THE INDUSTRIAL TRIBUNALS

CASE REFS: 5733/18

CLAIMANT: **Shirley Lyons**

RESPONDENTS: **1. Starplan Furniture Limited**
2. Neville Grattan
3. Beverley Donaghy
4. Mark Weatherill
5. John Neville

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim that she was harassed contrary to Article 6A of the Sex Discrimination (Northern Ireland) Order 1976 as amended is partially upheld against the first and second respondents;

2. The claimant's claim that she was victimised contrary to Article 6 of the Sex Discrimination (Northern Ireland) Order 1976 as amended, is partially upheld against the first, third, fourth and fifth respondents;

3. The claimant's claim that she was unfairly constructively dismissed, is well founded;

4. The claimant's claims of direct sex discrimination, unpaid commission and that she was subjected to a detriment contrary to Article 70B of the Employment Rights (Northern Ireland) Order 1996 are dismissed.

5. The Tribunal awards the claimant compensation totalling £18,857.18.

Constitution of Tribunal:

Employment Judge: **Employment Judge Knight**

Members: **Mr A Barron**
Mr T Carlin

Appearances:

The claimant was represented by Mr R Fee, Barrister-at-Law, instructed by the Equality Commission for NI.

Respondents 1, 3, 4 and 5 were represented by Mr N Phillips, Barrister-at-Law instructed by Worthingtons Solicitors

Respondent 2 was represented by Mr O Friel, Barrister-at-Law, instructed by Edwards & Co Solicitors

THE CLAIMS AND RESPONSE

1. The claimant's Originating Claim Form was received by the Office of the Industrial Tribunals and the Fair Employment Tribunal on 19 April 2018. Her claims are that on 16 December 2017, she was subjected to sexual harassment by the second respondent; she was subjected to discrimination by way of victimisation by the second, third, fourth and fifth respondents; that she was subjected to direct sex discrimination and was unfairly constructively dismissed by the first respondent. The claimant also claimed unlawful deduction from wages and breach of contract in respect of unpaid commission.

2. A Response Form was entered on behalf of all the respondents on 20 June 2018 in which all the claims were denied. The second respondent obtained separate legal representation shortly before the first day of the Hearing. He did not seek leave to enter a separate Response and no application was made by any of the remaining respondents to amend the original Response Form.

3. A claim that the claimant was subjected to a detriment on the ground of making a protected disclosure contrary to Article 70B of the 1996 Order was dismissed after being withdrawn at the beginning of the Hearing. No evidence was led at the Hearing in relation to the claims of direct sex discrimination or for £800.00 unpaid commission. Those claims are therefore dismissed.

4. At a previous case management discussion, an order was made pursuant to Rule 49 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, as amended, granting anonymity to the parties as the case involves allegations of a sexual offence.

THE ISSUES

5. The agreed legal issues confirmed at the beginning of the Hearing were:-
"Whether, in relation to the factual issues set out below:

(1) (i) the claimant resigned or was constructively unfairly dismissed contrary to Articles 126 and 130 of the Employment Rights (NI) Order 1996 ("the 1996 Order") and, if so

(ii) whether the claimant was guilty of contributory fault such that any compensation should be reduced accordingly;

(2) whether the claimant was subjected to unlawful harassment contrary to Article 6 of the Sex Discrimination (NI) Order 1976 ("the 1976 Order");

(3) whether the claimant was subjected to victimisation contrary to the Article 6A of the 1976 Order following her allegations of sexual harassment against Neville Grattan .

(4) whether in the event that the second, third, fourth or fifth respondents are found to have unlawfully discriminated against the claimant, the first respondent had taken such steps as were reasonably practicable to prevent them from doing that/those act(s), or from doing in the course of their employment, acts of that description, the statutory defence pursuant to Article 42(3) of the 1976 Order."

6. The factual issues were confirmed by the parties at the beginning of the Hearing as being:

(1) Did the second respondent subject the claimant to serious sexual harassment at an office Christmas party on 16 December 2017?

(2) Did the second respondent sexually assault the claimant at an office party on 16 December 2017?

(3) Did the claimant disclose to the respondent that she had been subject to a sexual assault i.e. a criminal offence?

(4) Did the third respondent following the claimant's complaint of sexual harassment:

(a) Shout at the claimant?
(b) Ignore the claimant?
(c) Stop passing telephone messages to the claimant?
(d) Demean the claimant?
(e) Condone the behaviour of male colleagues who ostracised the claimant?
(f) Cause the claimant to be upset at work?
(g) Leave confidential information pertaining to the claimant in a position where it was visible to other staff?
(h) Destroy evidence, namely pornographic cards, pertaining to the claimant's grievance?

(5) Did the fourth respondent subject the claimant to an angry outburst on 28 December 2017 telling her that she would cost the second respondent his job and possibly his marriage?

(6) Did the fifth respondent

(a) Stop passing messages to the claimant?
(b) Ignore the claimant?

(7) Was the claimant ostracised by other colleagues to the extent that she had to take sick leave?

(8) Did the fifth respondent say to the claimant on 14 February 2018, "We have a solicitor, we will dish the dirt on you. We will take you down, just look at yourself"?

(9) Was the first respondent aware of previous issues in respect of the second respondent?

(10) Did the first respondent fail to take appropriate steps to protect the claimant from the second respondent?

(11) Why did the claimant resign?

(12) Was the claimant entitled to resign and to treat herself as constructively dismissed?

(13) (If the claimant's claims are well founded) has the claimant sustained financial loss, and if so, what is the appropriate amount of any award?

(14) Has the claimant sustained injury to feelings, and if so, what is the appropriate amount of award?

TIME LIMITATION ISSUE

7. After the Hearing and before issuing its decision, the Tribunal identified that there may be a jurisdictional issue as it appeared that the events giving rise to the claimant's sexual harassment complaint and some of her complaints of victimisation had occurred more than three months before the presentation of the originating claim form. These issues had not previously been raised by any of the parties, so the Tribunal had not received any evidence as to whether any of the claimant's claims were presented outside the time limit prescribed by Article 76(1) of the 1976 Order and if so, whether it would be just and equitable to extend the time for presenting such claims. Accordingly, the Tribunal of its own motion gave the parties an opportunity to address these issues. Following leave granted by the Employment Judge, the claimant made an application to extend time for presenting the claim, should the Tribunal determine that any of the allegations detailed in paragraphs 1-33 of her witness statement had been presented outside the three month statutory time limit. Copies of the records of the proceedings at the Pre-Hearing Reviews are appended to this decision for ease of reference.

8. Due to delays caused by the Covid-19 pandemic and the indisposition of a Panel Member, the Hearing reconvened on 21 June 2021 to deal with the claimant's application. The claimant gave evidence by a supplemental witness statement and was cross examined by Counsel for the Respondents. None of the Respondents gave further evidence. The Tribunal received and considered written and oral submissions on the jurisdictional issue from Counsel for the respective parties.

THE LAW

Unfair Constructive Dismissal

9. The right not to be unfairly dismissed is found in Article 126 of the Employment Rights (NI) Order 1996 ("the 1996 Order"). The initial burden in a constructive unfair dismissal claim is on the claimant to prove that she was dismissed in that her resignation should be treated as a dismissal.

10. The case of ***Western Excavating v Sharp Limited [1978] IRLR 27*** outlines the four key elements of constructive dismissal which the claimant must prove as follows: -

(i) There must be a breach of contract by the employer;

(ii) The breach must be sufficiently serious to justify the employee resigning;

(iii) The employee must leave in response to the breach and not for some other unconnected reason; and

(iv) The employee must not delay too long in terminating the contract in response to the employer's breach as otherwise he may be deemed to have waived the breach of contract.

11. As regards the delay point there is no fixed time within which an employee must make up her mind to resign in response to a breach of contract; the surrounding circumstances are key.

12. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor event if it is the last in a series of acts one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation amounting to dismissal. (***Omilaju [2005] IRLR 35 CA***).

13. The case of ***Malik [1997] 3 All ER 1 (HL)*** confirms that there is an implied term in the employment contract that the employer will not conduct itself in a manner likely to damage the relationship of trust and confidence between the employer and the employee. If the employer breaches that term, it can amount to repudiation of the contract. The tribunal was referred to the case of ***Shaw v CCL Ltd [2008] IRLR 284*** concerning the issue of whether the finding of discrimination will constitute a constructive dismissal, that is "an attack on the contract going to its fundamentals". This was a case where there had been a bare refusal of a flexible working request and the EAT reversing the decision of the Employment Tribunal held, *"on the facts of the case and applying* ***Meikle*** *and* ***Greenhof*** *"the treatment of the claimant here in the form of direct and indirect discrimination constituted a failure to carry out the duty to maintain trust and confidence between the parties."*

14. Where the fact of dismissal is proven the Tribunal must decide whether the dismissal is fair or unfair in accordance with Article 130 of the 1996 Order.

Discrimination in the Employment Field

15. Part III the Sex Discrimination (NI) Order 1976 ("the 1976 Order") prohibits discrimination by employers in the employment field. Article 8 (2) provides that:

> *"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 dismissing her or subjecting her to any other detriment."*

Direct Sex Discrimination

16. **Article 3 (2**) of the 1976 Order provides that "*in any circumstances relevant for the purposes of a provision other than which this paragraph applies, a person discriminates against a woman directly if –*

.

(a) On the ground of her sex, he treats her less favourably than he treats or would treat a man; …"

Sexual Harassment

17. **Article 6A** of the 1976 Order sets out the provisions on sexual harassment and provides:-

"(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,

(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."

18. 'Harassment' is specifically defined in a way that focuses on three elements:

(1) unwanted conduct;

(2) having the purpose *or* effect of either:

(i) violating the claimant's dignity; or
(ii) creating an adverse environment for her;

(3) on the prohibited grounds (in this case, sex).

19. Although many cases will involve considerable overlap between these elements, the EAT has held that it would normally be a *'healthy discipline'* for Tribunals to address

each factor separately and ensure that factual findings are made on each of them. ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336.***

20. In the case of ***Stedman v Reed and Bull Information Systems Limited [1999] IRLR 299,*** the EAT gave guidance on the meaning of harassment and in particular what amounts to "unwanted conduct":

> *"As to whether the conduct is unwelcome, there may well be difficult factual issues to resolve. In general terms, some conduct, if not expressly invited, could properly be described as unwelcome. A woman does not, for example, have to make it clear in advance that she does not want to be touched in a sexual manner. At the lower end of the scale, a woman may appear, objectively, to be unduly sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct she had made it clear that she found such conduct unwelcome. It is not necessary for a woman to make a public fuss to indicate her disapproval; walking out of the room might be sufficient. Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and whose defence may often be that the victim was being over-sensitive. Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment."* Per Morison P.

21. In the case of ***Smith v Ideal Shopping Direct Ltd UKEAT/0590/12, [2013] EqLR 943,*** the EAT held that although, in principle, a person may not be able to object to conduct that they have willingly participated in, there can still be a line to be drawn when the conduct goes beyond what that individual was agreeing to. That will especially be the case where it crosses the border into deliberately insulting language based on and abusive references to the protected characteristic.

22. Provided the other requirements are met, the conduct in question does not have to be specifically directed at the complainant. ***Moonsar (Appellant) V. Fiveways Express Transport Ltd (respondents) - [2005] IRLR 9.***

Discrimination by Victimisation

23. **Article 6** of the **1976 Order** sets out the provisions for victimisation and provides:

> (1) *A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—*
>
> *……..*
>
> *(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order ….*

(e) or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

(2) *Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith".*

24. Victimisation arises where a claimant has performed a 'protected act'. The claimant must identify an appropriate comparator and the doing of the protected acts must be the cause of the less favourable treatment. The appropriate comparison is between the claimant and someone who has not done a protected act. ***(See Chief Constable of West Yorkshire Police v Khan [2007] ICR 2065 HL.)***

25. In ***Simpson v Castlereagh Borough Council [2014] NICA 1***, Girvan LJ stated, *at Paragraph 14* of his judgment that: -

"A Tribunal determining the question of victimisation must address the issues, firstly, whether the claimant suffered a detriment, and, secondly, whether she was subjected to less favourable treatment as compared to an actual or hypothetical comparator by reason of the fact that she had done a protected act."

26. In ***McCann v Extern Organisation Ltd [2014] NICA 65,*** Horner J at *Paragraphs `14, 15 and 17* summarised the law on victimisation as follows: -

"(14) ... The IDS Handbook states at Paragraphs 9.41 and 9.42: -

'9.41 To succeed in a claim of victimisation, the claimant must show that he or she was subject to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protective act …

9.42 …. The essential question in determining the reason for the claimant's treatment is always the same: what consciously or sub-consciously motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer …'

(15) *As Harvey said at Paragraph [468] in respect of the test for victimisation*

'Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation…

A claim of victimisation requires consideration of: -

- the protected act being relied upon
- the correct comparator
- less favourable treatment
- the reason for the treatment

- any defence
- burden of proof'

(16) ...

(17) As Harvey says at Paragraph 488: -

> *'The key issue in such situations will be the Tribunal's understanding of the motivation (conscious or unconscious) behind the act by the employer which was said to amount to victimisation.'."*

27. In ***Nagarajan v London Regional Transport [1999] ICR 877***, the House of Lords, reversing the Court of Appeal, held that in complaints of victimisation (in that case under similar provisions in the Race Relations Act) the motive of the alleged discriminator was irrelevant, and that the question to be asked was a simple causative one, namely whether the claimant would have been treated in that way but for the protected act. Therefore, conscious motivation is not a necessary ingredient in victimisation. A subconscious motive is enough.

28. Additionally, whether the actions of the alleged discriminator constitute victimisation depends primarily on the perception of the employee who alleges victimisation. However, the perception must be reasonable. ***Derbyshire v St Helen's Metropolitan BC [2007] UKHL 16***; ***Northern Ireland Fire and Rescue Service v McNally [2012] Eq LR 821 NICA***.

Burden of Proof in Discrimination Cases

29. The burden of proof is dealt with Article 63A of the 1976 Order which provides:

> *"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."*

30. The Court of Appeal, in the case of ***Igen v Wong [2005] IRLR 258*** considered provisions equivalent to Article 38A of FETO, in a sex discrimination case, and approved, with minor amendment, guidelines set out in the earlier decision of ***Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332***.

The ***Barton*** guidance, as amended in ***Igen***, provides, as follows: -

"(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, an inference that it is just and equitable to draw in accordance with s.74(21) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and; if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant Code of Practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or Code of Practice."

31. In the case of ***Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865***, the Employment Appeal Tribunal held that: -

"A Tribunal at the second stage is simply concerned with the reason why the employer acted as he did. The burden imposed on the employer will depend on the strength of the prima facie case ….

It would be inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. Unfairness is not itself sufficient to establish discrimination."

32. The Court of Appeal in the case of ***Nelson v Newry & Mourne District Council [2009] NICA -3 April 2009*** dealt with the proper approach for a Tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof. The court stated:

*"(22) The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which*

conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal in Northern Ireland commended adherence to the* ***Igen*** *guidance.*

(23) *In the post-****Igen*** *decision in* ***Madarassy v Nomura International PLC [2007] IRLR 247,*** *the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the* ***Igen*** *approach, the* ***Madarassy*** *decision is in fact an important gloss on* ***Igen****. The court stated: -*

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter 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 allegations 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 in contesting the complaint. Subject only 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 as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'*

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

(24) This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed 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 properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [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 the 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."*

33. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, the Court of Appeal considered the shifting burden of proof in a discrimination case. It referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated: -

"We agree with both counsel that the 'more' 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."

34. In ***Laing v Manchester City Council [2006] IRLR 748***, the EAT stated at Paragraphs 71 - 76: -

"(71) There still seems to be much confusion created by the decision in ***Igen v Wong****. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race….*

(73) No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in ***Network Road Infrastructure v Griffiths-Henry****, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly*

artificial distinctions if they always feel obliged to go through these two stages….

(75) The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.

(76) Whilst, as we have emphasised, it will usually be desirable for a Tribunal to go through the two stages suggested in ***Igen****, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

35. The comparator in cases of direct discrimination is someone whose circumstances are the same or not materially different from those of the claimant but who does not share the protected characteristic. The comparator may be actual or hypothetical. Where there is no actual comparator the Tribunal must identify the characteristics of the hypothetical comparator. However it is open to the Tribunal to focus on the reason for the claimant's treatment; *"…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. Was it on the proscribed ground which is the foundation of the application? Or was it for some other reason? If the latter the application fails. If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."* Per Lord Nicholls at Paragraph 11 **Shamoon -v- Chief Constable of the RUC** *[2003] IRLR 285***.**

36. The Supreme Court in ***Hewage v Grampian Health Board [2012] UKSC*** endorses the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc.*** Lord Hope at paragraph 31 of his judgment refers to the comments of Mummery LJ in **Madarassy** as to the interpretation of the **Igen** guidance as follows:-

"In paragraph 77, in a passage which is particularly in point in this case in view of the employment Tribunal's reference in paragraph 107 to its being required to make an assumption, he said:

'In my judgment, it is unhelpful to introduce words like 'presume' into the first stage of establishing a prima facie case. Section 63A (2) makes no mention of any presumption. In the relevant passage in Igen Ltd v Wong … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The Tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the

respondent has to prove that he did not commit an unlawful act of discrimination.'

Lord Hope makes clear that there is no assumption as to whether or not a prima facie case has been established. *"The prima facie case must be proved, and it is for the claimant to discharge that burden".* If she does so, the burden of proof shifts to the respondents to provide an untainted explanation.

Detriment

37. Detriment is determined using the ***Shamoon*** test, which is whether a reasonable worker would, or might take, the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged.

38. An employer's statutory liability for the unlawful discriminatory acts of its employees is found in **Article 42** of the 1976 Order which provides: -

(1) "anything done by a person in the course of his employment shall be treated for the purposes as this Order is done by its 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 is agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that person shall be treated for the purpose of this order is done by that other person as well as by him

(3) in proceedings brought under this Order against any person who 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".

Time Limits for Bringing Proceedings under the 1976 Order

39. Article 76 (1) of the 1976 Order provides that *"an industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of the period of,*

(a) three months beginning when the act complained of was done… "

Article 76 (5) provides that *"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."*

Article 76 (6) provides: *"For the purposes of this Article—*

…(b) any act extending over a period shall be treated as done at the end of that period….."

40. The Tribunal was referred to and is mindful of the comments of Auld LJ in **Robertson V Bexley Centre 2003 EWCA Civ 576** paragraph 25:

> *"It is also of important to note that the time limits are exercised strictly and employment and industrial cases. When tribunals consider their discretion to consider a claim out of time unjust and equitable grounds there is no presumption that's they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

41. In **British Coal Corporation V Keeble 1997 IRLR,** the EAT suggested that a tribunal would be assisted by the factors mentioned in section 33 of the limitation act 1980, (the Northern Ireland equivalent of which is the Limitation (Northern Ireland) Order 1989 which deals with the exercise of discretion by the courts in personal injury cases. The Tribunal is required to consider the prejudice each party would suffer as the result of the decision to be made and also have regard to all the circumstances of the case and in particular to:-

(a) the length of and reasons for the delay
(b) The extent to which the cogency off the evidence is likely to be affected by the delay
(c) The extent to which the party sued had cooperated with any request for information
(d) The promptness with which the plaintiff acted once her or she knew of the facts giving rise to the cause of action; and
(e) The steps taken by the plaintiff top ten professional legal advice once he or she knew of the possibility of taking action.

The fault of the claimant is clearly a relevant factor to be considered. However, the authorities suggest that the fault of a legal advisor cannot be attributed to the claimant. In ***Robinson v Bowskill UKEAT/0313/12*, *[2014] ICR D7*,** Judge Burke QC, while also applying *Virdi*, held that an employment judge had erred in concluding that the claimant had not shown any reason why time should be extended when the very fact that she had put the matter into the hands of solicitors showed that she was *'putting forward an explanation which is capable of being a satisfactory explanation for delay in the presentation of the claim'* (at [49]).

Injury to Feeling

42. Awards of compensation pursuant to the 1976 Order may be made against employers and individual respondents, who are named in the claim form. In the case of ***London Borough of Hackney v Sivanandan [2013] EWCA Civ 22***, it has been held, if a Tribunal is making an award of compensation against such respondents, pursuant to the said order, where the same indivisible damage is done to a discrimination claimant by two or more respondents, who are either 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 same damage. In such circumstances it is not necessary for the Tribunal to apportion an award between contributing respondents. 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 this (see Underhill J in the Employment Appeal Tribunal in ***Sivanadan***). ***Essa v Lang [2004] IRLR 313*** is a reminder of the importance of assessing the impact of the discrimination on the individual concerned. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent.

Credibility of Witnesses

43. Regarding the credibility of witnesses, in ***R v G [1998] Crim LR483,*** it was held by the Court of Appeal that, *"A person's credibility, any more than their reliability, is not necessarily a seamless robe".* A Tribunal may take a different view as to credibility or reliability of the evidence of a witness in relation to different issues *(see also)* R v H [2016] (NICA 41). The Tribunal had regard to factors set out in the case of ***Thornton (a minor) v NIHE [2010] NIQB 4*** by Gillen LJ in which he stated, "*the credibility of a witness embraces not only the concept of his truthfulness i.e. 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 assessing credibility, the court must pay attention to a number of factors which, inter alia, include the following;*

(1) the inherent probability or improbability of representation of facts;

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

(3) the preserving of contemporaneous records;

(4) the demeanour of witnesses, e.g. does he equivocate in cross-examination;

(5) the facility of the population at large and accurately recollecting and describing events in the past in detail;

(6) does the witness take refuse in wild speculation or uncorroborated allegations of fabrication?

(7) does the witness have a motive for misleading the Tribunal; and

(8) weighing up a witness against the other."

44. In the case of ***Lynch v Ministry of Defence [1983] NI216*****,** Hutton J, endorsed the principles stated in ***O'Donnell v Reichard [1975] VR916*** at page 929 concerning the failure of any witness to give evidence, the Tribunal relied on the following guidance, found in the case law:-

> *"Where a party without explanation fails to calls 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 might 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 person's case; if the jury draw that inference, then they may properly take it into account against the person 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 a person not called as a witness could have spoken; and (b) in deciding whether to draw inferences and fact which are open to them upon evidence which has been given, again in relation to matters with the respect to which the person not called as a witness could have spoken."

45. The tribunal was also referred to the case of ***Habinteg Housing Association v Holleron UKEAT/0274/14 20 February 2015*** in which it was stated, *"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… 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 in 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 power 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… This is not a question of reverse burden of proof. This is a question of establishing the probabilities of what has or has not been said."*

SOURCES OF EVIDENCE

46. The claimant, Shirley Lyons, gave her evidence in chief by witness statement and was cross examined. The claimant confirmed at the Hearing that she wished to adopt the details of claim as stated on her originating claim form and her first grievance statement given to her then line manager Beverly Donaghy on 27 December 2017 as part of her evidence in chief to the Tribunal. The claimant gave further evidence by an addendum witness statement in support of her application dealt with at the reconvened Hearing and was cross examined.

47. Witnesses for the respondents gave their evidence in chief by witness statement and were cross examined. The second named respondent, Neville Grattan gave evidence on his own behalf. Beverley Donaghy, Mark Weatherill and John Neville gave evidence on their own behalf and on behalf of the first respondent. Beverley Donaghy adopted her investigation report on the claimant's first grievance as part of her evidence in chief to the Tribunal. Lynda Boyd, the company secretary of the first respondent, Ms Elaine McCann, an HR consultant who dealt with the claimant's first grievance appeal and the first stage of the claimant's victimisation grievance, Ms Michelle Burnett, an HR consultant who dealt with the claimant's victimisation grievance appeal and Ms Rosemary Reid, an HR consultant appointed to dealt with the disciplinary process against Neville Grattan also gave evidence on behalf of the first respondent. The three HR consultants adopted as part of their evidence in chief documents relating to the claimant's grievances, the grievance appeals and the disciplinary process against Neville Grattan.

48. The Tribunal had careful regard to all the written and oral evidence in cross-examination of the witnesses and those documents contained in the Hearing Bundle to which it was referred during the Hearing. This included statements taken from the claimant, Neville Grattan, Mark Weatherill and John Neville during investigations following a complaint made by the claimant to the Police Service of Northern Ireland.

49. The claimant provided a report by Dr Philip McGarry, Consultant Psychiatrist dated 26 September 2018 and the respondents provided a report by Dr John J Sharkey dated 8 February 2019. By agreement of the parties' representatives, these reports were admitted into evidence without the necessity of formal proof. Both reports were prepared following an examination of the claimant with the benefit of the claimant's GP records. Neither the claimant's GP records, nor her counselling records were before the Tribunal. Details and dates of her attendances with her GP have been discerned from references to same in the psychiatric reports.

50. An amended Schedule of Loss and an agreed chronology of events were submitted to the Tribunal.

51. During oral closing submissions it was conceded on behalf of Starplan Furniture Limited, the first respondent that no evidence was led by the first respondent concerning the Article 42(3) statutory defence should the Tribunal uphold any of the claimant's harassment or victimisation complaints. In respect of the unfair constructive dismissal claim, it was not contended by the first respondent that there was undue delay on the part of the claimant before she resigned.

CREDIBILITY AND RELIABILITY OF WITNESSES

52. It was a feature of this case that almost every factual detail was in dispute. There was little or no independent evidence to enable the Tribunal to determine its findings of fact in respect of the disputed matters. Unfortunately, the Tribunal found that neither the claimant, nor any of those respondents who were her work colleagues, gave a wholly truthful account of events, without exaggeration, embroidery and embellishment. The Tribunal therefore had to consider, and did so, the credibility of all the parties and their witnesses in making relevant findings of fact, in respect of each of the allegations which were made. Consequently, it has been necessary to set out in more detail than would usually be necessary, the competing evidence on the matters in dispute in the body of this decision. The Tribunal notes that the claimant could have called her husband and her friend, who would have both been able to corroborate aspects of her account but did not do so. Similarly, the first named respondent did not call Oliver Tallon, Luke Wilson and Stephen Purdy to give evidence about the events at the office party. Nor were Laurence Kennedy or David Wilson called to give evidence concerning the claimant's contact with them about her victimisation complaints.

FINDINGS OF FACT AND CONCLUSIONS

Background

53. Starplan Furniture Limited, the first respondent (hereinafter called "Starplan") is a company which sells and fits freestanding and fitted furniture through its showrooms at various locations in Northern Ireland.

54. At the relevant time, Shirley Lyons, a 60-year-old woman, (hereinafter referred to as "the claimant") was employed as a Designer/Sales Consultant from 24 June 2013 until she resigned with effect from 8 April 2018.

55. Neville Grattan, the second respondent her male colleague and the alleged harasser,

was employed by the company as a Designer/Sales Consultant for approximately 11 years.

56. Beverley Donaghy, the third respondent was appointed as manager of the Portadown showroom around August 2017. She line managed the claimant, the second, fourth and fifth respondents from September 2017.

57. Mark Weatherill, the fourth respondent was employed as a designer from 3 March 2015.

58. John Neville, the fifth respondent was employed by the company as a designer for approximately 15 years.

59. The claimant, the second, third, fourth and fifth respondents all worked in the Portadown showroom. Until December 2017, the claimant enjoyed cordial working relationships with all her work colleagues. They shared conversations about family and personal matters and had each other's personal mobile numbers. The claimant had showed her colleagues photographs of her home and taken them for a spin in her new car. The second respondent and the claimant regularly exchanged jokey comments. The second respondent often complimented the claimant on her personal appearance and dress, without causing her any offence. Previously, Christmas office parties had passed without incident and the claimant had raised no previous complaints about her colleagues or working environment.

60. The Christmas party took place on 16 December 2017. It was attended by the claimant, the second, fourth and fifth respondents from the Portadown showroom. Oliver Tallon, Luke Wilson and Stephen Purdy, who were employed in the Dungannon showroom also attended. Oliver Tallon was the manager of the Dungannon showroom. Luke Wilson is the son of David Wilson, Sales Director of the first respondent. The claimant was the only female employee at the party as The third respondent was on holiday. The party started off in the Portadown showroom and later moved on by pre-booked taxi to a restaurant in a nearby town. The claimant had organised the meal and paid for the restaurant booking deposit using her own credit card.

61. The first respondent did not put in place any guidelines or instruction for standards of behaviour and the consumption of alcohol for attendees. Oliver Tallon, the most senior person present, was not formally delegated responsibility for supervising the party. The third respondent left 15 bottles of beer and a bottle of Prosecco as a "gift for the team". Additionally, attendees, including the claimant, brought their own alcoholic drinks to the party and more drink was purchased and consumed before they left the showroom. Large quantities of alcohol were consumed by all the attendees. The second respondent estimated that he drank 7 or 8 bottles of beer, 4 to 6 vodkas and a couple of shots of Cactus Jack in the showroom and had up to 6 more drinks in the restaurant afterwards – at least 22 alcoholic drinks in total. The claimant's other colleagues also drank large quantities of alcohol. The claimant drank Prosecco and gin and tonic in the showroom and had more to drink in the restaurant. It appeared to the Tribunal that all attendees were in a state of inebriation from the early stages of the event, and tended in their evidence to underestimate the adverse impact of the excessive consumption of alcohol upon their respective behaviours and memories of events that evening.

62. On 20 December 2017, the claimant rang the third respondent and Lynda Boyd to report that she had been sexually harassed verbally and physically by the second respondent in the showroom and at the restaurant afterwards. She followed this up with an email to the third respondent which she copied to Lynda Boyd. She wanted David Wilson to be informed about her allegations. On 27 December 2017, the claimant lodged a formal written grievance which was investigated by the third respondent.

63. The third respondent received advice and guidance about the grievance investigation from People Management Solutions, ("PMS"), an agency which provides the company with HR advice. The investigation was to be conducted under the company's *"Positive Work Environment Policy".* This sets out the procedure for dealing with complaints of Harassment or Bullying and provides that consideration should be made as to whether it is necessary to move an alleged harasser pending an investigation.

64. The Formal Procedure contained in the Positive Work Environment Policy specifies that *"Managers carrying out investigations at the formal stage will not be connected in any way with the allegation which has been made".* It further provides that consideration should be given to the issue of avoiding contact between the two parties involved before action is taken to inform the alleged harasser of the complaint. The formal procedure provides for an initial meeting with the complainant to clarify and formally record the nature of the complaint (Step 1); a meeting should then be conducted with the alleged harasser to obtain their response to the allegations made (Step 2); then meetings are to be held with "anyone who can assist with the investigation" (Step 3). Further Clarification may be sought at meetings with any persons mentioned in Steps 1-3 to clarify or gain further information (Step 4). The third respondent did not follow this sequence when investigating the claimant's complaint.

65. The third respondent carried out the investigatory interviews in the following order:-

<u>First Investigatory Interviews</u>

27.12. 17 Oliver Tallon and Stephen Purdy.

28.12.17 The fourth respondent

29.12.17 Luke Wilson

30.12.18 Lynda Boyd

01.01.18 The fifth respondent

3.01.18 The claimant

9.01.18 The second respondent

<u>Second Investigatory Interviews</u>

16.01.18 The fourth respondent, Oliver Tallon and Stephen Purdy

17.01.18 Luke Wilson, the fifth respondent and the claimant.

22.01.18 The second respondent.

Effectively The third respondent held the Step 1 and Step 2 meetings after she held Step 3 meetings with other colleagues who had attended the party. The third respondent reviewed photographs provided by the claimant of bruising to her arms, being hugged from behind by the second respondent and a broken bed. She refused the claimant's offer to view the dress she wore to the office party.

66. At the first investigatory meeting with the third respondent, the claimant also raised a grievance against Oliver Tallon for swearing and using foul language in the showroom. This grievance was not upheld by the third respondent. The claimant did not appeal this outcome as she did not consider it important. She made it clear at the Hearing that this was not part of her complaint to the Tribunal.

67. On 6 February 2018, the third respondent presented the claimant with the grievance investigation report, detailing her findings and recommendations.

68. The third respondent partially upheld the claimant's grievance against the second respondent. Firstly, she accepted the second respondent's account that he had made an *"inappropriate comment"* about the claimant's cleavage, when he joked that she *"should have tied the girls up better".* The third respondent concluded that both parties regarded this as *"light-hearted banter".* Secondly, she accepted that the second respondent placed his hand under the claimant's bottom in the restaurant. The third respondent considered that although the claimant had given "mixed signals", she had changed her position by asking Luke Wilson a second time to help her. The third respondent considered that these two matters fell within the definitions of *"verbal harassment through offensive language"* and *"inappropriate touching to serious assault,"* in the first respondent's Positive Work Environment Policy. She recommended that formal disciplinary action be taken against the second respondent.

69. The third respondent did not uphold other allegations made by the claimant that the second respondent told the claimant that she had "*great tits*", made further comments about her cleavage and other comments of a sexual nature to the claimant throughout the evening. She rejected allegations that the second respondent put his hand up her the claimant's dress or that he had sexually assaulted the claimant in the showroom office and toilet areas. Rather, she concluded that the claimant had engaged in "consensual" activity with the second respondent. The third respondent's reasoning was that even though the claimant said she was uncomfortable and disgusted by the second respondent's behaviour, she remained in the restaurant until approximately 11pm and continued to interact with him.

70. By email dated 8 February 2018, the claimant appealed against the outcome of her grievance against the second respondent. Elaine McCann, a self-employed HR consultant was appointed by PMS to handle the grievance appeal on behalf of the first respondent.

71. The claimant was given special leave of absence by the first respondent on the recommendation of Laurence Kennedy from 16 February 2018 until 11 March 2018. Thereafter she went on sick leave until her resignation.

72. The claimant's grounds of appeal were that:-

- The third respondent did not have the experience or competency to conduct the investigation of her grievance and further had a conflict of interest. She alleged that the third respondent and the second respondent were very close, the third respondent had jumped to his defence when the claimant mentioned the pornographic cards, in the invitation to the investigatory meeting, the third respondent addressed the claimant as *"Mrs Shirley Lyons"* whereas she had addressed the second respondent more familiarly by his first name and that the third respondent had condoned the second respondent's actions on a previous date when she alleged the second respondent had drawn a picture of a penis on a piece of paper in front of the claimant and the third respondent;

- The events of 16 December 2017 were premeditated and planned by the second respondent, as evidenced by the phone calls she received from the second respondent prior to the party. She alleged he was motivated by jealousy of her new car;

- The fifth respondent was the ringleader on 16 December 2017. This new allegation had not raised by the claimant during the initial investigation;

- The third respondent had broken the investigation down into specific allegations, each addressed individually which *"diluted the overall impact of the sexual assault allegations".* She complained that the third respondent had not used the term *"sexual assault"* to describe the second respondent's actions*;*

- The second respondent had lied during the investigation, *"which she could prove and that if one lie was told this was proof that parts of the evidence of other witnesses was also untrue".* She identified his lies as being:

    a) That she had been drinking before she arrived,
    b) That she had smoked a cigarette, when she is a non-smoker,
    c) That the second respondent had stated the only time he came up behind her was in the restaurant,
    d) That the second respondent had not grabbed her hand,
    e) That her dress had a plunging neckline.

- The third respondent had refused to view the dress she was wearing on the evening in question which would have proved that the second respondent was lying about the "cleavage" comments;

- The photograph taken by Luke Wilson of the claimant and the second respondent was not a consensual hug but clearly showed him kissing her neck and that she was pushing him away and protecting her breasts. She asserted that Luke Wilson's statement confirmed that she had been annoyed and he had seen her *"rolling her eyes".*

73. The grievance appeal meeting took place on 8 March 2018. The claimant informed Ms McCann during the appeal meeting that she felt it was not an option for her to remain with the company and her position was now untenable.

74. The claimant also raised allegations of victimisation against the third, fourth and fifth respondents during her the grievance appeal meeting with Ms McCann These mirrored the claimant's complaints of victimisation to the Tribunal that:-

- The third respondent "turned into a bully and made her feel like she had done something wrong rather than supporting her". She alleged that the third respondent had destroyed the pornographic cards, became angry and shouted at her on 29 December 2017 when the claimant pointed out that questions and answers for the fourth respondent had been left on the computer screen and shouted at her again on 8 January 2018 when they met to discuss the record of her first interview. She told Ms McCann that she considered that these matters formed part of the "procedural part" of her grievance appeal.

- The fourth respondent turned nasty on 28 December 2017 and admitted he said *"you'll be responsible for him (The second respondent) losing his job and marriage";*

- The fifth respondent refused to acknowledge her in store after she made the allegation,

- On 6 January 2018 when the final report was released, she saw the third respondent and the fifth respondent chatting and laughing and when the third respondent left, the fifth respondent said directly to the claimant, *"We'll take you down";*

- On 8 February 2018 when she met with customer in store at on her day off, neither the fifth respondent nor the third respondent would speak to her. The claimant alleged that the third respondent told her that these hours would cover the time she was taking off to see the counsellor and therefore her employer did not comply with its policy and she had to obtain counselling herself and pay for it.

- On 12 February 2018, the third respondent and the fifth respondent ignored her when she said "Hello". The fifth respondent told her *"we will sort you out, we will take you down, we have a solicitor".* When she had asked the third respondent if she was going to let him talk to her like that, The third respondent just said she had to go to Iceland for a drink and walked away;

- On 14 February 2018, the third respondent deliberately left a letter sent by The second respondent's solicitor, asking for information and the grievance outcome onscreen so that she would see it. She further stated that this was evidence of the third respondent's incompetence and inability to conduct a professional and confidential investigation.

75. Ms McCann agreed with the claimant that:-

- the victimisation allegations should be dealt as a separate grievance to ensure the claimant's right to appeal the outcome.

- The victimisation allegations should be sufficiently set out in the agreed record of the meeting of 8 March 2018 to avoid the claimant having unnecessarily to repeat the allegations.

- Ms McCann should question the third, fourth fifth respondents about the victimisation allegations at the same interviews arranged with them to discuss the issues raised by the claimant's grievance appeal. Ms McCann also interviewed Laurence Kennedy and spoke with David Wilson on the phone on 6 June 2018 about the claimant's victimisation grievance allegations.

76. As well as interviewing the second, third and fifth respondents, Ms McCann reviewed the claimant's photographs of her bruises, an email from the claimant sent on 19 March 2018 and a photograph of the dress the claimant wore at the Christmas party.

77. The claimant sent a letter of resignation dated 7 April 2018, which stated:

> *"Further to the incidents which occurred on the evening of December 16th 2017, at an event organised by* [the first respondent]; *attended by company employees and held on company premises, I must inform you that I am resigning my post with immediate effect.*
>
> *The impact that the entire affair has had on my personal wellbeing has been enormous, compounded by the manner in which the incidents have been investigated and handled by your company and its agents.*
>
> *Furthermore, my treatment by the company during my time back at work and up until February 14th 2018, I believe is victimisation, seemingly orchestrated with the intent of forcing me from employment and from a role which I had previously occupied with distinction".*
>
> She indicated that she was acting on medical advice that a return to work would be too injurious to her health and she intended *"to take steps to seek recompense from the company and the individuals involved."*

78. Ms McCann wrote to the claimant on 16 April 2018, to inform her that she did not uphold the claimant's grievance appeal. She concluded: -

- The third respondent, as the store manager, was an appropriate person to carry out the investigation. She rejected that the third respondent had a conflict of interest and the claimant's assertion that the third respondent *"had conducted the investigation with one underpinning outcome*".

- The events of 16 December 2017 were not premeditated and that there was no plan by male members of staff to have fun with her. She rejected the claimant's suggestion that her colleagues were motivated by jealousy because the claimant had recently purchased a new car.

- There was no evidence to support the claimant's allegation that the fifth respondent was the ringleader on 16 December 2017.

- There was nothing wrong with the third respondent's approach in breaking the investigation down and dealing with specific allegations separately. It was a matter ultimately for the disciplinary authority to decide whether there had been a "sexual assault"

- Concerning the claimant's assertion that the second respondent lied about her during the investigation, she concluded that the second respondent's description of the dress was *"fairly accurate",* and that there was no evidence the second respondent had suggested the claimant's cleavage was on show. There was no evidence to suggest that the second respondent was lying about the style of dress, and other matters, such as whether the claimant was smoking or drinking, were not fundamental to the allegations made. The cause of the bruising on the claimant's arms was not established as there was no evidence to suggest that it had been caused by him jiving with her and handling her roughly. It was not of key importance whether the second respondent was standing behind her or not.

- Her view was that the photograph of the second respondent hugging the claimant from behind was inconclusive and did not support her allegation that this was not "*an embrace"* with him grabbing her from behind and her trying to protect her breasts with her hands.

79. A disciplinary hearing was held with the second respondent on 10 May 2018, which was conducted by Mrs Rosemary Reid, another self-employed HR consultant appointed by PMS. She upheld a first charge that the second respondent had verbally harassed the claimant when he commented that she should have tied the girls up better and partially upheld a second charge of inappropriate touching. She accepted the second respondent's explanation that he had accidentally touched the claimant *"in the area of"* but *"not underneath"* her bottom. Somewhat bizarrely, Mrs Reid confirmed that she considered these matters to amount to gross misconduct, but nevertheless recommended the second respondent be issued with a final written warning and that he should be "counselled" and receive advice about his obligations under relevant employment policies. The second respondent did not appeal against this penalty. The third respondent told the Tribunal that she subsequently printed out a copy of the company handbook for the second respondent and offered him counselling which he declined.

80. Ms McCann did not uphold any of the claimant's allegations of victimisation and communicated the outcome to the claimant in a letter dated 6 June 2018. She concluded that *"from the information presented, it is clear that further to you making allegations of a serious nature against The second respondent and on filing a report to the PSNI, that there was an atmosphere with the company offices amongst work colleagues".* Her view was that the company had exercised its duty of care to the claimant by removing the second respondent temporarily to another store, sending Laurence Kennedy to the store to support the team and providing paid time off for the claimant while carrying out investigations to reach a resolution.

81. The claimant appealed against the victimisation grievance outcome on 12 June 2018. Her grounds for appeal were that the investigation was biased towards a predetermined outcome which exonerated the first respondent and its employees and that Ms McCann had failed to probe the veracity of or challenge the statements of the witnesses. Ms Michelle Burnett, another self-employed HR consultant appointed by

PMS, dealt with the victimisation grievance appeal. An appeal meeting was arranged for 25 June 2018. The claimant declined to attend but opted to proceed by written submissions only, contained in an email dated 15 July 2018. Ms Burnett reviewed the documentation of the original victimisation grievance outcome. She upheld Ms McCann's decision and dismissed all the claimant's grounds of appeal in a cursory fashion. The victimisation grievance appeal outcome was communicated to the claimant by letter of 22 August 2018.

82. The Tribunal is not bound by the findings and conclusions of the decision makers in the internal grievance and disciplinary processes. We have made our own findings of fact and reached our own conclusions in relation to the events which occurred on 16 December 2017 and subsequently. These are as follows:-

Sexual Harassment Allegations against the second respondent

83. The claimant had been on annual leave and was not working on 16 December 2017. She missed a call from the second respondent around 3.17pm. She rang him back and he asked what time she was coming in. He said that he and the fifth respondent did not have a lift home. He joked that they could come back to her house and stay in the "*West Wing*" and what was for breakfast? He told her the third respondent had left beer and prosecco for them. She could hear laughing in the background. He sounded drunk so she replied sarcastically that he sounded "remarkably sober". She ended that call by saying she was "*away to iron a wee frock and put her hair in rollers".* The claimant was not offended by this call.

84. The second respondent telephoned the claimant again at 17.17 as she was being given a lift to the Portadown showroom by her husband. He asked where she was and said he was *"missing her"*. She claimed this made her *"start to feel pestered"* and that it was *"completely out of the ordinary"* for the second respondent to call her in this way. The claimant contended that this call signposted a premeditated plan by the second respondent and her other male colleagues to *"have fun with her"* that evening. In her most recent leave period the second respondent had phoned her on her mobile phone about contributing towards the third respondent's birthday present. The Tribunal therefore did not find that that this call was completely out of the ordinary. When the claimant arrived around 17.36, she telephoned the second respondent to come and let her into the showroom. We find that this was inconsistent with the claimant's assertion that she felt *"pestered"* by the second respondent during this call. We did not accept that there was any premeditated plan to sexually harass the claimant.

85. The fourth and fifth respondents and Stephen Purdy, Luke Wilson and Oliver Tallon from the Dungannon showroom were congregated around the fourth respondent's desk, drinking and watching a football match on TV. Beer and vodka bottles, a bag of ice and crisps were on the desk. Her colleagues were yelling loudly and swearing at the TV. The claimant suggested that Oliver Tallon was the "main culprit" at this point as his language "foul and offensive". This did not form part of her complaint of sexual harassment.

86. The claimant's arrival was greeted by a couple of wolf whistles. Comments were made that she was "*glammed up*". The second respondent said she looked *"very nice".* The claimant described this as "*the normal male banter*" which the claimant did

not find offensive. The second respondent appeared to be much drunker than his colleagues and he was behaving very boisterously. He spilled drink over himself as he opened a bottle of Prosecco and was shouting at Luke Wilson to *"F… off, Luke"*, which Luke Wilson described to the third respondent as being unoffensive *"banter".*

87. At one point, the claimant went upstairs to look around the new kitchen display. The second respondent linked her arm and they walked up to the first floor together. The claimant asked him how his week had been and the second respondent told her he had *"missed her".* She let him try on her coat *"for a laugh"* and he complimented her dress and said she was just *"a wee thing".* The claimant confirmed she was not offended by these comments and that *"nothing happened"* during this exchange. The Tribunal considered that the claimant exaggerated when she stated that this exchange alerted her that the second respondent was *"going to be a pest"* and from then on she was trying to distance herself from him.

88. After returning to the desk, someone joked *"that was a quickie".* The claimant could not identify who made this comment. She confirmed during the grievance investigation that this was not included in her grievance because the was the *"usual man banter"* which as before, she did not find offensive. The claimant then chatted to the fourth and fifth respondents about a family wedding and her recent weekend away in "Derry". The Tribunal accepted that the fifth respondent corrected this to "Londonderry"

89. The second respondent continued generally "larking around" and engaging in horseplay. The second respondent threw the claimant's coat on the floor, which she found annoying. As the claimant was chatting to Oliver Tallon, the second respondent came over, kissed Oliver Tallon and told him how much he missed and loved him. He threw a Prosecco bottle across the floor, knocking over a lamp and the claimant's handbag. The claimant was dancing and the second respondent was trying to get her to dance with him. He then took off his shirt and danced around in front of everyone. Jokes were passed about him being *"the next Chippendale".*

90. The claimant alleged that the second respondent mentioned in her presence, that when in the nearby Iceland store nearby earlier with the fourth respondent and The fifth respondent, he was offered a *"threesome*" by the female staff. The claimant responded, *"you can have your threesome"* as she was *"getting cheeky".* The second respondent denied making the comment at all. The third respondent later concluded in her investigation that the comment had been made but she was unable to identify who said it, as the three employees concerned each denied making the comment and could not remember who had. The Tribunal finds that this comment was made by the second respondent in front of the claimant. However, we concluded from the claimant's reaction she was becoming increasingly irritated with the second respondent's behaviour in general.

91. The second respondent and Oliver Tallon left the showroom and went to Tesco to buy more alcohol. While they were away, the fourth respondent told her that the second respondent had dealt with one of her "come back" customers while she was on leave and joked about the second respondent stealing her sales.

92. The claimant's case was that events took a turn for the worse after the second

respondent and Oliver Tallon returned from Tesco. She alleged that the second respondent, in front of her colleagues:-

- Started to make comments in a *"a more sexual way"*, including telling her what he would like to do to her and "Valentina" (her syndicate racehorse) and that he would like to *"make her wet.*

- Danced around her, held her arms back as he danced with her, bruising her arms.

- Tried to put his hand up the front of her dress when he sat beside her near the fourth respondent's desk in front of colleagues nearby.

93. These allegations were denied by the second respondent. The claimant did not mention in her original grievance statement about the second respondent trying to put his hand up her dress. The claimant confirmed that she did not call out for assistance to any of her colleagues. While we accept that the claimant's grievance statement was a "condensed" account, this allegation is of such seriousness, we consider that it would have been included, had it happened. The other incidents were mentioned but the Tribunal did not find the claimant's evidence in respect of the allegations set out above to be credible. We did not consider the photographs were sufficient to prove the causation of the bruising or to corroborate the allegation that the second respondent held the claimant's arms back causing injury. Around this point, the claimant mentioned to Oliver Tallon that the second respondent's behaviour was over the top and he told the second respondent to *"wise himself up".* The claimant did not tell Oliver Tallon about the alleged explicitly sexual comments or the nature of the second respondent's behaviour. She said that this was because Oliver Tallon was too drunk. Oliver Tallon thought he had seen the second respondent pushing the claimant onto a bed but this was not an allegation made by the claimant. The Tribunal accepts that this was the only complaint raised by the claimant to Oliver Tallon during the evening. The Tribunal considered that these comments were so offensive and sexually explicit that the claimant would have mentioned them specifically to Oliver Tallon had they been made. On balance we did not accept this part of the claimant's account when also viewed in the context of the claimant's actions later in the evening.

94. The claimant also alleged that the second respondent came up and hugged her from behind her, tried to kiss her neck and was *"going for her boobs"*. The Tribunal was not satisfied on a balance of probabilities that this incident occurred entirely as was alleged by the claimant because it is not possible to discern from the poor-quality photograph whether the second respondent was in fact trying to kiss the claimant's neck or was trying to touch her "boobs". However, the second respondent admitted that he hugged the claimant from behind. He later told Ms McCann that he had known the claimant for 5/6 years and he would never hug a person who he did not know and *"if she had been uncomfortable or tried to push him off he would have been so embarrassed but she did not".* However, we find on a balance of probabilities that the second respondent did come up and hug her from behind, without her consent. As the second respondent gave her no choice, this was not a *"consensual embrace*".

95. The claimant also alleged that the second respondent commented to her "*You have great tits" and* made several other comments about her "cleavage" during the

evening. She told him to *"Piss off and leave me alone".* The second respondent denied making these comments as alleged by the claimant. During the grievance investigation he admitted making one comment about her cleavage. He contended that early in evening, the claimant commented that her *"cleavage had nearly fallen out",* as she bent down to pick something up from the floor and he had responded, *"You should have tied the girls up better".* The claimant denied that this conversation took place at all.

96. The Tribunal did not find the second respondent's evidence to be credible. We considered that this was a self-serving statement and an anodyne version of events made up to minimise his culpability. He incorrectly told the Tribunal that the claimant was wearing a dress which had a see-through panel and plunge neck so that her cleavage was *"on show".* It was in fact a completely opaque tunic style dress with a high round neck, which did not reveal her breasts. We noted that Luke Wilson was the only one of the claimant's colleagues who reported during the grievance investigation having heard the second respondent make any comment about the claimant's cleavage. Luke Wilson's first statement to the third respondent, records that he spontaneously responded that the second respondent had mentioned the claimant's "cleavage" *"about a dozen times*" during the evening, when asked did he remember the second respondent making comments about the claimant and how she looked. In his first interview with the third respondent, Luke Wilson did not mention at all the incident as described by the second respondent. However, in his second interview in the grievance investigation, he recalled only one incident which was almost the same as the second respondent's account. His explanation to the third respondent for changing his story was that in his initial statement that the second respondent had made such comments at least a dozen times was *"just a fly off comment"* and that he should have thought before he spoke. Luke Wilson was not called to give evidence at the Hearing. We concluded that the more likely explanation for the change in his account was that he had conferred at some point after his first interview with the second respondent and possibly other colleagues about what he would say to the third respondent during his second interview.

97. We found the third respondent's reasons for accepting this part of the second respondent's account to be flawed. For the purpose of this particular allegation, the third respondent considered that Luke Wilson's first statement was inaccurate and that his later statement was correct. She reasoned that because the claimant had only identified one comment about her cleavage, this corroborated the second respondent's account of a *"reciprocal conversation with [the claimant] after her cleavage had nearly fallen out while wearing a dress with a plunging neckline."* The third respondent concluded that by his own admission The second respondent had made a comment about the claimant's cleavage and that this was perceived by both parties as being "*light-hearted banter".* Yet she found Luke Wilson's first statement to be more credible in relation to her finding of inappropriate touching and sexual assault in restaurant. The third respondent refused the claimant's offer to show her the dress as she did not think this *"was relevant".* This finding was upheld by the appeal officer, who having viewed a photograph concluded that the second respondent's description of the dress was "fairly accurate". This was clearly not the case. The Tribunal is therefore satisfied that the incident described by the second respondent did not happen and that the second respondent did tell the claimant she had *"nice tits"* and make other comments about her "cleavage" throughout the evening.

98. The claimant told the Tribunal that at this stage she was actively trying to avoid the second respondent because she was so disgusted by his behaviour. She alleged that she asked the fifth respondent to keep the second respondent *"in check"* but he responded by asking her to accompany him to the kitchen. The fifth respondent denied that the claimant made this comment and alleged that the claimant later propositioned him just before the party left for the restaurant. We preferred the claimant's evidence on this point. The claimant did not raise a formal grievance against the fifth respondent about this comment, but she did mention it during the investigatory hearing.

99. The claimant alleged that two further incidents of serious sexual harassment occurred in the showroom, shortly before the party left for the restaurant. She alleged that the first occurred in the office, when she went in to check the daily sales record ("the DSR") to see if the second respondent had really stolen her sale as advised by the fourth respondent. She alleged he was *"strong in behind me, his words were "I would love to come all over you on top of the DSR. He was trying to put his hand up my dress, cards were mentioned."* He asked if she was *"wet"* and tried to kiss her. She alleged she *"told him I was old enough to be his mother and to piss off".*

100. The reference here to *"cards"* related to a box of pornographic playing cards containing crude and graphic sexual images, which was apparently a *"gift for the store"* from a former colleague. These cards had lain in a desk drawer for a couple of years. Everyone who worked in the Portadown showroom, including the claimant, had seen the cards. No one raised any complaint about the cards. On a prior unspecified date, the third respondent *"told the guys to get rid of them"* but she did not ensure that this instruction was carried out.

101. The second respondent's version of events was completely different. He denied that he made any of the comments attributed to him by the claimant. He alleged that he had left the group to get a glass and went into the office to charge his e-cig. He alleged that the claimant followed him in, perched on the desk and asked for a go on his vape pen, commenting that she was used to *"sucking on big things*".

102. The claimant did not report the "office incident" or seek help or assistance immediately afterwards from any of her other colleagues. In cross examination, the claimant said variously that she did not know what to do, that she had not been prepared for this kind of behaviour from a work colleague and thought the second respondent would just *"pass out"* because he had so much to drink.

103. Instead, the claimant then went down to the toilet, where the second incident allegedly occurred. Her evidence was:-

> "*I needed to go to the toilet, Neville followed me down and pushed me into the Ladies' toilet, I told him to get out I needed to go to the loo, he had the outer door locked, he pulled the zip of my dress down, I was fighting to get into the inner toilet as I couldn't get out past him, he made comments about my tits and also about Beverley's as well. I said you wouldn't be saying that if she was here. I was pushing with all my might to get the inner door closed and locked which eventually I did, I went to the loo. Neville was still on the other side, I told him I needed out, he didn't reply, so I chanced opening the door, he had his penis out and was asking for a blow job, I said you disgust me, he started*

urinating in the sink, I made my escape. "

104. The claimant's account was that she had to fight to get past the second respondent into the toilet cubicle and she had a proper struggle to keep him out, bruising her knee and finger in the process. She kept asking him to "*leave me alone, just go away, I need to go to the loo."* The claimant did not photograph this bruising because she said she considered they were "self-inflicted" and she was more concerned with the bruises on her arm. She contradicted herself as she said that she was screaming at him but also stated "*I probably could have shouted"* but did not know if anyone would hear her. At one point she did hear the toilet being flushed in the men's toilet next door.

105. The second respondent's account of the "toilet incident" was completely different. He alleged he left the office first and headed towards the kitchen and toilet area, followed by the claimant. They walked together down the steps to the corridor leading to the toilet and kitchen. The claimant stood by the toilet door and called him over from the kitchen. She then pulled him by the belt into the toilet cubicle and closed the door behind him. She had a cigarette and said, "*Let's light this and have a wee smoke".* She hugged and kissed him, which lasted for two to three seconds. He then pulled away and told her that this couldn't happen as they were both *"happily married*". She responded, *"Wait until you're married as long as me to see how happy you are"*. He had to turn his head to avoid her kissing him again and *"gently*" removed her hand to stop her from groping his penis through his jeans. He confirmed at the Hearing there was no moaning of a sexual nature from either of them in the encounter. He heard low flush of the toilet next door and told her to stop *"as someone else is down here".* He alleged this appeared to excite her even more. She laughed and told him that she was having an affair with a young GAA player from Lurgan to whom she gave "*the best blow jobs*" and that she loved "*sucking his cock".* the second respondent was shocked, laughed nervously and asked "*what would Carson say"?* She responded that *"it was bad enough that she was having an affair but with a big fenian".* They then smoked the cigarette and after a couple of puffs put it out in the sink. He noticed lipstick on his shirt and was trying to rub it out. He was worried about what the others would think. He left and walked back to the double doors. He did not see anyone else in the vicinity of the toilets. The claimant followed up a few seconds later and Stephen Purdy had commented to him that they had been away a long time.

106. The fourth respondent gave evidence that he was in the men's toilet when he thought he heard the claimant's voice next door. He flushed the toilet and then heard the second respondent's voice. As he passed the ladies toilet, he stopped to listen. He said he could hear *"muffled talk and heavy breathing".* he went upstairs and told the fifth respondent and they went back down together and listened for approximately 10 or 15 seconds. the fifth respondent said that they listened at the toilet door for 2 minutes and it was "obvious" that the occupants were engaged in *"heavy petting".* They then thought someone was about to come out so they "*dodged into the kitchen for a couple of seconds"* and then "*ran back upstairs like two schoolchildren".*

107. The Tribunal did not find the evidence of the second respondent about his conversation with the claimant to be plausible. We doubted, given the very large amount of alcohol he had consumed, that he could have recalled the conversation between himself and the claimant in such detail, when his recollection about other parts of the evening appeared vague, sketchy or inaccurate. The Tribunal considered

that the second respondent's version of events had the flavour of a retrospectively concocted story based on comments made by the claimant in the restaurant later that evening. Similarly, the Tribunal doubted the veracity of the evidence of the fourth and fifth respondents that that they could hear heavy breathing or "consensual activity" such as heavy petting going on between the claimant and the second respondent. We found their respective accounts to be remarkably similar, but their suggestion that they could hear consensual sexual activity did not accord with the evidence of both the second respondent and the claimant that there was no moaning from either of them while in the toilet.

108. The Tribunal was also sceptical about assertions made seemingly with the sole purpose of discrediting the claimant, for example, when the fifth respondent claimed that the claimant had invited him to take a walk with her in the kitchen and that she had told him previously that she was a *"wild girl in her day, especially when (her husband) was not about".* The Tribunal rejected a suggestion put to the claimant in cross examination that a joke posted by her on Facebook about making a wish in the Trevi fountain was an indicator that her marriage was in trouble, making it likely that she was having or would want to have an affair.

109. However, the Tribunal also had serious doubts about the accuracy of the claimant's version of events in the office and toilet areas. We were not convinced that the claimant's actions both on the evening and afterwards or her explanations for those actions were consistent with her allegations that she had been subjected by the second respondent to what she described as "*serious sexual harassment",* including *"sexual assault".* Accordingly, after weighing the evidence, we do not find that the claimant has established on a balance of probabilities that the incidents in the office and toilet occurred as she alleged.

110. The claimant did not show any visible signs of distress, upset or concern when she returned to the showroom. To the contrary she behaved normally and calmly in front of her colleagues. She applied lip gloss and straightened her hair, which she said was usual for her, in readiness for the taxi arriving to take them to the restaurant. She bought a last man standing ticket from Stephen Purdy.

111. The claimant did not report the alleged incidents in the office and toilet areas. She gave contradictory accounts about reporting the matter, on the one hand stating that she had spoken to Oliver Tallon and on the other hand stating that she had not told anyone at all, "*because they were all boys"*. As stated above the Tribunal has found the claimant's conversation with Oliver Tallon took place earlier in the evening before the claimant went to the office and toilet. The claimant did not alert Oliver Tallon to any further concerns after this.

112. The claimant also told the Tribunal that she thought when she got to the restaurant, she would call her husband to come and get her. In fact, she did not ring her husband when she arrived the restaurant but waited until 9.50pm before attempting to call him.

113. The claimant continued to the restaurant rather than to avail of the obvious opportunities that she had to remove herself from the situation. The Tribunal did not find the claimant's reasons for not so doing to be at all convincing. These were variously that she had paid for the restaurant booking deposit with her credit card and was afraid that her colleagues would use her credit card to pay for the rest of the

meal; that she was "dazed" and "her mind was all over the place"; that it was dark outside the showroom and she was concerned for her personal safety as it was known that *"guys drive around in cars"* in the vicinity of the showroom, when in fact the showroom is in close proximity to large supermarkets which would have still been open at that time, with members of the public around; that she did not want to be left alone at the showroom. She confirmed that she later told the police that she had tried to ring her husband at one point, but he had left his mobile phone in the car and she did not try the landline as they do not use it. She told the Tribunal her intention was to call a taxi home or seek assistance from people she knew once at the restaurant. When they arrived at the restaurant, she did not do this.

114. The claimant did not physically distance herself from the second respondent in the taxi or afterwards at the restaurant despite her evidence that she wanted to keep away from him. She sat in the back row of the taxi beside Oliver Tallon and the fourth respondent. The second and the fifth respondents sat in the middle row and Luke Wilson and Stephen Purdy sat in front beside the driver. Although Oliver Tallon said in his statement, that he thought the claimant may have sat beside him to keep away from the second respondent, she held on to the headrest in front. Oliver Tallon is recorded as having told the third respondent that after seeing the second respondent and the claimant sit together later at the restaurant, he thought that any issues between them had "resolved". The claimant alleged that the second respondent sucked her fingers and that Oliver Tallon would have heard her say *"Yuck*" as she pulled them away. Oliver Tallon denied having witnessed this. The second respondent denied this allegation. The claimant did not raise any issue about this in the taxi. Once at the restaurant, the claimant sat beside the second respondent and Luke Wilson who had to get up and down several times to allow her to leave and return to the table when she went to the toilet.

115. The party arrived at the restaurant around 8pm and the meal was served around 8.30 pm. The Tribunal was satisfied that all the partygoers, including the claimant, were all very drunk at this stage. The fourth respondent had to help the second respondent on with his blazer and straighten his tie before going inside the restaurant. Shortly after arrival, the fifth respondent fell asleep face down on the table beside his dinner. He *"was out of it for quite a while",* which he said is his *"party piece"* when he is drunk. The claimant sat at the rear of the table beside Luke Wilson on her right. The second respondent sat at her other side. The claimant said that she did not want him beside her but she did not refuse to sit with him because she thought that she *"could deal with him".* She alleged that: - "*He was pushing his hand under my bottom asking me to let it further in, the other hand was up the front of my dress, he was saying stuff like we would get together sometime. I was pulling his hand down. He wanted me to feel his dick and that we could have an affair."* She alleged the second respondent also tried to grab her up to dance, was trying to dance with other women in the restaurant and when the Christmas crackers were being pulled at the table, he asked her *"to pull him off"*. Her evidence was that she tried to kick him under the table and had retaliated to his behaviour by using what she described as *"racist comments*". She told him *"I would rather f…k a Fenian"* and that he was *"disgusting"* and "*only a child".* She told him that she was having an affair with a GAA player and the second respondent would *"have to take his turn".* The second respondent responded by telling her to "F..k off", and left the table. She told the Tribunal that by using these comments she was *"fighting fire with fire"* and playing to his allegedly sectarian views to get him to leave her alone.

116. The second respondent confirmed that he sat beside the claimant at the restaurant throughout the meal. We rejected the fourth respondent's assertion the claimant sat between him and Luke Wilson, and not the second respondent. We accept that the "selfie" taken by him captured an unspecified point in the evening, probably after the meal. We considered that this was a deliberate attempt by the fourth respondent to mislead the Tribunal to exonerate the second respondent. The second respondent denied pushing his hand under the claimant's bottom, trying to put his hand under her dress or making any lewd comments to her. He countered that the claimant was in fact trying to feel his leg under the table to be plausible. The second respondent's evidence that he may have accidentally touched the claimant's bottom as he tried to get his phone or e-cig from his blazer pocket, was not plausible. Luke Wilson's interview statement recorded that the claimant did not appear initially to care about the "cleavage" comments but that "*by dinner she seemed to get fed up with the comments and the touching".* He confirmed that the claimant told the second respondent that she was *"old enough to be his mother"* and that he could see that the claimant "*was having a problem with Neville".* Just after the starters arrived the claimant had said to Luke Wilson*: "He won't leave me alone. Luke you have to help me."* He thought she was joking but that it had a *"serious"* element. He then saw the second respondent put his hand *"under the claimant's bum for around 20 minutes"* and that *"she did not react*". During the grievance investigation the claimant told the third respondent that she feared he would "get his hand further in if she moved and she was trying to get his hand away from the front of her dress". In cross examination she denied that his hand was under her bottom for that length of time. Luke Wilson stated after the second respondent got up the claimant repeated *"I thought I asked you to help me"* in a more serious tone. However, he also stated that at other times the claimant did not seem to mind *"the attention"* she was receiving. The fourth respondent confirmed that the second respondent was *"showing the claimant some attention as she was the only woman present"* and he also heard her say: *"Get your hand off my bum".* In his second statement Luke Wilson included the allegation made by the second respondent that the claimant was *"feeling Neville's leg as she leaned over the table to talk to John (Neville)".* The Tribunal concludes that he could only have known about this allegation through discussion on a later date with the second respondent and possibly other colleagues.

117. The claimant alleged that her colleagues' ears "*perked up*" at her outburst to the second respondent. She explained to the fourth respondent that she was not actually having an affair but had made this story up "*to get Neville off her back"*. The claimant alleged that the fourth respondent had replied that he was also disgusted with the second respondent's behaviour and was going home. Although the Tribunal considered that the claimant was embellishing her account when she alleged that the second respondent tried to put his hand up her dress, the tribunal accepted that the second respondent did feel her bottom and did make other comments about her breasts, having an affair, asked her to feel his "dick" and to "pull him off" when they were sitting at the table.

118. The claimant told her husband, when he later came to pick her up:- *"I've had enough of being groped".* The Tribunal considered that this comment was not commensurate with the claimant's allegation that she had been sexually assaulted earlier in the evening, but was consistent with her having been hugged without her consent, inappropriately touched on the bottom and subjected to sexual comments by the

second respondent.

119. Around 1am, at home, the claimant noticed that she had a missed call on her mobile phone. The second respondent confirmed that he rang the claimant in the early hours on 17 December 2017 as he was getting a lift home with the fifth respondent's son. The fifth respondent, Stephen Purdy and Luke Wilson were also in the car and were noisy and boisterous. The second respondent told the Tribunal he wished to ask the claimant if she had arrived safely home. She later discovered on 31 December 2017 that a voicemail message had been left on her phone. A recording of that voicemail was available at the Hearing. A slurred voice can be made out saying the claimant's name along with the words *"f…ing liar"*. The rest of the message is unintelligible, but it is doubtful the caller is asking after her welfare. At the Hearing, the second respondent said he could not discern if it was his voice and that he did not intentionally leave a voicemail. The third respondent told him during her investigation that the message was "*inaudible".* However, the Tribunal accepts it was, more likely than not, the second respondent who made the call, even if he did not deliberately intend to leave the message. We find it was probable that the second respondent had been alerted that the claimant had raised issues about his behaviour to Luke Wilson during the evening.

120. The claimant told the Tribunal that she met with a female friend on 18 December 2017 who helped her to *"focus"* on what had happened the previous evening. The Tribunal is surprised that this friend, who would have been able to provide corroborative evidence, was not called as a witness. Later the same day the claimant rang the second respondent to confront him about his behaviour. He returned her call and she said that initially he tried to act as if nothing untoward had happened. She told the Tribunal that she said that he should *"never speak to her or touch her like that again*". During the investigation she told the third respondent that she rang him because she could not wait until 27 December and had said, *"I'm sure you're in the doghouse at home with lipstick all over him from dear knows who"* and he had replied *"Tell me about it".* She said she was clear with him that this was not all over and he then apologised and said that he was embarrassed. She told him that he also "needed to apologise to the fourth respondent" to which he responded he had already seen the fourth respondent. She felt that his apology was "rehearsed". The second respondent confirmed to the tribunal that he had apologised to the claimant but only "*if there was anything i had done like dancing or anything just in general for acting the lig*" and that she told him not to worry. He said she asked him not to mention what had happened in the toilet and he reassured her that no one was talking about it and he would not mention it. He said that he apologised automatically and not because he thought he had done anything wrong. The Tribunal's view is that because of the amount of alcohol imbibed, he could not be sure what he had done at the Christmas party. The Tribunal is satisfied that the second respondent told the fourth respondent about his conversation with the claimant sometime between that date and 27 December 2017.

121. On 20 December 2019, the claimant rang the third respondent at home. after exchanging some pleasantries, she raised the issue of the second respondent's behaviour at the office party. She said he had been "a pest" and "boisterous" and she wished to raise a grievance. The third respondent asked if the claimant was OK and explained she could raise a grievance either formally or informally. The Tribunal accepted that that the third respondent, who had recently returned from holiday, learned about the allegations for the first time during this conversation and that it

would not have been clear from this conversation whether the claimant wished her grievance to be dealt with informally or formally. The third respondent advised the claimant to write down her allegations. They agreed to have a further discussion on 27 December 2017. After this conversation, the claimant emailed the third respondent and copied in the company secretary, Lynda Boyd: "*I feel I have to document what happened to me which is totally out of order and as we discussed we will talk about this further on the 27th when we return to work. Until then I have made my own documentation of events etc and hope this matter can be resolved."* The third respondent first received the claimant's email when she returned to work on 27 December 2017 after the holidays.

122. The claimant rang Lynda Boyd around 1.30pm to confirm she had received her email and asked if she had informed DW about it. The claimant told Lynda Boyd that it had been a *"dreadful night"* and that she wanted to make an "official" complaint. She reported that the second respondent had *"locked her in the bathroom and urinated in the sink and put his hands up her dress."* Although he apologised to her the next day, the claimant did not feel he was being sincere. Lynda Boyd expressed surprise when the claimant said her complaint was about the second respondent because she initially assumed the complaint would involve the fifth respondent. The claimant then told Lynda Boyd that she believed that the fifth respondent had initiated the events and she was *"not happy with Oliver Tallon"* but Lynda Boyd could not remember why. The claimant advised that Luke Wilson had seen her "being hassled". She said she *"wanted something put on Neville's file and straightened out so that she and Neville could work together again".* She wanted David Wilson to be informed about her complaint. Lynda Boyd did not think that the claimant was *"as mad as she was",* so she *"made light of it saying you should come out with us next year instead".* She told the claimant that she would speak to David Wilson and ask him to speak to the third respondent.

Victimisation Allegations

123. On 27 December 2017, the claimant was driven to work by her friend. She went in to speak with the third respondent in the general office. The friend parked her car with the engine running in the staff carpark and waited for the claimant. The second, fourth and fifth respondents were working together on the top floor and could see the claimant talking to the third respondent through the office windows. The evidence given by these witnesses to the effect that there was no discussion between themselves about the events of 16 December 2017 prior to the commencement of the grievance investigation was contradictory and simply was not credible. We are satisfied that they would have speculated together about the purpose of the claimant's conversation with the third respondent and linked this to the comments made by her on the evening to Luke Wilson and the fourth respondent. The claimant alleged that the fifth respondent glared at her in the general office as he came downstairs making her feel uncomfortable. She contended that this was an act of victimisation. The fifth respondent denied glaring but confirmed he had looked in at the claimant and she looked back at him. He then went outside to find out who was in the carpark as he heard the friend's car in the staff carpark. He asked the claimant's friend if she was OK. She confirmed she was waiting for the claimant. The fifth respondent then went back inside and told the second respondent that the claimant was in speaking to the third respondent. We are satisfied that the fifth respondent suspected at this point that the claimant's conversation with the third respondent

concerned the second respondent's conduct at the Christmas party and relayed this to the second respondent.

124. During their conversation, the claimant informed the third respondent that she wished to raise a formal grievance. She gave the third respondent a copy of her written statement but read it out to her first. She asked the third respondent to pass her statement on to David Wilson. The third respondent's evidence was that the claimant informed her at this meeting that she had been advised by a barrister that she was within her rights to report the second respondent to the police but had decided to await the outcome of her grievance.

125. The claimant alleged that when she got to the part where she mentioned the pornographic cards, the third respondent jumped to the second respondent's defence and interjected that they did not belong to the second respondent. The claimant asked the third respondent's permission to take photographs of the cards, copies of which were in the Hearing Bundle. After this conversation, the third respondent disposed of the cards. The claimant's case was that by doing this, the third respondent deliberately destroyed evidence pertaining to her grievance and that this was an act of victimisation. The third respondent's explanation was that she destroyed the cards because the claimant found them offensive. The claimant denied that she had informed the third respondent that she found them offensive. The Tribunal does not accept that this was a deliberate attempt by the third respondent to destroy evidence. The third respondent knew that the claimant had photographs of the cards which were before the Tribunal. The third respondent made no attempt to conceal their existence at any stage.

126. The claimant told the third respondent at this meeting that she no longer trusted or felt safe with the second respondent. the third respondent initially asked the claimant if she wanted to be transferred to another showroom. The claimant objected and suggested that the second respondent, as the alleged perpetrator should be moved. This was given as an example of where the third respondent had failed to support her and made her feel like she had done something wrong. Later that day, the third respondent informed the claimant that that she had been asked to investigate her grievance and that the second respondent would be moved to the Dungannon showroom pending completion of the investigation.

127. The third respondent started the investigation immediately on 27 December 2017. She conducted the first investigatory interviews with Oliver Tallon and Stephen Purdy.

128. The claimant returned to work on 28 December 2017. She felt that the fourth and fifth respondents were both avoiding her and sniggering behind her back. She alleged that the fifth respondent kept his head down and would not look at her and ignored her if she offered him coffee. Early afternoon, the claimant walked towards the fourth respondent at his desk and asked about his Christmas break with his family. She alleged that at first, the fourth respondent kept his head down and appeared reluctant to talk to her. Then in a raised voice, he told her angrily that the second respondent "*could lose his marriage and maybe his job over this".* The claimant was shocked and taken aback by his reaction and she walked away. The fourth respondent confirmed saying this to the claimant, but denied he spoke angrily. He alleged she raised the office party and he wanted to close this discussion down. The Tribunal is satisfied his intention was to communicate his disapproval to the claimant for having raised a

grievance against the second respondent. He said that he was "*100% shocked"* by her allegations and his view was that she was *"tarnishing people's characters when she knew it did not happen and staff are not as she portrayed".* The Tribunal accepted that this conversation occurred as was alleged by the claimant. At this point he could only know of the nature of the claimant's allegations being made by the claimant through conversation with the second respondent or his other colleagues.

129. Later that day and shortly before the third respondent interviewed the fourth respondent in the general office, the claimant alleged she went in to log a sale into the DSR and saw a document with questions for the fourth respondent which were formulated from the claimant's grievance document, displayed on the computer screen. The claimant approached the third respondent, who was with customers, and asked if she could have a quick word with her. The third respondent told her that she would speak to her when she had finished with the customers. The claimant's assertion that at this point she was *"cut dead"* by the third respondent was therefore incorrect, although the third respondent did not approach the claimant when she had finished with the customers.

130. Later, the claimant was on the shop floor and felt uncomfortable as she could see the fourth respondent being interviewed by the third respondent in the general office. After his interview finished, the claimant went into the office to log another sale. She alleged she saw that the fourth respondent's responses had been inserted into the document on the computer screen. When the claimant again tried to speak with the third respondent at the end of the day, she responded that it was now too late, and she would speak to the claimant the next morning.

131. On 29 December 2017, the claimant raised with the third respondent first thing what she had seen on screen the previous day and pointed out it was confidential information. She alleged that the third respondent asked her who had seen it and "*flew into a rage, her face was crimson"*. She alleged that the third respondent stomped off, shouted that no one was allowed in the office and threw the receipt book the DSR and other things onto the counter outside. The third respondent denied losing her temper or shouting at the claimant. She told the Tribunal that that she was *"almost 100% certain"* that she had not left the information on the screen and that she suspected that the claimant may have searched the computer herself. However, she did not confront the claimant about her suspicion at the time and instead she apologised to the claimant. From then on, the third respondent relocated her investigation to another office upstairs. On balance the Tribunal finds that the third respondent did leave the information onscreen but that this was not done deliberately. We conclude that the third respondent was noticeably embarrassed at her oversight and annoyed to have this pointed out by the claimant, but we do not accept that the third respondent shouted at the claimant as was alleged. The third respondent's actions were nevertheless careless of the need to maintain the confidentiality of the claimant in the grievance process.

132. The claimant in her witness statement alleged that on 31 December 2018, the third respondent deliberately gave her incorrect information that there would be normal opening hours on New Year's Day. The claimant therefore arrived on 1 January 2018 and opened up at the normal start time of 9.30 am. She was angry because she said she had asked the third respondent specifically about the opening hours and rang the third respondent who said that she would be there shortly. This matter was not raised

by the claimant as part of her victimisation grievance. The Tribunal preferred the third respondent's evidence that she had announced to everyone, including the claimant, that the store was opening at the later time. The claimant informed the third respondent about the message which left by the second respondent on her voicemail, on his way home from the party, which she had only discovered the day before.

133. The claimant alleged that on 2 January 2018, the fifth respondent made a point of walking straight past her desk, with his head down and he ignored her when she asked who wanted coffee. This was the day after his first interview with the third respondent. She alleged on 9 January 2018, she arrived late to work and met the fifth respondent at the door who again ignored her. Although both the fourth and fifth respondents denied that that they were avoiding the claimant and alleged that it was the claimant who changed and kept more to herself, the Tribunal is of the view that it is likely that the claimant's version was more correct. The fifth respondent told the Tribunal that the claimant was *"creating the atmosphere by making the claim"*. The fourth respondent suggested that he did not ignore the claimant but now kept his conversations *"professional"* and no longer talked to her about personal matters. The third respondent confirmed that she observed the claimant *"withdrawing from the team"* and that separately the fourth and fifth respondents approached her to complain that the claimant was not passing on leads and was not speaking to them. Her response was simply to ask them to *"let it pass*". She took no further action to deal with the issues being raised and or find out why the claimant might be withdrawing from the team. The Tribunal is satisfied that this is further evidence that the fourth and fifth respondents had deliberately stopped talking to the claimant and were deliberately ignoring her.

134. The third respondent conducted the first investigatory interview with the claimant, who was accompanied by her support person, on 3 January 2018. This lasted from 10.55am until 5.16pm and included several breaks. Thelma Jackson took notes of the meeting. The third respondent asked the claimant for clarification of matters contained in her own statement and to respond to excerpts from the statements of the fourth respondent, the fifth respondent, Luke Wilson, Stephen Purdy and Lynda Boyd. The claimant provided the further information requested and told the third respondent that her own statement was "condensed". She told the third respondent she had photographs of bruising and from the evening. The third respondent asked her for copies of same. The claimant later alleged at the grievance appeal that the third respondent acted more supportively towards her at this meeting than previously, she suspected because Thelma Jackson was present. This was denied by the third respondent who asserted that had always shown the claimant support.

135. The claimant informed the third respondent that she thought the fourth respondent had spoken to the second respondent about her allegations. There was a discussion about whether the claimant had initially wished to proceed informally with her complaint and why she had waited until 20 December 2017 to report her allegations. The claimant advised that her preferred outcomes at that stage included a written apology from the second respondent with a note put on his file; for the second respondent to be permanently transferred; a review of procedure and training for her colleagues about the bullying and harassment policy. She requested *"back up and support"* and for the process to be concluded as quickly as possible. She indicated that she was considering taking the matter further. The third respondent reassured the claimant that *"she was always there" for her* and that they would meet every

couple of weeks to make sure the claimant was comfortable. The third respondent informed the claimant that the notes of the meeting should be with her by 5 January 2018 *"for verification".* In the event there was a slight delay as the record was not provided to the claimant until 8 January 2018.

136. The third respondent met again with the claimant on 8 January 2018 to sign off the notes of the claimant's grievance meeting. The claimant alleged that as she read over the notes, she realised there were inaccuracies and omissions and when she pointed this out the third respondent became angry, snatched the pages from her and refused the claimant's request to take the notes away and read them in her own time. The third respondent denied that she became angry, rather she alleged that the claimant became upset and annoyed when she read the inserts from other witness statements, saying "F..k off, I can't do this". The third respondent informed the claimant that she was not sure if she could take the notes away with her. The Tribunal found this surprising given that the third respondent contended that she was experienced in carrying out grievance investigations. We considered that this aggravated the claimant's sense of grievance and reinforced her view that the third respondent had refused to let her remove the notes. The claimant walked out of the office and into the carpark where she telephoned her husband. He apparently offered to come and pick her up because she was too upset to drive. The third respondent sought telephone advice while the claimant was out of the building. On her own account, the claimant returned to the general office, still speaking to her husband and lifted one of the pages from the desk. The third respondent asked the claimant who she was talking to and said that she was not sure that the claimant should be discussing the notes with this person. The claimant alleged that the third respondent was shouting at her, which she denied. The Tribunal finds that the third respondent probably did raise her voice to make herself heard as the claimant continued talking to her husband. The Tribunal considers that the claimant's own behaviour at this meeting was unnecessarily challenging and confrontational. The meeting ended when the third respondent told the claimant that she was permitted to take the notes away with her and have more time before she signed them. The claimant agreed to this and drove herself home early.

    The third respondent carried out her first investigatory meeting with the second respondent later that day.

137. On 9 January 2018, the third respondent emailed the claimant to request her agreement of the notes. She mentioned in her email that the claimant had previously agreed the record but suggested that she then changed her mind and refused to sign them. This was incorrect as the claimant had not in fact agreed the notes at the previous meeting. The claimant was unhappy about this and emailed back to complain about how the third respondent had treated her on 8 January 2018. She reiterated that the notes were inaccurate, that she had neither agreed the record nor changed her mind. The third respondent sought advice from PMS because she was *"not happy"* with the claimant's assertion that she had become irate and shouted at her, felt she needed *"her own witness to her conversations with the claimant"* and was starting to feel that she would be *"the next person with a grievance against her".* The third respondent clearly felt defensive in the face of the criticisms raised by the claimant. On 11 January 2018, the third respondent replied to the claimant, as drafted by PMS, and denied any improper behaviour on her part. She advised the claimant, in accordance with accepted HR practice, when the accuracy of minutes are disputed,

that any amendments the third respondent deemed to be "accurate and relevant" would be included in the record but that any amendments or comments which were not agreed, would not be included but would be appended to the record of the interview.

138. The claimant emailed the third respondent her suggested amendments to the record. On 15 January 2018, she sent the third respondent nine photographs in total, containing images of the pornographic cards, a broken bed POS, bruises on her arms, the second respondent hugging her from behind and the second respondent kissing Oliver Tallon. On 16 January 2018, the third respondent invited the claimant to attend a second meeting the next day to discuss this *"new evidence*". She sent the claimant copy minutes of 3 January meeting showing the claimant's handwritten annotations and advised that she agreed to include three of the claimant's suggested amendments and that the others, which were not agreed, were appended to the record.

Later that day the third respondent carried out second interviews with the fourth respondent, Oliver Tallon and Stephen Purdy.

139. The third respondent duly met with the claimant on 17 January 2018 to discuss the photographs as part of the grievance investigation. The claimant took this opportunity to raise criticisms about how the third respondent was conducting the grievance investigation. She questioned the third respondent's impartiality because *"she was a witness"* to the pornographic cards and an occasion when the second respondent allegedly drew a penis on some plans being worked on by the third respondent and the claimant. The third respondent denied that these matters raised any issue of bias on her part. At the hearing, both the third respondent and the second respondent denied he had drawn a penis but this was a scribble. The Tribunal accepted in any event that the claimant had laughed and treated this as a joke and did not complain or show any offence at the time.

140. The claimant also queried the third respondent's *"credentials"* to deal with the grievance. The third respondent responded that she was following the policies and procedures and taking advice when needed. The third respondent confirmed that if the claimant had any concerns about the conduct of the investigation, she could raise them with the third respondent or someone above her. The claimant confirmed that she was happy for the third respondent to continue with the investigation at this stage. However, she later renewed these allegations as part of her victimisation grievance and complaint to the Tribunal. The claimant told the third respondent that the grievance process made her feel *"under more stress … humiliated and degraded".* The third respondent asked if the company could do any more to support her. The claimant declined the third respondent's offer to transfer her to another store with CCTV and other female employees if this would make her feel safer and more comfortable. The claimant reiterated her complaint that the third respondent had breached confidentiality by leaving the questions on screen. The third respondent denied there had been a breach of confidentiality as no one had seen the questions. The third respondent asked the claimant to confirm that she was content with the steps she had taken to prevent a recurrence which included using her personal iPad in another room and keeping the office door closed. The claimant confirmed that she was happy with these measures. The claimant reiterated her complaint that the third respondent had shouted at her causing her upset. The third respondent denied this

and referred the claimant back to her email response rejecting that she behaved inappropriately, raised her voice or became irate at any time.

The third respondent carried out her second interviews with Luke Wilson and the fifth respondent the same day. Luke Wilson gave a significantly different account to his earlier statement, as stated above.

141. The claimant alleged that on 30 January 2018 she asked the third respondent if she could leave work early on 6 February 2018 to attend an appointment at 6pm that day with her counsellor. She alleged that the third respondent reluctantly agreed to let her go at 5pm which put her under pressure on the day to arrive on time for her appointment. The third respondent denied any detrimental treatment. As this allegation did not feature as a complaint in her victimisation grievance, on balance the Tribunal is not satisfied that this incident occurred as alleged by the claimant.

142. The third respondent compiled her reports on her investigations into claimant's grievances against the second respondent. The third respondent's findings and recommendations were set out in detail in Section 5 of the Report. In summary, she did not uphold the majority of the claimant's allegations "due to a lack of supporting evidence", mainly because witnesses had reported they had not seen or heard the alleged behaviour or comments by the second respondent. Accepting the evidence of the fourth and fifth respondents, she concluded that whatever had happened in the toilet, *"the actions of [the second respondent and the claimant] were more likely than not to be consensual".*

143. The third respondent presented the grievance investigation report to the claimant on 6 February 2018. The claimant went to an office upstairs to read the report. She was aware that the third respondent was sitting with the fifth respondent, and they were laughing and joking together. The fifth respondent denied that they were talking or laughing about the claimant. The Tribunal accepts that the claimant had a genuine belief that they were laughing and joking about her and that it was likely that they did discuss the grievance outcome. The claimant further alleged that as she was leaving work that day, the fifth respondent spoke to her for the first time in weeks and as she passed his desk threatened her by saying: "*We will dish the dirt on you",* called her a *"bitch"* and told her to *"F*** off".* The claimant's evidence was that she felt threatened by the fifth respondent and was so scared by this incident she made a report to the police the next day**.** The fifth respondent denied making these comments. On balance we preferred the evidence of the claimant. A feature of the fifth respondent's evidence was his tendency to make unsubstantiated allegations and insinuations of sexual misconduct and infidelity on the part of the claimant, which we concluded were untrue and made with the intention of impugning the claimant's character. This included his suggestions that the claimant had previously teased him with her banter that *"she was a wild girl in her day, especially when (husband) was not about"* and had propositioned him in the showroom after being engaged in a sexual encounter with the second respondent. This confirmed to us that the fifth respondent was prepared to "dish the dirt" against the claimant and find that it is likely that the fifth respondent did make these comments to the claimant.

144. The claimant asserted that she was told by the third respondent on 7 February 2018 *"don't think that I will be forwarding any receipt to HR for reimbursement"* after the claimant informed her that she had attended for counselling and had paid for it herself. This was denied by the third respondent and there was no evidence before the

Tribunal that the claimant submitted a claim for counselling expenses which was refused. As this allegation did not feature as a complaint in her victimisation grievance on balance the Tribunal is not satisfied that this incident occurred as alleged by the claimant. She further alleged that the third respondent told her on 8 February 2018 in contravention of company policy that the extra hours she worked that day would cover for the time she had taken off for counselling. There was not sufficient evidence of this allegation to enable the Tribunal to make a finding.

145. The claimant alleged that she was ignored by the third respondent on 8 February 2018 and subjected to further intimidatory behaviour by the fifth respondent when she came in at 7.15 pm on her day off to meet a customer. She alleged that the third respondent and the fifth respondent watched as the claimant closed the sale with the customer. The claimant went into the general office to get the safe keys to put the money in the safe. She told the third respondent that she had got the order and the claimant alleged that the third respondent did not reply. Then as the claimant tidied the desk, she alleged that the fifth respondent came and stood very close to the desk in the claimant's personal space, texting on his phone. He did not look at the claimant once and felt intimidated. She left quickly afterwards and neither the third respondent nor the fifth respondent spoke to her. These allegations were denied by the third respondent and the fifth respondent but the Tribunal considered that there were some significant contradictions between their respective accounts. The fifth respondent denied that there was "an atmosphere" and alleged that the claimant had left straight after she had completed the sale with the customer. The Tribunal did not find the third respondent's evidence to be plausible when she suggested that she and the fifth respondent had stayed behind to support the claimant while she dealt with the customer. The claimant's unchallenged evidence was that she tried to phone Thelma Jackson after she returned home. When she did not pick up, the claimant sent her a text to say that "the atmosphere is toxic". The next day the claimant rang Thelma Jackson. She was crying and reported that *"this is making my life hell. I don't know what to do anymore".* Thelma Jackson told her that she would speak to David Wilson. On balance the Tribunal accepted that this incident occurred as the claimant alleged.

146. The claimant alleged that further instances of victimisation occurred involving the third respondent and the fifth respondent on 12 February 2018. She alleged that when she arrived to work, the third respondent opened the door but did not speak to the claimant and walked ahead of her through swing doors, which she then let swing back towards the claimant's face. The third respondent then went up and started a conversation with the fifth respondent. The claimant alleged that when she said good morning to him, the fifth respondent verbally attacked her in the presence of the third respondent and again said to her, *"We will take you down, we will get you, now we have a solicitor, we will dish the dirt".* The claimant alleged that when she asked the third respondent if stand by and let this happen, she replied that she was going to Iceland for a drink and walked away. The claimant said she was shocked and upset. She rang David Wilson from the showroom to report this incident. He told her that he was going to Australia that afternoon but that he would send Laurence Kennedy, a manager from the Abbey store, to deal with the situation.

147. Both the third respondent and the fifth respondent denied this allegation. The Tribunal has very carefully considered the accounts given by each of these witnesses, both in their evidence in chief to the Tribunal and as recorded by Ms McCann during the investigation of the victimisation grievance. We considered that there were significant

discrepancies and contradictions between their own respective accounts and the account given by each other. The fifth respondent embellished his account in cross examination adding further details not previously mentioned in his witness statement or to Ms McCann during the victimisation grievance investigation. Consequently, the Tribunal preferred the claimant's evidence about this incident and finds that this incident occurred as she alleged.

148. The Tribunal further noted that although both the third respondent and the fifth respondent alleged that the claimant had behaved in a confrontational and highly inappropriate manner, the third respondent on her own account did not take any steps to address the situation. It was the claimant who initially rang David Wilson to report this incident. In cross examination, the third respondent admitted that it *"bothered her"* that the claimant felt that she could not come to her. She confirmed that she felt *"patronised"* that Laurence Kennedy was being sent down to intervene and took it as an indication that the claimant did not have faith in her.

149. When Laurence Kennedy arrived at the showroom, he spoke to the claimant first and then spoke to all other staff members individually. There were no records made of these conversations. The claimant alleged that afterwards Laurence Kennedy and the rest of the staff gathered in the general office and laughed and joked together while the claimant dealt with customers on the floor. She felt totally excluded. Laurence Kennedy then spoke again with the claimant and offered her a period of special paid leave, because *"the Portadown showroom was a powder keg about to blow".* Laurence Kennedy's statement to Ms McCann during the victimisation grievance investigation records that he denied making this specific comment but confirmed he did phone David Wilson to recommend that the claimant be given paid leave. It was felt that the option of giving the claimant some paid time off would help while the grievance investigations were ongoing. It is recorded that Laurence Kennedy informed David Wilson that there was *"a big problem down there as the atmosphere isn't good"* which he thought may have been because the claimant had *"involved the police".* Laurence Kennedy confirmed to Ms McCann that he *"could see how the claimant could feel she had been pushed to the side slightly,"* but that he would not use the word *"victimisation".* It was clear that although the fourth respondent and the fifth respondent apparently told Laurence Kennedy that the claimant was not speaking to them, they agreed to make "small talk with her and act professionally". The fifth respondent told Laurence Kennedy that he is *"always busy and that he would not go out of his way to do anything different than he had always done. He said he didn't speak to her before this and would be doing the same."* The Tribunal found it surprising that despite this, Ms McCann concluded that there was no evidence to suggest that the third respondent, the fourth respondent and the fifth respondent were victimising the claimant or that she would reject this even as a possibility simply because Laurence Kennedy would not characterise their treatment of the claimant as such.

150. When Laurence Kennedy left, the claimant alleged that she went into the general office to finish off and saw a letter from the second respondent's solicitor addressed to the third respondent left on screen enquiring about the grievance outcome. The Tribunal accepts that this did happen as the claimant was able to identify the second respondent's solicitor. We did not accept that the claimant had searched the computer as alleged by the third respondent. The claimant characterised this at the

Hearing as being a further instance of victimisation and further that this was a further example of the third respondent's failure to preserve confidentiality in the process.

151. The claimant made some further allegations of victimisation at the Hearing including that she was "tackled" by the third respondent about a customer who had requested a fitted bedroom but had been persuaded by the claimant to take a freestanding bedroom and that the fifth respondent did not pass on a message to her from a customer who complained that she did not return the call. There was insufficient evidence about these specific allegations to enable the Tribunal to conclude that they occurred as alleged.

152. The claimant's last day in work before she went on special leave was 14 February 2018. The claimant alleged that she felt uncomfortable because the third respondent ordered her out of the general office while she was "giggling on the phone with the second respondent". The Tribunal did not consider that there was anything untoward in the third respondent speaking with the second respondent on the phone. She was his line manager and at that stage he was based in another location. The claimant objected to being left alone in the showroom with the fifth respondent when the third respondent proposed to drive a colleague up to another showroom to collect a pool car. In the event, the claimant was not left alone with the fifth respondent. The Tribunal notes that the claimant did not raise these matters as part of her victimisation grievance at the time. In any event, on the available evidence, we did not consider that these matters could reasonably be regarded as detrimental treatment.

153. On 13 February 2018, Ms McCann a professionally qualified HR consultant, was appointed by PMS to conduct the grievance appeal on behalf of the company. The claimant questioned Ms McCann's independence because she is described on the PMS website as an "associate consultant". She felt stressed and anxious because Ms McCann was allegedly *"persistent and relentless"* in her attempts to arrange a meeting with the claimant and displayed insensitivity by initially suggesting the meeting take place in the Dungannon showroom, where the second respondent was based at the time. The appeal meeting eventually took place on 8 March 2018 at the Boucher Road showroom.

154. The claimant had been on special paid leave from 16 February 2018 until 11 March 2018, upon Laurence Kennedy's recommendation. Thereafter she went on sick leave until her resignation on 8 April 2018. According to Dr McGarry, the claimant's GP notes record an attendance on 6 March 2018: "*Discussed episode of 16 December. Currently off on leave from work and undergoing anxiety and distress due to episode of sexual violence".* The GP recommended continuing sick leave. On 1 May 2018, the GP records the claimant *"has resigned and taken up a new post".*

155. Prior to that the history recorded on 8 January 2018 was *"sexual assault by colleague at Christmas party, under investigation by PSNI"* and that she was *"struggling to go into work but very keen to continue doing same".* The history recorded is incorrect in that at this stage the claimant had not yet reported any matter to the PSNI. The claimant was prescribed sleeping tablets and referral for counselling was discussed. The claimant phoned her GP on 18 January 2018 as she had no response from NEXUS. He gave her contact details for a counsellor and there was a note dated 5 June 2018 from counsellor named J Henry who had seen claimant privately on 3 occasions. The presenting issue was "a recent assault" and the claimant was

recorded as being *"emotional and has lots of thoughts trying not to let them overwhelm her".* She is recorded as having had 11 sessions with Nexus which ended on 16 October 2018. There were no counselling reports or other medical records before the Tribunal.

156. The claimant's resignation predated the notification of the outcomes of her first grievance appeal and the second victimisation grievance and the subsequent appeal and the disciplinary process against the second respondent. These did not have a bearing on her decision to resign. The claimant commenced alternative employment with another company on 28 April 2018. This is less well paid than her employment with the employer, but there was no evidence that the claimant had made efforts to find other better paid employment.

Time Limitation Issue

157. The claimant first contacted a leading employment solicitor on 19 February 2018. The claimant wished to obtain expert legal advice as how best to proceed. A meeting between the claimant and her solicitor, at which her husband was also present, took place on 20 February 2018. At this point, the claimant had received the third respondent's grievance report and the grievance appeal and victimisation grievance were ongoing. The claimant hoped to reach a resolution of her situation with the first respondent. Her preference was not to have to pursue proceedings in the Industrial Tribunal. She was discouraged by the publicity which surrounded the "Ulster Rugby" trial. On 22 February 2018, upon the claimant's instructions, the claimant's solicitor sent a *"Without Prejudice"* letter to David Wilson.

158. On 5 March 2018, the first respondent sent a reply. The claimant's solicitor spoke to the first respondent's solicitor on 16 March 2018, who may have indicated that she would take instructions. No further communication was received from the first respondent's solicitor. The claimant's solicitor sent her a draft ET1 on 21 March 2018. The claimant and her husband met again with her solicitor on 27 March 2018 to discuss lodging the originating application. Her solicitor and husband were apparently concerned about the claimant's wellbeing. The claimant resigned with effect from 8 April 2018.

159. The Tribunal accepted that the claimant's solicitor did not discuss with her when the statutory time limit would expire in her case, specifically that there might be a need to lodge an originating claim form by 16 March 2018. The claimant relied totally on the solicitor to give the best advice and put the matter into the hands of her solicitor before the expiry of the primary limitation period. The originating claim form, signed by the claimant's solicitor, was lodged with the Office of the Tribunals on behalf of the claimant on 19 April 2018. This alleged that the acts of harassment by the second respondent and the subsequent alleged acts of victimisation by the third respondent, the fourth respondent and the fifth respondent formed a continuing course of conduct constituting discrimination.

CONCLUSIONS

SEXUAL HARASSMENT COMPLAINT

Time Limitation Issue

160. The acts giving rise to the claimant's complaint of sexual harassment occurred on 16 December 2017. The primary statutory time limit for making a complaint to the Tribunal expired on 16 March 2018. The Tribunal rejected that there was a continuing act of discrimination encompassing the complaint of harassment against the second respondent and the complaints of victimisation against the third respondent, the fourth respondent and the fifth respondent. There is no allegation of victimisation made against the second respondent. Having proper regard to the wording and the scheme of Articles 6 and 6A of the 1976 Order and the need in discrimination cases to identify the acts complained of, we conclude the complaint against the second respondent does not form part of *"a continuing course of conduct which constituted discrimination against her"* as alleged in the originating claim form but rather it is a separate head of claim, which is freestanding and discrete. Consequently, we determine that the claimant lodged her complaint of sexual harassment one month and three days outside the three month statutory time limit.

161. The Tribunal then considered whether it should exercise its discretion to extend the time for the presentation of the complaint of sexual harassment against the second respondent. We rejected submissions that the claimant's health and wellbeing presented any impediment to the timely presentation of her originating claim form, in circumstances where she was able to give instructions to a solicitor and engage in the internal grievance processes. In the present case, it was clear that the claimant herself was unaware of the effect of the statutory time limits. The Tribunal did not agree with submissions made on behalf of the respondents that we should infer from this that the claimant had deliberately chosen not to lodge proceedings with the Tribunal within the three month time limit but opted instead to pursue an internal resolution. She sought expert legal advice and indeed put the matter in the hands of her solicitor. The Tribunal accepted, in these circumstances, that the claimant was not at fault in the late presentation of the claim. It was the solicitor's responsibility to ensure that proceedings were issued in time, and this did not happen. The Tribunal acknowledges that the delay in the present case is significant. However, it was accepted on behalf of the first respondent and the second respondent that the delay in presenting this claim had no adverse impact whatsoever on the cogency of the evidence of either of those two respondents. Consequently, having regard to the prejudice which each party would suffer and all the relevant circumstances, we determine that it is just and equitable to grant the necessary extension of time to permit the Tribunal to hear and determine the claimant's claim of sexual harassment against the second respondent.

162. As set out above, the Tribunal did not find on a balance of probabilities that the second respondent engaged in the following conduct, as alleged by the claimant:

- Made comments of a more sexual nature involving Valentina the racehorse and making her wet,
- Danced with her, holding back her arms, causing bruising,
- Tried to put his hand up her dress in the showroom and at the restaurant,
- Went for her boobs and trying to kiss her neck as he hugged her from behind,

- Subjected the claimant to verbal and physical harassment, including sexual assault, in the office and women's toilet at the showroom.

In reaching this conclusion, we carefully considered all the circumstances, including the apparent lack of reason or motive for the claimant to make unfounded allegations, the medical evidence and the fact that we found the accounts of the second respondent, the fourth respondent and the fifth respondent to be unreliable. However, in making our findings of fact we placed most weight on the claimant's own words and actions on and after 16 December 2017 and her own explanations as set out above. In light of our findings of fact in relation to these matters, the claimant has not established those particular acts of harassment on a balance of probabilities and that part of her harassment claim therefore fails.

163. However the Tribunal did find on a balance of probabilities that the second respondent did engage in the following conduct:-

- the second respondent told the claimant she had "great tits" and made other comments about her cleavage in the showroom and the restaurant.

- He hugged her from behind, without her consent in the showroom.

- He suggested to her that that they might have an affair and asked her to "pull him off", when the Christmas crackers were being pulled in the restaurant.

- He touched her bottom in the restaurant.

We are satisfied that these matters amount to both verbal and physical conduct of a sexual nature. We did not accept submissions made on behalf of the claimant that this conduct was premeditated by the second respondent or that his behaviour at the office party had been orchestrated by the fifth respondent. We are satisfied that the second respondent's conduct on the evening was down to the excessive amounts of alcohol consumed by him, which led to a loss of self-control and unacceptable behaviour on his part. This could have been prevented by the first respondent putting in place and communicating standards behaviour for office parties and ensuring that a manager was put in charge to ensure those standards were met.

164. We concluded that the conduct set out in the forgoing paragraph was unwanted by the claimant. The claimant told the second respondent to "piss off", that she was *"old enough to be his mother"* and to *"Get your hand off my bum".* The claimant told OT that the second respondent was "out of order". We are satisfied that this referred not only to the second respondent's drunken and boisterous behaviour in general but also included the comments about her breasts and the hug in the showroom. She asked LW to help her in the restaurant. It was apparent to LW that the claimant became progressively fed up by the comments and the touching. In the restaurant, she told the second respondent she would "rather F..k a fenian" and suggested she was already having an affair with a GAA player. This was shocking, sectarian and coarse language on the part of the claimant, but viewed in the context of the evening, the Tribunal accepted that at this point the claimant wished to repulse the second respondent, and as she told the fourth respondent, to get him off her back. She told her husband that she was tired of being groped. The Tribunal concluded that the claimant tolerated but did not welcome the second respondent's conduct and this was

not negated by her continuing on the restaurant. The Tribunal is satisfied that the claimant's expressions and actions were commensurate with the nature of the conduct which had occurred and demonstrated that this conduct was unwanted by the claimant.

165. The Tribunal accepts that as the second respondent was under the influence of alcohol, he may not have intended to violate the dignity of the claimant or understood that his conduct was unwanted. The Tribunal is satisfied that his conduct did have the effect of violating the claimant's dignity and creating an adverse environment for her. The Tribunal has considered that the claimant on her own account did not mind a certain amount of "man banter", did present as being robust, used coarse language herself on occasion and she was not easily offended. However, the second respondent's comments about her breasts, having an affair and pulling him off, were entirely different to the compliments and jokey comments previously shared between them as work colleagues. The Tribunal considers that these comments to the claimant, touching her bottom and hugging her from behind without her consent amounted to objectively offensive and disrespectful conduct by the second respondent. We concluded that this conduct, directed at the claimant, "*crossed the border"* of what was acceptable for her and therefore amounted to unlawful sexual harassment by the second respondent.

VICTIMISATION COMPLAINTS

166. We are satisfied that the claimant's grievance raised on 27 December 2017 that she had been sexually harassed by the second respondent constituted a protected act. The Tribunal was also satisfied that the second respondent, the fourth respondent and the fifth respondent were aware prior to that date from conversations between themselves that the claimant was likely to raise a grievance following her conversation with the second respondent on 18 December 2017.

167. Based on our findings of fact, the Tribunal concluded that the following matters did not amount to victimisation:-

a) The third respondent did not deliberately destroy evidence (the pornographic cards) as was alleged. Photographs of the cards were in the bundle of evidence and THE THIRD RESPONDENT made no attempt to conceal their existence at any stage. In the circumstances we do not accept that a reasonable worker would consider they had been disadvantaged by these actions. Therefore, we conclude that this was not an act of victimisation by the third respondent.

b) The third respondent did not "cut her dead" on 28 December 2017 as was alleged by the claimant. She could not immediately speak to the claimant because she was dealing with customers. She informed the claimant that she would speak to her later. Therefore, this was not an act of victimisation by the third respondent.

c) On 28 December 2017, the third respondent accidentally left documents on the computer screen in the general office both before and after she interviewed the fourth respondent. The Tribunal accepts that leaving confidential documents on a computer screen in a general office amounted to a breach of confidentiality and there was a risk that it could be viewed by others. Although

this was not a deliberate act, we considered that a reasonable worker would consider they had been disadvantaged by these actions. However, there was no evidence to suggest that the third respondent treated the claimant less favourably than a comparator who had not carried out a protected act. The Tribunal was further satisfied that the third respondent acted in this way due to carelessness, not because of the protected act. Therefore, this was not an act of victimisation by the third respondent.

d) On 29 December 2017, the third respondent was embarrassed at her mistake in leaving the documents onscreen and did not conceal her irritation and annoyance to have this pointed out by the claimant. The Tribunal is satisfied that her irritation and annoyance was communicated to the claimant and this was not warranted. However, there was no evidence to suggest that the third respondent treated the claimant less favourably than a comparator who had not carried out a protected act. We are further satisfied that the reason for this treatment was because the third respondent felt criticised by the claimant in her failure to maintain the claimant's confidentiality, not because of the protected act. Therefore, this is not an act of victimisation by the third respondent.

e) On 30 December 2017, we found as a fact that the third respondent did not deliberately tell the wrong store opening time, as was alleged. Therefore, this is not an act of victimisation by the third respondent.

f) On 8 January 2018, when the claimant attended the office to agree her interview note, the Tribunal was not satisfied that the third respondent shouted at the claimant as was alleged but found that she probably did raise her voice. We concluded that the reason the third respondent did this was to make herself heard as the claimant continued talking to her husband and in reaction to her exchange with the claimant about whether she could take the notes away. The third respondent's actions were not influenced by the protected act and therefore this is not an act of victimisation.

g) On 14 February 2018, when the second respondent's solicitor's letter, enquiring about the grievance outcome, was left onscreen. The Tribunal found this was again a breach of confidential information and therefore would be regarded by a reasonable worker as detrimental treatment. However, there was insufficient evidence to enable the Tribunal to conclude that this was done deliberately with the intention that the claimant should see it. Further the Tribunal could not conclude that this was less favourable treatment of the claimant as the breach of confidentiality affected both her and the second respondent.

168. Based on our findings of fact, the Tribunal concluded that the following matters did amount to victimisation:-

a) On 27 December 2017, when the fifth respondent glared at the claimant as she sat in the office with the third respondent, making her feel uncomfortable. We are satisfied that a reasonable worker would have considered that this amounted to a detriment. In the context of his actions that morning and later events, the Tribunal accepted that this was less favourable treatment, clearly

influenced by the protected act. The reason why the fifth respondent showed such an interest in the claimant's conversation with the third respondent and going out to speak to the claimant's friend was because he suspected that she was speaking to the third respondent about the second respondent's actions.

b) On 28 December 2017 when the fourth respondent raised his voice angrily to the claimant and said that the second respondent could "lose his marriage and maybe his job over this". The fourth respondent admitted that stopped speaking to the claimant on a personal level and only spoke to her, when necessary, about work matters. We are satisfied that the fourth respondent barely communicated with the claimant from this date and did not afford her the courtesy normally shown to work colleagues. The Tribunal is satisfied that a reasonable worker would regard this as being detrimental treatment. The Tribunal is further satisfied that this was less favourable treatment because previously the fourth respondent was happy to speak to the claimant about personal and work matters. He was aware that the second respondent had been transferred to the other showroom because the claimant had complained about him to the third respondent. He was aware of or at least had a strong suspicion about the nature of allegations from various conversations he had with the second respondent and the fifth respondent. We therefore conclude that he was significantly influenced by the protected act and wanted to show his disapproval to the claimant. This was therefore an act of victimisation.

c) On 2 January 2018 when the fifth respondent walked past the claimant without saying anything to her and went to sit laughing and joking with the fourth respondent. We are satisfied that the fifth respondent's intention was to make a point and emphasise that he was ignoring the claimant and that she was excluded from such conversations. Further there was a level of complicity on the part of the fourth respondent. The Tribunal is satisfied that a reasonable worker would regard this as detrimental treatment. The Tribunal is satisfied that this did amount to less favourable treatment as before the fifth respondent and the fourth respondent would have included the claimant in these conversations and would not have ignored her. In so doing, we consider that the fifth respondent and the fourth respondent were significantly influenced by the protected act and this amounted to victimisation.

d) On 9 January 2018 the fifth respondent glared at the claimant when she came in the back door, turned on his heel and walked off and ignored her. The Tribunal is satisfied that this did amount to less favourable treatment as before he would not have ignored the claimant. We are satisfied that this was influenced by the protected act.

e) On 6 February 2018 when the fifth respondent told the claimant as she was leaving work, "we will take you down, will dish the dirt on you", called her a bitch and told her to "f… off." This is clearly detrimental treatment. The tribunal regarded this as being less favourable treatment because prior to the claimant's grievance we are satisfied that he would not have addressed her in this way. The comments were made to the claimant on the same day that the grievance investigation report was released to the claimant. the fifth respondent was aware of this as he had sat chatting and laughing with the third respondent as the claimant read her statement upstairs and it was likely that

there was a discussion about the grievance outcome. In these circumstances, the Tribunal is satisfied that there is a clear link with the protected act. We are satisfied that this amounted to victimisation.

f) On 8 February 2018, when the third respondent and the fifth respondent ignored and did not speak with the claimant when she came in to deal with a customer and when the fifth respondent stood in the claimant's personal space, creating an atmosphere which she found isolating and intimidating. The Tribunal is satisfied that a reasonable worker would consider this to be a detriment and that this amounted to less favourable treatment because previously neither the third respondent nor the fifth respondent would have treated the claimant in this manner. We are satisfied that on this occasion the actions of the third respondent and the fifth respondent towards the claimant were significantly influenced by the protected act and therefore amounted to victimisation.

g) Similarly on 12 February 2018, when the third respondent witnessed the fifth respondent acting in a hostile manner to the claimant by telling the claimant "we will take you down, we have a solicitor, we will dish the dirt", and doing nothing about it. We are satisfied that a reasonable worker would consider this to be a detriment. Further the Tribunal regarded this as being less favourable treatment because prior to the claimant's grievance we are satisfied that the fifth respondent would not have addressed her in this way and the third respondent would not have ignored this behaviour. The Tribunal concluded that the actions of both the third respondent and the fifth respondent were significantly influenced by the protected act. Therefore, this amounted to victimisation.

Time Limitation Issue

169. The Tribunal concluded that these acts of the third respondent, the fourth respondent and the fifth respondent when viewed together were "linked to one another and are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period". We are satisfied that there was collusion and coordination between the fourth respondent and the fifth respondent in their treatment of the claimant. They had conversations with the second respondent after he was alerted by the claimant that she intended to make a complaint against him. There was collaboration between the fourth respondent and the fifth respondent in their respective statements to the third respondent and we are satisfied that this extended to Luke Wilson who changed his evidence to the investigation, to suit the second respondent's narrative. Their desire to support the second respondent and express disapproval of the claimant for having raised a grievance was reflected in their actions towards her. The third respondent did not take adequate steps to deal with concerns raised by the claimant that the fourth respondent had spoken with the second respondent and that her colleagues were not speaking to her. The Tribunal accepted that the third respondent joined in and appeared to condone this behaviour.

170. In summary, we are satisfied that the claimant established that she was ostracized and isolated by her colleagues after she raised her complaint of sexual harassment against the second respondent. This treatment commenced before she made any complaint to the police and continued afterwards. While we can understand that the

claimant's colleagues might be wary about talking to the claimant, they went far beyond that, they blocked her out. We are satisfied that the protected act was a significant influence on their treatment of the claimant. None of the respondents provided any explanation at the Hearing for the less favourable treatment afforded to the claimant. Indeed they mostly denied that the acts complained of had even happened or blamed the claimant. Accordingly, we are satisfied that these matters amount to a continuing act which lasted until the claimant went on special paid leave on 16 February 2018. The victimisation claim has therefore been presented in time.

Liability of the Employer

171. The Tribunal is not satisfied that the first respondent took such steps as were reasonably practicable to prevent the acts of sexual harassment and victimisation in the present case. Christmas office parties are notorious for the increased risk of inappropriate behaviour between colleagues, usually due to the consumption of excess alcohol in a festive atmosphere outside normal work constraints. In the present case, there was a management failure to provide guidance for the provision and consumption of alcohol or the required standards of behaviour, compounded by the fact the third respondent, provided alcohol for those she managed. The most senior person at the party was himself drunk.

172. Further, the third respondent as outlined above, did not take decisive and appropriate action to prevent the claimant from being isolated and ostracised by her male colleagues. It was conceded that no evidence was led by the company in respect of the Article 43(3) statutory defence either in relation to sexual harassment or victimisation. The Tribunal therefore concludes that the company is liable for the unlawful discriminatory actions of its employees pursuant to Article 43(1) of the 1976 Order.

Unfair Constructive Dismissal

173. The Tribunal refers to the facts found. As set out above, the Tribunal has partially upheld the claimant's complaints that she was sexually harassed and victimised contrary to the 1976 Order. The claimant resigned with immediate effect from 8 April 2018 and the Tribunal is satisfied that the reason for her resignation included the sexual harassment and the victimisation she suffered. In the circumstances of this case, the tribunal considers that there was a failure of the first respondent, primarily through the actions and omissions of the responsible manager, the third respondent, to protect the claimant from being sexually harassed and victimised. The third respondent did not put in place any procedure for the conduct of those attending the Christmas party, which could have protected the claimant. She provided drinks for those she line managed. She did not formally delegate responsibility to Oliver Tallon, the most senior manager present, who was himself intoxicated and unable to take steps to ensure that appropriate standards of behaviour were observed. The third respondent subsequently failed to take action to prevent the claimant being victimised and did herself victimise the claimant. We are satisfied that these failures amounted to a fundamental repudiatory breach of the implied duty of trust and confidence by the first respondent.

174. The claimant resigned in response to this breach and it was conceded on behalf of the first respondent that the claimant did not delay in resigning in response to the

breach. In these circumstances the claimant was dismissed by the first respondent. The first respondent did not put forward or establish the reason for the dismissal and therefore the employer has not discharged its burden pursuant to Article 130(1) of the 1996 Order. Accordingly, on this basis the dismissal is unfair.

Remedy

Unfair Dismissal Compensation

175. No order was sought for reinstatement or re-engagement.

Basic Award

176. The basic award of **£ 1772.58** is calculated in the usual way:

£295 (Gross weekly wage) x 4 (Complete years' service) x 1.5 (Age Multiplier-60 years)

Compensatory award.

177. The claimant's net weekly wage was £264.31. She commenced alternative employment with another company on 28 April 2018. This is less well paid than her employment with the first respondent but the claimant has not since applied for any other better paid employment. Therefore, the tribunal determines that it would not be just and equitable to make an award for loss of earnings after 28 April 2018. The claimant's compensatory loss is therefore limited to three weeks' net loss of earnings which amounts to £792.94. Additionally, the Tribunal awards an amount equivalent to one week's pay for loss of statutory rights, which would bring the compensatory award to £1057.24.

178. The Tribunal considered the issue of contributory fault which applies equally to constructive dismissals as to dismissals by an employer. The Tribunal does not think it is just and equitable to make a deduction from the compensatory award pursuant to Article 156(2) of the 1996 Order. In relation to the compensatory award, the Tribunal had regard to the fact that part of the claimant's reason for resigning was expressed to be the events of 16 December 2017. We have found that the office and toilet incidents did not happen as alleged. We consider that including these allegations in her grievance amounts to blameworthy conduct on her part, which contributed to her dismissal. However, we have upheld some of the claimant's complaints of sexual harassment which could have been prevented if the first respondent had put in place measures to control alcohol consumption and the behaviour of those attending the party. Additionally, the first respondent failed afterwards to protect the claimant from victimisation. On balance, the tribunal concludes that the appropriate deduction from the compensatory award for contributory conduct by the claimant is 20%, reducing the compensatory award to **£845.79.**

179. The basic and compensatory awards total **£2618.37** which is payable to the claimant by the first respondent in respect of compensation for unfair dismissal.

Sexual Harassment and Harassment - Injury to Feeling

180. The Tribunal does not consider that it is appropriate to make an award for psychiatric injury, over and above an award for injury to feeling. The Tribunal's view is that Dr McGarry identified the primary causative factor for his diagnosis of an adjustment order as being an alleged serious sexual assault and other alleged acts of sexual harassment in the showroom. The history recorded by Dr McGarry is less detailed in relation to the allegations of victimisation. Dr McGarry examined the claimant in August 2018, found there was *"no overt evidence of significant anxiety and "she was not objectively clinically depressed".* The tribunal further accepts Dr Sharkey's assessment that the claimant's symptoms were prolonged because of the litigation itself. The Tribunal did not accept that all the claimant's residual symptoms described by Dr McGarry flowed from the discriminatory acts as found by the Tribunal. Focussing on the actual injury we assess has been suffered by the claimant we make the following awards in respect of injury to feeling:-

(a) Sexual Harassment. The Tribunal has partially upheld the claimant's complaint of sexual harassment. We are satisfied from the facts found and our conclusions, that it is appropriate in all the circumstances to award compensation for injury to feeling towards the middle of the lower Vento Band for a claim presented after 6 April 2018. We therefore award £4000.00 against the second respondent and the first respondent jointly and severally.

(b) Victimisation. We are satisfied from the facts found that it is appropriate, in all the circumstances to award compensation for injury to feelings suffered by the claimant at the top of the lower Vento Band. We therefore award £8600.00 against the first respondent, the third respondent, the fourth respondent and the fifth respondent, jointly and severally.

181. We are satisfied that interest on the award for injury to feelings is payable pursuant to the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.
The calculation of interest - Date of Calculation 21 June 2021

(a) Harassment

Date of act of discrimination: 16 December 2017

Interest: 1267 days x daily rate of 8% annual interest x £4,000.00 = **£ 1114.96**

(b) Victimisation

Date of Discrimination ended on 8 April 2018

Interest: 1170 days x daily rate of 8% annual interest x £8,600.00 =**£2199.60**

(c) Other award:

Date of midpoint from date of dismissal: 13 November 2019

Unfair Dismissal Compensation £2,618.37

Interest: 565 days x daily rate of 8% annual interest **£324.25**

Total compensation awarded: £ 18,857.18

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

Employment Judge: Jane Keighley.

Date and place of hearing: 4-8 March 2019, 18 April 2019 and 21 June 2021, Belfast.

This judgment was entered in the register and issued to the parties on: 24 January 2023