Neutral Citation No: [2018] NICA 47	*Ref:* **STE10804**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **10/12/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

DIANE RICE

Appellant:

-and-

DIGNITY FUNERALS LIMITED

Respondent:

_____

Before: Stephens LJ and Sir Paul Girvan

_____

STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of an Industrial Tribunal ("the Tribunal") issued to the parties on 28 December 2017. The Tribunal having heard evidence between 25 and 26 September 2017 dismissed the claim of Diane Rice ("the Appellant") against Dignity Funerals Limited ("the Respondent") of unfair dismissal in the form of constructive dismissal. The Tribunal also dismissed the Appellant's claims of direct sex discrimination on the grounds of her gender or marital status in the form of alleged adverse treatment over a period culminating in constructive dismissal which was also alleged to have been an act of discrimination.

[2] Mr O'Donoghue Q.C. and Ms McIlveen appeared on behalf of the Appellant. Mr Mulqueen appeared on behalf of the Respondent.

Factual background

[3] The Respondent is a long established national company of Funeral Directors providing services throughout the United Kingdom employing approximately 3,000 personnel.

[4] On 21 October 2002 the Appellant commenced employment with Kirkwood Funeral Directors as a funeral service manager.

[5] In March 2011 the Respondent purchased that business so that the Appellant's employment transferred to it.

[6] In 2013 the Respondent appointed the Appellant as a team leader. Her job was essentially an administrative one with some managerial responsibilities.

[7] The Appellant's husband, David Rice was also employed by Kirkwood Funeral Directors and his employment also transferred to the Respondent in 2011. In 2013 the Respondent appointed him as its Northern Ireland area manager. The Appellant worked under the direction of her husband who in turn reported to Mr Driver, the Northern Ireland Regional Manager who was based in England. Mr Rice remained as Northern Ireland area manager until his dismissal for gross misconduct, at the age of 57, on 9 September 2016.

[8] By letter dated 24 October 2016 the Appellant resigned from her employment with the Respondent. The Appellant alleges that this was unfair dismissal in the form of constructive dismissal.

[9] The background to the Appellant's claims involves a consideration of some of the events relating to her husband.

[10] In 2016 another of the Respondent's employees, Michelle Grimmett, was the subject of company disciplinary proceedings leading to Mr Rice dismissing her from which decision she appealed. In the course of her appeal she made a series of allegations against him of management failing and inappropriate behaviour of staff in Northern Ireland which became the subject of an investigation by the Respondent commencing on 18 April 2016.

[11] On the same date the Appellant was interviewed by Mrs Skelton as part of her investigation. The Appellant was therefore being asked questions about the business in Northern Ireland and this necessarily involved questions about the way her husband ran that business.

[12] On 20 April 2016 an investigation meeting with Mr Rice was conducted by Emily Skelton, an Area Manager of the Respondent and Steven Williams of the Respondent's Human Resources.

[13] On 22 April 2016 Mr Rice was suspended. He was escorted from the business premises and his keys taken from him. It has subsequently transpired that this was the last day that he performed work for the Respondent.

[14] Subsequent to Mr Rice's suspension Mrs Skelton sent a letter to him confirming that he was suspended from work pending investigations into a series of allegations that had been raised which if proven could demonstrate a failure to carry out managerial duties that could be deemed as gross misconduct.

[15] On 27 April 2016 Mrs Skelton provided her full investigation report to the Respondent which contained a number of recommendations including a recommendation that Mr Rice face disciplinary charges. She stated that on two occasions in the last 12 months a deceased left the premises in the wrong coffin. In relation to the most recent incident the deceased was viewed by his widow in the wrong coffin. In relation to the earlier incident it was noticed that there was a coffin in the garage that should not have been there, the driver of the hearse was contacted and this led to the right coffin being provided so that the deceased did not arrive with the family in the wrong coffin. Mrs Skelton stated that Mr Rice was aware of both incidents but that there was no record of any formal action being taken. She considered that a formal investigation should have taken place identifying individuals involved, consequences and a learning process. That if this had occurred on the first occasion there would not have been a recurrence. She also had a concern as to the attitude of some of the staff involved which was that "the family did not know as the deceased never got to home and there was no complaint." Mrs Skelton also reported in relation to two occasions in which a deceased had been dressed in the wrong clothing and again she considered that a formal investigation ought to have been conducted. Another aspect of her report was the incident in which the cremated remains of a deceased were scattered when the family had requested burial. Mrs Skelton stated that she was concerned that staff did not realise the importance of the company's reputation or of the adverse impact on a family. She considered that a formal investigation ought to have been undertaken. In addition Mrs Skelton considered that it was her belief that by failing to act and investigate Mr Rice had placed Dignity Northern Ireland and the wider business at risk and potential disrepute. She recommended that Mr Rice face disciplinary charges in that he "failed to investigate 2 incidents of deceased leaving the premises in the wrong coffin; 2 incidents of the deceased being dressed in the wrong clothing, failing to investigate inappropriate conduct within the team which included a video recording on company premises, threatening and violent behaviour and an allegation that a member of the team was under the influence of alcohol whilst at work."

[16] On 6 May 2016 Mr Ian Studd, the Respondent's Regional Manager for the Midlands region, met with Mr Rice at Mr Studd's request at a hotel in Stranraer. The Appellant was also requested by Mr Studd to attend this meeting but declined to do so. The Tribunal referred to this meeting as the "Scottish meeting." Mr Rice tape recorded the meeting without Mr Studd's knowledge. Before the Tribunal there was a dispute as to the admissibility in evidence of the tape recording with the Respondent contending that recording was inadmissible as the meeting was

"without prejudice." The Tribunal ruled that the tape recording was admissible. That ruling was not challenged by the Respondent on this appeal.

[17] At the date of this meeting Mr Studd had the adverse findings contained in Mrs Skelton's investigation report which led to the possibility of the destabilisation of the Respondent's Northern Ireland business. In the course of the meeting Mr Studd offered Mr Rice and the Appellant the opportunity to relocate to employment with the Respondent in Scotland on the understanding that disciplinary action would not proceed against him. The Appellant and Mr Rice had close family living in Scotland and had on previous occasions indicated that they might like to consider relocating to Scotland.

[18] The Respondent invited the Appellant to attend the Scottish meeting and if that invitation had been accepted then there would have been a discussion involving the Appellant, her husband and Mr Studd. The Appellant chose not to attend and she stated that she only knew what had taken place from listening on 8 May 2016 to the recording as Mr Rice could not talk about it. She stated that she was devastated by what she heard and that although she had no work issues prior to 8 May 2016 it was then that she lost trust and confidence in the Respondent. The Appellant highlighted four references in that meeting to her.

i. The first was labelled by the Tribunal as the "package deal point" in that Mr Studd said that there could be a job for her in Scotland with her husband as they came as "*a package deal*." The Appellant asserted that this demeaned her on the basis of gender and marital status suggesting that she came as a "package" with her husband in relation to the proposed move to Scotland. In her skeleton argument in this court it was submitted that "speaking about relocating an employee behind her back in such circumstances is obviously capable of causing offence to that employee and the comment should never have been made …."

ii. The second was labelled by the Tribunal as the "*indiscreet point*" namely an allegation that she was being accused of being indiscreet or untrustworthy. At the Scottish meeting Mr Studd said "……*and again David, don't hear this the wrong way, cos I'm not in the threats market, but if Diane, if she chooses to be indiscreet about the conversation that you and I have had, it will feed back to me from the business and I will be disappointed if I am hearing anything that we've talked about coming back from anybody in the business in Northern Ireland*…." In her skeleton argument in this court this passage was interpreted not only as an allegation that she was indiscreet and untrustworthy so as to cause affront to her but also as a request to Mr Rice to "tell your wife to keep her mouth shut" with the foreseeable consequence that she would feel threatened by this comment.

iii. The third point was labelled by the Tribunal as the "*reporting back point*" which was another allegation that the Appellant was untrustworthy in that

Mr Studd said "……*irrespective of what your good lady wife comes back and tells you, this is going on and that's going on, you need to be very aware that if there is a conversation to be had, anything and everything will be put to one side*…." In her skeleton argument in this court it was stated that the Appellant interpreted this as meaning that she was untrustworthy.

iv. The fourth point was labelled by the Tribunal as the "*time in lieu point*" namely that Mr Studd made reference to the Appellant claiming time in lieu at time and a half, when everyone else was claiming single time. The Appellant's point was that this impugned her integrity when there had been prior agreement with Mr Driver that she could do this. In her skeleton argument in this court it was stated that the Appellant felt that she was being singled out and that her integrity was being impugned in circumstances where she was contractually entitled to claim time off in lieu in this way.

In her skeleton argument in this court the Appellant asserts that the overall impact of these remarks was that she felt that she was not wanted in Northern Ireland and that she was not to be trusted by the Respondent. That she was led to believe that the Respondent found her untrustworthy, indiscreet and within the context of Northern Ireland dispensable. Also that her rights were viewed by her employer as ancillary and secondary to those of her husband.

[19] On 9 May 2016, the day after listening to the recording of the Scottish meeting the Appellant went on sick leave.

[20] On 26 July 2016 the Appellant attended a Welfare Meeting and agreed to an Occupational Health consultation.

[21] Also on 26 July 2016 the Appellant lodged a grievance with the Respondent. This ran to seven typed pages and raised 7 issues. We set out in summary form the various issues raised by the Appellant all of which were rejected by the Respondent. Those issues were also raised before the Tribunal and for convenience we will set out at this stage the Tribunal's determinations in relation to the majority of them:

i. The Appellant asserted that an email from Mr Driver, at the beginning of April 2016 to the Northern Ireland branches requesting that staff attend a meeting was unsettling in tone. The Appellant characterised it as abrupt and intimidating. The Tribunal rejected that characterisation finding it to be an example of the Appellant's overreaction to a normal management instruction which in addition was not targeted specifically at her.

ii. The Appellant asserted that the nature of the questioning by Mrs Skelton on 18 April 2016 about some of the serious issues which had arisen in relation to the working practices in the Northern Ireland operation was intimidating. The Tribunal found nothing untoward in the nature and manner of Mrs

Skelton's questioning and in particular it rejected the Appellant's characterisation of this as intimidating.

iii. The Appellant complained that on 25 April 2016 Mrs Skelton asked her for confirmation in the form of an appointment card, of her GP appointment ("the appointment card issue"). The Appellant characterised this request as intimidating and harassing. Mrs Skelton's account, which the Tribunal accepted was that in her London division, it was normal practice to ask people for the appointment card for any medical appointments and that when the Appellant informed her that this was not the practice in Northern Ireland this was accepted by her. The Tribunal found that there was no detriment suffered by the Appellant as she did not have to produce an appointment card and also even if there was detriment rejected the suggestion that it was on grounds of sex or marital status. The Tribunal also found that this action of Mrs Skelton's did not undermine the employment relationship and rejected the Appellant's characterisation of the request as intimidating or harassing.

iv. The Appellant asserted that there was a backlog of invoices and that she was not supported in sending these out. The Tribunal rejected that complaint as the evidence was that Mrs Hammond was made available to the Appellant by Mrs Skelton and the Appellant's own evidence was that she rejected Mrs Hammond's offer to deal with the backlog of invoices deciding that Mrs Hammond should instead deal with issues of bad debt.

v. The Appellant raised an issue as to a talk to be given at the Marie Curie hospice. The Appellant had made an arrangement in the course of her work that Mr Rice would attend a talk at the hospice. However Mr Rice was then suspended from work and the commitment was subsequently cancelled by the Respondent's managers. The Appellant asserted that the decision to cancel attendance at that talk adversely reflected on her as the administrator who had set it up and that this undermined her relationship with her employer. The Tribunal rejected these assertions finding that the management decision to cancel attendance at the Marie Curie hospice did not adversely reflect on the Appellant. The Tribunal also rejected the Appellant's case that this undermined her relationship with her employer.

vi. The Appellant raised an issue in relation to limousines. The Appellant had organised two cars for a customer for a wedding but it transpired that Mrs Skelton sent two different cars to the wedding. The customer in question accepted the change of car and rejected the offer of a discount on the price. The Appellant asserted that this reflected badly both on her and on the organisation and that she was undermined by Mrs Skelton. The Tribunal found that there were valid management reasons for the change in limousines and rejected the Appellant's assertions.

vii. The Appellant raised a number of issues in relation to the Scottish meeting asserting that she was referred to as a package deal, that there appeared to be arrangements in hand to move her to Scotland with her husband and that there was reference to her possibly talking about the content of the meeting. There was also reference to the claimant claiming time and a half for time in lieu. The claimant characterised this conversation as threatening, accusing, derogatory and mentioning her as being indiscreet. She regarded this as harassment and that she was not trusted and that she was going to be sent off to Scotland without being asked about it. We set out later in this judgment the Tribunal's findings in relation to these issues.

[22] On 16 August 2016 the Appellant attended a grievance investigation meeting. In the course of that meeting the Appellant was not permitted to refer to the "Scottish meeting" on the basis that the Respondent considered it was a "without prejudice" meeting.

[23] On 26 September 2016 the Respondent dismissed the Appellant's grievance.

[24] By letter dated 6 October 2016 the Appellant appealed against the dismissal of her grievance.

[25] By letter dated 24 October 2016 before the appeal was heard and determined the Appellant resigned from her employment.

[26] On 3 November 2016 an appeal meeting was conducted which was attended by, amongst others, Nicola Cook Regional Manager of the Respondent for East Midlands, and the Appellant. The grievance appeal was rejected by the Respondent and the Appellant was informed of the outcome and the reasons by letter dated 22 December 2016.

The proceedings before and the decision of the Tribunal

[27] The Tribunal had written and oral evidence from the Appellant. It also had written and oral evidence from (a) Mrs Skelton, who interviewed the Appellant as part of an investigation into matters which concerned Mr Rice; (b) Ms Davidson who was the Grievance Officer; and (c) Ms Cooke who was the Grievance Appeals Officer.

[28] The Tribunal set out the issues for determination as follows

i. Was the content of a meeting of 6 May 2016 ("the Scottish meeting") between the claimant's husband and Mr Studd, (which was covertly recorded by the claimant's husband) covered by without prejudice privilege?
ii. Did the claimant resign or was there a repudiatory breach of contract by the Respondent and was the claimant therefore constructively dismissed?
iii. Was any dismissal unfair and/or an act of sex discrimination?

iv. Was the claimant subjected to detrimental treatment on grounds of her gender and/or marital status?

In this court there was no challenge to the Tribunal's identification of these issues.

[29] The Tribunal held that the meeting of 6 May 2016 between the Appellant and Mr Studd was not a "without prejudice" meeting so that what was said at it was not privileged but rather was admissible in evidence.

[30] In relation to the applicable legal principles in relation to constructive dismissal the Tribunal relied on *Western Excavating v Sharp Limited* [1978] IRLR 27 as identifying the four key elements of constructive dismissal which a claimant must prove as being: -

(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 claimant 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 she may be deemed to have waived the breach of contract.

The Tribunal added that in relation to the key element of delay "there is no fixed time within which an employee must make up her mind." The Tribunal also adverted to the "last straw" principle which it defined as "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." Also the Tribunal relied on *Malik* [1997] 3 All ER 1 as confirming 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 so that if the employer breaches that term, it can amount to repudiation of the contract. In this court there was no challenge to those four key elements, to the proposition that there was no fixed time in relation to delay, to the Tribunal's formulation of the "last straw" principle or to its formulation of the implied term of trust and confidence.

[31] In relation to sex discrimination the Tribunal relied on the Sex Discrimination (NI) Order 1976 ("the 1976 Order") stating that it is for a claimant to prove detriment and it is for a claimant to prove facts from which the Tribunal could conclude that an act of sex discrimination has occurred. The Tribunal also stated that if the claimant proves such facts the burden of proof shifts to the employer to provide an

explanation which is untainted by sex. In relation to detriment the Tribunal relied on *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] NI 174 to apply a test as to "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."

[32] The Tribunal ruled that the recording of the Scottish meeting was admissible but decided that Mr Studd was seeking to find a way out of a difficult position for the company as he could see the ramification for the Northern Ireland business of the serious matters uncovered by Mrs Skelton and that Mr Studd was reacting to commercial imperatives.

[33] The Tribunal formed a most unfavourable impression of the Appellant holding that:

> "*throughout* the relevant period in this case we find that the letters from the (Appellant) and the (Appellant's) evidence to us displayed a *gross overreaction* to, and a *wholly unreasonable interpretation* of, different events …" (emphasis added).

We consider that it is of significance that this was a finding in relation to all of the relevant periods, which included the period from 8 May 2016, when the Appellant listened to the recording of the Scottish meeting, to the Appellant's resignation on 24 October 2016. We have set out at paragraph [21] (i) – (vi) the findings made by the Tribunal which illustrate the Tribunal's conclusion that the Appellant was grossly overreacting, which overreaction was based on her own wholly unreasonable interpretations.

[34] The Tribunal having formed this overall assessment of the Appellant then analysed her allegations in relation to the Scottish meeting which allegations we have summarised at paragraph [18].

[35] In relation to the "*package deal point*" the Tribunal found that the negotiation between Mr Studd and Mr Rice did not amount to sex discrimination or detrimental action of any kind as regards the Appellant. The Tribunal stated that it was clear from the transcript that the offer of a move to Scotland for both Mr and Mrs Rice was something that Mr Studd envisaged Mr Rice would go away to discuss with his wife to see if it was acceptable. The Tribunal also found that (a) in the event no deal was done, (b) there was no suggestion that the Appellant should actually move to Scotland, (c) there was no suggestion that she should leave the business at all and (d) there was no basis for the Appellant's conclusion that the company no longer wanted her or that they were going to move her to Scotland against her will.

[36] In relation to the "*indiscreet point*" the Tribunal found that the Appellant's interpretation was unreasonable and that Mr Studd was doing no more than

emphasising the confidential nature of the conversation on the basis that he understood Mr Rice would discuss the offer with his wife. The Tribunal also found that this was not detrimental to the Appellant.

[37] In relation to the "*reporting back point*" the Tribunal found that Mr Studd's point was that the process of an audit (which had just been initiated) was separate and would continue but that if Mr Rice decided to accept the offer of a move to Scotland that Mr Studd would honour that offer. The Tribunal concluded that Mr Studd was emphasising that Mr Rice needed to get back to him with his answer on the offer very quickly. The Tribunal rejected the Appellant's case that this comment was disparaging of her.

[38] In relation to the "time in lieu point" the Tribunal found that the point being made by Mr Studd was that there was a danger for *Mr Ric*e in approving something when it was his wife who was getting extra payment but that there was no suggestion that the Appellant was doing anything wrong. The Tribunal considered that it was clear from the transcript that there was no accusation being made against the Appellant and that the Appellant unreasonably placed that interpretation on it.

[39] The Tribunal then considered the Appellant's general allegations that Mr Studd's statements in the Scottish meeting were threatening, that the statements questioned her integrity or demonstrated that the Respondent did not want her in Northern Ireland or that the Respondent was determined to remove her from Northern Ireland when there was no criticism of her work. The Tribunal rejected the Appellant's interpretation of Mr Studd's statements finding that such an interpretation to be unreasonable and her reaction to it to be an overreaction.

[40] The Tribunal also found that Mr Studd was trying in the Scottish meeting to do a deal with Mr Rice in order to stave off a situation where the business might be destabilised. The Tribunal considered that in the course of that discussion it would have been entirely artificial and indeed wrong for him to have ignored the fact that Mr Rice's wife worked in the business. The Tribunal held that there was no suggestion whatsoever by Mr Studd that Mrs Rice was doing anything wrong or was performing her role badly and following the Scottish meeting there was no adverse treatment of the Appellant. The Tribunal held that it had heard no evidence which indicated that there was any intention at all to push the Appellant out of her job. The Tribunal found that it was the Appellant who misinterpreted and overreacted to comments and events, regarding them as a slight on her integrity.

[41] In relation to the issue as to whether the Appellant resigned or was constructively dismissed the Tribunal found that the Appellant's severe (overreaction) to the Scottish meeting had occurred on 8 May 2016 some six months before her resignation on 24 October 2016. The Tribunal found that there was some unfairness in refusing to let her discuss in the grievance procedure the allegation about the Scottish meeting but that this did not amount to a breach of contract and even if it had amounted to a breach of contract it was not sufficiently serious to

strike at the heart of the relationship between the parties and did not warrant her resigning in response. The Tribunal also found that she had discussed her resignation letter and drafted it with her solicitor the week before it was actually sent in and that the letter was signed by her solicitor and was dated the same day as the Appellant's email to the appeals officer to arrange the grievance appeal meeting. The Tribunal found that the Appellant could not identify what the event was that led her to decide that she had had enough and that the Tribunal had received no satisfactory explanation from the Appellant as to why she decided to resign at that point whilst still pursuing her grievance. In conclusion the Tribunal found that the Appellant had failed to establish a sufficiently serious breach of contract on the part of the Respondent, that she had failed to establish a last straw event and that she had delayed in resigning following the events she regarded as adverse.

[42] In relation to the claim based on sex discrimination the Tribunal made a number of findings including that (a) there was no evidence to indicate that a male comparator would have been treated differently so that the Appellant had failed to prove less favourable treatment; (b) that none of the points raised about the Scottish meeting by the Appellant amounted to matters which could reasonably be regarded as detrimental nor could they be interpreted as indicative of sex discrimination; (c) that the Appellant had failed to establish facts from which the Tribunal could conclude that any adverse treatment or detrimental treatment she suffered was on grounds of her sex and/or marital status.

The grounds of appeal

[43] The grounds of appeal set out in the Appellant's Notice of Appeal dated 8 February 2018 are as follows:

(a) The Tribunal erroneously held that the failure of the Respondent to deal with the Claimant's concerns with regards to the content of the Scottish meeting did not amount to a repudiatory breach of contract.

(b) The Tribunal failed to correctly apply the legal test contained in the case of *Malik* [1997] 3 All ER 1 in relation to the Claimant's constructive dismissal claim.

(c) The Tribunal erroneously held that the Claimant had resigned.

(d) The Tribunal erroneously held that the Claimant was not subjected to detrimental treatment on the grounds of her gender and/or marital status.

(e) The Tribunal attributed improper weight to the (i) the Respondent's failure to let the Claimant discuss the content of the Scottish meeting as part of the grievance (ii) the manager's stance that they could not take

account of it, had upon the grievance process and/or fairness of dismissal.

(f) The Tribunal failed to have regard or proper regard to the evidence that was adduced before it.

Legal principles

[44] In relation to unfair dismissal in the form of constructive dismissal there has first to be a constructive dismissal, see *Western Excavating v Sharp Limited* and the Tribunal's summary of the four key elements of constructive dismissal at paragraph [30].

[45] In relation to sex discrimination on the grounds of Appellant's gender Article 3 of the 1976 Order provides that "… a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person." Article 5 deals with discrimination against married persons and civil partners in employment field. Article 5(1) provides that "… a person discriminates against a person ("A") who fulfils the condition in paragraph (2) if (a) on the ground of the fulfilment of the condition, he treats A less favourably than he treats or would treat a person who does not fulfil the condition. One of the conditions in paragraph (2) is that the person is married. The basis of comparison is set out in Article 7.

[46] In relation to the claims for discrimination in addition to establishing that the Appellant had been treated 'less favourably' it was necessary for her to establish that that she had been subject to "detriment" within the meaning of article 8(2)(b) (or had been treated in one of the other ways mentioned in article 8(2)). The courts have given the term "detriment" a wide meaning. However as the statutory cause of action is discrimination in the field of employment the requirement is that 'detriment' has arisen in that field. For there to have been detriment it is not necessary to establish that there has been some physical or economic consequence as a result of the discrimination. In *Ministry of Defence v Jeremiah* [1979] 3 All ER 833 at 841, [1980] QB 87 at 104 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". As May LJ put it in *De Souza's case* [1986] ICR 514 at 522, the court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* Lord Hope, with whom Lord Hutton and Lord Rodger of Earlsferry agreed, articulated the test of detriment as being "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" Undermining the role and position of an employee, marginalising an employee, reducing the standing or demeaning an employee in the eyes of those over whom she was in a position of authority can amount to detriment, see *Shamoon* at paragraphs [35] and [37].

[47] An unjustified sense of grievance cannot amount to 'detriment': *Barclays Bank plc v Kapur* (*No 2*) [1995] IRLR 87 and *Shamoon* at paragraph [35].

[48] The approach to be taken to evidence in discrimination cases was considered in *Shamoon* by Lord Hope at paragraph [55] – [56] where he stated that "those who discriminate on grounds of race or gender do not in general advertise their prejudices." He went on to state that "they may indeed not even be aware of them" so that "it is unusual to find direct evidence of an intention to discriminate. So the outcome in a case of this kind will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal." Lord Hutton also dealt with this issue at paragraph [81] quoting for instance what Lindsay J stated in *Chief Constable of West Yorkshire v Vento* [2001] IRLR 124 at 125 that "… another permissible approach is to ask witnesses how the hypothetical case that requires to be considered would have been dealt with, although great care has to be exercised in assessing the answers to questions such as that, because the witness will be aware that it will be next to impossible to disprove any answer to a hypothetical question and also witnesses will know, by the time of the Tribunal hearing, what sort of answer is convenient or helpful to the side that they might wish to support."

[49] The role of this court in relation to factual determinations made by the Tribunal is limited. The relevant principles have been set out by Lord Kerr at paragraphs [78] – [80] when giving the judgment of the Supreme Court in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7. Lord Wilson stated in *In re B (A Child)* [2013] 1 WLR 1911, paragraph [53] that "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it." This court does not conduct a re-hearing and it is only in very limited circumstances that the factual findings made by the Tribunal will not be accepted by this court, see *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]; *McConnell v Police Authority for Northern Ireland* [1997] NI 253; *Carlson v Connor* [2007] NICA 55; *Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A* [2000] NI 261 at 273.

Discussion

[50] Mr O'Donoghue in advancing the Appellant's appeal rather than dealing with each ground of appeal individually addressed those in relation to constructive dismissal on a comprehensive basis. He contended that the Tribunal ought to have proceeded on the basis that during the grievance procedure the Respondent's failure to permit her to refer to or rely on the contents of the Scottish meeting amounted to a breach of the implied term in the 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, which breach either taken on its own or in conjunction with what was said at that meeting and the other matters set out in her grievance, was so serious as to justify her resignation. In the Appellant's skeleton argument

and in oral submissions it was contended that the dominant finding by the Tribunal that throughout the relevant period that the Appellant had *grossly overreacted* and been *wholly unreasonable in her interpretations* was plainly wrong. For instance it was contended that it "defies objective and reasonable belief" to categorise the Appellant's response upon listening to the recording of the Scottish meeting as unreasonable or an overreaction. In advancing this contention he put particular emphasis on the "package deal point" and the reference by Mr Studd to "your good lady wife." These it was suggested portrayed anachronistic and wholly inappropriate attitudes towards a valued female employee. However as we have indicated the role of this court is limited in relation to factual findings made by the Tribunal. In relation to the "package deal point" it was the Appellant who declined to be present at the Scottish meeting. Depending on context, the tone and the overall attitudes expressed at a meeting the expression "your good lady wife" could be deeply upsetting even if that was not the intention of the person making the remark. However it was for the Tribunal to assess whether it was upsetting given the entire context of everything said at the Scottish meeting, the tone of that meeting and having seen and heard from the Appellant. We reject the attempt by the Appellant to undermine what we have termed the dominant factual finding by the Tribunal.

[51] We have set out that the Tribunal found that there was some unfairness in refusing to let the Appellant discuss in the grievance procedure the allegations about the Scottish meeting but that this did not amount to a breach of contract and even if it had amounted to a breach of contract it was not sufficiently serious to strike at the heart of the relationship between the parties and did not warrant her resigning in response. Those findings are not to be seen in isolation. As we have indicated the dominant finding made by the Tribunal was that *throughout* the relevant period the Appellant had *grossly overreacted* and been *wholly unreasonable in her interpretations*. The Tribunal considered that the Appellant continued to overreact to some unfairness in the grievance procedure particularly given that the appeal was outstanding and had overreacted in relation to a whole series of issues. Furthermore the Tribunal considered that the issue as to whether the contents of the Scottish meeting was without prejudice was not a simple matter for the Respondent and that its views although incorrect were not arbitrary or totally irrational. For those reasons we consider that there can be no criticism of the conclusion that if there was any breach of contract in relation to the failure to allow the Appellant to refer to the Scottish meeting in the grievance procedure that breach could not be sufficiently serious to justify her resignation. We are confirmed in relation to the conclusions of the Tribunal by the fact that during the Tribunal hearing the Appellant could not identify what the event was that led her to decide that she had had enough and that there was a period of 6 months between listening to the recording of the Scottish meeting and the letter of resignation.

[52] It was also contended that the Tribunal failed to correctly *apply* the legal test contained in the case of *Malik* it being accepted that the legal test had been correctly

formulated by the Tribunal. We do not consider that there was any failure by the Tribunal to correctly apply the appropriate legal test.

[53] In relation to the claim based on sex discrimination and/or marital status Mr O'Donoghue again placed particular emphasis on the "package deal point" and on the reference by Mr Studd to "your good lady wife." The Tribunal found that there was no evidence that a male comparator would have been treated differently so that the Appellant had failed to prove less favourable treatment. That finding was clearly open to the Tribunal in relation to the "package deal point" given the Tribunal's finding that the Respondent would have adopted the same approach in relation to a female employee attending a meeting with a husband who was not at the meeting. In relation to the expression "your good lady wife" the Tribunal also held that there was no detriment. An unjustified sense of grievance is not a detriment. The Tribunal was entitled to hold having listened to all the evidence that this was a matter in relation to which the Appellant had misinterpreted and to which she had overreacted. We dismiss those grounds of appeal which relate to an allegation of discrimination.

Conclusion

[54] We dismiss the appeal.