# EMPLOYMENT TRIBUNALS

**Claimant:** **A**

**Respondents:** **(1) B**
**(2) C**
**(3) D**
**(4) E**
**(5) F**

**Heard at Ashford on: 18th, 19th, 20th April 2017 and considered in chambers on 21st and 26th April 2017.**

**Before:** **Employment Judge Pritchard**
**Mrs J Jerram**
**Mr D Newlyn**

**Representation**
**Claimant:** **Mr S Margo, counsel**

**First Respondent:** **In person assisted by Mr D Conyer**

**Second to Fifth Respondents:** **Mr N Moore, solicitor**

# CORRECTED JUDGMENT

The unanimous decision of the Tribunal is that:

1 The Claimant's claim of sexual harassment succeeds.

2 The First Respondent's conduct took place in the course of employment.

3 The Second to Fifth Respondents did not take all reasonable steps to prevent such conduct and are held liable for it, together with the First Respondent.

# REASONS

1. The Claimant claimed that she had been sexually harassed under section 26(2) of the Equality Act 2010. The Respondents resisted the claim.

2. Following discussion with the parties on the morning of the first day of the hearing, it was decided that the Tribunal would consider liability only at this hearing and, if the Claimant were to succeed, a further hearing would take place to consider remedy. The Tribunal used the remainder of the first day to read the witness statements and the documents in the bundles. The Tribunal thereafter heard evidence from the Claimant on her own behalf and from the First Respondent on his own behalf. The Tribunal also heard evidence from the following witnesses on behalf of the Second to Fifth Respondents: Captain G (Ship's Master); Miss H (Head of Human Resources – Fleet); Miss I (HR Support Advisor); and Captain J (Senior Master). The Second to Fifth Respondents also put in evidence the witness statement of the On-Board Services Operation Manager. The On-Board Services Operation Manager did not attend the Tribunal to give evidence and since his evidence could not be tested in cross examination the Tribunal gave it limited weight. The Tribunal was provided with two bundles of documents to which the parties variously referred, together with a deck plan of the Employer's vessel ("the Ship"). At the conclusion of the hearing the parties made oral submissions, the legal representatives amplifying their written submissions. The Tribunal met in chambers on the last day of the allocated hearing dates to deliberate and, in the event, required one further day in chambers to reach a decision.

**Issues**

3. The issues were narrowed considerably from the pleaded case. Immediately before adducing witness evidence on the second day of the hearing, the parties produced an agreed list of issues relating to liability only as follows:

    3.1. Did the First Respondent engage in conduct of a sexual nature on the morning of 12 January 2016 as alleged, contrary to section 26(2) of the Equality Act 2010?

    3.2. If so:

        3.2.1. Was it unwanted?

        3.2.2. Did his conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

        3.2.3. Was it reasonable for the conduct to have that effect?

        3.2.4. Was the First Respondent's conduct committed in the course of employment?

        3.2.5. Had the employer taken all reasonable steps to prevent such conduct in the course of employment?

**Findings of fact**

4. The Second to Fifth Respondents, together trading as the employing entity (hereinafter referred to as "The Employer"), are offshore employing companies for seafarers serving on the Employer's vessels.

5. The Claimant commenced employment with the Employer in February 2007. At relevant times she was employed by The Employer as a Stewardess working and living on board the ship, one week on and one week off.

6. In 2012 the Claimant presented to her GP for the first time with mood problems. In December 2015 she was prescribed anti-depressant Citalopram.

7. In about January 2014 the First Respondent, joined the Ship as Head Chef. He worked and lived on board during the same weeks as the Claimant (the Green Watch) and worked the same shift pattern. He has approximately 29 years' service with the Employer.

8. The Employer has in place an Alcohol and Drugs Policy, dated 2009, for sea staff which provides, among other things, that individuals must not consume alcohol on board any vessel nor return the vessel whilst noticeably under the influence of alcohol. However, the strict zero tolerance policy does not apply when ships are taken off service, such as when in refit. In such circumstances, staff assigned to off service vessels may consume alcohol ashore during official off duty periods. The Alcohol and Drugs policy was described to the Tribunal as a high profile policy.

9. The Employer also have in place Dignity at Work and Equality and Diversity Policies, both having been issued in 2011. The purpose of the Equality and Diversity Policy is to create a culture in which diversity and equality of opportunity are provided in all areas of employment and where unlawful discrimination is not tolerated. Although the Equality and Diversity Policy states, among other things, that the company strives to ensure that the work environment is free from harassment, it is the Dignity at Work Policy which expressly deals with unwelcome sexual advances, whether physical or verbal.

10. The Employer's employment policies are introduced to staff during an induction process following the commencement of their employment. Miss H told the Tribunal, and the Tribunal accepts, that the relevant employment policies are emailed to the ships with an instruction that they should be cascaded. Captain J's evidence was that he would forward the policies to the various heads of department. Miss H's evidence was vague as to whether individual members of staff were actually issued with hard copies on board.

11. As for electronic access, although Fleet Regulations are available to all members of crew by way of a simple computer login, employment policies, such as the Equality and Diversity and Dignity at Work Policies, are only available in public folders which require an email address for access. In essence, this requires most crew members to make a request to a manager if they wish to access such policies.

12. In 2012 the Employer delivered "Fair's Fair" training. Attendees included the Claimant and the First Respondent. The aim of the training was to raise awareness of and responsibility for providing equal opportunities and to

refresh the attendees' knowledge of The Employer's Equality and Diversity Policy. The Tribunal accepts Miss H's evidence that copies of the Equality and Diversity policy were handed out at the Fair's Fair training. The Tribunal was referred to slides and notes of the training which make reference to harassment. However, the evidence before the Tribunal suggests that the training was focussed on equality of opportunity rather than dignity at work and/or sexual harassment. There was no evidence before the Tribunal to suggest that the Dignity at Work Policy had been handed out at the training.

13. Managers on board the Ship routinely gave "toolbox talks" relating to various aspects of the workplace. The evidence before the Tribunal suggested that such talks might include discussion of the policies. However, the Tribunal prefers the Claimant's evidence that no such discussions took place at the talks she attended; Miss H was unable to state with any degree of certainty that toolbox talks might include discussions about the policies as no monitoring takes place.

14. On Boxing Day 2015, the Ship entered into drydock for refit in Vlissingen in the Netherlands. The Claimant and the First Respondent joined the ship to work during the refit on or about 6 January 2016. Although both the Claimant and the First Respondent had worked on Green Watch for about two years and knew each other in passing, they did not interact socially. There were about 70 individuals, including a number of contractors, living and working on board during the refit.

15. Management of The Employer placed a reminder of the alcohol policy as it applied during refit on a crew notice board. The Food and Beverage Manager also reminded staff of the policy during the refit period.

16. Because the port side cabin usually occupied by the Claimant was being used by a contractor, she was instead allocated cabin 311 situated immediately adjacent to the First Respondent in cabin 309 on the starboard side. Mr K was in cabin 313. The cabins are single occupancy. Although the Claimant had not been issued with a key for cabin 311, she could lock the door from the inside. The crew area is isolated from the passenger area: entry to the crew area is by way of keypad entry.

17. The Tribunal heard conflicting evidence, even between Captains G and J, as to the extent to which the crew cabins offered effective soundproofing. For reasons set out below, the Tribunal has no need to resolve the issue.

18. The Tribunal also heard conflicting evidence as to the temperature in the crew cabins. The Claimant told the Tribunal that her cabin was very hot; the Claimant's evidence was that the air conditioning system (which also provides warm air) was not working; Captains G and J said that there were no reported problems of the system. The First Respondent told the Tribunal that the air conditioning was not working. The Tribunal does not need to reach a finding on this matter: different people perceive hot and cold in different ways; and in any event there was no evidence to suggest that the cabins were all the same temperature. The Claimant's perception that it was hot in her cabin does not lead the Tribunal to question her credibility because of it.

19. By Monday 11 January 2016, refit was nearing completion. The Claimant and the First Respondent were scheduled to travel home on Wednesday 13

January 2016. The coach in which they were to travel was to depart at 6.00 am that day.

20. On the evening of 11 January 2016, after she had finished her work duties on board, the Claimant went ashore to the Seafarers Mission nearby. It was attended by a considerable number of crew members of the Ship and some of the contractors who were working on the refit. A number of crew from another ship were also there. The First Respondent also attended. Although the evening out had not been arranged or organised by the Employer, the Food and Beverage Manager visited the Seaferers Mission and bought a round of drinks for crew members of the Ship as a token of appreciation for their work on the refit. Both the Claimant and the First Respondent consumed alcohol but there was no evidence before the Tribunal to suggest that they were inebriated. The Claimant explained to the Tribunal that the leaflet enclosed with her anti-depressant medication permitted her to drink in moderation.

21. Captain G had posted a watchman on the gangway who was specifically instructed not to allow anyone back on board who appeared to be under the influence of alcohol.

22. Save where stated, the facts set out above are largely uncontested. However, the Claimant and the First Respondent give very different accounts of what took place during the evening of 11 January 2016 and the early hours of 12 January 2016. The Tribunal pauses at this point to set out those versions of events.

23. In summary, the Claimant's version is as follows:

    23.1. Before going to the Seafarers Mission, she asked the First Respondent if he was out that evening and he replied that he was going out with the "galley lot".

    23.2. She was in the smoking area at the Seafarers Mission and spoke to the First Respondent who commented that the Claimant was stuck in a cabin between him another chef named Mr K and that the Claimant replied "I am indeed neighbourino".

    23.3. Having left the Seafarers Mission some time between about 11.15 pm and 11.30 pm, she walked back to the ship with a colleague named Mr L and, having used the toilet in her cabin, went to the crew mess at about 11.50 pm. There she made toast and then sat with colleagues. The First Respondent was also present.

    23.4. At 12.15 am she, and a number of her colleagues, went outside to the smoking deck for a cigarette. The First Respondent was also there.

    23.5. She then went to her cabin and went to bed, falling asleep with her television on. She slept naked because she found the cabin hot, her pyjamas under her pillow. In accordance with her usual practice, she did not lock the door. (The Claimant told the Tribunal that she did not lock the door for safety reasons. When at sea there was a risk of the door becoming jammed in the event of a collision; in refit there was a danger of smoke inhalation or other situation which might render her

unconscious and a locked door would impede rescue. The First Respondent told the Tribunal that some members of crew lock their doors but others do not).

23.6. At some time during the early hours of the morning she awoke to find the First Respondent kneeling on the floor halfway down her bed. She could feel one of his hands resting on her stomach and his other hand in between her legs and his fingers inside her vagina. She said "… [referring to the First Respondent] what the fuck are you doing", pulled her quilt around her and pushed him away. She shouted "get the fuck out of my cabin" to which he replied "sorry mate, sorry" and left.

23.7. After a few minutes she put on her pyjamas, slippers and dressing gown and left the cabin as quickly as possible. She headed for a service lift when she heard a noise in the corridor behind her. She turned to see the First Respondent leave his cabin and open her cabin door. She shouted "what the hell do you think you are doing … [referring to the First Respondent]" whereupon the First Respondent approached her and started pulling her back saying "let's talk, let's talk, we just need to talk". The Claimant responded "get the fuck off me", pushed past the First Respondent and went to knock on the door of Mr L's cabin on the port side of the ship.

24. In summary, the First Respondent's version of events, by reference to his witness statement, is as follows:

24.1. He had a conversation with the Claimant at the Seafarers Mission when she told him she wanted to stow her duvet back in her usual cabin and as the coach was leaving the following morning at 6.00 am she would not have the chance to enter her usual cabin occupied by the contractor. He told the Claimant that he had a spare duvet to which she replied "I'll be coming to your cabin for a cuddle then" but disregarded the comment at the time.

24.2. At about 11.00 pm he returned to the ship and went to the crew mess where a few other crew members were there eating.

24.3. He then went to the smoking deck and the Claimant was already there with her friend Ms M. The Claimant was wearing a "onesie" and said "hello roomie" to which he replied "hello". He then returned to his cabin but because he did not feel tired he returned to the crew mess for coffee.

24.4. He then revisited the smoking area where he spoke a colleague named Mr N before leaving to return to his cabin at about 1.20 am.

24.5. When he got near to his cabin, the Claimant came out of her cabin and said "am I getting that cuddle then"? He entered her cabin, they kissed, he came to his senses and backed away. The Claimant protested but he said he was married. He returned to his cabin, changed into a T shirt and track suit bottoms and went to sleep.

25. The Claimant denies, in particular: that she had a conversation with the First Respondent at the Seaferers Mission; that there was any discussion about

her duvet; that there was any discussion about going to the First Respondent's cabin for cuddle; and that she wore a "onesie" (she denied that she changed her clothes before going out on deck and told the Tribunal that she did not have a onesie with her at all). She further denied that she and the First Respondent had kissed.

26. The First Respondent denies, in particular, the sexual assault alleged against him.

27. The Tribunal now continues with its findings of fact. At about 2.15 am Mr L opened his door to the Claimant who was upset and crying (Mr L later recounted that the Claimant was "in a state,…she was hyperventilating and couldn't speak"). Mr L comforted her. The Claimant told him everything that had happened. Mr L fetched Mr O, duty On Board Services Officer, and the Claimant also told him what had happened. The Claimant's friend and colleague Ms M was also brought to Mr L's cabin. Mr O fetched Captain G at about 3.00 am and the Claimant told him what had happened. She said she did not want the police involved. The Claimant spent the rest of the night with Ms M.

28. Having heard what the Claimant had to say, Captain G and Mr O went to the First Respondent's cabin. The First Respondent was asked to accompany them to the training room where the Captain asked the First Respondent to recount events of the evening from the time he returned to the ship to the present time.

29. There was a dispute before the Tribunal as to whether or not the First Respondent was told that an allegation of sexual assault had been made against him. The Tribunal finds that the First Respondent was told that an allegation of sexual assault had been made against him (albeit not by whom at this stage). This is supported by both the statements of Mr O and Captain G in which they recorded events of that night. Captain G gave clear evidence to the Tribunal in this regard. This finding is further supported by the First Respondent's own statement made during a subsequent investigation meeting when, with reference to the early morning meeting, he said he was "probably annoyed that some allegation was made against me".

30. The First Respondent then told Captain G that a female had tried to get him into her cabin but that he had said "no" and returned to his own cabin. The First Respondent told Captain G that he could not name or describe the female. Although in cross examination he was most reluctant to do so, the First Respondent admitted to the Tribunal that he had been untruthful to Captain G saying that he was seeking to protect his wife and the Claimant who was rumoured to have been cohabiting with a contractor in cabin 311.

31. Although Captain G smelt alcohol on the breath of the Claimant and the First Respondent, none of the individuals involved that evening suggested that either the Claimant or the First Respondent were inebriated. The ship's alcometer was out of service at the time and could not be used.

32. Later that morning, the Captain ordered both the Claimant and the First Respondent to return home to the UK; this was one day earlier than their scheduled departure. The Claimant was repatriated because of concern about her emotional state; the First Respondent was repatriated having been

suspended on full pay. Both individuals were instructed to provide written statements before they were repatriated. The Claimant provided the Captain with her written statement before she left. The First Respondent did not do so.

33. In addition to Captain G's log entry, Mr L, Mr O, Mr K, and Ms M provided written statements.

34. A contractor named Mr P reported having heard shouting at around midnight and thought it might be relevant to rumours which had, by then, spread throughout the crew; however, this was not thought to be relevant because the alleged incident was said to have taken place later than midnight and Mr P referred to hearing the words "Stop it Jason, stop it". Mr P's cabin was some distance from cabin 311. The Tribunal agrees that this evidence was, and is, irrelevant to the alleged incident on the night in question.

35. The On-board services manager, Mr Q, was instructed to undertake an investigation. On 13 January 2016 he made telephone calls to Captain J, the ship's Master on Red Watch who had taken over from Captain G, to the First Respondent and to the Claimant. The First Respondent told Mr Q that he had marriage issues having told his wife what had happened and that he was going through emotional trauma.

36. On 13 January 2016, the Claimant reported to her GP that she had been sexually assaulted by a colleague which had set her back.

37. Mr Q interviewed the Claimant the same day. The notes of that meeting record that the Claimant was shaking dramatically, picking her nails, shredding tissue, tearful and giving clipped responses. The Claimant was at this time on medication for anxiety and depression. She was unfit to continue the interview which was adjourned.

38. Mr Q met with the First Respondent and his trade union representative on 19 January 2016. It was not until this meeting that the First Respondent provided his written statement for the first time as had been instructed to do by Captain G. In this statement, the First Respondent said that he had entered the Claimant's cabin where they kissed. The content of that statement is consistent with the content of the statement he provided to the Tribunal in these proceedings, the relevant extracts of which are summarised above.

39. The Tribunal accepts that, having heard the evidence of Ms I about the way in which she took notes of the various meetings held by Mr Q, the notes are a reasonably accurate and near verbatim account of what was said at those meetings.

40. At the meeting of 19 January 2016, the First Respondent said that he would not have gone further with the Claimant because it was common knowledge that she was in a relationship with a contractor on the ship.

41. Mr Q also carried out interviews with Mr L, Mr N, Mr K, Mr O, Ms M and Ms R (who had been to the Seafarers Mission that evening, slept in cabin 405, and could offer no relevant information about the alleged incident). Captain G also provided a written statement.

42. Mr Q interviewed the Claimant on 27 January 2016.

43. Mr Q interviewed the First Respondent again on 2 February 2016.

44. Mr Q interviewed the First Respondent for the third and final time on 12 February 2016. At this meeting Mr Q clarified the precise details of the alleged sexual assault to which the First Respondent made no reply and visibly paled.

45. Mr Q prepared a report which he sent to Captain J. Mr Q concluded that both parties were undoubtedly involved in a coming together but because both versions of events differed, and there were no witnesses to collaborate the events, he recommended to Captain J that he should read the investigation report carefully before deciding whether or not to hold a disciplinary hearing.

46. Captain J, on the basis of the investigation report, prepared his own report on the alleged incident. Having read through the investigation notes he concluded that, in the absence of any concrete evidence, there was insufficient evidence for the matter to be considered at a disciplinary hearing. He did believe that something happened, something that was not right or properly wanted or invited. However, only the two persons concerned would know exactly what was said and what actually did happen. Captain J felt that it was not a satisfactory end to the matter but unless further evidence were to be brought forward he could not see the matter ending any differently.

47. Upon being told by the Employer that the matter would not be taken any further, the Claimant reported the alleged assault to the police.

48. The First Respondent returned to work on a different ship. Having been off work sick since the alleged incident, the Claimant returned to work on a phased basis on 13 April 2016.

**Applicable law**

49. Section 40 of the Equality Act 2010 provides, in terms, that an employer must not harass an employee.

50. Section 26(2) provides that A harasses B if –

    (a) A engages in unwanted conduct of a sexual nature, and

    (b) The conduct has the purpose or effect referred to in section 26(1)(b)

51. The purpose or effect referred to in section 26(1)(b) is that of –

    (ii) violating B's dignity, or

    (iii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

52. Section 26(4) provides that in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

    (a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

53. The parties were asked to address the Tribunal as to the correct application of the burden of proof in this case and whether section 136 of the Equality Act 2010 was relevant. The Tribunal accepts the submissions of the legal representatives that this is not a case with which the Tribunal need be concerned about the burden of proof is contained in section 136. The Tribunal accepts that it is for the Claimant to prove that, on the balance of probabilities, the First Respondent engaged in conduct of a sexual nature on the morning of 12 January 2016 as alleged. In this regard the Tribunal has further had regard to Laing v Manchester City Council [2006] ICR 1519; and Transport for London v Aderemi UKEAT 0006/11 as authority for the proposition that the Claimant must show a probability, rather than a mere possibility, that the Respondent had committed the unlawful act.

54. Section 109(1) provides that anything done by a person (A) in the course of A's employment must be treated as also done by the employer. It does not matter whether that thing is done with the employer's knowledge or approval. The legal representatives referred the Tribunal to number of authorities: Jones v Tower Boot Co [1997] IRLR 168; Waters v Commissioner of Police for the Metropolis [1997] ICR 2073; Chief Constable of Lincolnshire Police v Stubbs [1999] ICR 547; Livesey v Parker Merchanting Ltd UKEAT/0755/03; and Bellman v Northampton Recruitment Ltd [2016] EWHC 3104 QB. Having heard submissions, the Tribunal draws the following conclusions from these authorities:

- a Tribunal must apply a wider approach to the meaning of "in the course of employment" than might be applied in common law;
- the words should be construed in the sense in which a lay person would understand them;
- factors that a Tribunal might take into account are whether the incident took place on the employer's premises, whether the victim or discriminator was on duty, whether the event took place at an employer-organised event, whether the event took place immediately after work, and whether any gathering included employees' partners, customers or unrelated third parties.

The Tribunal notes that the reported cases are largely fact specific and that Bellman, referred to by Mr Moore, was a case concerned with the common law meaning.

According to the EHRC Code of Practice on Employment 2011 which the Tribunal must take into account in respect of any question arising in proceedings that appears relevant, the phrase "in the course of employment" has a wide meaning: it includes acts in the workplace and may extend to circumstances outside such as work-related social functions or business trips abroad.

55. Under section 109(4), in proceedings against A's employer (B) in respect of anything alleged to have been done in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A –

(a) from doing that thing, or

(b) from doing anything of that description.

The onus rests firmly on the employer to establish the defence.

The legal representatives referred to the following authorities: Canniffe v East Riding [2000] IRLR 555; Croft v Royal Mail Group [2003] ICR 1425; and Caspersz v Ministry of Defence UKEAT/0599/05. Having heard submissions, the Tribunal draws the following conclusions from these authorities together with the guidance contained in the EHRC Code of Practice on Employment 2011:

- the proper approach is first to identify whether the Respondents took any steps at all to prevent the employee doing the act complained of in the course of his employment; and secondly, having identified what steps, if any, they took, to consider whether there were any further steps that could have reasonably been taken (applying Canniffe to the wording of section 109(4));

- an employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take EHRC Code of Practice 2011 at paragraph 10.51);

- reasonable steps might include implementing an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the equality policy as appropriate, and dealing effectively with employee complaints (EHRC Code of Practice at paragraph 10.52);

- it is permissible to take into account the extent of the difference, if any, which the action was likely to make, since an employer is entitled to consider whether the time, effort and expense of suggested measures are disproportionate to the result likely to be achieved;

- however, whether taking such steps would have been successful in preventing the acts of discrimination is not determinative: the effect of such steps the employer should have reasonably taken is not the sole criterion. An employer will not be exculpated simply because, if it had taken those steps, they would not have prevented anything from occurring;

- where there is no knowledge on the part of employers or managers of risk of any harassment or inappropriate sexual behaviour by an employee, it may well be sufficient for there to be an adequately promulgated sexual harassment policy, particularly where it can be said that, when a one-off sexual assault incident occurs, it must in any event be known to any employee that the conduct could not possibly be condoned or encouraged by employers.

56. Under section 110, an employee is liable for his discriminatory acts which place liability upon the employer under section 109. This section applies whether or not the employer establishes the defence referred to above.

**Conclusion and further findings of fact**

*Did the First Respondent engage in conduct of a sexual nature on the morning of 12 January 2016 as alleged, contrary to section 26(2) of the Equality Act 2010?*

57. The Claimant's version of events as to what she says took place in the early hours of 12 January 2016 was entirely consistent throughout, from her reporting to Mr L, Mr O and Captain G immediately after the alleged incident and throughout the investigative process. She also promptly reported a sexual assault to her doctor. Her evidence before the Tribunal was also consistent and entirely credible.

58. There was no evidence before the Tribunal, nor was it suggested, that the Claimant might have had cause to fabricate her story.

59. The Claimant presented what might be described in evidential terms as a "recent complaint". She did not delay waking Mr L and reporting what she says happened. Those members of crew interviewed in the course of Mr Q's investigation who saw and spoke to the Claimant in the early hours of 12 January 2016 attested to her extreme state of upset. The Claimant told them in near identical terms what she says happened to her. Thereafter, the Claimant repeated the same information about the alleged incident in consistent terms throughout.

60. The Tribunal has considered whether, had the Claimant shouted as she alleges, others on board would or might have heard. As stated above, the Tribunal makes no findings as to the effectiveness of the soundproofing in the cabins. In the Tribunal's view, the issue is not relevant in this case. The three witnesses in nearby cabins who were interviewed heard nothing: Ms M in cabin 307 wore earplugs; Mr K in cabin 313 said he sleeps so soundly he does not even hear vacuum cleaners outside his door; Mr N (four cabins along from Mr K) was watching television wearing headphones.

61. The Tribunal has considered the First Respondent's evidence which it finds unsatisfactory in the following ways:

    61.1. He clearly lied to Captain G on 12 January 2016 when questioned about events. He said that he had an encounter with a female whom he could not identify whereas, even on his version of events, he knew full well of the identity of the female in cabin 311.

    61.2. In cross examination, the First Respondent persistently denied that he had lied to Captain G until the Tribunal questioned him whereupon he admitted, for the first time, that he had lied to Captain G.

    61.3. The First Respondent's explanation for the lie is unconvincing: he said in cross-examination, for the first time, that he did not name the Claimant to protect his wife and the Claimant herself who was rumoured to be having a relationship with a contractor. This explanation is unconvincing because, according to Captain G whose evidence the Tribunal accepts, the First Respondent said that a female tried to coerce him into cabin 311: it was patently obvious to the First Respondent that it was the Claimant who occupied cabin 311 and the

allegation the First Respondent was making against the Claimant was far removed from any attempt to protect her.

61.4. According to Captain G, on 12 January 2016 the First Respondent told him that a female had tried to get him to go into her cabin but that he had resisted and proceeded to his own cabin. This evidence is supported by the statement of Mr O. This evidence is inconsistent with the First Respondent's later evidence that he had actually entered the Claimant's cabin and shared a kiss with her.

61.5. The Tribunal notes the following exchange of 2 February 2016 when Mr Q questioned the First Respondent about what he told Captain G on 12 January 2016 (INT is Mr Q; EMP is the First Respondent):

> INT: Then you went to the training room. What questions did he ask you?
>
> EMP: He just wanted to clarify the events of the evening. I said is this about … [referring to the Claimant by her first name]? Well I couldn't remember her name. I presumed that was what it was about coz I had no recollection of what happened then.

The Tribunal finds the First Respondent's response nonsensical and the Tribunal draws the inference that the First Respondent was seeking to obfuscate. In any event, what the First Respondent said on this occasion does not accord with what Captain G and Mr O had to say about what the First Respondent had to say when questioned.

61.6. The First Respondent's contention that he was tired and confused when awoken by Captain G is inconsistent with Captain G's evidence that the First Respondent was articulate and coherent. The Tribunal found Captain G's evidence credible in this regard.

61.7. The First Respondent's evidence that he was not told in the early hours of 12 January 2016 that an allegation of sexual assault had been made against him cannot be supported; the Tribunal has found that he did know that an allegation of sexual assault had been made against him. The First Respondent's evidence that he thought the incident did not involve him was most unsatisfactory.

61.8. The First Respondent's assertion that the Claimant said she wanted to stow her duvet back in her usual cabin because the coach was leaving at 6.00 am makes no sense; the coach was not leaving until one day later, the Wednesday. (The Tribunal notes that in cross examination, the First Respondent said "I thought the bus was leaving on the Tuesday" before correcting himself). In any event, the First Respondent allegedly telling the Claimant that he had a spare duvet she could borrow makes no sense given his assertion that the Claimant's concern was that she did not know what to do with her own duvet.

62. In the Tribunal's view, the First Respondent concocted a story which, upon close examination, does not hold water.

63. The Tribunal is mindful of Mr Moore's undoubtedly correct submission that the burden of proof remains on the Claimant to prove her case; it is not for the Respondents to disprove it. However, the Tribunal must consider such evidence as it has before it and the Tribunal is entitled to be unconvinced by the Respondents' evidence; see for example: B v A EAT 0505/07. The Tribunal is also mindful of Lord Nicholls' comment in Re H Minors 1996 AC 563 HL, properly referred to by Mr Margo, and reminds itself that the more serious the allegation, the less likely it is to be true and therefore the more cogent will the evidence need to be for the Tribunal to be satisfied that the event was more likely than not to have occurred. However, the Tribunal is not required to find "concrete evidence" which Captain J considered a prerequisite to support disciplinary proceedings.

64. The Tribunal found the Claimant's evidence compelling as described and for the reasons set out above. The Tribunal agrees with Mr Margo's submission that the Claimant answered questions directly, clearly and without at any time altering her account to try to fit the question that was being asked. The Tribunal concludes that, on the balance of probabilities, taking into account the cogency of the evidence, the Claimant has shown that the First Respondent committed the act alleged. It was clearly conduct of a sexual nature.

65. The Tribunal has reached its conclusion on the basis of the evidence before it. However, the Tribunal notes that Professor Chris Fox, Consultant Clinical Psychiatrist who examined and prepared a report on the Claimant, reached a similar conclusion. In his report Professor Fox states:

> *Aetiology*
>
> *It is clear that she has had previous depressive symptomatology which she has admitted but at the time of the incident she was stable. If one assumes that the incident did occur as [the Claimant] has indicated, then her PTSD symptoms are related entirely to this alleged assault.*
>
> *If the allegations against her* [sic] *are not proven, and did not occur, then her psychiatric symptoms would be seen as fabricated. It is my view that she is consistent with the documented provided by* [sic] *and occupational health and medical records are also supportive of the diagnosis. I do not believe there is any evidence, either from my assessment or from the paperwork that has been provided of any inconsistency or attempt at fabrication.*

*Was the conduct unwanted? Did the First Respondent's conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? Was it reasonable for the conduct to have that effect?*

66. There is no doubt that the act complained of was unwanted. There was no evidence before the Tribunal to suggest that the Claimant was being unduly sensitive. Having regard to the Claimant's perception, the other circumstances of the case, and having considered whether it was reasonable for the conduct to have such an effect, the Tribunal concludes that the First Respondent's conduct had the effect of violating the Claimant's dignity and/or that it created an intimidating, hostile, degrading, humiliating or offensive

environment for her. The Claimant was sexually harassed within the meaning of section 26(2) of the Equality Act 2010.

*Was the First Respondent's conduct committed in the course of employment?*

67. The sexual harassment took place on the Employer's vessel. It was a requirement for the First Respondent and the Claimant to work and live on board. But for their work for the Employer, neither the Claimant nor the First Respondent would have been there. The visit to the Seafarers Mission, which preceded the sexual harassment, marked the conclusion of a refit with the Food and Beverage Manager buying a round of drinks as a token of appreciation. It is clear that the Employer exerted some control over crew members despite the fact that they were off duty: the Alcohol and Drugs policy continued to apply, albeit more relaxed during refit. The definition of "At Work" in the policy includes time spent on any vessel or premises. The crew area was isolated from public areas. Applying the wide legal definition, the Tribunal has no hesitation in finding that the First Respondent's sexual harassment took place in the course of his employment.

*Had the employer taken all reasonable steps to prevent such conduct in the course of employment?*

68. The Employer undoubtedly took some reasonable steps to prevent the First Respondent from sexually harassing the Claimant or from committing sexual harassment generally:

    68.1. The Employer implemented the Equality at Work policy (although see what the Tribunal says about the scope of this policy below). Not only was it introduced to new starters at induction but training took place in 2012 when copies of the policy were provided to attendees. Ms H believed the Equality at Work policy was posted on the notice board but could not be sure. Otherwise crew access to the policy was dependent upon either having a company email or making a specific request.

    68.2. There is no doubt that the Employer fully implemented the Alcohol and Drugs policy and reminded crew members about it. Crew members would not be permitted on board if they were under the influence and Captain G posted a watchman with instructions not to let crew on board if visibly under the influence.

    68.3. The cabins could be locked.

69. However, the question for the Tribunal is whether the Employer has shown that it took all reasonable steps. The Tribunal concludes on the balance of probabilities, that the Employer has not done so.

70. There was no suggestion in this case that there was a known culture of harassment within the Employer or the Ship in particular. Nor was there any credible evidence to suggest that the First Respondent or any other crew member posed any particular potential risk to the Claimant or others. However, in the Tribunal's view, it cannot be said that the Employer had adequately promulgated a sexual harassment policy.

71. Further steps which could have reasonably been taken include the following:

    71.1. The Dignity at Work policy, which specifically deals with sexual harassment, could have been promoted in a similar way as the Equality at Work policy by way of training, or by way of specific instruction at toolbox talks. Human Resources could reasonably have monitored to check that such promotion had taken place;

    71.2. The Employer could have ensured that all crew members, at least those who did not have computer access, were given hard copies of the Dignity at Work policy or ensured that it was posted on the notice board; and

    71.3. The Employer could have provided periodic reminders to crew members of the Dignity at Work policy.

72. It cannot be said that the time, effort and expense of such steps would be disproportionate, especially on a vessel where crew members of different sexes work and live together for one week at a time and thus the potentially higher risk of sexual harassment taking place. Indeed, Miss H accepted in cross examination that there was more possibility of things going wrong because of the close proximity of male and female staff compared to, for example, an office environment.

73. The Tribunal has considered whether these further steps would have made any difference in the present case. The Tribunal is unable to reach a conclusion one way or the other but it must be at least arguable that such steps might have given the First Respondent cause to hesitate committing the act he did. Nevertheless, whether such steps would have been determinative is not the sole criterion.

74. In submissions Mr Moore reminded the Tribunal that the Claimant could not think of any other steps that might have been taken to prevent the conduct in question. However, the burden of proof lies firmly on the Employer. In the Tribunal's view, the Employer has not discharged that burden on the facts of this case.

*Future conduct of these proceedings*

75. It is hoped that the parties will apply their minds to the question of settlement and avoid further costs being incurred. In accordance with Rule 3 of the Employment Tribunal Rule of Procedure 2013, the parties are encouraged to use the services of ACAS or other mediation as a way of resolving the question of remedy.

76. This case will nevertheless be listed for a remedy hearing with a time estimate of one day. If settlement is reached, the parties are required to notify the Tribunal immediately.

77. For the avoidance of doubt, at any remedy hearing the Claimant can expect to be awarded costs in respect of any Tribunal fees she has paid.

Employment Judge Pritchard

Date 26 April 2017