



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MARTIN
MEMBERS: Ms C Oldfield
Ms S Campbell

BETWEEN:

Ms Chelsea Wade	Claimant
and	
(1) Young & Co's Brewery Ltd (2) Mr Mark McLaughlan	Respondent

ON: 8-12 July 2017

APPEARANCES:

For the Claimant: In person

For the Respondent: Mr Hignett - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. The Claimant was not unfairly dismissed
2. The Claimant's claim of sex discrimination is successful
3. A remedy hearing will be listed to consider compensation

RESERVED REASONS

1. The Claimant presented two claims to the Tribunal the first complaining of sex discrimination and the second of constructive unfair dismissal and sex discrimination. The first claim was presented on 23 June 2016 the second on 10 November 2016. Responses were received from the Respondent on 30 August 2016 and 1 December 2016 both defended the claims in their

entirety.

2. The issues were agreed as follows:

3. **Section 26: Harassment related to sex including conduct of a sexual nature**

a. Did the respondent engage in unwanted conduct as follows:

- i. On 10 February 2016 Mr Mark McLaughlan allegedly pulling down the claimant's track suit bottoms in the restaurant area of the pub when the claimant was not wearing any underwear.
- ii. Mr Craig Kennedy Operations Manager failing to interview Mr Patrick Dunn-Yarker from the Retail Audit Team in connection with the claimant's grievance
- iii. Failing to interview witness Ms Jessica Clarke so that the claimant had to obtain this statement. Ms Clarke left the respondent's employment on about 26 February 2016.
- iv. Failing to consider CCTV footage which would have shown who was there and would have shown that there was a customer present. The claimant accepts that the CCTV footage would not have shown the incident itself.
- v. Not providing the claimant with copies of witness statements of witnesses upon which she could comment and not allowing the claimant the opportunity to challenge the evidence of any witnesses by asking them questions at the grievance hearing.
- vi. The close relationship between Mr Mark McLaughlan and Ms Alex Manino was not considered.
- vii. There was a failure to suspend Mr Mark McLaughlan.
- viii. Failing to deal with the grievance process impartially.
- ix. At the grievance hearing on 10 March 2016 being interrogated so that the claimant felt "under attack" at the hearing. It was also the first time the claimant had had the opportunity to see the witness statements.
- x. At the grievance hearing Mr Craig Kennedy seeking to justify the actions of Mr McLaughlan.
- xi. The delay in providing the grievance outcome which was sent to the claimant by letter dated 13 April 2016.
- xii. Not allowing the claimant to attend a training meeting for new wines being sold (the claimant believes this was at about the end of March 2016), because Mr Mark McLaughlan was attending.

b. Was the conduct related to the claimant's sex and/or was it unwanted conduct of a sexual nature under section 26(2)?

- c. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- d. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- e. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Constructive Unfair Dismissal

- a. Whether the Respondent committed fundamental breach of the Claimant's contract of employment
- b. Whether the Claimant resigned in response to that breach
- c. What the last straw was that triggered the Claimant's resignation
- d. Whether the Claimant delayed too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

5. Remedies

- a. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- b. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations, injury to feelings, and/or the award of interest. The claimant confirmed that she did not suffer a loss of pay up to the date of the presentation of her claim on 23 June 2016.

The hearing

6. The Tribunal heard from the Claimant and on her behalf from Mr Henriques Santos. There was a witness statement from her mother Mrs Claire Wade. Mrs Wade was not required to give oral evidence. For the Respondent, the Tribunal heard from Mr Mark McLaughlan (General Manager), Mr Matthew Finch (General Manager), Ms Emma Strong (Operations Manager), Mr Craig Kennedy (Operations Manager) and Ms Alexandra Mannino (Assistant Manager). There was an agreed bundle comprising [] pages.

The law

Direct discrimination

4. Direct discrimination is dealt with in sections 13 and 23 of the Equality Act 2010.

5. Section 13 provides that:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

6. Section 23 provides that:

“On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.”

7. In considering the claim of direct discrimination, the task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

Victimisation

8. Section 27 of the Equality Act 2010 (“EqA”) provides:

- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.

- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”
9. In ***St Helens Metropolitan Borough Council v Derbyshire*** [2007] IRLR 540, HL Baroness Hale endorsed the three step approach set out in ***Chief Constable of West Yorkshire Police –v- Khan*** [2001] IRLR 830, HL with regard to the RRA, which equally applies to the EqA:

“There are three relevant questions under the 1975 Act. First, did the employer discriminate against the woman in any of the ways prohibited by the Act? In this particular case, the alleged discrimination was by 'subjecting her to any other detriment' (contrary to s.6(2)(b) of the 1975 Act). Secondly, in doing so, did the employer treat her 'less favourably than ... he treats or would treat other persons'? Thirdly, did he do so 'by reason that' she had asserted or intended to assert her equal pay or discrimination claims or done any of the other protected acts set out in s.4(1) of the Act?

Harassment

10. Section 26 of the EqA provides:
- (1) *A person (A) harasses another (B) if—*
- (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) *the conduct has the purpose or effect of—*
- (i) *violating B's dignity, or*
- (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B. . .*
- (4) *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.*
- (5) *The relevant protected characteristics are - . . . disability”*
11. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (***Driskel –v- Peninsular Business Services Ltd*** [2000] IRLR 151, EAT and ***Reed and Bull Information Systems Ltd –v- Stedman*** [1999] IRLR 299, EAT).
12. The motive or intention on behalf of the alleged harasser is irrelevant (see ***Driskel*** above).
13. The Court of Appeal confirmed in ***Land Registry –v- Grant (Equality and Human Rights Commission intervening)*** [2011] ICR 1390 “*when assessing the effect of a remark, the context in which it is given is always highly material*”.
14. In ***Richmond Pharmacology –v- Dhaliwal*** [2009] ICR 724 the EAT held

that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

15. The word 'victimisation' is specifically defined by the Equality Act 2010 and has a different meaning from the normal use of the word. In considering a claim of victimisation the claimant must prove that there has been a protected act as defined. The claimant must also establish that there has been a detriment, and most importantly the Tribunal must find that the detriment was because of the protected act. A claim of victimisation cannot succeed without that causal link being established.

Constructive unfair dismissal

16. S95 Employment Rights Act 1996 provides that a claim for constructive unfair dismissal requires a claimant to show that there was a breach of contract and that it was sufficiently serious to justify his or her resignation or that he or she resigned in response to the last of a series of incidents. The claimant must have left in response to that breach and must not have delayed his or her resignation.

The Facts

17. The Tribunal has found the following facts on the balance of probabilities, having heard the evidence, considered the documents and submissions made by both parties. These findings are limited to those facts which are relevant to the issues and is necessary to explain the decision reached. All the evidence was considered even if not set out below.
18. The Claimant started work with the Respondent on 10 July 2013 as an Assistant Manager and worked at various sites. In 2016 the Claimant was working at the Crown Tavern, and the manager was Mr McLaughlin. On 10 February 2016, which was normally a day that Claimant did not work, the Claimant attended work to do a stocktake. The Respondent has a dress code which includes that tracksuits or tracksuit bottoms should not be worn when working. Mr McLaughlin explained that this included when doing a stocktake as that member of staff would be in the public area of the pub.
19. Mr Dunn-Yarker is an auditor from head office and was overseeing the stock take. He was working downstairs in the office. The Claimant alleges that while she was chatting to colleagues at the pass Mr McLaughlin walked up and pulled her tracksuit bottoms down to her knees which was particularly embarrassing as she was not wearing any underwear. Mr McLaughlin denies pulling her tracksuit bottoms down but admitted giving them a tug, which he said was an expression of disapproval as she should not have been wearing them in the pub.
20. On 9 February 2016 the staff had been to a quiz night following a staff

meeting. The staff, including the Claimant drank a lot of alcohol and one of the members of staff flashed her breasts at the quizmaster. They went back to the pub and carried on drinking until about 1 a.m. Mr McLaughlin joined them. He did not go to the quiz as he needed to stay at the pub and work.

21. On 10 February 2016, the Claimant was at the pass chatting with Jessica Clark and Alexandra Mannino. Rachel Constidine and Michal Olszanowski who were kitchen staff were on the other side of the pass (the kitchen side). The Claimant was standing between Ms Clark and Ms Maninno. By all accounts, despite being a bit hung over, the staff were in good spirits and there was a lot of chat and banter about what had happened the night before. The Claimant, Ms Clark and Ms Maninno were hoping for some food to be provided by the chefs, and the Claimant told Mr Olszanowski that she would flash her breasts at him if he would give her some food. This part of the evidence was not substantially in dispute. What happened next, was.
22. The Claimant's evidence was that Mr McLaughlin walked past and pulled her tracksuit bottoms down to her knees, exposing her private parts. She said that the colleagues who were with her were laughing at her. She said that Mr McLaughlin had an "*evil smirk*" on his face. The Claimant's evidence was that she was shocked and very upset and went down to the office where Mr Dunn-Yarker was, as she thought she would be safe there as he was from head office. She says she told Mr Dunn-Yarker straightway what had happened and was in complete shock. Her evidence was that a short while after she had entered the office Mr McLaughlin came in boastfully saying that he had pulled her trousers down and that she was not wearing any knickers. She said that Mr McLaughlin left the office and she did not see him again.
23. Mr McLaughlin denies pulling the Claimant's tracksuit bottoms down, though he does admit "*tugging*" the top of her tracksuit bottoms, which he said was because she shouldn't have been wearing them at work. His evidence was that he heard the Claimant say "*don't do that. I have no knickers on!*" Or words to that effect. He said he walked off and did not look back. He agreed that he went down into the office and said that when he entered the office he heard the Claimant recounting to Mr Dunn-Yarker that he had "pulled at" her trousers and she went on to explain to Mr Dunn-Yarker that she had no knickers on. His evidence was that this was being recounted in a joking way and that the Claimant did not appear to be upset and shocked. He didn't consider anything of consequence had occurred and he left the pub to go on holiday.
24. The Tribunal also heard from Ms Mannino, who by all accounts had been standing between the Claimant and Jessica Clark at the pass. Ms Mannino had known Mr McLaughlin for a long time having worked with him at a previous pub. She confirmed that the Claimant and the chefs were talking and joking about the staff night out the previous evening. Ms Mannino had not joined the other staff at the staff night out as she was required to stay in the pub and work. Her evidence was that everyone was a bit hung over, but

everyone was in good spirits and they were talking about what Kate had done and were laughing. Her evidence was that the Claimant then told the chefs that she had "*fake boobs*" which started another discussion with the Claimant saying she would show the chef her boobs if they gave them some food. She said that they were a close team and there was a lot of "*mucking about*" and the whole conversation was light-hearted and jovial. Her evidence was that at this point Mr McLaughlin walked past and tugged at the top of the Claimant's trousers. She did not hear Mr McLaughlin say anything to the Claimant as they were all chatting and laughing at the time, but she noticed that the Claimant jumped and said something to the effect of "*be careful, I'm not wearing any underwear.*". She did not know whether Mr McLaughlin heard the comment but said that he did not stop and confirmed that he carried on walking away.

25. Ms Mannino was adamant that Mr McLaughlin did not pull the Claimant's trousers down to her knees, or the floor and said that as she was standing next to the Claimant she would have seen that if it had happened. She also said the Claimant did not bend down at all, which she would have had to have done if the trousers had been pulled down to pull them back up. She said that she and her colleagues at the pass immediately started teasing the Claimant about not wearing any knickers which they knew from the Claimant's exclamation. Her evidence was that later the Claimant gave Mr McLaughlin a big hug before he left on holiday. Her evidence was not challenged by the Claimant in cross examination.
26. At 18:35 the Claimant sent a text to Ms Mannino, who had prepared the rotas explaining she could not do some shifts she had been assigned to. The exchange of emails produced in the bundle are friendly and no make no mention of the incident earlier that day.
27. The Claimant went home and told her mother what she said had happened and asked her mother to contact Mr Kennedy as she said she was still embarrassed and upset. Her mother called Mr Kennedy on the morning of 11 February, who then telephoned the Claimant at about 7 p.m saying that he would investigate the matter. He asked the Claimant to provide a statement which she provided on 13 February 2016. The Claimant asked if she could be transferred to an alternative site within Mr Kennedy's area and he agreed that she should have a few days off and arranged for her to work at the Duke of Wellington pub from 19 February 2016. The Claimant knew the holding manager of this pub and he felt it was therefore appropriate that she was transferred there.
28. Mr Kennedy contacted Ms Khan, Head of Human Resources on Monday, 15 February 2016 and told her about the information he had received from the Claimant and her mother and sought Ms Khan's advice. Mr Kennedy interviewed all available witnesses while Mr McLaughlin was still on holiday and viewed the CCTV on site and noted that the cameras did not cover the pass and therefore would not give any evidence as to what happened at the time. Ms Clark was not at the pub when he attended. His evidence was

that he tried to contact her but received no response. He asked the witnesses to send a statement setting out what they had seen of the incident in their own words, and he received their statements on 16 February 2016.

29. Ms Rachel Constidine, said that Mr McLaughlin had come up behind the Claimant and tugged at her top and that the Claimant said she had no knickers on. She said Mr McLaughlin walked away, and that those present laughed and that Mr McLaughlin did not remove the Claimant's clothing. Mr Olszanowski said the Claimant's trousers were not pulled down, and Miss Mannino set out what she told the Tribunal set out above.
30. The Claimant contacted Ms Clark and Ms Clark sent a statement saying that Mr McLaughlin pulled down the Claimant's tracksuit bottoms and commented that she was not wearing knickers and that the Claimant was shocked and embarrassed.
31. Mr Kennedy did not suspend Mr McLaughlin as Mr McLaughlin was on holiday and by the time he had returned the witnesses had been interviewed and the Claimant was working elsewhere. He interviewed Mr McLaughlin by telephone on his return to work on 26 February 2016. The Claimant was invited to a grievance hearing to be held on 10 March 2016 with Mr Kennedy as the hearing officer. Mr Kennedy explained that the delay was because the Respondent has a comparatively small Human Resources team and this was the first opportunity that both a member of that team and Mr Kennedy could jointly attend the meeting.
32. The Claimant attended, unaccompanied by a workplace colleague. The Claimant was given copies of the witness statements at this meeting and given the opportunity to comment. The Claimant's preferred outcome was that Mr McLaughlin should be disciplined.
33. Following the grievance hearing, and considering what the Claimant said, Mr Kennedy undertook further investigations by telephoning Mr Dunn-Yarker (who had not been interviewed prior to this) and asked into account his memory of what had happened. He asked Mr Dunn-Yarker to send him a statement of the other witnesses had done which Mr Dunn-Yarker did. His statement said he was in the office when the Claimant came in and sat down and the Claimant was chuckling to herself and told him that Mr McLaughlin had just passed her and that she had told him she was not wearing any underwear. He said the Claimant did not seem particularly bothered by the incident or embarrassed about speaking to him about the incident.
34. Mr Kennedy noted that the witness statements were inconsistent with no one version of events fully corroborating another. He decided on balance that the statements of Ms Constantine, Mr Olszanowski and Ms Mannino supported Mr McLaughlin's recollections and that only Ms Clark's statement broadly supported the Claimant's version of events. Mr Kennedy believed that Mr McLaughlin had tugged at the Claimant's trousers in passing but did

not believe that this action amounted to sexual harassment. He recommended that Mr McLaughlin be invited to a disciplinary hearing on the basis that touching the trousers of a female employee to be unnecessary and inappropriate behaviour by a General Manager.

35. He set out his findings in a letter dated 13 April 2016. The Claimant raised concerns about his decision in a letter dated 17 April 2016, which Mr Kennedy thought should be dealt with at an appeal hearing and this was arranged.
36. The appeal was conducted by Miss Strong. The basis of the Claimant's appeal was that witness statements were not taken in an appropriate and timely manner and were not signed or dated. That Ms Clark and Mr Dunn-Yarker were not interviewed despite the Claimant naming them as witnesses; there was no checking the facts within and between the witness statements; Mr McLaughlin was not suspended from duty; CCTV was not checked; the grievance process had taken too long and that Mr Kennedy was deliberately biased against her with the grievance hearing being like "*police interrogation*" and that she had been prevented from attending wine training.
37. The wine training was offered to the Claimant on 9 March 2016. At that time the Claimant was the holding manager at the Porchester pub. She would soon be moving to another pub, The Bull. This had been arranged and her manager at that time was Mr Finch. The Claimant's invitation was rescinded. Mr Finch explained that there was a shortage of staff at the pub and the permanent Assistant Manager was also attending the training. His evidence was that Mr Kennedy had asked him to contact the Claimant (as he was the Claimant's line manager). The Claimant was required to work at the Porchester as otherwise it would not be able to open. The Claimant says she believed she was told not to go because Mr McLaughlin was attending the wine tasting.
38. The appeal was heard on 28 April 2016, the Claimant attended with her mother, who is a trade union representative. All matters were discussed and the Tribunal is satisfied that the Claimant was given the opportunity to put forward her concerns. Following the meeting, Miss Strong undertook further investigations as she had decided to manage the Claimant's appeal as a complete rehearing. She met with the witnesses at the Crown Tavern, except for Ms Clark and Mr Dunn-Yarker who were not available. She also reviewed the layout of the pub. She met with Ms Clark the following week, on 12 May 2016. And spoke to Mr Dunn-Yarker by telephone on 13 May 2016.
39. Ms Strong's conclusion was that Mr McLaughlin's behaviour did not amount to sexual harassment and she did not believe that his actions directly related to the Claimant's gender, or were of a sexual nature. On balance, she believed that Mr McLaughlin had only tugged at the Claimant's trousers in passing and did not believe that his conduct had the purpose or effect of

creating an intimidating environment for the Claimant. She concluded on balance at the Claimant made her own reference to not wearing any underwear and this is how her colleagues knew about it.

40. Mr McLaughlin was subsequently disciplined and issued with a final written warning for inappropriate behaviour.
41. On 12 April 2016 the Claimant moved to live with her parents in Eastbourne. This was a two hour commute each way to work. In about July 2016 the Claimant started a relationship with Mr Santos. Mr Santos worked at the Bull as a supervisor. The Claimant was the Assistant Manager and supervised Mr Santos. On 8 July 2016 the Claimant allowed Mr Santos to leave work two hours early, and she also finished work three hours early. Mr Finch was not asked if this was alright and was not told until the next day when the Head Chef reported it. The Claimant is salaried and therefore paid the same however many hours she worked and Mr Finch was concerned about her leaving early. Mr Finch was also aware that the Claimant was only scheduled to work 43 hours that week which was less than her contractual obligation. The reason for them leaving early was that they went to the Wireless Music Festival together. This was the first Mr Finch knew that they were in a relationship.
42. The next day, Mr Santos was 30 minutes late for work. He arrived with the Claimant (who was early for work). Mr Finch was concerned that the Claimant as Assistant Manager would be seen to be condoning or authorising Mr Santos's lateness. Mr Finch spoke to them both and asked if they were in a relationship and they confirmed that they were. He told them that he was concerned that their relationship would interfere with their work as exemplified by Mr Santos, arriving at work late and then leaving work early. He told them both that if they wanted to continue their relationship it may be better if one transferred to another site within the Respondents business. His evidence was that they were clearly not happy about what he had said.
43. The Claimant's version is that Mr Finch told them they could not be in a relationship and if they were they would have to leave. The Claimant's resignation letter (see below) says, "*we were not allowed to have a relationship and if we did then one of us would have to leave*". Mr Finch's evidence, which the Tribunal accepts, is that he did not say their relationship had to stop, but he said that if it continued, it may be better if one of them transferred to another site. The Claimant continued to work on the 9, 10 and 11 July.
44. On 12 July 2016. The Claimant came to work as scheduled at 4 p.m. and gave her resignation to Mr Finch giving four weeks' notice. She referred to her previous grievance and the comments she said Mr Finch had made on 8 July 2016 as being her reasons for leaving. The Claimant then confirmed her resignation in writing by email as set out below.

"Due to the stress and extreme pressure placed on me over the last six

months, caused by the sexual harassment against me on 10 February 2016 and the absolutely dismal way it was handled throughout.

This has culminated with the intolerable way I was spoken to by you on Saturday when you bluntly informed me and Henrique Santos that we were not allowed to have a relationship and if we did then one of us would have to leave.

I find the double standards you portray with this statement, bearing in mind that the last 3 Male General Managers have worked with have been in serious long-term relationships with other members of staff proves that Youngs is not an equal opportunities employer but one who considers the harassment that I have been set directed to acceptable in its day-to-day business. This has made it impossible for me to continue working for Youngs.

I therefore tender my resignation, giving the required one month's notice with my final day being 12 August".

45. Mr Finch accepted her resignation and arranged for a payment in lieu of notice to be paid.
46. On 14 July 2016 Mr Santos sent an email to Mr Finch saying:

"I write this email to inform you of my resignation with immediate effect.

I have enjoyed my time working at the bull and thank you for the opportunities you have given me but my living arrangements have now changed as of today, which would make it impossible for me to continue working at the Bull.

*Kind regards,
Henrique Santos"*

47. Mr Santos had moved to Eastbourne to live with the Claimant.

The Tribunal's conclusions

48. Having found the factual matrix as set out above, the Tribunal have come to the following conclusions on the balance of probabilities.
49. The Tribunal first considered the allegation of harassment in relation to the incident on 10 February 2016. As both parties appreciated, this was a difficult task in view of the opposing versions of events. The Tribunal first considered the live evidence before it. It is for the Claimant to prove that there had been harassment. The witnesses for the Respondent who were there when the incident occurred, said that the Claimant's tracksuit bottoms were not pulled down, exposing her private parts. There were consistent in saying that it was the Claimant who exclaimed that she was not wearing any underwear. The only person who corroborated the Claimant's version of events was Ms Clark during the grievance process. Ms Clark did not attend the Tribunal to give evidence and the Tribunal did not even have a signed

witness statement to consider.

50. The Tribunal accepts that there are inconsistencies between the witness statements, particularly between the two statements given by Mr Dunn-Yarker. However, the Tribunal also recognised that it is unusual to have entirely consistent statements, especially where the incident in question happened quickly.
51. The Tribunal considered what happened before the incident, and after the incident in trying to establish what, on balance, the Tribunal found happened. The Tribunal noted the atmosphere in the pub, which was generally one of jocular and banter. The Tribunal considered the events of the night before namely the incident at the quiz night and the discussion about this the next morning. The Tribunal noted the Claimant's comments about '*flashing her boobs*' and the general boisterous atmosphere that there was that time.
52. The Tribunal considered the evidence about what happened during the incident and note that Miss Mannino was standing between the Claimant and Ms Clark. If the Claimant's tracksuit bottoms had been pulled down as she suggested, the Tribunal has no doubt that Ms Mannino would have seen this as would Rachel Constidine and Mr Olszanowski.
53. The Tribunal then considered what happened immediately after the incident. The Tribunal does not accept the Claimant's evidence that she was embarrassed and shocked. Whilst Mr Dunn-Yarker's evidence has inconsistencies, what is consistent are his views on the general nature of the Claimant when she came into the office and his view that she was not upset. This was corroborated by Mr McLaughlin in his evidence. The Tribunal also noted the tenor of the text exchange between the Claimant and Ms Mannino later that day, which made no reference to the incident which the Tribunal finds surprising if it had happened.
54. Something did happen and the Tribunal finds that Mr McLaughlin did tug the Claimant's tracksuit bottom which the Tribunal finds to be inappropriate. The Tribunal accepts that such a tug (even if it is a small tug in passing) is conduct of a sexual nature which violated the Claimant's dignity, especially in the particular circumstances the Claimant was in. The Tribunal finds this to be harassment but also finds that the effect on the Claimant was limited, bearing in mind the jocular conversation she had with Mr Dunn-Yarker afterwards and the lack of any comment in her text exchange with Ms Mannino. Whilst the Tribunal will be listing a remedy hearing to consider compensation for this harassment, the Tribunal felt it prudent to set its view out as to the effect of the Claimant from the evidence it is heard, so the parties can if they so wish, seek to settle this aspect of the claim.
55. The Tribunal has considered the Claimant's grievance including the original grievance heard by Mr Kennedy and the appeal held by Miss Strong. The Claimant criticises Mr Kennedy for not taking a statement from Mr Dunn-

Yarker initially and not taking a statement from Ms Clark. However, the Claimant produced a statement from Ms Clark which was before Mr Kennedy and Mr Kennedy did take a statement from Mr Dunn-Yarker as part of his post hearing investigation. The Claimant was therefore not prejudiced, even though it may have been best practice for statements to have been taken by Mr Kennedy prior to the hearing.

56. The Claimant criticises Mr Kennedy for not viewing the CCTV footage. It is clear from his statement that he did consider the CCTV footage but thought it would not assist as the cameras did not cover the area of pass where the incident took place. By the time the grievance hearing happened, the recordings had been automatically wiped (they are wiped after 21 days). The Tribunal has considered whether the CCTV footage would have been of assistance. The crucial time was then the Claimant was at the pass with her colleagues and this was not recorded. In any event the Tribunal find it was reasonable for Mr Kennedy not to view the CCTV footage as it did not cover the incident itself.
57. The Claimant criticises the fact that she was not given copies of the statements prior to the grievance hearing. Whilst in a disciplinary hearing it is a requirement that statements are given to the person prior to the hearing, it is not such a requirement in a grievance hearing. Tribunal is satisfied that the statements were given to the Claimant for her to take away, and that she had the opportunity at the hearing with Mr Kennedy to make such representations as she wished. Even if that was not the case, by the time it came to the appeal, which was a rehearing, the Claimant had the statements and had had them for some time and had ample time to prepare a response. The Tribunal does not find the fact that the witnesses were not in attendance at the grievance hearing to be relevant as this is not a requirement.
58. The Claimant believes that Ms Mannino and Mr McLaughlin colluded and conspired to lie. This is something which came out during the hearing, but was not something which was mentioned to Mr Kennedy during his investigation. In any event, the Tribunal, accept the Respondent's submission that the witness statements were taken at a time when Mr McLaughlin was on holiday and therefore he was unable to influence the investigation. The fact that Ms Mannino and Miss McLaughlin had worked together for some time was something which was known to Mr Kennedy. The Tribunal is satisfied with Ms Mannino's evidence when she said that she would not cover up for Mr McLaughlin.
59. The Claimant criticises Mr Kennedy for not suspending Mr McLaughlin. The Tribunal accepts the explanation given that Mr McLaughlin was on holiday and would therefore not be around when the investigation was taking place and that by the time he had returned the Claimant had moved pub. The Tribunal accepts it was not necessary to suspend Mr McLaughlin.
60. The Tribunal then considered the content of the notes of the meeting with Mr Kennedy on 10 March 2016 and does not find that there was an

interrogation as suggested by the Claimant. Whilst the grievance could have been completed more quickly the Tribunal accepts the Respondents explanations for the delays, namely holidays and the difficulty of getting someone from human resources and Mr Kennedy to a meeting at the same time.

61. One aspect where the Tribunal does have criticism, although it does not affect the overall findings in this case, is that Mr McLaughlin coordinated the witness's attendance for the appeal meetings with Ms Strong. The Tribunal accepts that Mr McLaughlan didn't investigate them, however, the impression given could be different.
62. The next aspect, the Tribunal considered was the wine tasting course. The Tribunal accepted Respondent's explanation as to why the Claimant had an invitation rescinded and that it was not because of allegations she had made of sex discrimination, but because of business requirements as she was needed to be there for the pub to open. The Tribunal accepts that given that she was going to be moving on to another pub that it was appropriate for the Assistant Manager to attend the wine tasting as that Manager would be the only person trained in wine when the Claimant moved on.
63. The Claimant alleges that Mr Finch discriminated against her in the way he handled events on 9 July 2016. The Tribunal has found that Mr Finch acted entirely appropriately and prefers his version of events to the evidence given by the Claimant and Mr Santos. The facts are set out above. Both the Claimant and Mr Santos were treated in the same way and there was no less favourable to treatment of the Claimant on the ground of her sex. Mr Finch did not know the basis of the grievance that the Claimant had made and therefore any anything he did was not motivated by that.
64. The Tribunal finds that the Claimant was not unfairly constructively dismissed, but resigned most likely because the commute from Eastbourne to London was too great. This was the reason given by Mr Santos for his resignation. Given the Tribunal's findings in relation to the events of 9 July 2016, the Tribunal does not find this to be a breach of the implied term of mutual trust and confidence entitling the Claimant to resign and claim unfair dismissal. The Claimant is unable to rely on the incident in February 2016 as this occurred some six months before the resignation and she therefore waited too long and affirmed the contract.

Employment Judge Martin
Date: 09 October 2017