EMPLOYMENT TRIBUNALS

Claimant: C

Respondents: (1) R1

(2) R2

HELD AT: Manchester **ON:** 17 - 19 July 2019

IN CHAMBERS: 14 August 2019

BEFORE: Employment Judge Porter
Ms V Worthington
Mr J Flynn

REPRESENTATION:

Claimant: Mr K McNerney of counsel

Respondents: (1) Mr B Williams of counsel

(2) Not in attendance, no Response presented

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claims of sex discrimination against the first and second respondent are not well-founded and are hereby dismissed;

2. The claim of breach of contract is not well-founded and is hereby dismissed.

REASONS

Issues to be determined

1. At the outset counsel for the claimant confirmed that the claimant wished to withdraw a number of the complaints contained within an agreed List of Issues. The parties in attendance agreed an Amended List of Issues, which appears at Appendix 1.

Orders

2. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. An order was sent to the parties on 13 August 2019, including an Order for the extension of the Anonymisation Order made by EJ Franey on 30 January 2018, as amended by REJ Parkin on 20 March 2018

Submissions

3. Both representatives agreed that there was insufficient time, at the conclusion of the Hearing, to make submissions. It was agreed that the parties should exchange written submissions and an Order was made for that exchange and the provision of copies for the tribunal's deliberations in chambers. That Order was sent to the parties on 13 August 2019. The claimant and first respondent provided written submissions in accordance with the Order. The tribunal has considered those submissions with care but does not rehearse them here. The second respondent did not provide any submissions.

Evidence

4. The claimant gave evidence. In addition, she relied upon the evidence of her father.

5. The first respondent relied upon the evidence of:-

   5.1. Ms LG, HR adviser;

   5.2. Ms JR, former employee and the claimant's direct line manager;

   5.3. Ms KS, Head of Studio.

6. The second respondent did not attend the hearing. No evidence was received from the second respondent, who has not entered a Response. The claim and subsequent correspondence has been served upon the second respondent at his last known address. No post has been returned to the tribunal as undelivered. The tribunal is satisfied that the claim has been

properly served upon the second respondent and that it is in the interest of justice to proceed in his absence. Neither of the parties in attendance sought a postponement to try to secure the attendance of the second respondent at the hearing.

7. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

8. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

9. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

10. The claimant commenced work with the first respondent on 4 September 2017 as a model booker. She was 18 years old at the time and lived on her own in a flat in Manchester. She had previous experience in the industry. The claimant describes this as her dream job, a job she enjoyed.

11. The claimant's employment was subject to a 6 month probationary period.

12. The first respondent organised drink parties for all its employees on a monthly basis. Free drinks and food were provided. The parties were held on the respondent's premises.

13. The claimant's line manager was JR, who had genuine concerns with the claimant's performance relatively early into the claimant's employment. JR had genuine concerns that the claimant struggled with a number of tasks that she expected the claimant to be familiar with and this meant that the claimant was not performing to the required standard. JR provided assistance to the claimant to improve her performance. JR also had genuine concerns about the claimant's attendance and timekeeping.

    [On this the tribunal accepts the evidence of JR, in part supported by the documentary evidence.]

14. Initially JR sought to manage the claimant's performance informally. However, by late October 2017 JR began to feel that more formal steps were required as she had not seen any improvement.

15. On 25 October 2017 JR emailed to the claimant a to-do list of a number of tasks the claimant had not completed. The email starts “Hey hun”. JR also requested that the claimant seek JR’s prior approval for a number of her tasks as JR felt this would allow her to closely monitor the claimant’s work and ensure tasks were done on time (page 91). The to do list included the following:

    15.1. Going forward I want to see and sign off all your train and hotel authorisations – I'm concerned about how much you have spent on the casting trains for today and I don't want Steve to go off on you;

    15.2. Please can you update all the trains this week in the budget sheet – it really helps if you do this as you book them then I can see if there are gaps and if bookings are missing and again agencies are chasing trains. Please can you do this from now on;

    15.3. Keep the kids and men's options charts as up-to-date as possible, so is easy for everyone to see options etc when you are out of the office;

    15.4. Update the men's and kids model boards with any new models we have booked this month …..and forward to me for October's budget – ask me if you don't know what I'm on about;

    15.5. There are no travel or hotel costs in the budget sheet of the kids bookings for October yet. Please can you add them in asap

16. On 26 October 2017 JR emailed LG, HR advisor, to ask how long the claimant’s probationary period was, stating (page 93):

    “can you let me know how long the probationary period is. I’m having some trouble with (the claimant) and just wondered”

17. LG enquired what issues JR was having, to which JR responded “just a few issues (KS) and I are trying to work through them and coach her a bit from our side.” JR asked for a copy of a reference from the claimant’s old agency because JR was keen to understand the claimant’s previous experience, which may explain why the claimant was struggling with certain tasks.

18. By 27 October 2017 the claimant had not fulfilled the to-do list and JR sent the claimant a further email (page 91) asking that she complete certain tasks that day, reiterating that the tasks needed to be completed urgently. The email starts “Hey Nicole” and uses bold type and underlining to emphasise the urgency of the task:

    Please can we get the below done **today** –I need these done so I can complete other tasks

19. The claimant replied confirming she would complete the tasks. She did not complete the tasks that day as requested.

20. The claimant had not, up to this point in her employment, raised any complaints of lack of training, did not say that she had had insufficient training to enable her to complete these tasks or any other of the tasks allocated to her.

21. In October 2017 the claimant was introduced to the second respondent, a male freelance stylist. The second respondent was older than the claimant by more than 10 years. He lived with his girlfriend. The claimant and the second respondent became friends. They exchanged messages via social media on a regular basis prior to the drinks party on 27 October 2017 (p 69-74). These messages included exchanges of a flirtatious nature, including a request from the second respondent for photos of the claimant nude in the bath. This followed the claimant telling the second respondent that she had just had a bath and commenting "should've seen my bath had a glitter bath bomb…had so much fun x" The claimant did not send photos of herself in the bath, instead she sent a photograph of a nude colour palette to the second respondent. There followed a further exchange of messages between them. The claimant was not offended by any of the social exchanges between herself and the second respondent. The second respondent did not engage in unwanted conduct towards the claimant. At the relevant time the claimant regarded the written exchanges between her and the second respondent as casual banter. She entered into the messages freely. She was not offended or humiliated or intimidated by the messages.

    [The tribunal does not accept the claimant's evidence on this. She accepts that she does lie on occasion, even on very serious matters. For example, she has openly admitted before this tribunal that she lied to both respondents on separate occasions when she falsely told each of them that her urine sample showed that her drink had been spiked with the date rape drug "Rohypnal". The claimant's GP, in documentary evidence before this tribunal (page 150A), states " Unfortunately (the claimant doesn't always tell people the truth". Further, the claimant's evidence is inconsistent and unsatisfactory. The claimant has clearly stated in tribunal that at the time she sent and received the messages she regarded the exchanges as casual banter and it was only after the event on 27 October that she adopted a different view.]

22. The second respondent did not make any unwanted comments of a sexual nature to the claimant. The second respondent did not make any of the following verbal comments to the claimant:

    - "You have an amazing body for an 18 year old, imagine what you will look like when you are 21."
    - " You have a nice arse for an eighteen year old"
    - "You are fit now imagine what you will look like when you are 21".

[The tribunal does not accept the claimant's evidence on this. She accepts that she does lie on occasion, even on very serious matters. The claimant's evidence to this tribunal is inconsistent and unsatisfactory.

23. On Friday 27 October 2017 the claimant attended the first respondent's drinks party.

24. Prior to the drinks party the claimant left work early, with the consent of JR, as she needed to pick up a piece of sample clothing from her home address and give it to another employee. The claimant then attended the Friday drinks party with the second respondent and they were holding hands.

[On this the tribunal accepts the evidence of JR]

25. The claimant visited her flat prior to the Drinks party with the second respondent.

[This is the evidence of the claimant.]

26. The claimant recalls that she drank a few glasses of wine at that drinks party, ate some pizza. However, her next recollection is of waking up in her flat on her own at 6.30am the following day. She recalls that her apartment door was wide open, the apartment was a mess and she found a small bag of white powder on the floor. The claimant threw away the white powder, which she believed to be a drug. She did not call the police. Instead she contacted the second respondent by social media to try to find out what had happened the night before.

[*This is the evidence of the claimant.]*

27. There followed an exchange of messages between the claimant and the second respondent, in which the claimant expressed her concern that she may have offended someone the night before. The exchange shows that the claimant believed she had been drunk the night before. The claimant was upset and worried when she saw something posted on Instagram, which showed her behaving in a drunken manner the night before. The claimant has not identified who placed that post on Instagram.

28. The Medical evidence dated 19 January 2018 before the tribunal (page 150 A) includes the following:

28.1. the claimant suffers with depression and also probable personality disorder. She has poor compliance with her medication, sporadically takes alcohol and drugs and leaves herself in very vulnerable situations. She has informed her parents that she was probably raped twice in the last two years;

28.2. Problems:

28.2.1. 31 – Jan – 2017 - mental and behavioural disorders – due to substance misuse;
28.2.2. 29-Jan 2017 – attempted suicide – took two bags of cocaine;
28.2.3. 29 Nov 2016 – attempted suicide – took cocaine …

29. On 28 October 2017 the claimant sent a message to the second respondent telling him that she "got spiked last night, done tests and they found date rape in my urine."(page 77). That was untrue. The claimant had not been told that any date rape drug had been found in her urine. It is not clear whether the claimant did undertake any such test but what is clear is that there was no positive result for the presence of Rohypnol: the claimant admits that she lied about that.

30. On 30 October 2017, the Monday following Friday drinks, JR was at work when early in the morning another employee approached JR and asked whether she had seen the claimant. When JR said no, the employee suggested that she needed to find the claimant as something serious had happened. It was clear to JR that a number of people were talking about this. When JR saw the claimant for the first time, the claimant asked her to have a chat. The claimant told JR that there had been an incident at Friday drinks and that she had been spiked. She told JR that she had been sick after Friday drinks, so her parents had taken her to the hospital and Rohypnol had been found in her system. The claimant did not make any reference to, or complaint of, an alleged sexual assault. She did not accuse the second respondent of spiking the drinks. The claimant also told JR that she had spoken to a number of other employees, who had experienced similar symptoms. JR was seriously concerned with the issues raised by the claimant and immediately referred the issue to KS for advice. JR did not ridicule the claimant, was not dismissive of the claimant's concerns.

[On this the tribunal accepts the evidence of JR]

31. JR then told KS that the claimant had reported to her that she believed she may have been spiked at Friday drinks. KS was aware that there was some conversation going on within the team about Friday drinks. KS immediately recognised the potential severity of what JR was telling her and she went to LG for advice. LG advised that they needed to speak to everyone involved and establish what exactly had happened. KS emailed the claimant that morning to confirm that she had organised a meeting to discuss the events that the claimant could remember and also to ensure that the claimant was okay and whether there was any support respondent could offer (page 94).

32. A meeting took place between KS, LG and the claimant at 10:30 am on 30 October 2017. The claimant was asked to talk through the events of 27 October 2017. The claimant stated that she could not remember the events of

that night after around 7pm. She mentioned the names of several work colleagues who had she had been with at Friday drinks. The claimant stated that she had undertaken tests at hospital and that a urine test had identified Rohypnol in her system. The claimant stated that she had written confirmation of the test and results from hospital and LG asked the claimant to bring that in so that it could be considered as part of an investigation. The claimant did not suggest that the second respondent was involved in the alleged incident or that she was concerned that it had been the second respondent who had spiked her drink. The claimant was in fact praising the second respondent as she believed he had found her and ensured that she had got home safely. No allegation of sexual assault was made at that meeting. At the end of the meeting KS and LG confirmed that further investigation would be completed as they wanted to establish what exactly had happened at Friday drinks. They offered the claimant support and reminded her of an external employee assistance programme.

33. After that meeting the claimant entered into an exchange of text messages with the second respondent (page 78). The second respondent informed the claimant that he was being called into a meeting. The claimant indicated that she knew this. The exchange continued. Extracts read as follows:

Second respondent:
Awkward

Claimant:
what why?

Second respondent:
because I'm hearing you're saying your downstairs area is sore
but I know you got robbed safe
got to bed safe

Claimant:
what the fuck are you on about
None of that made sense
what the hell are you talking about

Second respondent:
yeah that made no sense ....
…. people are saying random things

Claimant:
who
I have no idea what you're saying literally no idea
……
Right can you and your friends just stay away from me please

Second respondent:

I've not said this shit

Claimant:
I literally don't know what you're talking about you make no sense to me... I have no idea what happened... Anything could have happened to me I have no idea... I have never felt this scared in my life

Second respondent:

we should talk though because next people are saying things

Claimant:
I don't give a shit what people are saying

……

Second respondent:
I'll stay away though if that's what you want

Claimant:

I literally feel violated though I don't know what happened to me I'm so scared

……

Second respondent:

That's cool I'll stay away. I did get you home though

34. At 11 am on 30 October 2017 LG and KS met with the second respondent. Notes were taken of the meeting (page 98). The second respondent stated that he had attended Friday drinks and stayed until the end, that the claimant had disappeared during Friday drinks so he had asked other colleagues where she was. The second respondent said that he went to the claimant's house to check on her but she was not there. On his walk home, he explained that he found the claimant on Dale Street with some unknown girls who said they had found the claimant in Cottonopolis, a nightclub. The second respondent said he then took the claimant home and was picked up by a friend. KS asked the second respondent whether he had noticed anything strange about the claimant's behaviour. The second respondent suggested that the claimant had hallucinated in her flat, as she appeared to be seeing other people in the flat. The second respondent said that he assumed that the claimant was drunk.

35. KS and LG then met with JR who explained that she had attended the early part of Friday drinks from 5pm to around 5:45pm JR said that as she was leaving, the claimant had arrived and JR believed her to be in her usual spirits. At the end of the meeting JR asked LG whether she should continue

with the performance management with the claimant. LG confirmed the investigation was a separate matter.

36. KS and LG then met with JF, a female stylist, who stated that she had felt drunk at Friday drinks and had slept from 8pm until the next morning which she described as weird. JF confirmed she got her own drinks and did not leave them unattended. JF stated that the claimant had appeared “happy drunk” at Friday drinks.

37. LG and KS then met with NV, a female lead photographer, who stated that she had only attended Friday drinks until 6pm so did not see anything unusual. NV stated that she had offered the claimant a drink of prosecco but the claimant had declined this as it gave her a “funny tummy”. Aside from that NV stated that the claimant appeared her usual self,

38. LG and KS then met with GK, a female stylist, who confirmed that the claimant had attended Cottonopolis after Friday drinks had ended with a number of other people. GK stated that a drink was bought for the claimant but she refused it. GK stated that she did not see the claimant drink anything whilst at Cottonopolis. GK stated that she thought the claimant was already “happy drunk” by that stage. GK said that the claimant left Cottonopolis after receiving a call from the studio team and had gone to find the second respondent.

39. On 30 October 2017 the claimant spoke to KS about an exchange of messages between the claimant and the second respondent. The claimant flicked through the messages on her phone. KS was unable to see them. The claimant said that she was upset by the messages from the second respondent because they were weird. KS advised her that if she was upset she should go to HR. KS did not want to discuss these matters with the claimant as this conversation was taking place in a public place. The claimant made no allegation of sexual assault or harassment against the second respondent during the course of this exchange.

40. The claimant emailed LG to request a further discussion. There was therefore a meeting between them in the early afternoon. The claimant reported to LG that she had exchanged What'sApp text messages with the second respondent, that she was confused by the messages that the second respondent was sending her and this led her to be concerned regarding his involvement in the alleged incident on Friday night. The claimant then showed LG some text messages between herself and the second respondent by showing her the screen of her mobile phone. The claimant showed LG the messages that the second respondent had sent to her and then scrolled past the replies that she had sent so that LG could not see how the claimant was replying, nor could she see any earlier conversations between the claimant and the second respondent to assess the tone or context of how they

generally communicated via What's app. The claimant showed LG a particular message in which the second respondent stated that other people had been talking to him about the claimant and it had been said that the claimant's "downstairs area was sore". LG understood that the claimant was concerned by these messages because she could not remember anything from Friday night. LG suggested that the claimant should stop communicating with the second respondent if it was making her feel uncomfortable. LG reassured the claimant that they were conducting an internal investigation and were trying to establish exactly what had happened at Friday drinks. LG reiterated the support previously offered to the claimant. In particular, LG asked whether the claimant was comfortable to remain in work, which the claimant stated she was.

[On this the tribunal accepts the evidence of LG, noting that the note prepared of the meeting at page 103 of the bundle is not a complete note of what was said during the course of that meeting.]

41. LG conducted a further investigatory meeting with C Mc, a male security officer, who was in charge of closing down Friday drinks. C Mc confirmed to LG that he had turned the lights on at 8:50 PM on the Friday and everybody had left by 9pm. C Mc had spoken to both the claimant and the second respondent during Friday drinks, and mentioned that he had a conversation with the claimant regarding how drunk she was at an earlier Friday drinks. CMc stated that the claimant had told him on Sunday, 29 October 2017, when she arrived for work, that she had been date raped i.e. her drink had been spiked. C Mc said he had asked when this happened and the claimant said she could not remember anything from the night. The claimant had also disclosed to C Mc that CM, a male Retoucher, may have been spiked. LG planned to investigate this further.

42. On 31 October 2017 JR emailed LG to see whether the claimant had provided the medical test results she had said she would provide following the first meeting. LG confirmed that she had not received this and asked JR whether she was aware if the claimant had the documents with her. LG was conscious not to apply pressure to the claimant, but at the same time wanted to encourage her to provide information which could help the investigation. JR told LG that the claimant had said she had the test results with her in work and JR had reminded her three times to bring it to LG.

43. On 31 October 2017 the claimant was due in work but did not attend on time. JR texted her to ask where she was (page 181). The claimant replied saying that she would be late for work the next day as she was attending a medical appointment to obtain a DNA test.

44. At approximately 10 am on 1 November 2017 JR sent a text message to the claimant asking for the claimant's computer passcode because JR could not

get in to the rota (p113). The claimant was awaiting her appointment at the SARC clinic when she received this message and replied to it. There is nothing aggressive in the tone of JR's message. The claimant replied to the message. JR informed the claimant that she had got in to the rota, to which the claimant replied "hahah okay good x"

45. At approximately 12.35 pm on 1 November 2017 JR sent a further message (p113) to the claimant enquiring "How is it going?????". The claimant indicated that she was on her way back to work. There is nothing aggressive in that message exchange.

46. By this date JR had arranged an informal performance meeting with the claimant to take place on 1 November 2017. The room for the meeting was arranged on or around 30 October 2017, after the claimant had raised her complaint about the spiking of drinks at the drinks party. JR and KS had been in email correspondence regarding the claimant's job description and had discussed the points JR intended to raise at the meeting. JR intended to raise with the claimant the following points:

    46.1. that she needed to concentrate on attention to detail;

    46.2. the adverse costs of booking trains;

    46.3. that it was important to ensure all child models had licences;

    46.4. that it was expected that the claimant was present during her job rather than visiting other areas of the office. JR had noticed that the claimant kept leaving her place of work to attend the Studio or going across the road every five minutes.

47. On 1 November 2017 JR emailed LG to explain that the claimant had attended a medical appointment and wished to speak with JR KS and LG about something serious. LG understood a performance meeting was due to take place that day with the claimant, so LG suggested that this performance meeting be postponed while they listened to what the claimant had to say. Arrangements were made for a meeting to take place that afternoon, as requested by the claimant. Notes were taken of the meeting (pages 116-117) but were wrongly dated 4 November 2017.

48. The claimant, KS JR and LG attended this meeting on 1 November 2017. During the meeting the claimant disclosed that:

    - she had attended a Sexual Assault Referral Centre (SARC) that day to undergo further tests;
    - DNA that did not belong to her had been found;

- this was concerning to the claimant as she had not had sex for 5 days and there was therefore no reason for another person's DNA to be present.

The claimant provided a letter confirming her attendance at the S A R C, but not the results of the tests. The claimant expressed her concern that she may have been sexually assaulted and that if that had happened she suspected that the second respondent may have had the opportunity to sexually assault her, that this sexual assault may have been by the second respondent or someone else unknown to her. The claimant did not make a formal complaint or allegation against the second respondent that he had sexually assaulted her. It was her expressed concern that she may have been sexually assaulted and, if so, she did not know who the attacker was and it could have been anybody, including the second respondent. The claimant gave a clear indication that she was not prepared to report the matter to the police. LG confirmed that:

- ultimately that was the claimant's choice;
- the respondent would support the claimant no matter what the choice;
- this was now a matter for the police and would recommend going to the police;
- the respondent would assist if the claimant wished to take that route;

49. LG asked again for the documentation confirming the urine sample. The claimant said she would bring that in the next day. LG then confirmed that the first respondent would support the claimant and again referred the claimant to the external employee assistance programme.

[On this the tribunal accepts for the large part the evidence of the respondent's witnesses. There has been a little inconsistency and the notes of the meeting are not a complete record of what was said. The claimant's recollection of this meeting is extremely poor. However, the claimant's evidence is clear in that before this tribunal the claimant stated categorically that she had never accused the second respondent of anything. In her witness statement the claimant merely states that she discussed her misgivings with regards to the second respondent. The claimant clearly had genuine concerns about what may have happened to her after the Friday drinks party when she had no recollection whatsoever of the events and had woken up to find her flat door wide open. Her visit to the SARC showed that she suspected that she may have been the victim of a sexual assault. The respondents were aware of the claimant's concerns. However, the claimant fell short of making any direct allegation against the second respondent because she had no knowledge of whether anything had happened to her, and if it had happened, who had been involved.]

50. At the meeting on 1 November 2017 LG asked whether the claimant was comfortable being in work. The claimant confirmed that she was and thanked

LG for the support. The claimant did not say that she was uncomfortable working with the second respondent, did not express any concern about continuing to work with the second respondent. The claimant said that she wanted to put the matter behind her and continue in work. In concluding the meeting LG reminded the claimant that there were still performance issues which needed to be discussed as a separate matter to the investigation, and that these would be addressed at another time.

[On this the tribunal accepts the evidence of the first respondent's witnesses. In reaching this finding the tribunal bears in mind that:

- *LG and KS conducted a further investigatory meeting the next day. This meeting had been previously arranged as part of the investigation;*
- *LG did not confirm in writing the claimant's declaration that she wanted to put the matter behind her and that the investigation would not continue*

These matters are not inconsistent with the respondent's evidence. The tribunal notes that the claimant did not ask about the conduct of the investigation after 1 November 2017, made no complaint that the investigation had been stopped. That is consistent with the first respondent's evidence that the claimant wanted to put the matter behind her.]

51. On 2 November 2017 LG and KS conducted a further investigatory meeting with CM. There had been concern raised that CM may also have had his drinks spiked so KS was keen to establish whether this was true. In the meeting CM confirmed that he had attended Friday drinks and had been sick, but felt fine the next morning. CM stated that he did not see anything unusual and had gone straight home. CM did not report any suspicion that his drinks had been spiked.

52. In the investigatory meetings with the various employees/work colleagues they were not asked the direct question: did they think that their drinks had been spiked. Instead, LG and KS asked open questions relating to how the interviewee had felt at the drinks party and what they had observed. None of the employees/work colleagues interviewed said that they suspected that their drinks were spiked. Only the claimant made that assertion.

53. The respondent did not interview every attendee at the drinks party. They interviewed friends of the claimant, people who worked directly with her. The claimant did not identify any other attendee at the drinks party whom she believed would have relevant evidence to give.

54. It is the normal practice of the respondent when conducting investigations, to provide copies of notes of any investigatory meeting for approval by the

attendee of that meeting. That normal practice was not followed in this case. Notes were prepared of each of the meetings and were retained on file.

55. LG prepared notes of the investigation (page 117C). The notes show that:

55.1. LG discussed the allegations with managers and that it was agreed that they needed to see the result of the urine test to understand fully the next steps in that investigation. (page 117F);

55.2. On Wednesday 1 November 2017 (page 117C) KS had expressed her concern to HR that the claimant had continued to be vocal with her team about the incident on Friday drinks and was upset. KS had sent the claimant home early that day around 4.30pm.

56. KS was not upset by the claimant being vocal. She was simply concerned at the time about the potential for yet more rumours.

[On this the tribunal accepts the evidence of KS]

57. After the meeting on 1 November 2017 the claimant did not provide the medical evidence she had previously promised. KS had requested this a number of times but did not want to apply pressure to the claimant.

58. The investigation did not progress any further. No further interviews were undertaken. No further steps were taken because the claimant had indicated at the meeting on 1 November 2017 that she did not want to take the matter further, that she wished to carry on at work. The claimant continued to work in the usual way. KS was aware that the second respondent was going to be present in the Studio and checked whether the claimant was comfortable with this. The claimant said that she was fine.

59. JR and KS continued to investigate and monitor the claimant's performance in her work. The first respondent's managers did not conduct such investigation and/or monitoring of the claimant's performance in a demeaning or offensive or humiliating manner.

60. On 7 November 2017 KS attended a meeting with JR and the claimant for an informal discussion surrounding the claimant's performance. This was the meeting delayed from 1 November 2017. There was a review of the claimant's job description and JR expressed concern regarding the claimant's ability to manage priorities, manage travel bookings, keeping option and bookings schedule up to date, and other elements of her role. The contents of this discussion were set out in a Job Chat form which is contained at page 118 of the bundle. A job chat form is an internal document within the respondent company which is used for informal performance management meetings. LG was updated on this meeting. It is normal practice for these

"Job Chats" to be held by two managers. It was noted that there would be a review of the claimant's performance against noted actions in 2 weeks. The claimant did not say that her performance was affected by the events following the drinks party and/or the requirement to work in close proximity to the second respondent.

61. On 8 November 2017 KS provided LG with a summary of the discussions that had taken place with the claimant (page 120 of the bundle). This detailed various concerns with the claimant's work performance including leaving work early on a number of occasions and on one occasion being untruthful in the reasons why.

62. JR continued to follow up with tasks the claimant had not completed. This is evidenced at pages 125 – 134 of the bundle. These emails are not aggressive. They do not support the assertion that the first respondent changed its attitude, and became aggressive. The tribunal notes that at times JR continues with the address "Hey hun". For example, by email dated 20th November at page 133 of the bundle JR addresses the claimant as follows:

> Hey Hun just noticed there are no agencies under the male models on the board! Please can you amend this tomorrow x

63. JR does at times point out that these are repeat instructions after a repeated mistake. For example, she on occasion uses block capitals to emphasise a point. For example:-

63.1. by email dated 10 November 2017 (page 129) JR asks the claimant:

> Can you make sure the options are on the kids options chart also! VERY IMPORTANT! Not going to ask again. X

63.2. By email dated 14 November 2017 (page 131) JR asks the claimant:

> Can you get together the below for 5pm:
> a schedule of your plan for Thursday
> -packs of kids you are going to see
>
> AGAIN please don't book any transport until we have been through this
> Thanks x

The use of block capitals by itself is not evidence of aggression towards the claimant. JR is clearly seeking to emphasise the point. She also did this in emails prior to the claimant's complaints on 30 October and 1 November 2017. In the email dated JR used bold font and underlining for emphasis (see paragraph 18 above).

64. These emails showed genuine concerns about the claimant's performance. There is no satisfactory evidence to support the claimant's submission that the email trail at page 129 of the bundle suggests a hypersensitivity to the claimant's performance by JR. There is no satisfactory evidence to support the submission that JR had exclaimed the importance of recording kids options within minutes of the claimant confirming that is exactly what she would do. The claimant has raised no satisfactory evidence on this point. The submission is made on the basis of a reading of the emails before the tribunal and is not supported by any satisfactory evidence. This was not raised with JR in cross-examination. She was not given the opportunity to respond to this assertion. The claimant has raised no satisfactory evidence to counter the respondent's evidence that the performance issues raised by them were genuine.

65. After the meeting on 1 November 2017 the claimant:

65.1. did not make any enquiry as to the progress of the investigation into her allegation in relation to the spiking of her drink at the drinks party;

65.2. did not make a request for the investigation to be continued;

65.3. did not make any complaint as to the conduct of the investigation;

65.4. did not make any complaint about having to work in the same office as the second respondent;

65.5. did not ask for the second respondent to be suspended, did not complain about the failure to suspend him;

65.6. did not inform any of her managers or HR that her performance was affected by the incident on 27 October 2017 and her concerns about what might have happened on that night;

65.7. did not raise any complaint of aggressive behaviour by JR or any other manager;

65.8. did not ask for any further training;

65.9. did not make any complaint or express any concern about the appointment of the second respondent as an employee;

65.10. did not provide the respondent with documentary evidence of the urine test which she said she had undertaken on or around 28 October 2017;

65.11. continued to visit the premises where the second respondent worked without complaint;

65.12. did not inform anyone in the office that she felt humiliated or offended by any actions or inactions of either of the respondents;

65.13. did not tell any of the managers or HR advisers of the first respondent that she had changed her mind and wanted the investigation to continue, that she was no longer comfortable at work, that she was no longer comfortable working with the second respondent, that she was upset, humiliated or offended by having to work in close proximity to the second respondent

66. On 13 November 2017 the first respondent employed the second respondent. The claimant raised no complaint about that at the time. Neither JR nor LG nor KS made the decision to employ the second respondent.

67. On the 22 November 2017 KS became aware of more serious issues with the claimant's performance, in particular, in relation to Billboard usage. JR emailed KS and summarised three examples of performance concerns which had led to significant unnecessary costs being incurred for the respondent company (page 140 of the bundle). The email includes:

Is the below okay?

With regards to the issues we're having with [the claimant]:

W….. billboard usage

Received a complaint from an agency who have tried to contact her on numerous occasions with regards to billboard usage (also mentioned they tried to speak to her about kids with no response)

-I asked the claimant to send me the relevant information for the job so I could pick this up and remedy for her, which she did not do fully
-When looking into the complaint I discovered that [the claimant] did not send an official confirmation we are therefore breach of contract using the imagery without payment.
- Without official documentation it has cost us double what it should have done as we don't have a leg to stand on and it has cost us double what it should be.

F ….billboard usage

J…. informed me that he specifically asked her to include billboards in a contract usage.
This did not happen and when she went back to the agent for costs it was astronomical amount (over £2000)
Meaning menswear now cannot use the imagery they intended and specifically shot for billboard campaign

B….W…. billboard usage

> Was asked to include billboards in the usage especially as it was a higher rate Billboards have not been included this is going to cost a lot in additional usage as B was a high rate to begin with

68. These were genuine concerns, genuine problems with the claimant's performance. The fact that the claimant had raised a query about the appropriate rates for Billboard usage (page 130) does not invalidate the complaint raised by JR.

[On this the tribunal accepts the evidence of JR. The claimant has adduced no satisfactory evidence to contradict that evidence.]

69. KS replied to JR's email in the following terms:

> Wow plenty to go off there! I've got to issue the letter and evidence to support it today but I'll leave it until towards the end of the day....

70. KS was surprised to see how many issues there were with the claimant's performance and the adverse financial impact this had. That was the reason she had used the word "Wow" at the beginning of her email. KS does not work at her desk all day and had duties to perform away from the office. That is why she indicated she would leave handing the letter to the claimant until later in the day, as she needed to sign it. As it turned out, KS returned to the office sooner than anticipated and she and JR handed the claimant the letter of invitation to the probation review meeting in the early afternoon (page 144). There was no intention by KS to deliberately delay handing the letter to the claimant.

[On these matters the tribunal accepts the evidence of KS]

71. JR and KS agreed to proceed to a formal probation review meeting with the claimant. LG assisted KS in drafting an invite letter (page 143 of the bundle.) Extracts from that invite letter read as follows

> Notification of probation review meeting – Thursday, 23 November 2017
>
> I am writing to confirm that you are invited to attend a probation review meeting in accordance with your six-month probation period
>
> > Reason for hearing: to review performance in the role as model Booker
> > Attendees: KS, studio manager and LG, HR advisor
> > When: Thursday 23rd November – 4.30pm

> Please find enclosed copies of relevant evidence which will be referred to during the meeting. The company will rely on these documents in support of the allegations made against you.
>
> All the factors will be considered and a decision will be made regarding your future employment. As you are still within your probation period, if it is confirmed that the required standards have not been reached the outcome of this meeting may result in the termination of your contract.
>
> You have the right to bring along a work colleague or certifies trade union representative to act as your witness at the hearing

72. Attached to the letter was the Record of the Job Chat and the list of weekly tasks (pages 145 and 146). This letter was in a standard format used by managers of the first respondent when inviting employees to probation review meetings in their probationary period. Each and every employee is advised that a possible outcome of the meeting may result in the termination of contract. It is standard practice for 24 hours notice to be given of such a probation review meeting.

73. Shortly after JR provided the claimant with letter, the claimant stood up and said that she was leaving. She left the office. JR then received a call from the claimant's mother. The claimant's mother told JR that the claimant had told her that the respondent had asked her to leave. JR confirmed that this was not the case. JR explained that the respondent had simply invited the claimant to a meeting the next day to discuss performance concerns and it was the claimant who chose to leave the building. The claimant's mother asked whether this was personal. JR confirmed that it was not; it was solely related to the claimant's performance.

74. The next day JR received an email from the claimant in which she resigned her position with immediate effect (page 149 of the bundle). Extracts from the email read as follows:

> I would please like you to take this email as my official resignation..
> I wish for my employment to end with immediate effect
> Whilst working for [the first respondent] I feel like the job role I was given was not explained to me fully, I feel like I didn't have sufficient training to begin with and ended up doing more than my job entailed.
> There have been certain incidents which have led me to feel extremely uncomfortable with a colleague of mine, I don't feel like this was handled properly and as this person is now officially full-time I don't feel comfortable working so closely beside them. After reading the points I got handed yesterday I have a few things I feel have been misunderstood…..
> I feel like I am not comfortable working at the first respondent would like my employment and immediately

75. The claimant answered some of the allegations of poor performance within that email of resignation. In particular, she provided her explanation about some of the billboard issues.

76. The day after the resignation the claimant sent to JR a text message (page 180) in the following terms:

> Thank you for everything J….., you're a wonderful person to work with! Sorry it didn't work out, if you need anything let me know xx

77. JR replied to wish the claimant well for the future.

78. After the presentation of the claim to the employment tribunal the first respondent investigated the allegations made against the second respondent, because a significant number of the allegations had not been previously disclosed to the first respondent. The second respondent was interviewed on 8 February 2018. As part of the investigation the second respondent provided the first respondent with a complete transcript of the what's app messages between himself and the claimant. That complete transcript was included in the Agreed Bundle as part of these proceedings. During the interview the second respondent:

    78.1. stated that he and the claimant were friends and engaged in text and whats app messages, which he described as banter;

    78.2. stated that he was never under the impression that the claimant was not happy with the messages;

    78.3. denied having any physical or sexual contact with the claimant whilst at her flat on the night of 27/28 October 2017.

79. The first respondent took no disciplinary action against the second respondent in relation to the complaints raised by the claimant in her claim form.

80. The second respondent was dismissed on or around 23 February 2018 for performance related issues, by the second respondent's line manager, who had not been involved in the management of the claimant or the investigation of the incident on 27 October 2017.

81. After the termination of the claimant's employment, in or around May 2018, the claimant reported the incident on 27 October 2017 to the police. The investigation was closed in September 2018. The police later confirmed to the first respondent that there was insufficient evidence from the DNA samples taken at the claimant's visit to the SARC clinic, to pursue the investigation.

The Law

82. Section 39 Equality Act 2010 provides:-

(2) An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment

83. Previous case law is of assistance in defining the meaning of "detriment". In the case of **Ministry of Defence v. Jeremiah [1998] ICR 13 CA** (a sex discrimination case), the Court of Appeal took a wide view of the words "*any other detriment*" indicating that it meant simply "*putting under a disadvantage*". The House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** (a race discrimination case) held that in order for there to be a detriment the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. While an unjustified sense of grievance cannot amount to a detriment, it is unnecessary for the claimant to demonstrate some physical or economic consequence.

84. The EHRC Code of Practice on Employment provides:

9.8 Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse, or put them at a disadvantage. ... A detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However an unjustified sense of grievance alone would not be enough to establish detriment."

85. Section 136 Equality Act 2010 provides:

Burden of Proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

86. Section 13 Equality Act 2010 provides:

> "A person (A) discriminate against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others."

87. Section 23 Equality Act 2010 provides:-

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case;

88. When considering the appropriate comparator we note that like must be compared with like. Previous case law is of assistance in this exercise. Relevant circumstances to consider include those that the alleged discriminator takes into account when deciding to treat the claimant as he did. **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337.** If no actual comparator can be shown then the tribunal is under a duty to test the claimant's treatment against a hypothetical comparator. **Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting (2002) ICR 646.**

89. We have considered the decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332**, and its observations on the correct approach to the burden of proof in discrimination cases. We note the Court of Appeal's decision in **Igen Ltd v Wong [2005] IRLR 258** where the **Barton** guidelines were amended and clarified and it was confirmed that the correct approach, in applying the burden of proof regulations, is to adopt a two stage approach namely (1) has the claimant proved, on the balance of probabilities) the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination? and, if so, (2) has the respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act? We note also the case of **Madarassy v Nomura [2007] IRLR 246**, which confirmed the guidance in **Igen**. The Court of Appeal in **Ayodele v CityLink Ltd and anor 2018 ICR 748, CA** confirmed that at the first stage of this two stage approach the burden remains on the claimant to prove facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination

90. In **The Law Society v Bahl 2003 [IRLR] 640** the EAT held that a Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. The tribunal must consider all the relevant circumstances to determine the reason for the unreasonable treatment.

91. We also note the decision in the case of **Hammonds LLP v C Mwitta [2010] UKEAT** in which the EAT (Slade J) reiterated that the possibility that a respondent "could have" committed an act of discrimination is insufficient to establish a prima facie case so as to move the burden of proof to the respondent for the purposes of (now) s136 Equality Act 2010. The tribunal must find facts from which they could conclude that there had been discrimination on the grounds of race. The absence of an explanation for differential treatment may not be relied upon to establish the prima facie case.

92. Section 26 Equality Act 2010 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 these dignity, or

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

93. The EHRC Code of Practice on Employment 2011 provides, in relation to harassment under section 26:

7.6 This type of harassment (harassment related to a protected characteristic) of a worker occurs when a person engages in unwanted conduct, which is related to a relevant protected characteristic and which has the purpose or the effect of:

Violating the worker's dignity; or

Creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word "unwanted" means essentially the same as "unwelcome" or "uninvited". "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

7.16 For all three types of harassment, if the purpose of subjecting the worker to the conduct is to create any of the circumstances defined in paragraph 7.6, this will be sufficient to establish unlawful harassment. It will not be necessary to enquire into the effect of that conduct on the worker.

7.17 Regardless of the intended purpose, unwanted conduct will also amount to harassment, if it has the effect of creating any of the circumstances defined in paragraph 7.6.

7.18 in deciding whether conduct had that effect, each of the following must be taken into account:

(a) the perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment;

(b) the other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which to conduct takes place.

(c) whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

94. The Tribunal must consider all surrounding circumstances and may draw any appropriate adverse inference in deciding whether the unwanted conduct did have that purpose.

95. The cases relating to harassment claims under the legislation prior to the Equality Act are of some assistance. We note **Richmond Pharmacology v Dhaliwal 2009 ICR 724** in which the EAT noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions the tribunal should then consider whether it was reasonable for him or her to do so. In deciding whether the claimant did experience these feelings or perceptions the tribunal must apply a subjective test. However, we note the decision of the Court of Appeal in **Land Registry v Grant 2011 ICR 1390** in which the court commented that tribunals must not cheapen the significance of the words (violation of dignity or intimidating hostile degrading humiliating or offensive environment) because they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. It follows from this that the fact that a claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or offensive environment.

96. In deciding whether it was reasonable for conduct to have that effect an objective test is applied. Whether it was reasonable for a claimant to have felt his dignity to have been violated is a matter for the factual assessment of the Tribunal taking into account all the relevant circumstances including the

context of the conduct in question. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular claimant.

97. S.27(1) Equality Act provides:

'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.' By virtue of S.27(4), the victimisation provisions apply only where the person subjected to a detriment is an individual.

98. It follows from S.27(1) that a claimant seeking to establish that he or she has been victimised must show two things: first, that he or she has been subjected to a *detriment*; and, secondly, that he or she was subjected to that detriment *because* of a protected act.

99. The following are 'protected acts' for the purpose of S.27(1):

- bringing proceedings under the Equality Act
- giving evidence or information in connection with proceedings under the Equality Act
- doing any other thing for the purposes of or in connection with the Equality Act, and
- making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the Equality Act

100. Lord Nicholls indicated in ***Nagarajan v London Regional Transport 1999 ICR 877, HL*** (a race discrimination claim), that if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out. **Nagarajan** was considered by the Court of Appeal in **Igen** (see above). In that case Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.'

101. This " significant influence" test was applied by the EAT in the context of a victimisation claim in **Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469, EAT.** The EAT confirmed 'we recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the tribunal thought that any relevant influence had to be important… If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial.'

102. In **Woodhouse v West North West Homes Leeds Ltd 2013 IRLR 773, EAT,** the EAT observed that the relevant question was whether

the protected acts had played any significant part in the employer's decision.

Constructive dismissal

103. The Tribunal has referred to **Western Excavating (ECC) Limited v Sharp [1978] ICR 221** and the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.

104. The first question is whether the employer committed a fundamental (or repudiatory) breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

105. The employer's repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.

106. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for the resignation: it is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**.

107. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental.

108. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

109. The determination includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

110. The tribunal has considered each of the Issues contained in the agreed Amended List of Issues, which is set out at Appendix 1.

Paragraphs 1 – 4 of the Agreed List of Issues

111. The second respondent did not make the verbal comments (as outlined in claimant's further and better particulars [p22] and her statement) to the claimant.

112. The claim of direct discrimination and harassment in relation to these alleged comments is not well-founded and is hereby dismissed.

Paragraphs 5 – 8 of the Agreed List of Issues

113. The second respondent did, before the incident on 27 October 2017, send text and Whatsapp messages to the claimant as part of a social exchange between the two. This was not less favourable treatment of the claimant. She suffered no detriment. She was a willing participant in what she regarded as casual banter.

114. The tribunal has considered all the text and WhatsApp messages, and in particular, the request by the second respondent for a nude photo of the claimant. The claimant and the second respondent were clearly friends engaging in messages of a flirtatious nature, in which both engaged freely and voluntarily. This was not unwanted conduct. Further, there is no satisfactory evidence that any of these messages were sent by the second respondent with the purpose of creating a humiliating or offensive environment for the claimant. The second respondent was older than the claimant, but he held no position of seniority over her, no managerial position. Further, the tribunal does not accept the evidence of the claimant that she was humiliated by them or found them to be humiliating and/or offensive. The claimant's evidence is inconsistent and unsatisfactory. It is her clear evidence that at the time she had no concerns about these messages: she regarded them as banter.

115. The claimant did become upset by the contents of messages from the second respondent after the incident on 27 October 2017, in particular the message referred to at paragraph 33 above. The claimant was upset by the messages because the second respondent was reporting to her what work colleagues were saying about the incident at the drinks party. The second respondent was in effect reporting office gossip. The claimant was upset because she did not understand the messages, which were poorly written and confused, and she did not understand what her work colleagues were saying. The claimant has not sought to establish either an actual or hypothetical comparator in relation to the claim of direct discrimination. The tribunal does not accept that there was any difference in treatment between the claimant and an actual or hypothetical comparator. The question is whether the second respondent would have treated a male colleague any differently in

circumstances which were not materially different. The tribunal considers that any hypothetical comparator would be a male colleague of the second respondent who:

- had reported that his drinks had been spiked at a works event with a date rape drug;
- had a friendly relationship with the second respondent;
- had engaged in extensive what's app messages with the second respondent before this incident; and
- had no recollection of events after the works event; and
- had asked the second respondent for information about what had happened following the works event;
- had received from the second respondent, in an exchange of messages, information about the events after the works event

116. In all the circumstances the tribunal finds that the second respondent would have treated the hypothetical comparator in exactly the same way, that is, the second respondent would have reported back to the male hypothetical comparator the office gossip about the male comparator's complaint of having his drinks spiked, including the information "I'm hearing you're saying your downstairs area is sore" There was no difference in treatment.

117. Further and in any event, there are no facts from which the tribunal could infer that any difference in treatment was because of sex. The fact that the second respondent reported that the office gossip included that the claimant had reported that "I'm hearing you're saying your downstairs area is sore" are not facts from which the tribunal could draw the appropriate adverse inference. Such a comment is not gender specific. The same could be said about a male colleague who reported that his drinks had been spiked with a date rape drug.

118. The sending of the messages about the office gossip was not less favourable treatment because of the claimant's sex.

119. As to whether the sending of the what's app message about the office gossip meets the definition of harassment, this was not conduct relating to the claimant's sex. Further, there is no satisfactory evidence to support any assertion that the second respondent sent the what's app message with the purpose or intent of creating a humiliating or offensive environment for the claimant. The nature of the message and the context in which it was sent, is consistent with the second respondent sending this what's app message with the purpose of informing the claimant what was being said in the office.

Further, the tribunal does not accept the evidence of the claimant that she felt humiliated or violated by this what's app message. The claimant's evidence on this is unsatisfactory. The complete what's app messages show that the claimant, quite understandably, was upset by the thought of what might have happened to her after the drinks party, the possibility that she might have been sexually assaulted by a person unknown. The what's app messages show that the claimant's expressed feelings of being violated related to that incident, that possibility, and not to the what's app message received from the second respondent explaining office gossip. Further and in any event having considered all the circumstances, if the claimant was humiliated by this or did feel humiliated or violated because of the what's app message, the tribunal finds that it was not reasonable to have that effect. The claimant clearly had a good relationship with the second respondent. They obviously saw a lot of each other, they obviously drank together. They obviously exchanged what's app messages on an extremely regular basis and the claimant had openly invited the second respondent to find out what had happened to her on the night of the drinks party. The claimant did exchange messages with the second respondent while in the office. She responded freely. When the claimant indicated that she was not happy with the messages the second respondent gave a clear indication that he would stay away. In these circumstances, for the claimant to receive a what's app message from the second respondent, reporting what was being said in the office, does not amount to harassment within the meaning of section 26 of the Equality Act.

120. The claims of direct discrimination and harassment in relation to the verbal comments and text messages/what's app messages from the second respondent are not well-founded.

121. The claim against the second respondent fails.

122. It follows that the tribunal does not need to address whether the first respondent is the vicariously liable for the acts of the second respondent and does not do so.

123. The claims against the second respondent are not well-founded.

Paragraphs 9 – 13 of the Agreed List of Issues.

124. In relation to the issue at paragraph 9 of the List of issues, there is no sufficient evidence on which the tribunal can be satisfied that the claimant's drinks were spiked on 27 October 2017. The claimant has produced no satisfactory evidence to support this allegation. The claimant did not undertake a urine test which showed any drug in her system. The claimant has a history of drug abuse. That is clear from the medical evidence. The claimant found a drug on the floor of her apartment when she woke up the following morning. The claimant has no recollection whatsoever of what she

did, what she drank, what if any other substance(s) she took from 7pm on the Friday evening to 6:30am the following day. It is not clear on what basis the claimant pursues this allegation bearing in mind her admission that she lied about the results of the drug test.

125. The allegations of direct discrimination and/or harassment in relation to the alleged spiking of drinks are not well-founded and are hereby dismissed.

Paragraphs 14 – 15 of the Agreed List of Issues.

126. In relation to the issue at paragraph 14 of the Agreed list of issues there is no sufficient evidence on which the tribunal can be satisfied that the claimant was sexually assaulted on 27 October 2017. The tribunal accepts that the claimant had genuine and reasonable concerns that a sexual assault may have taken place, bearing in mind that she has no recollection whatsoever of any events that took place after 7 o'clock on the Friday evening until 6:30am the following day, when she woke up to find the door of her flat in the centre of Manchester wide open and drugs on the floor. However, the claimant lied to the respondent when she said that the results of the tests in the SARC clinic showed that foreign DNA had been found. The tribunal has not been provided with the results of these tests taken at this SARC clinic. The tribunal accepts that sexual assault **may** have taken place. However, there is no evidence whatsoever that sexual assault **actually** did take place. It is not clear from the list of issues what claim the claimant is actually making in relation to this alleged sexual assault. However, the tribunal finds that no such sexual assault took place. Therefore, in answer to paragraph 15 of the Agreed list of issues, the first respondent is not, and cannot, be vicariously liable pursuant to s109 Equality Act.

Paragraphs 16 - 18 of the Agreed List of issues

127. On 30 October 2017 and 1 November 2017 the claimant made a complaint that her drinks had been spiked at the drinks party and that this spiking may have been done by the second respondent. There was no complaint of sexual assault by the second respondent. The claimant expressed her concerns and worries that she may have been sexually assaulted and if that was the case then this may have been the second respondent or another person unknown. As stated above the claimant is adamant in evidence before the tribunal that she makes no allegation against the second respondent, and has never made any allegation against the second respondent. An expression of concern that there was a possibility that there may have been a sexual assault, and, if so, the identity of the attacker was unknown and it may have been the second respondent because he had the opportunity to perpetrate such an attack does not amount to a complaint of sexual assault.

128. The first respondent did investigate the complaint in a reasonable manner. It interviewed the claimant's work colleagues, it interviewed the security officer. The claimant did not identify any other witnesses who may have relevant evidence to give. She did not provide the respondent with the alleged urine test to take the investigation further. The first respondent carried out a reasonable investigation of the allegation that the claimant's drinks had been spiked at the drinks party. They did not carry out any investigation as to whether or not the claimant had been the victim of sexual assault because the claimant made no such allegation against the second respondent. That was reasonable. The first respondent became aware of a possible sexual assault at the meeting on 1 November 2017. The first respondent encouraged the claimant to report the matter to the police. The claimant gave a clear indication at the time that she did not wish to do so, and that she wanted to put the matter behind her. She made no complaint that the investigation was not progressing. On the limited information given by the claimant at the time the investigation by the first respondent was reasonable.

129. In any event, this is, firstly, an allegation of direct discrimination because of sex. The question is not whether the respondent acted fairly or reasonably. The first question is whether there was any less favourable treatment. The tribunal has considered paragraphs 17 and 18 of the Agreed List of Issues together and notes in particular that:

129.1. the first respondent did not make any findings following their investigation of the claimant’s complaint and did not share those findings with her; and

129.2. the first respondent did not suspend the second respondent

130. The tribunal does not accept that the claimant suffered any detriment or other disadvantage by the way in which the respondent conducted the investigation. The claimant did not identify any further witnesses, made it clear that she wanted to put the matter behind her, made no complaint at the time about the nature of the investigation or its lack of progress. The claimant did not ask about the findings of the investigation, did not ask for the findings to be shared. She made no complaint whatsoever about the second respondent continuing to work in the same or adjoining premises. To the contrary she stated she was comfortable continuing to work in the same work premises. There is no satisfactory evidence that the claimant suffered any detriment at the time. There was no less favourable treatment.

131. Further, and in any event, the next question would be whether there was a difference in treatment. The claimant has not identified an actual comparator. The tribunal considers that a hypothetical comparator would be a male comparator of the same age and length/grade of employment as the claimant who:

131.1. made a complaint that his drinks had been spiked at the drinks party and that this spiking may have been done by a female work colleague who was also in attendance at the drinks party;

131.2. made no complaint of sexual assault by the female work colleague;

131.3. expressed his concerns and worries that he may have been sexually assaulted after the drinks party and, if that was the case, that this may have been the female work colleague or another person unknown;

131.4. had been encouraged by the first respondent to report the matter to the police but had given a clear indication that he did not wish to do so but wanted to put the matter behind him;

131.5. made no complaint at the time that the investigation was not progressing;

131.6. did not ask about the findings of the investigation, did not ask for the findings to be shared;

131.7. made no complaint whatsoever about the female colleague continuing to work in the same or adjoining premises;

131.8. stated that he was comfortable continuing to work in the same work premises as the female colleague who may have spiked his drinks, who had the opportunity to sexually assault him after the drinks party.

132. There is no evidence to support any assertion that the respondent would have treated the male hypothetical comparator any differently. The tribunal is satisfied that there is no evidence to support a finding of a difference in treatment. The tribunal is satisfied and finds that the respondent would have conducted the investigation of the alleged spiking of drinks in the same way, would not have investigated the possibility of sexual assault by the female work colleague in the absence of an actual allegation of such assault by the male comparator, would not have suspended the female colleague in the absence of an actual complaint of sexual assault.

133. Further, and in any event, there are no facts from which the tribunal could infer that any difference in treatment was on the grounds of sex. The fact that the respondent did not follow their normal practice of inviting witnesses to agree and sign notes of their interviews is not a fact from which the tribunal could draw the appropriate inference. A departure from normal practice is not gender specific. The fact that the first respondent did not, during the investigatory interviews, ask the direct question as to whether the witness thought their drinks had been spiked, is not a fact from which the tribunal

could draw the appropriate inference. Again this is not gender specific, and in any event, was reasonable conduct. The fact that the first respondent continued the investigation by interviewing the one outstanding potential witness, CM, on 2 November 2017, a day after the meeting with the claimant, is not a fact from which the tribunal can draw the inference of discriminatory treatment. This was an interview which had been scheduled to take place before the meeting with the claimant on 1 November 2017. An assertion had been made that CM may have had his drinks spiked. It was reasonable and understandable for that serious issue to be addressed.

134. Further and in any event the tribunal has considered the explanation put forward by the first respondent. Having considered all the circumstances the tribunal accepts the evidence of the first respondent's witnesses and finds that:

134.1. The first respondent did not continue with the investigation, did not make any findings following their investigation of the claimant's complaint and did not share those findings with her because it had interviewed all the witnesses identified as having potentially relevant evidence, the claimant did not want to pursue the matter, she wanted to put it behind her and carry on working. The first respondent respected the claimant's decision on this, even though they advised her to report the matter to the police and offered her support in doing so;

134.2. The first respondent did not suspend the second respondent because the claimant had not made a direct allegation of sexual assault against him and confirmed that she was happy to continue to work in close proximity to the second respondent. The tribunal considers this reasonable conduct consistent with an employer's duty to take care of all its employees. It is difficult to see how the first respondent could have justified suspension of the second respondent in these circumstances.

The actions of the respondent were not in any way related to, were not because of, the claimant's sex.

135. The claim of direct discrimination is not well-founded.

136. In relation to the alternative argument that this conduct amounted to harassment, the tribunal finds that the conduct of the investigation, the failure of the first respondent to make any findings following their investigation of the claimant's complaint, the failure to share those findings with the claimant, and the failure to suspend the second respondent is not unwanted conduct of a sexual nature. The claimant did not want the investigation to continue, made no request for any findings, made no complaint about the investigation at the time, raised no objection to continuing to work in the same business premises

as the second respondent, confirming that the she was comfortable to carry on working in the same business premises.

137. Further, and in any event, the first respondent did not conduct the investigation, did not fail to make and share its findings, did not fail to suspend the second respondent, with the purpose or intent of creating a humiliating or offensive environment for the claimant. Each of the managers acted in an appropriate manner, offered the claimant support, checked whether she was happy to continue working in the same working environment as the second respondent. There is no satisfactory evidence to support the assertion that any of the managers acted in a belittling or demeaning way towards the claimant. The fact that JR sent to the claimant a text message enquiring about computer access codes while the claimant was at the hospital awaiting the SARC tests is not evidence of any intention to bully or harass the claimant. It is clear that JR and the claimant did engage by text message on work issues. The claimant did not have to respond to that text message but chose the do so. The wording of the response (see paragraph 44 above) does not support the claimant's case now that she found that text message humiliating oppressive or offensive at the time.

138. Further, the tribunal does not accept the claimant's evidence that she was offended or humiliated by the first respondent's conduct of the investigation, the failure of the first respondent to make any findings following their investigation of the claimant's complaint, the failure to share those findings with the claimant, and the failure to suspend the second respondent. The claimant's evidence has been unsatisfactory. She was not offended or humiliated by the conduct of the first respondent. She made no complaint at the time. Her criticisms of the respondent's conduct were made for the first time after her resignation and as part of these proceedings.

139. The claim of harassment is not well-founded.

Paragraph 19 of the Agreed List of Issues

140. The respondent decided to employ the second respondent on 13 November 2017. It is not clear who made that decision. It was not the decision of any of the first respondent's witnesses. In any event, there is no satisfactory evidence to support the assertion that this decision was either unwanted conduct or less favourable treatment of the claimant. She suffered no detriment from this decision. It was not upsetting offensive or humiliating for the claimant. The tribunal rejects her evidence on this point. Again, the claimant made no complaint about it at the time. The complaint was made after her resignation and as part of these proceedings. The respondent's decision to employ the second respondent on 13 November did not amount to an act of less favourable treatment or harassment because of sex.

Paragraph 20 of the Agreed List of Issues

141. The claimant was required to work in close proximity to the second respondent. She made no complaint about it at the time. The tribunal does not accept the claimant's evidence that she was upset, humiliated or offended by this requirement. This requirement did not cause the claimant any detriment. The respondent's failure to ensure that the claimant did not work in close proximity to the second respondent was not an act of less favourable treatment or harassment because of sex.

Paragraph 21 of the Agreed List of Issues

142. After the complaints of 30 October and 1 November 2017 the respondent continued to review the claimant's performance. Again the claimant has not identified an actual comparator. The appropriate hypothetical comparator would be a male employee doing the same job for the same length of time as the claimant who:

142.1. had the same level of work experience as the claimant;
142.2. had received criticism of performance previously;
142.3. was still in their probationary period.

143. The tribunal is satisfied and finds that such a hypothetical comparator would not have been treated any differently to the claimant. Any new employee, early in their work experience, can reasonably expect their performance to be reviewed and monitored throughout their probationary period. There was no difference in treatment.

144. Further and in any event there are no facts from which the tribunal could infer that any difference in treatment was on the grounds of sex. The tribunal rejects the assertion that there was a change of tone in the emails from JR after the meeting on 1 November. There is no satisfactory evidence to support the assertion that JR became aggressive in tone, or was demanding too much. There is no satisfactory evidence that the claimant was upset by the demands on her performance or the way in which it was done.

145. Further and in any event the tribunal accepts the evidence of the first respondent's witnesses that they had genuine concerns about the claimant's performance both before and after the complaints of 30 and 1 November 2017. That was the reason for the investigation and review of the claimant's performance. It was wholly unrelated to the claimant's sex.

146. In relation to the alternative argument that this conduct amounted to harassment, this was not unwanted conduct related to sex. This was unwanted conduct related to performance. Very few employees welcome investigations in to their performance at work, but such feelings of disquiet or

discomfort or mild upset do not fall within the meaning of s26 Equality Act 2010. Investigation of performance is a norm of everybody's working life. By itself this cannot amount to harassment within the meaning of s26 Equality Act because it is wholly unrelated to the protected characteristic – in this case, sex. There is no satisfactory evidence to support the assertion that the investigation of the claimant's performance was done in an intimidatory or humiliating or offensive manner, no satisfactory evidence that it was related in any way to the claimant's sex.

147. Further and in any event, the tribunal accepts the evidence of the first respondent's witnesses and finds that neither JR nor KS nor LG undertook the investigation into, and review of, the performance of the claimant with the purpose or intent of creating a humiliating or offensive environment for the claimant. Their purpose and intent was to investigate the performance of an underperforming employee who was still in her probationary period, to identify areas for improvement and steps to be taken to obtain the necessary improvement.

148. Further and in any event the tribunal does not accept that the claimant was offended or humiliated by the investigation and review of her performance.

149. Further and in any event if the claimant was offended by this investigation of performance the tribunal has considered all the circumstances and finds that it was not reasonable to have that effect. Every employee in a probationary period must expect their performance to be investigated. Any such investigation, provided that it is not carried out in a demeaning or offensive or humiliating manner, cannot amount to harassment within the meaning of the Equality Act. The first respondent's managers did not conduct the investigation of the claimant's performance in a demeaning or offensive or humiliating manner.

150. The respondent's investigation into the claimant's performance after the complaints of 30 October and 1 November was not an act of less favourable treatment and/or harassment because of sex.

Paragraph 22 of the Agreed List of Issues

151. The claimant was required to attend a formal meeting regarding alleged performance issues on 24 November 2017. In submissions the claimant describes this meeting as a disciplinary meeting. This is not the case. This was a probation review meeting. The letter of invitation clearly describes the meeting as a probation review meeting, the reason for the meeting is stated to be a review of performance. The reference to "allegations " is a reference to allegations of underperformance.

152. As to whether this was an act of less favourable treatment because of sex, the first question is whether there was a difference in treatment. The claimant has not identified an actual comparator. The tribunal has identified a hypothetical comparator as the hypothetical comparator as identified at paragraph 142 above who:

152.1. had attended an informal "Job chat" to discuss problems with performance and to set goals for improvement, that is, similar to the job chat attended by the claimant on 7 November 2017; and

152.2. had been identified as failing to follow procedures resulting in more serious concerns about performance and a negative financial impact on the first respondent.

153. The tribunal is satisfied and finds that the hypothetical comparator would have been treated in the same way. Any employee in their probationary period can be expected to attend a probation review meeting when concerns about standard of performance continue and escalate. There was no difference in treatment.

154. Further and in any event there are no facts from which the tribunal could infer that any difference in treatment was on the grounds of sex. The tribunal rejects the assertion that there was a deliberate delay in giving the claimant the invitation to the probation review meeting and relevant documentation.

155. The tribunal rejects the assertion that the giving of 24 hours notice of the meeting, or the warning in the letter that dismissal was a possible outcome of the meeting, are facts from which the tribunal could draw the appropriate inference. The tribunal accepts the evidence of the respondent's witnesses and finds that the giving of 24 hour notice was standard practice and the invitation to the meeting was by way of a standard letter, used for all employees in these circumstances. That is perfectly reasonable. It is possible that an employee on probation could face termination of employment if their performance is unsatisfactory and does not improve.

156. The tribunal rejects the assertion that the failure of the respondent to attach to the letter of invitation the documentation relating to the billboard allegations is a fact from which the tribunal could draw the appropriate adverse inference. This was a review of performance of an employee on probation. This was not an employee facing disciplinary charges of misconduct.

157. The tribunal rejects the assertion that pursuing the claimant for matters of underperformance when that underperformance related to the events of 27 October 2017 and the claimant's allegations of sexual assault is a fact from which the tribunal could draw the appropriate adverse inference. There is no

such fact. The claimant did not, after the meetings on 30 October and 1 November 2017 until the invitation to the probation review meeting make any assertion that her performance was affected by the events of 27 October 2017 and her belief that she may have been sexually assaulted.

158. Further and in any event the tribunal accepts the evidence of the first respondent's witnesses that they had genuine concerns about the claimant's performance both before and after the complaints of 30 and 1 November 2017, that these continued after the job chat, and that the issues raised about the claimant's actions relating to the billboards were genuine. The first respondent had genuine concerns about the claimant's poor performance and lack of improvement. That was the reason for calling the probation review meeting on 24 November 2017. The tribunal accepts the evidence of the first respondent's witnesses and finds that dismissal was not necessarily the outcome of that meeting. They were prepared to listen to the claimant's explanation for her performance. The invitation to the probation review meeting was wholly unrelated to the claimant's sex.

159. In relation to the alternative argument that this conduct amounted to harassment, this was not unwanted conduct related to sex. This was unwanted conduct related to performance. As stated above, very few employees welcome investigations in to their performance at work, and the possibility of dismissal prior to the completion of their probation period. However, such feelings of disquiet or discomfort or mild upset do not fall within the meaning of s26 Equality Act 2010. Investigation of performance is a norm of everybody's working life. By itself this cannot amount to harassment within the meaning of s26 Equality Act because it is wholly unrelated to the protected characteristic – in this case, sex. There is no satisfactory evidence to support the assertion that the invitation to the performance review meeting was done in an intimidatory or humiliating or offensive manner, no satisfactory evidence that it was related in any way to the claimant's sex. The tribunal rejects the assertion that there was a deliberate delay in giving the claimant the invitation letter.

160. Further and in any event, the tribunal accepts the evidence of the first respondent's witnesses and finds that neither JR nor KS nor LG invited the claimant to the probation review meeting on 24 November 2017 with the purpose or intent of creating a humiliating or offensive environment for the claimant. Their purpose and intent was to investigate the performance of an underperforming employee who was still in her probationary period, to identify areas for improvement and steps to be taken to obtain the necessary improvement.

161. Further and in any event the tribunal does not accept that the claimant was offended or humiliated by being called to the meeting on 24 November 2017. The claimant's witness statement makes no complaint about the

manner in which she was invited to this meeting. She makes no complaint of lack of notice or threatening behaviour. The claimant has adduced no satisfactory evidence of any intimidating or offensive behaviour by the first respondent leading up to the invitation to the probation review meeting.

162. Further and in any event if the claimant was offended by being called to the probation review meeting the tribunal has considered all the circumstances and finds that it was not reasonable to have that effect. Every employee in a probationary period must expect their performance to be investigated. Any such investigation, provided that it is not carried out in a demeaning or offensive or humiliating manner, cannot amount to harassment within the meaning of the Equality Act. The first respondent's managers did not conduct the investigation of the claimant's performance in a demeaning or offensive or humiliating manner.

163. The respondent's investigation into the claimant's performance after the complaints of 30 October and 1 November was not an act of less favourable treatment and/or harassment because of sex.

164. The requirement for the claimant to attend a formal meeting regarding alleged performance issues on 24 November 2017 was not an act of less favourable treatment or harassment because of sex.

The resignation – Paragraphs 23 and 24 of the Agreed List of Issues

165. The allegations of less favourable treatment and harassment are not well-founded. The claimant did not resign in response to any less favourable treatment or harassment.

166. The claimant has failed to prove that the first respondent committed any fundamental breach of contract entitling her to resign. There is no evidence of any breach of any express or implied term of the contract. The first respondent carried out a reasonable investigation of the claimant's complaints. The managers did not act in a demeaning or belittling way to the claimant. The first respondent had genuine concerns about the claimant's performance. It did not without reasonable and proper cause conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. The claimant resigned to avoid the possibility of dismissal.

167. The claim of breach of contract is not well-founded.

Paragraphs 25 and 26 of the Agreed List of Issues

168. The first question is whether the claimant's complaint to the first respondent on 30 October and/or 1 November amounted to a protected act within the meaning of s27 Equality Act 2010.

169. As stated above, the tribunal does not accept that the claimant did make an actual allegation of sexual assault against the second respondent. She expressed concern that she may have been sexually assaulted and that, if so, it may have been the second respondent. An allegation of criminal assault outside the work place does not amount to an allegation that a person has contravened the Equality Act, and does not amount to doing any other thing for the purposes of or in connection with the Equality Act.

170. The claimant did make a clear allegation that her drinks had been spiked with a date rape drug at the works event on 27 November 2017. However, she also asserted that other work colleagues had had their drinks spiked, including a male colleague, CM. It is not clear on what grounds the claimant asserts that this allegation of criminal conduct amounts to an allegation that a person has contravened the Equality Act 2010 or doing any other thing for the purposes of or in connection with the Equality Act.

171. However, the tribunal has considered this claim on the basis that the complaints on 30 October 2017 and 1 November 2017 did amount to a protected act under s27 Equality Act.

172. The claimant has failed to establish that she did suffer each of the detriments as alleged. The tribunal refers to its findings above. In particular:

172.1. the first respondent did not fail to properly investigate the complaint. The complaint suffered no detriment from the conduct of the investigation;

172.2. the first respondent did fail to make and/or share any findings of the investigation with the claimant but she suffered no detriment arising from that;

172.3. the first respondent did fail to suspend the second respondent but the claimant suffered no detriment arising from that;

172.4. the first respondent allowed the claimant to work in close proximity to the second respondent but the claimant suffered no detriment arising from that;

172.5. the first respondent recruited the second respondent on 13 November 2017 but the claimant suffered no detriment arising from that;

172.6. the first respondent did not force the claimant to resign. She resigned of her own accord to avoid dismissal.

173. The first respondent did performance manage the claimant and did invite her to a probation review meeting. The tribunal has found that this does not amount to harassment within the meaning of s26 Equality Act 2010. However, the tribunal accepts that this would have caused the claimant upset, it did put her at risk of dismissal. That is detrimental treatment.

174. There are facts from which the tribunal could infer that the treatment was influenced by the protected act, namely:

174.1. The comment from KS that the claimant continued to be "vocal" about her complaints;

174.2. The wording of the email referred to at paragraph 69 above "Wow, plenty to go off there".

175. The tribunal has therefore considered the respondent's explanation for this treatment. Having considered all the circumstances the tribunal accepts the evidence of the first respondent and finds that the reason for the treatment was that the first respondent had genuine concerns about the claimant's performance. These genuine concerns had arisen prior to the complaints on 30 October and 1 November. The evidence is clear that these genuine concerns continued and were acted upon in a reasonable manner. The tribunal accepts the evidence of KS and finds that she was not upset by the claimant being "vocal." She was simply concerned at the time about the potential for yet more rumours. This did not influence her later decision making, did not influence the decision to continue to performance manage the claimant and to invite her to a probation review meeting. The tribunal accepts the evidence of KS and finds that she was surprised to see how many issues there were with the claimant's performance and the adverse financial impact this had. That was the reason she had used the word "Wow" at the beginning of her email. The tribunal does not accept that there was a marked change in the way the first respondent treated the claimant after she made her complaint. There is no satisfactory evidence to support that assertion. The claimant relies in the main on an interpretation of the email exchanges. There is no satisfactory evidence that at the time the claimant noticed a change in behaviour towards her and/or was upset by the email exchanges. She raised no complaint about it at the time. Having considered all the circumstances the tribunal finds that the decisions of the first respondent to performance manage the claimant and to invite her to a probation review meeting were not in any way influenced by the claimant's complaints, the protected act.

176. Further and in the alternative, the tribunal has considered the complaint of victimisation in relation to each of the pleaded detriments and has considered the reason for the actions or inactions of the first respondent as listed at paragraph 26 of the Agreed List of Issues. There is no satisfactory evidence

to support the assertion that the first respondent reacted badly to the claimant making her complaints, that they ignored her complaint and/or failed to take it seriously, and/or that they concocted a reason to remove the claimant from employment because she had made her complaint and/or, in the words of the claimant because was regarded as a trouble maker. To the contrary, the clear evidence is and the tribunal finds that the first respondent listened to the claimant's complaint, carried out a reasonable investigation, offered her support. The first respondent acted reasonably on the information it had available to it at the time. The first respondent stopped the investigation because the claimant did not want to pursue her complaint. The fact that the first respondent continued the investigation by interviewing the one outstanding potential witness, CM, on 2 November 2017, a day after the meeting with the claimant, is not a fact from which the tribunal can draw the inference of discriminatory treatment. This was an interview which had been scheduled to take place before the meeting with the claimant on 1 November 2017. An assertion had been made that CM may have had his drinks spiked. It was reasonable and understandable for that serious issue to be addressed. The first respondent did not make any findings following the investigation and did not share the findings because the investigation did not continue at the claimant's request. The first respondent did not suspend the second respondent, allowed the claimant to continue to work in close proximity with the second respondent, because the claimant made no allegation of sexual assault against the second respondent and gave a clear indication that she was comfortable continuing to work on the same business premises. The claimant at no point until after the termination of employment complained about having to work in close proximity to the second respondent. There is no satisfactory evidence that the manager who made the decision to employ the second respondent knew about the protected act. In all these circumstances the tribunal finds that the actions and/or inactions of the first respondent as listed at paragraph 26 of the Agreed List of Issues were not influenced in any way by the protected act.

177. The claim of victimisation is not well-founded.

Employment Judge Porter

Date: 4 September 2019

RESERVED JUDGMENT with reasons SENT TO THE PARTIES ON
5 September 2019

FOR THE TRIBUNAL OFFICE

APPENDIX 1

AMENDED AGREED LIST OF ISSUES

Section 13 and 26 of the Equality Act claims:

Verbal comments:

1. Did the second respondent make verbal comments (as outlined in claimant's further and better particulars [p22] and her statement) to the claimant?

2. If so, did such comments amount to less favourable treatment because of sex?

3. If so, did such comments meet the definition of harassment pursuant to s26EqA?

4. If such conduct amounted to direct discrimination or harassment, is the first respondent vicariously liable pursuant to s109 EqA?

Text messages/whatsapp

5. Did the second respondent send text and WhatsApp messages to the claimant which amount to less favourable treatment because sex?

6. Did such communication meet the definition of harassment pursuant to s26 EqA?

7. If such conduct amounted to direct discrimination or harassment, is the first respondent vicariously liable pursuant to s109 EqA?

8. In the event that the first respondent is found to be vicariously liable for any of the acts outlined above, did the first respondent take all reasonable steps to avoid the discrimination allegedly perpetrated by the second respondent?

Spiked drinks

9. Is there sufficient evidence on which the tribunal can be satisfied that the claimant's drink(s) were spiked on 27 October 2017?

10. If so, when was this done?

11. If the claimant's drink(s) were spiked, does this amount to an act of less favourable treatment because of her sex?

12. If the claimant's drink(s) were spiked, does this amount to harassment pursuant to s26 EqA?

13. If the drinks being spiked amounts to an act of less favourable treatment harassment, is the first respondent vicariously liable pursuant to s109 EqA?

Sexual assault

14. Is there sufficient evidence on which the tribunal can be satisfied that the claimant was sexually assaulted on 27 October 2017?

15. If so, is the first respondent vicariously liable pursuant to s109 EqA?

The first respondent's investigation

16. What complaint did the claimant make to the first respondent on 30 October 2017 and 1 November 2017?

17. Did the first respondent thereafter investigate the complaint in a reasonable manner?

18. If not, was the nature of the investigation an act of less favourable treatment and/or harassment? In particular

    a. did the first respondent make findings following their investigation of the claimant's complaint and did they share those findings with her?

    b. Was the first respondent's failure to suspend the second respondent in the light of those complaints a matter of less favourable treatment because of sex or harassment because of sex?

The second respondent's employment

19. Did the respondent's decision to employ the second respondent on 13 November amount to an act of less favourable treatment or harassment because of sex?

20. Was the respondent's failure to ensure that the claimant did not work in close proximity to R2 an act of less favourable treatment or harassment because of sex?

Performance management

21. Was the respondent's investigation into the claimant's performance after the complaints of 30 October and 1 November an act of less favourable treatment and/or harassment because of sex?

22. Was the requirement for the claimant to attend a formal meeting regarding alleged performance issues on 24 November an act of less favourable treatment or harassment because of sex?

The resignation

23. In the event that any of the treatment outlined above is made out, did the claimant resign in consequence of it?

24. If the claimant's resignation was caused wholly or in part by any acts of less favourable treatment or harassment because of sex was the dismissal caused by the less favourable treatment or harassment?

Victimisation

25. Did the claimant's complaint to the first respondent on 30 October and/or 1 November amount to a protected act?

26. If so, did the claimant suffer any detriment because of those protected acts, in particular:

    a. the failure to properly investigate

    b. the failure to share findings

    c. failing to suspend the second respondent

    d. allowing the claimant to work in close proximity to the [second] respondent

    e. recruiting the second respondent on 13 November 2017

    f. performance managing the claimant

    g. inviting her to a probation review meeting

    h. forcing her to resign