EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Lulian Ciobota **v** Nando's Chickenland Limited

Heard at: Watford **On**: 4 to 6 February 2020

Before: Employment Judge Bedeau

Members: Mrs L Thompson
Mrs N Duncan

Appearances:

For the Claimant: Ms R Pop, Lay representative
For the Respondent: Mr M Difelice, Solicitor

JUDGMENT

1. The claimant's unfair dismissal claim is not well-founded and is dismissed.

2. The claimant's direct discrimination because of race claim is not well-founded and is dismissed.

3. The claimant's claim of direct discrimination because of sex is not well-founded and is dismissed.

4. The claimant's claim of harassment related to sex is not well-founded and is dismissed.

REASONS

1. At the conclusion of submissions, the tribunal delivered its judgment. Ms Pop, representing the claimant, asked for written reasons. For the sake of clarity, we have combined the judgment with the reasons.

2. By a claim form presented to the tribunal on 4 August 2018, the claimant made claims of unfair dismissal; race discrimination; and sex

discrimination. These arise out of his employment with the respondent as a Griller.

3. The respondent was required to present its response by 13 September 2018 but failed to do so. On 8 January 2019, a judgment was issued in default of a response. In ignorance of the judgment, the case was listed for a preliminary hearing, in private, on 12 March 2019, before Employment Judge Henry. The parties agreed the claims and issues and the case was set down for hearing on 3 to 6 February 2020 before a full tribunal. The Judge directed that the case should be set down for a reconsideration hearing to determine whether or not the judgment entered in default of a response should be either varied or revoked. The hearing was on 29 April 2019, again before Employment Judge Henry, who set aside the judgment.

The issues

4. The issues in this case are as set out in the case management summary dated 12 March 2019 and are repeated below:

> 1. "The issues between the parties which will potentially fall to be determined by the tribunal are as follows:
>
> ***Unfair dismissal***
>
> 1.1. What was the reason for the dismissal? The Respondent asserts that it was a reason relating to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.
>
> 1.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?
>
> 1.3. Has there been a reasonable investigation?
>
> 1.4. Following that investigation, did the Respondent hold a reasonable belief that the Claimant committed the acts complained of?
>
> 1.5. Was dismissal a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer, in that:-
>
> 1.5.1. The misconduct of which the claimant was charged happened during his free time, not during the working hours, outside the work premises and outside of any work functions or activities.
>
> 1.5.2. The alleged misconduct happening outside the workplace did not have any kind of impact on the employment relationship, work environment, or otherwise such as to bring the respondent into disrepute?
>
> 1.6. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?
>
> 1.7. If the dismissal was procedurally unfair, can the Respondent prove that if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event, and/or to what extent and when?

EQA, section 13: direct discrimination on the protected characteristic of race

1.8. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act, namely?

1.8.1. Not addressing the claimant's grievance.

1.8.2. Not allowing the claimant to present witness evidence at the disciplinary hearing

1.8.3. Gave priority to the statement of Ms X a white British female.

1.9. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator? The claimant relies on the comparators: Mr Fenner and Ms X.

1.10. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of race?

1.11. If so, what is the respondent's explanation? Does it prove a non- discriminatory reason for any proven treatment?

EQA, section 13: direct discrimination on the protected characteristic of sex

1.12. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act, namely?

1.12.1 The treatment of the claimant's grievance.

1.13. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator? The claimant relies on the comparator, Ms X.

1.14. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of sex?

1.15. If so, what is the respondent's explanation? Does it prove a non- discriminatory reason for any proven treatment?

***EQA, section 26: harassment related to sex*.**

1.16. Did the respondent engage in conduct as follows?

1.16.1. During the disciplinary investigation meeting on 22nd of March 2018, did Mr Webber ask the claimant sexually explicit questions

1.16.2. during the disciplinary hearing on 30 March 2018 Mr Fenner asked the claimant sexual questions about "what happened in his bedroom in his free time"?

1.17. If so, was that conduct unwanted?

1.18. If so, did it relate to the protected characteristic of sex and/or was it of a sexual nature?

1.19. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.20. If, not did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant

1.21. In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect

Remedy

1.22. If the claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy. There may fall to be considered compensation on a finding of unfair dismissal, being; a basic award and a compensatory award.

1.23. Would it be just and equitable to reduce the amounts of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to ERA section 122(2) and if so to what extent

1.24. Did the claimant, by blameworthy or culpable conduct, cause or contribute to the dismissal?

1.25. In respect of any proven unlawful discrimination, the Tribunal will be concerned to issue a declaration thereof, and compensation to include an award for injury to feelings, and make such appropriate recommendations for the purpose of obviating or reducing any adverse effect relating to the claim."

The evidence

5. The claimant gave evidence and called Mr Marcia Marinescu, Griller/Staff Trainer, and Mr Ionut Andrei Tresca, Managers/Staff Trainer, to give evidence.

6. The respondent called Mr Christian Webber, Restaurant General Manager; Mr John Fenner, General Manager; and Ms Nicky Clarke, Regional Managing Director.

7. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 138 pages. Further documents were produced during the course of the hearing.

8. The claimant, who is a Romanian national, had the assistance of an interpreter fluent in both English and Romanian.

Findings of fact

9. The respondent owns a chain of restaurants split into regions, including the east Kent region. In that region there are eight restaurants including its restaurant in Canterbury where the claimant worked, and the new restaurant in Dover.

10. The claimant worked as a Griller barbecuing chickens in accordance with customers' orders. He commenced employment with the respondent on 28 October 2015 as far as he is aware, although the respondent contends that his employment commenced on 30 October 2015. Nothing much turns on the date of commencement.

11. The manager of the Canterbury restaurant 2018 was Mr Marcin Krzyzaniak, a Polish national.

12. Staff from the newly established Dover restaurant had been trained by staff at the Canterbury restaurant over a period of about four weeks. One of those who attended the training from Dover was Ms X, white British. The respondent refers to its employees as 'Nandocas', and describes a member of management as a 'Patriao'. Ms X was a Nandoca and had met the claimant during her training at the Canterbury restaurant. During and after her training, they communicated with each other by texts messages.

13. Staff from the restaurants within the east Kent region, would socialise at a nightclub called "Chemistry" in Canterbury. This case is about an incident of a serious sexual nature having taken place between the claimant and Ms X at the claimant's flat. What we will later describe raises the issue of the extent to which an employer has control over the activities of its employees outside of the workplace?

14. On Saturday 17 March 2018, some staff from the east Kent restaurants met at the Chemistry nightclub. The claimant was there, as well as Ms X. They chatted and mingled with the other staff. There came a point in the evening when the claimant invited Ms X to his flat to which she agreed. It would appear that at that time, Ms X had imbibed herself with drink and might have been intoxicated. We find that there was an incident during the night of 17 and 18 March 2018 at the claimant's flat. Precisely what occurred is in dispute between the parties. We now deal with events as they unfolded after Ms X left the claimant's flat.

15. She left the flat and went home to Dover. She spoke to her father whom she was living with at the time, about what occurred in the claimant's flat. He advised her to contact the police which she did. She went into work the next day, Monday 19 March 2018, at the Dover restaurant, and reported the incident to the restaurant manager.

The investigation

16. Mr Christian Webber, General Manager, was asked to conduct an investigation into the allegation made by Ms X. He travelled to Dover and interviewed Ms X on 20 March 2018, in the company of Ms Jo Cheeseman, Human Resources Advisor. The interview commenced at 11:40 in the morning and concluded at 12:50 in the afternoon. Notes were taken by Ms Cheeseman.

17. From the notes, Ms X said that she travelled to Chemistry in the company of another member of staff from the Dover restaurant. They had an argument and that other member of staff by the name of Anthony, went home. At the club she was drinking. The claimant was also at the club and he bought her an alcoholic drink. They chatted and at some point, she and the claimant left the club and got into a taxi to his flat. She was taken to what she thought was a spare room and while in there she said that the claimant kept "trying it on" and she kept saying "no, I don't feel well, leave me alone". She then said that he kept physically touching her. He had his hands on her, but she was pushing him away. He then pulled her by the neck and kissed her on the neck. She went "out cold" and when she woke up, her jeans were down, and he was fingering her. She was shocked at first as it did not register with her. Then she thought about it and pushed him off her. She said that he said to her "you know you want it". She was shocked and tried to look for her mobile phone, but he told her that she did not need it and shoved her back down. She demanded that he give her her phone, or she would scream "the house down". After five to ten minutes he then gave the phone to her, at which point she said that she was leaving. He told her not go, but she insisted that if he did not let her go, she would call the police. After 20 minutes he allowed her to leave his flat.

18. Ms X was asked whether the claimant was physically preventing her from leaving, to which she replied "yes". It was about "four-ish in the morning". She was asked "how was he keeping you in the room?". She said "standing by the door, throwing me down, restraining me, I have so many bruises. Then I was walking down the road on the phone to my friend when I saw Maryon … and I explained what happened and he was apologetic and walked me to McDonalds and waited with me until the taxi arrived." She said that from the time she arrived at the his flat to her waking up, was a few hours as she was out cold. She said that the police believe that her drink had been spiked. She was asked whether the claimant had made any previous advances towards her, to which she responded by saying that he had messaged her many times but not made any advances.

19. She said that another friend called Toby, got her a taxi and she went home, where she called Ben, the manager of the Dover restaurant. She had initially decided not to take any action but after speaking to her father she decided to call the police on the Sunday night. They came to her house, took a statement from her as well as her clothing, and swabs of her mouth, hands, and neck. She then went to Maidstone for the forensic scientist to swab her for DNA. The police told her that the results of the

forensic examination would take two to three days. She went to work the following day.

20. She said that she had made it "100% clear to him that no it was not happening. I made it really clear to him that I am not that type of person. I was shocked". The only Nando person was Maryon in the flat.

21. She was asked whether the claimant was fully clothed when she woke up. She replied, "I don't know – he was doing stuff to himself; I was 100% sure he was doing that, I've told the police that". She also said that after going to the police he tried twice to contact her the previous night. She then went through the timings during the evening in question from arriving at Chemistry to her leaving his room. She said that he did not try anything on when they were in the taxi on the way to his flat. She could remember him sitting down on the bed and "him keeping on trying, then I went out cold".

22. As a result of her state of mind, she was allowed time off work for one week with pay (pages 56 to 59 of the bundle).

23. After speaking to Ms X, Mr Webber, in the company of Ms Cheeseman, made his way to the Canterbury restaurant. While there he spoke to Mr Ionut Andrei Tresca, Manager/Staff Trainer. Mr Tresca said in evidence before us that Mr Webber told him that he was investigating the claimant regarding "serious allegations" and asked him how were the claimant's English language skills, but could not give him any details about the allegations as they were confidential. He said that Mr Webber also mentioned that he had a daughter working at the Canterbury restaurant and that given the seriousness of the allegations, he would not know what to do should anything happen to her. According to Mr Tresca, Mr Webber became very agitated, and he told Mr Webber that the claimant had very limited English language skills, and that he would need a "translator" because the allegations were complex and serious. He then said that Mr Webber told him that he would start the investigation meeting without him, that is, Mr Tresca, acting as translator but would call him if his assistance was needed. Mr Tresca said that the meeting went ahead and concluded without him being called to interpret for the claimant.

24. In evidence, Mr Webber said that Mr Tresca, who managed the Canterbury restaurant, had said to him that the claimant had a good command of the English language and proceeded to question the claimant in the absence of an interpreter.

25. We find that if Mr Tresca had serious concerns about the claimant's level of understanding of the English language, as a responsible manager, he ought to have realised the claimant would have been disadvantage should the investigation proceed without an interpreter fluent in Romanian and English. We do not accept that he told Mr Webber that the claimant's command of English was very poor and would require an interpreter. Had that been said, we further find that Mr Webber, with the

assistance of Ms Cheeseman, would have asked for an interpreter to be present, as was the case during the later disciplinary hearing.

26. Mr Webber interviewed the claimant in the company of Ms Cheeseman on 20 March 2018, between 3:15 and 5:25 in the afternoon, for two hours and ten minutes. From the notes taken, at the commencement of the meeting, the claimant was asked whether he was aware he could have a companion with him and if he did not want a companion, whether he was content to proceed without one. He was informed that if he needed a companion the meeting would be rescheduled for another time. According to Mr Webber, the claimant was content to proceed in the absence of a companion. It was explained the purpose of the investigation and that if the claimant needed a break at any time, he should let Mr Webber know.

27. The claimant then gave his account of events during the night in question. He said that he met Ms X during her training at Canterbury restaurant and they exchanged messages and showed Mr Webber the messages on his mobile phone. He then gave an account of an earlier incident two weeks prior when he met Ms X in the company of his friends and her friends, but they did not talk much on that occasion. That encounter was of little consequence to the investigation.

28. He said that on Saturday 17 March, Ms X texted him asking whether he was going to Chemistry but at the time he was busy at work and did not reply. His friends at work were going to the nightclub and he decided to go with them. At that point he did not know whether Ms X was going to the club. He finished work at 12 midnight, got changed out of his uniform and, in the company of other female members of staff, travelled by taxi to the nightclub. He said that during evening, although he saw Ms X and gave her a hug, he ignored her as he said, "she pissed me off about a week ago" and told her so. He was asked why? He replied that he had bought her a drink the last time, but she then left him. He said that at one point he left the club to go outside to have a cigarette, was alone when Ms X joined him. She lent on him and said she was sleepy. He asked her whether she wanted a drink. She replied saying that she was sleepy. He then asked her whether she would like to come with him to his home, but she did not reply. He asked again and she agreed. He saw his friend Maryon and told him that he was going home with Ms X. They then got into a taxi and were taken to his flat.

29. He said that when they arrived, Ms X asked for the toilet which was on the upper level where his bedroom was. She made her way to the toilet and he went to his room, turned on the light and opened his laptop. She joined him after two minutes and laid on his bed. He asked her whether she would like to watch a movie or listen to music. She preferred to listen to music. He then put some music on and after that tried to kiss her while she was on the bed, but she ignored him. He then sat on the bed. She was lying next to the wall, facing the wall with him behind her, in the "spooning position". This was at about 3 o'clock in the morning. He touched the top of her leg. Her response was to say that he should not

touch her. He did it two or three times over five minutes, but she kept saying that he should not touch her. He then stopped for about five minutes and tried again to touch her, which she objected. He then stopped for about ten minutes, opened her jeans and said to Mr Webber, "I put my hand inside". He was asked "inside her jeans? Or inside her?", to which he replied "inside her, she didn't say anything, and after that I thought about it being a mistake because I did that and I stopped and I was going to the toilet to pee. She stood up in my room and she started to cry, I think she called a guy, I don't know exactly, she said "I want to go home" and I said it is fine and I am sorry, she took her jacket and covered, she took her shoes in her hand and she went outside out of the front door. I went with her and I said, "please come back", and she go. After that I went back in my house and closed the door and I went in bedroom and put my jacket …… "

30. At that point there was a short adjournment for 12 minutes after which the investigation resumed.

31. The claimant then said that he went outside because he was afraid to leave her alone as it was around 5 o'clock in the morning. He looked for her but could not see her. He then returned to his room and at 5:41am, he messaged her on Facebook saying that he was worried about her and asked where she was. She did not reply. The following day he sent her a message saying that he was sorry about what happened the previous night and hoped that she was "ok".

32. He was asked whether he had purchased a drink for Ms X to which he said he had not. He was asked whether she said that she was feeling unwell, or tired when she wanted to leave. He replied that she said she was feeling "sleepy, drunk and tired". He did not see her drink at the club but said that she was drunk. He was asked when he laid on the bed behind her and she told him not to touch her, why did he keep on touching her? He replied that he did not know why. He agreed that she had made it clear to him that she did not want him to touch her, but he continued. He said that he continued because he thought she liked him, and she tried to be nice to him. He thought she wanted more, to have fun with him and for him to be her boyfriend.

33. The following is then recorded:

> "C: I want to clarify where you were touching her, stopped, waited five minutes, touched her again, then waited and then you did her jeans. Was she asleep at that time?
> J: I don't know, I think she was as she didn't have a reaction.
> C: You open her jeans, you think she was asleep as she had no reactions.
> J: Yes that is right.
> C: Ok so you think she is asleep, so you continued to put your hand inside her jeans?
> J: I put my hand in her jeans, in her knickers and one fingers inside her, the middle finger.
> C: How long for?
> J: Two to three minutes
> C: (Ms X) then knows what is happening?
> J: Yes – she cried, I realised it was a mistake.

C: Was you pleasuring yourself?
J: I did not touch my penis.
C: She gets upset.
J: No, no, no after two to three minutes I took out my hand, I then went to the toilet, then when I got back she woke up and started to cry.
C: Where were her trousers?
J: I opened the buttons and put my hands inside.
C: She was woken up and found her trousers open, did you tell her what you did?
J: I don't know.
C: You left the room and she is on the phone to her friend?
J: Yes.
C: Her phone, did you take it?
J: No I did not take it.
C: And did you stop her leaving?
J: No, I did not hit or push her, I did not get aggressive in any way.
C: Did you have sex with her?
J: No I just put in one finger.
C: Ok – you met her four weeks ago, you got on well, and you think you are friends, went clubbing a couple of times, she came back with you on Saturday, into your room, she has laid against the wall with her back to you, you made approaches which she stopped you?
J: Yes, I tried, she stopped and I tried.
C: You then put your finger into her vagina, can you understand why that is not acceptable behaviour. Do you think it is wrong?
J: It is not right.
C: So why did you do it?
J: I don't know, I was drunk, four double rum and coke and one single.
C: Do you understand how serious this is?
J: Yes, I do not try to do that.
C: Have you done anything like this before?
J: No.
C: What impact do you think this has had on (Ms X)?
J: Upset, yes of course.
C: You have apologised?
G: Why did you send the message to say sorry?
J: Because I felt bad and did not know that this was not good, it was supposed to be fun and this was a mistake."

34. The claimant then went on to say that the message on Facebook saying he was sorry, was at 8:35 in the evening. He carried on touching Ms X because he liked it and at the time she was asleep. He denied pleasuring himself but acknowledged that his conduct was very serious with the possibility that he may lose his job. He said that he had never kissed Ms X before (60 to 66).

35. We make this finding that after hearing Mr Webber in evidence and reading the account as recorded in the notes, we are satisfied that the claimant was asked open rather than close questions to which he gave the occasional short replies but other times, detailed responses. He was able to fill in the gaps in Ms X's account, particularly when she was asleep. He did not ask for an interpreter, and it is not recorded that he asked Mr Webber to repeat any of the questions because he did not

understand them. His answers followed sensibly from the questions asked. Comparing the two accounts between Ms X's and his, there were similarities, however, in places, the claimant gave more detail. We find that his account was clear, intelligible, and unprompted. This will become significant later during the disciplinary hearing and in his evidence before this tribunal, as he asserted that his command of the English language was limited.

The claimant's suspension

36. In paragraphs 13 and 14 of Mr Webber's witness statement, he noted that there were some important facts in the claimant's account. He wrote the following, which we have accepted and do find as fact:

> "13– Drawing out some of the particularly important parts of the narrative provided to me by Lulian:
>
> - After Lulian and (Ms X) had got back to his home, and when they were in the bathroom, he said that he "tried to kiss her on the bed" and that she had ignored him. He said that they were lying next to the wall facing the wall and lying in the 'spooning' position.
> - He said that he tried to touch the top of her leg and that she had explicitly said "don't touch me" and that he did it more times (about five times) and she had kept saying "don't touch me".
> - He said he would stop for about five minutes but after that he tried again.
> - He said there had been further discussions of her saying "don't touch me" and then he had stopped but after about ten minutes she didn't say anything. He said that at that point he had opened her jeans and put his hand "inside". When I asked for clarification as to what 'inside' meant, he said "inside her".
> - I asked him whether (Ms X) was drunk, he said that she was.
> - I asked him why he had kept touching her when she had said not to, and he said he said "I don't know why".
> - He said that at that point, that his hand entered her jeans and he thought she was asleep. He said that he put his hand in her jeans, in her underwear and one finger inside her. He was very specific that it was his 'middle finger'. He said that was about two or three times.
> - I asked him whether he thought his conduct was wrong and he said "it is not right". When I asked why he had done it then, he said he didn't know, that he was drunk and he referred to the amount he had drunk.
> - He acknowledged a number of times during the meeting that what he had done was a "mistake". I asked him whether he understood the consequences of what had happened and he said "not something good for me", he acknowledged that it was very serious and he could lose his job.
>
> 14 – At the conclusion of the meeting, based on (Ms X's) version of events, and based on what Lulian had said to me during the course of the meeting, it appeared to me in the most-clear terms that Lulian was admitting to the conduct in question. As far as I could see, I was in a situation where Lulian was admitting to having sexually assaulted one of our employees. On that basis I considered that the most appropriate action was to suspend Lulian on full pay while matters were dealt with. I informed him of that at the conclusion of the meeting".

37. In evidence, Mr Webber also told the tribunal that he had no reason to doubt what Ms X had told him. She was upset and had reported the matter to the police. In addition, the claimant gave his account in excellent English, therefore, he did not have to ask him whether he needed someone to interpret for him.

38. On the same day the claimant was sent by Mr Webber, written information about his suspension. He was informed that he should not contact team members unless he requested a companion to the disciplinary hearing. The letter stated that he had been investigated for an alleged sexual assault on Ms X on Sunday 18 March 2018. At the end of the investigation it could be recommended that either no further action be taken, or he be invited to a disciplinary hearing where formal action may be taken. He was advised to read the Supporting Success Section of the respondent's handbook on its processes. (page 67)

39. Mr Marcin Krzyzaniak, General Manager of the Canterbury restaurant wrote a statement on 22 March 2018, referring to a conversation with the claimant on 21 March 2018 and their subsequent meeting the following day, 22 March 2018. He wrote:

> "On 21/03/2018 Julian texted me if he ,could meet up with me for a chat. I have arranged the meeting for Thursday 22 March 2018 in Costa at 8am. During the meeting Julian explained what happened and asked me for advice and what will happen next. I have asked him if the allegations are true and he admitted to them. When asked why he did it, in spite of being told not to more than once, he replied that he thought the girl is "playing hard to get" game. I then explained to him that what he done, it is very serious and is treated as sexual assault. I then showed him definition of the term in "sexual assault" on the internet and asked him if he understand to which he replied "yes". At that point, I have advised him to check the explanation of the term in his mother tongue (Romanian). He also told me that he could be misunderstood during the investigation process when he was asked why he did it. He meant to say, "because he liked Ms X" and not "because he like touching ppl". I then explained the investigation and the disciplinary process and procedures." (75)

40. Mr Krzyzaniak is Polish. The claimant later told the tribunal that his conversation with Mr Krzyzaniak was in English which we further find significant.

41. After having read the notes of his investigation meeting, the claimant wrote to Ms Cheeseman by e-mail on 21 March 2018 at 8:22pm, stating:

> "I checked today the report and because I could not express correctly in English and did not understand all the questions, many details are misunderstood. I would like to clarify and discuss this. Can I be accompanied by a person to help me with the translation? Thank you." (72)

42. He told the tribunal that upon reading the interview notes, he spoke to Mr Marinescu and, with his help, they drafted and sent the e-mail. It is note-worthy that in Mr Marinescu's witness statement, he made no reference

to having read the claimant's investigation notes and was involved in drafting the e-mail sent on 21 March at 8:22pm.

43. Although Mr Krzyzaniak was not called as a witness to give evidence before us, his statement was relied on by Mr Webber in his outcome. The claimant said in evidence that he made no admissions to Mr Krzyzaniak as the discussion was all about the meaning of sexual assault. He did say, however, that he rang Mr Krzyzaniak because he trusted him.

The disciplinary hearing

44. On 27 March 2018, the claimant was invited to a disciplinary hearing scheduled to take place on Thursday 29 March 2018. He was informed that he could bring along a translator to assist him. He wanted to bring a companion as well as a tanslator but was told that he could only bring one. He chose a translator. We have used the word translator because that was how it had been described during the respondent's internal investigation and disciplinary proceedings. The true position was that he required an interpreter. In the context of this case the words translator and interpreter are interchangeable.

45. The allegation was that,

> "in the early hours on Sunday 18 March 2018, it is alleged that you sexually assaulted (Ms X) whilst in your home after a night out in Canterbury."

46. He was warned that one potential outcome may be his summary dismissal as the allegation was one of gross misconduct. He was sent the notes of the interviews and the brief statement by Mr Krzyzaniak. (76-77)

47. Prior to the hearing the claimant sent a letter setting out his case which was to challenge the conduct of the investigation, his lack of English, and right of the respondent to treat as a disciplinary matter, events outside of the workplace. (78-80)

48. The disciplinary hearing was chaired by Mr John Fenner, General Manager. Mr Marinescu attended with the claimant to act as his interpreter. The claimant had asked for three female witnesses to give evidence but were not present in his flat at the time. Mr Fenner did not consider their evidence to be relevant as they were character witnesses. During the hearing, the claimant denied he had made admissions as recorded in the investigation notes. He denied saying that he opened Ms X's jeans and inserted his finger into his vagina. He maintained that he only touched her at the top of her leg and that the question and answers during the investigation meeting were misunderstood by him. Moreover, he said that the incident was a private matter that had nothing to do with the respondent as it occurred in his flat. He said that he and Ms X were both drunk; there was a language barrier; and they were tired at the time. He insisted that he had misunderstood the questions put to him by Mr Webber. Mr Fenner then put to him the following:

> "Ok, one more question, pull out a snippet from here, Julian's meeting – 'yes but after I stopped after that I tried again', what did you try to touch again, after that I stopped again for about ten minutes, did not say anything and then I opened her jeans. Bearing in mind Julian was never asked if he put his hands in her jeans, he has made that statement of his own accord, and now trying to retract that."

49. The claimant replied, through Mr Marinescu:

> "Made a mistake earlier, when I asked him if he did it he said no, he had intentions to go like that but he never did it. Translation is hard, he understood something wrong in Romanian and translated incorrectly, I made sure he understood, he had intention of doing that but he didn't."

50. What the claimant was saying was that he had intended to insert his finger inside Ms X's vagina but did not do so. (81-88)

51. We were invited by the claimant following advice from Ms Pop, to consider his "without prejudice" letter to the respondent dated 28 March 2018, in which he offered to resign on payment by the respondent of two months' salary; the closure of disciplinary proceedings against him; the provision of a positive reference to any prospective employer; and the signing of a confidentiality agreement regarding the reason for his departure. No agreement was reached. (138)

52. Prior to Mr Fenner's outcome, on 30 March 2018, the claimant submitted a grievance alleging sexual harassment. It was meant to be dealt with by Ms Nicky Clarke, Regional Managing Director, but she was on leave at the time. She, however, emailed the claimant on 31 March 2018 acknowledging receipt of his grievance and that she was going to be in touch with him following her return from leave on 9 April 2018 (89-91).

53. In his letter dated 3 April 2018, sent to the claimant, Mr Fenner set out his reasons behind his decision to terminate the claimant's employment. He considered the allegation and wrote the following:

> "During the meeting, you stated some of the information you provided in your investigation was incorrect. You said that you had felt under pressure and froze and gave incorrect information. Your corrections were that you did not put your hand inside her trousers, you opened one button and decided not to go further. You also said that (Ms X) was awake the whole time and was using her phone facing away from you. She did not respond to you touching the top right side of her leg (around her hip area) and therefore you believe this amounted to consent.
>
> I questioned you around this, as whilst I can understand the meeting would have been difficult I found it implausible that your version of events changed so significantly from your first meeting. It wasn't simply a case of you saying yes or no to answers. In fact Christian didn't ask questions about you putting your hand in her jeans, you were asked what had happened. You provided very detailed information in the meeting on 20th March 2018, which I include below to provide an example of this;

You After that I tried to top the top of her leg, she said don't touch me, I did it more times
Chris 2-3 times
You About 5 times, she kept saying don't touch me
Chris And you kept putting it back there
You Yes but after I stopped it. I stopped for about 5 minutes and did nothing, and after that I tried again

You then onto to describe how you put your hand down her jeans and inside (Ms X), the level of detail you gave includes the finger you used to put inside her, (again without being asked directly) you then state that she woke up and started to cry and at that point you were in the toilet.

(Ms X's) statement that you had not seen at the point of your investigation corroborates this information in that she states;

> "Then he kept trying it on and I kept saying no, I don't feel well leave me alone. Then he kept physically trying to touch me, he had his hands on me and I was pushing him off. He pulled my neck and kissed my neck. Then after that I was cold out and then I woke up to him with my trousers down and him fingering me."

(Ms X) alleged that you may have spiked her drink and also tried to stop her leaving your house, which you deny, you said she left and you did not try to stop her.

The following day you asked to meet your Patrao Marcin Krzyzaniak who wrote a statement confirming you admitted to the allegation to him but thought that she was playing "hard to get" game.

Based on all the investigations and meeting with you, I have concluded that you did sexually assault Annabel against her will whilst she was asleep. I have made this decision based on the information you gave to Christian and Marcin and the fact it corroborates with what (Ms X) alleged happened to her on the bed.

The other point that you raised was that this did not happen at work and was in fact in your house. This is therefore something that the police only should investigate and nothing to do with Nando's and your job. Whilst I agree that this did not happen at Nando's you and (Ms X) both work in Nando's and were out that evening with a group of employees from Nando's. It would be unreasonable given the serious nature of the allegation that Nando's would not investigate this. We have to assess the impact an allegation of this nature has had on (Ms X) as well as assess our approach to any future contact you may have with her in a regional setting. We also need to take into account how you may behave with other fellow Nandoca's. Overall your actions have impacted the trust and confidence that we have in you as an employee in our business.

You stated that you have other female colleagues who could state that they do not feel scared to work with you and you wanted us to speak to them. I appreciate that you have worked for us for over 2 years and this is the first time this has been alleged. I appreciate this is the case, but that other people stating they are not scared of working with you does not mitigate for your actions against (Ms X). Sometimes something is so serious that it only takes one time to do it and it could result in your dismissal. In our handbook, we are clear that fighting, threatening

> or abusive behaviour and sexual harassment could constitute this and your actions have amounted to this.
>
> I acknowledge that you have shown a level of remorse for your actions in both your investigation and disciplinary meetings. However, you have failed to acknowledge the huge impact this has had on an individual, namely (Ms X).
>
> As a result of this, I have made the decision to summarily dismiss you for gross misconduct, specifically the sexual assault of a fellow Nandoca. This dismissal is with immediate effect from 3 April 2018. You will be paid up until this day and any outstanding holiday pay will also be paid to you. Any payment for excess holiday taken over your accrued entitlement will be deducted from your final pay. However, you will not receive any bonus payments and you are not entitled to notice pay as this is a gross misconduct issue. Your P45 will be forwarded to your home address.
>
> I have enclosed a copy of the disciplinary meeting notes and your reference along with your amendments.
>
> I understand you sent a letter to Nicky Clarke, Regional Managing Director, after the disciplinary meeting. This was reviewed by Nicky and Hayley Jordan, HR Advisor, and it was concluded the points you raised would be something that should be raised as part of an appeal process should you wish to appeal my decision.
>
> Should you wish to appeal against my decision, you should do so in writing outlining the reason for your appeal within 7 days of receipt of this letter to Nando's Human Resources, Erico House, 1st Floor, 93-99 Upper Richmond Road, London, SW15 2TG or via email at hradvice@nandos.co.uk" (92-94)

54. Mr Fenner said in evidence that to issue the claimant with a written warning or final written warning would not have met the seriousness of the claimant's conduct and would not have reflected the hurt and upset suffered by Ms X. As stated in his outcome letter, the respondent's disciplinary policy provides, in relation to examples of gross misconduct, the following:

> "Fighting', threatening or abusive behaviour, sexual or racial or other harassment"

and,

> "Any action that could be considered to cause a breakdown of trust and confidence between employer and employee." (134)

The claimant's appeal

55. On 9 April 2018, the claimant appealed against his dismissal in a lengthy document covering 8 pages. He told the tribunal that this was drafted with the assistance of Ms Pop, his lay representative. He asserted that the dismissal was unfair as the reasons were not a potentially fair reasons; that an employee's actions outside of the workplace cannot amount to misconduct; that such conduct did not have an impact on the employment

relationship; and that the ACAS Code required the respondent to carry out a fair investigation (96-103).

56. In his grievance dated 30 March 2018, he accused Mr Webber and Mr Fenner of sexual harassment in the way in which they conducted meetings with him; he was asked questions by Mr Webber and Mr Fenner in such an aggressive, insensitive and sexually explicit manner regarding the incident at his home that it resulted in him suffering from anxiety, panic attacks; was unable to communicate and sleep; the incident could only be investigated by the police and not by his employer as it occurred outside of the workplace; and as Mr Webber had a daughter working at the restaurant in Canterbury, and Mr Fenner was the General Manager for the Dover restaurant where Ms X worked, they were both biased in their conduct of their meetings and preferred the account given by Ms X. The claimant also referred to an alleged similar incident of sexual harassment which was reported in the media. He stated that the incident occurred outside of the workplace (89-90).

57. On 18 April 2018, Ms Clarke wrote to inform him that his grievance would be considered as part of the appeal as there was a considerable amount of overlap. She took this decision following advice from human resources. She arranged for an interpreter to be present and reminded the claimant that he was entitled to have a companion to attend the hearing (106).

58. We have taken into account that paragraph 46 of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, allows for grievance and disciplinary issues to be dealt with together if they are "related". In the tribunal's view, it was both appropriate and practical that the claimant's grievance be dealt with during the appeal hearing as it came after the disciplinary hearing and the issues were related.

59. The appeal hearing was initially scheduled to take place on 20 April 2018, but the claimant emailed Ms Cheesman on 19 April, stating that he would be unable to attend as his fit note covered him up to 1 May. He was suffering from anxiety and panic attacks and had received the invitation 18 April not giving him sufficient time to prepare. He asked that his female work colleagues, who were at the club on the night in question, be allowed to give evidence. He stated that he would bring along his own interpreter in whom he trusted and requested that his grievance be treated separately from the disciplinary appeal. (108)

60. He later re-iterated his concerns to Ms Hayley Jordan, Human Resources Advisor, in an email dated 23 April 2018. (111-112)

61. The appeal hearing was on 3 May 2018, chaired by Ms Clarke, who was accompanied by Ms Yvonne Habib, note-taker. The claimant was accompanied by Mr Marinescu, his interpreter.

62. In evidence before us, the claimant under cross-examination, admitted that there were three issues in this grievance and that it was sensible that they be dealt with during the appeal. They were:

- The manner of the questioning;
- That the issue was a private matter; and
- That Mr Webber and Mr Fenner were biased.

63. During the appeal hearing, the claimant, through his interpreter, repeated the concerns that he had expressed in his grievance and in his grounds of appeal about the questioning by Mr Webber and Mr Fenner; not understanding the questions because he is Romanian; that the incident occurred outside of the workplace; witnesses were not allowed to give evidence on his behalf; and that both Mr Webber and Mr Fenner, for the reasons given in the grievance and grounds of appeal, were biased.

64. When he repeated his concerns that the incident occurred outside of the workplace and that his witnesses would prove that he was not a threat to his colleagues, Ms Clarke replied by saying that he and Ms X were the respondent's employees and although the incident occurred outside of working time, it presented a significant risk to the respondent's business. It impacted on its value systems and on internal working relationships, therefore, the respondent had to investigate it as a business issue.

65. Ms Clarke told the tribunal in evidence that the claimant's behaviour during the appeal was such that before questions were interpreted and put to him by Mr Marinescu, he understood them because he did not wait for Mr Marinescu to finish before giving his answers in Romanian. (117-122)

66. On 16 May 2018, Ms Clarke sent him her outcome letter. It is a detailed document covering the grounds of his appeal and grievance namely: he felt the decision to dismiss him was unjust and unfair; there was lack of evidence in support of the gross misconduct allegation; concerns he had in relation to the conduct of the investigation and disciplinary meetings; that the respondent had declined to allow his witnesses to give evidence; and the incident took place outside of the workplace, and his right to privacy had been violated.

67. She took each in turn and dismissed them.

68. In relation to intervening in what the claimant asserted was a private matter, she wrote:

> "I considered this point carefully and wanted again to take a company-wide perspective as well as reflecting on similar cases I have dealt with in the past.
>
> As a large and sociable employer, we come across instances where the lines between work and home become blurred. We have to take a sensible approach to the issues that cause us concern; the impact these have on the workplace and the relationships, which at Nando's form a fundamental part of the family-orientated culture we function within. Our employment platform goes far beyond serving chicken.
>
> In this case, it was alleged you sexually assaulted a Nandoca not on our premises. This is a matter which we take very seriously, as it is an action which we cannot

> condone or ignore and an action which has the potential to further impact (Ms X) should you stay employed.
>
> We also have a duty of care to other Nandocas you work with. A stance which we have to take to protective and forward-thinking approach on. We had to assess the continuation of the employment relationship and what that meant now and in the future. We also had to assess the message alone this would send out to the business should we have chosen to keep you in our Nando's Family. As I stated in our meeting, your actions pose a significant risk to our business.
>
> Therefore I do not uphold this part of your appeal."

69. Ms Clarke then wrote that in was "deeply concerning" that the claimant had significantly changed his account during the disciplinary hearing from what he said at the investigation meeting when he made a clear and unambiguous admission to the allegation. His lack of honesty meant that the respondent could no longer have the trust and confidence in him to act in the way that it would expect of its employees should he remain in the business (124-128).

70. She told the tribunal and we do accept her evidence, that her region put on social events, such as a family event; a summer party; a summer drinks event; and a Christmas party each year. Employees attend all events. The purpose being to develop a "culture of inclusivity and diversity". She also told the tribunal that there are many employees from Eastern Europe, hence the need for inclusivity. The allegation was serious, and she took into account the effect it had on Ms X. She did not want the message to go out that an employee could assault another employee and carry on working for the respondent. The claimant had changed his story and did not show an understanding of the effect his conduct had on Ms X. It affected the trust and confidence the respondent expected of him. Separating him from Ms X would not have been easy as it may require transferring one to another area resulting in one of them taking up residence at considerable costs to them. Further, there was no certainty that the claimant and Ms X would not be meeting either at a training session or at one of the social events arranged by the respondent.

71. We further find that the claimant studied English in Romania for seven years. He arrived in the United Kingdom in October 2015 and by the date of the incident, he had been in the United Kingdom for two and a half years. At the Canterbury restaurant there are Romanian, Polish and English-speaking members of staff. We find that the common language used is English unless those of the same nationality are working together when they are likely to speak in their own native language.

72. Having considered the documentary and oral evidence, we also find that the respondent was entitled to take the view that the claimant had a good command of the English language and had clearly admitted to the allegation. We have taken into account that he and Ms X conversed in English. Mr Krzyzaniak, who is Polish, also conversed with him in English on 21 and 22 March 2018. Of note was what we witnessed. At the

beginning of this tribunal hearing we put questions to the claimant about his current address. He gave the tribunal his old address and proceeded to give his current address in clear, understandable, and in good English. This was without the assistance of interpreter. However, immediately prior to giving evidence, Ms Pop, on his behalf, asked that the tribunal should provide an interpreter fluent in Romanian and English. At short notice, an interpreter was found, and it was noticeable that almost every question asked of the claimant he required it be translated before giving his answers in Romanian.

73. He understood the questions put to him by Mr Webber, in English, and gave his answers without prompting, in English. He made admissions to having engaged in a serious sexual act on Ms X. Knowing that suspension may lead to disciplinary proceedings and that sexual assault was a serious allegation of gross misconduct, he then changed his account. His changed account was not believed by Mr Fenner and by Ms Clarke who formed the view that his admissions were clear and unambiguous.

74. We were told that the police did not charge with an offence arising of the events during the evening in question.

75. We were told by Mr Ionut Andrei Tresca, that another employee, Mr M, British, faced more than one sexual harassment allegation while at work which went on for months, but no formal disciplinary proceedings were invoked against him. We were told that his manager, Mr Adam Jowitt, had several informal conversations with him but, Mr M's behaviour continued for several months. We were not shown any documentary evidence in relation to this employee nor was the alleged complainant in his case called by the claimant to give evidence before us in respect of the allegations made against him. He does not feature as a comparator in the list of issues.

76. Mr Fenner, in cross-examination, admitted to a sexual allegation made against him in either June or July 2018. He said that it involved a female member of staff who alleged that he inappropriately rubbed his body against her. He was suspended but during disciplinary proceedings he decided that, after 17 years working for the respondent, to resign. There was no evidence that he would only resign if certain conditions were met by the respondent.

77. The claimant relies on the above two cases as evidence of less favourable treatment because of sex and race. The complainants in both cases were white British women whose complaints were quickly investigated, but his grievance about the investigative and disciplinary process, was delayed and subsumed within the disciplinary appeal.

Submissions

78. We have taken in to account the detailed written submissions by Ms Pop, on behalf of the claimant, and the oral submissions by Mr Difelice, solicitor on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and

Rules of Procedure) Regulations 2013, as amended. We have also taken into account the authorities we have been referred to, as well as the ACAS Code of Practice and Guide on grievance and discipline.

The law

79. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

80. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

80.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

80.2 Second whether that genuine belief was based on reasonable grounds,

80.3 Third, whether a reasonable investigation had been carried out,

81. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

82. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

83. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

84. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

85. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

86. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

87. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

88. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

89. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

90. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the

other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

91. In the case of Thompson v Alloa Motor Co Ltd [1983] IRLR 403, the EAT, Lord McDonald, held that conduct within the meaning of section 98(2)b means "actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship", paragraph 5.

92. Evidence as to decisions made by an employer in "truly parallel circumstances" may be sufficient to support an argument, in a particular case, that it is not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate. "Employment tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar to afford an adequate basis for argument.", Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 EAT.

93. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

94. The protected characteristics are set out in section 4 EqA and includes race and sex.

95. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

96. Section 136 EqA is the burden of proof provision. It provides:

> "(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 provisions 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."

97. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play

where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

98. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

99. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

100. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

101. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual

orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

102. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

103. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

104. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

105. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

106. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799

107. Harassment is defined in section 26 EqA as;

> **"**26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or

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

108. Harassment covers the protected characteristics as set out in section 26(5) which includes race and sex.

109. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

110. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

111. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049..

112. An unjustified sense of grievance cannot amount to detriment, Barclays Bank v Kapur and Others (No 2) [1995] IRLR 87, CA.

Conclusions

Unfair dismissal

112. In relation to what was the reason for the claimant's dismissal, we are satisfied that it was that he sexually assaulted Ms X. It was, therefore, conduct.

113. Did the respondent have reasonable grounds? Both Mr Fenner and Ms Clarke had Ms X's interview notes who gave an account of what happened as far as she could recall. The gap in her memory was filled in by the claimant during his interview with Mr Webber. As the claimant changed his account before and during the disciplinary hearing, Mr Fenner accepted Ms X's account because, without prompting, the claimant admitted sexually assaulting Ms X and his volte face was not accepted.

114. In many respects both Ms X and the claimant corroborated each other in relation to lying on the bed; him touching her; telling him to stop; fingering her; and on her leaving his flat.

115. There was also the claimant's conversation with Mr Marcin Krzyzaniak on 21 and 22 March 2018, in English, because he trusted him. This trusted colleague wrote that the claimant admitted to him that he sexually assaulted Ms X because she was playing "hard to get".

116. Although the claimant maintained that he had a poor grasp of English and misunderstood the questions put to him, the respondent had reasons for believing his spoken English was good. Mr Webber asked Mr Ionut Andrei Tresca about the claimant's command of the English language and was told by him that it was good. On that basis Mr Webber did not see the need for an interpreter. The claimant spoke to him during his investigative interview in clear, understandable English, and he gave answers to open questions. This was unsurprising because unbeknown to Mr Webber, the claimant studied English in Romania for seven years and had been living in this country for two and a half years when interviewed. The claimant and Ms X conversed in English. The respondent had no note and no recollection of the claimant saying during his investigative interview that he needed an interpreter. Had he requested an interpreter one would have been provided as was the case during the disciplinary and appeal hearings.

117. The claimant's change in account to one of touching rather than fingering Ms X, was not believed.

118. We find that there were reasonable grounds for believing in the claimant's guilt. Both Mr Fenner and Ms Clarke genuinely believed that and did not have an ulterior motive for doing so.

119. Was there a reasonable investigation? Ms X and the claimant were interviewed. A statement was taken from Mr Krzyzaniak. During the disciplinary and appeal hearings the claimant put forward his case with the assistance of an interpreter. He had his and Ms X's accounts of events. The evidence the three women were going to give was in respect of his character. They were not witnesses of fact. We are satisfied that the respondent conducted a reasonable investigation.

120. It was reasonable for the respondent to combine the appeal grounds with the grievance as the issues in relation to each were related and accords with paragraph 46 of the ACAS Code of Practice.

121. Was dismissal within the range of reasonable responses? The sexual assault allegation is in the respondent's disciplinary policy as an act of gross misconduct. It was a serious sexual assault with adverse effects on Ms X to the extent that she reported it to the police shortly after speaking to her father. The respondent did not accept the claimant's changed account and his attempt to minimise his behaviour. He also failed to appreciate the impact on Ms X. His behaviour affected the trust and confidence the respondent reposed in him and went against its ethos of diversity and inclusivity. Women must feel safe and respected by their colleagues. It is for an employer to determine the seriousness of the conduct, Tayeh v Barchester Healthcare Ltd. It had to respect the rights of Ms X and for her not to be sexually violated. There was the risk, if the claimant was given a written warning whether final or not, that Ms X may come into contact with him by attending one or more of the respondent's social or training events.

122. It is precisely for those reasons the respondent decided that it could not ignore the fact that one of its female employees was sexually assaulted by a male employee. Applying Thompson v Alloa Motor Co Ltd, the claimant's conduct outside of the workplace reflected on the employer-employee relationship. He and Ms X attended a club frequented by the respondent's employees. Ms X reported the incident to the respondent as well as to the police which is evidence of the impact it had on her. She also reported it to the respondent because, as a responsible employer, she wanted the matter to be investigated and by inference action taken. The decision to intervene is unimpeachable.

123. Applying Newbound and Brito-Babapulle v Ealing Hospital NHS Trust, the respondent concluded that there was no other penalty it could apply in this case other than summary dismissal. It came to that conclusion having made its findings on the seriousness of the claimant's conduct and impact on Ms X. We are not in the role of being the reasonable employer. The respondent came to a conclusion for the reasons given which we do not impugn. The claimant's unfair dismissal claim is not well-founded and is dismissed.

124. Even if the respondent had held separate hearings for the disciplinary allegation and the claimant's grievance, there was no evidence to suggest that the outcome in both instances would have been different. The claimant would have been dismissed in any event as the evidence before the respondent would not have changed and it was unlikely that the grievance outcome would have been different.

125. In relation to alleged inconsistent treatment, in the case of Mr M circumstances, we did not have documentary evidence to determine whether his circumstances were similar to the claimant's. All we had was the evidence by Mr Tresca. In Mr Fenner's case he was subject to disciplinary proceedings but resigned before they were concluded. There was no evidence that he had fingered the female complainant.

126. In order for there to be inconsistent treatment the circumstances must be "truly similar or sufficiently similar", Hadjioannou v Coral Casinos Ltd. Neither Mr M's nor Mr Fenner's circumstances satisfies either requirement.

Direct sex discrimination

127. This claim is based on the respondent's treatment of Ms X's complaint when compared with how the claimant's grievance was dealt with.

128. Ms Pop submitted that, in three respects, the respondent did not address the claimant's grievance; it did not allow the claimant to present evidence from his female witnesses; and priority was given to the statement of Ms X, a British female.

129. Following advice from human resources, Ms Clarke treated the concerns raised in relation to the conduct of the investigation by Mr Webber and the disciplinary hearing by Mr Fenner, as related to his grounds of appeal. The three matters he identified as arising out of his grievance were all relevant to his appeal.

130. As we have already found, the evidence the claimant's three female witnesses were to give was of the claimant's character as they did not witness the incident. The respondent was aware of his length of service and hitherto clean disciplinary record. Their evidence was not relevant to commission of the sexual allegation under investigation.

131. Both Mr Webber and Mr Fenner had to ask questions relating to the events during the night in question. The allegation was that the claimant sexually assaulted Ms X. She did not know that he was fingering her until she woke up, it was the claimant who gave the information about how he fingered her. It was graphic in its detail and it was clear he took advantage of her while she was asleep. It was unavoidable, in the circumstances, that questions would be put to him of a sexually explicit nature. Neither the evidence given by Mr Webber and Mr Fenner, nor from the notes of their meetings with the claimant, is it evident that their conduct was aggressive.

132. In relation to bias, there was no evidence given in support of this assertion. It was a concern or suspicion and nothing more. We are satisfied that Mr Webber's and Mr Fenner's decisions were based on the preponderance of the evidence before them. The allegation was serious and had to be investigated by the respondent's managers.

133. As regards preferring the evidence of Ms X, Mr Webber, Mr Fenner and Ms Clarke, were entitled to take into account that the claimant gave full and frank admissions when interviewed. He later changed his account to touching Ms X. He was not believed because the respondent also had the statement by Mr Krzyzaniak, who wrote that the claimant made admissions to him of sexually assaulting Ms X. There was no evidence or belief that Ms X had fabricated her account. Quite the contrary, her account and the

claimant's corroborated each other in many material respects. The respondent, therefore, had good grounds for believing Ms X.

134. We also conclude that Ms X is not an appropriate comparator because she was only a complainant whereas the claimant was an alleged perpetrator and complainant.

135. Even if Ms X is an appropriate comparator and the claimant was treated less favourably in the three ways described by Ms Pop, we have come to the conclusion that it was unrelated to the claimant's sex or to sex. The respondent had to investigate a serious allegation of sexual assault which, if proved, amounted to gross misconduct. It was the claimant's behaviour that was under investigation not his sex of anyone else's sex. Had he punched Ms X while in the club, the assault would have been investigated and an outcome reached which would have been unrelated to sex. This claim is not well-founded and is dismissed.

Direct race discrimination

136. There is no direct race discrimination claim in the list of issues, but Ms Pop raised it in the context of the direct sex discrimination claim when she referred to the comparator as Ms X, as a British female. We have decided to deal with this claim for the sake of completeness.

137. His comparators are Mr M, whom it is alleged faced sexual harassment allegations but was not disciplined; Ms X; and Mr Fenner.

138. We have already dealt with the complaint by Ms X and the claimant's grievance and is not an appropriate comparator.

139. We did not have any documentary evidence in relation to Mr M's case, only Mr Tresca's account. Mr M was not a named comparator in the list of issues, and we cannot verify his alleged British nationality. We were, therefore, unable to engage in an appropriate, sensible, comparative analysis.

140. In relation to Mr Fenner's case, as we have already found, he did not set preconditions for his resignation. After 17 years' service with the respondent he decided to resign. In the claimant's case, he wanted two months' salary; a favourable reference; and a confidentiality agreement. In addition, there was no allegation that Mr Fenner had fingered the female complainant in his case. Mr Fenner is, therefore, not an appropriate comparator.

141. In these comparator cases, the alleged acts occurred in the workplace, but in the claimant's case it was outside of work. An appropriate comparator would be a Nandoca who is not Romanian and who committed a serious sexual act on a female outside of the workplace, but no disciplinary action was taken, or they were allowed to resign. I would appear from all the evidence available to us that such a person would have been dealt with in

the same way as the claimant for the reasons given by Mr Fenner and Ms Clarke. The matter would be treated as a serious sexual assault.

142. The claimant has not shown less favourable treatment because of race for the burden to shift on to the respondent to show a non-discriminatory reason for the treatment.

143. Even if the claimant can establish less favourable treatment, the reason why he was dismissed was that he engaged in a serious sexual assault on Ms X that impacted on her so seriously that she reported it to her father, the police were involved, and the matter reported to the respondent. The claimant changed his account and was not believed. He failed to appreciate that when a woman says no, she means no. It is not a green light to go on to sexually assault her, particularly when she is unaware of what is happening to her. By persisting in such behaviour, a man demeans, degrades, and disrespects the woman. The respondent had to act for the reasons given by both Mr Fenner and Ms Clarke, and they were irrespective of race. We conclude that had it been someone who is not Romanian, the respondent would have conducted itself in the same way and dismiss that person summarily. For these reasons, this claim is not well-founded and is dismissed.

Harassment related to sex

144. Did Mr Webber and Mr Fenner ask the claimant sexually explicit questions about what happened in the bedroom and, if so, was such conduct unwanted?

145. It was the claimant who gave a graphic, sexually explicit account of what he did when Ms X was asleep. Both Mr Webber and Mr Fenner had to question him about what Ms X said occurred and to get his account. It was unavoidable that questions of a sexual nature were going to be asked of him as it was a serious sexual assault allegation. We have come to the conclusion that the questions were not unwanted but predictable under the circumstances.

146. Even if the questions were unwanted, they did not have either the purpose or effect of violating the claimant's dignity nor of creating an intimidating, hostile, degrading, humiliating or offensive environment for him, because he gave an account of kissing the claimant on her neck; touching her on her leg; pulling down her jeans and underwear, and fingering her, Richmond Pharmacology v Dhaliwal. He was questioned on Ms X's and on his accounts of events during the evening in question. For these reasons we conclude that this claim is not well-founded and is dismissed.

147. It follows from our conclusions that all claims are dismissed.

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Employment Judge Bedeau

Date: …2 July 2020……..

Sent to the parties on: .....

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For the Tribunal Office