EMPLOYMENT TRIBUNALS

Claimant:	**A**		
First Respondent:	**B**		
Second Respondent:	**C**		
Heard at:	**Cardiff via CVP**	**On:**	**14 – 18 December 2020**
Before:	**Employment Judge**	**R Havard**	
	Members:	**Ms M Humphries**	
		Ms B Currie	

Representation:

Claimant:	Mr S Hirst, Counsel
First Respondent:	Ms R Tuck QC, Counsel
Second Respondent:	Mr L Bronze, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Claimant's claim of sexual harassment is not well-founded and is dismissed;

2. The unanimous judgment of the Tribunal is that the Claimant's claim of sex discrimination is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 12 June 2019, the Claimant indicated that she wished to pursue a claim that she had been subjected to sexual harassment and that she had been discriminated against on the grounds of sex.

2. The claim for sexual harassment is made against both the First and Second Respondents. The claim for sex discrimination is made against the First Respondent alone.

3. Both the First and Second Respondents lodged responses in which they disputed the claims being pursued by the Claimant.

4. At a preliminary hearing conducted by telephone on 28 August 2020 before Employment Judge Brace, it was agreed by all parties that it was appropriate and proportionate for the final hearing to take place remotely via CVP.

5. At the same hearing, and on the application of the Second Respondent which was not opposed, Employment Judge Brace made a restricted reporting order pursuant to section 11 of the Employment Tribunals Act 1996 and Rules 50(1) and (3)(d) of the Employment Tribunals Rules of Procedure 2013. The order prohibited the publication in Great Britain, in respect of the proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain. It was ordered that the parties may not be so identified and it was stipulated that the order would remain in force until both liability and remedy had been determined in the proceedings unless revoked earlier.

6. On the same day, Employment Judge Brace made an Anonymisation Order in respect of the names of the parties to these proceedings. This granted the Claimant and Second Respondent lifetime anonymity. Employment Judge Brace considered that, if the First Respondent was not anonymised, this could lead to the identification of the Claimant and Second Respondent.

Issues

7. At a preliminary hearing conducted by telephone on 29 August 2019, the issues between the parties to be determined by the Tribunal had been discussed and formulated. At the beginning of this hearing, it was confirmed by the representatives of the parties that there was no requirement for those issues to be amended in any way.

8. Those issues are:

    1. *EqA, section 13: direct discrimination because of sex*

        a. Has the First Respondent treated the Claimant as follows:

            i. Carried out a "woefully inadequate" investigation into the Claimant's complaint of harassment against the Second Respondent? In particular the Claimant alleges that the investigation was inadequate because:

(a) The written report of the investigation was only 4 pages long and did not contain any detailed narrative or fact finding;

(b) The investigators failed to interview key witnesses until more than one week after 21 January 2019;

(c) The written report referred to "inconsistencies" in the Claimant's account of the incident as a reason for disbelieving her without properly setting out what the inconsistencies were;

ii. Disbelieved the Claimant in its investigation report?

iii. Adopt a "neutral" stance in investigating the Claimant's complaint?

iv. Fail to take any action against the Second Respondent following the Claimant's complaint?

b. Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

c. The Claimant relies upon a hypothetical comparator;

d. If so, was this because of the Claimant's sex and/or because of the protected characteristic of sex more generally?

2. *EqA section 26: Harassment related to sex*

a. Did the Second Respondent engage in a sexual assault on the evening of 21 January 2019?

b. If so, was that conduct unwanted?

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

d. Did the conduct have the <u>purpose</u> of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

e. Did the conduct have the <u>effect</u> of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (Whether conduct has this effect involves taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

f. If so, is the First Respondent liable for the Second Respondent's conduct on 21 January 2019, in accordance with section 109 EqA?

g. The First Respondent maintains that it is not liable for the acts of the Second Respondent by reason of section 109(4) EqA. Did the First Respondent take all reasonable steps to prevent the Second Respondent from carrying out the conduct complained of?

Evidence

9. The Claimant gave evidence on her own behalf.

10. The First Respondent called:

    i. Witness J, Senior HR Business Partner at the First Respondent.

    ii. Witness K, Unit Manager of the First Respondent's Employment Team based in Bristol and Cardiff and the Plymouth Settlement Agreement Unit;

    iii. Witness L, Unit Manager of the First Respondent's London Employment Rights Team;

    iv. Witness M, Branch Manager for the Wales and Southwest Branch of the First Respondent;

    v. Witness N, Branch Manager of the Northwest and Northern Ireland Branch of the First Respondent.

11. The Second Respondent gave evidence on his own behalf.

12. The Claimant and Second Respondent had provided written witness statements. Statements had also been submitted by those witnesses called by the First Respondent. An agreed bundle had been prepared by the First Respondent and submitted together with an index running to 709 pages. In the course of the hearing, certain additional documents were incorporated into the bundle and paginated accordingly. Unless otherwise stated, any page references in this judgment refer to pages in the bundle.

Submissions

13. At the outset of the hearing, Mr Hirst lodged a document entitled "Skeleton Argument on Behalf of A". This had not been served on the representatives of the First and Second Respondents and therefore arrangements were made for this to be done.

14. At the conclusion of the evidence, and in support of their oral submissions, Mr Hirst and Ms Tuck QC provided written submissions. Mr Bronze relied on oral submissions alone.

Findings of Fact

Allegation of sexual assault

15. The First Respondent is a national law firm. It acts primarily for trade unions and their members, specialising in particular in the areas of claimant personal injury, employment law and criminal law. The firm is organised into five geographical branches, each of which will have one or more offices operating within it.

16. On 3 December 2018, the Claimant commenced her employment with the First Respondent; she is a qualified solicitor specialising in employment law with three years post qualification experience. Her status was that of a Grade 4 Executive in the Employment Rights Department in the Cardiff office. The Claimant continued in that employment until her resignation which took effect on 10 July 2019.

17. The Second Respondent is employed by the First Respondent as a paralegal in its Personal Injury Department in the Cardiff office. He is a member of the Serious Injury and Asbestosis Team. He is employed at Grade 3 level. Consequently, whilst the Second Respondent has been with the firm for some 27 years, he was employed at a lower grade to that of the Claimant.

18. Taking account of the nature of its activities, the First Respondent and its staff are required to operate in accordance with a number of policies and are expected to follow procedures common to all members of staff. For the purposes of these proceedings, the following are of particular relevance: the staff handbook (page 611 to 636); the Dignity at Work Bullying and Harassment Procedure (pages 637 to 664); Disciplinary Policy (pages 673 to 708); the Equality and Diversity in Employment Policy (pages 709 to 717) and the Grievance Procedure (pages 718 to 724).

19. These policies and procedures, together with other documents such as the Sickness Absence Policy, would have been available to all members of staff on the firm's intranet.

20. When the Claimant commenced her employment with the First Respondent, she received her induction from Witness J and Witness K. Witness J provided the Claimant with instruction on the various policies and procedures and how to gain access to them. Witness K provided more operational instruction, taking the Claimant through the operational manuals which would have included guidance and instruction on such issues as client care arrangements and time recording. Whilst the Claimant made some generalised criticisms, the Tribunal was satisfied that the Claimant was properly inducted into the firm. The Tribunal also accepted the evidence of Witness J and indeed that of the Second Respondent and found that the Second Respondent had received training on equality and diversity in March 2011 and then in 2014. The firm conducted ongoing online training of its staff and provided online updates in areas such as the Bullying and Harassment Policy and the Equality and Diversity in Employment Policy.

21. As part of the service offered to its trade union clients, the First Respondent would provide training to the unions' regional offices and officials. Witness K described them as "union education meetings".

22. One such training session had been organised to take place on 22 January 2019. It had been planned to hold the training session in Bangor, North Wales, on the topics of employment law and personal injury claims.

23. The Claimant was one of a team of four in the Employment Team in Cardiff. She reported to Person V who is a Senior Supervisor and who the Claimant described as her, "work mother". Witness K was Unit Manager of the team.

24. The original plan was for Person V and the Second Respondent to deliver the training in Bangor on 22 January 2019 on employment law and personal injury claims respectively. However, on 16 January 2019, Person V indicated that she would be unable to attend the training on 22 January 2019. Rather than cancel it, Person V and Witness K concluded that the Claimant was perfectly capable and competent to take her place. Also, the Claimant had been a student at Bangor University and therefore knew the area well. The Second Respondent had never been to Bangor before.

25. The Claimant confirmed that there were pre-prepared slides and that, whilst she had not delivered such training before, she had some experience of public speaking which she gained when at university and she was happy to do it. It was considered that it would be good experience for her.

26. Whilst the Claimant and the Second Respondent worked in the same building, they barely knew each other. It was arranged that they would drive up to Bangor together on the afternoon of 21 January 2019, staying overnight in a hotel called "the Management Centre" and deliver the training on the following morning.

27. It was during the evening of 21 January 2019 that the Claimant alleged that she was sexually assaulted by the Second Respondent.

28. The claim for sexual harassment is restricted to the events which the Claimant alleged to have occurred in her hotel bedroom. However, the Tribunal's findings of fact with regard to events earlier in the evening represent important context.

29. It was decided that the Claimant and Second Respondent would drive up to Bangor in the Second Respondent's car. The Second Respondent would be able to claim mileage expenses at 65 pence per mile and both were entitled to a subsistence allowance of £10 to go towards an evening meal. The First Respondent would be responsible for paying the hotel accommodation.

30. By the time the Second Respondent collected the Claimant from outside the office on the afternoon of 21 January 2019, he was aware that the Claimant had studied at Bangor University. On the journey to Bangor, the Claimant and Second Respondent spoke to each other about their respective families and also the Claimant's time as a student at Bangor University. When talking about their respective families, the Claimant had indicated that she had used to work on a farm and that her parents used to be in the police force. They did not stop on the

journey to Bangor. The Second Respondent indicated that it had been a long drive and he "had worked up a bit of a thirst". There was a discussion about what sort of drink they each enjoyed.

31. From time to time, those who delivered the training, to include the Second Respondent, would meet union officials the night before a training session but no such arrangements had been made on this occasion. Further, the Tribunal accepted the Second Respondent's evidence and found that he had indicated to the Claimant that, if she wished to meet any of her friends from her university days during the evening, he would perfectly understand. However, this did not happen.

32. On arrival at the hotel, it was agreed between the Claimant and the Second Respondent that they would meet each other in reception at 7 p.m. to go for a drink and then have something to eat. This meant that they had approximately one and a half hours to themselves. During this time, the Claimant indicated that she ate some food left over from her lunch but the Second Respondent had not eaten anything before they met at 7 p.m.

33. There were substantial areas of conflict between the accounts provided by the Claimant and the Second Respondent with regard to what was said and what happened in the lead up to, and when in, the Claimant's hotel room.

34. The Claimant confirmed that she had not written a detailed complaint immediately following the alleged assault. Her account is therefore drawn from the attendance notes prepared by those with whom she spoke on 22 January 2019 and subsequently, the minutes of the investigatory meeting and appeal meeting on 29 January 2019 and 6 March 2019 respectively, the statement prepared for the purposes of these proceedings and her oral evidence.

35. The Claimant confirmed that she met the Second Respondent in reception and he said, "look at you all dolled-up". Initially, the Claimant said in answer to questions from Mr Bronze that she thought this was an odd remark. However, when asked by Mr Hirst to clarify what she meant, the Claimant stated that she found the comment to be degrading. All that she had done was to let her hair down and the remark made her feel "like a piece of meat" and made her feel "dirty" and "horrible" and "as if I was stripped already". Nevertheless, the Claimant and the Second Respondent decided to go for a drink and then have something to eat. They went to a bar called Patricks and then to a second bar called Bellevue. Both were known to the Claimant from her university days.

36. When at Patricks, they both drank two pints of cider and also two drinks called a "Quad Vod" which was a drink comprising of a quadruple vodka and orange which the Claimant used to drink when in university and which she had mentioned to the Respondent. In her interview at the appeal, the Claimant said, "With quad vods the tradition is to neck it. He challenged me to. He necked his and I sipped. When he put the second drink down he said there you go that's your fine".

37. They both had a second Quad Vod although the Claimant believed that it may have been a single shot of vodka as she said that it tasted weaker than the first. When the Claimant found out that they were not meeting any one from the union, and as the Second Respondent was, in her view, a senior figure, she did not think there was anything untoward in the amount they were drinking. They stayed at Patricks for a couple of hours and the barman spent time talking to them and he recommended an Italian restaurant but the Second Respondent had seen the hotel menu and so the Claimant anticipated that they would have a drink and return to the hotel for something to eat.

38. When at Patricks she described herself as "happy drunk. Tipsy but not falling".

39. The Claimant denied that it was her idea to have a competition to see who could drink the first Quad Vod the quickest and that, when she lost, she would have to drink another one as a fine.

40. When asked whether she could drink that much without any ill effects, she confirmed that she came from a farming background and that, "with that amount of alcohol I would feel fine" (page 387).

41. It was indicated by the Claimant that the Second Respondent also had a drink called a Chilli Vodka and they then left and went to a second bar called the Bellevue.

42. The Claimant indicated that the Second Respondent bought another pint of cider for each of them but that, having drunk perhaps a third of that drink, she had a "blackout". The Claimant stated that she suspected the Second Respondent had spiked her drink. Her next memory was holding the key and opening the door of her hotel room. On walking through the door, the Claimant alleges that the Second Respondent came up behind her and pushed her against the wall; he tried to kiss her and the Claimant bit his lip. He had his hands around her neck and then forced her hand down onto his penis and made her masturbate him. The Claimant said that she could smell the alcohol on his breath and that he was making moaning noises. She tried to force him off her but was unable to do so. The Claimant alleged that the Second Respondent then was lying on his back on the bed with his shirt unbuttoned. He was lying spread-eagled on the bed with his jeans and boxer shorts around his ankles. He then got up and left the room.

43. The Claimant maintained that she froze and shut her eyes and told him to leave the room. When she had done so, she locked the door. She discovered that the Second Respondent had left his mobile and his scarf in the room and she took photographs of them.

44. The following morning, the Claimant telephoned Person V at just after 7 a.m. and provided her with an account of what had happened. Person V' record of that conversation is set out at page 185 of the bundle. She then spoke with her boyfriend and said that she had been assaulted but cannot remember whether she told him exactly what had happened. The Claimant called her mother and told her what had happened. The Claimant indicated that she did not know what to do but felt obliged to go ahead with the presentation and she went down to

breakfast even though she said she was not hungry. She looked through the pane of glass in the door to the restaurant and could not see the Second Respondent but the maître d' took her to the table at which the Second Respondent was sitting as he knew that the Claimant and the Second Respondent were colleagues. The Claimant stated that the Second Respondent apologised to her five times and then made small talk but she left without eating anything.

45. On subsequent telephone conversations with Person V, it was confirmed that she should not attend to give the presentation. The Claimant also held conversations with Witness K and provided him with an account of what had happened. This is the version set out at page 156 on which the Claimant relies:

> *"James*
> *Has spoken to [the Claimant]*
> *Drove up together. Got to hotel. He walked her to room, she opened door.*
>
> *Barged in, pushed her against wall and made her grab his penis + give him a hand job.*
>
> *He goes to bed and starts taking his clothes off. She screams. He leaves room leaving scarf + phone. He knows next day – she ignores.*
>
> *Goes down to hotel. Maître d' taken her to his breakfast table. He says are you angry. Repeats it five times. She panics, doesn't know what to say + says there is a family emergency + leaves. He says are you leaving because of me + she leaves."*

46. Arrangements were made for the Claimant to travel to be with her parents and she subsequently made an online report to the police.

47. As for the Second Respondent's account of what had happened, he confirmed that he had not had anything to eat before meeting with the Claimant in reception at 7 p.m. He agreed that he said "look at you all dolled-up" but did not think that this could have caused any offence. The Second Respondent said that, when in the car, the Claimant had her hair tied back and, when she met him in reception, she had let her hair down. The Second Respondent stated that he was wearing a T shirt, jumper, gilet and jeans as it was cold, windy and raining. The Second Respondent got an umbrella from his car and gave it to the Claimant as they walked up the hill to the first bar which was on the recommendation of the Claimant as the Second Respondent had never been to Bangor before.

48. When walking to the first bar, the Claimant was telling the Second Respondent about parties being held in houses across the road. He went and took money out of a cash point and it was then that they went to Patricks bar. Having obtained a pint of cider for both of them, they sat at a table and chatted. The Claimant had told the Second Respondent about drinking games they used to play when she was in university and she mentioned Quad Vods. The Second Respondent asked the barman for two Quad Vods and the Claimant had already told him what was included in the drink. The Second Respondent said that the Claimant stated the

game was to "down them and the loser gets a fine and has to down another one". The Claimant said that she was not "a wuss" and that the loser had to drink another. The Second Respondent drank the Quad Vod more quickly than the Claimant.

49. The barman came to speak with them and he asked the Second Respondent whether he wanted to try a Chilli Vodka. The barman gave the Second Respondent a very small measure which he tasted which caused his lips and tongue to burn and he had to drink some cider to cool them down.

50. It was when the Claimant and the Second Respondent were talking to the barman that the conversation turned to where they had visited when travelling. The barman had said that he liked the Caribbean. The Second Respondent stated that he had been on his honeymoon in Hawaii. The Second Respondent then stated that the Claimant, "asked if I preferred Brazilian or Hawaiian. We were tipsy. I knew what she meant. I said I didn't know the difference." (page 360)

51. The Second Respondent joked with the Claimant about when she was going to pay her fine i.e. drink another Quad Vod. He said they both had another Quad Vod with the Claimant taking the ice out of her drink and placing it in an empty glass that was on the table. They then had a second pint of cider.

52. The barman mentioned an Italian restaurant which was nearby when discussing where to go to eat but both decided they no longer wanted anything to eat.

53. When the Second Respondent asked the Claimant where they were going to go next, she mentioned Wetherspoons and also Yates and Bitch Hill which has its name because the Claimant said it "was a pain to walk up".

54. In any event, they both walked to another bar called the Bellevue. They ordered another pint of cider. The Second Respondent then saw the rum that he had mentioned previously when in the car on the journey to Bangor. It was on a shelf behind the barman and it was 63% proof. Both drank a single measure of the rum and the Claimant then went to the bar and bought a drink which the Second Respondent could not identify but that it was green and the Claimant said that it was WKD; he did not know what else was in it.

55. The Second Respondent recalled the Claimant going to the toilet and the Second Respondent understands that it was at this stage the Claimant alleges that her drink must have been spiked by him which he categorically denied.

56. The Second Respondent described both of them as being "tipsy". When leaving the Bellevue, the Second Respondent held the door open for the Claimant. It was narrow and there was a small step leading out of the pub. The Second Respondent held out his hand to steady the Claimant. They kissed but only for a few seconds; it just happened.

57. They then walked down the hill with an arm around each other's waist to try and steady each other. When they got to the hotel car park, the Second Respondent put his umbrella in the boot and the Claimant walked on to the hotel entrance.

58. The Claimant and Second Respondent walked through reception. He was staying in room 119 and the Claimant was in room 115. His room was on the corner of the corridor and the Claimant's room was down some steps on the right. The Claimant got her key out and opened the door. As she walked in, she held the door open and the Second Respondent walked in behind her. As the doors were hinged fire doors, it closed by itself. The Second Respondent sat at the foot of the bed which was directly in front of the door and they were both chatting. After a short while, the Claimant took two small steps towards the Second Respondent and they kissed for about 20 seconds.

59. The Second Respondent could feel his head starting to spin and he got up and stumbled to the door. He opened the door and left but within moments of leaving the room he had to sit down and was ill on the floor. The Second Respondent did not consider he was in the Claimant's room for any longer than two to three minutes.

60. He went into his room and lay face down on the bed fully clothed. He woke shortly afterwards when he heard other residents going to their room, and when he moved, he was sick again and then went back to sleep. He woke up in the morning, knocking the Claimant's door at about 8.30 a.m. to see if she was going down for breakfast.

61. When there was no answer, he went down and sat at the first table to the right. Some 10 minutes or so later the Claimant walked in and he said to her "I blame you" to which the Claimant replied that she felt fresh as a daisy. The Claimant then ordered a poached egg when the Second Respondent told her that he was having an omelette. The Second Respondent asked the Claimant if she had seen his phone and she replied that it was in her room.

62. The Claimant then told him that she had a family emergency. The Second Respondent asked her if she wanted a lift to the station which she declined and he also offered her his umbrella. The Claimant then left. It was at that stage that the Second Respondent tried to call Person V to find out what was going on. The Second Respondent finished his breakfast and then, having retrieved his phone, went to give the training to the trade union officials.

63. On the following day, the Second Respondent was told by Witness M that an allegation had been made against him and that there would be an investigation. The Second Respondent was suspended with immediate effect.

64. In reaching its findings of fact in respect of the allegation of sexual assault made by the Claimant against the Second Respondent, the Tribunal had considered all the evidence available to it. In assessing the evidence, the Tribunal had concluded that there were material aspects of the Claimant's account which were neither credible nor reliable.

65. In her oral evidence as outlined at paragraph 35 above, the Claimant stated how offended she was at the Second Respondent's remark, "look at you all dolled up". However, the Tribunal did not accept her evidence. It conflicted with the fact that she still went out for the evening with the Second Respondent. She

describes how they were chatting with each other at the Patricks bar and it is inconsistent with her comment in the course of her appeal interview when she describes herself as, "happy and chatty" when she was walking from the Patricks bar to the Bellevue (page 389).

66. The Claimant maintained that she felt under pressure to drink as much as she did on the basis that the Second Respondent was her senior and also because she had only recently joined the firm and wished to make a good impression.

67. The suggestion that the Claimant considered the Second Respondent to be more senior was not considered to be plausible by the Tribunal. Whilst the Second Respondent had been at the firm for a number of years, the Claimant was a Solicitor with three years' post qualification experience and held a more senior grade within the firm than the Second Respondent.

68. It was the Claimant who had been to university in Bangor and it was at her recommendation that she and the Second Respondent went to the bars at Patricks and Bellevue. She knew the manager at Patricks from her university days and it was the Claimant who had told the Second Respondent about a drinking game involving a drink called a "Quad Vod". Having found that it was the Claimant who had informed the Second Respondent about the drinking game, the Tribunal also found that it was the Claimant who told the Second Respondent that, as part of the game, a fine had to be paid, namely drinking a second Quad Vod, by the person who drank the first Quad Vod less quickly. The Tribunal also found that the Claimant had consumed two Quad Vods when at Patricks.

69. It was also alleged that it was the Second Respondent who, when at Patricks bar, had raised in conversation the topic of Brazilians and Hawaiians. However, the Tribunal considered that the Second Respondent had a clear recollection of the detail of that conversation and that it followed a discussion about travelling, with the Second Respondent having mentioned that he had been to Hawaii on his honeymoon. The Tribunal therefore found on the balance of probabilities that it was the Claimant who had made the remark to the Second Respondent.

70. The Tribunal did not find the Claimant's belief that her drinks had been "spiked" by the Second Respondent to be plausible. There was no evidence to support such a suspicion. It was suggested by the Claimant that this may have occurred when she had been to the lavatory. However, she professed to have no memory of what happened in the period shortly after their arrival at the Bellevue bar and her walking into her hotel room. It was when they were at the Bellevue bar that she went to the lavatory.

71. The Tribunal did not find the Claimant's assertion to have suffered from a blackout to be credible. As stated, it was suggested by the Claimant that she has no memory of events between the time that she had consumed approximately a third of her pint of cider when at the Bellevue and the time at which she had her key in her hand opening the door to her hotel room.

72. During the period of the "blackout", the Second Respondent confirmed that they had kissed briefly on leaving the Bellevue. Taking account of the description of how this occurred, the Tribunal accepted the Second Respondent's evidence. They had then walked with their arms around each other's waists to support each other when walking from the Bellevue back to the hotel. This is consistent with CCTV footage to which the Crown Prosecution Service referred in its letter of 9 April 2020 (page 536), which was not challenged. The footage showed the Claimant and the Second Respondent holding hands as they enter the hotel car park. The CCTV then shows the Claimant letting go of the Second Respondent's hand and walking quickly ahead of him and entering the hotel. When giving her oral evidence, the Claimant postulated for the first time that this may suggest that she was scared but there was no evidence at all to suggest that this was the case.

73. In the letter from the CPS, it was also stated that the Claimant informed both her mother and her boyfriend that the Second Respondent had escorted her back to her room. Indeed, the Claimant told her boyfriend that she could recall the Second Respondent offering to walk her back and accepting because she thought he was being kind. This is also confirmed by the Claimant's representative in the investigation and appeal, Person T, who stated that the Second Respondent walked the Claimant to her door which she thought was an act of kindness.

74. The Tribunal also took into account what is said by the Claimant in her own written statement. There is very little detail provided by the Claimant in the statement with regard to the events which are alleged to have occurred in her hotel room, but the Claimant's description of what she was thinking when they were returning to the hotel suggested that she did have a recollection of what had occurred at that stage of the evening. The following are extracts from paragraphs 7 and 8 of her statement:

> "7. When we arrived in Bangor we checked into the hotel and [the Second Respondent] and I then met in the hotel reception in order to go for some drinks and something to eat. We met around 7 pm, and visited hospitality venues in the immediate vicinity of the hotel. We stayed out drinking for around two to three hours, and then returned together to the hotel at around 10 pm.
>
> 8. I went up to my room, intending to get an early night and to prepare myself for the training session the following day. [The Second Respondent] and I had consumed a fairly substantial amount of alcohol in a short space of time and so I wanted to make sure that I was able to "sleep this off" and be refreshed for the training session the following day . . . "

75. The Tribunal also took into account that the Claimant had confirmed that, whilst she did not drink such quantities of alcohol on a regular basis, admitted by her to be in the region of 14 to 16 units of alcohol, she had drunk such amounts in the past and described herself as being "happy drunk". There was no plausible explanation for the Claimant suffering a blackout for what would have amounted

to a relatively short period of time and that the memories are then restored the exact moment that she walks into her hotel room.

76. As for the events which took place within the hotel room, the Claimant accepted that there were no witnesses to what took place and that it would be necessary for the Tribunal to prefer her account to that of the Second Respondent.

77. In reaching its decision, the Tribunal took into consideration its findings of fact with regard to the events leading up to the Claimant and the Second Respondent finding themselves in the Claimant's hotel room as part of its assessment of the Claimant's credibility and the reliability of her account compared with that of the Second Respondent.

78. The Tribunal took into consideration the proposition that, had the sexual assault taken place as described by the Claimant, this may have led to her recollection being affected by the shock of what took place. Nevertheless, the Tribunal had to make its findings on the basis of what the Claimant described as "snapshots" and that her recollection was "fragmented".

79. In her witness statement, the Claimant does not outline in any detail what she alleges to have taken place in the hotel room. She states at paragraph 8, "I reported the incident as recorded at page 156 of the bundle. I find it difficult to recount the events of that night again for the purposes of this statement, but they are accurately recorded in the report at page 156."

80. In fact, the account at page 156 represents a handwritten note by Witness M of a conversation she held with Witness K on 23 January 2019 at 14.08 which, in turn, is based on an earlier conversation between the Claimant and Witness K. The account is set out at paragraph 45 above.

81. The first account given by the Claimant was to Person V shortly after 7 a.m. on 22 January 2019. Person V' record of that account is at page 185. In that conversation, the Claimant informed Person V that the Second Respondent had tried to force himself on her. Person V said the Claimant explained that both she and the Second Respondent had been out for dinner and "had had a few drinks. [The Claimant] said they continued drinking in [the Claimant's] hotel room when they returned. She then said that the Second Respondent had undressed and grabbed her trying to kiss her. She said she struggled to get him off her but that he eventually hurriedly left the room leaving behind his mobile phone and scarf."

82. It was not until Person V was interviewed in the course of the investigation that she found out that it was alleged by the Claimant that the Second Respondent had forced her to masturbate him.

83. As for the account provided by Witness K, Witness M records that he said the Claimant had informed him that she screamed and the Claimant then left the room (page 156). This is confirmed in an email dated 24 January 2019 sent by Witness K to Person P and Witness M (page 171) in which he sets out in a series of bullet points what had been said to him. Again, he confirms that the Claimant

said that she screamed at the Second Respondent to leave the room and she describes how the Second Respondent then runs out of the room.

84. This conflicts with what was said subsequently by the Claimant in the course of her interviews during the investigation and appeal. First, the Claimant stated that she had not screamed.

85. In addition, Witness K recorded how the Claimant said the Second Respondent had run out of the room and Person V stated that the Claimant said to her that the Second Respondent "hurriedly" left the room. In the course of her oral evidence, the Claimant said that the Second Respondent had fled from the room.

86. This was in contrast to what the Claimant said in the course of the interviews. At the meeting held on 29 January 2019, the Claimant stated that the Second Respondent "started pulling his trousers and boxers up and slowly walked out of the room" (page 194). At the appeal interview on 6 March 2019, the Claimant stated "he slowly sat up, slowly pulled his boxers and trousers up and starts to sort his shirt. He leaves and I run and bolt the door".

87. The Tribunal was also concerned that the Claimant had provided new evidence in the course of oral testimony which had not appeared in previous accounts despite her evidence that she only had snapshots of what took place and also the extensive account of what she says in her written statement has been the consequences of the assault in terms of her wellbeing.

88. The Claimant alleged the Second Respondent had held her neck. Whilst this had been said by her in previous interviews, she then said in her oral evidence that, in doing so, his fingers had become entwined in her hair. It was as a result of that memory that she cut her hair very short. This had not been mentioned before her oral evidence. However, and whilst the Claimant subsequently produced photographs illustrating her hair at different lengths, a photograph was produced of the Claimant which is dated 21 October 2020. It related to a request for donations in support of a challenge described as "brave the shave" for a cancer charity. Whilst the Claimant's hair in the photograph could not be described as long, nor could it be described as very short. The Tribunal did not consider her explanation that she had been unable to go to the hairdresser because of lockdown due to the pandemic to be a plausible explanation.

89. The Claimant had maintained that the Second Respondent had been wearing a shirt and that, when he was lying on the bed, his shirt was unbuttoned. The Second Respondent had stated that he was wearing a t-shirt, a jumper and a gilet. He had also been wearing a scarf which the Claimant found in her bedroom along with the Second Respondent's phone. Taking account of the time of year and the weather, the Tribunal found that it was more likely that the Second Respondent was wearing a jumper and the gilet as he had claimed. There was no evidence to suggest that the Second Respondent had taken off either garment when in the Claimant's room. Finally, there was no CCTV footage available of the Second Respondent crossing the car park which may have shown what he was wearing. The Tribunal therefore found, on the balance of probabilities, that

the Second Respondent was wearing a t-shirt under his jumper and gilet as opposed to a shirt with buttons.

90. The Claimant had also indicated for the first time in her oral evidence that the Second Respondent was lying "spread-eagled" on top of the bed in her room although she still maintained that the Second Respondent's jeans and boxer shorts were around his ankles.

91. The Tribunal also did not consider that it was credible that, if the Claimant had been assaulted in the manner alleged, she would then go down to breakfast the following morning. The Claimant had also said in her evidence that she was not hungry.

92. Finally, the Tribunal was concerned that the Claimant had been critical of the First Respondent for failing to carry out an adequate investigation, to include a failure to interview witnesses such as the barman at Patricks, the people on reception at the hotel, the Maître d', the Claimant's mother and the Claimant's former boyfriend and also for failing to obtain CCTV footage.

93. However, no such evidence had been provided by the Claimant for the purposes of this hearing. Indeed, there was no suggestion that attempts had been made to obtain such evidence, whether directly or from the police following its investigation. The only indication of such evidence is that which is contained within the letter from the CPS (page 536) which did not support the Claimant's account.

94. By contrast, the Second Respondent had provided a detailed witness statement setting out his account. He maintained that he had a clear recollection of events during the evening of 21 January 2019. His written statement and oral evidence were consistent with the account that he gave at the investigatory meeting on 29 January 2019 (pages 235 to 246) and the appeal meeting on 21 March 2019 (pages 322 to 361). In the course of his oral evidence, whilst properly tested in cross-examination, the Second Respondent remained consistent in his account. The Tribunal found the Second Respondent to be a credible witness. He fully accepted that he had consumed too much alcohol and that such behaviour had been inappropriate but he maintained his denial of what had been alleged by the Claimant, confirming that: the Claimant had held the door open for him; the door was a fire door on a spring which shut automatically behind him; he sat at the foot of the bed and the Claimant took two short steps towards him and they kissed; he felt "ropey" and he then left the room.

95. When he was informed of the nature of the complaint, he was described to be incredulous. Indeed, Witness M described his reaction by stating that he looked "gobsmacked". It was also not challenged that, in his 27 years of employment with the First Respondent, there had been no prior incidents of such alleged behaviour and he was described as "quiet" when attending functions relating to work.

96. In all the circumstances, the Tribunal found that the Claimant had failed to establish, on the balance of probabilities, a prima facie case that she was

sexually assaulted by the Second Respondent when in her hotel room on the evening of 21 January 2019.

Investigation by the First Respondent

97. As stated, the Tribunal has found that, just after 7a.m. on 22 January 2019, the Claimant telephoned Person V and informed her that the Second Respondent had attempted to kiss her and force himself on her. There were also subsequent telephone conversations between the Claimant and Witness K who then spoke to the Branch Manager, Witness M (page 150). The Tribunal found Witness M to be an impressive and credible witness. She followed her practice of making written notes at the time, or immediately after, conversations held with those involved.

98. On 23 January 2019, the Claimant attended for work but was sent home. The Claimant gave an account to Witness K by telephone. He made notes of that call and then set them out as bullet points in an email of 24 January 2019 (page 171), then disposing of the handwritten notes. It built on the notes Witness M had made of her conversation with Witness K on 23 January 2019 (page 156) and on which the Claimant relied.

99. On 23 January 2019, Witness M spoke with the Second Respondent, informing him of the complaint and confirming that he was suspended pending the outcome of the investigation. This was confirmed in a letter of the same date (pages 162 to 164).

100. The Second Respondent was informed that the complaint would be investigated in accordance with the First Respondent's Dignity at Work Bullying and Harassment Procedure (page 638).

101. Witness L and Person R were appointed to carry out the investigation. As stated, Witness L is a Unit Manager of the London Employment Rights Team and, at the material time, Person R was Head of the First Respondent's Professional Misconduct and Criminal Team based in Manchester. Neither knew either the Claimant or the Second Respondent at the time they were requested to carry out the investigation.

102. Witness L and Person R were assisted by Witness J. Prior to meetings with the Claimant and Second Respondent, Witness L and Person R had been provided with the email of Witness K dated 24 January 2019 (page 171) and the correspondence which had taken place between the First Respondent and the Claimant and Second Respondent. Finally, they had access to the procedure to be followed and received advice on the procedure from Witness J. This was set out in section 9 of the Policy (pages 644 to 646).

103. Meetings with the Claimant and the Second Respondent were arranged and took place on 29 January 2019 (pages 190 and 235 respectively). Witness J attended and took notes and then prepared the notes of the two meetings. The Claimant was accompanied at her investigatory meeting by Person V, who is an

employment lawyer, and was the Claimant's supervisor and GMB representative. The Second Respondent attended his interview unaccompanied.

104. At the conclusion of the meetings, the typed notes were sent to the Claimant and the Second Respondent and both were given the opportunity to make amendments to those notes. The Claimant made some amendments in manuscript.

105. On 1 February 2019, Witness J wrote to the Hotel Management Centre requesting certain information (page 202) with regard to the accommodation and whether they still had CCTV for the night of 21 January 2019. Witness J then sent an email to Witness L and Person R on 4 February 2019 (page 205) in which she reports the outcome of a conversation with someone at the hotel. In particular, Witness J confirmed that the police had been in contact with the hotel and was arranging for the CCTV to be collected.

106. Initially, it was intended by Witness L and Person R to arrange to interview the Claimant and the Second Respondent again in order to ask further questions. By this time, not only had Witness J obtained the further information from the hotel but also Witness L and Person R had obtained a copy of Person V' statement (page 105). The meeting was to take place on 8 February 2019. However, on 4 February 2019, the Claimant sent an email to Witness J informing her that she was due to attend the police station to provide an interview and the police had confirmed that they would be interviewing witnesses.

107. In the event, Witness L and Person R decided that there was no requirement to conduct the second interviews and therefore the meeting on 8 February 2019 was cancelled.

108. On 8 February 2019, Witness L and Person R completed their "summary investigation report" (page 256 to 259). Its conclusion and recommendation was that, having considered the evidence, to include the interviews of the Claimant and Second Respondent, and in the absence of any independent evidence, there was no case to answer.

109. However, ultimately it was a decision to be made by Witness M who, by email of 8 February 2019, concluded that, "I am not going to proceed any further due to the evidence being inconclusive, inconsistent and contradictions in [the Claimant's] own account. I do note reference to an ongoing criminal investigation, if any new information is brought to light then the matter will be investigated further at that point."[sic] (page 261). On 8 February 2019, Witness M wrote to both the Claimant and Second Respondent informing them of her decision and enclosing the report (pages 264 to 266).

110. On 11 February 2019, Witness M met with the Second Respondent who expressed his anger about what had been said against him. However, Witness M stated that she was both very surprised and very disappointed to note the amount of alcohol the Second Respondent had consumed on 21 January 2019 which was not the standard of behaviour expected and that this was to be taken as a warning. Witness M confirmed that she had never seen the Second

Respondent drunk or acting unprofessionally in the time that she had known him and did not want to see it ever again.

111. In the letter to the Claimant dated 8 February 2019, the Claimant was informed that, in accordance with the Dignity at Work, Bullying and Harassment Procedure, if the Claimant was not satisfied with the outcome of the investigation, she had the right to refer the matter for consideration under the grievance procedure.

Appeal

112. By an email dated 12 February 2019 sent to Witness M, the Claimant indicated her intention to appeal the decision (page 278). On 14 February 2019, the Claimant submitted a detailed letter of appeal (pages 281 to 294).

113. The appeal meeting was arranged for 6 March 2019. Witness N and Person S were requested to consider the appeal. Both are senior equity partners within the First Respondent. Witness N is the Branch Manager of the Northwest and the Northern Ireland Branch and Person S is Branch Manager of the Midlands Branch.

114. On 5 March 2019, Witness N and Person S travelled to Cardiff and met in the evening to discuss the process the following day. They were supported through the process by Witness J who also attended the meetings to take notes.

115. Witness N attended to give evidence before the Tribunal and had provided a detailed statement. The Tribunal found Witness N to be a credible and reliable witness who gave evidence in a measured way. The Tribunal was satisfied that Witness N considered the complaint to be very serious and took the whole process of the appeal extremely seriously. It was suggested by the Claimant that Witness N was "huffing her way through the interview as if she had better places to be". The Tribunal did not accept the Claimant's evidence. Witness N denied that she had done so and this was supported by Witness J.

116. Furthermore, the morning of 6 March 2019 had been set aside for the hearing of the appeal. However, taking account of the comprehensive nature of the interviews of the Claimant, the Second Respondent, Witness K and Person V, the appeal took the entire day. That was not consistent with the suggestion that Witness N gave the impression that she, "had better places to be".

117. At her meeting, the Claimant was represented by Person T who was described in the minutes of the meeting as the Claimant's GMB representative but he is also a solicitor specialising in employment law. At the outset of the meeting with the Claimant, it was confirmed that the appeal would effectively be a re-hearing of the complaint. There was also a discussion about the fact that the police investigation was ongoing. It was agreed that the appeal should not prejudice the police investigation in any way. The Claimant was given the option by Witness N and Person S of deferring the appeal until the outcome of the police investigation. The Claimant and Person T were allowed a break in order to discuss what they wished to do. On their return, Person T said:

"Thanks for the opportunity to talk. I think it's not an easy situation. We had a chat about adjourning and [the Claimant] feels that it will be detrimental to her as she will be in limbo pending the outcome. We are happy to go ahead today with the facility to re-look at this if the police report shows different".

118. The Tribunal was satisfied that the interviews with the Claimant, the Second Respondent, Witness K and Person V were conducted thoroughly and that the participants were given every opportunity to provide their accounts.

119. On 3 April 2019, Witness N and Person S published their report following the appeal under the Grievance Procedure. By a letter of the same date, the report was sent to the Claimant. In their report, Witness N and Person S concluded that it would be "manifestly unfair" to the parties to make a final decision one way or the other and that further evidence may materialise which would assist in determining whether the assault as alleged occurred.

120. Whilst it was recognised that the First Respondent was not able to insist on the police making available to the firm the evidence which they had gathered, it was recommended that the First Respondent should maintain its contact with the police to preserve and, if appropriate, release the evidence that they held when it was appropriate to do so.

121. The Claimant was subsequently informed by the police that it was not their intention to bring a prosecution against the Second Respondent. The Claimant requested a full explanation for that decision.

122. By a letter dated 9 April 2020 (page 536 to 538) the District Crown Prosecutor, Ms Karen Dixon, set out clearly the reasons behind their decision not to prosecute on the basis that the CPS did not believe there would be a realistic prospect of conviction.

123. Having had sight of the letter from the CPS dated 9 April 2020, Witness N and Person S met and carried out a review. As a result of the observations of the CPS in relation to the evidence gathered in the course of the police investigation, Witness N and Person S concluded that they remained unable to uphold the Claimant's grievance.

The Law

124. Sex is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").

125. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

126. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

Direct Discrimination

127. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (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.

128. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

129. Since exact comparators within the meaning of section 23 EQA are rare, it may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

130. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516.

131. Statutory provision is now made by Section 136 EQA:

> 136 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.
>
> But subsection (2) does not apply if A shows that A did not contravene the provision.

132. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v**

Nomura International Plc [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must established on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.

133. It was also said by Mummery LJ in Madarassy:

"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."

134. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: **Nagarajan v London Regional Transport** [1999] IRLR 572

135. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

136. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

Sexual harassment

137. Section 26(2) of the EqA sets out the definition of sexual harassment:

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 an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

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

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

138. In Grant v HM Land Registry [2011] EWCA Civ 769 the Court of Appeal said that in that case even if the conduct was unwanted, and the Claimant was upset by it, the effect could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile degrading, humiliating or offensive environment. It said that Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

139. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 it was said that dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. … It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

<u>Vicarious liability</u>

140. Section 109 of the EqA provides that employers can be vicariously liable for certain acts of employees, including harassment under s. 26:

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

…

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

141. The equivalent provisions in the predecessor discrimination enactments all used the phrase “in the course of employment” (see for example s. 32(1) of the Race Relations Act 1976; s. 41(1) of the Sex Discrimination Act 1975). Case law under these provisions is therefore authority for the interpretation of the EqA.

142. The common law rules on "in the course of employment" in relation to vicarious liability at common law have most recently set out by the Supreme Court in *WM Morrisons Supermarkets plc v Various Claimants* [2020] AC 989 [2020] IRLR 472, but this is not to be read across to statutory vicarious liability under the Equality Act. Waite LJ, in *Jones v Tower Boot Co Ltd* [1997] IRLR 168, CA, at para 43, set out the approach to be taken by tribunals:

"*The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words 'in the course of employment' in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstance which is liable to occur in particular instances - within or without the workplace, in or out of uniform, in or out of rest-breaks - all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.*"

143. More recently, in *Forbes v Heathrow* [2019] ICR 1558, EAT, Mr Justice Choudhury said, at para 29, that:

"*…the main principle to be gleaned is that the question of whether conduct is or is not in the course of employment within the meaning of Section 109 of the EqA is very much one of fact to be determined by the Tribunal having regard to all the relevant circumstances. It can also be said that the words "in the course of employment" are to be construed in the sense in which the lay person would understand them and that there is no clear dividing line between conduct that is in the course of employment and that which is not. Each case will depend on its own particular facts.*"

144. Relevant factors to be taken into account include whether the act was done at work or outside of work, and if done outside of work, whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment (*Forbes v Heathrow* [2019] ICR 1558, EAT, para 26).

145. Where an alleged offence occurred in a social context and while off duty, it was held not to be 'in the course of employment' - even where the act took place on the premises of the common employer; *Waters v Commissioner of Police of the Metropolis* [1997] IRLR 589, CA. Waite LJ at para 82, said that:

"*T and the applicant were off duty at the time of the alleged offence. He lived elsewhere, and was a visitor to her room in the section house at a time and in circumstances which placed him and her in no different position from that which would have applied if they had been social acquaintances only, with no working connection at all. In those circumstances it is inconceivable, in my view, that any tribunal applying the Tower Boot test could find that the alleged assault was committed in the course of T's employment.*"

146. A post-work social function can be regarded as an extension of employment. However, the extent to which an employer has organised, or is in control of, the

social function will be relevant. In *Chief Constable of Lincolnshire Police v Stubbs* [1999] ICR 547, EAT, at 559, the EAT upheld the finding by the ET that an organised leaving party attended by fellow officers was an extension of employment. This can be distinguished from a purely social occasion: the ET placed weight on the fact that neither the victim nor the perpetrator would have been at the party but for their connection with the employer.

147. Even where an employer has organised an event, it is open to an ET to conclude that an act of discrimination or harassment by one employee against another is not carried out in the course of employment. In *Sidhu v Aerospace Composite Technology Ltd* 336 [2001] ICR 167, CA, at para 22, the Court of Appeal upheld the ET's finding that an act of racial abuse was not in the course of employment. The ET regarded as significant that the organised event occurred in a public place rather than in the place of employment, that everyone was there in their own time rather than during working hours, and that the majority of the participants were friends and family rather than employees.

148. The fact that an employer disciplines an employee should not be construed as tacit acceptance that the employee has been acting in the course of employment (*Forbes v Heathrow* [2019] ICR 1558, EAT, paras 37-38).

149. An employer's code of conduct which requires employees not to do anything on or off duty that could discredit the employer cannot bring within the course of employment all acts done by employees while off duty (*HM Prison Service v Davis* (2000) EAT 1294/98, para 13).

<u>Statutory defence to vicarious liability</u>

150. Section 109(4) of the EqA provides a defence for employers against vicarious liability for employees:

109 Liability of employers and principals

…

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

151. The equivalent provisions in the predecessor discrimination enactments contained similar wording, save for using the words "such steps as were reasonably practicable" as opposed to "all reasonable steps" (see s. 41(3) of the Sex Discrimination Act 1975; s. 32(3) of the Race Relations Act 1976).

152. The burden of proof is on the employer to establish the defence, and it is appropriate to consider steps taken before the alleged offence occurred.

153. The EAT in *Canniffe v East Riding of Yorkshire Council* 2000 IRLR 555, EAT, at para 14 set out the questions which a tribunal should ask itself in determining whether the statutory defence is made out:

    a. first, whether there were any preventative steps taken by the employer; and

    b. secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

154. The knowledge of the employer is relevant: where the employer has no knowledge of risk of any harassment or inappropriate sexual behaviour by an employee, it may be sufficient that the employer had a policy which was promulgated (*Canniffe v East Riding of Yorkshire Council* 2000 IRLR 555, EAT, at para 22).

155. Evidence that an employer has put policies in place, implements those policies, disciplines employees for breaches of the policies, and sends employees (particularly the wrongdoer) on relevant training courses, will help make out the defence (*Al-Azzawi v Haringey Council* (*Haringey Design Partnership Directorate of Technical and Environmental Services)* (2001) EAT/158/00, para 21).

156. The Equality and Human Rights Commission *Equality Act 2010: Statutory Code of Practice* provides that reasonable steps taken by an employer might include (para 10.52):

    a. implementing an equality policy;

    b. ensuring workers are aware of the policy;

    c. providing equal opportunities training;

    d. reviewing the equality policy as appropriate; and

    e. dealing effectively with employee complaints.

157. In answering the second question under *Canniffe*, tribunals may take into account whether any further measures would have made a difference. In *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 142, CA, at 1446, Pill LJ said that:

    "*In considering whether an action is reasonably practicable…it is however permissible to take into account the extent of the difference, if any, which the action is likely to make. The concept of reasonable practicability is well known to the law and it does entitle the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved*."

Analysis and Conclusions

158. In respect of the agreed issues between the parties, the Tribunal had carried out an analysis of the facts that it had found and, having applied the relevant law, had reached the following conclusions. In doing so, the Tribunal considered that it made sense to deal first with the issue of alleged harassment related to sex which concerned the allegation of sexual assault. It would then consider the allegation of direct discrimination because of sex which focussed on the investigation and the conclusions reached by the First Respondent in respect of the Claimant's complaint.

1. EqA section 26: Harassment related to sex

a. **Did the Second Respondent engage in a sexual assault on the evening of 21 January 2019?**

b. **If so, was that conduct unwanted?**

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

d. **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?**

e. **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? (Whether conduct has this effect involves taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)**

159. The Tribunal noted that the complaint as pleaded by the Claimant in her ET1 was restricted to the alleged conduct on the part of the Second Respondent when in the Claimant's hotel room on the evening of 21 January 2019. It did not include any of the alleged conduct prior to the time at which they were alone in the Claimant's hotel room. Indeed, the issue at paragraph 1a above, which was discussed and agreed by the parties at the preliminary hearing on 29 August 2019, explicitly restricts the claim of sexual harassment to the alleged assault.

160. However, in the course of the hearing, and as summarised by Mr Hirst at paragraph 46 of his second skeleton argument, it was submitted that the behaviour of the Second Respondent prior to his attendance at the Claimant's hotel room was inappropriate and improper.

161. Taking each matter set out in paragraph 46 of Mr Hirst's skeleton in turn, it was accepted by the Second Respondent that the Claimant and he had kissed on two occasions. Details surrounding the first kiss only came to light via the Second Respondent himself as, even though her account on this issue was not accepted

by the Tribunal, the Claimant maintained that she had no knowledge of this first kiss but suggested that it could not have been consensual. However, there was no evidence to suggest that the kiss was non-consensual and there was evidence to suggest that, a short while later, both were seen crossing the carpark, hand-in-hand.

162. The reference to the Second Respondent "flattering [the Claimant's] appearance" related to the comment, "look at you all dolled up". This was said by the Second Respondent to the Claimant prior to them leaving the hotel and before they had had a drink. The initial reaction of the Claimant was not as strident as when she was asked again what her reaction was to that comment. It was on re-examination that the Claimant suggested that the comment made her feel like, "a piece of meat" and "dirty" and "as if I had been stripped already". Such a comment may have been ill-judged although the Second Respondent meant no offence by it. The Tribunal considered that any effect caused by such a remark could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment.

163. The Tribunal's view was reinforced by the fact that the Claimant did not withdraw to her room but decided to continue to spend her evening with the Second Respondent, at one stage when walking between Patricks and the Bellevue, describing herself as "happy and chatty".

164. Even if the perception of the Claimant was that the remark violated her dignity, or was degrading or humiliating, taking all the circumstances into account, the Tribunal did not consider that it was reasonable for the remark to have had that effect.

165. The Second Respondent had always accepted that it was inappropriate for him to have consumed so much alcohol and that this reflected badly on him and the firm.

166. As for going into the Claimant's room drunk late at night, the Second Respondent had stated that he was invited into her room.

167. Again, the Second Respondent had admitted that it was unacceptable for him to be sick and to pass out in the hotel corridor.

168. As for engaging in conversations of a sexual nature, the Tribunal had found that it was the Claimant who made such remarks and not the Second Respondent.

169. There was no dispute that, had the Tribunal found that the alleged assault of the Claimant by the Second Respondent had been found proved, this would represent unwanted conduct and would amount to harassment.

170. However, the Tribunal relied on its findings of facts and, in particular, its finding that the Claimant had failed to establish, on the balance of probabilities, that she had been a victim of a sexual assault by the Second Respondent on the evening of 21 January 2019.

171. The Tribunal had found that the Second Respondent had not engaged in a sexual assault on the Claimant on the evening of 21 January 2019. Therefore, the remaining issues b. – e. fall away.

    f. **If so, is the First Respondent liable for the Second Respondent's conduct on 21 January 2019, in accordance with section 109 EqA?**

    g. **The First Respondent maintains that it is not liable for the acts of the Second Respondent by reason of section 109(4) EqA. Did the First Respondent take all reasonable steps to prevent the Second Respondent from carrying out the conduct complained of?**

172. In the light of the Tribunal's findings that the Claimant had failed to establish that the Second Respondent sexually assaulted her on 21 January 2019, the issue of whether the First Respondent was liable for the Second Respondent's conduct did not arise.

173. For the reasons outlined above, the Tribunal found that the Claimant's claim of sexual harassment against the First and Second Respondent was not well-founded and was dismissed.

2. EqA, section 13: direct discrimination because of sex

a. **Has the First Respondent treated the Claimant as follows:**

   i. **Carried out a "woefully inadequate" investigation into the Claimant's complaint of harassment against the Second Respondent? In particular the Claimant alleges that the investigation was inadequate because:**

      (a) The written report of the investigation was only 4 pages long and did not contain any detailed narrative or fact finding;

174. For the Claimant to succeed, the Tribunal would have to find not only that the investigation conducted by Witness L and Person R was woefully inadequate because the report was only 4 pages long and did not contain any detailed narrative or fact finding, but also that this led to the Claimant being treated less favourably than the First Respondent treated or would have treated others in not materially different circumstances and that this was because of the Claimant's sex and/or because of the protected characteristic of sex more generally.

175. The Tribunal was unable to conclude that, simply because a report was only 4 pages long, it must mean that the investigation which led to the production of that report was "woefully inadequate".

176. Further, it was clear that it was not intended for the report to be considered in isolation in that it referred to the notes of the meetings held with the Claimant and the Second Respondent together with the written accounts provided by Person

V and Witness K. The recommendation made to the decision-maker, in this instance Witness M, made reference to the conflict of evidence between the Claimant and the Second Respondent as well as inconsistencies in the Claimant's own account. The conflict of evidence between the Claimant and the Second Respondent was set out in the report and in the typed notes of their respective interviews. However, the Tribunal accepted that the inconsistencies in the Claimant's own account were not outlined in any detail.

177. Nevertheless, the Tribunal did not consider that this must lead to the conclusion that the investigation was therefore woefully inadequate. Furthermore, at no stage was Witness L challenged that he would have prepared the report any differently, and more comprehensively, had the Claimant been male.

178. Whilst it was submitted at paragraph 45 of Mr Hirst's skeleton that, if the Claimant had been a man, the investigation and final report would have been handled differently, no evidence, let alone facts, had been produced to support such a submission. Further, in her evidence, the Claimant accepted that she could not produce any evidence to support her contention that, had the complainant been a man, the complaint would have been considered more seriously.

(b) The investigators failed to interview key witnesses until more than one week after 21 January 2019;

179. The chronology was not contentious. The alleged assault occurred on the night of Monday 21 January 2019. The Claimant held a conversation with Person V on the morning of 22 January 2019 and then held further telephone conversations with Witness K on 23 January 2019. On 24 January 2019, Witness L and Person R had been appointed to undertake an investigation and both the Claimant and the Second Respondent were interviewed on 29 January 2019. In other words, within one week of the First Respondent becoming aware of the Claimant's complaint, it had appointed two partners to carry out an investigation and those partners had met with, and interviewed, the Claimant and the Second Respondent.

180. Whilst not directly falling under this heading, it was also worth noting that the First Respondent wrote to the hotel on 1 February 2019 and obtained a statement from Person V. A further meeting was arranged for 8 February 2019 but Witness J had obtained further information from the hotel and the police investigation was underway. Therefore the meeting on 8 February 2019 did not proceed. The investigation report was dated 8 February 2019 and it was sent to both the Claimant and the Second Respondent on that day.

181. On that basis, the Tribunal did not consider there was any undue delay in interviewing key witnesses nor in preparing and disseminating the report.

182. At no stage during the presentation of the First Respondent's evidence were Witness J or Witness L challenged that the time taken to interview key witnesses represented or amounted to less favourable treatment than would be given to a hypothetical male comparator in the same circumstances. The Tribunal did not

consider it had been presented with any evidence on which such a conclusion could be reached or such an inference could be drawn.

(c) The written report referred to "inconsistencies" in the Claimant's account of the incident as a reason for disbelieving her without properly setting out what the inconsistencies were:

183. The Tribunal had already touched on this issue under paragraph 176 above.

184. Under the heading "Differing Accounts and Inconsistencies in the Summary Investigation Report" (page 251) Witness L set out primarily the conflict of evidence between the Claimant and the Second Respondent. There was little detail with regard to the claimed inconsistencies in the Claimant's own account to which Witness L refers in the pre-penultimate paragraph on page 252.

185. Nevertheless, whilst considerable time was taken in challenging Witness L with regard to the adequacy of the investigation report, it was not put to Witness L that any inadequacy was as a result of him being influenced, whether consciously or otherwise, by considerations of the Claimant's sex.

186. The Tribunal found that there was no basis at all on which it could make findings of fact from which such an inference could be drawn.

ii. Disbelieved the Claimant in its investigation report?

187. The conclusion reached by Witness L and Person R when they had completed their investigation was that the Claimant had failed to establish a prima facie case that she had been subjected to a sexual assault by the Second Respondent. They reached this conclusion on the balance of probabilities.

188. That was a conclusion they were entitled to reach.

189. The Tribunal was satisfied that the Claimant had failed to establish through the evidence that a hypothetical male comparator in the same circumstances would have been treated any differently. Indeed, it was accepted by the Claimant that she had no evidence to support an assertion that "accusations by women are not treated as serious as allegations by men . . . "

190. In any event, it was important to remember that the investigation report concluded by making a recommendation. The ultimate decision was made by Witness M.

191. The Tribunal had already indicated that it was impressed with Witness M as a witness. She emphasised that she took the complaint very seriously and approached her role as decision-maker with the welfare of the Claimant and the Second Respondent at the forefront of her mind.

192. Witness M was satisfied that the investigation report dealt with the questions that needed to be asked particularly with regard to the Claimant's account clashing with that of the Second Respondent. She considered it was a significant complaint and took it incredibly seriously. She emphasised that she approached the matter as "a female and a mum and a daughter".

193. No evidence had been introduced that a male comparator would have been treated any differently and there was no suggestion at all that Witness L, Person R or Witness M approached the investigation and decision in respect of this complaint with their approach influenced, consciously or otherwise, to any extent by consideration of sex.

iii. Adopt a "neutral" stance in investigating the Claimant's complaint?

194. The Tribunal repeated its findings under paragraph i. above. Had the First Respondent adopted anything other than a neutral stance when investigating the Claimant's complaint, this would have been of concern to the Tribunal.

195. The investigation and recommendation of Witness L and Person R, and the decision of Witness M, were based on the evidence before them and a decision had to be taken on the balance of probabilities.

196. As stated above, there was no evidence from which the Tribunal could draw an inference that the Claimant was subjected to less favourable treatment than would have been accorded to a hypothetical male comparator in circumstances not materially different and that this was because of her sex or sex more generally. The purpose of adopting a neutral stance was to ensure that the Claimant was not subjected to less favourable treatment because of her sex or sex more generally.

iv. Fail to take any action against the Second Respondent following the Claimant's complaint?

197. In February 2019, Witness M issued the Second Respondent with a verbal warning as a result of his inappropriate behaviour in consuming so much alcohol the day before he was due to make a presentation to clients. This verbal warning was reaffirmed in May 2019. However, the First Respondent concluded that it was not appropriate to take any action against the Second Respondent in relation to the allegations made by the Claimant as such allegations had not been established.

198. Consequently, the Tribunal found that the First Respondent did not treat the Claimant less favourably than the First Respondent would have treated others as a result of the Claimant's sex or due to sex more generally in the way that it conducted the investigation of the Claimant's complaint.

199. Furthermore, having read and listened to the evidence, it was clear that the issues identified as having to be determined by the Tribunal in respect of the claim of direct discrimination was focussed very much on the investigation

leading to the written report of Witness L of 8 February 2019 and the decision of Witness M of the same date. It did not seem to make any specific reference to the process followed by the First Respondent in considering the appeal of the Claimant against the decision of Witness M of 8 February 2019.

200. It was not in dispute that the initial complaint should be considered under the Bullying and Harassment at Work Policy and, in particular, section 9 of that policy. Indeed, there was specific provision under paragraph 4.8 of the Grievance Procedure that complaints of harassment should be dealt with in that way and under that policy.

201. In the Bullying and Harassment at Work Policy, paragraph 9.1.4 stipulates that, following an investigation, if a complainant is dissatisfied with the outcome, the matter may be referred for consideration under the firm's Grievance Procedure.

202. At no stage before the hearing had it been suggested, either by the Claimant's representative, Person T, or in the Claimant's ET1, that both stages of the Grievance Procedure i.e. a grievance hearing and then the appeal, should take place if the original investigation of the complaint under the Bullying and Harassment at Work Policy was to be challenged.

203. Furthermore, it was never suggested that, even if there had been a procedural irregularity, this amounted to direct discrimination on the basis that, by not pursuing a grievance and then an appeal against the grievance, the First Respondent had treated the Claimant less favourably than the First Respondent would have treated a hypothetical male comparator in the same position in all material respects as the Claimant.

204. As for the process that was followed, Witness N and Person S were requested to conduct the appeal on behalf of the First Respondent. Whilst the Claimant suggested that she was unaware of their seniority, it was accepted that both were senior partners within the First Respondent and appropriate people to conduct the appeal. Furthermore, neither Witness N nor Person S knew either the Claimant or the Second Respondent.

205. Witness N and Person S considered the lengthy letter of appeal submitted by the Claimant; they had also read the documents prepared in the course of the investigation together with the investigation report. Half a day had been allocated for the appeal but this was extended to ensure that the Claimant was able to put her case and so that the Second Respondent, Person V and Witness K could all be interviewed at length. It was not disputed that the appeal hearing represented a re-hearing of the Claimant's complaint. Furthermore, in the knowledge that a police investigation was also underway, the Claimant was giving the option of either proceeding or deferring the meeting until the conclusion of the police investigation. Not forgetting that the Claimant herself was an employment lawyer with three years' post qualification experience, she also had the advice of another employment lawyer, Person T, who accompanied her to the hearing, and they concluded that they wished for the hearing to proceed.

206. The Tribunal had rejected the Claimant's evidence that Witness N had been "huffing her way through the interview as if she had better places to be" and this was particularly so as both she and Person S extended the time taken to ensure that they listened to the four individuals who were questioned by them through the day.

207. The report that was produced and dated 3 April 2019 (page 426) made it clear that they took the complaint very seriously.

208. Reference was made to procedural issues with regard to the investigation and that there had been a failure to interview staff from the hotel and bars attended by the Claimant and the Second Respondent or to obtain CCTV. However, it was accepted that such investigation could jeopardise the police investigation. The Tribunal also accepted Witness N's evidence that the evidence collated by the police, to include the CCTV footage, was not evidence to which the First Respondent was entitled to have access in that it belonged to the Claimant and potentially the Second Respondent.

209. At the conclusion of the appeal report, it stated that the First Respondent was unable to reach a decision on the evidence presented but that it would review its decision once it was provided with the outcome of the police investigation.

210. Witness N and Person S became aware of the outcome of the police investigation when it was provided with a copy of the letter of 9 April 2020 sent to the Claimant by the District Crown Prosecutor, Karen Dixon (page 536 to 538). They then reviewed the evidence before them. On the basis of that review, the Tribunal was satisfied that Witness N and Person S were entitled to reach the conclusion that the Claimant's appeal could not be upheld.

211. The Tribunal could identify no evidence at all on which it could be inferred that the manner in which they conducted the appeal was such that the First Respondent had treated the Claimant less favourably than the First Respondent treated, or would treat, a hypothetical male comparator in the same position in all material respects as the Claimant.

212. Indeed, Witness N approached the process stating, "I am a senior member of the firm, a socialist and a female and I headed the panel as a female".

213. The Tribunal noted that, whilst criticisms in relation to the procedure were put to Witness N, for example with regard to the Claimant's ability to call witnesses, and that, as in the case of the investigation, the appeal was "doomed to fail", it was never suggested to Witness N that, had the Claimant been a man, the steps taken, and the process followed, by the First Respondent would have been any different.

b. Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

c. **The Claimant relies upon a hypothetical comparator;**

d. **If so, was this because of the Claimant's sex and/or because of the protected characteristic of sex more generally?**

214. The Tribunal relied on its conclusions under each of the sub-headings in the preceding issue 2a. and found that the Claimant was not treated by the First Respondent less favourably than it treated or would have treated a hypothetical male comparator in not materially different circumstances. Indeed, there was neither evidence nor, indeed, facts on which such an inference could be drawn.

215. For these reasons, the Tribunal had concluded that the Claimant's claim against the First Respondent of direct sex discrimination was not well-founded and was dismissed.

Employment Judge M R Havard
Dated: 19 January 2021

JUDGMENT SENT TO THE PARTIES ON 21 January 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS