# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondent:** B

**Heard at:** Birmingham Employment Tribunal by CVP

**On:** **8 – 12 March 2021 hearing with parties and 1 and 15 April (tribunal members only)**

**Before:** Employment Judge Cookson sitting with Mr Stanley and Mr Reeves

**Representation**
Claimant: Ms Tyson (solicitor)
Respondent: Mr Bansal (solicitor)

# RESERVED JUDGMENT ON LIABILITY

It is the unanimous decision of the Employment Tribunal that:

1. The claimant's claim that she was subject to unlawful sexual harassment by C is found to be proven.

2. The respondent was vicariously liable for that harassment and the respondent has not shown that it took all reasonable steps to prevent such conduct from taking place. As such it has failed to establish that it is entitled to rely on the defence in s109 of the Equality Act 2010 (EqA).

3. The claimant's claim for unlawful harassment contrary to s26 of the Equality Act which is made against the respondent, succeeds and is upheld.

4. The claimant's claim that the respondent failed to meet its duty to make reasonable adjustments in light of her disability is not upheld and is dismissed.

5. The claimant's claim that she was subject to unlawful victimisation is not upheld and is dismissed.

6. The claimant resigned from her employment but, by virtue of its conduct, the respondent then summarily dismissed the claimant in breach of her contract of employment and her claim for damages in relation to her notice period is upheld.

# REASONS

**Rule 50 order (the "restricted reporting order")**

1. This case is subject to an order restricting reporting under Rule 50 made by Employment Judge Dimbylow on 11 March 2020 which prohibits the publication in Great Britain or elsewhere, in respect of the above proceedings, of any identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain or elsewhere by electronic means or any form of social media.

2. 'Identifying matter' is described in the order as follows "*in relation to a person means 'any matter likely to lead members of the public to identify them as a person affected by, or as the person making the allegation'. In particular, the following information must not be published: the names and addresses of the claimant (who shall henceforth be referred to as "the claimant" or "A") the respondent (henceforth "the respondent" or "B") or the alleged perpetrator (henceforth "C"). The Order remains in force indefinitely for the claimant, and until the end of the final hearing for the respondent and C (when it may be reviewed), unless revoked earlier"*. For ease this panel has adopted that way of identifying the parties and we have not referred to the names of any of the witnesses in this case. Instead initials have been used throughout this judgment. This is to minimise the risk of the claimant being indirectly identifiable from details in the judgment.

3. We note that this is highly regrettable that despite this reporting order, both parties failed to take steps to anonymise witness statements (which could be subject to public inspection under Rule 44), the bundle of documents or the submissions. The respondent was also insistent the name of the respondent's care home should not be referred to because its location should be confidential yet the documents produced by the respondent at for this tribunal are littered with references to its name. It appears that the parties have expected the tribunal to undertake the task of anonymisation that they could not be troubled to undertake themselves. We find that both surprising and disappointing when both parties were legally represented parties. Not only have the parties failed to have due regard to the order made under Rule 50 and their duty under Rule 2 of the Employment Tribunal Rules of Procedure to cooperate with the tribunal, their omissions in this regard have made the preparation of this judgment substantially more difficult and time consuming than it should have been.

**Introduction**

4. The background to this case is as follows. The claimant, also referred to as A below, was employed by the respondent, B, a private limited company which operates a children's residential home. The claimant was employed as a support worker from 26 November 2018 until her dismissal or resignation (which is one the issues which we determined) with effect on 14 August 2019. The precise description of her role is a matter of dispute. By a claim form presented on 12 November 2019, following a period of early conciliation from 30 September 2019 to 1 October 2019, the claimant brought complaints of: (1) sex discrimination (harassment and victimisation), (2) disability discrimination, (3) damages for breach of contract over notice, and (4) failure to pay for holidays accrued but not taken. The claimant subsequently withdrew her claim for holiday pay which was dismissed. The claim is essentially about the harassment including a serious sexual assault which the claimant says that she was subject to by a manager (C) and the circumstances which subsequently led to the ending of the claimant's employment which she asserts was tainted by discriminatory treatment. In summary, the respondent's defence (as set out in the response form presented on 17 December 2019) is that some of the claims are out of time and if there was any sexual harassment, then it contends that it took all reasonable steps to prevent such from occurring. The claim of disability discrimination, victimisation and the money claims are also denied.

5. There was a case management hearing before Employment Judge Dimbylow on 11 March 2020 which identified the legal issues in this case based on the submissions of the parties and made a number of orders in relation to case management including in relation to disclosure. There was then a preliminary hearing on 29 September 2020 and 19 January 2021 before Employment Judge Algazy QC. This was to determine three of the four issues identified in paragraph 2 of Employment Judge Dimbylow's order: whether the claimant was disabled at the relevant time, whether the tribunal had jurisdiction to hear the claimant's claims which are out of time and whether the claimant's application to amend the claim form should be granted. At the second day of hearing before Employment Judge Algazy QC the application to amend was withdrawn, disability was conceded and he concluded that this was an exceptional case in which time should be extended to enable all of the claims identified in the list of issues identified by Employment Judge Dimbylow to be considered.

6. In reaching our judgment the employment tribunal has considered:

a) An agreed bundle of documents prepared by the respondent (simply referred to as the bundle in this judgment) which runs to some 149 pages;

b) A further document disclosed by the respondent immediately prior to the hearing along with a better copy of a page from the bundle;

c) A further disclosure of documents, made in consequence of an order of this tribunal on 8 March 2021;

d) A further discourse of documents made on the final day of evidence in consequence of a further order of this tribunal;

e) The evidence in witness statements and given orally by:
   i. The claimant
   ii. The claimant's former partner, YS
   iii. C, the alleged perpetrator;
   iv. FR, a clinical psychologist employed by B ;
   v. GB a colleague of the claimant ;
   vi. AJ the new manager of the care home;
   vii. AC a director of B.

f) A list of issues prepared by the respondent which we understand is agreed;

g) Written submissions prepared by Ms Tyson and sent to the tribunal on 31 March 2021 together with an index to those submissions;

h) Written submissions prepared by Mr Bansal and sent to the tribunal on 31 March 2021.

**Issues to be determined at this hearing (taken from the parties' list of issues)**

7. Sex Discrimination: Harassment (s.26(1) EqA 2010)

a) Did C during the period November 2018 – March 2019 engage in unwanted conduct with the A, as pleaded, namely;

*a She was subjected to "sexualised comments" including "you look like the type that likes getting her hair pulled"; (Para 4)*

b *He rubbed himself against her;(Para 5)*

c *He made growling sounds;(Para 5)*

d *Called her a "fucking slut";(Para 5)*

e *Taunted her about having a threesome with herself and her girlfriend;(Para 5)*

f *Said he would "pleasure himself" over a photo of her;(Para 5)*

g *Asked her "if it was breast milk so he could suck it off";(Par 6)*

h *She was sexually assaulted in February 2019 when he "forced his penis into her mouth" (Para 9)*

b) If so, was that conduct unwanted?

c) Was the unwanted conduct related to A's sex or of a sexual nature (allegation h only)?

d) Did the conduct have the purpose or, taking into account A's perception, the other circumstances of the case and whether it is reasonable to conclude that the conduct had that effect, the effect of violating the A's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for A?

8. **Disability Discrimination** Reasonable Adjustments (s20 EqA 2010)

a) At the Preliminary Hearing on 29 January 2011, the Tribunal determined that the Claimant had a disability (anxiety & PTSD) at the relevant date (from June 2019 onwards).

b) Did the Respondent know or could the Respondent reasonably have been expected to know that the Claimant had the disability at the relevant time?

c) Did the Respondent have the PCP of not allowing the Claimant time off work to attend counselling sessions sometime in or around June 2019.

d) Did this PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons?

e) If so, were there any reasonable adjustments that could have been made by the Respondent to avoid the disadvantage? The Claimant identifies allowing her time to attend counselling sessions.

9. **Victimisation (s.27 EqA 2010)**

a) Did the Claimant do protected acts by making complaints on 14 March 2019 of sexual harassment and sexual assault on 2 May 2019?

b) If so, did the Respondent subject the Claimant to any of the detriments, namely;

   a. By dismissing her;

   b. By not carrying out a risk assessment;

   c. By failing to give sufficient support following the assault;

c) If so, was this because the Claimant did a protected act?

d) Or did the Claimant resign because she was denied a cigarette break?

10. **Breach of Contract**

a) What was the Claimant's contractual notice entitlement?

b) Did the Respondent summarily dismiss the Claimant? If so, how much notice pay is the Claimant entitled to

11. **Vicarious Liability –s109(4) Equality Act 2010**

    a) The Respondent relies on the statutory defence under s109(4).

    b) Did the Respondent have knowledge of the alleged unlawful acts/conduct of C during the period complained of?

    c) Is the Respondent vicariously liable for the unlawful acts/conduct of C, irrespective of the issue of knowledge?

    d) If so, has the Respondent demonstrated that it took all reasonable steps to prevent any such acts/conduct from taking place, to satisfy the statutory defence?

**Applications made in the course of the hearing**

12. I will explain briefly the circumstances which led to a number of applications being made in the course of this hearing.

13. Prior to the hearing the claimant had made an application for specific disclosure in a letter dated 24 February 2021 which was sent to the tribunal on 25 February 2021. The significant element of the disclosure sought relates to the previous complaints made against C and was made as follows

    "I therefore request under S30 of the Employment Tribunals (Rules and Constitution of Procedure) Regulations 2013 that the respondents be ordered to disclose full details all and any complaints and concerns about [C] and all and any subsequent investigations, with names of complainants duly redacted. Should they fail to comply with such order, then I invite the tribunal to draw inferences from that failure."

14. By an email dated 26 February 2021 the respondent said this (this has been redacted to remove relevant names in light of the restricted reporting order):

    "Dear Sirs,

    We refer to the Claimant's letter dated 24 February, sent to the Tribunal on 25 February, seeking specific disclosure.
    We oppose the Claimant's application to the disclosure request on the following grounds set out below.

    1. Disclosure of all complaints against [C] have been made – [AC] (Respondent Director) has in his witness statement openly disclosed and detailed that only 2 complaints were received against [C]. The Respondent is not aware of any other complaints. Neither has the Claimant alleged that there were any specific complaints which have not been disclosed. Further, the two complaints were not about sexual harassment or assault.

       The Claimant in her witness statement at Para 10 (complaint 1 – made by ex-employee [J] in Dec 2018) & Para 28 (complaint 2- by a carer) confirms her knowledge of these two complaints.

2. Disclosure of documents in relation to the 2 complaints
[AC] in his witness statement has confirmed that in respect of complaint 2 –this complaint was made verbally and there is no documentation recording the complaint, as [C] resigned before any investigation was commenced. There are no documents to disclose.

In respect of complaint 1 – the complaint was made in writing and an investigation was carried out. The complaint was about an incident between the employee and [C]. Disclosure of this complaint is given by way of the supervision record with [C] dated 2/01/2019 which is in the hearing bundle and also confirmed in [AC's] witness statement. Given that the Claimant was aware of this complaint at that time, that is sufficient knowledge, and upon which both [C] and [AC] can be cross –examined. This complaint had no connection to the Claimant and has no direct relevance to the Claimant's sex harassment/assault allegations, which the Tribunal must determine.

3. Confidentiality and interest of justice
It is in the interests of justice that both parties receive a fair hearing. Therefore, the investigation notes to complaint 1 should remain confidential as they are not relevant to the Claimant's claim of sexual harassment/assault claim. Further, non-disclosure of the documents will not prevent or prejudice a fair hearing for the Claimant, particularly as the Claimant was aware of the complaint, (as confirmed in her witness statement) and that details of the complaint and its finding are set out in the supervision record of [C], which has been disclosed, and is in the hearing bundle. This is sufficient disclosure for the Claimant's representative to cross examine [C] and [AC].

This request for disclosure is a fishing exercise and any disclosure should be relevant and proportionate to the issues to be determined. Accordingly for the reasons mentioned, the application should be refused. If, however, the Tribunal is minded to make any Order for disclosure, it should be limited to the written complaint only as made by the ex-employee ([J]) at the relevant time, as the issue is not about [J]'s complaint and the outcome of that complaint."

15. Having heard oral representations from the parties on the first day, the tribunal ordered the respondent to disclose all relevant documents related to both complaints against C because we were satisfied that it was in the interests of justice and in accordance with the overriding objective for this order to be made. These complaints are referred to by the claimant in her evidence. The respondent disputed what she said about those complaints and its witnesses also gave evidence about them. This is an evidential dispute which the parties require this tribunal to resolve and the best way for the tribunal to resolve that dispute is by considering the relevant documents. The respondent should not have dismissed that a "fishing expedition". It was not a fishing expedition, it was request for documents relating to a specific matter which is referred to by AC in his evidence which presumably this means the respondent considers it is material to the case. Accordingly, these are documents which fall within the scope of the order for disclosure of relevant documents which Employment Judge Dimbylow made in

March 2020. The respondent's submission above, that these are matters which could simply be dealt with through cross-examination but without the claimant's side having sight of the relevant documents, is without merit and appears to have been made without due regard to the overriding objective which includes that parties should be on an equal footing. That is not possible if only one side knows what the documents say. Further the respondent in this case relies on the statutory defence. Documents relevant to show how other complaints about the same individual have been raised, what those complaints are and how they were dealt with are potentially relevant to the determination of the extent to which the respondent is entitled to rely on that defence.

16. On the final day of evidence the tribunal heard further evidence from AC which had continued over from the previous day. The tribunal members had asked me to clarify with AC the sequence of events because his evidence the day before had been very confusing and unclear. As a panel we felt it would be helpful to clarify, in particular, which reports had been made to regulatory or other official bodies to ensure that we understood exactly what his evidence on these matters had been. AC himself conceded that his evidence the previous day had been rather confused because he had felt nervous. In the course of that explanation, just as he appeared to be concluding his final answer, AC referred to a referral having been made to the Disclosure and Barring Service (usually referred to as "the DBS") in relation to C. There are no documents in the bundle of documents in relation to that and I asked further questions because the tribunal had been told on the morning of the second day that no further documents existed in relation to the complaint about C which A refers to in her witness statement as having been made of the abuse of a family member of a looked after child. No DBS referral documents had been disclosed.

17. We were told that a referral had been made but that no conclusions had been reached by the respondent about the allegations and therefore the respondent did not believe that they were relevant to the tribunal order. That was an unsatisfactory explanation. The order for disclosure did not require that the respondent believed that the complaints were well founded for them to be disclosable, it had been an order for documents relevant to any complaints made to be disclosed. Notwithstanding the proximity to the conclusion of the hearing, the respondent was ordered to disclose documents relevant to the DBS referral and to any other documents relevant to any complaint made about C. That disclosure was received at the tribunal at around 15.35pm on the final afternoon. Clearly this made it too late for Ms Tyson to consider them and question AC. The claimant was offered the opportunity to seek an adjournment to enable relevant questions to be asked but, understandably perhaps in light of the delay this would cause, Ms Tyson informed us she would prefer to simply make submissions on this. Mr Bansal agreed with that approach. Ms Tyson and Mr Bansal invited us to read those additional documents, although when considering them we were mindful that we had not heard on evidence on them.

18. In his submissions Mr Bansal says this *"The EJ's inquisitorial questioning of AC was unfair and not relevant to the issue whether the C was subjected to harassment. AC clarified that, given his 20 years' experience his understanding was that he had to report [C]'s resignation and of the complaints received. This, as*

*he had to repeat to the Tribunal did not imply or was an admission or acceptance that [C] had committed the alleged conduct"*.

19. In light of that submission we consider that it is helpful to clarify the position. The first point to make is that it was a matter of extreme concern that AC appeared to make an admission that he was aware of documents which the respondent had been ordered to disclose on the first day of the tribunal, when he was present, and that the respondent had failed to disclose. AC is not only a witness he is a statutory director of B. Mr Bansal did not dispute that the documents in question were disclosable in accordance with the tribunal order made earlier in the week. With all due respect to Mr Bansal, tribunal must be entitled to explore with a witness a matter of non-compliance with an order, especially in relation to an issue which had been so significantly contested between the parties. That is an issue relevant to the inferences that we should draw from the respondent's evidence, if any.

20. At the beginning of the week Mr Bansal had repeated the assurance given previously in writing that no further documents existed relevant to further complaints against C. AC's evidence appeared to contradict that assurance and it was therefore relevant to ask AC questions about those documents and what they said. That was particularly so given Ms Tyson had already made clear that she would be making submissions asking the tribunal to draw adverse inferences from the respondent's failure to disclose documents she said were relevant to the issues. It was in the respondent's interests for the tribunal to understand AC's evidence on this matter. This tribunal found AC difficult to follow as he answered questions. He gave answers which were sometimes contradictory or evasive. He was particularly unclear about what concerns had been referred to the DBS. The questioning of him was not inquisitorial but his failure, at times, to provide an unequivocal or clear answer to questions did make it necessary to repeat questions to understand what his evidence was.

21. AC told this tribunal that a DBS referral was made because there were concerns that had been raised but not investigated but no conclusion about the C's conduct had been reached by B. The circumstances in which a DBS referral are made are a matter of legal obligation and a matter which comes up in the tribunal from time to time. AC misstated that legal obligation when he said that he had to report that concerns had been raised. It was potentially relevant to our assessment of AC's credibility to seek to understand if that misstatement arose from a misunderstanding of the law or deliberate evasion on his part. We observe that the DBS referral made by the respondent when it was disclosed was made in a way entirely consistent with the legal obligation as understood by the tribunal and not on the basis that AC had referred to in his evidence and in particular in response to the questions from me. The referral was made because, on the face of the DBS referral form, the respondent had assessed that C represented a risk of harm to a child or vulnerable adult. Despite the critical submissions made by Mr Bansal, it is a simple fact that the DBS disclosure was not completed on the basis asserted by AC in his oral evidence. No explanation for that was offered to us despite Mr Bansal indicating that he would deal with issues raised by the additional disclosures in his submissions. He failed to do so. The documents show that respondent did not report to the DBS that allegations had been made but not investigated. The DBS form explicitly states that the respondent has reached

conclusions about C's conduct and that it concluded he posed a risk of harm. Accordingly the evidence offered to us by AC was misleading.

22. Finally at one stage in response to questions from the panel, AC said that he accepted that sexual harassment of the claimant had taken place. When he was asked further questions about that admission Mr Bansal suggested that this showed the matter had been prejudged by the tribunal. That objection was misconceived. AC's statement had been clear and heard by all of the panel and Ms Tyson. It may be that Mr Bansal had misheard it, he did have significant connection issues at times throughout the hearing, but AC's statement was clear and was unprompted. The fact that this comment by AC might be seen to be unhelpful to the respondent's case did not justify Mr Bansal's objection nor the submissions he made.

23. It was not surprising nor was it unfair that AC was asked questions about his potentially significant admission that harassment had occurred to understand what he meant by that statement. It was disputed by the respondent that the harassment had happened – that is a legal issue we had to determine, and the respondent had called evidence from C disputing A's account. When asked about this by me, AC clarified that he had not meant to say what he had and I made clear at the time that his withdrawal of that admission was accepted. However, that did not alter the fact that he had made the admission in the first place. I have noted previously that at times AC's evidence was contradictory and evasive at worst and confused at best. If AC had not been asked further questions about the panel's understanding about this comment that harassment had happened would have been that AC had made a significant admission which would be damaging to the respondent's case. It was to ensure that we understood what had been meant by the admission that he was asked the further questions Mr Bansal objected to. That was not prejudging the evidence and in fact it was in AC's interests that the questions objected to were asked.

24. The inferences which the tribunal drew from the documents disclosed late and their significance to the legal issues, are set out below.

**Submissions**

25. It was not possible to conclude evidence until late on the last day that had been listed for hearing, 12 March 2021. We invited the parties to express their preferences for the way forward. As already noted Ms Tyson had already expressed a preference to deal with the matter of late disclosures purely by way of submissions. It was clear that the parties were represented by experienced and, perhaps inevitably, busy advocates and it was clear that seeking to find a suitable dates to relist this case for submissions in light of their diaries was going to lead to delay. In light of this both parties expressed a preference to make purely written submissions and we agreed to that way forward. The written submissions were received by the tribunal on 31 March 2021.

26. We are grateful for the comprehensive and detailed submissions that we received. As those submissions are entirely contained within the written documents the key points in the submissions are summarised below.

**Respondent's submissions**

27. The Respondent's submissions in relation to harassment and vicarious liability:

a) We were told that the respondent directors and the employees involved in this case had taken A's allegations extremely seriously and that they did not they seek to defend or condone the alleged conduct and behaviour of DM. In particular Mr Bansal highlighted that AC had made two reports to the police because he considered that he was obliged to report the complaints; these needed to be investigated and DM held accountable if he had committed the alleged conduct, irrespective of the C's decision not wanting to pursue these with the police.
b) Mr Bansal places reliance on that fact that the respondent does not know if the alleged incidents occurred and, in his submissions he highlights in particular that A had not told her colleagues or her partner at the time about the incident and that following a meeting with AC on 14 March 2019 A did not want AC to do take any action about her complaint.
c) He also points to the working interaction between A and C and the fact that A accepted that C helped her with her shifts changes and payment for shifts worked; gave a lift on a couple of occasions; shared cigarette breaks; and that it is said A shared personal and family information with C, for example in the course of supervisions and we are invited to draw inferences from that evidence.
d) It is suggested that it would be perverse to find or draw an inference that the reporting of the complaints to the police or to find that that amounted to an admission of liability or an acceptance by AC that the alleged incidents did occur because AC's evidence had been that he understood that it was his obligation to report the complaints, nor it is asserted, is the reporting of C to the regulatory authorities an admission of C' alleged conduct.
e) It is suggested that A gave an inconsistent account of the "sexual assault" incident to AC and we should draw an inference from the difference in between the pleaded case which uses the word "forced" and A's statement that "I didn't have a choice and chose my mouth" whereas AC had been consistent in his evidence from the outset (evidenced by the exit interview). On this basis we are invited to prefer AC's evidence and it is suggested that AC had no reason to be untruthful about this.
f) It is suggested that "it would remiss" not to consider why (i) A did not report the alleged sexual assault incident on 14 March 2019 with the other incidents, or immediately after C had resigned which she knew from 15 March 2019 (ii) why there was a delay in reporting this to 2 May 2019; and (iii) why A did not go to the police despite AC's informing her of the need to and we are invited to consider whether the incident occurred as pleaded or at all.
g) It should be taken into account C attended voluntarily to give evidence. He was not subject of a witness order and if C knew he had committed the acts complained of, he could have refused to give evidence voluntarily.
h) Mr Bansal concedes that if we find that the alleged conduct is proven, it is not disputed that such conduct would, subject to the findings made, amount to unwanted conduct which would have the effect of violating an

employee's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment.

i) On the question of vicariously liability Mr Bansal submits that that the respondent has evidenced its various policies and procedures, that those policies are detailed and comprehensive in their coverage and set out the respondent's standards of conduct; conduct and acts of unlawful discrimination; the procedures to follow on reporting any incidents, including access to a confidential helpline.

j) He also points to the fact that in evidence, A accepted that at the commencement of her employment, she had received full training in relation to these policies and procedures and the reporting of complaints and that A conceded in evidence that she was familiar with the policies; procedures and reporting and knew she "should have reported C, but did not do so" referring to the evidence that she gave that "Yes, I could have told (S). Yes it was my fault I know, I could have done more, I did not, I was scared".

k) Mr Bansal also refers to the fact that C in his evidence confirmed that he had received the same training on policies & procedures at his induction; that he had been involved in reviewing and drafting these policies; that he was involved in delivering this training to new employees in their induction training and that following his supervision on 2 January 2019, as directed, he did re-read the whistleblowing policy and that he was aware from the training received in previous and present role; that the conduct of harassment on any grounds and on any basis was unlawful and would lead to disciplinary action including dismissal and/or criminal prosecution.

l) It is submitted that the Tribunal should be satisfied that B has taken reasonable steps to educate and inform its employees in the prevention of discrimination and harassment and says that the effectiveness of the training as delivered was not questioned or challenged in evidence. We are invited to apply the analysis in *Allay (UK) Limited v Mr S Gehlen EAT/0031/20/AT* and have particular regard to the fact that "there might be circumstances in which an employee has undergone training but is contemptuous of it and continues to harass. If the training was of good quality and the employer was unaware of the continuing harassment the defence may be made out".

28. On the question of failure to make reasonable adjustments Mr Bansal asks us to take into the following:

a) In terms of actual or knowledge of the claimant's disability and the fact that the claimant placed has been subject to substantial disadvantage it is submitted that the earliest it could have been expected to know or became aware of that A was suffering from anxiety was either 3 July 2019 or by the email dated 8 August 2019.

b) Although in monthly supervisions it had been noted that A had a number of personal medical health issues and she was having some anxiety/stress due to her daily frustrations coping with her work and the pressures she was facing in dealing with her role and every day family life, that anxiety was not a medically diagnosed condition, A was not on medication to confirm or give the R the impression that it was long term or had a

substantial adverse effect on her day to day activities and A did not disclose if she was taking any prescribed medication which she had a duty to do.

c) It is submitted that B was not made aware of A's PTSD until after her resignation and during employment there is no medical evidence to confirm that A had been diagnosed with PTSD.
d) It is submitted that it would be perverse for the Tribunal to find that B had knowledge or ought to have reasonably known about A's PTSD during her employment.

29. In terms of the failure to make reasonable adjustments:
    a) In terms of provision, criterion and practice (PCP's) relied upon by A are not allowing A time off work to attend her counselling sessions sometime on or about June 2019; and expecting A to return to work following from counselling sessions. We are reminded that the pleaded case is that the PCP's were applied on or about June 2019 and A has not amended her claim to include any other period. The respondent's position is that A did not make any request to attend counselling appointments on or about June 2019. The first and only request was made on 3 July 2019. A has not provided any documentary evidence or proof of her appointments attended in or about June 2019 or at all, and Mr Bansal points out that in cross examination, A conceded that she was asked for evidence of her appointments.
    b) We are asked to find that the claimed PCP was not applied and that further, A did not lead any evidence to show what the substantial disadvantage was or would have been in comparison with a non-disabled person nor that B had knowledge of the substantial disadvantage relied upon.
    c) B's primary position is that A has not discharged the legal burden and therefore, the claim must be dismissed for the following reasons:
    d) If the Tribunal finds that the PCP's were applied then B's position is that the claim must fail because the duty to make reasonable adjustments was not triggered, because B did not have knowledge of A's disability until sometime in July, which is after the pleaded date when it is claimed the stated PCP's were applied; an it did not know "and could not have reasonably be expected to know, that the PCP's would have placed A at a substantial disadvantage so A has not made out her case.

30. Victimisation
    a) The respondent accepts that the complaint made by A on 15 March 2019 to MH and confirmed to AC amounted to a protected act but that it is not accepted that the allegation of sexual assault made verbally on 2 May 2019 to AC amounted to a protected act because it is contested that there is inconsistency in A's evidence and that what was said to AC and understood by him as to what happened was a consensual act.
    b) On the question of the dismissal detriment it is submitted that: A has not established that she was dismissed, and/or that if she was dismissed it was because of the protected act
        (i) A was not dismissed because B had no reason to terminate her employment: she was considered to be a good employee with good prospects, and would have been placed at another home if C had another home.

(ii) A resigned voluntarily after her outburst occasioned by her issue over a cigarette break. We are invited to reject A's evidence because she confirmed she could no longer work at the respondent's care home.
(iii) It is submitted that the production of a sick note, the day after was an afterthought and a mechanism to receive an income for what A believed was her notice period.
(iv) If the Tribunal rejects this submission, it is submitted that by A's email of 27 August 2019 she confirmed that she would be resigning after the expiry of her sick note and her intention to leave her employment was clear.
(v) If the Tribunal finds that A was dismissed, A has not identified or given any evidence in support to assist the Tribunal to make a finding that her dismissal was because of the protected act.

c) On the question of the detriment asserted of not carrying out a risk assessment it is submitted that:
(i) This claim should be dismissed because the C has not established the reason for not carrying out the risk assessment was because of the protected act.
(ii) It is not disputed that B did not carry out a risk assessment but A's evidence was vague and confusing. A in cross examination, accepted she had not requested that a risk assessment be carried out and that she had not asked why this had not been done. The first time the issue of a risk assessment was raised was the exit interview and no indication was given by the C that one should be done.
(iii) AC in his evidence, confirmed he was not aware that a risk assessment was necessary. If he knew one was necessary, he would have done so.
(iv) A has not presented any supporting evidence to prove that this was not done because of the protected act(s) and there is no evidence before this Tribunal from which it could conclude that requirement of causation is satisfied.

d) On the question of the detriment asserted of a failure to give sufficient support following the assault it is submitted that:
(i) This claim should be dismissed because the claim has not been made out. A's claim is vague and lacks clarity and she gave no direct evidence as to what "support was not given".
(ii) If it is the C's case, which was not put to the Tribunal in this way, that (i) the C could not do the sleep ins as she was fighting her demons and wanted support, A did not disclose that she was struggling to do sleep-in shifts;
(iii) The note in the exit interview states that, "A said just putting her aside would have made her feel more supported... A reiterated that the blame was definitely not on AC, B or even AJ. She just feels that she was not supported."
(iv) Nothing was said in the monthly supervisions after C left about a lack of support despite the fact that issues were aired freely and A mentioned her workload; time off issues and pay issues.

31. No submissions were made on the issue of breach of contract.

32. Mr Bansal does not address the issues raised by the late disclosures and offers no explanation or this in submissions.

**Claimant's submissions**

33. On behalf of the claimant, Ms Tyson makes substantial submissions running to over 20,000 words (and so these take a little more summarising):

34. In relation the alleged harassment it is submitted that:
    a) The claimant needs to demonstrate 3 essential features: unwanted conduct; that has the prescribed purpose or effect; and that relates to sex or disability. There is no need for a comparator. She refers to the guidance in the EHRC Employment Code and highlights to us the guidance in *Richmond Pharmacy v Dhaliwal* [2009] ICR 724 and in *Weeks v Newham College of Further Education* UK EAT 0630/11 where Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.
    b) Our attention is drawn to the case of Read and Bull Information Systems Ltd v Stedman [1999] IRLR 299, and a quote from Morison J: *"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. As it has been put in a USA federal appeal court decision (eighth circuit) [USA v Gail Knapp (1992) 955 Federal Reporter, 2nd series at page 564]; 'Under the totality of the circumstances analysis, the district court [the fact finding tribunal] should not carve the work environment into a series of incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each episode had its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.'"*
    c) In terms of evidence, Ms Tyson highlights a significant number of evidential matters in her submissions which are impossible to fairly summarise here, which she says support her contention that given the explicit sexual references and behaviour, it is clear that the alleged harassment and conduct relates to the protected characteristic of sex. She highlights to us A's vulnerability and that C was older, in a position of power over her as her line manager, and that he had built up trust with her.
    d) In terms of the plausibility of A's evidence, she highlights that C denies all allegations in his statement but GB (a witness for the respondent) recalls conversations about a threesome and about breast milk and she suggests that it is not unreasonable to accept that there were many more conversations that were not witnessed.
    e) Ms Tyson suggests that AC must have known and believed A was sexually harassed because he accepted at the exit interview that he thought she was coping so well and that, according to his witness statement, AC saw fit to report the matter to the police on two separate occasions, on 3rd May and again on the 14th May 2019 (noting that AC did change his evidence).

f) In terms of the effect on A Ms Tyson highlights the impact on A shown by the medical evidence and the evidence of her then partner YS and the fact that on the basis of his perceptions of A at the time, he suggested that he speak to Dr R the clinical psychologist. She also refers to the fact that AC said at the exit interview that "AC accepts that R did not do enough to support A after her disclosure" and that he and Dr R believed A needed support telling her partner about the incident.

g) Ms Tyson refers us to specifically the evidence of Dr R who confirmed that it is common for abuse victims to keep things secret, that she was told of a sexual 'incident' by AC and she confirmed it would be very unusual for a person to be so distraught if the conduct been consensual and that Dr R said in her evidence that she did not believe the conduct was consensual and she confirmed that in her opinion the conduct was abusive.

h) Ms Tyson highlights the inconsistencies and contradictions in AC's evidence highlighting occasions when not only did he directly contradict his witness statement but he gave oral evidence which contradicted earlier answers and contemporaneous documents in the bundle, including his own notes of meetings (for example he denied saying things that he recorded he had said at the time in the exit interview notes), the implausibility of his evidence in relation to the reports made to the police and the fact that AC had denied that C had been suspended for abuse of a vulnerable adult or child despite the fact that was directly contradicted by the DBS referral documents (which were unavailable to the tribunal and Ms Tyson when that evidence was given). She highlights that in his oral evidence, AC conceded he knew and accepted that A had been subjected to sexual harassment (but not abuse). She points out that Mr Bansal's argument that AC had not made a concession was not consistent with what AC had said.

i) Ms Tyson invites us to find that AC lied in his evidence about what he reported and when, and that his original evidence that there were two reports to the police in May was in fact the truth. She points out that the reason why none of what happened can be verified is that the has produced no written records.

j) Ms Tyson argues that the fact that, in the respondent's defence to the case and in his oral evidence, AC denied that A had been sexually harassed and put her to proof, but in cross examination he conceded that on 1st July 2019 he knew that A was visiting a mental health nurse on 3rd July for mental health issues caused by workplace sex harassment and he then said they never disputed she had mental health problems to a matter which is relevant to our considerations. Ms Tyson points out disability was not conceded until after A had been through (in her words) a horrendous ordeal of describing her symptoms and the cause in the preliminary hearing on 29th September. She submits that this is a seriously aggravating factor. She also argues that the fact that B put A to proof that the sexual harassment and abuse occurred when the evidence suggest that AC accepting at the time she had been harassed and volunteered in oral evidence that sexually harassed is also an aggravating factor and in itself is an act of harassment.

k) We are asked to accept that it is objectively reasonable based upon the evidence, that the purpose and/or effect of C and B's behaviour was to violate A's dignity and create and intimidating, hostile, degrading,

humiliating or offensive environment for A. It is submitted that it is clear that C's behaviour had a devastating effect on A, as did the subsequent lack of support and dismissal by R and that it is objectively reasonable given the conduct and the threats made by C and the lack of support and dismissal by R, that A would respond in this way.

35. Disability Discrimination - Reasonable Adjustments (s20 EqA 2010)
    a) Ms Tyson reminds us that at the Preliminary Hearing on 29 January 2021, the Tribunal determined that the claimant had a disability (anxiety & PTSD) at the relevant date (14th March 2019) but that this only happened after A had spent a day being cross examined by Mr Bansal about this issue and this should be regarded as an aggravating feature of this case.
    b) In terms of knowledge of disability Ms Tyson refers us to the fact that on 14th March 2019 R had knowledge of allegation of sexual harassment by A and suggest that it is not unreasonable to presume that at the very least, a degree of distress would have been experienced by A but points out that no enquires about A's wellbeing were made. She highlights evidence in supervisory meetings of how to manage stress. She suggests that a reasonable employer with the significant experience of working within the care sector with abused children should have spotted the signs and would have delved deeper and she suggest that AC has 25 years' experience of working in the care sector. He has come across many traumatised people in that time and would be extremely experienced in identifying the signs of mental illness.

36. In terms of the failure to make reasonable adjustments Ms Tyson makes the following submissions
    a) In relation to not allowing A time of work and expecting her to come in after her counselling she says that the position of R that they did not know of these appointments is very hard to believe. A was clearly in a terrible state and they admit to knowing of at least one appointment with the mental health nurse on 3rd July and that she returned to work after that shift. She suggests that even a lay person knows that when a person has mental health issues that treatment always involves a series of appointments.
    b) Ms Tyson submits that it is obvious that a class of people with mental health issues of anxiety and PTSD would suffer exacerbation of these conditions by constantly having to make their own arrangements for their shifts to be covered and having to attend not only work, but also the place where the abuse occurred before and after traumatic counselling sessions. She suggests that the significant detriment occurred not only due to the added stress and inconvenience of constantly making these arrange but also due to the lack of empathy from the culpable employer.
    c) After summarising references to evidence in her submissions, Ms Tyson highlights that AC made a verbal admission that he knew A had mental health issues on 1st July 2019. She argues knowledge can be inferred from AC's conduct following the disclosure on 2nd May. i.e. contacting Dr R, disclosing with Dr R, going to the police twice and she argues AC's explanation of these things is implausible.
    d) She argues that B did not facilitate time off for A, that AC accepted in the exit interview that not enough had been done, that the respondent own

evidence confirmed that A returned to work after counselling on at least one occasion and that it would have been reasonable for AC to have actively taken control and managed matters for A who was struggling and in desperate need of help. In terms of substantial disadvantage, A suffered the deterioration in her mental health which ultimately led to the loss of her job and that largely A has not worked and points to the evidence that A has tried to take her own life.

37. In relation to the victimisation claims the submissions can be summarised as follows:
    a) To succeed with a victimisation claim, a claimant must establish two matters: that she has been subjected to a detriment and that this was because she has done a protected act if the employer believed that s/he had done a protected act or the employer believed that she had done or might do a protected act. It is not necessary to show the detrimental treatment was received solely because of the protected act, if the protected act has a "significant influence" on the employer's decision-making, and significant in this context means more than trivial (*Nargarajan v London Regional Transport* and *Igen Limited v Wong*). Further the protected act does not have to be the prime or even the conscious motivation of the victimiser. It is enough that it forms some part of the discriminator's conscious, subconscious or unconscious motivation .
    b) In terms of the termination of the claimant's employment Ms Tyson highlights that a party who uses unambiguous words to terminate a contract of employment cannot normally argue that they did not mean what they appeared to mean. However, there may be 'special circumstances', eg where words are spoken in the heat of the moment or under emotional stress, where those words can be withdrawn if it is done in a timely manner, or where the listener ought to have known that the words should not be taken seriously so that the purported dismissal (or resignation) will be of no effect. Where special circumstances exist, an employer should, for example, allow a reasonable period of time to elapse before accepting a resignation at its face value, during which facts may arise that cast doubt upon whether the resignation was really intended and can properly be assumed. She points to the cases of *Martin v Yeomen Aggregates*, *Barclay v City of Glasgow District Council*, *Sovereign House Security Services v Savage* and *Kwik-Fit (GB) v Lineham*.
    c) In terms of the risk assessment and failure to give sufficient support, Ms Tyson notes that AC admitted that he did not do a risk assessment and he did not know one was required but places a responsibility for this onto YC as she did not ask for one.
    d) In terms of the evidence, Ms Tyson refers to the fact that at no support offered at initial investigation of the complaint in March nor at the following supervision in March and May and puts to comments made in the exit interview and the evidence of A and AJ about what was said on 14 August about "AC not being there for her". She also refers to the requests made in the email of 8 August 2019.
    e) Ms Tyson suggest that in terms of the issues there is a "binary choice for the Tribunal – did A suffer a detriment by being dismissed on 14th August 2019 or did A resign because she was denied a cigarette break?". She

says there no third option the Tribunal is being invited to consider. She points to the respondent's own evidence that A offered to get a sick note that which suggest that she did not did not intend to resign and because A had resigned previously on 16th May this showed that B was on notice that it was unlikely A intended to resign but was simply struggling to cope. She asserts that the respondent's evidence on this is inconsistent.

f) In terms of whether this was because A had done a protected act Ms Tyson submits that with 25 years' experience in childcare and being highly qualified, AC failed to carry out a risk assessment and failed to make reasonable adjustments A says he agreed to and that B knew he had a duty to record his conversation with A prior to her return to work and to have a return to work interview in order to risk assess the situation. She argues that a failure to keep records indicates a desire to cover this up.

g) Ms Tyson highlights that A did not ask for a risk assessment because she didn't know that she had to. She wished she had done so, and she didn't ask for support in the handover meeting of 24th June because she believed AC would raise it. AC conceded that he had not paid A for the two days off until after she had left but said that he would have paid her anyway. He gave no explanation why she had not received this pay sooner.

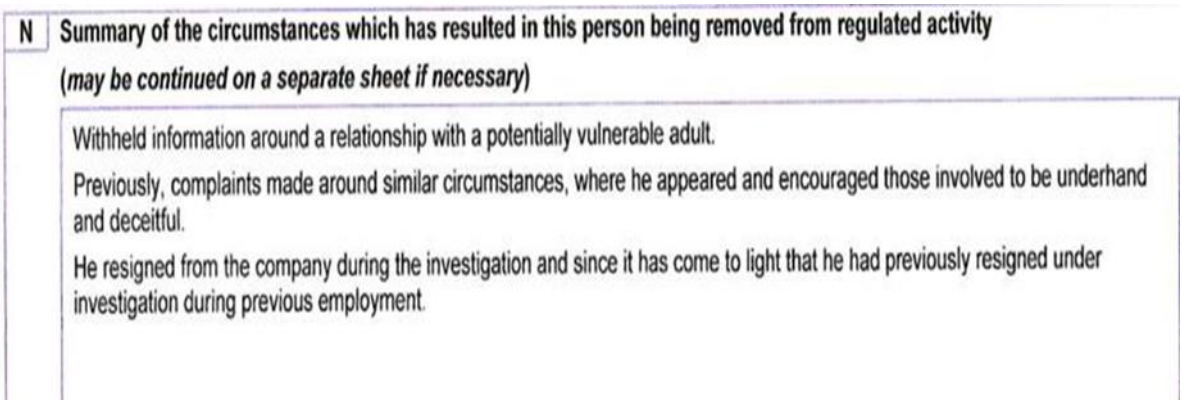
38. On the question of whether A was dismissed resigned because she was denied a cigarette break, Ms Tyson submits that A admits that that she was very angry and that A admitted started grabbing things out of her draw in anger, saying that she couldn't do this anymore. She told AC he wasn't there for her and she'd had enough. A was adamant that she said she would get a sick note, confirmed in AC's witness statement and his oral evidence, although contradicted in the Response. She points to A's evidence that she sent the text to GB to say that she quit because she had already had AC's letter accepting her 'resignation' and she wanted to take control of something, and she didn't want to say she had had a breakdown and been sacked. It is suggested that this is consistent with AC's evidence of A's aggression and erratic behaviour.

39. Adverse inferences – we are invited to draw adverse inferences from AC's behavior at the time and throughout proceedings and that we should conclude that this gives rise to suspicion along with the lack of documentary evidence which should gives rise to the suspicion of a cover up. It is suggested that B knew full well of its obligations for record keeping and risk assessments the lack of records for this (and all other complaints about C) is deliberate because B was simply hoping that A would just leave and they would be "shot of the problem" and Ms Tyson argues that whilst this may be gross incompetence, but it is more likely it was downright deliberate.

40. On the issues of vicarious liability Ms Tyson draws our attention to the EHRC Guidance on Sexual Harassment and Harassment at Work and she highlights a number of cases to us including *Lister and others v Hesley Hall Ltd* [2001] UKHL 22, *Allen v Chief Constable of the Hampshire Constabulary* and *Catholic Child Welfare Society v various claimants* and *Bellman v Northampton Recruitment Ltd.* Ms Tyson draws our attention to the evidence of complaints brought by J and the lack of evidence offered by the respondent in relation to

this matters and the documents disclosed on the final day of the hearing. She points out the DBS referral shows the following (amongst other matters)

a) That R says C represents a risk of harm to children or vulnerable adults.
b) That there was reference to matters being reported to Staffordshire County Council and two separate Ofsted officers but no documents have been disclosed.
c) At paragraph 'N' of this form B says this:



**N** **Summary of the circumstances which has resulted in this person being removed from regulated activity**

***(may be continued on a separate sheet if necessary)***

Withheld information around a relationship with a potentially vulnerable adult.

Previously, complaints made around similar circumstances, where he appeared and encouraged those involved to be underhand and deceitful.

He resigned from the company during the investigation and since it has come to light that he had previously resigned under investigation during previous employment.

d) Ms Tyson points out this appears to refer to previous complaints (plural) and to C encouraging those involved to be underhand and deceitful but no evidence of those matters was given to this tribunal.
e) Ms Tyson submits that the correspondence sent to the tribunal by Mr Bansal was misleading about the nature of the complaints and this can be seen in the documents disclosed in the course of the tribunal.

41. In terms of the reasonable steps defence, Ms Tyson points to the following:
a) AC said he could not do an investigation into C's conduct because he had left. His excuse for this failure is because A asked him not to. This clearly shows a failure by R to acquire relevant knowledge of harm and to take all reasonable steps to protect staff.
b) AC told C to re-read the policies and in his supervision with A he stressed the important of the whistleblowing policy but this a policy that applies for any reporting of any kind of alleged wrongdoing and despite his insistence this this document was very important, that he had read it numerous times, that he made sure all of his staff read it too, nobody had picked up on the fact that it referred to the establishment as being a 'school' or that child protection issues should be referred to the 'Surrey LADO'. Ms Tyson suggests that this makes it obvious that neither he, nor anybody else who worked for R, had ever taken the time to read this key document properly.
c) In cross examination AC conceded that there was no evidence of training in the bundle and told Mr Bansal in re-examination that he had not offered C and training after Jess's allegations. He also confirmed there had been no reassessment of the policies.
d) Prior to A's complaints, there were seriously concerning allegations of sex harassment, verified by independent witnesses. The investigation was inadequate, the outcome perverse and no further steps were taken other

than to tell C to read the policies. R was on notice that C was a sex predator of younger women. There was no additional training with C, no follow up with him and crucially, he was left to continue to manage other, younger, female members of staff including the claimant unmonitored.

e) Ms Tyson also highlights that the late disclosure suggests that B failed at the outset when they employed C to do due diligence in obtaining references. No references were requested until January 2019 and all references were not obtained until April 2019.

f) Ms Tyson argues that if B did not have knowledge of C's unlawful conduct, it is because R was willfully ignorant. It is not objectively reasonable that R had no knowledge. B did nothing to discharge the duty as set out in the EHRC Guidance on Sexual Harassment and Harassment at Work. We are invited to accept that the only conclusion that can reasonably be reached on this evidence is that B is vicariously liable for the actions of C and they failed to take all reasonable steps to protect A from harm.

42. Ms Tyson argues that in consequence of the evidence the burden of proof has been reversed in this case in accordance with s136.

43. In relation to breach of contract Ms Tyson submitted that the claimant was entitled by the terms of her contract to 2 weeks' notice and she had been summarily dismissed without payment.

**Credibility**

44. There was considerable conflict between the witnesses in this case, not only between the claimant and the respondent's witnesses, but also internally between the respondent's witnesses. At times this made the respondent's case difficult to follow. We did not find any of the witnesses in this case to be wholly reliable and the fact finding in this case was difficult. I have explained the findings we made in relation to credibility in relation to different matters below.

45. A, the claimant: A found the process of giving evidence very difficult. She had to take frequent breaks and broke down in tears on a number of occasions. At times she found it very difficult to give her evidence at all. The claimant appeared genuine in her belief of what she told us, but her accounts were not always consistent with the documents. Sometimes she was very vague about dates. We recognise that she has had significant mental health issues since the end of her employment and it would surprising if this had not affected her recall of the events, but we found that we could not simply accept her evidence on all matters. However, we did not believe that the inconsistencies in her evidence came from any attempt to mislead us.

46. YS is A's former partner. She gave us clear evidence but she was protective of A and she only able to give limited first hand evidence of matters relevant to the legal issues.

47. We found C to be a generally unconvincing and unreliable witness. In relation to matters where there was corroborating evidence, for example in relation to the first workplace complaint by J, C changed his evidence before us significantly from the

broad denials in his statement to admitting making some comments. C denied entirely knowledge of the matters contained in the DBS referral and gave a wholly different account of what had happened, which is contradicted by other evidence we received from the respondent. It would have assisted this tribunal if Ms Tyson had been able to cross examine C on those matters and the fact that this was not possible because of the respondent's failure to disclose relevant documents has troubled us.

48. AC told us that C had not given us an accurate account of some matters relevant to his resignation. C told us that he resigned on 15 March before he was aware of his suspension which AC says happened by telephone on 11 March and which was confirmed in writing on 12 March. We found that implausible. The evidence of AC and GB contradicted other aspects of C's evidence. In consequence we concluded that C could not be regarded as a trustworthy witness on matters where there was no corroboration and we concluded that he sought to create a misleading impression of his own conduct. We concluded that C was a generally and substantially unreliable witness whose evidence was not credible.

49. AC, a director of the respondent. AC had a tendency to give verboise and at times rambling answers. He would sometimes contradict himself and we found his account to be confused on a number of occasions. He conceded himself that his evidence had been confusing because he was nervous. On a number of important matters the evidence AC gave was not consistent with his witness statement or indeed substantially contradicted it and no convincing explanation for that was offered to us.

50. The evidence in AC's witness statement was inconsistent with the documents in relation to J's complaint. For example in his witness statement AC says this about J's complaint

*"In a supervision held on 2 January 2019 [with C], I had to discuss with a complaint that had been made against him from a female staff member, who had claimed he had invited home for a social evening which she found uncomfortable. Our investigation did not find any wrongdoing. In our supervision I reminded him to be professional with his staff. We went through his induction programme and I re-enforced his duty to re-read the bullying harassment, whistleblowing and our rules of conduct and disciplinary policies. Further, I made it clear that had there been any evidence of misconduct he would have faced disciplinary action. [C] acknowledged he understood and assured me as to his future conduct."*

51. The documents disclosed by the respondent on the first day of this hearing show that this description of the complaint made by J by AC is substantially misleading. J had submitted an 8-page statement raising concerns about C's conduct. The complaint about the invitation to go for a drink (the social evening referred to by AC) was just one of the concerns raised. She had also raised a large number of complaints about C's conduct towards her in the workplace. She raised concerns that:

    a) From the first time she met C he had made her feel uncomfortable by making a point of sitting very close to her at a training event;

b) Asking another member of staff to swap shifts so J would do a sleep-in shift with C;
c) Making comments about J's body shape;
d) Asking J if what she cooked for the young person being cared was what she would cook for C "if he was her man"
e) Asking J to sit with C in the office to go through files while sending another new member of staff downstairs to read files;
f) Making comments like J was "not just a pretty face";
g) Commenting on J's appearance and her clothes;
h) Calling J "cheeky" including to other members of staff;
i) Making J feel uncomfortable by asking her to accompany C on shopping trips, asking her to give him lifts
j) Making J feel uncomfortable by staring at her during a team meeting.

52. AC's witness statement misleadingly suggests that J's complaint was about something which did not happen in the workplace and he implies there was no evidence in support of her claims "I made clear that if there had been any evidence [our emphasis] of misconduct…" When taken together with the failure to disclose the documents relevant to J's complaint before start of the tribunal hearing, we concluded that this was an attempt to create a misleading impression of the evidence which would be in the respondent's interests in the context of the claim that it was vicariously liable for what happened to A.

53. In relation to the DBS referral as a panel we were concerned that as a result of the respondent's failure to disclose relevant evidence we had not heard evidence on these matters and the claimant's representative was denied the opportunity to fairly cross examine respondent witnesses. We noted that the contents of those documents disclosed at the conclusion of the hearing suggest that what we could not rely on what AC had told us about that DBS referral. That is entirely the fault of the respondent.

54. In our findings of fact we have referred to other occasions on which AC's evidence did not appear to be reliable based on surrounding evidence and taking into account the plausibility of what he told us. We were all faced with a noticeable absence of contemporaneous notes despite this being an employer in a highly regulated sector where record-keeping is important and this was acknowledged by AC and GB. We remain concerned that this respondent may not have disclosed all relevant documents because its conduct gives us no confidence that it was prepared to comply our orders.

55. Our conclusion was that AC had sought to present evidence in way to lead the tribunal to make findings which were not consistent with relevant documents and that he had sought to mislead us in a significant way. We concluded that AC could not be regarded as a reliable or credible witness and he was not trustworthy.

56. Dr R, a clinical psychologist who provide services to the respondent. Dr R was at times vague in her evidence and had little specific recall and in that sense she did not appear to be a reliable witness, but she appeared more willing to give the tribunal a frank and honest account of events than AC. The panel had particular difficulties reconciling the conflicting evidence between Dr R and AC about their

decision to report matters to the police. We preferred Dr R's evidence because her evidence was more consistent with the evidence of C and YS and for the reasons explained above we did not consider AC to be an honest witness.

57. GB, was a work colleague of A and the two regarded each other as friends. She is still employed by B. We found her to be a neutral witness but in terms of direct evidence she could not assist us with many of the issues in dispute. Her view of A's allegations matters was based on her belief that A would have confided in her. Whilst the tribunal accept that is a belief which she genuinely holds, we found it was based on an assumption or belief on her part which we could not accept and we agreed with Ms Tyson that GB had overstated the significance of the fact the A had not told her if something had happened.

58. We also heard evidence from AJ who was a new manager who came into the care home to take over from C. He became A's new line manager. We found him to be a generally plausible witness whose evidence was generally, but not wholly, reliable.

**Findings of Fact**

59. We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have not made findings about every matter raised in evidence but only those matters which we found to be relevant to our determination of the issues.

60. The disputed events in this case occurred, in the main, at the respondent's care home which provides residential care for children over the age of eight. The care home can look after up to three children at a time, although the home is not always fully occupied. The children being looked after are supported by a team of care workers. There are team leaders and also a home manager. The number of staff on duty at any one time will depend on the care needs of the children being looked after at any particular time. Staff typically work on rotating shifts, beginning work at around 10 am with a handover from the staff finishing the previous shift, working all day, then completing "a sleep in" night shift finishing the next morning with a handover to the staff coming in. Care workers will usually work 3 shifts per week. There is however a good deal of flexibility and staff can arrange for colleagues to cover shifts, reducing or increasing the number of sleep-in shifts they cover, for example, although this is always subject to the approval of the manager who must ensure that the correct number of employees are working and that they have the required range of experience.

61. C began employment with B as Acting Deputy Manager on 10 October 2018. The claimant, A, began her employment as a support worker on 26 November 2018. We accept that the claimant was well thought of and thought to offer promise for the future and on the basis encouragement was offered to her about her future prospects. She was not offered employment as acting senior support worker but she was being referred to in that way by AC in the supervision of 1 May 2019. We

find that A was made promises that lead her to believe she would be promoted to senior support worker in the near future as a matter of course.

62. There was an induction period which included physical intervention training delivered by external trainer. There was also training on company policies. This involved employees reading the relevant policies and we were told that if questions arose about those policies they would be discussed at the time. That is the only explanation we were provided with when AC was asked to provide an explanation for how training on harassment and discrimination was delivered. We were not provided with any documentary evidence of training materials, other than the policies themselves, there was no evidence of any wider training materials for example, with the process apparently being dependent on employees raising questions themselves. There was no evidence that any attempt was made to assess whether staff had learnt anything from reading the policies, that their understanding was tested or assessed in any way or that they were given training on applying policies in practice. The induction covered, amongst other matters, B's policies on Equal Opportunity; Grievance; Harassment & Bullying; the Anti-Sexist & Anti-Racist Policy; Conduct & Standards and whistleblowing. As AC conceded in cross examination, it would appear that in the course of reading these policies no-one had ever noticed that the whistleblowing policy relates to a school not a care home and the safeguarding policy appears to specifically relate to a home subject to the policies of Surrey and its Local Authority Designated Officer despite the location of the care home being in the West Midlands.

63. In his witness statement in relation to training, AC also highlighted B's practice of carrying out monthly supervisions with the staff on a one-to-one basis which reviews and records staff practice and review any issues or concerns. This is described as a management tool to deliver instruction and guidance on new tasks that a line manager wants the staff member to achieve, conducted on a confidential basis between the line manager and staff member. However, we were provided with little evidence of those supervisions specifically addressing training or matters relevant to discrimination. It appears that this was a supervisory tool focused on the needs of the children being looked after and day to day management issues.

64. A alleges that at the physical intervention training during the induction period C "dragged me by my hair towards the toilets, jokingly, and said 'you look like the type that likes getting her hair pulled.'" A says that she was taken aback by the comment but that she did not expect him to cause her harm. C acknowledges that he was partnered with A and would have pulled her hair in light of the exercise in question but denies making the comment alleged.

65. We accept that the hair pulling was part of the training. We find that the comment the claimant alleged, that she looked like the type that likes getting her hair pulled, was made, but find it likely that at the time, she thought it was simply a joke made in poor taste. We find that it is comment that would not have been made to A by C if she were a man.

66. In her statement A repeats the allegations made in her claim form that C would "rub himself against me", make "growling sounds", and call her a "fucking slut", taunted A about having "a threesome with me and my girlfriend" and that C told

her he would “pleasure himself” over a photo of her that he took from the employee of the month board. The claimant also referred in her statement to other sexualised conduct such as commenting on her “backside“ and saying “Look at you, you sexy slag dressing up for me”. The claimant says that such conduct was frequent but gives us little in the way of specific evidence of when these things are said to have happened. The allegations are strongly denied by C.

67. We did receive some corroborating evidence from GB, a colleague of A. Both she and A described their relationship as being more than simply work colleagues and in the time they worked together it is clear that they became friends. GB overheard C say to the claimant, after she had spilt coffee on her top, that it looked like breast milk and could he suck it off. C denies that he said this. GB told that she heard the comment and she admonished C for making it. We prefer the evidence of GB and the claimant and find that the comment was made and that it caused offence not only to the claimant but also to GB. It is comment which C would have not have made to a man.

68. GB also told us about a conversation she was involved in with C and the claimant about sexual “threesomes”. GB told us that there had been conversation about this which she had found quite shocking. She says this in her witness statement, *“Both C and the claimant had talked about engaging in threesomes in the past. I was shocked and said I never done anything like that. [C] said I should try it. I said to [A] that I would chew him up and spit him out, to which [A] was laughing and joking*”. The claimant told us that the comment GB had made about expressing her shock had “reminded her of her mum”. We accept that this conversation happened. We found that C’s evidence in relation to this had been evasive. In his statement he denied it and then in cross examination admitted he had been involved in the conversation. This conversation, which GB was a party to, was a conversation A took part in willingly, but we note that she was clear that this is not the conversation about threesomes which she referred to as being harassment in her evidence to us. She told us in cross examination that this was an earlier conversation but it led to C making comments about having a threesome with A and her partner. That was also denied by C. We prefer C’s evidence and we accept that C did make unwanted comments of a sexual nature to A about having a threesome with her and her partner. C and her former partner are lesbians. The comments were unwanted. C would have not have made those comments to a man.

69. In terms of the other allegations raised by the claimant and set out above, they were all denied by C. A did not give us specific dates when comments were made although she could describe their context and where in the house the comments were made. We did not believe C’s denials because of his unreliability in relation to other matters. C’s accounts, although vague in terms of timing, were plausible. We found that it was likely these things did happen but her evidence was such that we were unable to specific findings about when they happened.

70. On 15 December 2108 an employee, J, made a complaint about the conduct of C. An investigation was carried out and concluded on 21 December 2018 and J was told her complaint was not upheld. She subsequently left her employment. Her allegations were:

a) From the first time she met C he had made her feel uncomfortable by making a point of sitting very close to her at a training event;

b) Asking another member of staff to swap shifts so J would do a sleep-in shift with C;

c) Making comments about J's body shape;

d) Asking J if what she cooked for the young person being cared was what she would cook for C "if he was her man"

e) Asking J to sit with C in the office to go through files while sending another new member of staff downstairs to read files;

f) Making comments like J was "not just a pretty face";

g) Commenting on J's appearance and her clothes;

h) Calling J "cheeky" including to other members of staff;

i) Making J feel uncomfortable by asking her to accompany C on shopping trips, asking her to give him lifts;

j) By staring at her during a team meeting.

71. The additional documents disclosed showed that there was an investigation into these complaints and that the manager who investigated them, MH, took statements from a number of member of staff. Those statements show that the concerns raised by J were corroborated at least in part by two other members of staff, one with some direct evidence of things that C had done and the other corroborating that J had been raising concerns with colleagues at the time. They were denied by C. At the conclusion of the meeting J was told this by AC:

*"Everything has been looked at thoroughly and advice has been taken. The outcome is that [C] will not be dismissed.*

*The problem has been lack of evidence to substantiate her complaint. We are not saying we do not believe [J]'s complaint, but there is no further evidence to justify any further action other than what has been taken.*

*For the most part, Jessica has been the only witness. There are no text messages. During the interviews with other staff, they have confirmed that they never heard the comments themselves just hearsay or they were made in a joking manner. This leaves the company with no justification dismiss [C]. If there was evidence, we would be going down another route.*

*Supervision will be undertaken with [C] to lay out our expectations, to make sure that this does not happen again. If it does [J] can complain again"*.

72. Despite what he says in his witness statement about what he said to C *("Our investigation did not find any wrongdoing… Further, I made it clear that had there been any evidence of misconduct he would have faced disciplinary action*") these notes suggest what J was told at the time was quite different and that AC concluded there was insufficient evidence to justify dismissal not that there was no evidence as his statement suggests. Significantly AC told J *"we are not saying that we do not believe [J]'s complaint*" suggesting that, in fact, AC did believe that that C had acted inappropriately, and it was a question of evidence. When he was asked about this, AC told us that no action was taken because there was no *"concrete evidence"* against C. In fact the witness statement of one witness (V) had provided some corroboration for J's allegations and confirms that she had had concerns about his conduct towards J. Not all of the staff in the care home had been interviewed despite some of them being referred to as potential witnesses to what had happened and it was not clear to us why only a limited investigation was conducted in light of the apparent seriousness of the allegations. It is not entirely clear to us what burden of proof AC meant when he used the term "concrete evidence" and his oral evidence did not assist us, but looking at the evidence that was rejected by B as being "insufficient", our conclusion is that an employee of B who raised concerns was expected to produce direct corroborating evidence before AC would take any action.

73. The notes of the meeting concluding J's grievance which were part of the late disclosure on the first day of the hearing, show that "AC asked J what is her concern. J replied not feeling comfortable and happy at work at work. A pointed out that was a decision for her. The company had done the investigation and cannot proceed further. It now goes back to J and the decision to work or not lies with J". J left employment shortly after that and it appears likely that the reason was that grievance outcome.

74. The expectation of the respondent appears to have been that an individual would have to produce evidence more consistent with a criminal standard of proof than a civil one. It is a matter of very significant concern to us that the discrepancies between what is said in AC's witness statement and the relevant documents disclosed in consequence of the claimant's application for specific disclosure made at this hearing, would not have been apparent to this tribunal if we had not allowed the claimant's application for specific disclosure. We draw an adverse inference that the respondent failed to disclose those documents because they did not support the misleading version of events AC had offered in his witness statement. In short AC had wanted to mislead us into believing that the only concerns raised about C did not relate to things which had happened in the workplace.

75. Before us C denied the allegation that he harassed J but his evidence was unconvincing. He suggested that there was conspiracy between the staff in the investigation to discredit him because he told them to get on with their work. No credible basis for such a conspiracy was offered to us.

76. On 12 February 2019 it is alleged that C sexually assaulted A. In her claim form the claimant said this:

9. In early February 2019 I was sexually assaulted. On that day, there were 4 members of staff working, one being me and the other being [redacted] as well as one minor in the home. [redacted] sent 2 staff members to IKEA and the minor was in his bedroom. He then said, 'come on then' and dragged me into the office toilet. He then dragged my head down and somehow forced his penis into my mouth, which I believed happened for a couple of seconds. I don't know how I managed to escape but I did.

77. In her witness statement, A said this:

25. One day, in early February 2019 I was sexually assaulted. On that day, there were 4 members of staff working, including me and [redacted]. There was one minor in the home. [redacted] sent 2 staff members to IKEA and the minor was in his bedroom. He then said, 'Come on then' and dragged me into the office toilet. and made me choose between allowing him to penetrate my vagina or to pleasuring him with my mouth. I didn't have a choice and chose my mouth. When I have my back flashes, I can still smell him, hear him and taste him one year later.
26. I after ran out to the toilet with him saying "Next time, you are going to let me cum".

78. The allegations are denied in the strongest terms by C.

79. The various witnesses in the case would learn of these allegations over a period of sometime so dealing with who was told what and when takes out these findings away from a chronological account but it makes sense in terms of our findings to look at all of the relevant evidence in this regard to explain our findings. As a panel we recognised that the extremely serious nature of these allegations and we approached our fact finding on this with particular care. It was a difficult process given the lack of evidence and the disputed and conflicting nature of much of what we heard.

80. In his submissions Mr Bansal suggested that the difference in accounts between the claim form and A's witness statement suggest an inconsistency in her allegations which pointed to them being untrue. He particularly emphasised A's failure to report what she says had happened to her either to the police, her partner, her employer or others at the time. We took into account the criticism made by Mr Bansal of the claimant's account and have weighed that carefully. However, on balance we cannot accept these as reasons to reject the claimant's account. We accept that it is not uncommon for people to find it difficult to report abuse and the more serious the incident the harder that can be, especially if what has happened is of a sexual nature. A explained one reason why she did not tell anyone was because she was scared of C. That is a plausible explanation for not reporting abuse. We also note that truthful witnesses do sometimes give slightly different accounts of events especially if they are traumatic. A also told that she felt ashamed by what had happened and blamed herself. She felt unable to tell

anyone what had happened and believed that C posed a threat to her partner. We accept her evidence about that.

81. As might be expected in light of the nature of the allegations, there is no direct documentary or other evidence.

82. The claimant had a supervisory session with C on 6 February 2019 and that records there are not staffing issues or bullying issues, However as the claimant herself observed in cross-examination, she was very unlikely to try and report the alleged abuse to the perpetrator himself. We view that as self-evident.

83. A also had a supervisory meeting on 25 February 2019 with CS, an individual not otherwise referred to. Those notes also refer to no issues and no bullying but we accept that the claimant had initially decided to keep what had happened secret for the reasons already referred to. We find that to be credible.

84. We have also taken into account A's former partner's account. YS accepted that the claimant had not told her about what happened at the time but in cross examination she reported that C had shown behaviour which was consistent with something having happened to her around that time, for example using distraction techniques to escape upsetting thoughts and that in particular that A had started to show signs of panic and extreme anxiety. We found YS's evidence about that to be credible.

85. We also received evidence from Dr R. We were careful to note that Dr R did not give us evidence as an expert, nor did she have any clinical responsibility for the claimant, but she is a qualified clinical psychologist. Dr R was also sometimes vague in her recollection but significantly she told us that when she interviewed the claimant in May, A had told her that *"when [C] approached her and exposed himself and [A] was most distressed because she said that she put his penis in her mouth even though she had not wanted to".* She also told us she believed that the claimant had been subjected to a traumatic experience and she believed what the claimant told her about being assaulted. That was only some three months after the incident was alleged to have happened. A had spoken to Dr R at around the same time as she spoke to AC.

86. Turning to C, he strongly denied that the incident had happened but we had found him to be unreliable given that he also denied other matters only to concede them when presented with contrary evidence where that existed. The documents disclosed late by the respondent suggest that the evidence C gave us about his relationship with the looked after child's aunt was misleading but the respondent's failure to disclose those documents meant that Ms Tyson was not given the opportunity to challenge C on that, nor indeed was C given the chance to offer any explanation for this apparent contradiction. That arises from the respondent's conduct in the course of this litigation. It is also relevant that AC's evidence was that what C had told us about those matters was misleading. We concluded that that we could not place weight on C's denial in the circumstances.

87. GB told us that she was not aware of the assault by C because the claimant had not told her about it and she thought that she would done so if it had happened.

She also told us that she had not observed any change in the behaviour between A and C but she did confirm that the claimant began to describe increasing health problems over the following months. GB referred to the "breast milk incident" and confirms that this was wholly inappropriate and that this had embarrassed A but does not suggest any change in the conduct of A towards C after that either. We will stress that the panel took GB's evidence into careful account, she was a neutral witness and we accept that she told us what she honestly believed, but we also observe that A has explained that because she felt she was to blame for what had happened she was covering up how she felt at work and only showing her distress to her partner at home. We found that we cannot attach the weight to the fact that A had made no disclosures to GB that GB invites us to.

88. Finally we considered AC's evidence. In his witness statement he says this

*"On 2 May, at about early evening, I had returned home. I was about to have my tea. I received a call on my mobile from [A]. She was crying and her breath was quite high. She told me she was having panic attacks. I asked her why. She said she was worried that her partner would find out about what she incident, which would ruin their relationship. She then explained that she was playing him at his own game and said she had "sucked his dick" in the en-suite. I asked her "why did you do that." She said she had been told by her friend that if she did this, she would scare him off; he will then get cold feet. I then asked her why you would even do this without speaking to someone senior. She replied, "I thought I could handle it, and she thought her friend's advice was right." I then asked have you been to the police. She said no. I said if she did not report this I would. She said, "I can't do it."*

89. We find this account to be implausible for a number of reasons. The first is that if, as AC reports, A had acted entirely voluntarily and consensually and had simply regretted what she did because she thought it would impact on her relationship with her partner, there would have been no reason for her to report anything to the police as AC says he suggested. Indeed, it would have been a very odd thing for her to do. Quite simply it would be nonsensical to ask someone if they had gone to the police to report a voluntary and consensual sexual act. We considered that the only reasonable explanation for the question was that AC believed at the time that the encounter had been unwanted and non-consensual. AC was unable to convincingly explain to this contradiction in his evidence to us.

90. The second reason is that AC had been told about this around the same time as A had spoken to Dr R. AC told us that he did not any stage discuss what A told him with Dr R and he was unaware that they had been told different accounts. Dr R told us that she could not recall what she had discussed with AC but significantly however she says that she accompanied AC to the police station and was there when AC reported the alleged assault to the police. This matter is dealt with in more detail below but significantly Dr R's account gave a reason to go to the police which AC's did not, because she believed that an assault had taken place. It seems inconceivable that there was no discussion between AC and Dr R where they agreed that the matter was so serious it justified going to the police. Although her evidence was vague at times, we preferred Dr R's account of events insofar as it differed with AC's.

91. We also considered that it was likely that if AC had been told that two members of staff had been engaging in consensual sexual activity at work while they were supposed to be looking after a child that would, and should, have resulted in a disciplinary action. We agreed with Ms Tyson that AC's evidence about this was not credible.

92. We note that it is curious that a director and senior manager of a heavily regulated business where record keeping is a key requirement, would not have made any sort of record of such a significant discussion with the claimant. None has been disclosed and we are told that no record was made. We think it is likely that either records were made and not disclosed, or no records were made because at the time it was recognised they could be damaging to the respondent in the future. In any event we drew an adverse inference from the absence of any contemporaneous documents made by the respondent about such a significant and serious matter.

93. Weighing all of this conflicting evidence together, we found on the balance of probabilities that there had been unwanted sexual contact between the claimant and C. We accept that the claimant felt forced to take C's penis in her mouth, albeit briefly, and that C did not and could not reasonably have believed that this encounter was consensual or wanted by the claimant. This is described as an assault by the claimant. We accept her description of what happened and that description although it is important to stress that, of course, we have no findings whatsoever about whether a criminal offence was committed.

94. In summary in relation to the claimant's allegations about things C said and did, we found C sexually assaulted A in or around early February 2019; that the breast milk incident happened and we also accepted the claimant's evidence that the comment about C having a threesome with A and her partner happened. A's allegations in terms of when the other incidents were more vague and unspecific but we prefer the claimant's evidence to that of C. Taking into account our assessment of C's reliability on other matters we preferred the claimant's evidence in this matter and we find that, on the balance of probabilities he did make sexualised and unwanted comments to the claimant as alleged but, as noted about, we are unable to make specific findings about when they happened.

95. Returning to the chronology of events we found that the unwanted sexual encounter happened in early February. Within a month C's employment with the respondent had ended. We were given rather confusing and conflicting evidence by C and AC about the events leading to the termination of his employment and the fact that we found both of them to be untrustworthy made this particularly difficult. It is not necessary for the determination for the legal issues in this case for us to make findings about precisely what we find happened, but on the basis of the evidence before us we think the following is the most likely sequence of events:

    a) C's father was unwell and he took some time off work to look after him. C told us that it was making a decision that he needed more time to look after his father that led him to resign. In his statement he says *"I resigned from my position due to significant stress I was under at the time and the amount of working hours I was extra required to complete for the role and its total*

*commitments required was having an effect on me. My father had also been taken seriously ill during this time and I was required to support him. I had physically, been absent from work for about a week prior to resigning, although was still in communication and completing reports etc for the business, in which time I had already made my decision".*

b) At around this time concerns were raised with the local authority about some actions that C had taken in relation to the child who was being looked after although those concerns were resolved and were found not to require any action;

c) At around the same time it also came to the respondent's attention that C had been in a sexual relationship with the looked-after-child's aunt. That is consistent with the evidence of A and with the contents of the text message sent by A to GB at this time. C denies that he had a relationship with the aunt and says that there was simply a dispute between them about the purchase of a car. That was not what AC believed. We find that what is significant is that the respondent had reasons to believe there had been an improper relationship between C and the aunt. In due course this would trigger the DBS referral.

d) The letter to C suspending him from employment is dated 12 March 2019 His resignation email is dated 15 March 2019. In his statement AC said this *"On 7 March, [C] was off work as his father was ill in hospital. He remained off from work. On 11 March, I telephoned [C] to suspend him from work due to a complaint I had received about him…"*

e) We consider that it is likely that, on the balance of probabilities, C resigned his employment from the respondent because he had been suspended and no doubt suspected he may well be dismissed in due course. His denial that he was aware of the respondent's suspension letter when he wrote that email was not plausible because AC had also spoken to him by telephone. We conclude that the evidence C gave us about this matter was misleading and untrue. This finding is significant because it gave us reason to doubt C's approach to truth and accuracy and the reliability of his evidence generally.

96. On 14 March 2019 the care home staff were told about C's suspension. A met AC and MH, a senior company employee, and A raised concerns C's inappropriate comments and behaviour but she did not refer to the unwanted sexual encounter in February. MH made notes of the meeting which say this[1]:

[1] Regrettably the parties had not redacted documents for witness statements despite the anonymity order, I have redacted the documents above, although it is not possible to include the parties' details below the sense of the note should be clear

[redacted] explained that she didn't want to get anyone into trouble, hence she did not come forward before.

In the past when [redacted] has been making sexualised comments, [redacted] feels if [redacted] is made aware she has said something, and he comes back to [redacted], it would be a very awkward situation. [redacted] has spoken to GB about not coming back and both felt the same, if he was return back to [redacted].

[redacted] proceeded to give examples of the comments [redacted] had made to her:

I bet you fucking love it between two men don't you?
[redacted] was in the kitchen and asking them for a threesome.
If you weren't lesbian we would be the next Adam and Eve.

[redacted] explained that she is 24, and although mature for her age, his comments had taken her a back. She was unprepared and did not have the experience in having a quick comeback.

On another occasion [redacted] was drinking coffee and she spilt some on her boob. [redacted] pointed out that she had spilt coffee on her boob. [redacted] replied, Oh I have missed my mouth. [redacted] continued by asking her if it was breast milk and should he lick it off? [redacted] was made to feel very uncomfortable and unable to reply.

[redacted] happened to see a photograph of [redacted]'s partner on her phone and told her he would love a threesome.

[redacted] advised she never felt comfortable on shift with [redacted].

[redacted] went for a cigarette with [redacted] and asked her if he could say something? He told her that her arse is amazing. This made [redacted] even more concerned, as she was now aware he was looking at her.

[redacted] reiterated that she was worried, if [redacted] came back and he know of the information she had given. She knows he can be very manipulative and he is ambitious. If this was to happen she would be unable to work with him.

[redacted] advised that [redacted] was an animal with women and thinks it is historical. She then proceeded to advise that when WD first started working here, he told [redacted] to not think with his dick this time. WD also told staff members of this today.

97. In her witness statement A says she met with AC and MH. In his statement AC says she met with MH alone, but that shortly after that meeting on the same day, he was informed of the allegations by MH and then he and MH met with A together. A then confirmed her allegations to AC. On that basis we find no significant conflict between the evidence of AC and A. AC says this *"I informed her, that due to the serious nature of her statement, I would have to take it forward to our HR advisers and seek advice what to do next. [A] asked me not to pursue it, and said [C] is not here and she did not want anyone to know about it. She told me that GB was the only person aware of this. I left it because she had told me not to pursue it. After this date, nothing further was said about this, and neither did C raise the issue again.*"

98. There are no notes of that later meeting but in his contemporaneous notes of the earlier meeting MH had recorded that A had expressed fears about the possible consequences if C became aware that she had raised allegations. There is no suggestion in the notes or in AC's statement that she was offered any reassurance about steps the respondent would take to try and protect her. That reference to

concerns about retaliations was consistent with the evidence that A gave us about her reasons for not wanting to go to the police and A's medical records show that the claimant raised similar concerns later on. As a panel we are satisfied that the claimant's failure to pursue a police complaint and her request for B not to pursue it further at that time was not evidence that the matters she raised had not happened, but rather is consistent with her account that she was concerned about retaliations from C.

99. In the early hours of the following morning (15 March 2019) C resigned his employment by email. It would still have been possible for the respondent to seek to investigate the allegations raised by A. In his statement AC says that he did not investigate at A's request but in his oral evidence AC told us that he took the view that because C had left he could not investigate them. Despite having told us in his witness statement that he had decided he could not investigate this matter because A did not want to take it further, in his oral evidence, AC told us that he reported these allegations of harassment to the police (to be clear not the sexual assault, AC did not know about this at this time). We simply did not understand AC's evidence on this but observe that a decision to go to the police without speaking to A about that when she had expressed fears about retaliation from C and expressed a desire not to pursue matters at a time when C was no longer under B's control was highhanded at best. AC told us that the police told him that A would have to make a report to the police herself.

100. A reports that she started experiencing migraine headaches in late March which may have been linked to stress, although we have no medical evidence about that. Those headaches worsened and in April she experienced a headache so severe she was admitted to hospital for tests.

101. On 1 May 2019 the claimant had a supervisory session with AC. The notes of that meeting are in the bundle. It is not in dispute that A did not mention the February incident in that meeting, and indeed as notes set out further below show, she also indicated that she had no issues with bullying. There was a discussion about her health which indicates that the claimant was reporting some anxiety. The notes also suggest that A did have a legitimate expectation she would be made a senior support worker and that at the time she was an acting senior despite the respondent's general denials about this being the case.

102. The notes make reference to the fact that A is showing signs of anxiety:

> We have discussed in great detail what [redacted]'s role in the home is and her value as a team member and the frustrations she has been having recently. We have looked at and tried to help by using strategy's discussed above on trying to reduce her anxiety's by discussing issues training others when working with her on what she needs from them instead of taking all the responsibility on herself as this will benefit [redacted] and the team as it will function better as they have a better understanding of each other.

103. There is reference to the amount of time she has had off sick:

would be at work , which means her job is safe. [redacted] takes her job and roles within the home very seriously and puts her heart and sole into the job she is doing she shows compaction and positive outlook when at work and ensures all her tasks are completed. However does need to be able to switch off and not take or allow people let her take it home with her and set tasks for others and monitoring they have done them and give instruction when needed which again will help when away from [redacted] house and hopefully allow her to recover fully. Well Done and keep up all the hard work as it is appreciated by all even when sometimes it fells like its not being recognised.

**10. Any issues relating to Bullying within the home?**

☐ Yes

☑ No

[redacted] has had a lot of sick time recently with her back problem and migraines.hopefully the migraines will be rectified with glasses as she has been told she needs to where them permanently. I have informed her that she needs to stop worrying about her job at [redacted] as she is a valued member of the team and even though she has been unwell its very clear it genuine and if she wasn't unwell she

104. In her witness statement the claimant says that by May she had realised that her mental health was getting worse and on 2 May 2019 she told AC what had happened in February. She denies that she told him that she had invited the encounter on the advice of a friend as alleged by AC, and we have set out above our findings on that. It is common ground between the parties that AC allowed A a couple of days off work after the conversation.

105. On 5th May 2019 the claimant says that she had a GP mental health assessment and that she was diagnosed with severe depression, but we have not been shown any evidence of that. She says that she told AC of her diagnosis but he denies that. What AC did tell us is that he had been aware of the migraine and other signs that the claimant was suffering from stress, but he says that this was because of her personal family circumstances. What matters for the purposes of the legal issues in this case is not whether AC knew that the claimant had mental health problems caused by the February incident or the allegations raised in March, but whether AC knew of the claimant's mental health difficulties which are now admitted by the respondent to be a disability.

106. AC describes the claimant telling him that she was having panic attacks. This is sign of significant mental distress. AC that the claimant was in such a worried and distressed state he suggested that she speak to Dr R, who is a clinical psychologist. That happened in mid-May. We find it improbable that AC would have suggested that the claimant speak to Dr R if he thought the claimant was simply struggling with family issues he had been aware of for some time nor would he have given her 2 days off work. Dr R did not have clinical responsibility for A nor was she employed by B, but the fact that she described A as being showing signs of trauma is consistent with A's own account of her behaviour and the evidence of YS. We find that it would have been clear that there was something wrong with A's mental health. B should not have closed its eyes to the signs. AC noted that A was suffering from stress and was going so far as to offer her coping strategies. AC was aware, or should have been aware, that C was suffering from mental health problems at this time and was on notice of the claimant's anxiety.

107. The issue of the 2 days leave was to become a source of dispute. The claimant became aware in due course that she had not been paid for those days. She

raised this as an issue and eventually the respondent agreed to pay her for that time. This matter resolved and is a not a dispute in this case. However, we note that if AC had not intended that the offer of the 2 days off work would be paid he should have made that clear. Offering 2 unpaid days off work to someone with no fixed working pattern is not offering those days as leave, it is offering to rearrange shifts. However we cannot see that anything turns on it. What is significant is that AC had perceived that the claimant needed some time away from work.

108. AC contacted Dr R and she then spoke to the claimant. They arranged to meet.

109. In his statement AC says this *"Given [A']'s distressed state, I then gave her 2 days off from work. A has claimed that she resigned in a text in a phone call. That is not correct, as she did not resign.*

*The next day I went to the police station and reported this alleged incident. I was informed that A would have to report this incident to the police to pursue it further. I explained this to A and said she would be protected, if she reported it. I am not aware that she reported it to the police."*

110. In his oral evidence AC insisted that he had never reported the February assault to the police. That is not what his written statement says. In his statement he says this: *"The next day I went to the police station and reported this alleged incident".* "This" is clearly a reference to the sexual encounter, the statement cannot be read any other way. At the hearing before us he said that he reported the allegations of inappropriate comments reported to B in March to the police at this time although his evidence was extremely confused because he also said that he reported those allegations in March and that he only went to the police twice, including the occasion when he visits the police with Dr R later in May. It is hard to understand why AC found it so difficult to give us a straightforward account of these matters either in his written statement or in oral evidence if what he was giving an honest account of what happened. No convincing explanation for why his witness statement was wrong about such an important matter was offered. AC's evidence about what he reported and when, changed during the course of the hearing and was so confused that was what prompted the panel members to ask me to clarify this in the evidence on the morning of the final day. We found AC's evidence on this to be unreliable and we concluded that AC had sought to mislead us, changing his evidence in a way that he thought would be more helpful to the respondent's defence of A's claims.

111. AC and the claimant arranged to meet in a pub near her home. The claimant says that AC told her she would be supported on her return to work, that she could do less hours if she wanted to and there was a discussion about her doing sleep-ins. AC's account is that he asked A if she was ready to return to work and she confirmed that she was. Again there is absence of any contemporaneous record keeping by AC and no notes of that meeting have been disclosed.

112. We prefer the claimant's account of that meeting. If it was simply a case of the claimant being asked if she was ready to return and her saying she was, there would have been no reason to arrange an off-site meeting. What AC refers to would not account for a short telephone conversation. That is a not credible.

113. On 10 May 2019 A returned to work and on 14 May she met Dr R. It is relevant to briefly explain Dr R's role. Dr R explained in her statement that she is a qualified clinical psychologist. She works as an independent practitioner. She visits the care home around one month to provide consultation regarding the young persons and one-to-one supervision for staff members. This is not in any clinical capacity. The purpose of the supervision with the staff is to discuss anything that may be impacting on their work and any challenges they are facing in the workplace to help them to understand those to improve their effectiveness at work.

114. We note that Dr R refers to being aware from her previous sessions with A that on occasion she experienced anxiety at times, and that they had discussed some of the past and current pressures in her personal life but she had never disclosed any past issues with C and had made positive comments about him and AC.

115. When A met with Dr R at the care home she describes in her statement how A became distressed and very tearful. We have dealt with what A told her above. Dr R's evidence was that she believed what A told her and that she appeared have gone through a traumatic experience and that Dr R believed that she had been assaulted.

116. Dr R says that she was concerned about the support available to A at home and that A had told her that she had not told her partner what had happened, and she did not know how to tell her. Dr R offered to support her to while A told YS and they all travelled together in AC's car to A's home.

117. We heard different accounts of the meeting at A's home. It is common ground between all the witnesses to this that A became upset trying to tell YS about the incident and that Dr R provided some of the information. YS said that AC was present throughout but Dr R and AC say that he left for some of the time. We accept that he may not have been there all of the time. YS told us that there was a discussion about going to the police during that meeting. We find that plausible because Dr R and AC did decide to go the police station after meeting with A and YS. It is unlikely that they would have done this without mentioning it to A. We accept YS's evidence about that and that A had expressed her concerns about going to the police. YS's evidence was that AC told A she should go to the police and that A had said that she only would go if AC also raised concerns himself. That is consistent with what happened next.

118. Dr R's evidence was that AC drove her back to the care home to collect her car and they both drove to the police station. She says that both of them went to the front desk, and AC reported the incident. However the police officer told them that A would have to report the complaint herself.

119. In his witness statement AC says this *"I then decided to go to the police station again, I drove to the House. For Dr R to pick up her car. She followed me in her car to the police station. The officer took a note and re-confirmed that [A] would have to report the incident. We then left. On my return, I telephoned [A] and advised her of our visit and that she would have to report the incident."*

120. There is very little difference between the evidence in the witness statements of AC and Dr R but in his oral evidence AC made very substantial changes to that account. He told us that he did not report the assault, he reported the allegations of inappropriate comments made in March and also told us that Dr R had not gone into the police station with him. We are told there is no contemporaneous notes made by the respondent of this visit.

121. No substantial or convincing reason was given by AC for such a material change in his evidence about the visit to the police station. We found that AC's oral evidence about this was not plausible or credible. We found that it was implausible that Dr R and AC attended the police station that evening to report the March allegations. It was implausible that Dr R went there with AC but simply stayed in her car. AC suggests in his oral evidence that Dr R had provided misleading sworn evidence to the tribunal. We think that is very unlikely. Dr R was sometimes rather vague in her answers, but it appeared to the panel that was because she would only confirm details and provide definitive if she was sure of her evidence. She had no reason to mislead us. AC, as a director of the respondent, does have an interest in a particular outcome. It appeared to us that AC changed his evidence about what was reported to the police because it had been put to him that on his account of what A had told him about the February incident, that A had invited the sexual contact on the suggestion of a friend, there would be no reason to go to the police and he recognised the implausibility of his evidence. AC appeared to change his evidence to try and explain that inconsistency in his evidence. We did not find the new account credible. On the issue of the report to the police we prefer Dr R's evidence and find on the balance of probabilities that the account AC gave in his written statement is more likely to be true. This is significant because we think that Dr R and AC went to the police that evening because on the basis of what they had been told by A they both believed that what she had told them was true and that the sexual contact between A and C had been nonconsensual and unwanted.

122. A says that after disclosing what had happened in February she felt vulnerable and that in her words "she fell apart mentally" once it was no longer secret. She returned to work but soon felt unable to cope and resigned on 16 May 2019 by text. A says that was on 16 May, and AC says that was on 17 May. We do not think that difference in date is material.

123. Over that weekend YS contacted AC to tell him that A had not meant to resign and that she was stressed. AC told YS that was fine for A to come back to work.

124. In both A's and YS's evidence, criticism is made of the respondent's failure to carry out a risk assessment when A returned to work. This appears to be because YS, who works for a much larger care provider, had disclosed to her employer something of what had happened and they had carried out a risk assessment. We have dealt with this in our conclusions. It is common ground of all concerned that no risk assessment was ever carried about that was specific to A.

125. At around this time, a friend of A's, D, began working at the care home and AJ took over as the care home manager. It is common ground between A and AJ that he offered her support by offering her words of encouragement including positive

quotations from the Bible which he thought might help her. We think it is likely that he did that because he observed someone who was clearly struggling at the work with anxiety and other signs of mental distress.

126. The claimant was continuing to seek medical support from her GP and she was referred to see a mental health nurse. A says that she told AC on 1 July 2019 that she had an appointment with the mental health nurse on 3 July but that this request was refused.

127. In his evidence AC says that on 3 July A visited the Dudley Talking Therapy Service but that she did not provide information in advance of that appointment nor did she ever produce evidence of the appointment. Despite that AC was able to get GB to cover the shift and the time off was authorised. The claimant did not produce any evidence of that appointment to us and we accept that no evidence was ever produced to the respondent of that appointment.

128. A told us that she had counselling sessions with the mental health nurse every week. AJ, AC and GB explained to us that as far as possible staff are expected to use non-working time to attend medical and other appointments. The nature of the shifts care home staff work means that they are in a different situation from, say, an office worker who may find it difficult to attend appointments only available during office hours. Care home staff have non-working time during office hours. If it is not possible to arrange an appointment in non-working time, B's care-home workers are able to swap shifts with other members of staff as long as this is approved by the home manager who has to ensure that the right mix of staff in terms of skills and experience on any particular shift to ensure continuity of care. AJ explained that if this is not possible staff will be allowed time off work, for example if there is a hospital appointment which does not offer the flexibility of timing that a GP appointment can. In that case if a member of staff had not been able to find someone to cover a shift for them he would ensure the shift was covered. We observe that those working arrangements are commonplace in this sector and are a sensible and reasonable approach.

129. GB confirmed that staff find this flexibility useful. It enables staff who want to earn more money to do so, especially if they are planning a holiday or have a reason to save up for something, and it also enables other staff with social plans or other reasons to reduce their shifts, some flexibility. GB explained that she had found flexibility useful for her own reasons on occasion and we accept her evidence about that.

130. A complains in her statement that *"I have had mental health appointments the same day I was finishing 10 hours shift + sleep-in + 3 hours in the morning). Others have been when I was on shift and I had to sort out someone to cover me for few hours so I could attend my appointment and then I was at work straight after (the remainder of the day + sleep-in + 3 hours in the morning)"*. We are satisfied that that reflects the arrangements explained by the respondent. The claimant's witness statement suggests no disadvantage caused to her from her making her own arrangements with colleagues in this way and she has not referred to specific date on which she could not attend an appointment as a result. We accept AJ's

evidence that if A had not found someone to cover for her, he would have sorted out cover if needed. That was not challenged.

131. In her statement A appears to complain that she was asked to provide proof of her appointments. The panel considers that criticism to be unfair and unreasonable. If an employer is asked to allow an employee time off work to attend an appointment we cannot find any basis to criticise them for asking for proof that there is a genuine reason nor indeed any good reason why a care worker should object to that request. The need to avoid this right to time off being abused by dishonest staff is obvious and the production of evidence of an appointment is a simple administrative request. It is not a detriment.

132. A says that on 5 July 2019 she was diagnosed with PTSD and extreme anxiety by her GP however we were not taken to any evidence of that diagnosis. Her witness statement refers to a diagnosis of PTSD at Bushy Fields Mental Health Hospital when she was prescribed sertraline on 30 July 2019. There is a letter in the bundle from Dudley Talking Service dated 19 August 2019 which refers to a telephone assessment and sets out an agreed way forward in relation to "PTSD as your care plan" but there is no evidence of a PTSD diagnosis from any particular medically qualified professional at Bushy Fields Mental Health Hospital that we were taken to in the course of the hearing and we are not satisfied that the respondent was told about that.

133. A says that at first she updated AC about each mental health appointment she had with her GP and she told AC about the mental health diagnosis above. A says that "*one day, AC was on the computer in the downstairs office, I approached him regarding my mental health appointments and he then turned around and said "I'm backing off being manager now. [AJ] is here, all appointments have to go through [AJ*]". AC explained that this was because staffing arrangements should be dealt with by the home manager and we accept that. This evidence is consistent with AJ's evidence and consistent with the role of the home manager as he was the one who would need to sort out cover for shifts if necessary.

134. The claimant says that *"she didn't feel comfortable discussing any of this with [AJ]. He was a man, he was new and I was in a terrible place mentally*." However we were not satisfied that this was a reason not to speak to AJ about arrangements for appointments. The claimant would not have to go more into more detail than that she had an appointment.

135. A part of the claimant's complaint relates to working sleep-in shifts. In her statement she says that she asked her colleagues to cover her sleep-ins on multiple occasions as she could not bear the thought of spending the night at the care-home. The shift rota details included in the bundle show that in the period of 21 July to 5 August 2019 A worked 5 sleep-in shifts. When the claimant was challenged about this in cross-examination, her evidence was that she had to work the shifts because she could not afford to lose more pay, especially because she had time off ill. It would appear that in that period she worked the usual number of sleep-shifts which might be expected. In the following 9 days she worked no sleep-in shifts and worked a series of short shifts. That is consistent with the claimant's evidence that towards the end of her employment she had begun to struggle and

she was either going home early or phoning in sick. The claimant says that during this period she was having panic attacks and also self-harming. That is consistent with her medical notes. The fact that the claimant was not completing shifts must have suggested that something was wrong, but neither AC nor AJ refer in their witness statement to what steps were taken by the respondent in this period to investigate why the claimant was leaving work and no longer sleep-in shifts.

136. In his witness statement AJ says that *"A did not make me aware of any past issues, until towards the end of her employment on a date, I cannot recall, she [A] mentioned that she felt stressed coming to the House because of an issue with the ex-manager. She mentioned that she had an appointment with her doctors to see a counsellor, in a few days….In this conversation, I recall asking her, if she felt stressed coming to the House, why was she doing her sleep ins, and did not get another staff member to cover her sleep ins. She did not reply to this*". No date is attributed to that conversation but given that the claimant did not work any sleep-in shifts after 5 August, it must have been earlier than that and it seems likely that this conversation was in July. It must have been apparent that there was something wrong when the claimant stopped working those sleep in-shifts.

137. The tribunal finds that, on the balance of probabilities, the claimant's mental health worsened from the meeting in mid-May until July but during this time it appears that the claimant was able to work reasonably normally, no doubt helped by counselling sessions that she was attending. Despite that AC was still aware the A was stressed and had shown signs of significant mental distress from May onwards. However, at the end of July A had a crisis and from there her mental health deteriorated sharply. After 6 August 2019 she was unable to work a complete shift.

138. On 8 August 2019 the claimant wrote to AC and his fellow director, NS. The letter was prompted by the fact that she had not been paid for the 2 days that AC had told her to take off in May. In his statement AC says "this was the first time [A] queried not being paid for the 2 days she had off which I offered her in May. The requested payment was subsequently paid following our taking advice." That time was paid for and it is not necessary for us to make any findings about that except to observe it is difficult to see why advice was required. AC had told her to take time off so it should have been paid.

139. After referring to the pay issue she referred to requiring future counselling and requesting paid time off for that.

> Moving forward I understand that [redacted] has no support to offer to match my need, accept for 2 sessions with [redacted] who comes into [redacted] once or twice a month to give the staff team training and 1.1 supervisions, so I have had to find this externally via my GP practice.
> At this time I have been advised to attend counseling which is every 2weeks with a mental health nurse at my doctors while waiting for the referral to go through for counseling with a professional counselor but will soon change to 1 a week because of the incidents nature and impact on myself.
> I am aware that this time off to attend counseling will on occasion affect my hours which I can not financially take on.

> Due to individual specialist care not having the facilities to assist me could I please request that my missing hours are paid in full whilst I attend counseling as this is work-related and I feel that [redacted] need to offer some sort of support and assistance in me getting help.
>
> [redacted], if [redacted] is not fully aware of the details I have informed you in regards to the incident you have my permission to disclose all that you know to [redacted] and [redacted] only so that he can better understand why support is needed.
>
> I am sorry if this email comes across as direct and sudden but I have made attempt to discuss the 2 days I was not paid with [redacted] on the previous occasion over the phone when I looked at my pay that month and realized the 2 shifts and the 2 sleeps was not paid to myself but feedback from yourselves has left me feeling overwhelmed.
>
> I also need to inform you that I have sought out advice from professionals whom I have cc'd into this email.

140. We were not told who the professionals referred to at the conclusion of that email are nor is it evident from the way the email has been printed off, but it can be seen that the reply AC sends is sent to A, NS and Unison. Although that letter does not refer to a medical diagnosis, there are a number of reasons why we conclude that as a matter of fact, the respondent had constructive if not actual knowledge of the claimant's disability on 14 August 2019 even if they had not had it earlier:
    a) the information which was available to AC about what the claimant had told him,
    b) AC's reaction to that as shown by the decision he and Dr R took to go the police,
    c) Dr R's description of A appearing to be traumatised about what had happened to her;
    d) The fact that AC was aware that A had attending Dudley Talking Therapy in July;
    e) The deterioration in the claimant's health demonstrated by her failing to complete shifts and working erratically and intermittently phoning in sick;
    f) The reference to attending counselling in this letter.

141. On 14 August 2019 matters came to a head. In her statement the claimant said that she had been working a long shift without any break, was becoming very anxious and that she asked to go for a break because she needed to escape from the office to have a cigarette. She says she needs told AC and AJ that she *"needed a cigarette break to try to calm down*". AC said A became angry and said "*Yes I am angry, you haven't done anything to help me*." She felt that AC was goading her, she then swore at him. AJ and the other member of staff took the looked after young person out of the house. A says she said that AC had let her down and that she was furious that she had not been paid and that the other director had said to her in relation to the unpaid 2 days *"that if we had to pay everyone who wasn't in, we wouldn't have a company"*.

142. In her claim form the claimant says that she broke down. In her evidence before us she said that she had had a panic attack and she described what happened as a breakdown. She says that in essence she lost her self-control and she was very angry.

143. In his statement AC says this *"on 14 August, A alleges she has a panic attack and a confrontation with management for failing to provide sufficient support following the disclosure of the assault. This is incorrect. The situation was that A was looking after a young person and I was in training with another member of staff (Team Leader). A became challenging and aggressive towards both me and the Manager, AJ, as she was told to wait to have a cigarette break as the Team Leader was in training with myself. A burst into the office and became verbally aggressive and very demanding, to the point whereby I was forced to ask AJ and the Team Leader to take the young person offsite, so she did not witness A's behaviour. During the conversation with A, she stated that she was handing in her notice with immediate effect….I accepted her verbal resignation with immediate effect. I informed her that I would take her back home, at which point she became calmer, and accepted the offer of a lift home. I then contacted AJ and informed him that I was taking A off shift as I had accepted her resignation*."

144. In his statement AJ gives a much more detailed account. He says that A had burst into the office and stormed towards him and that they had a confrontation about her taking an extended tea break. AJ describes A as speaking to him in a patronising way. AC had intervened. AJ described A's behaviour as starting to get heightened and her body language showed she was agitated, and that AC tried to calm her down. AJ says that A had got up and as she got to the office door she turned around and said in a sarcastic tone with an attitude, "thank you very much [A] and [AJ] for your time" and AJ had asked A why she was being sarcastic. She came back and sat in the chair and pulled it close to AC, denied that she was being sarcastic and then said to AC "you can keep your job I quit, I am cleaning out my drawer right now." She then pulled out her ID and placed it on the desk, she started to clear out her drawer but then suddenly burst out crying and shouting at AC and said "you wasn't there for me, I asked you for help and you wouldn't help me". AJ says that he and AC were shocked by how she was acting. She was shouting and banging her hand on the desk.

145. Both AJ and AC disputed that A had a breakdown. AJ and AC say that the claimant behaviour was up and down and they dispute that she lost control but they both describe behaviour which was highly emotional and erratic. The term "breakdown" can suggest a medical meaning. We were offered no medical evidence and it is a term that we do not consider it appropriate to use as a result. However, AJ himself says that he and AC were shocked by the behaviour. This was behaviour which was out of character and out of the ordinary and the claimant was clearly very upset and emotional. We accept that in the course of that confrontation the claimant said that "she quit" but that it was apparent to both AJ and AC that this was not a considered decision and that in every sense the claimant was acting in "the heat of the moment" and that she not acting in a rational way.

146. AC offered to drive the claimant home. A and AC agree that in the car A offered to get a sick note. In his statement AC says that "I have no doubt that it should have been apparent sick note to cover her notice period was not required. I told her that doing so, would be detrimental to the home". It is not clear to the panel it should have been apparent to A that a sick note was not required. Nowhere in the accounts given by AJ and AC is there a reference to A saying that she was resigning without notice. She simply told them she was quitting, that suggests she

was giving notice and on everyone's account she was acting in the heat of the moment. We find that A's insistence that she would get a sick notice shows that she did not intend to resign with immediate effect and it must have been clear that insofar as A intended to bring her employment to an end, she intended to do so with notice.

147. The following day A phoned AC to let him know that she had made an appointment with her doctor and AC told her that was not necessary for her to provide a sick note "because we had accepted her verbal resignation with immediate effect"

148. That same day, 15 August 2019, AC wrote to A to confirm her resignation and to invite her to attend an exit interview. The exit interview went ahead on 22 August. In the questionnaire A completed she said that she had "felt unsupportive after her disclosure". We accept that the accounts of both AC and A are broadly consistent with those notes. They record that as A says AC had made a comment about not being able to change the house. This is consistent with a discussion about why A felt she could not continue to work at the home – because the office where the February incident had happened and where she would be expected to carry out sleep-in shifts could not changed and A felt the room would always bring back memories of the February incident. That is also consistent with a discussion having taken place in which AC appeared to accepted A's version of events but it is also consistent with it being clear to AC that A would not be able to continue to work for B.

149. On 27 August 2019 A write to AC and said this

> As you know I had a sick note for one month after verbally telling you I can no longer work at [redacted].
> When I was extremely upset in the office with yourself and [redacted] about everything.
> You taken that as my verbal registnation
>
> You have declined to take my sick note what covers me for 4 weeks until the 11th September. I'm seeking advice where I stand in my situation, as its not really a normal situation and why I couldn't longer go to [redacted]

150. In reply AC said this

> As discussed in your resignation letter and at your exit interview we accepted your verbal resignation on the day you said you resigned 14 August 2019 and you left the building without completing your shift. We do not need a sick note as you dint attend the doctors until the 16th of August 2019 and had not indicated at any point before or after the letter of accepting your verbal resignation had been sent. Which i also find very confusing why you still feel the need to submit a sick note after you had finished with the organisation. I would be grateful if you could supply us with the letter of resignation and the notes from the exit interview as agreed.

151. We find that reply was disingenuous. AC in his own evidence said that he had offered to drive A home so she had left the home and her final shift with his knowledge and implicit, if not explicit, consent. In his evidence AC referred to the fact that A had offered to get a sick note on the day. It is not surprising she was not able to get that immediately and we fail to see the relevance of the timing of the respondent's letter. This simply seems to be an attempt by the respondent to avoid the claimant's entitlement to be paid during her notice period. A repeatedly tried to be allowed to present her medical evidence in a way that would be consistent with her giving her notice of termination. The respondent refused to

accept that and by repeatedly refusing to accept the sick note the respondent made clear that it was severing the employment relationship.

**After the termination of the claimant's employment**

152. We accept that after the termination of her employment A's mental health deteriorated further. She found other employment but for health reasons was not able to stay in that job. Her relationship with YS broke down and she has continues to be treated for significant depressive symptoms.

## The Law

### The Discrimination Claims

153. The relevant statutory provisions which fall to be determined in this case are:

Equality Act 2010

154. *s20 Duty to make adjustments*
*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
*(2) The duty comprises the following three requirements.*
*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

155. *s21 Failure to comply with duty*
*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
*(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

156. *S26 Equality Act 2021 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).*

*(3)A also harasses B if—*
*(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
*(b)the conduct has the purpose or effect referred to in subsection (1)(b), and*
*(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

157. *s27 Victimisation*
*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
*(a) B does a protected act, or*
*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*
*(a)bringing proceedings under this Act;*
*(b)giving evidence or information in connection with proceedings under this*
*(c)doing any other thing for the purposes of or in connection with this Act;*
*(d)making an allegation (whether or not express) that A or another person has contravened this Act.*

158. *s109 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.*
*(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
*(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
*(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.*

159. *The burden of proof: s136 Equality Act 2010*
*(1) This section applies to any proceedings relating to a contravention of this Act.*
*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

160. Unlawful discrimination is rarely blatant, and the law recognises that it is unlikely that an employer will be explicit that its motives for a particular act are related to a protected characteristic. For this reason, the legislation applies the burden of proof for a claimant bringing a claim in a particular way. If a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate.

161. The approach we should adopt was explained in *Laing v Manchester City Council and anor* 2006 ICR 1519. This is case of direct discrimination but s136 applies to all prohibited conduct. A claimant can establish a prima facie case of direct discrimination by showing that he or she has been less favourably treated than an appropriate comparator. At the first stage 'the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn'. That requires that we consider 'all material facts" but not the employer's explanation. It is only if the claimant succeeds in establishing that less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment.

162. Further, something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. As explained in the judgement of Lord Justice Mummery in *Madarassy v Nomura International plc* 2007 ICR 867, CA, *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' In determining whether the claimant has gone from showing that there could be discrimination to showing there are facts which suggest that discrimination has occurred we can take into account any evasiveness or inconsistency in the employer's case. However, the fact that the claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination (*Glasgow City Council v Zafar* 1998 ICR 120). In *Chief Constable of Kent Constabulary v Bowler* EAT 0214/16 Mrs Justice Simler explained as follows *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic*.' Unreasonable treatment may go to credibility, but our prime consideration is likely to be whether the primary facts we find provide another and cogent explanation for the conduct.

163. If an employment tribunal has decided to draw an inference that has enabled the claimant to show a prima facie case of discrimination, it must uphold the complaint of discrimination unless the respondent can prove a non-discriminatory explanation — see S.136(2) EqA.

164. In *Talbot v Costain Oil, Gas and Process Ltd and ors* 2017 ICR D11, EAT, His Honour Judge Shanks provided employment tribunals with the following principles to consider when deciding what inferences of discrimination may be drawn:

a) it is very unusual to find direct evidence of discrimination;

b) normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

c) it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances;

d) the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;

e) assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities;

f) where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations;

g) the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;

h) if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

165. When deciding what inferences can be drawn when considering whether a prima facie case has been made out for the purposes of applying the shifting burden of proof rule, the respondent's explanation for the alleged discriminatory treatment should generally be discounted, because this is a matter for the second stage (i.e. consideration of whether the respondent can prove that discrimination has not occurred based on the evidence presented). However, we are permitted at the first stage to take account of the respondent's rebuttal of any evidence adduced by the claimant to establish a prima facie case and we can also draw adverse inferences if appropriate at this stage in relation to the evidence we have received from the respondent.

166. As noted above, it may be appropriate to draw adverse inferences from inconsistent evidence if it appears that forms part of an attempt to cover up discrimination. In this case it is also relevant that that we consider if what inferences we should draw from the respondent's failure to disclose relevant documents in breach of orders made by the tribunal. We recognise that we must not be too ready to infer unlawful discrimination from unreasonable conduct. We must consider the explanation that is offered for that conduct. However, in considering any explanation offered it is appropriate that we consider whether the employer's purported explanation for its actions are in in fact the true explanation for what has happened or whether it is covering up a discriminatory intent. We note that if we must not reject the explanation offered by the employer simply because no reasonable employer would have behaved in the same way. We are not

applying the 'band of reasonable responses' approach. Something more is needed. Nevertheless if an employer acts in a wholly unreasonable way, this may relevant in drawing an inference that the employer's purported explanation for its actions was not in fact the true explanation (*Rice v McEvoy* 2011 NICA 9, NICA). We must make it clear whether and why we reject the explanation offered by the employer.

167. If and when the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931).

168. In terms of any employer's liability for the acts of its employees under s109 for an employer to be liable for the discriminatory conduct of one of its employees, three things must be established:

a) that there is, or was at the relevant time, an employment relationship between the employer and the alleged discriminator
b) that the conduct occurred 'in the course' of employment, and
c) that the employer failed to take all reasonable steps to prevent the conduct in question.

169. It was relevant in that case that we considered if C had acted 'in the course of' his employment, pursuant to S.109(1) EqA. According to the EHRC Employment Code, *'The phrase in the course of employment has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work-related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party'.*

170. We have reminded ourselves that whilst employment law originally adopted the approach of the common law in tort cases, that is that an employer is only liable for acts done by employees when those acts are connected with acts which the employer has authorised and which could rightly be regarded as modes, albeit improper modes, of doing the authorised acts that is not the correct approach to adopt in cases under discrimination legislation. In particular we have taken into account the Court of Appeal judgment in *Jones v Tower Boot Co Ltd 1997 ICR 254, CA* in addition to the authorities referred to by Ms Tyson in particular.

171. In the *Jones* case the Court of Appeal accepted that there is a broad conceptual similarity between the common law principles of vicarious liability and an employer's secondary liability under S.32(1) of the Race Relations Act 1976 (RRA) (which was the relevant legislation applicable in the case but the equivalent of S.109(1) EqA). However, the two contexts are not so similar as to require that the phrase 'course of employment' in the statute be read as subject to the gloss imposed upon it at common law because that would impose a more restricted meaning than the natural everyday meaning of the words allowed and would result in the anomaly that the more heinous the act of discrimination, the less likely it

would be that the employer would be found liable. That would cut across the underlying policy of the discrimination legislation, which is to deter harassment by making the employer liable for the unlawful acts of employees while providing a defence for the conscientious employer that has done its best to prevent such behaviour. The question of whether an employee's discriminatory acts were done in the course of his or her employment, thereby rendering the employer liable for them, should be treated as a question of fact.

172. In the case before us the respondent relies on the defence set out in s109(4) EqA. As set out in the statutory wording above, it is a defence for the employer to show that it took all reasonable steps to prevent employees from either committing a particular discriminatory act or committing such acts in general. The EHRC Employment Code provides useful guidance. It says this *'An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act' — para 10.50*.

173. What amounts to 'all reasonable steps' will depend on the circumstances, for example we recognised that in this case the respondent was a relatively small one. That does not however remove the obligation to take all reasonable steps. Again the EHRC Employment Code is helpful. It suggests the following may be reasonable steps

a) implementing an equality policy
b) ensuring workers are aware of the policy
c) providing equal opportunities training
d) reviewing the policy as appropriate, and
e) dealing effectively with employee complaints (see para 10.52).

174. In terms of approaching this question we reminded ourselves of the guidance set out in *Canniffe v East Riding of Yorkshire Council 2000 IRLR 555*, where it was held that the proper test of whether the employer has established the defence is to identify:
a) whether there were any preventative steps taken by the employer, and
b) whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

175. We note that, as the EAT made clear in *Canniffe* it is not determinative whether such steps would in fact have been successful in preventing the act of discrimination in question.

# Discussion and our Conclusions

***Harassment contrary to s26 and the issue of vicarious liability***

176. As our findings of fact make clear we received conflicting and contradictory evidence from the respondent witnesses and AC in particular. We also took in account the failure of the respondent to disclose the relevant documents in relation to J and the DBS referral and the fact that the description of J's grievance was misleading in that it suggested the grievance related to an invitation to social event outside work when the grievance raises a number of allegations of workplace harassment. For reasons which were not explained to us, AC gave oral evidence about when he went to the police and what he reported which contradicted the evidence in his written witness statement and that given by Dr R. AC told that a DBS referral had been made which just recorded that concerns had been raised but without making any conclusion when the DBS referral reports that the respondent has concluded that C had caused harm to a vulnerable adult.

177. We drew an inference from these matters that AC had sought to mislead us about the concerns which had been raised about C's conduct by J and in relation to N, the looked after child's aunt. He sought to mislead us about the fact that when A told him about the sexual assault he and Dr R had believed her that what she described to them was an unwanted sexual with C encounter. That led him to change his evidence about when and why he went to the police and whether Dr R was there, contradicting his written statement. This was in addition to other complaints A had raised previously about C's unwanted conduct which was of a sexual nature. We did not believe C's denials about what had happened and we concluded that he had also sought to mislead us about what had happened with J and N and in relation to the timing of and reasons for his resignation.

178. On the basis of this we concluded both C and AC where unreliable and dishonest witnesses whose evidence could not be accepted. In terms of the other witnesses, Dr R had told us that she believed that A had been assaulted. GB did not but she had not been in the care home at the relevant time and based on her belief, which arose out of an assumption on her part and which we found to be misplaced, that A would have confided in her. Significantly however she confirmed that C had made a distasteful comment about breast milk which C denied. She offered partial corroboration for the threesome comment. Although A had not confined in her partner at the time, YS confirmed that she had seen changes in A behaviour which suggested something had happened and that was consistent with Dr's assessment that A showed signs that something traumatic had happened to her.

179. Although as Mr Bansal pointed in his submissions there were some differences in the account given by A we did not find those differences to be material. Given that we did not accept AC's account, what we had been told was that A had felt forced or coerced into performing a sexual act that she did not want to engage in. We could not accept the weight that Mr Bansal placed on the fact A had not

reported what had happened to the police, to her partner or her employer at the time. She felt ashamed and initially wanted to keep what happened secret. We do not find that surprising or implausible.

180. We found on the balance of probabilities that the events as described by A had happened including the other sexualised comments and behaviour. C would not have behaved in this way if A was a man. In his submissions Mr Bansal accepts that if that was our finding that the A's allegations are found to be proven despite the denials of C, it would follow that we would find that the claimant was subject to unlawful harassment.

181. For completeness we were satisfied that C's conduct towards A was unwanted and it had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for A. A is lesbian and was open about her sexuality. It must have been obvious to C that his conduct was unwanted and we find that it also had the purpose of creating an intimidating and hostile environment which would violate A's dignity. In terms of statutory refences, the list of issues refers to 26 (1) rather than s26(2) but there is reference to the conduct of being of sexual nature in relation to the incident in February which we understand to be a reference to s26(2). In any event we are satisfied that C would not have behaved in the way that he did towards A if she had been a man and therefore his conduct was related to her sex for the purposes of s26(1). In terms of the list of issues, we conclude that A was subject to unlawful harassment contrary to s26(1) of the Equality Act and the incident in February was also unlawful harassment contrary to s26(2).

182. Having reached that finding we considered whether the respondent was vicariously liable for C's conduct.

183. Applying the test in *Jones v Tower Boot Co*, we are satisfied that the harassment occurred in the course of A's employment. C was a manager, the conduct happened when he and A were on duty and at the respondent's care home. We find that it is immaterial that the respondent was unaware of it and would not have approved of that conduct.

184. Accordingly the respondent, B, is liable for that unlawful harassment unless it can demonstrate that it can rely on the defence in s109(4) of the EqA. Mr Bansal made much of the fact that C knew that what he was doing was contrary to B's policies. We do not attach the same weight to this. The fact that such behaviour would amount to gross misconduct was part and parcel of his denial that these things happened at all and we did not believe him. In any event if employers could avoid vicariously liability by referring to behaviour as gross misconduct it is unlikely that any employer who has a written disciplinary procedure would ever be vicariously liable for such conduct. We do not think this has the significance Mr Bansal suggests.

185. In order to succeed in establishing the statutory defence B must show that it took all reasonable steps to prevent C from doing what he did and to prevent that thing, or to prevent C from doing anything of that description. We do not accept Mr Bansal's submissions that the respondent met that burden. In his

submissions he suggests that the effectiveness of the training was not challenged but it is for the employer to show that it has taken all reasonable steps to prevent the harassment, there is positive obligation on the employer to establish that the defence, there is not a burden not on the claimant to show that the defence cannot be relied upon. We were not offered any evidence of what training was given to staff except to be told that new employees would read the policies and could ask questions if there was anything they did not understand. In his submissions Mr Bansal suggests the evidence was that training was comprehensive. It was suggested at one point there was online training but when asked about that AC referred again to staff reading policies and asking questions. We had no evidence the training was more than that. As Ms Tyson pointed out, the flaw in that sort of training, which is that it depends on staff read something thoroughly, is shown by the fact that it appears no one had ever noticed the significant defects in the whistleblowing policy where the same sort of training approach was taken. We agree with Ms Tyson that referring to the respondent as a school and to the wrong local authority is not simply "a typo", it suggests lack of careful engagement with the content of the document and if these mistakes have never been spotted and questions raised it must raise the possibility the policies are not in fact being read that carefully by anyone at all. Beyond staff reading policies and being given the opportunity to ask questions we were offered no evidence which supports Mr Bansal's submission that training was good and comprehensive. We were not satisfied that this employer had made any real attempts to ensure that staff had been properly trained in accordance with the EHRC guidance above.

186. However, of greater concern in terms of whether the employer had established the defence was the way this employer had implemented its approach to preventing harassment in practice. The evidence was that J had raised significant concerns about harassment, including offered corroboration from other employees, but B set a bar to take action of there being "concrete evidence" before it would act. By requiring concrete evidence beyond partial corroboration of other employees we consider that this employer set a bar so high it is unlikely it would ever take action in relation to harassment.

187. We consider that it is likely that the fact B had failed to take sufficient steps to prevent harassment was obvious after A made her tribunal claim and that was way they did not disclose the relevant evidence in relation to J, provided misleading information about the nature of that complaint in AC's witness statement by suggesting that it was complaint about conduct outside the workplace, and that "there was no evidence of wrongdoing" when in reality to the response to J suggests that there were concerns about C. Despite that C was left as the manager of the team. Staff including A were not interviewed to see if anyone else had concerns and the action taken was to require C to review policies and provide training to new staff. The respondent cannot have believed that it had taken all reasonable steps to prevent future harassment. In fact we think it is likely the steps taken by B after J's grievance led C to believe that the chances of the respondent taking any action were small.

188. We also consider that the respondent itself recognised that it had not taken all reasonable steps that is the most plausible explanation for why the evidence

about the DBS referral was not disclosed in accordance with our order made on the first day of the hearing. No plausible explanation was offered to us about for this failure and we consider that it is tellingly that Mr Bansal does not seek to address this in his submissions. We think it is the most plausible explanation for why the evidence of the DBS referral was withheld from the disclosure of information ordered by this tribunal on the first day of the hearing and why AC said he had not raised concerns about C posing a risk of harm when that is exactly what was said in the DBS referral form. No explanation has been offered for that either. It appears the respondent recognised that this evidence would be prejudicial to its ability to rely on the statutory defence and it tried to mislead us.

189. We conclude that B failed to show that it taken to all reasonable steps to prevent C from harassing A or indeed other staff and it is not entitled to rely on the statutory defence in s109(4) of the EqA. B is vicariously liable for C's unlawful harassment of A.

***Disability discrimination (failure to make reasonable adjustments, s20 and 21 EqA)***

190. Disability in this case was conceded but it was disputed that the respondent had knowledge of the relevant time. It appeared to the panel that AC in particular conflated in his evidence knowledge of disability and knowledge of the February assault and its impact. AC denied that he knowledge of the claimant's disability but described as her having panic attacks in May and being highly distressed. He gave her time off work because she was so distressed. He allowed the claimant to withdraw her resignation because she had resigned when she was upset and distressed, He acknowledged that he had provided advice on managing her stress and anxiety because she was having sleeping problems. The supervision notes refer to the claimant struggling with stress and anxiety. We are satisfied that the respondent had constructive, if not actual, acknowledge of the claimant's anxiety which is conceded to amount to a disability in May 2019. If we are wrong about that the respondent had constructive knowledge in July when it became aware of the counselling sessions and further confirmation of the claimant's disability was available to it in August.

191. In terms of knowledge of the claimant's PTSD we accept that knowledge came later. The claimant told us that she told AC about that diagnosis following her diagnosis on 5 July 2019 but we were shown no evidence of that GP's diagnosis in the medical notes. The medical notes refer to depression and anxiety but not PTSD and it seems surprising that a GP would not have recorded such a significant finding although there is a letter for the GP surgery where it is suggested there was a diagnosis in May 2019. The claimant has not produced evidence which enables us to find to find that the respondent had knowledge of PTSD until after the claimant's employment ended.

192. In terms of the duty to make reasonable adjustments the PCP asserted by her is as follows: Did the Respondent have the PCP of not allowing the Claimant time off work to attend counselling sessions sometime in or around June 2019?

193. We agree with Mr Bansal that we must determine the legal issues which are set out in the list of issues. The PCP we are asked to consider relates specifically to June 2019. We accept that the respondent was aware of the claimant's anxiety but not her PTSD at that time. More significantly the claimant gave us no evidence that she was refused time off work to attend counselling sessions in June 2019. Indeed the claimant's evidence suggests that her first counselling session was not until 3 July 2019. On that basis the claimant's own evidence cannot establish the PCP asserted and accordingly that claim must fail.

194. We found that the respondent's policy was that staff were expected to arrange medical appointments around shifts were possible including seeing if they could find a colleague to cover them. If that was not possible the employer would allow time off work subject to the employee producing evidence of an appointment.

195. Although it is not strictly necessary in relation to our finding above for the sake of clarity we find that the respondent did not have the PCP asserted by the claimant – there was no blanket policy of refusing time off the claimant time off to attend counselling sessions. She was allowed time off if she either made arrangements for someone to cover her shifts or subject to her producing evidence of the appointment in question and we have seen no evidence of why that would cause substantial disadvantage for someone with anxiety which would require a reasonable adjustment to be made.

***Victimisation (s.27 EqA 2010)***

196. The issues we are required to determine from the list of issues are as follows:

197. Did the Claimant do protected acts by making complaints on 14 March 2019 of sexual harassment and sexual assault on 2 May 2019?

198. If so, did the Respondent subject the Claimant to any of the detriments, namely;

a) By dismissing her
b) By not carrying out a risk assessment;
c) By failing to give sufficient support following the assault.

199. If so, was this because the Claimant did a protected act?

200. Or did the Claimant resign because she was denied a cigarette break?

***Dismissal***

201. Ms Tyson's submits that this is a binary choice, that we must decide that either we find that the respondent dismissed the claimant because she did a protected act or we must we find that she resigned because she was denied a cigarette break. However that cannot be right. These are question of fact we have to determine on the evidence. We cannot be compelled to make a finding of fact about one thing simply because the evidence does not support the other finding

if the evidence supports neither finding, that would be perverse. Rather we understand the list of issues to be putting to quite separate propositions.

202. We approach this issue by asking ourselves first whether or not the claimant resigned. We found that the claimant had said that "she quit" and had told AC that she didn't feel that she could work at the home anymore. It is clear that A said this several times. It is suggested to us that this was a heat of the moment resignation. We agree, but that it was still a resignation and we received that no evidence that at any stage the claimant sought to retract that resignation. The evidence was that she repeated to AC that she couldn't work at the care home anymore at the exit interview. The claimant was employed at as a care worker and the respondent only operates one care home. The claimant had made clear that she did not feel that she could work at the place where she was employed. The claimant chose to end her employment with the respondent and we had no evidence that she had changed her mind. Resignation requires an intention to end employment being made clear but the retraction of a resignation must also be made clear to the employer. It must have been apparent that A resigned in the heat of the moment but she did not offer us evidence that she ever meaningfully expressed to B that she had changed her mind.

203. Mr Bansal submits that the claimant "walked off her shift" but that was not the evidence we received. The evidence of the respondent is that AC offered to take A home. A did not "walk off her shift", she left with the consent and agreement of AC. It is AC's evidence that in the car A said that she would get a sick note. None of the witnesses gave us evidence that the claimant said she was resigning with immediate effect or that she refused to give her contractual notice. That was AC's assumption. The fact that A offered to get a sick note was a clear expression of her intention that her employment was not ending immediately. No one used the contractual language a lawyer might expect, but we found that once the immediate heat of the moment had passed, what the claimant confirmed was she was leaving her employment because she no longer felt able to work at the care home, but that there would be a period of sick leave before her employment ended. In effect she was giving notice of her employment ending in the future. It was not for AC to determine the basis on which A ended her employment but that is what he purported to do when he sought to insist that she had resigned with immediate effect. That was not the case and the claimant plainly tried to tell him that.

204. Employees are entitled to provide sick notes during a notice period, that is clear from the wording of s88(1)(b) and s89(1)(b) of the Employment Rights Act which sets out what the rights of employees are during a notice period if they are incapable of work because of sickness.

205. In his submissions Mr Bansal says that "It is submitted that the production of a sick note, the day after was an afterthought and a mechanism to receive an income for what A believed was her notice period". That submission ignores the evidence of AC. In his AC's witness statement he says this "During the journey back to Yvonne's home, she said that she was going to get a sick note. I told her that as we had accepted her verbal resignation with immediate effect,

a sick note to cover her notice period was not required. I told her that doing so, would be detrimental to the home." The offering of the sicknote was not an afterthought "the next day", it happened within minutes of the claimant saying "she quit", however inconvenient that is to Mr Bansal's arguments. That is not just A's evidence, it was AC's evidence too.

206. We found AC's evidence that he said "I told her that doing so [ie getting the sick note], would be detrimental to the home" somewhat curious. We find no basis for drawing an inference of victimisation from those words because AC is clearly referring to the claimant getting a sick note during her notice period and we do find any basis for drawing any inference from that. We think the only way those words can be understood is that AC did not want to pay the claimant for any period of notice because, if she was not going to return to work because she was sick, the respondent would not receive anything in turn for that payment. In that sense that is detriment to the respondent because it would be "wasted money", but that is not a basis for the respondent to refuse to the claimant her statutory and contractual rights. In essence AC has asserted he has that right.

207. The claimant had made clear that she expected her contract to continue for a period of time. It was the respondent that acted in a way which was inconsistent with the existence of a contract. A was repeatedly told that she was no longer employed and the respondent refused to accept the sick note. In that way it was the respondent, not the claimant, which severed the contract of employment. Employment ended sooner than the claimant intended – the timing was determined by the respondent. That amounts to a dismissal by conduct (*Kirklees Council v Radecki*). Even if we are wrong about that, the claimant did not resign with immediate effect. In accordance with the terms of the contract the claimant was entitled to be paid for the balance of her notice period and a respondent cannot decide to unilaterally ignore that contractual and statutory obligation because it is to the company's detriment.

208. We have reached further conclusions about this in our findings about breach of contract below.

209. We then considered whether the claimant had satisfied the burden on her to show that her dismissal, as found above, was because she had done a protected act.

210. Mr Bansal concedes that the complaint made by A on 15 March 2019 amounted to a protected act, but he argues that the allegation of sexual assault made verbally on 2 May 2019 to AC was not because what was it is suggested that what was said to AC, and understood by him, was a consensual act. Whether a grievance, concern or allegation amounts to a protected act does not depend on what is understood by the respondent but in any event that submission is not consistent with our findings of fact. AC was told about conduct of a sexual nature which was unwanted, and we are entirely satisfied that he understood it to be unwanted whatever he has tried to suggest in his evidence. We find that both disclosures, on 15 March and 2 May 2019 were protected acts within the terms of s26(2) EqA.

211. In consequence of that finding we asked ourselves if the claimant had shown us prima facie evidence from which an inference could be drawn that the reason for the dismissal, or an influencing factor for the respondent, was the protected disclosure. We found that she had not.

212. We accept Ms Tyson's submissions that we should draw adverse inferences from the respondent's failure to disclose relevant documents and the inconsistent evidence in relation to what happened in February and the question of vicariously liability. We do not accept that those adverse inferences extends to all of the claims. In her submissions Ms Tyson did not highlight any evidence from which a specific inference could be drawn that the reason for the dismissal was the protected acts and we were unconvinced by the links she sought to draw to events in March to May to August. We found no basis for making a finding of fact which would enable us to reach that conclusion.

213. We have to consider what inferences we should draw in relation to each claim. The claimant had previously purported to resign in May shortly after both of the protected acts and the respondent had allowed her to rescind that resignation some days later. There had been a delay of a few days and if they had wanted a reason to end A's employment because of the protected acts that resignation and the delay in retracting that would have been an opportunity to do so. In August the claimant had told the respondent that she could never come back to work in the care home. We are satisfied that that was what reason for the claimant's employment ending. The timing of when her employment was taken over by the respondent but it does not later the fact that the ending of employment was initiated by A. The evidence strongly suggests that AC simply dismissed A to avoid paying her for her notice period. That was a breach of contract but it was not an act of victimisation. This victimisation claim is not upheld.

***The failure to carry out a risk assessment***

214. In terms of the failure to carry out the risk assessment, it was asserted by the claimant that a risk assessment should have been carried out but it was not explained on what basis it was asserted that such an obligation arose. It appears that A's belief there should have been a risk assessment arose because A's former partner YS's employer had conducted such an assessment although precisely what the risk assessment related to was somewhat unclear. That does not mean B was obliged to carry one out. A accepted that she did not ask for a risk assessment. We accept that AC did not consider that a risk assessment was necessary or required. No specific evidence has been identified to us which would enable to draw an inference that a risk assessment was not carried out because of the protected act and we found no evidence to make such a finding. This claim is not upheld.

***The failure to provide sufficient support***

215. In relation to the provision of sufficient support we found this a difficult claim to assess. The alleged detriment is extremely vague. It was not clear to us on

what basis we could make an assessment of what is meant by "sufficient support" and we were not offered evidence to enable to make findings on that. Without that it is impossible to find that a detriment of" insufficient support" has been applied to A, let alone what the reason for that treatment was. In the circumstances we concluded that the claimant had failed to show evidence which would enable to draw an inference of victimisation. This claim is not upheld.

***Breach of contract***

216. We accept that the claimant was entitled to 2 weeks' notice. We found that although she had resigned, the claimant had not waived her contractual entitlement and she did not resign with immediate effect. By offering the sick note the claimant made clear that she intended her employment to end when her notice expired. The claimant was then summarily dismissed by the respondent in breach of contract. Even if we are wrong about the claimant being dismissed, the claimant was entitled to be paid for her notice period after she resigned.

217. It is clear that the claimant would not have returned to work during that notice period because she would have been off sick and she would have relied on the GP sick note that she had offered to obtain immediately after telling AC she quit and that she duly obtained.

218. Although we were not referred to this by the parties, we observe that the rights of employees during notice are determined by not only ordinary contract law but also by the provisions of sections 86- 91 of the Employment Rights Act. In terms of remedy we invite the parties to make submissions to us about how we should assess the amount of damages for the notice period.

# Remedy and orders

219. The parties are encouraged to seek to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by the same tribunal panel on a date to be confirmed after hearing any relevant evidence and submissions from the parties.

220. **The parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):**

**Statement of remedy / schedule of loss**

221. The claimant must provide to the respondent, copied to the tribunal, **within 4 weeks of the date of this judgment**, an updated Schedule of Loss – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated, together

with copies of any documents and/or statement of evidence that he wishes to rely upon at the remedy hearing.

**Counterstatement of remedy / counter- schedule of loss**

222. The respondent must provide to the claimant, copied to the tribunal, a counter schedule of loss if it disagrees with the claimant's schedule, **by not later than 2 week after it receives the claimant's schedule of loss** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

**Remedy bundle**

223. The claimant must submit an one electronic and four hard copies of a remedy bundle together with any supporting witness statements and any written opening submissions / skeleton argument must be lodged with the Tribunal by whichever party wishes to rely on those documents b**y 10 am 5 working days before the date set for the remedy hearing.**

**The rule 50 order**

224. The parties must attend the hearing prepared to address us on whether the order made under Rule 50 which is set out above should remain in place in relation to the identities of B and C.

225. **Public access to employment tribunal decisions**: The parties are reminded that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

226. Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

227. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Cookson

Date 3 June 2021