THE EMPLOYMENT TRIBUNALS

Claimant:	Claimant[1]
Respondent:	Respondent
Heard at:	Newcastle Hearing Centre via CVP
On:	5 - 12 March 2021
Before:	Employment Judge Jeram
	sitting with Ms Johnson and Mr Wykes
Representation	
Claimant:	In person
Respondent:	Mr Stubbs of Counsel

RESERVED JUDGMENT

1. The Claimant's claims of direct sex discrimination are not well founded and are dismissed.

REASONS

1. By claim presented on 28 February 2019, the claimant complains of direct sex discrimination.

[1] On 6 July 2020 at a case management hearing, anonymisation and restricted reporting orders were made in respect of the claimant, the respondent, Officers X and Y.

Issues

2. The issues arising are as follows:
   a. The Respondent accepts that it subjected the Claimant to the following treatment:
      i. To commence formal disciplinary proceedings rather than attempt to resolve the matter informally;
      ii. Gary Forbes made a finding of gross misconduct;
      iii. Bozena Hillyer decided to uphold the disciplinary manager's finding and sanction;
   b. Was that less favourable treatment than treatment afforded to:
      i. Officer X;
      ii. a hypothetical comparator?
   c. If so, was that treatment because of gender?

Evidence

3. The parties had agreed a single joint file of documents for use at the hearing, comprising of 618 pages.

4. The Tribunal heard from the following witnesses who gave evidence on oath:
   - The claimant
   - Jonathan Searle
   - Claire Scott – an ex-employee and former friend of both the claimant and Officer X
   - Mark Usher - the claimant's Public and Commercial Services Union representative
   - Nathan Dalgarno - PCSU representative
   - Gary Forbes – disciplinary officer
   - Bozena Hillyer – appeal officer
   - Officer X – comparator
   - John Terrell – line manager of Officer Y
   - Ewan Holton – governance officer

5. In addition, we read the statement of Debbie Murphy – notetaker.

Findings of Fact

6. The respondent is a large national organisation and employs several thousand people. The claimant began his employment with the respondent in 2004 and

continues to be employed by in the capacity of officer. For the last five years, the claimant has been employed as a criminal fraud investigator in a team involved in criminal fraud investigation; he remains in employment.

7. The respondent has very well-established national codes of conduct and policies and procedures in place that are readily available to its employees.

8. The respondent has a policy to recognise and deal with bullying and harassment. Harassment is defined as *"unwanted conduct including that of a sexual nature, related a relevant protected characteristic which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, or offensive environment for the individual. Harassment can include… making unwanted physical or verbal contact or advances".*

9. The respondent has a zero-tolerance approach to sexual harassment.

10. On 5 December 2017, immediately prior to Christmas party season, a bulletin was circulated among staff directing their attention to prior blog post and newsroom message created by Esther Wallington, Chief People Officer. The links were to posts conveying that message that sexual misconduct would not be tolerated so that *"the behaviours we cocreated for our values are professional, integrity and respect are clear. For example, the behaviours are:*
    - *we are inclusive and considerate the circumstances of others*
    - *we have high ethical standards*
    - *we exercise judgement, and hold ourselves to account for our actions. All of these described workplace where harassment will not be tolerated. I would encourage and expect anyone who experiences or observes behaviour which falls short of these standards not stand by, but speak to a colleague or your manager about why you feel this doesn't meet the standards of an organisation you're proud to work for"*

11. According to the respondent's whistleblowing policy, conduct considered to be wrongdoing or a breach the values of the code should be raised using its whistleblowing policy. The policy envisages that most concerns can be raised with an employee's line manager, but that there may be certain occasions where it would be inappropriate for example whether concern implicates the manager in some way. The policy indicates that harassment, bullying and discrimination are not covered by whistleblowing policy but would normally be dealt with by line manager.

Christmas Party / Anonymous Complaint

12. On 14 December 2017, the department in which the claimant worked Christmas party a local restaurant between 2pm and 5pm. Not unusually, significant numbers of staff continued drinking at various public houses thereafter. At around 8pm, staff were drinking in the Mile Castle public house. The claimant was there, as was Officer X; the 2 were unknown to one another, save that they had a then mutual friend in Claire Scott.

13. On 11 January 2018, an anonymous letter was sent to the respondent's governance department. It stated

    "[The] Newcastle [team] held their recent Christmas party on Thursday 14 December and some of the things that went on the shows exactly why so many people feel bullied and harassed in our office yet do not feel that they can complain to anyone because nothing will be done and it will be held against them.… [Officer X] was also groped by another person from Newcastle [team]. [The claimant] who thought it was acceptable to grab her buttocks. Although he is not a manager it is totally unacceptable behaviour whether he was drunk or not.… All of this is known to everyone who was out on the night including management but as usual nothing will be done about it. . . Both of these people have been promoted recently and they obviously think they can behave in this manner because their grade. . . None of us think anything will come of this because we feel [Officer X] and [redacted] will not wish to rock the boat particularly [Officer X] who was a trainee is concerned about the effect this will have on her but this is so wrong it must be addressed by management. Very concerned Newcastle [. . .] Staff".

14. The reference to the claimant not being manager grade, was a reference to a different incident of sexual harassment perpetrated by another employee, NP, also on Officer X during the same Christmas party.

15. It formed no part of the claimant's case either before his employer or at Tribunal that Officer X contributed to this complaint.

16. The governance department received the complaint on 11 January 2019. On 22 January 2019, the incident was assessed as being at the level of potential gross misconduct. That decision was taken without the completion of a 'manager's review/checklist' having been completed. The purpose of a checklist is to determine the most appropriate way to proceed with a case. Ewan Houlton advised that the checklist would be dispensed with in this case. He did so because the complaint contained information about wider concerns about management. The claimant accepted in cross examination that sexual harassment including an act of inappropriate touching was potentially an act of gross misconduct.

17. On 31 January 2018, Officer X agreed to be interviewed by the internal compliance team. She described a culture of bad language, inappropriate name-calling and behaviour which, she said, would not be tolerated by other similar employers. She described a culture of disrespect by older and more experienced officers towards trainees and young females who she described were treated as second-class citizens. She said she was fully aware that the respondent's policies,but stated that the reality was that there was no confidence that inappropriate behaviour and attitudes would be dealt with by management and because of the genuine fear of reprisals, people do not complain.

18. Of the incident, Officer X described it as having taken place at the Mile Castle public house, which she said was very busy. She said she manoeuvred past the claimant who was stood talking to colleagues. She felt his hand on her bottom; it was not a grab but rather a 'cupping' action. She said she knew it was the claimant's hand because she turned around and saw it. She said she wanted to chastise him but realised that he was very, very drunk and there was no point confronting him.

19. The following day, Officer X said that she had spoken to colleagues about how the claimant had cupped her bottom. She said they laughed and agreed it was disgraceful behaviour. She said she had not made a complaint to her line manager and that she did not believe her claim would be treated seriously.

20. A few days later she described Lisa Foster approaching her saying that she had received a text message from the claimant asking Ms Foster to *"please say sorry to [Officer X] for me".*

21. Officer X described that other colleagues had since been making fun of the claimant, something that she believed was also inappropriate. As the claimant stated in his later disciplinary hearing, one of those colleagues was Claire Scott.

Investigation

22. The governance team decided to investigate the complaint. We accept Ewan Houlton's evidence that there were features of the complaint that made it appropriate to be dealt with centrally; they include not just the fact that Officer X was a putative victim of acts alleged of both the claimant and NP, but also the express reference to acts of this nature being tolerated or not taken seriously by management.

23. On 26 March 2018, the claimant was notified that he was under investigation of an allegation of sexual harassment, specifically that he had inappropriately touched a female colleague at the social function attended by the team on 14 December 2017.

24. On 4 April 2018, the claimant attended an investigation meeting, accompanied by his PCS trade union representative, Mark Usher. The claimant read from a pre prepared statement and he answered individual questions.

25. Of the act alleged, the claimant said that he was *"extremely drunk and I've no recollection whatsoever of the incident she described".* He *stated "I would hope that it was no more than an accident and I've done it, but I can't say … It's down to Officer X's perception not my own".*

26. Of the alleged apology, the claimant agreed that he had asked Lisa Foster to convey his apology to Officer X, because colleagues were *"taking the Mickey out of me, trying to make you think I behaved inappropriately Christmas party and that she said words to the effect that I had behaved inappropriate towards [Officer X]".*

27. When asked why he had done what he appeared to have done the claimant was unable to say since he did not recall the incident *"at all".*

28. Of his relationship to Officer X, he agreed that he *"did not really know her"* and that she was a friend of a friend, that she worked in the office.

29. Finally, when questioned, the claimant accepted that if the events had occurred as Officer X had described it was an act of misconduct and he was in breach of the code of conduct.

30. On 16 May 2018, Steve Billington produced an investigation report; it was submitted to Gary Forbes who had by then been identified as the decision-maker. The stages involving the claimant, from investigation through to appeal, involved similar timing and the same personnel to those involved in the process involving NP.

31. The investigations of NP and the claimant were dealt with concomitantly. Gary Forbes was selected because he occupied a role that was appropriately senior to that of NP.

32. Of a contemporaneous note made on 4 June 2018 in which Gary Forbes made of his review of the documents, wherein he referred himself to the ACAS guidelines on sexual harassment and observed that he *was "95% plus sure that I will lay charges"*, the claimant accepted, correctly in our view, that it did not follow that the outcome of any disciplinary hearing was 95% certain.

Disciplinary Hearing

33. On 21 June 2018, the claimant was invited to a formal disciplinary hearing, to answer the allegation that on 14 December 2017 the claimant *"inappropriately touched a female member of staff at the social function attended by [the team] which could constitute a breach of the code of conduct by constituting an act of sexual harassment as defined in the policy".* The hearing was to take place on 5 July 2018 and be chaired by Gary Forbes.

34. The following day, on 22 June 2018, Mark Usher wrote to Gary Forbes stating *"as you are aware, this largely rests on the testimony of [Officer X]. I have previously asked Steve Billington for disclosure of any material which may cast doubt on the credibility of [Officer X's] testimony. . . I would be grateful if you would confirm whether you will aware of any such material and if so provide copies of the same".*

35. Mark Usher accepted in evidence that he had no reason or basis to doubt Officer X's testimony.

36. Gary Forbes replied the same day to say that he was unaware of the existence of any such material. The claimant did not suggest that any such material did exist.

37. The disciplinary hearing proceeded on 5 July 2018, with the claimant again accompanied by Mark Usher. The claimant:
    a. Said he had not had the opportunity for the matter to be dealt with informally;
    b. Responded to the direct question whether he admitted the allegation or not the claimant that *"I don't remember, it was out of character, if [Officer X's] version of events are correct then I agree it is misconduct";*
    c. Confirmed the lack of any direct relationship between himself and Officer X;
    d. Stated that he does not normally wake up the following day feeling the need text about possibly having upset someone or done something wrong.

38. As the claimant stated in cross examination *"at the interview, I couldn't deny or, or, or argue against it, what she was reasonable; I accepted it was gross*

misconduct" and *"I had no other indication of any other version of events, why would I think she is making up something so horrific"*[2]*.*

39. Gary Forbes specifically asked Mark Usher whether the claimant sought to pursue the line of enquiry into evidence that might discredit Officer X, to which Mark Usher confirmed that he did not; he repeated that the complaint turned on the reliability of Officer X's evidence.

40. On 20 July 2018 Gary Forbes was notified that the internal governance department had received a telephone call from Lisa Foster who had been approached by Jonathan Searle, who wished to come forward as a witness.

41. On 21 July 2018, Lisa Foster sent to Gary Forbes lengthy email in which she described Jonathan Searle reporting to her that Officer X had told him *"it wasn't really a grab it was more like he brushed past her"*.

42. The same day, Jonathan Searle sent to Gary Forbes an email. He clarified that he was not in attendance on the evening in question but that he had had the subsequent conversation with Officer X. He continued *"she stated it was to do with [the claimant] touching/grabbing her "behind"* while they were out. Jonathan Searle continued *"from what was said [the claimant] was passing by [Officer X] to go to the toilet .. . As it was crowded [the claimant] has grazed [Officer X] with his hand while passing by."* He said that "due to discrepancies" he believed that something wasn't quite right (emphasis applied).

43. Mr Forbes thanked Jonathan Searle for his email and asked him to confirm what the "*discrepancies*" were; he received the response *"the discrepancy being the course of action".*

44. Gary Forbes noted that in his opinion, the information did not change anything; the claimant had clearly stated *"he did not grab my bottom but 'cupped' it".*

45. Gary Forbes wrote to Mark Usher on 23 July to state that he had considered the information and that in his opinion, it did not *"add anything new but you and [the claimant] may have a different view".*

[2] 2.10pm on 5 March 2021

46. Mark Usher responded *"I think it tends to support the suggestion we have already made that even if [the claimant] did touch her bottom, it could have been inadvertent due to the confined space and busy pub."*

    (emphasis applied)

47. On 23 July 2018, Gary Forbes notified Mark Usher and the claimant of his decision. He concluded that the claimant was guilty of inappropriately touching Officer X: he found that was an act of gross misconduct but took account of the contrition he believed the claimant demonstrated, noting that he did not seek to blame Officer X for his own actions. Accordingly, Mr Forbes issued the claimant with a final written warning that would remain live for 24 months and expire on 22 July 2020. As the claimant himself accepted in cross examination, a sanction of a final written warning given a finding of gross misconduct was *"a good result".*

Claimant's Appeal

48. The claimant exercised his right to appeal the decision of Gary Forbes and addressed his letter of appeal, dated 1st of August 2018 to Bozena Hillyer. At the relevant time, Bozena Hillyer was a Deputy Director of a sector of the respondent; she was also Diversity and Inclusion Lead for one of its portfolios. In her latter capacity, she was very well versed in the respondent's approach to sexual harassment.

49. In the letter, written by Mark Usher, the claimant:
    a. Did not challenge the finding of gross misconduct;
    b. Contended that the sanction was disproportionately harsh;
    c. Accepted that this seemed to be little reason to question Officer X's version of events, and specifically *"there seems to be little reason to question the fact that [the claimant's] hand did indeed touch [Officer X's] bottom"* but said that the *"key factor"* was *"to what extent any such contact was deliberate";*
    d. Maintained that he was *"extremely drunk"* at the relevant time but nevertheless invited Ms Hillyer to reject the claimant's evidence that the contact was intentional, and reject Officer X's evidence that she had seen that it was the claimant who was the perpetrator;
    e. Contended the Gary Forbes did not have available to him *"new information".* This "new information" was a statement from Jonathan Searle, now contained in a formalised witness statement suitable for use in criminal proceedings and containing a statement of truth, which the claimant said supported *"the contention that any contact was likely to have been accidental";*

f. Finally, the letter reiterated that whilst sexual harassment wholly unacceptable and repugnant, it was also *"without doubt a high-profile issue at the moment, following the alleged allegations of Harvey Weinstein and subsequent 'Me Too' campaign"*

50. On that last point, the Tribunal received a powerful summary from Gary Forbes about the consequences of an imbalance of power highlighted by the 'Me Too' campaign. By contrast, the claimant was unable to articulate with any conviction what his understanding of the movement was; he denied that it was to do with 'women's rights' and he framed it primarily as a Hollywood phenomenon. We are satisfied that Gary Forbes was unconcerned by any desire on the part of the respondent to be seen to be taking steps in cases of sexual assault; he acted on the evidence before him.

51. The formalised statement provided by Jonathan Searle was only 6 lines long; in it he recounted a discussion between himself and Officer X. He described the event as being the claimant passing by Officer X; the area narrowing, the place being crowded, the claimant having *"grazed Officer X with his hand while passing by".* He continued *"Officer X went on to demonstrate this by brushing her hand across her backside. From this conversation I believe the contact made was accidental and not an intentional grab".*

52. Excluded from this statement was any reference to Officer X telling him that the claimant touched/grabbed Officer X's bottom as contained in his statement to Gary Forbes; what was added to this statement was a description of a physical demonstration of contact he said Officer X had provided which he construed as accidental.

53. Ms Hillyer interviewed the Officer X who told her that since the word '*grabbed'* was not quite apposite to the events that she was describing, it had taken her a few days before she settled on a more accurate term, being the word '*cupped'*. She said she would not have used the word 'cupped' to her colleagues when talking about the incident the following day; she would have used the word '*grabbed'* or '*touched'*. Ms Hillyer was impressed with this part of Officer X's evidence; she considered it demonstrated conscientious and considered reflection on the part of Officer X in the way she described events.

54. Ms Hillyer also interviewed Jonathan Searle. In the interview, Jonathan Searle stated that Officer X *"said that the incident was quite accidental"* (emphasis applied). Ms Hillyer was keen to concentrate on precisely what Jonathan Searle was saying that Officer X told him. She told him that several words had been attributed to Officer X and asked him to recount precisely what Officer X

had told him. Jonathan Searle maintained that Officer X had described her standing with the claimant trying to get past her to go to the toilet.

55. She again asked Jonathan Searle to confirm the precise words Officer X used are not the ones that he was implying she used. Jonathan Searle confirmed that the words used by Officer X were *"it was nothing, it was more like a grazing as opposed to a grab or something to that effect".*

56. Like the claimant, Jonathan Searle works as a criminal investigator. We agree with Mr Stubbs' submission that each version of events he gave to his employer was increasingly more favourable to the claimant; he had moved from a statement provided to Gary Forbes in which Officer X had told him in terms that the claimant had 'grabbed' her behind to one of impression, to finally, one in which she told him in terms that the contact was accidental.

57. As Jonathan Searle accepted in cross examination, the versions were inconsistent. We are less clear, however, having heard from him, why he provided inconsistent statements to his employer, only that we are satisfied that he had convinced himself of the final version of events he provided.

58. We go further and note that at the same time, the claimant went from a position in which he did not seek to undermine Officer X's testimony, to suggesting that the contact *"could have been inadvertent*", to asserting that it "was likely to have been accidental".

59. Ms Hillyer took the view that the evidence Jonathan Searle gave made no difference; he was not a witness of fact but simply expressing an opinion in his witness statement, based on what he alleged Officer X told him.

60. On 17 September 2019 Ms Hillyer conducted the appeal hearing. The claimant attended and was accompanied by Mark Usher. Bozena Hillyer reminded Mark Usher that her role was to review, not revisit, the decision of Gary Forbes.

61. During that hearing:
    a. Mark Usher accepted that a finding that if the claimant *"touched [Officer X] in the way that has been described, then it's deliberate and clearly I don't think anyone would dispute that [amounts to] gross misconduct";*
    b. Having been provided with time to reflect, contended that what was being challenged was now both the finding of gross misconduct and the sanction;
    c. the claimant repeated that he had no recollection of the events of that night. He stated that he had depression and his support network included Nathan Dalgarno, *"who has also been dealing with this from the union side";*

d. They accepted on the balance of probability something did happen, but that what was in issue was *"the intent";*
e. Despite being afforded an adjournment to consider the point, neither could attribute a reason to Officer X to lie about events as she described them to be;
f. Both Mark Usher and the claimant contended that the claimant was *"the same as"* Officer X in that he had no reason to lie, either;
g. Mark Usher said *"the only thing is that perhaps the respondent was under pressure 'to be seen to address perceived issues of this nature".*

62. In a second conversation with Bozena Hillyer, Officer X told her that she could not recall having had any conversation with Jonathan Searle, but that she regarded him as a friend and could not see why he would fabricate evidence.

Bingo Night / Officer Y

63. In September 2018, Officer X went out for an evening with a colleague and friend, Officer Y; they were accompanied by their partners. The event they attended is renowned for being a lively social event and includes music, dancing and bingo.

64. On 18 September 2018, Mark Usher invited Officer Y to have a discussion with him about recent events he understood had taken place during a night out with Officer X. Officer Y was asked to provide a statement of the bingo night but came away from the discussion still unclear about the purpose any information he gave to Mark Usher would be put.

65. The relevance of any of events that were said to have taken place on this particular evening we will turn to in our Discussion and Conclusions. At some points in his cross examination, the claimant appeared to accept that the event bore little or no relevance to what had happened 9 months previous at the Christmas party; leaving us with the impression that the apparent inconsistency in procedure was what aggrieved him. At other points in his evidence, and insofar as the claimant was able to articulate the relevance of the event at all, he claimed that this event demonstrated that the claimant lied or exaggerated about being upset when he touched her bottom on the night of the Christmas party, alternatively that the behaviour he firmly believes she was guilty of this evening made her a hypocrite when she complained about his harassment of her.

66. Mark Usher stated that in his view that events that he believed had taken place were relevant to the claimant's case because what Officer X was said to have

done were *"the same and arguably worse"* than what the claimant had been accused of,

67. Mark Usher emailed Officer Y to tell him that what they had discussed had already been mentioned to him *"by several different people and seems to be widely known".* He continued that his information would be *"potentially be helpful to the person I'm representing".* He clarified his request was not a request from the internal governance department, rather a request in his capacity as a PCS representative, but that he could not guarantee that the compliance department would not wish to speak to him anyway.

68. Officer Y declined by email to provide a statement to Mark Usher stating that he still did not fully understand what purpose the information would be put to and he did not feel that any information he gave would be of any use *"given any contact made was not intentional, no offence was taken and I feel has been grossly exaggerated by others within the office".*

69. Nevertheless, an hour later, Mark Usher emailed Bozena Hillyer about Officer Y. He thanked Ms Hillyer for the appeal hearing 2 days earlier and said that he had since been made aware of an incident *"that may have a bearing on your consideration".* He asserted that on a recent works night out, Officer X grabbed the bottom of Officer Y and attempted to grab his crotch; he said that Officer X apologised to Officer Y. He added that Officer Y did not take offence and did not wish to make a complaint. He did not tell Ms Hillyer that Officer Y had only an hour earlier refused to provide him with a statement; he told Ms Hillyer that Officer Y was "*reluctant*" to do so.

70. Mark Usher reminded Bozena Hillyer that there been a discussion about *"how much credibility should be attached to Officer X's account, particularly when compared to the contradictory account provided by Jonathan Searle".* He added *"you may think that Officer X's actions, which are similar if not worse to those she alleges against the claimant may impact on the credibility of her account".*

71. Mark Usher omitted to tell Bozena Hillyer that Officer Y had confirmed to him that any contact that had occurred, was accidental. We consider this omission to be significant: only two days earlier at the claimant's appeal, as he himself acknowledged, this was the sole issue on the claimant's appeal.

72. Furthermore, we reject as disingenuous Mark Usher's evidence that by writing this email to Bozena Hillyer, he was complying with his duty to report any breaches of the code of conduct. He confirmed in evidence that knew how to raise the matter directly with the internal governance department if he wished

to do so; we consider his evidence as nothing more than deflection from his attempt to capitalise on information which he knew, from information given to him by Officer Y, to be nothing more than baseless office gossip.

73. Nevertheless, now in possession of the information provided to her by Mark Usher, Bozena Hillyer took steps to confirm what she should do with it; she received advice from the governance department, that if she considered the information to potentially amount to misconduct, she should refer it to Officer X's line manager at the time. She did consider the incident to amount to an act of potential misconduct, a decision that the claimant accepted was unrelated to Officer X's gender.

74. The matter was therefore referred to John Terrell, who Bozena Hillyer mistakenly believed to be Officer X's line manager: he was not, in fact, he was Officer Y's line manager. To that end, Debbie Murphy, head of Bozena Hillyer's private office, called and spoke to John Terrell. Notes of the discussion appear in the bundle. John Terrell confirmed that he was aware of the social occasion, and that Officer Y had not taken offence that he and Officer X were described as 'very good friends; and that he as drunk apparently swinging his shirt around his head and giving Officer X piggy backs'. John Terrell told Debbie Murphy that Officer Y was 'mortified' about his and Officer X's behaviour that evening and that Officer X had apologised to Officer Y formally as colleagues. Both were content with that resolution and Officer Y did not want to pursue the matter, nor complain. At the time of the discussion neither Debbie Murphy nor Mr Terrell appreciated that the discussion was supposed to have taken place with Officer X's line manager.

75. John Terrell was aware of the incident because Officer Y had approached him to seek advice about Mark Usher pursuing him for a statement, something that he was quite annoyed by. Officer Y was at pains to point out to John Terrell that as far as he was concerned there was no incident, that nothing untoward happened involving Officer X, that they were good friends and that whilst he described his own immodest behaviour, and was 'mortified' that his and Officer X's behaviour was causing offence to anyone else. We accept the evidence of both John Terrell and Officer X – and it was not denied by Mark Usher or Nathan Delgarno - that the PCSU (generally) was persistent in its requests of Officer Y to provide it with assistance.

76. Bozena Hillyer interviewed Claire Scott on 4 October 2018. Claire Scott's trade union representative with Nathan Dalgarno. Claire Scott said that she and Officer X were *"quite close friends",* and she implied that Officer X had agreed since, she said, she had not objected, that the Christmas party was a good night, there was really nothing in it and that it was all just joking and that whilst

she could not remember Officer X's exact words, if she had given Claire Scott any indication that she did not agree with the evening's events that she, Claire Scott, would have walked away from the conversation knowing that.

77. Claire Scott said there was something else that she wished to add; she had heard that on a recent night out Officer X grab the crotch of a male colleague. She had not been there at the time but she would not say who had told her this. Claire Scott continued that she felt, as an officer in truth, that she had to impart this information.

78. Claire Scott wished to add another point, this time about an incident involving Officer X that was said to have taken place at the Christmas party in 2016 she said she was would not provide names of any witnesses to any particular incident. She was not particularly cooperative. Claire Scott agreed the Nathan Dalgarno would get back to Ms Hillyer with any names to share. As Clare Scott accepted in cross examination; whatever she believed had happened at the Christmas party in 2016 shed no light on whether Officer X was sexually assaulted at the party in 2017.

79. We accept the evidence of Bozena Hillyer that Nathan Dalgarno made a short call to her on 8 October 2018. We are far from satisfied that anything at all of significance was relayed in that call: on his own evidence, Nathan Delgarno was able to venture little more than that he told her *"names and a sentence"* and we had no reason at all to doubt Ms Hillyer's evidence that if he had suggested to her that Officer X had manufactured an incident that was said to have occurred at the Christmas party in 2016, that she would have regarded that as a matter that was *"very very serious indeed".* We also prefer the evidence of Bozena Hillyer who posited that no names were likely to have been given to her because if they were, she personally would have jotted them down and sought to interview them.

80. The claimant was deeply unhappy about the lack of notes in relation to this short call. We are satisfied that the lack of notes or recordings in respect of this call was exceptional occurrence and an omission that happened *despite* the detailed and meticulous efforts on the part of Debbie Murphy to ensure that all such recordings and notes were retained. The claimant does not seek to challenge Debbie Murphy's evidence. Furthermore, we fail to identify the prejudice caused to the claimant in circumstances where his witness was unable to provide any meaningful evidence about the content of the call.

81. We were concerned about the profile attached to the lack of notes in respect of this call, in particular because the claimant adduced no evidence that would

otherwise suggest that the contents of the call were important in some material way. At best Nathan Dalgarno's evidence was a poor attempt to distract from the salient features of the case; at worst, it was a flimsy attempt to give evidence about his – wholly irrelevant - opinion of the character of Officer X.

82. On 24 October 2018, Bozena Hillyer sent Mark Usher and the claimant the outcome of the appeal hearing together with a note of her deliberations. She rejected the appeal, having found that Gary Forbes is decision was both proportionate and reasonable in the circumstances and that the penalty of a final written warning was also reasonable in the circumstances.

83. In doing so, Bozena Hillyer had reviewed all the material that Gary Forbes had had available and created, including his contemporaneous notes of deliberation and took into account evidence of her own investigation to identify the possibility of omitted but pertinent information; she checked he had followed the correct procedure. We generally considered Bozena Hillyer to be a formidable witness; given her role in Inclusion and Diversity, she was able to give us detailed evidence of the steps she takes to ensure that she eliminates not only conscious but subconscious bias from her decision-making role.

Grievance

84. On 1 November 2018, the claimant submitted a formal grievance alleging that the respondent had been guilty of *'flagrant double standards'* in the way it had chosen to deal with the investigation into his conduct towards Officer X, compared with the way it had dealt with – or more particularly failed to deal with – Officer X's conduct towards Officer Y. He sought a resolution by which he was treated informally, and that any sanction applied to him should also be applied to Officer X.

85. The grievance was investigated and decided against the claimant on 19 July 2019, James Ainsley concluding that the claimant was not entitled to any information in relation to any allegation against Officer X and finding that the decision made against him was consistent with the respondent's guidance on discipline in cases involving gross misconduct. The claimant appealed. In his deliberations, the appeal officer, Mark Collier, listing the distinguishing features between his case and any incident – insofar as anything at all took place - at the bingo night: it occurred on a social occasion; between very good friends; no offence was taken, the alleged victim having confirmed that he had no intention to pursue the matter or raise a complaint was a satisfactory conclusion to the incident. He repeated that whilst the claimant may perceive the cases to be similar, they were in fact, he concluded *'completely different'.* The claimant

was sent a copy of the outcome, together with Mark Collier's deliberations, on 20 August 2020.

Comparator – Officer X

86. In respect of his claim of direct sex discrimination, the claimant named Officer X as his comparator as a basis for contending that had he not male, he would have been treated differently and more leniently. It was in that context that Officer X gave evidence to the Tribunal. She denied grabbing Officer Y's bottom at the night of the bingo in September 2018 as the claimant and his witnesses alleged; she denied having attempted to grab his crotch. We believe Officer X. We have no reason to disbelieve her; she made for a straightforward and perfectly compelling witness.

87. Furthermore, the claimant adduced no evidence to undermine Officer X's account. He invited us to find that the claimant was lying under oath by preferring a note made by Debbie Turner during a call to John Terrell in which John Terrel is said to have told her *"Officer X apologised to Officer Y in a formal setting as work colleagues".* It is unclear from the note what the apology was said to be for; we remind ourselves of the fact that at the time this note was made, Debbie Turner incorrectly understood John Terrell was Officer X's line manager. John Terrell was unable to assist; the note was not his.

88. Unlike the claimant's other witnesses, however, Mark Usher and Nathan Dalgarno both attended as witnesses at the Tribunal hearing of manager NP's claim of sex discrimination[3] – he, too, was a member of PCSU - wherein he alleged that the respondent's decision to sexually harass Officer X at the same Christmas party was an act of sex discrimination against him and, we are invited to accept, coincidentally, he also cited Officer X as his comparator. From that vantage point, both witnesses had far more information about Officer X than someone in their position might ordinarily expect to have. We consider it significant that despite this, they were each unable to provide the Tribunal with any basis – other than office gossip - upon which to seek to undermine Officer X's credibility or integrity.

The Law

[3] Claim number 2503603/2018, also subject to restricted reporting and anonymisation orders

89. Section 13 of the Equality Act 2010 5 direct follows: *"(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

90. Section 23 of the Equality Act 2010 provides *"(1) on a comparison of cases for the purposes of section 13... there must be no material difference between the circumstances that relating to each case."*

91. Section 136 of the Equality provides *"(1) this section applies to the 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) contravene the provisions concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

92. Guidance on the burden of proof is to be found in the Court of Appeal case of Igen Ltd v Wong [2005] ICR 931, as approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054. The first stage requires the claimant to discharge the burden of establishing facts from which an inference of discrimination – here, less favourable treatment – could be drawn, before at the second stage requiring the employer to provide an explanation that excludes the proscribed ground – here gender.

93. At the first stage, adducing facts which indicate the possibility of discrimination is not enough to slip: a difference in status and a difference in treatment indicate only the mere possibility of discrimination and are, without more, insufficient to discharge the prima facie burden of proof that rests on the claimant: Madarassy v Nomura International plc [2007] ICR 867, CA.

94. It may sometimes be appropriate to proceed directly to the second stage of the analysis where the claimant relies upon a hypothetical comparator. In such circumstances, the first question, the 'less favourable treatment' issue cannot be resolved without at the same time deciding the second question i.e. 'the reason why' issue: Shamoon v Chief Constable of the RUC [2003] ICR 337.

Discussion and Conclusions

95. We remind ourselves that this is a complaint of direct sex discrimination pursued by the claimant in respect of the respondent's response to his own

conduct. Nothing done by the respondent in its response to the information it received was unusual or unexpected.

96. We have little doubt that he believes he has suffered some injustice in the respondent's response to his own conduct, however, our clear impression is that the true target of his frustration is Officer X. Whilst on the one hand repeatedly endorsing the respondent's intolerance of sexual harassment, his barely concealed, and occasionally expressed, view was that Officer X was the liar and the hypocrite; it appeared inconsequential to him or his witnesses that Officer Y, as the putative victim, had no criticism to make of her.

97. Much of the evidence of the claimant and his witnesses was little more than an unedifying attempt to castigate Officer X for the conduct they alleged she was guilty of at the bingo event. We rejected it as irrelevant and misguided. We were given no basis upon which to doubt Officer X's account of events, and more particularly, upon which *the respondent* could or should have doubted them. The events at the bingo night, insofar as the claimant and his witnesses doggedly believed them to be, was a red herring. As the claimant was aware, and as Mark Collier reminded him when dismissing the claimant's appeal, Officers X and Y were very good friends; in stark contrast, the claimant was to all intents and purposes a stranger to Officer X. Any consent and/or tolerance of any physical contact between Officers X and Y had the any intentional physical contact occurred – and we do not find it did – was wholly absent in the claimant's case. In short, any physical contact between her and her friend Officer Y at the bingo event did not and could not conceivably operate to negate the offence she felt when the claimant, a stranger to her, sexually assaulted her 9 months previously.

98. Mr Stubbs observes that by pursuing the claim as he did, the claimant has effectively compounded the original act of harassment; in light of our findings below, we do are not in a position to dispute that.

Identity of the Comparator

99. The claimant relies on Officer X as a comparator. We are required to consider whether there were any material differences between the circumstances relating to the cases the claimant and Officer X in order to determine whether Officer X is a valid comparator. We remind ourselves that it is the *treatment* that is being compared, and not the underlying events themselves.

100. There are significant differences between each case, that render Officer X fundamentally inappropriate comparator. As identified by Mark Collier in dismissing the claimant's appeal of his grievance outcome, they include:
   a. In the case of the claimant, his conduct took place at a work-related event, thereby entitling the respondent to investigate. As Mr Stubbs pointed out, Officer X would not have been in the same public house as the claimant had it not been for the Christmas party. By contrast, the bingo event was a private social function which would require other considerations before the respondent could intervene;
   b. Officer X confirmed that she wished to pursue a complaint about the claimant's conduct. Officer Y confirmed that he did not wish to pursue any complaint against Officer X;
   c. Officer X gave uncontested evidence that the claimant deliberately touched her inappropriately. Officer Y confirmed that any contact was purely accidental;
   d. Officer X was upset by the claimant's actions. Officer Y confirmed that nothing untoward occurred as far as he was concerned.

101. It was absurd in those circumstances to suggest, as Mark Usher did, that one could simply have regard to the number or type of body parts alleged to have been touched, in order to conclude that the similarities were not only *"obvious but arguably worse".* We reject it for the reasons above as well as those additional reasons given below.

102. We accept Mr Stubbs' submission that the features of a hypothetical comparator include someone: in respect of whom an anonymous complaint was made to the governance department about someone who it was said had sexually harassed/assaulted a colleague and who was alleged to work in a team whose culture was tolerated by local management; against whom there was direct evidence from the victim confirming the events complained about; was unknown or barely known to the complainant; acknowledged the possibility of having acted inappropriately so as to check with their colleague and subsequently apologise to the complainant; who failed, whether by reason of incapacitation or otherwise, to advance any positive case in their own defence at the investigation, disciplinary or appeal stages; accepted that if the incident occurred in the manner it had, it would amount to gross misconduct.

The decision to commence disciplinary proceedings rather than attempt an informal resolution

103. Insofar as the claimant relies upon Officer X as a comparator, he fails to establish a prima facie case. The material circumstances of his case and that of Officer X are not materially the same. In the case of Officer X, when asked,

confirmed that nothing untoward occurred and that he did not wish to pursue any complaint; there were no other witnesses to the events that the claimant believed to have taken place that could form the basis of any other type of investigation. Put simply, the respondent did not treat Officer X more favourably by attempting an informal resolution, because after investigation with Officer Y, there was nothing to resolve.

104. There is no evidence before us at all to suggest that in circumstances that are materially the same, i.e. had a female colleague failed to advance any defence to an accusation that she had sexually assaulted an unfamiliar male colleague, that the respondent would have been treated her more favourably than it did the claimant.

105. We consider the case of a hypothetical comparator and ask ourselves what was 'the reason why' the respondent commenced formal disciplinary proceedings? We are satisfied that it did so because the claimant was unable to deny the complaint that was made of his conduct, and as he himself recognised, it was a very serious matter. It was, essentially, an uncontested complaint of sexual assault.

106. In truth, the claimant is aggrieved that *he* was not offered an opportunity to avoid formal disciplinary proceedings and that he was subject to scrutiny by senior officers. There was a clear rationale for the proceedings to be dealt with centrally given the anonymous complaint claimed that there was a culture of inappropriate tolerance by local management, a point that was reinforced by Officer X in her interview. We find for the avoidance of doubt, that the level of seniority at which the investigation and subsequent disciplinary proceedings were conducted was unrelated to the claimant's gender.

Gary Forbes' decision to make a finding of gross misconduct

107. As Mark Usher accepted in the appeal hearing, if the respondent found that the claimant touched Officer X in the manner she described, i.e. as a deliberate act of cupping her bottom, it was an act of gross misconduct. That concession is less surprising than the fact that the claimant continued to argue the point: a sexual assault is a criminal act and was plainly an act that comfortably could be categorised as an act of gross misconduct; the claimant and Mark Usher individually accepted that that categorisation was open to the respondent in the event that it found the act occurred as Officer X contended.

108. Reliance on Officer X becomes inappropriate in circumstances where she was subject to disciplinary proceedings.

109. We are unable to identify any basis upon which we could find that had Gary Forbes found a female colleague had perpetrated a sexual assault on an unfamiliar colleague, she would have received a less severe finding. As the claimant accepted, and as he observed 'rightly so' the respondent had a zero-tolerance policy of sexual harassment, which definition includes sexual assault. We are satisfied that the reason why he made the finding of gross misconduct is because of the seriousness and significance of the offending conduct and not on the ground of sex.

Bozena Hillyer decided to uphold Gary Forbes' finding of gross misconduct and sanction of a final written warning

110. Again, reliance on the Officer X as a comparator is inappropriate; she had not been subject to disciplinary findings.

111. When considering 'the reason why' Ms Hillyer rejected the claimant's appeal and upheld Mr Forbes' decision to find that he was guilty of an act of gross misconduct and impose a sanction of a final written warning, we are satisfied that she did so because she was herself satisfied that: there was ample evidence of the act having occurred; Officer X was a conscientious witness of the act complained of; the probative value of the evidence given by Jonathan Searle was marginal to nil given that it was of his impression of discussions that took place at an indeterminate point after the act occurred; that the decision to impose a final written warning as a sanction was open to Mr Forbes on the basis of the information before him. On the claimant's own account, a sanction of a final written warning was *'a good result'* in respect of a finding of gross misconduct. In addition, this respondent has a detailed and complete contemporaneous record of all advice given, each step taken, the deliberation of each office and rationale of decisions taken; none of those documents suggested that any stage of the whole of the disciplinary process, was tainted by discrimination.

112. In those circumstances, are satisfied that Ms Hillyer's decision to reject the claimant's appeal and uphold the decision of Mr Forbes was untainted by gender discrimination and that no more favourable treatment would have been afforded to a hypothetical comparator in materially the same circumstances. The claimant did not receive less favourable treatment because of his sex, than would have been afforded to others.

113. The claimant's claims of direct sex discrimination are not well founded and stand dismissed.

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EMPLOYMENT JUDGE JERAM

REASONS SIGNED BY EMPLOYMENT JUDGE JERAM ON 27 JUNE 2021