EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms M	**P Ltd (1)** **Mr T (2)**

Heard at: **London South Employment Tribunal**

(via CVP)

On: **21 June – 1 July 2021**
5 July (in Chambers)

Before: **EJ Webster**
Ms G Mitchell
Mr R Shaw

Appearances
For the Claimant: **Mr T Perry (Counsel)**
For the Respondent: **Ms P Leonard (Counsel)**

RESERVED JUDGMENT

1. By a majority decision (Mr Shaw dissenting) the claimant's claim for sexual harassment is upheld.

2. By a majority decision (Mr Shaw dissenting) the claimant's claim for direct sex discrimination is upheld.

The Hearing

1. The parties are anonymised throughout the Judgment due to the continued existence of the Rule 50 order due to the nature of the allegations in this case.

All witnesses and individuals are therefore referred to by initials. This includes incidental parties referred to by the witnesses we heard from.

2. We heard from and had written witness statements for the following witnesses:
   (i) Ms M – the claimant
   Mr T - the second respondent and sole owner of the first respondent
   DB – for the claimant (A former employee of the first respondent)
   SK – the claimant's mother
   SH – for the claimant (a former employee of the first respondent)
   LS - for the respondent (a current employee of the first respondent)

   We also had supplemental witness statements for Ms M and Mr T.

3. The hearing was heard by way of CVP. The respondents made an application on the first day of the hearing for the two main witnesses (Ms M and Mr T) to give evidence in person due to the importance of in person evidence in assessing credibility. The tribunal refused that application. In summary the decision was reached because although in person hearings were the norm until recently, the hearing had been listed to be via CVP, the risk to public health was still a concern and the tribunal was not holding in person hearings without good reason. The justification that the witnesses could only give properly assessable evidence in person is not correct provided both witnesses could confirm that they had good connections and visibility which they did. Further, given the nature of the allegations made, we considered the adjustments and methods of giving evidence for witnesses that apply during criminal rape hearings and had regard to the Equal Treatment Bench Book. Given that complainants in criminal sexual offence cases are frequently allowed to give evidence via a video link or behind a screen, it was unnecessary to put the parties in a position where they would have to spend a minimum of 4 days in the same room together and the claimant would be given little protection from facing her alleged attacker.

4. There were numerous applications made throughout regarding additional documents and evidence. Full reasons were given at the time of each application regarding the documents. In short, all documents were allowed into evidence apart from an additional witness statement by the claimant's solicitor and the documents referred to therein.

5. We were provided with an agreed bundle and a supplementary bundle. Where page numbers in the Supplementary bundle (SB) are referred to they have 'SB' written after them. If the reference is to the main bundle then they are left as just numbers.

6. With agreement by both parties we also watched 3 videos that we were provided with:

(i) A short clip from the 22 March
(ii) Ms M's interview with the police
(iii) Mr T's interview with the police

7. Other relevant people referred to in the Judgment are as follows:

Initials	**Role**
MB	Mr T's driver
ST	A friend of the claimant and the first person the claimant says she disclosed to.
KH	Employee at R1.
ZB	Fellow director of R1 at the relevant time and close colleague of R2.
NA	Relatively new employee at R1 who the claimant was training on 22 March 2017 and someone who the claimant says she disclosed to.
G	An employee at R1 in a relationship with Mr T

The Issues

8. The Issues were set out in the Case Management order dated 21 March 2018 and later clarified at a further preliminary hearing on 8 July 2019. They are as follows:

9. EQA, section 13: direct discrimination because of sex

(i) Has the respondent subjected the claimant to the following treatment
   a) constructive dismissal?

(ii) In respect of the constructive dismissal :-

   a) The claimant relies on the alleged sexual assault as the fundamental breach of her contract of employment.
   b) f the claimant's contract was so fundamentally breached, the respondent contends that she affirmed such a breach.

(iii) Was such treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

(iv) If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

EQA, section 26(2): harassment related to sex

(i) Did the respondent engage in conduct as follows:

a) Sexual assault on 22.3.17

(ii) If so was that conduct unwanted?

(ii) If so, was it of a sexual nature?

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

General observations

10. The tribunal has found this an incredibly difficult case to determine. Whilst we make the reason for our eventual conclusions clear below, we stress that we have made our decision and all our findings of fact on the balance of probabilities and based on the evidence which we were provided with; little of which was actually determinative of whether the alleged attack took place or not. Where we have not mentioned an issue that was raised by a party, we have not done so because we did not consider that the evidence on that issue assisted us in reaching a decision.

11. We were only able to reach a majority decision despite 3 days of very careful deliberation. We were, and are, acutely aware that our conclusions will have an enormous impact on both parties.

12. Our ability to reach a decision was severely hampered by the lack of any good independent evidence. This is particularly troubling given that there have been two police investigations into the matter. The police investigation and report into this matter was poor. The time line of when the police spoke to people appears to show huge gaps between the police becoming aware of facts and interviewing the relevant witnesses. They seem to have done very little to track witnesses down. They did not speak to MB (the second respondent's driver) for example until 9 September (p345), six months after the event. They did not ask for or test the only piece of clothing that could have had DNA evidence on it for over a year. They did not seize the claimant's or (despite it being clearly in front of him when interviewed and a statement in the police log that he did not have it with him at that time) the respondent's phone. Both the claimant and the respondent say that detailed conversations they had with the investigating officer are not recorded in the log/report - which we accept. Some potential witnesses were not contacted or their details were not even sought and others were not followed up when they did not respond. There are clear errors in the reports making it more difficult to rely on any conclusions outlined therein.

Burden of proof

13. Given that the judgment has been reached only by a majority, we felt it appropriate to set out, at the outset of this Judgment, that we have applied the balance of probabilities standard of proof. We note the case of *Miller v Minister of Pensions 1947 2 All ER 372, KBD*, which both parties referred to in their submissions. Mr Justice Denning states '[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.' We have also had regard to the case of *Re H. and Others (Minors) (Sexual abuse: Standard of Proof) [1996] AC 563* where it is observed that the more serious the allegation, the less likely it is to be true.

Background

14. Ms M worked for the respondent from 26 September 2016 until her employment terminated on 4th October 2017. By an ET1 dated 16 August 2017 the claimant brought a claim for sexual harassment. By an ET1 dated 15 December 2017 the claimant brought a second claim for direct sex discrimination with the less favourable treatment being her constructive dismissal. The respondents defended both claims.

15. The Second Respondent is the CEO and sole owner of the First Respondent. The respondent was a recruitment agency employing roughly 115 staff in offices across the country. The number of offices changed over the course of the claimant's employment but it had around 12 offices by the end of the claimant's employment.

16. Liability in this case rests solely on whether one incident occurred. The claimant alleges that on 22 March 2017 the second respondent, Mr T, raped her. Mr T denies that any sexual activity took place whatsoever. As the incident took place in a hotel room there were no witnesses. For various reasons which are explored more fully below, there was also little or no physical evidence available on which any assessment of whether the incident occurred could be made.

17. Both parties' cases relied almost entirely on attempts to undermine the credibility of the other. This was done through a mixture of highlighting discrepancies in their accounts of events and undermining the character of the other or any witnesses to peripheral events.

Facts – Agreed by the whole tribunal panel

18. P Ltd was an employer where alcohol, sexualised conversations and a 'work hard/play hard' culture was tolerated and at times positively encouraged by Mr T.

19. Alcohol was regularly consumed in head office and work parties were regularly drunken affairs. We accept the claimant's evidence that there was a recreation area in the middle of head office nicknamed with a pub name that resembled the the name of the First respondent which had a pub sign and a wine fridge. Whilst it may also have been the staff breakout space for lunch, it is where many, regular after work drinks sessions took place. These were often initiated by Mr T.

20. We accept that on people's birthdays they were often given alcohol as a present and would drink it that afternoon. Staff were given their birthday as leave, but their presents would be given to them at some other point during the week and they often drank it at the office. On 22 March itself it is accepted by Mr T that he went to the local pub early because he had just bought one of his colleagues a new company car. Celebrating with alcohol was the norm and it occurred both in and out of the office.

21. We also heard anecdotal evidence that a previous allegation of sexual harassment had been made against Mr T several years earlier where, on Mr T's own evidence, an employee had become so intoxicated she had passed out in a pool of her own vomit. We were shown a video of March 22 (which was also someone's leaving drinks), where Mr T is present and, whether it is his idea or not, he does nothing to stop a staff member attempting to drink 20 shots in an hour.

22. Further there were also several anonymous Glass Door reports [608-621] almost all of which referred to drinking in head office. Whilst the validity of the Glass Door reviews was challenged by the respondent because they were anonymous, the volume of them that made reference to alcohol and drinking in head office was high. The respondent stated that they had been cherry picked by the claimant but he provided no positive reviews to counter them – something that was entirely open to him had he wanted to do so. Overall these reports support the other facts which demonstrate that there was a drinking culture at the respondent.

23. We also accept that there were very few if any boundaries in place regarding conversations about sex and people's sexual relationships. Mr T has accepted that he was having a relationship for several years with a member of staff, G, who, at least at the beginning for the relationship was 23 and a junior member of staff. The respondent was 51and the CEO.

24. Mr T dismissed all other allegations regarding sexual relationships with staff as rumours. We were provided with no evidence beyond repeated rumours, that he had relationships with others. All 3 of the claimant's witnesses made reference to relationships with several women but none of them had seen any such behaviour themselves. We were therefore not in a position to make a finding regarding any other relationships with staff. However his relationship

with G was very public as were intimate details about medical procedures she had that he shared with staff members.

25. He put no policies in place to stop the rumours and they were widespread throughout the organisation as were relationships between other members staff. Mr T states that he was very aware of the rumours and we find it difficult to understand why he made no attempt to stop them if they were untrue and continued to adopt a style whereby he was extremely friendly with staff at all levels including texting colleagues about his partner's medical procedures (presumably knowing that she was on holiday with other staff members) and going on holiday to Spain with several colleagues. There were no discernible sexual harassment policies in place that were enacted by the respondent or the HR department.

26. We heard evidence from the claimant that there were of threats made against Mr T by the partner of a woman who worked for the respondent. The partner thought that she was having a relationship with Mr T. In evidence Mr T explained this away saying that it was a case of mistaken identity and that the woman was in fact having an affair with a contract driver. There was also another incident where the finance director was having an affair with a member of staff who Mr T then helped buy a car for. He was alleged to be having the relationship but Mr T stated that it was in fact his finance director. This suggests that it was not frowned upon for senior staff members to have sexual relationships with more junior (both in terms of age and seniority) members of staff. Mr T's relationship with G condoned that behaviour and did nothing to stop the rumours.

27. Another incident described by the claimant was that she and several colleagues walked in on a couple having sex during an office party. We find that plausible. An official HR memo about an awards ceremony talked about the celebrations being made through "shots and slut drops" (p137). Whilst the tribunal is aware that a slut drop is a dance move, the language would seem to be reflective of the overall culture condoned and somewhat encouraged by Mr T within the workplace.

28. LS was a very credible witness. She gave evidence of situations and information that supported statements made by both sides. She confirmed that she had shown round the office a video of a man masturbating that had been sent to her via a dating app. She confirmed that people spoke about their sex lives and other personal matters as routine. We accept that the claimant was one of those people and that at no point did she object to the overall culture in the office.

<u>Mr T's management style</u>

29. Mr T was a reasonably capricious manager. The rewards for those staff doing well were extraordinarily generous. We heard unchallenged evidence of staff getting cars, Rolex watches and designer handbags if they reached their sales targets. However we also find that Mr T did not tolerate bad performance. This was a hire and fire culture – something we accept, as it was agreed by both parties, is typical of the recruitment industry.

30. The company-wide emails that he sent regarding performance were, if described kindly, robust. At times however they were rude and indicated a 'my way or the high way' approach. He treated everyone in this way. He explained away his email to staff dated 19 April 2017 (234) as frustration and an attempt to defend Ms M following a meeting in April which went wrong (we deal with this further below). We find that this email goes far beyond frustration and expresses a clear message that if you do not like the way the company's culture, including the alcohol and partying, then you should find alternative employment as he was not going to change. His email to staff is not quoted in full but we consider that the following excerpts are a summary of the respondent's approach to his staff, not just a frustrated response.

"As a company we took a decision some time ago, to produce League tables and weekly figures so we had full transparency over the company, I'm sorry but if you find these demoralising it is probably because your own figures are diabolically poor, I can assure you people at the top of the table never complain, funny that! Solution: sort your bloody figures out and stop moaning about being at the bottom of this table week to week, there is only one reason you are and that's because you are personally doing nothing to improve this.

Social events

We organise a number of social events throughout the year, we pay for everything except your travel to these events. These cost me personally throughout the year approximately £60,000, obviously moving forwards I am happy to review and suspend these events, but again the majority of you, I realise enjoy and appreciate what we do for you, I cannot allow the moaning minority to dictate our company culture. If you do not like the culture of the company you work for, I suggest you find alternative employment.

Birthdays and other celebrations

These, again, are part of our company culture; therefore I plan to change the moaning people rather than the company culture ASAP

Rewards and Recognition

We pride ourselves on rewarding and recognising great achievements, this does not mean I am willing or I will pat you on the back for doing your job at a minimum level, we reward and recognise exceptional people who go above and beyond what is asked of them. If you feel you are not rewarded or recognised enough just for turning up to work, then I suggest you do not turn up anymore because I will never celebrate mediocrity.

I like to believe people who go above and beyond are recognised and thanked by me on a regular basis, so if you haven't been recognised or thanked then it's because you do not deserve to be. If you feel this is unfair then again I invite to find alternative employment because I will not allow you to drag either a great company or me personally down to your level. My role is to bring you up to my level, to offer you opportunity to improve your work and your personal lives through what we give back.

I believe in my good people and go out of my way to help them on a regular basis, I believe in our great company and will continue to grow and develop us to be one of the best and biggest recruitment company's we have ever seen. I will do this because of having great people despite having selfish, self-serving individuals trying to prevent this. I will do this by removing these people and I personal apologise for allowing them to creep their way into our great company. Our culture will not change, our people will!!

I happily invite you to comment on the above."

31. This email was not a one-off in terms of communication style. The email at page 185 also show that the respondent did not like dissent in the ranks. We therefore consider that the respondent was blunt at best in his communication style and rude at other times.

32. Whilst being a hands-on manager he expected people to just get on with the job and was not an organised communicator. Whilst there was a structure for various levels of management meetings, the meetings were not minuted and did not appear to have agendas. Mr T would speak to everyone about what he wanted to speak about and that was usually, from the evidence we saw, the bottom line.

33. Into this context, the claimant was employed to take over a significant chunk of the second respondent's work by managing the branches. Mr T had identified that he wanted to spend less time on the business and that the branches were not doing well as a result. He wanted the claimant to take over his management of the branches. The claimant was head hunted having undertaken a similar role at a large competitor company some years previously. We therefore consider that the respondent was inevitably going to have some strong views

as to whether the claimant was doing a good job or not and how she ought to carry out the role.

The Claimant's probation and job security

34. The claimant's contract stated that there was a 6 months probation period. This was due to expire on 25 March 2017. We accept that the claimant's performance was not what the respondent wanted it to be. The branch figures were not improving and in some cases they were getting worse though we accept not significantly. We accept that on balance it is likely that the claimant knew that the respondent had concerns about her performance. Emails dated 20 March 2017

Morning

I could see your feelings coming through so I knew we would be having a chat at some point.

I do believe we have a couple of branches which are going to take a bit longer than expected but the foundations are there and I believe we will see an increase in figures across the whole business in the next couple of weeks.

I'm not a "shouty" manager and so you probably think I'm not applying pressure. I just think I do it in a different way to you but I think we compliment each other in that sense.

My new manager, [redacted] is starting in MK today so I will be spending pretty much the whole day with her. I will be in Nottingham tomorrow and then I've got [redacted] and [redacted] in head office for the day on Wednesday. I just need these guys to get inducted quickly so they can hit the ground running. I am in head office on Thursday and then Peterborough on Friday.

So maybe we could catch up on Wednesday after work? Our "catch ups" are always a bit rushed and I think we could benefit from you really understanding where I'm coming from in terms of the way I'm working and what I'm trying to achieve.

I need you to know I want this to work too [redacted]

[redacted]

x

Morning [redacted]

I'm good at hiding feelings well until it gets to a point where I have to speak out.

I think your doing really well on recruitment and settling branches, however this needs to deliver increase in sales and more importantly GP.

We need GP to help grow and expand business also to pay for the new people we have bought in recently. What we have seen is a decrease.

I am disappointed with results from branches so far. This needs immediate improvement.

I know by shifting your focus we can start to see results, you will need to start putting pressure on to branches to deliver though.

Give this some thought for me please. I want this to work (but what we are all judged on is figures, this is true of me more than anyone. I am constantly scrutinised by finance and bank on what we deliver.

Thanks

35. We do not accept the respondent's account of events that people were complaining about her or saying she was awful. There was no evidence to substantiate such a high level of criticism. However it is clear that the claimant was not enacting change or improving figures as quickly as Mr T wanted her to. We also expect that she approached problems differently and not as directly as the respondent. We accept that she would have been more reluctant to fire without a performance process and we find it plausible that the respondent expected her to dismiss some people without following such processes.

36. We find that Mr T did raise his concerns with the claimant directly. Those meetings are not minuted or recorded. Whilst we are sure he would have been direct in his 1:1s we do not think he would have been rude. We accept that in team meetings he would probably have been more 'shouty' and LS confirmed that he would ask people, in team meetings, whether this was the right job for them. Even if kindly meant (which we doubt), to ask such a question in public would be very undermining.

37. We find that the claimant found this style of management difficult to cope with. She felt insecure in her employment and unsure of whether the respondent liked her or wanted to keep her. Her emails are frequently apologetic and deferential and attempting to glean reassurance from Mr T.

38. We had emails that showed a range of approaches by Mr T to the claimant. However by and large, the direct emails we were shown demonstrated a relatively calm, friendly tone. There are some notable exceptions such asp183-185.

39. We also accept that the email he sent on 12 April 2017 to all staff would appear to be directly undermining the claimant as Mr T is specifically commenting on how he is going to take back control of the branches – the job that he had specifically hired the claimant to do.

40. The relevance of the above performance/probation-related findings , is that we accept that the claimant was aware that her continued employment was not secure before the 22 March. We accept that there were probably not precise, formal conversations where Mr T assured the claimant that her probation was

passed though we accept that in a 1:1 Mr T may have given more vague reassurances to the claimant about trying to make the situation work. However we also accept that he will have said that the figures were of concern (which they objectively were) and not committed to keeping her on in the way that she now suggests.

41. We found her evidence to us regarding her complete assurance that she believed she had passed her probation before the alleged attack and her subsequent fear of losing her job after the attack contradicted each other. In answer to specific questions on this point from the panel the claimant was unable to explain what changed and why she went from feeling certain that her probation was going to be passed to being terrified of losing her job. The 8 weeks between the alleged attack and the claimant's decision to report it to the police do not show any material difference in approach from the claimant or the respondent to her working life or her performance.

42. This also calls into some doubt the respondent's claims that he felt that her performance was so woeful that he was almost inevitably going to dismiss her. Given the hire and fire culture that both parties accepted was prevalent, Ms M was given a considerable period of time to improve.

Mr T's alleged anger towards the claimant

43. Despite the respondent's management style we do not accept that he was so annoyed by the claimant challenging him that this was the reason for any alleged attack. His style was robust but he expected his staff to be robust too both in terms of being able to take his blunt criticism and the decisions that they took regarding management and sales matters. Having robust staff would not, it seems to us, mean that they were also purely 'yes' people.

44. The claimant relies upon two main incidents as indicating that the respondent was angry with her and wanted to, on her case, exert his control over her. They were an incident involving a meeting about an individual called Duncan and then an email exchange on 21 March 2017 (the day before the alleged attack) regarding a colleague, DJ. We address them in turn.

45. The claimant describes the incident with Duncan in her witness statement, paragraph 15 and during her police interview (p 318). We have no reason to dispute her version of this meeting as the respondent cannot remember it. However we have no evidence of the accuracy of her account either. With regard to the incident with DJ, we have the email exchange. We accept that the claimant undermined the respondent by copying DJ in on her response to an email and defending DJ over the second respondent. We also accept that Mr T's email response was sarcastic and clearly displeased with the claimant for taking DJ's side over his. However we have nothing to suggest the level of anger that the claimant now attributes to the respondent. If this matter was

discussed again on 22 March as suggested by the claimant, then it was raised by her in order to apologise because she was worried. We understand that she may have been worried given the tone of his email. This also ties in to our assessment that the claimant was worried about her job and found it difficult to respond to Mr T's hot and cold management style. That does not, in our view, mean that the respondent was uncontrollably angry with the claimant because she had challenged his opinion on one matter.

46. The claimant stated, that in effect, the respondent could not bear to be challenged and those that challenged him were fired or punished. We found no evidence to suggest this. Whilst we accept that he was a temperamental manager, we find it implausible that someone who ran a largely successful business could operate successfully on such a purely emotional level. To be temperamental and angry on occasion is one thing, to be vindictive as a result is another and we do not find it plausible that this successful business was run with such a mentality. DB challenged him after his email dated 19 April 2017 and she remained in employment for a considerable period thereafter and ultimately resigned voluntarily.

The events on 22 March 2017

The claimant's arrival time at the pub

47. There were several different versions of when the claimant arrived at the pub on 22 March. She says 4.45, the respondent says around 7.30 and LS said it was at around the time that she was leaving. The video we were provided with showed that the claimant was definitely there by 6.30. We think the witnesses are probably all wrong though we think little turns on it. We believe it more likely than not, given LS's evidence, that the claimant arrived after LS with the managers that she was training. The claimant and LS both agreed that the claimant was training the two new managers and wanted to finish the training session with them. We suspect that such a training session was likely to go until near the end of the day though not quite. We accept the claimant's evidence that she had hoped to have a more formal meeting with Mr T about the branches and her probation at the end of the day so it is likely that she was aiming to finish before 5.30 to give time for that meeting. We therefore conclude that she arrived somewhere between 5.30 and 6pm once the normal working day had finished.

Conversations between the claimant and Mr T that evening

48. We accept that during that evening the claimant and the respondent had a conversation about the claimant's car. We found no evidence to suggest that the respondent was trying to goad the claimant into a 'rise' simply because she was not being given a new car. Perhaps that was the claimant's perception but she was drinking a lot that evening and was worried about the security of her role because of the email incident with DJ and the poor branch figures. We can see no plausible reason as to why the respondent would seek to goad the

claimant when on everybody's evidence, the second hand car she would be given was a very nice car.

49. We also accept that a conversation may have been had regarding the DJ email. We accept this because of the 'showdown' she refers to in her text to a friend [P56 SB]**.** We think it likely that this refers to her having expressed to her friend that she was worried about the email exchange about DJ. We also consider that she probably raised it in order to further apologise as she was worried that she had upset Mr T. There was some pointing at each other about it in a drunken and possibly jokey way, but not in the hostile way that she describes in her witness statement. We prefer her evidence on this as given in the police interview which does not suggest that it was an aggressive exchange.

50. The claimant was drunk. It is unclear why the respondent sought to state that she was not when later in his witness statement he accepts that she was. By all accounts the claimant was very drunk by the time they arrived at the hotel. The majority of the tribunal found this account to the police and the contradictory evidence in his witness statement on this point undermined his credibility.

<u>Going from the pub to the hotel</u>

51. Mr T messaged his driver (MB) at 21.19 and MB arrived at the pub by 21.45. Whilst he may have been on call we estimate that it is unlikely that he would have been on the road and driving before 21.25 and his journey therefore took him around 20 minutes.

52. MB drove Mr T, Ms M and two other colleagues to the office to pick up their bags and then to the hotel. They arrived at the hotel and the three of them checked in between 10.01 and 10.03. The claimant's receipt shows she checked in at 10.02.

53. Ms M and Mr T agree that he helped Ms M to her room and carried her bag for her. Ms M does not remember this but has pieced it together by what her colleagues told her the next morning and by what she says happened next. The claimant's room was on the second floor. There is no CCTV footage of the room or the corridor. Given the short distance and the lift, we accept that the claimant and Mr T must have reached her room by approximately 10.10 even with the claimant being unsteady on her feet. The respondent argued that the party milled around in the lobby for some time but we doubt it was particularly long and given how drunk the claimant was and the fact that the other two managers were new members of staff, we think it is very unlikely that they would have stood around talking for long. Mr T states that he does not like being around drunk people very much – something we hard to believe given the culture he encouraged – however if that is to be believed then it is unlikely that they would have hung about in the lobby for a long period of time.

54. Mr T states he then went into the claimant's room momentarily to put her bag down. He cannot recall how far into her room he went.

Mr T leaving the claimant's hotel room

55. We do not know exactly when Mr T left the claimant's room. The claimant has suggested that we consider the cell site evidence provided which demonstrates (on her case) that he did not start moving again until 23.00. The respondent has argued that the cell site evidence is unreliable because we do not have expert evidence to assist us with interpreting it and cell site evidence is notoriously difficult to interpret without specialist knowledge. We carefully considered the respondent's submissions regarding the cell site evidence. We have therefore approached that evidence with caution and do not rely on it as a decisive factor in making our findings.

Mr T's journey home

56. We have therefore taken a different approach and worked backwards from when the respondent arrived home. It is accepted that Mr T arrived home between 10.55 and 11.10 This is because his driver logged off by 11.15 at the latest. This meant that the driver himself home by 11.15 at the latest (he rounded up to the nearest quarter of an hour on his time sheet). We accept the claimant's evidence, based on the Google maps printout, that the driver lived 3 minutes away from Mr T. However we also accept that the electric gates at Mr T's home would have added some time to the dropping off process. We therefore consider that Mr T got home some time between 11 and 11.10.

57. We were taken to a huge number of maps and a large amount of time was spent in cross examination on what route the respondent may have taken home. Ultimately, Mr T does not remember what route he took home because he was not driving. MB told police a long time later that they would have taken the A282 home because on that day the Dartford tunnel was closed and there would have been traffic. MB came to this conclusion because they checked a website and found that the tunnel was closed and so assumed that this would have meant that there was traffic and they would have taken the A 282 route.

58. We do not accept that there were significant levels of traffic at the relevant time such as to slow Mr T's journey home. The average traffic flow data for the relevant roads shows that the traffic was flowing freely and was not particularly heavy. It is also clear that it only took MB 20 minutes to reach the hotel from his home on the way in and that was over an hour earlier in the day. If all the traffic was so snarled up as suggested by the respondent, then it would have affected the driver's journey in as well as out.

59. We cannot determine with any certainty which route the respondent took. However, based on all the maps we were shown, the time it took MB to drive in the opposite direction at an earlier time, the fact that it was late at night, and the

traffic flow data we were shown, we consider that the drive would have taken around 20 minutes at the most. We think it is quite likely, based on the traffic flow that MB would have chosen to take the M25 route which would have meant that the journey took considerably less than that – but we cannot be sure.

60. There are therefore, by our findings, there are two possible time lines which satisfy the claimant's extreme version and the respondent's extreme version.

Claimant

(a) Arrive at room – 10.10
(b) Respondent leaves room – 10.50
(c) Respondent gets to the car – 10.55
(d) Respondent drives home via M25 – 15 minutes
(e) Respondent arrives home – 11.10
(f) Driver arrives home 11.15

Respondent

(a) Arrive at room 10.15
(b) Respondent leaves room – 10.26
(c) Respondent gets to car - 10.31
(d) Respondent drives home via A282 – 25 minutes
(e) Respondent arrives home at 10.56
(f) Driver arrives home at 11.01

61. The reality is that we will never know for sure. However we consider that the evidence supports, on balance, that the claimant's suggested time line is more plausible for various reasons –
    (i) The traffic flow on that night was good so the journey is likely to have been quicker, not slower;
    (ii) The respondent has not been plausible regarding the journey despite the fact that he clearly does not remember it, he has absolutely committed himself to arguing that it took a long time and that he took a certain route.
    (iii) Whilst not determinative, the police's interpretation of the cell site evidence does suggest that the respondent was not on the move much before 11pm even if this does not give precise timings. This evidence therefore does not contradict the claimant's version whereas, even though we do not rely upon it, it does appear to contradict the respondent's case.
    (iv) Even on the respondent's 'best case', he was in the hotel room for 11 minutes which whilst not in accordance with the claimant's account of how long the attack took, is still 11 minutes of completely unaccounted for time that the respondent cannot explain.

62. If we were to take half way between the two opposing time lines, then the likely time that the respondent left the room was around 10.40. This means that there was ample possible time for the alleged attack to take place. This is something that the whole panel agree on.

Events after 22 March

Claimant's behaviour at work

63. The claimant accepts that at work, she largely behaved in the same way as she had done beforehand. She attended work the next day and behaved professionally in handling a grievance against DB.

64. The respondent states that she acted in such a way that she could not have been raped by the respondent. They rely on various behaviours at work but the main ones are:

    (i) She sent emails to the respondent inviting him to spend more time with her and, on their case to be overnight at hotels with her;
    (ii) She sent texts to the respondent giving unnecessarily intimate details about her health;
    (iii) Her voluntary attendance, in April 2017, at a 90 minute drinks after work in Milton Keynes with just Mr T;
    (iv) She went to a work's award night in London and attended a strip club with another colleague

65. We accept that she sent emails inviting the respondent to attend more branches with her. We do not accept that this meant that she would be staying overnight. The claimant frequently went to various branches but did not stay overnight because she had childcare responsibilities other than on Wednesday nights. However, her invitation to the respondent would necessarily involve more time with Mr T and probably more 'entertaining' time with him as he would probably stay over even if she did not. The claimant explained that she did this because she was worried about losing her job and was trying to persuade him that her management of the branches could work particularly if they showed a united front. It is also a logical response to the email he has sent where he states to the company at large that he is not happy with the way the branches are running and he is going to take back control of them. He sends a text [pg 128] stating that this email is not aimed at her but it clearly is. It is an email that broadcasts to the company that he is not happy with the overall branch management and is going to go back to the old model at least to some extent. Given that the claimant was worried about losing her job, we accept that she sent this email in an effort to persuade the respondent that she was doing a good job and to develop her relationship with the branches. The panel disagreed regarding the significance of this incident and discuss that in our separate conclusions below.

66. The texts messages at page 128 do give details about the claimant suffering from a UTI. The claimant states that she gave this information, only days after the 22 March, to try and 'inform' the respondent that he needed to be aware that the attack had caused her to develop a UTI. She stated that she spent a long time crafting the messages so as to relay to the respondent that his actions had caused the situation without actually saying anything negative. The respondent states that he found a little odd at the time. His text clearly says that it's a bit too much information for that time of the morning.

67. Overall, we conclude that these texts do not, on normal reading of them, have the significance that either party ascribes to them. The claimant shared her health issues but there is nothing to be ashamed of in having a UTI nor are its repercussions something that may not be shared with a colleague in circumstances where it means you need to work from home. We have already established that this was a work place with few boundaries and we do not think that it is remarkable that such information was shared in these circumstances. The claimant readily shared information about her daughter and her mother's health earlier on. We therefore do not think it supports the respondent's assertion that it somehow demonstrates that the claimant was not behaving in a way that suggests she had been attacked. She was a person explaining why she was going to be absent from the office.

68. By a majority (Ms Mitchell dissenting) we find that the claimant did attend drinks in Milton Keynes with the respondent. The respondent has a clear memory of the events. He had reason to be there for some period of time and the claimant did not dispute that in her witness statement – she simply says she cannot recall it. We conclude that her change from not being able to recall it to an adamant denial undermines her credibility in this regard. We as a panel then disagree as to the significance of this and discuss that further below in our dissenting findings.

69. The claimant states that she attended the strip club with a colleague from work (ZB) after an award ceremony, to avoid getting in the car and going back on her own to the hotel with Mr T. We did not find her account of that evening reliable. We found LS's account of assisting ZB to find her phone in the strip club the following day more plausible. As stated above we found LS to be a reliable and credible witness with her answers assisting both parties to degrees and consider that she gave answers that she believed to be truthful throughout. It is also clear on both accounts of the evening that the claimant would have been in the taxi with Mr T and another female colleague so she was not avoiding being on her own with him. We again disagree as to the significance of the claimant's version of events being found to be untrue. This is discussed further below.

<u>Claimant's behaviour outside work after 22 March</u>

70. The claimant has said that she informed her good male friend 'ST' on 30 March 2017 and DB on 31 March 2017. She then tells her mother on 24 May, her doctor on 25 May and the police on 26 May. We accept that the claimant told everyone as she describes apart from ST. We have no evidence that confirms that she had told ST. The text messages we were provided with do not confirm such a significant conversation and we were given no explanation of why ST was not giving evidence to the tribunal. Nevertheless, we can also accept that the claimant gains nothing by lying to us about this given that we accept that she did tell DB the following day. She also tells NA on or around 14 July 2017. We think that the claimant had far more to lose (and in fact did so) by telling colleagues about the attack. However the claimant's failure to call ST to give evidence to the tribunal or to give his details to the police as part of their investigation causes us great concern as to the truthfulness of her account in this regard.

71. The claimant's account of what happened that night differs. There are three versions that vary; her account to Ms DB, her account to the police and her account for the purposes of this hearing.

72. We accept DB's account that the claimant told her about 'giggling' with Mr T prior to the attack. That part of DB's account has remained unchanged. Whilst DB accepts that she has lied at various times regarding this situation, we found her to be a credible witness to a certain extent. We consider that she genuinely believed, at all times, that her convictions were correct. Unfortunately her convictions have varied over time and this has meant that her understanding of what happened has also changed as she views it through different prisms. What has not changed, regardless of the way she is looking at the situation is that the claimant told her about the attack and, by and large, the contents of what she says the claimant told her, do not differ. What differs are the motives she ascribes to the claimant's disclosure.

<u>The Claimant's health after 22 March</u>

73. The claimant developed a UTI shortly after 22 March. There is no evidence that links this to an attack given that she has a history of repeated UTIs before this. However the claimant does develop depression and is prescribed Citalopram (9 June 2017 (pg 648) and is referred for independent counselling for rape victims called ISVA which continues for 18 months after 22 March 2017 and is discussed in her GP notes (pg 633).

<u>Mr T's behaviour after 22 March</u>

74. Mr T states that his first knowledge that something was wrong was the letter dated 9 July 2017 he received from the police inviting him to the station [page 371] saying that an allegation of sexual assault had been made against him. It provides no further detail than that. He says he then received a call from NA asking him if he had heard from the police and telling him that the claimant had made allegations against him but not divulging what the allegations were.

75. We find this account implausible. We find that NA would have informed Mr T that the allegation was that he had raped her or at the very least that it was a sexual assault allegation otherwise she would not have called him. The police letter also confirms that it was a sexual assault allegation.

76. Therefore, contrary to what he now asserts, he knew that he was being accused of sexual assault by the claimant before he attended the police station. He has said that he only really realised that it was the claimant when he attended the police station but we do not accept that this is true.

77. He also states that the police only told him that the assault took place on 22 March when he attended the police station. We accept that this is likely to be the case given that the police letter gives very little detail.

78. Despite this however he attended the interview with several emails demonstrating the claimant's behaviour towards him. It is not clear from the police report what emails he attended with and whether they were all after 22 March or whether they included emails from before as well. Having viewed the video it is clear that Mr T is gesturing towards a file of papers held by his lawyer when he is talking about emails that he has printed off. We therefore find that he did take some emails with the claimant to the police station. We think that this can only have been done before he was told that the attack took place on 22 March but indicates that he knew it was about the claimant and it was about an alleged sexual attack. We therefore conclude that he was prepared, by the time of the police interview, to answer questions about an allegation of sexual assault by him against the claimant. It was not the complete shock to him that he now says it was.

79. He states that the detail of the assault were a shock and a surprise and that this led to him making mistakes regarding what occurred on the 22 March. The interview took place on 21 July 2017 several months later. The main error in the respondent's statement to the police is that he says they went for drinks in the office in the afternoon as opposed to going to the pub. The respondent says that he said this because he thought it was the most likely place as they often did have drinks in the office. He gains very little from lying. He accepts that there were drinks and he accepts taking the claimant back to the hotel. He states that he was unsure about where he had drinks because the police referred to the Pub by the wrong name. However they give the name of the pub after he has said that the drinks were in the office, not before, thus casting doubt on why he was so confused as he now states.

80. During the police interview Mr T states that he remembered a phone call the following morning and offering the claimant a lift from the hotel to the office. Claimant's counsel expressed disbelief that Mr T would remember that call but not the pub. The respondent was not able to explain the memory difference. As

a tribunal we have considered whether the respondent checked his phone records for that day in the hour/90 minutes or so he had between knowing the date and his police interview. This was not put forward as an explanation by the respondent though. Our interpretation of the significance of this contradiction of lack of memory coupled with very specific memory differs and we address it below.

81. The other discrepancy in the police interview is the fact that he states that none of the staff members, including him and the claimant were drunk, when they clearly were. It is as if he is trying to downplay that aspect. He also mistakenly states what route they take home. However, given that he was not driving it is not surprising that he cannot remember the route taken home. We have dealt with that issue in some detail above.

82. We consider that after the police interview Mr T did contact various witnesses who were also members of staff at the time. We find that he did call DB and tell her that the police were obtaining CCTV footage. We do not accept DB's account that he told her there categorically was CCTV footage – though she may have interpreted it that way. We find it plausible that he called DB and told her that the police were obtaining the footage and that it would show he had not raped the claimant. It was on that understanding that DB made the statement that was sent to the police (page 446).

83. We also find that he (or ZB on his behalf) spoke to NA and showed her the emails where the claimant invites Mr T to the branch visits with her along with telling her the narrative that rape victims would not behave in this way. For this reason NA withdrew her support from the claimant. There is no other explanation for NA to change her support so completely for the claimant. Someone, either the respondent or ZB, spoke to NA, showed her the emails between the claimant and Mr T and suggested that the claimant was lying. She accepted their version of events and changed her position and refused to speak to the claimant.

84. We found Mr T's statement that he delegated all information gathering and liaison with his criminal lawyers and the police to his colleague ZB hard to believe or understand. He has told us that this was because he was upset by the allegations. We find this implausible. We cannot accept that facing these exceptionally serious allegations, he did nothing to assist his lawyers in defending him. He states for example that he did not see the letter at page 507-512 before it was sent. We are extremely sceptical that such an important letter would be sent without Mr T's approval. Solicitors are likely to be guilty of misconduct if acting without appropriate instructions. We find his account of his behaviour after the allegation is made known to him to be strange at best and largely implausible. This is particularly the case given that he has not called ZB to give evidence to us.

85. We believe that it is most likely that he kept a low profile so that his colleague ZB could speak to staff relatively freely and discuss the claimant and her allegations in a way that cast continued doubt over the veracity of the allegations. Without ZB giving evidence it is hard to say why she was asked and why she took on this role yet was not at the tribunal to support Mr T during this hearing.

86. We did not find SH a credible witness. He had several reasons to want to get back at Mr T including his outstanding debts. The main allegation by SH was that Mr T had asked him for the contact details for some people SH knew who had once kidnapped and set fire to someone. Even if Mr T had said, following the allegation, that he might need their number, we find that this sheds absolutely no light on whether Mr T attacked the claimant. We find that any such statement will have been said flippantly and in jest when, whether true or not, Mr T would have been very upset to have had the allegations made against him. SH had no reason to genuinely believe that there was a threat to the claimant's life. We find his decision to communicate that there was to the claimant and the police hugely irresponsible and consider that the whole allegation and fall-out was due to him wanting to add pressure to Mr T as opposed to being genuine.

The Claimant's grievance and sickness absence

87. The claimant went off sick on 26 May 2017 and did not return to work. From then on she was on SSP as she had exhausted any entitlement to contractual sick pay. She raised a grievance on 9 August 2017. After 2 weeks the respondent replied stating that it would not investigate the grievance whilst the police investigation was continuing. The claimant resigned with immediate effect on 4 October 2017.

Credibility Issues – Mr T

88. There are various matters that undermine Mr T's credibility. We note in particular the lack of witnesses that he has produced for this hearing despite asserting at the preliminary hearing that he would be calling 6-9 witnesses. The most relevant witnesses that were missing were MB and ZB. No credible account has been given of why they did not give this tribunal evidence. Both are still known to the respondent and could have been asked. When the tribunal asked why they were not giving evidence Mr T said he did not want to put them through it but that they had said they would. It is not clear then why he did not ask them. By all accounts they could have given us vital evidence regarding several issues. Mr T has chosen not to call them.

89. Mr T has also made a statement that he says that he was told by the police that they had 'found' his car on ANPR data showing that he took the A282 route at a particular time and this was why they did not need to reinterview him. We do not accept that this happened. Whilst the police report is inadequate, we do not accept that it would not have recorded a matter which entirely absolved the

respondent and gave him a cast iron alibi as he now asserts. He has never made mention of this point at any time in the pleadings for this matter or his witness statements. Particularly his supplementary witness statement which specifically addresses the route he took. In addition his solicitor's letter to the police dated 10 November 2017 (pg 507) which asks the police to confirm that they will not taking any further action was written after Mr T says he had been told about the ANPR data. Were that the case then his solicitors would have referenced this concrete exculpatory information in that letter. Presumably they would also have been able to produce a letter with Mr T's permission, confirming that they had been told this by the police. We therefore consider that Mr T's attempts to persuade us that this had occurred to be extremely concerning.

90. Mr T's position regarding the culture of the organisation has been utterly implausible. Despite all the evidence to the contrary he has stated that it was not an organisation where much drinking took place or where sexual relations between staff were anything more than rumour. This is clearly not the case and to take such a stance has undermined our ability to trust him in relation to other matters.

Credibility Issues – Ms M

91. The claimant has also said/done things that undermine her credibility. She has at various points made statements to the tribunal that suggest that she is seeking to exaggerate what happened or her memory or understanding of what happened. These have included:

    (i) Suddenly remembering that he pushed her against the wall as they got into the hotel room – something she has never mentioned before;
    (ii) That she took a photo of a bruise on her chest and then deleted it as opposed to what she had previously said which is that she did not take a photo though she wished she had;
    (iii) She has stated categorically that LS was not at the pub that night when the video evidence shows that she was. No explanation has been given for that deliberately incorrect evidence;
    (iv) She initially stated that she wasn't sure if Mr T had ejaculated but then when there is very little DNA evidence on her suspender belt, she states that firstly she isn't sure if it was the right belt (whereas before she had been certain) and that she is sure that he did not ejaculate;
    (v) She has created what can best be described as conspiracy theories about someone accessing her LinkedIn profile and that the respondent has faked emails. We can see absolutely no benefit to the respondent of accessing her LinkedIn profile and the emails she says are forged serve no purpose to the respondent whatsoever. This gives the impression of someone who is trying to discredit the other and grasping at straws to do so.

(vi) She has not called ST to give evidence about her initial disclosure and not given his details to the police. No reason has been given for his absence from either process.

(vii) Whilst we are not deciding damages at this hearing, her witness statement contained evidence regarding her health that clearly attributed conditions which pre-exist the alleged attack as being 'caused' by the attack without any medical evidential basis being provided to us.

(viii) The version of events she disclosed to DB differs from the version told to the police and this tribunal;

(ix) She states that she believed SH's implausible assertion that Mr T was going to attempt to have her set on fire.

Dissenting factual conclusions

92. All of the above facts are agreed conclusions and statements other than where expressly stated. However different members of the panel placed different weight on those findings to reach their conclusions. We tried for 3 days to reach a consensus on what the findings we did agree on meant with regard to whether, on balance of probabilities, the alleged assault on 22 March 2017 occurred or not. Despite very careful deliberations; we could not. All of us consider that our decisions, even where they dissent, have been very difficult to reach due to the evidence we were provided with.

Majority factual conclusions – EJ Webster and Ms G Mitchell

93. We have concluded that the alleged sexual assault took place. We base this conclusion on all of the findings of fact set out above but set out here how those findings shape our conclusion about what happened on 22 March 2017.

94. Whilst we accept that the claimant has, at times before us and in the lead up to this hearing, embellished what happened or attempted to ensure that certain facts 'fit' the timeline, we consider that this has largely occurred in order to persuade people of what actually occurred to her, rather than because it did not happen. She is desperate to be believed because the event occurred and she has not been supported by the police in gathering sufficient evidence to support that; thus she has taken her own steps to try and show us, the Tribunal, what happened.

95. We have concluded that there was sufficient time for the attack to take place. We prefer the claimant's interpretation of the journey and think it more likely than not that MB took the M25 route thus meaning that the respondent did not leave the hotel much before 10.45 at the very earliest and 10.55 at the latest. We base this conclusion on the traffic flow data that was provided to us showing that the traffic flow was clear that evening and this would have been known to MB as demonstrated by the various photos of the route that we were taken to by both parties. We consider that the failure to call MB as a witness in this

matter has meant that it has been much harder than it needed to be to reach a conclusion regarding the journey home and address the respondents' failure to call him further below.

96. We also prefer the claimant's evidence regarding the journey home because we consider that Mr T's evidence about the existence of ANPR evidence which 'cleared' him was deliberately wrong and stated in order to try to convince the tribunal that the journey took a long time. Making such a statement when he had never suggested such evidence before at any stage and when his solicitor's letter (written after he says they and he knew about this crucial exculpatory evidence) makes no reference to it, meant that we found his credibility was very low.

97. We also consider that his failure to have even considered locating evidence of any emails he might have sent during the crucial time when he says he was in the car on the way home at an earlier time than the claimant says, and his suggestion that such evidence exists which would absolve him, suggests that he is both not particularly concerned by the need to explain himself in the face of such serious allegations and an easy willingness to allude to the existence of evidence in the hope or with the assumption that we will believe him without him actually producing that seemingly crucial exculpatory evidence.

98. We also considered that his flat refusal that there was a culture of alcohol and sexual relationships between staff despite all evidence, (including from him and LS to the contrary) reduced his credibility further. We find that the backdrop of a culture and organisation almost without any appropriate boundaries means that him overstepping those boundaries on 22 March was more likely, particularly in light of him denying that such a culture existed at all. This would have been harder to believe if the culture had been one of formality and strict guidelines as opposed to one where lap dances were paid for at Christmas parties, affairs between staff were common and alcohol regularly consumed to excess in the office.

99. There were two witnesses that Mr T could have called but chose not to; MB and ZB. Mr T stated that MB was retired but he knew where he lived and provided us with no convincing evidence as to why he had not asked him. He also chose not to call ZB. We accept he may not have seen her for some time but there was no plausible reason for her not to give evidence to us given that she was, according to him, the main person who dealt with matters on his behalf after the allegation was made and would have been privy to many aspects of the evidence and investigation. He is clearly in touch with her or could be if he chose to be, and she provided a date and time stamped video of the 22 March to LS during the course of the hearing. We therefore have drawn negative inferences from her absence.

100. In contrast whilst the claimant has not always been consistent in her account and has displayed behaviours that have caused us doubt, we have found that her embellishments and inconsistencies do not go to the heart of the credibility of her evidence about the incident itself but go to demonstrating someone whose life has been turned upside down and who is desperately looking for answers and reasons for everything that happened before and afterwards. The whole panel agreed the list of concerns that we have regarding her evidence above but, on balance of probabilities, we still find that we prefer her evidence over Mr T's regarding whether the assault took place or not.

101. The claimant has been consistent in stating that something happened that night. We suspect that she was not sure what to call that 'something' for some time thereafter. She did not necessarily immediately know that it was rape because she only partially remembered it. She was embarrassed by what had happened and was perhaps unaware as to whether she initially consented or not – though of course we heard no evidence on this point and we are fully aware of the fact that she was so drunk she was unlikely to be able to consent. We are not making findings of fact on this point, merely making observations and they are largely irrelevant in light of the respondent's blanket denial that anything happened at all. We do not accept the respondents' assertions that the delay in her reporting the incident undermines her credibility. We disagree; it is well known that sexual assault victims respond in many different ways including delaying in reporting. We think that must particularly be the case where much of the incident is unknown to the victim.

102. The respondent was in the claimant's room for a minimum of 30 minutes according to our findings of what his journey time was likely to have been. We do not consider it plausible that they chatted for that long given that the respondent's version of events is that he just put the bags down and left.

103. The claimant's account of the attack has varied but we do not consider that it has so significantly varied as to undermine the fact that the assault occurred. We conclude, on balance of probabilities, that Mr T had sex with the claimant when she did not consent or did not have the capacity to consent.

104. The claimant did disclose the incident to DB soon afterwards on 1 July. At this point we accept that it was DB who labelled it as rape. This, in our view, undermines the suggestion that the claimant made the allegation because she was worried about her job when the letter regarding her probation came through. She had been worried about her role beforehand, she continued to be worried about it. When she disclosed to DB on 1 July she did not have any reason to doubt her role any more than she had before the assault. We accept that in the weeks following the assault she behaved no differently towards the respondent or at work but we do accept that she behaved differently outside work.

105. We also accept the explanation that the reason she decided to tell her mother when she did, was that she had realised that her job was no longer worth fighting for because of the probation meeting and she no longer wanted to put it above everything else. We do not consider that she was motivated to disclose at this point because of financial difficulties. She had been in worse financial positions in the past and worked through them. By going off sick she experienced an immediate drop in income because she went onto SSP. Both she and the respondent gave evidence to say that she would have found work relatively easily elsewhere had she wanted to; therefore had it not been for the assault changing how she felt about things and affecting her health, we consider that she would have started looking for alternative work and moved on.

106. Her health has deteriorated since the assault. As agreed, we make no findings as to causation but we consider it probative to determining liability (though not determinative) that she has been prescribed citalopram and counselling since the assault.

107. Finally, whilst also not determinative, we accept claimant's counsel's submissions that making a rape allegation is not an easy thing to do and that this must be put into the balance when considering, on balance of probabilities, whether the assault occurred. We have born in mind the case of Re H. and Others (Minors) that states that such a serious allegation is less likely to have happened, but do not consider that this necessarily outweighs the enormity of making a rape allegation. The damage the disclosure has had on the claimant's personal circumstances and family is huge. If, as is suggested by the respondent, that she has done this for financial gain, it seems as if to date it has had the opposite effect.

108. The dates on which she issued her claims to the tribunal and the CICA were in line with the deadlines she had to submit such claims by. We have no doubt that the respondent would have said her tribunal claim was out of time had she waited any longer to submit her proceedings. The timing of those claims is not and should not be determinative of her motive. She tried to get the matter dealt with by the police but that has not happened and as stated above we find the police investigation and report into this matter was poor. One of very few routes open to the claimant to have this issue determined by a court was through an employment tribunal and the only remedy available in these circumstances is financial compensation. That fact should not be held against the claimant. Further had that been her sole motive we find that she could just as easily made a lesser complaint of harassment which could have garnered similar levels of compensation through less traumatic means.

109. Therefore for all of the above reasons, we consider that there is sufficient cogent evidence to make a finding, on the balance of probabilities that the attack occurred on 22 March 2017.

Dissenting factual conclusions – Mr R Shaw

110. I conclude that, on balance of probabilities, based on the evidence, the assault did not take place. As stated above, I agree with my colleagues on the vast majority of the findings of fact but do not agree with their subsequent interpretation of what those facts mean.

111. I recognise the reporting of a rape would be a daunting for anyone, and there might be good reason for delay in (or not to) report it. Here, however, there is a clear link in the timeline to the claimant's uncertainty about the security of her employment. She had started working for the company on 26 September 2016, so her six month probationary period would appear to have ended on 25 March 2017. The tribunal was satisfied that Ms M was concerned about the security of her employment, yet Ms M's evidence was that she had been told by Mr T that she had passed her probation, and this might well have been reinforced because, by then, the six month period had passed. However, at this time there had been no formal meeting to confirm the end of Miss M's probation, and it is clear from the emails with HR that Mr T did not consider the probationary period had come to an end. This led to an email on 23 May 2017 which confirmed she had not yet passed her probationary period, and extending it by four months with a review to be held in July, and the following day to a request for her to attend a performance management meeting. It was on that day that she told her mother she had been raped and in the following two days her doctor and the police.

112. Before this time, Miss M says she had told ST and DB.

113. I am concerned that ST, to whom the claimant says she first disclosed the allegation, was not a witness to the police or the tribunal, as what she said in her first report of the allegation seems very relevant in both a criminal investigation and to this tribunal claim. Although the claimant was very active in volunteering the details of other potential witnesses to the police, she did not pass on his details (which were readily available to her from their text conversations) because, she says, she was not asked for them. This is implausible. ST is a friend who is a businessman who, she says, advised her to tell a colleague, and would have been a credible witness removed from internal pressures of being an employee of the first respondent. The text messages we were referred to (214) as evidence of the disclosure clearly show they met and discussed Mr T, and that the claimant had some sort of issue with him. Following this up, on 3 April 2017 she says she had been *"a stupid cow for getting in to that situation. Just need to work out my next move I suppose. Not so ready though x*". In response he said *"Yep just keep your powder dry"*.

He finishes the text, "*Got to go off to golf x*". I find it incredible that the claimant makes no reference to having by then made a disclosure to DB (on 1 April 2017) (as she says she was advised) and that, a friend having recently told him she had been raped, ST would terminate the exchange because of a golf commitment. These exchanges could easily have related to performance issues of which she was aware and about which she was concerned at the time.

114. There are three versions from the claimant of what happened at the hotel on 22 March. The disclosure to DB happened during a very long conversation while DB was driving, when contact kept cutting out. DB's statement to the police describes what she was told by the claimant about events and is in far greater detail than the claimant subsequently told the police or was in the claimant's witness statement, yet the claimant's evidence was that she was gradually recalling more details through flashbacks. This suggests that the claimant is now not telling the truth.

115. DB says the claimant said Mr T took her bag to the room, got the keys out of the bag and opened the door. He then "*started to kiss her, she was giggling. He pushed her on the bed and continued to kiss her, she was giggling*". It then goes on to describe the alleged rape and that the claimant covered her face with the bedding until he left. Although we were shown statements from DB which flip-flopped between backing Mr T or the claimant, her evidence about what she had been told on 1 April was relatively consistent, in particular about opening the door and the giggling. Neither of these details nor the covering of her head were referred to in the claimant's statements. In cross examination the claimant said that she did not tell DB that she was giggling, and said that the respondent pushed her against the wall and kissed her. This was a new detail not previously referred to.

116. I understand that such a traumatic event whilst very drunk could lead to different versions or varying memories, but the claimant has not given us an explanation for these different versions nor the fact that she continued to change her story even to us – such as suddenly remembering in evidence that he pushed her up against the hallway wall in her room. The timing of the disclosure to the police and others being so closely aligned with clear evidence of performance management putting her employment at risk, leads me to question her credibility.

117. I found the claimant's credibility was harmed further by the lack of evidence, changes in her story and her repeated embellishments of various facts and incidents. Whilst many of them served no purpose, the fact that some were largely incidental meant that I felt that overall she was creating a narrative retrospectively to fit what she says happened as opposed to it having happened.

118. The issues where she changed her story or lied to the Tribunal are generally as set out at paragraph 91 above. I found her statements to the police that she wished she had photographed the bruise on her chest, and to the tribunal that she had taken a photograph but had deleted it, to be a wholly incompatible. If she had deleted a photograph, she might have provided her phone to the police to recover it, and this would have been physical evidence to support her claim. I conclude she lied to the tribunal because there had been no such photograph. Similarly, I found her shifting evidence regarding the suspender belt and whether Mr T ejaculated to be bald attempts to shift her evidence to fit with the absence of DNA. It was only in cross examination that she shifted her evidence to say that he had not ejaculated.

119. There were further embellishments or alterations to the narrative which can only have been deliberate, such as when referring to the email from Mr T on 20 March (177), saying that he had *"hoped to see a bigger increase in the figures*" when he actually said "*what we have seen is a decrease*", and, in relation to the email about DJ (181) "*it was no surprise that I would back DJ*" when he actually said that he was "*rather surprised you sent this to myself and DJ*". These are small matters but they go to a willingness to embellish, even when the facts are clear. Together with the implausible allegation she believed her life was in threat, and that she had been poked by Mr T while at The Wharf when she then texted that "*All cool*", I conclude they were deliberate attempts to cast herself in a favourable light and Mr T in a poor one. I am unclear why she was insistent LS was not at The Wharf on the evening in question and the video was of another evening, when we accept she was and the video has clearly been shown to be of that night. I conclude this can only have been to suggest LS's other evidence in support of Mr T was also false. The embellishments and what I perceive to be falsifications, provided to me, a picture of someone who was creating a story and who, whenever evidence appeared to suggest that she was incorrect, changed her evidence to suit her perception of what was needed to offset other people's doubts and reinforce her story.

120. Of particular importance to me in terms of determining the claimants' credibility is whether the Milton Keynes drinks took place. Her witness statement says she does not recall going for a drink, but in cross examination she said that she hadn't. Mr T was clear and detailed about going for a drink with her, and it seems very plausible that he would want to go for drinks with colleagues given that he had time to kill. The claimant subsequently confirmed that they had had a nice time with her text (254) which clearly states that she "really enjoyed" Friday. I do not consider this is the language of a message confirming a successful business meeting as the claimant suggests, but a reference to a social interaction. I am aware that there is no right or wrong way for a rape victim to react however, such an unprompted, positive and proactive text suggests that she was happy to spend time with the respondent. This is

also confirmed by her invitation for Mr T to join her on other trips. This seems incompatible with him having raped her.

121. Although I understand she has now set up her own company, I consider it telling against Mr T that ZB was not a witness for him. Nevertheless, she is not a direct witness to most key events and I think her evidence would largely have been about dealing with the police investigation and matters concerning the fall-out from this and rumours about the allegations with staff. She would also have been able to give evidence about affairs, including whether she had an affair with Mr T as claimed. But I do not consider any of this is central to the allegations against him. Similarly, MB might have been a witness. But Mr T's evidence was that he had joined the company after retirement, had then retired from his job with R1 before being re-employed as Mr T's driver, and around the time of the incident which was now four years ago, had retired completely. Mr T's evidence was also that MB and his wife were unwell. MB's evidence to the police was that he did not remember the night, so it would largely have been confined to generalities. I do not see the absence of either potential witness tips the balance against Mr T.

122. In cross examination, Mr T said he had been told by his solicitors that an ANPR camera had confirmed his route home. Despite the clear and extensive flaws in the police investigation, if a camera had done this I am clear it would have been referred to in the police file and by Mr T's solicitors in writing to them. So, I am satisfied his car was not caught on camera. But Mr T was aware all the evidence had been disclosed so it gained him nothing to make the claim his solicitors had told him this. His statement in this regard does not lead me to conclude he raped the claimant.

123. I do accept that there was a culture of drinking and sexual relationships within the office but I consider that there is too significant a leap from this to finding that, on balance of probabilities, that Mr T attacked the claimant. There was, in my view insufficient evidence to make that finding and, on the contrary, there was positive evidence to suggest that the claimant has not been truthful about various matters thus making her account of that night unreliable.

124. I consider that the culture of the organisation was one where gossip and rumour mongering was rife and the rumours of Mr T settling claims against him fuelled the claimant's decision to make the allegation in the hope of securing a settlement. The fact that one has not since transpired does not mean that this was not her original motivation.

125. For all these reasons, I do not consider the balance of probability tips in favour of the respondent. I consider that the assault did not take place.

<u>The Law</u>

124. S13 Equality Act 2010 - Direct discrimination

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

125. S26 Equality Act 2010 - 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.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

sex;

126. The right to protection from sexual harassment under the Equality Act is governed by section 40(1) Equality Act 2010 which provides

S40 Equality Act 2010 - Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment.

127. Employment is defined for the purposes of the relevant part of the Equality Act 2010 under section 83(2) Equality Act 2010.

128. S 136 of the Equality Act 2010 sets out the burden of proof in sexual harassment cases. This is a two-stage burden whereby (1) if there are facts from which the court could decide, in the absence of any other explanation, that a contravention of s. 26(2) occurred, the court must hold that that contravention occurred (s.136(3)) – stage one; (2) but this does not apply where the Respondent can prove that the contravention did not occur (s.136(3)) – stage two.

129. Igen v Wong Ltd [2005] EWCA Civ 142 remains the leading case in this area. There is a two-stage test whereby the Claimant must first establish facts from which the tribunal could infer that discrimination took place. If that is established on the balance of probabilities the burden shifts to the Respondent to prove the treatment was "in no sense whatsoever" on the protected ground. The Court of Appeal in Barton v Investec Henderson Crosthwaite Securities Ltd 2003] IRLR 332 confirmed that the shifting burden applies to all forms of discrimination.

130. We accept claimant's counsel's submissions that there is no authority to suggest that a harsher burden than this should apply to cases of sexual harassment. Both parties noted the comments of Lord Nicholls in Re H. and Others (Minors) (Sexual abuse: Standard of Proof) [1996] AC 563 when considering the standard of proof in civil sexual abuse cases, where he said [at 586]: "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

131. Once the burden has passed to the Respondent, it is on them to show that a contravention of s. 26(2) EqA2010 did not occur. This is stage two of the s. 136 burden.

Conclusions

132. The majority of the tribunal have concluded that the sexual assault took place on 22 March 2017. We accept that the assault was unwanted either because the claimant was so intoxicated as to not be able to consent or because she started to say 'No' during the assault and the respondent failed to stop.

133. The assault involved Mr T raping the claimant so it was clearly of a sexual nature. In addition given that it was a sexual assault, by its very nature, it had the purpose and/or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

134. We therefore uphold (by a majority) the claimant's claim for sexual harassment.

135. The claimant's claim as pleaded was that her constructive unfair dismissal was an act of direct discrimination. It is not clear as to why it was not

pleaded as a constructive dismissal in response to an act of sexual harassment.

136. We accept that the claimant resigned in response to the attack. Such an attack clearly amounts to a fundamental breach of the implied clause of trust and confidence. The respondent argued however that she had affirmed the breach because she waited until 4 October 2017 to resign. A time lag of almost 7 months.

137. Although the claimant took several weeks to process what had occurred to her and decide to report the matter to the police, we do not consider that this is sufficient to amount to her affirming the breach. We consider that it would be almost impossible for an individual to accept that they had been raped by their employer and waive that as a breach of contract. The time lag of 8 weeks or before she reports it to the police does not amount to her affirmation. Perhaps if she had indicated in some way to the respondent that she had in fact agreed to sex after the event - then perhaps the situation would be different – however she did not do that. It is correct that she did not behave in a way that would suggest that she was now repelled or scared by the second respondent but we do not believe that by continuing to work and fulfil her employee obligations amounts to a waiver of such a fundamental breach of contract. We conclude that it amounts to an individual trying to make sense of what has happened to her.

138. Once the claimant had reported the matter to the police, we consider that this demonstrated that she did not accept the assault and therefore did not accept the breach of her contract. She had reported it to an external body with the relevant authority to investigate such a matter. She did not return to work or attempt to do so. Mr T is the CEO and sole owner of the first respondent so there was no question that the first respondent would somehow behave differently from Mr T and provide the claimant protection if the claimant brought an internal grievance. We therefore consider that by reporting the matter to the police the claimant showed that she was not accepting or waiving any such breach.

139. The claimant brought a grievance which the respondent did not investigate given the police enquiry. The respondent's behaviour in this regard was sensible. The claimant stated that she brought the grievance because she had been advised to do so and did not expect the respondent to investigate it. Therefore her decision to resign following the first respondent's letter saying that the investigation would be stayed does seem strange in terms of timing.

140. However we accept that the claimant resigned because of and in response to the attack which was a fundamental breach of her contract, which she had not affirmed. The timing of the resignation was partly prompted by the somewhat redundant grievance process but not caused by it. The fact that the

grievance was not going to be properly considered for an indefinite period of time was the final reason that prompted her to resign at that moment in time but she resigned in response to the fundamental breach of her contract that had not been affirmed. (Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19).

141. The claimant resigned because she had been sexually assaulted. That assault occurred because of her sex. Neither party addressed us regarding an appropriate hypothetical comparator. Although harassment claims do not require a comparator, direct discrimination claims do. It may feel a slightly artificial process identifying a comparator in a case such as this when the findings of fact are as they are. Nevertheless, we consider that the second respondent would not have treated a man in the same circumstances (drunk after a work function and requiring assistance back to his room) in the same way. We were certainly provided no evidence or arguments to suggest that this was the case.

142. The claimant has shifted the burden of proof as we have found, on balance of probability, she was sexually assaulted by the second respondent and subsequently resigned as a result. The respondents have provided no non-discriminatory reason for that treatment. We therefore conclude that the claimant was sexually assaulted because of her sex. She resigned in response to that fundamental breach of contract and therefore her constructive dismissal amounts to direct sex discrimination. Given the slightly clumsy nature of that analysis, we also note that in our view in any event, the claimant's resignation flows from the act of direct sex discrimination, namely the assault.

143. We therefore uphold (by a majority) the claimant's claim for direct sex discrimination.

Employment Judge Webster

Date: 23 July 2021

Corrected on 26 August 2021