



## EMPLOYMENT TRIBUNALS

Claimant

**Mrs. J. Madeley**

v

Respondent

**Cambrian Group**

**Heard at: Birmingham**

**On: 29 & 30 November, 1 & 2**

**December 2021**

**In chambers 3 December 2021**

**Before: Employment Judge Wedderspoon**

**Members : Mrs. K. Ahmad**

**Mr. A.A. Moosa**

**Representation:**

**Claimant: In Person**

**Respondents: Mr. C. Crow, Counsel**

## JUDGMENT

1. The claimant's claim for sexual harassment is well founded and succeeds.
2. The claimant's complaint of victimisation is well founded and succeeds.
3. In so far any complaints are out of time, the Tribunal finds it is just and equitable to extend time.
4. The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.
5. The wrongful dismissal claim is not well founded and is dismissed.
6. The claimant's complaint of direct discrimination is not well founded and is dismissed.
7. By 9 December 2021 the claimant (if she so decides) will update her schedule of loss.
8. By 5 January 2022 the claimant will disclose to the respondent any fit notes, pay slips of new employment, benefits received since the end of her employment with the respondent, applications for employment, pension contribution information.
9. By 19 January 2022 the respondent will compile an updated bundle of documentation for the remedy hearing and provide a paper bundle to the claimant.
10. Witness evidence as to remedy should be exchanged by 2 February 2022.
11. By 9 December 2021 the claimant will disclose to the respondent relevant medical material from April 2020 to date concerning her contention that her mental health was affected by the respondent's discriminatory treatment.
12. A remedy hearing will take place in person at Birmingham Employment Tribunal on 7 March 2022 for one day.

## REASONS

1. By claim form dated 8 October 2020, the claimant brought complaints of constructive unfair dismissal, direct sex discrimination, harassment related to sex, wrongful dismissal and victimisation.
2. The respondent had prepared a list of issues to be determined. On reading the case management order dated 16 December 2020 the Tribunal considered the claimant had made a section 39 (2)(c) of the Equality Act 2010 claim. Mr. Crow agreed and amended the list of issues for day 3. It was agreed that the issues to be determined by the Employment Tribunal were as follows :-

### Constructive unfair dismissal:

1. Has C proved that R breached the implied term of 'trust and confidence' (a fundamental/repudiatory breach) by:
  - i. Allowing JB to behave in a sexual manner around YP;
  - ii. Allowing JB to move to another house whilst under investigation, notwithstanding the nature of the allegations being investigated (which C says were allegations of 'sexual harassment');
  - iii. Not investigating C's complaints 'properly';
  - iv. Not supporting C by failing to ensure C would not come into contact with JB;
  - v. Not supporting C by refusing the request for paid time off (instead informing her that it would have to be sick pay when JB was suspended on full pay).
2. If there was a fundamental/repudiatory breach/breach of the implied term of trust and confidence:
  - i. Did C affirm the contract before resigning;
  - ii. Was the resignation in response to R's conduct/fundamental breach;
3. If there was a dismissal:
  - i. What was the principal reason for dismissal?
  - ii. Was it a potentially fair reason?
  - iii. Was the dismissal fair or unfair (per s.98(4) ERA).

### s.13 Direct Discrimination because of sex:

4. Has C proved that R dismissed her by failing to "respond appropriately" to C's complaints of sexual harassment by:
  - i. Not investigating C's complaints 'properly';

- ii. Not supporting C by failing to ensure C would not come into contact with JB;
  - iii. Not supporting C by refusing the request for paid time off (instead informing her that it would have to be sick pay when JB was suspended on full pay).
5. If so, was that 'less favourable treatment: was it because of C's sex and/or because of the protected characteristic of sex more generally?

s.26(1) and s.26(2) Harassment:

6. Has C proved the following conduct:

- i. JB unnecessarily brushing past C touching her arms, legs and body 'from April 2020 until his suspension on 18.5.20'
  - ii. JB making comments about a picture of C with clients: 'who is that in the picture; when do I get to meet her; she's a bit of alright';
  - iii. (on or about 11<sup>th</sup> or 12<sup>th</sup> May) JB coming close to C, putting the picture in her face and saying, "who's that bit of fluff, she's a bit of alright" and "it's when the picture disappears you need to worry love";
  - iv. (on or about 11<sup>th</sup> or 12<sup>th</sup> May) JB making similar comment to P. Amerson;
  - v. JB making comments to C: "aren't you a luck girl getting to sleep with me" when on night shifts with C;
  - vi. JB asking C if she was happily married, where she lived and what her husband looked like;
  - vii. JB saying he had checked staff on social media before starting at the house;
  - viii. (in the dining room) JB looking C up and down, smirking, and saying "I bet you're a handful";
  - ix. JB saying that men liked curvy women and boys liked skinny girls, whilst looking C and Ella Preece up and down;
  - x. JB making comments about clients with regard to their stomach and breasts, and drawing comparisons with his partner;
  - xi. During a medication count: JB saying "she's got a lot of condoms, does she use them?".
  - xii. R telling C that her allegations 'were not investigated as sexual harassment of C but rather as a safeguarding issue of the clients'.
  - xiii. R made C to feel that it was her fault.
7. If so, was the conduct unwanted?
8. Is so, did it relate to sex and/or was it conduct of a sexual nature?
9. Did the conduct have the 'harassing effect' (i.e. the effect described in s.26(1)(b) taking into account the matters referred to in s.26(4)?

10. If required, has R proved that took all reasonable steps to prevent JB from harassing, or from doing anything of that description (per s.109(4) Eq Act 2010).

Victimisation:

11. It is admitted that C's emailed complaint of 13.5.20 amounted to a protected act.

12. Has C proved that she was subjected to the following treatment:

- i. On or about 10<sup>th</sup> or 11<sup>th</sup> November 2020, by Abigail Jessica Clarke saying that she could not provide a reference for the Claimant;
- ii. By R failing to make C's wages clear in October 2020;
- iii. By R saying, in November 2020, that C owed R about £235.

13. If so, was that treatment 'a detriment'?

14. If so, was the detriment(s) because of the protected act or because the R believed C had done or might do a protected act?

Limitation (not simply related to the harassment claims):

15. Were C's complaints presented in time? If not should there be an extension of time?

Remedy (if appropriate):

16. What compensation should be awarded?

17. Is it possible that C would have been dismissed or left employment fairly/without discrimination at some relevant stage? If so, how should that be reflected in the compensation?

18. Did R unreasonably fail to comply with a relevant ACAS Code of Practice? If so, how should that be reflected in the compensation?

19. Did C unreasonably fail to comply with a relevant ACAS Code of Practice? If so, how should that be reflected in the compensation?

The hearing

3. The Tribunal was provided with a bundle of 2 pages. By agreement the parties added further documentation to the bundle. The claimant relied upon her evidence and her mother's evidence. The respondent relied upon the evidence of Jason Burns, former Team Leader; Abigail Clarke, Team Leader in Serene House; Alex Hornby, Regional Manager; Jamie Offer, Employee Relations Investigation Manager; Laura Duckett, Registered Manager of Hemford House and Sian Thomas Jones, Registered Manager. The parties agreed that the claimant would give her evidence first. Due to the fact that Mr. Burns was no longer employed by the respondent and his limited availability, his evidence was interposed on the second day. It was further determined that due to the amount of evidence to be heard the hearing would only deal with liability.
4. At the commencement of the hearing the Tribunal was informed that the claimant had served her witness statement on time and served her mother's statement a few days before the hearing. The respondent had served its statements in September 2021 and sought permission to amend the statement of Mr. Burns. The respondent did not object to the claimant relying upon her mother's evidence. The claimant objected to Mr. Burns amending his statement. The claimant accepted that she had time to read the amended statement and she had prepared her cross examination. The Tribunal determined that it is not unusual for witnesses to amend their witness statements at the time they confirm their witness evidence. There was nothing remarkable about this. However, if the evidence was substantially amended from the original witness statement exchanged that is a matter which the opposing party may wish to cross examine the witness about. In the circumstances the Tribunal accepted the amended statement of Mr. Burns.
5. The respondent made an application under Rule 50 of the Employment Tribunal rules to anonymise the name of the alleged perpetrator of sexual harassment Mr. Burns during the hearing of the evidence on the basis that the allegations made against him were serious and were career ending. The claimant objected to this application. The Tribunal refused the application. Pursuant to Rule 50 (2) the Tribunal in considering whether to make an order under this rule should give full weight to the principle of open justice and to the convention right of freedom of expression. The Tribunal took account of the allegations made against Mr. Burns but acknowledged that a number of witnesses are subject to serious allegations in the employment tribunal. Naming a person in the course of a public hearing can interfere with the article 8 right of respect to private life and in the case of **Clift v Slough Borough Council (2011) 1 WLR 1774** it was held that this includes a right to protection of reputation. An order anonymising an individual interferes with the right of the freedom of expression. Interference with article 8 and article 10 rights are permitted where necessary and proportionate. To anonymise a person also is an interference with the common law principle of open justice see **A v BBC (2015) AC 588**; Lord Reed in the Supreme Court stated *"It is a general principle of our constitutional law that justice is administered by the courts in public and is therefore open to scrutiny. The principle is an aspect of the rule in law in a democracy. In a democracy where the exercise of public authority depends on the consent of the people governed the answer must lie in the openness of the courts to public*

*security*” Baroness Hale described the principle of open justice as one of the “*most precious in our law*” (**R v Secretary of State for Justice 2016 1 WLR 444**). The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation; **Fallows v Newsgroup Newspapers Limited (2016) ICR 801** and there is a requirement to provide clear and cogent evidence that harm will be done by reporting. The Tribunal notes that respect should be given to the general public to be able to discern the difference between allegations made and findings. It is insufficient simply to assert that allegations are serious and could be career changing to derogate the fundamental principle of open justice and the respondent’s application was rejected.

6. The Respondent applied to amend its reason for dismissal to some other substantial reason. The claimant did not object. The Tribunal determined the application should be granted because it is important that the Tribunal hear all the evidence to determine the reason for dismissal and the respondent was seeking to relabel the reason and there were no objections by the claimant. In the circumstances it was in the interests of justice to allow the amendment.
7. The respondent also sought clarification as to whether the Tribunal would have time to determine both liability and remedy in the allotted time. The Tribunal took account of the evidence to be heard, the fact that the claimant was a litigant in person and noted that discrimination claims are fact sensitive so that the level of any award of is dependent on the precise findings of the Tribunal. The Tribunal determined that the hearing would be confined to liability only.
8. The claimant requested that she be permitted to read her witness statement aloud in the Tribunal. The Tribunal noted that it had read the statement as is usual but the claimant stated it would assist her to give her evidence. The respondent did not object. The Tribunal permitted the claimant to read her witness statement.
9. The parties provided the Tribunal with a reading list and the Tribunal took the time to read all witness statements and the documents that were identified.
10. In the course of cross examination of Mr. Burns, it became evident that the document included by the respondent at page 276 was not the true training record for the witness. In particular, it detailed training dating back to 2018 when Mr. Burns was not employed by the respondent. Mr. Crow took instructions and produced a witness statement from Noreen Coyle, Learning and Development Administrator who explained that the respondent had employed two persons called Jason Burns. Her evidence to the Tribunal was that details of training records were migrated from one system to another; the two employees named Jason Burns had their training records effectively added together. The claimant accepted this explanation and there was no need for the respondent to call Noreen Coyle.
11. The claimant in cross examining Mr. Burns insisted on a yes or no response to her questions. The Tribunal reminded the claimant that the witness answered a question in a manner they wanted to; further clarification could be sought with a further question.
12. The claimant requested that her mother, Mrs. Davies, sit beside her; there were no objections from the respondent. On day 2 the claimant’s mother

was heard to mutter something to the claimant whilst the claimant was in the witness box. Mrs. Davies was reminded that she should not talk to the claimant whilst she was in the witness box. On day 2 during the course of her cross examination the claimant became very upset. She told the Tribunal she was taking medication and receiving counselling. Mr. Crow was reminded about the fact that the claimant had been unwell and pursuant to the Equal Treatment Bench Book that cross examination of the witness should take this into account. At some points of the claimant's questioning she became upset and stated she did not want to answer a question. The Employment Judge attempted to re-word the question and ask a further question to the claimant. Mr. Crow objected to this because although he thought a reasonable adjustment had to be in place, the process had to be followed and he had to put his case. There was no attempt by the Tribunal to deviate from the correct process; the Tribunal was entitled to seek clarification of the answer to assist its fact finding. During questioning of the claimant about the order of the alleged harassment allegations comparing those to the complaint on 13 May the claimant became very upset. She was given a break and the claimant's mother was invited to step outside the Tribunal for a few minutes to comfort her. On resumption of the hearing Mr. Crow for the respondent said he had overheard Mrs. Davies speaking to the claimant about the case and inviting her to show the Tribunal the photograph (of the claimant and the females in the unit). The Judge noted that she had not reminded the claimant and Mrs. Davies not to discuss the case but stated in future the evidence of the claimant should not be discussed. Mrs. Davies apologised. Towards the end of day 2 whilst the claimant was under cross examination, Mr. Crow informed the Tribunal the claimant's retention of a photograph was a safeguarding concern and would have to be reported by the respondent to the relevant regulatory body. The claimant stated that the photograph had the faces of the females in the unit blanked out. The Tribunal stated that it was unnecessary for the Tribunal to hear about that; it was a matter for the respondent to deal with outside of the Tribunal process. The claimant said she felt unwell and wanted to stop. The tribunal adjourned for the day.

13. On day 3 during the cross examination of Mrs. Duckett, disciplining officer, the claimant became very emotional and raised her voice concerning the claimant's case that Mrs. Duckett should have disciplined Mr. Burns for his conduct where the care of vulnerable young people was at stake. Mr. Crow objected to the question and stated if the claimant was represented a representative would have been stopped. The Employment Judge agreed that it had become very emotional. The claimant apologised. The Tribunal suggested to the claimant she should pause her questioning for a few moments to allow emotions to cool down. The hearing thereafter progressed.

## The Law

### Constructive unfair dismissal

14. Section 95 (1) (c) of the Employment Rights Act 1996 ("ERA") relevantly provides *"For the purposes of this Part an employee is dismissed by his*

*employer if (and only if)-the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

15. An employee seeking to establish that she has been constructively dismissed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that she resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).
16. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232**. The two part test was emphasised in the case of **Mr. M Sharfudeen v T J Morris Limited t/a Home Bargains (UKEAT/0272/16)**.
17. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13  
*"It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious"*. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *"..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"*. That case has been followed since in **Cooper v Oates (2010) EWCA Civ 1346** but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *'Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract'*.
18. The case of **Morrow v Safeway Stores plc (2002) IRLR 9** held a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract and entitling the employee to resign and claim constructive dismissal. Whether any conduct amounts to a repudiatory breach is a matter for the tribunal to determine having heard the evidence and considered all the circumstances.
19. In **British Aircraft Corporation Limited v Austin (1978) IRLR 332** it was held that the employers are under an obligation to act reasonably in dealing with matters of safety or complaints of lack of safety which are drawn to their attention by employees.



20. A fundamental breach of contract cannot be cured but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence; **Assamoi v Spirit Pub Co Limited (2012) All ER (D) 17.**
21. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16).**
22. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493.** Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent “last straw” and following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

Direct sex discrimination

23. Section 13 (1) of the Equality Act 2010 states “*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*”.
24. Section 23 (1) of Equality Act 2010 states “*On comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.*”
25. Pursuant to section 13 of the Equality Act 2010 the Tribunal should concentrate primarily why the Claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails; see paragraph 11 of **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 1.**
26. Less favourable treatment is because of the protected characteristic if either is inherently discriminatory or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker’s mind; **Nagarajan v London Regional Transport (1999) IRLR 572.**

Burden of proof

27. Section 136 (2) and (3) of the Equality Act 2010 states “(2)..*If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision*

*concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision.”*

28. Section 136 (2) of the Equality Act 2010 envisages a two-stage approach to the burden of proof in discrimination claims. The Claimant has the initial burden of proving a prima facie case of discrimination and if this hurdle has cleared the burden shifts to the Respondent to provide a non-discriminatory explanation (**Ayodele v Citylink Ltd and anor 2018 ICR 748**).
29. If the Claimant can prove a ‘prima facie’ case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.
30. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show ‘something more’ which indicates that discrimination may have occurred:  
*‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination’.*  
**(Madarassy v Nomura International plc [2007] ICR 867 at [56] per Mummery LJ); Laing v Manchester City Council (2006) ICR 1519.**
31. The tribunal should not assume that an inadequate or unsatisfactory explanation for prima facie discriminatory conduct could entitle the Employment Tribunal to conclude that there was discrimination without considering whether any explanation for the conduct which was not indicative of racial discrimination; **Teva (UK) Limited v Goubatchev (UKEAT/0490/08)**.

### Harassment

32. Section 26 (1)(a) of the Equality Act 2010 states “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.
33. Pursuant to section 26 (2) of the Equality Act 2010 it states “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).
34. Whether the conduct is related to a relevant protected characteristic is a question of fact. In deciding whether conduct had the proscribed effect,

tribunals should consider the context; (**Bakkall v Greater Manchester Buses (South) Limited (t/as Stage Coach Manchester 2018 ICR 1481)** including whether or not the perpetrator intended to cause offence.

35. Dignity is not necessarily violated by things said or done which are trivial or transitory particularly if it should have been clear that any offence was unintended.
36. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase; **Richmond Pharmacology Limited v Dhaliwali (2009) IRLR 336.**

#### Victimisation

37. Section 27 (1) of the Equality Act 2010 states  
*“A person (A) victimises another person (B) if A subjects B to a detriment because (a)B does a protected act or (b)A believes that B has done or may do a protected act. Subsection 2 (a) categorises protected acts as including (d)making an allegation (whether or not express) that A or another person has contravened this Act. The EHRC Code states that a protected act need not be the only reason for the detrimental treatment; it is enough if it is one of the reasons.*

#### Statutory Defence

38. Section 109 (4) of the Equality Act 2010 states  
*“In proceedings against A’s employer (B) in respect of anything alleged to have been done by A in the course of A’s employment it is a defence for B to show that B took all reasonable steps to prevent A (a)from doing that thing or (b)from doing anything of that description.*
39. The EAT in the case of **Allay (UK) Limited v Gehlen (UKEAT/0031/20)** held that section 109 (4) is designed to encourage employers to take proactive steps aimed at effectively combatting discrimination in the workplace. The training did not meet the requirements of a reasonable step as it was two years prior to the discriminatory acts and had become stale. HHJ Tayler stated that the Tribunal was *“entitled to conclude the training was stale and was no longer effective to prevent harassment and that there were further reasonable steps by way of refresher training that the respondent should have taken.”* HHJ Tayler emphasised that the defence is available only to the employer that can show that **“all reasonable steps to prevent harassment have been taken.”**

#### 40. Time

41. A discrimination claim may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

Where conduct extends over a period, the act is to be treated as done at the end of the period (see section 123 of the EqA). There is a distinction to be made between an act of discrimination which has continuing consequences and an ongoing situation or a continuing state of affairs which extends over time (**Hendricks v Commissioner of Police for the Metropolis**).

42. The discretion to extend time is broad. In **Miller v MOJ (UKEAT/0003/15)** it was stated that time limits are to be observed strictly; the EAT can only interfere if the decision is *Wednesbury* unreasonable/perverse; the prejudice to the respondent is customarily relevant and section 33 of the Limitation Act 1980 contains a useful checklist. Lord Justice Underhill in the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23** that it was a useful exercise to consider the factors in section 33 of the Limitation Act 1980 but that there is no requirement to go through the list. The most relevant factors are likely to be (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent. In the case of **Wells Cathedral v Souter** the EAT held that a balancing exercise is required for the just and equitable test and that if the use of the grievance procedure exhausted the limitation period that is a relevant factor for the Tribunal to consider in the balancing exercise.

### **Facts**

43. The claimant commenced her employment with the respondent from 1 September 2017 as a residential care worker. The respondent is a group of companies which provides specialist, behavioural, educational and residential services for children and young people with challenging behaviours and complex care requirements. The claimant worked at Serene House which was a home for females (aged about 15 to 17 years) who had suffered sexual exploitation. The claimant really enjoyed her work and in particular that she had the opportunity to make a difference to young women's lives.
44. Part of the claimant's duties involved working nights or undertaking sleep ins. This was undertaken with a colleague. In respect of holiday entitlement, the claimant's contract stated at paragraph 13.8

*"We shall not pay you in lieu of untaken holiday except on termination of employment. If, on termination of your employment you have taken more hours holiday than you have accrued then the company may deduct such accrued but untaken hours of holiday from any payments due to you."*

45. The claimant's contract of employment was subject to a number of standard policies including the disciplinary policy. Pursuant to that policy there was a right to suspend with pay for the purposes of investigating any allegation of misconduct or neglect (see paragraph 16.2, page 69 and page 96 paragraph 6.11). The use of suspension in circumstances where *"If at any point before investigation or during investigation it is believed that the matter involves serious or gross misconduct is of a sensitive nature or where the presence*

*of the employee at work may hinder the investigation, the employee may be suspended from work and will be paid their basic rate of pay. Any decision to suspend shall be made by a senior manager in conjunction with HR, and they will discuss with the employee how they would prefer their absence to be communicated to colleagues.”*

46. The disciplinary procedure provides a list of disciplinary offences including bullying or harassment (paragraph 5.9, page 95).
47. The respondent also had an Equality and Diversity Policy which stated that it was unlawful to discriminate directly or indirectly in employment because of sex and stated that every employee was required to assist the company to meet its commitment to provide equal opportunities in employment and avoid unlawful discrimination. The respondent also provided a confidential counselling service to anyone who experienced discrimination. An employee assistance helpline number was also provided (see paragraph 7.19 page 85).
48. The purpose of the Harassment and Bullying Policy and Procedure is stated at paragraph 3.1 (page 87) as *“The company is committed to providing a work environment in which all staff feel comfortable and in which everyone is treated with respect and dignity, regardless of gender, sexual orientation, transgender status, marital or family status.....These are known as protected characteristics.”* The policy went on to define harassment at paragraph 3.3 and 4.4.2 namely *“..bullying at work or at a work related event or arising from work may be unlawful. Employees found liable of harassment or bullying may face disciplinary penalties up to and including dismissal and could be personally liable to pay compensation in legal claims. Serious harassment may be a criminal offence.....harassment is defined as any unsolicited and unwelcome action, behaviour and/or conduct related to race, sex, gender reassignment, marital status, ethnic origin, religion or belief....is considered objectionable or offensive..”*
49. The policy deals with an investigation into harassment allegations at paragraph 5.9 (page 89) and it states *“the investigating manager will take such steps as are reasonable and feasible to remove or reduce the contact the victim has with the alleged harasser during the investigation. The company reserves the right to suspend, give special leave or temporarily redeploy either the employee suspected of bullying or harassment or the employee raising a complaint of bullying or harassment during the investigations, if it is considered in the interests of the individuals or the company to do so...Suspension in these circumstances will be for as short a time as possible does not constitute disciplinary action and will be on full pay.”*
50. Pursuant to paragraph 5.16 of the Harassment and Bullying policy it is stated that following the investigation the complainant and the employee will be informed of the outcome of the investigation *i.e. whether to dismiss the complaint (pursuing any action as appropriate) or to instigate disciplinary action against the employee. In certain circumstances an investigation may reveal factors which suggest that an informal conclusion is most appropriate.*

51. The Grievance Procedure (pages 103 to 107) states at paragraph 4.1.5 that a complainant has *“a legal right to be accompanied at that (grievance) meeting and at any further such meetings by a fellow worker or a trade union official. The meeting may be postponed at your request and for up to five working days if your chosen companion is not available to attend on the date set for the meeting in question. Cambrian may insist on any trade union official being certified as being experienced or trained in accompanying employees at grievance hearings.”*
52. The Code of Conduct set out the standards of behaviour required by employees to act in a professional and appropriate manner in the workplace. Paragraph 4.2 states *“it is not exhaustive and employees are expected to conduct themselves professionally and appropriately at all times and adhere to local guidelines and directives as well as those highlighted within this document..”* Paragraph 5.4 states *“The guidance and details of the Code of conduct for employees shall be covered in all induction programmes.”* Further in respect of equality, diversity and inclusion its states at paragraph 6.20 *“It is the responsibility of every employee, regardless of position, to promote inclusivity and diversity. The company seeks to ensure that the workplace is supportive of its staff and one where individuals respect is shown to everyone regardless of age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, ethnic background, culture, sexual orientation, religion or belief, sex or any other factor.”* The code of conduct also referred to professional boundaries at paragraph 6.72 it states *“as our workforce are operating in a position of trust it is imperative that all staff maintain professional boundaries with both colleagues and the young people in our care.”*
53. Mr. Burns commenced his employment as a Team Leader at Sandiway (one of the respondent’s homes); this was another home for young females who had suffered sexual exploitation. Mr. Burns employment history involved work in the prison service and children’s care. His employment with the respondent was subject to a 6 month period of probation. Allegations were made against Mr. Burns by a young person at Sandiway that he had made comments about her weight and asked whether she was sexually frustrated (see page 116). His evidence was that the young person vandalised his car. On 10 April 2020, he was transferred to Serene House as a “precautionary step”. At Serene House he was to be supervised and he could not be left alone with young people; see the risk assessment conducted by Sian Thomas Jones on 13 April 2020 (page 261-2).
54. Mr. Hornby, Regional Manager of the respondent, described the allegations made against Mr. Burns as *“inappropriate use of language”*. His view was that the alleged conduct of Mr. Burns did not meet the criteria for suspension and was a code of conduct matter not a safeguarding one. A risk assessment was carried out so that it was considered there was no significant risk of harm. When asked by the Tribunal whether Mr. Hornby considered that comments about a young person’s weight and/or whether a young person was sexually frustrated could affect the mental well-being of a

young person, Mr. Hornby accepted that it could. The effect of this alleged conduct on the mental health of the young person did not appear to have been considered in the risk assessment at the time. The Tribunal considered that Mr. Hornby's description of "inappropriate use of language" in these circumstances in the context of vulnerable young people who had been subject to sexual exploitation minimised the actual allegations made.

55. Mr. Hornby investigated the allegations against Mr. Burns. There was no dispute that allegations were made by young people against staff on occasions. Mr. Hornby stated that the young person had made false allegations before and the two other young people and two members of staff who could have had the opportunity to hear the allegations did not hear them. There was no corroborative evidence and he concluded the matter with no further action by 18 May 2020. Mr. Hornby felt Mr. Burns had been targeted and they had damaged his car. He was unable to conclude any wrongdoing on the part of Mr. Burns. Ultimately the young person's account was not believed.
56. On Mr. Burns arrival at Serene, the claimant and other colleagues were not informed about the allegations made against Mr. Burns at Sandiway but they were informed that Mr. Burns should not be left alone with any young people.
57. On or about 25 April 2020 the claimant spoke to Danny her deputy manager about Mr. Burns conduct and on 26 April 2020 the claimant texted her deputy manager about Mr. Burns conduct. At some point it was discussed with Sian and the claimant was told to put her concerns in an email.
58. On 27 April 2020 (p.206) Mr. Burns had a supervision with Sian Thomas Jones, Registered Manager of Serene House. By this point, Mr. Burns who had been in Serene House for about 17 days, had undergone a mediation with a colleague, Eilish concerning a conversation he had with her about cot death. Ms. Jones who had raised the complaint with her regional manager and HR had been told to raise the complaint with Mr. Burns via a supervision (page 252). Also at this time, Mr. Burns had two meetings concerning the allegations made against him at Sandiway and the investigations were still ongoing. Sian informed Mr. Burns that she had little warning about his move to Serene and the move of Jess (another member of staff) was not linked to Mr. Burns coming to the home. Mr. Burns raised that the staff were accepting of him at Sandiway but the young people were not so accepting (page 207). Mr. Burns stated that he felt he was on the defence at the present time and he was lacking in confidence. He stated he was good at his job and needed the team to be behind him. Sian and Mr. Burns talked about his background in residential care and the culture of the different settings he had worked in; he had not worked in the child sexual exploitation sector before. In the context of the discussion about a cot death with his colleague Eilish, Sian explained to Mr. Burns that this was quite personal to Eilish and she was upset. Although Mr. Burns was unaware of Eilish's background, he continued the conversation when he was asked to

stop. Mr. Burns said that the conversation was about a dead baby and had come about due to Mr. Burns disclosing his childcare and sleeping arrangements due to his son sleeping in his bed at home. It had been described that Mr. Burns had gone into quite significant detail which upset Eilish. Mr. Burns explained that this was not done on purpose to upset Eilish as he doesn't know her background. At this point although Mr. Burns carried the title of team leader, he was actually working in the role of residential care worker as he was subject to a period of probation. Sian proposed to have a discussion with the team to explain about Mr. Burns arrival and explain that Jess was supporting another home for a period of time and that she would be returning to Serene.

59. Mr. Burns was reminded by Sian that he needed to stay professional in his conduct and conversation otherwise this could impact on his probationary period. It was suggested that he be more guarded in his conversations rather than give his full life story. Mr. Burns did not allege he was being bullied. He said there was an uncertainty "*you can see it and feel it*". Sian raised with Mr. Burns that he would have more loose conversations with the young people he looked after as in a placement with 19 year old and was an unregulated placement. Mr. Burns stated that he was working blind and his language would probably over step the mark as he gets used to the setting. Although Mr. Burns had completed an induction he had not been given the induction booklets or read any policy at Sandiways. At Serene he was given the code of conduct and policy and inductions booklets to complete by the end of May.
60. Mr. Burns had also made a comment about the number of condoms a young person had in their personal box. It was explained to Mr. Burns that the young person had started free time and home contacts and had completed a placement plan with staff; so the condoms were being supplied for her own safety as she was 16 years old; young persons' had to learn and keep themselves safe. Sian advised Mr. Burns to keep his conversations a little guarded as opposed to giving his full life story.
61. There were no further complaints made by Mr. Burns that he was being mistreated until 18 May, before he was suspended.
62. On 13 May 2020 the claimant raised a grievance (page 108). She sent her email to Sian, the manager, Danny Jones, the deputy manager and Jack Smallman the regional manager. She stated  
*"This email is to inform you of situations that have occurred at Serene House regarding the behaviour of co-worker (Mr. Burns) as this is not the first incidence there have been previous instances involving making comments about the young peoples weight and appearance and discussing his intimate relationship with his partner in great detail that were brought to the managers attention. This has now moved on to making comments that are derogatory/subjective and have sexual connotations that are offensive towards myself and another female co-worker Ella Preece. Making myself and co-worker Ella Preece feel degraded and uncomfortable in the workplace. Situations where co-worker Pete Amison pointing at me "saying*



*who's that bit of fluff she a bit of alright. ": Pete Amison replied you know who that is its June. Co worker then proceeded to come into the office with the picture crouch down in front of me putting the picture up towards my face and say to me "whos that bit of fluff" pointing to me in the picture. When asked to put the picture down he said "its when the picture disappears you need to worry love" and walked away laughing (what was he suggesting he would do with the picture this is disgusting). Touching on arms and leg with myself and co worker Ella Preece and situations with the young people where this happened. Comments when on the sleep in with him as staff leave "aren't you a lucky girl getting to sleeping with me laughing. (There is nothing funny about this) Comments in the kitchen about "how older men like curvy women and boys like skinny women" Stating to co worker Ella Preece "if you lived with me I would feed you cream cakes everyday to feed you up." Comments such as "what's a pretty girl like you doing here". Saying I bet all the girls are jealous of your looks." Constant touching and inappropriate comments. This situation needs addressing as this is sexual harassment in the workplace and has become more serious and the company have a duty of care towards female staff members and the young people in their care. I have informed management that I will not be left alone on a sleep with this person or share a shift as I do not feel safe or comfortable to do so. I await written confirmation that you have received this email and how we are going to move forward."*

63. Sian immediately emailed Mr. Smallman a copy of the claimant's grievance and a statement from Ella Preece dated 13 May 2020 which stated  
*"On the night of the 30/4/2020 when in conversation with JB, JB made a comment about an injury he had witnesses on another person from the ankle to the knee when making these comments JB touched my ankle and then my knee. On 12/5/2020 JB made a comment to me about being interested in my what boyfriend looked like, asking for descriptive details including his age, whether he was taller than JB, whether he has facial hair and what colour hair he had. JB also asked to see a picture of him, which I did not show him. JB also made comment about wondering what staff JM's husband looked like and whether he was taller than JB. Later o JB made a comment to me stating "if you lived with me I'd feed you up." Later on JB repeated this comment in front of a young person and stated that he would feed me cream cakes." Both forwarded emails from Sian were titled "Inappropriate behaviour and sexual connotations and comments from a co-worker."*
64. Sian informed the claimant that she had forwarded her complaint to Jack Smallman. The claimant asked how her Sunday/Monday shifts would be affected. Sian stated she would look at that tomorrow and come back to the claimant with a plan. On 14 May 2020 Sian contacted the claimant to state that she had requested Danny to call the claimant with a plan until she and Jack Smallman could get some clarity from HR on what happens next. The claimant was informed to work on Saturday and not Sunday and then start late on Monday with a 12 to 1 start.
65. On the morning of 14 May 2020, Mr. Smallman forwarded the emails to Shona Watson, Regional HR Partner and asked whether Mr. Burns' alleged conduct was sufficient for Mr. Burns to fail probation (page112). He made no

enquiries as to whether Mr. Burns should be suspended. Sian informed LADO. Shona Watson was on leave at that time.

66. On 18 May 2020 Shona Watson advised Shilleen Freeth, Head of Human Resources (page 116); she stated  
*“..The allegations are around inappropriate comments and touching that make the staff feel very uncomfortable and the below directly refers to is sexual harassment – they are also alleging this behaviour is aimed at young people. Incidentally we have just closed a case against Jason as NFA where a young person has made allegations that JB made comments of a similar nature to her (regarding her weight and if she was sexually frustrated). In that case there was no evidence to back the allegations up so she could not proceed – the YP alleged there was 3 other people in the room, all 3 were spoken to and none remembered the comments. Additionally, this young person lived at a different home -so there isn’t crossover. Jack states that his behaviour has been raised to JB previously by Sian (home manager) and is documented but I haven’t seen this personally. He asked if we could look to fail probation but I think these comments are quite concerning and should be investigated and I think given the nature of the comments and the fact that these are CSE homes that we should consider suspension pending investigations. What are your thoughts on this?...”*Ms. Freeth did not make a decision about suspension but agreed with Shona Watson given the nature of the allegations and that they needed investigation. She told Ms. Watson to flag her recommendations with Mike Ore, the director.
67. On 19 May 2020 Mike Ore made the decision to suspend Mr. Burns pending investigation. Jack Smallman acknowledged in his email of the same date at 9.14 a.m. stating *“Thank you for your support and contribution yesterday to the decision of Jason’s suspension I can confirm he left site with no issues raised. “*
68. There was an unacceptable delay in deciding to suspend Mr. Burns. Mr. Smallman the regional manager does not appear to have considered suspension and does not appear to have authority to make a decision about Mr. Burns’ suspension. The evidence of Mr. Hornby to the Tribunal was that a HR partner or Mr. Ore, the respondent’s director had authority to suspend a staff member. In his interview with Mr. Offer on 13 November 2020, (page 259) Mr. Smallman was directly asked by Mr. Offer why if Shona was off why wasn’t another HR person consulted. Mr. Smallman was not able to say and said he felt he risk assessed the situation with Sian and found an outcome to protect both parties; this amounted to the changing of the shifts of the claimant and Mr. Burns. The Tribunal found that the delay and lack of explanation by Mr. Smallman was unsatisfactory and led the Tribunal to conclude that the respondent failed to react promptly to the serious sexual harassment allegations made against Mr. Burns with particular regard to the similar allegations he had faced at Sandiway.
69. Sian suspended Mr. Burns with Danny, the deputy manager and Mr. Burns was informed it was for a safeguarding and conduct concern (page 123-4).

70. Regrettably by reason of this delay and the lack of communication with the claimant on 18 May the claimant saw Mr. Burns in the car park as she came on shift (this was before he was suspended). The claimant was told to go home. She felt she was being blamed by having to be off work and then being sent away. The Tribunal accepts that the claimant did genuinely feel this. The respondent failed to react in a prompt manner to the allegations made by the claimant or take the necessary steps to ensure she had no further contact or sighting of him when she returned to work.
71. On 18 May 2020 (page 215) 11.48 am sent an email to Sian having raised his concerns on the morning before he was suspended. There had been no previous complaints about his treatment save that he had felt unwelcome by young people which he raised with Sian at his supervision on 27 April 2020. He alleged that on 17 May 2020, Peter, Maz and Lydia were discussing him in front of a young person. He said he was openly questioned. He does not say he was bullied. There was no evidence before the Tribunal that Mr. Burns complaint was investigated by the respondent at any time but it was discussed with him in July 2020 with Laura Duckett in the course of his disciplinary hearing.
72. On 18 May 2020 the respondent suspended Mr. Burns on full pay (pursuant to his contractual entitlement) for reasons of misconduct and safeguarding. The Tribunal finds that the respondent was entitled to suspend Mr. Burns taking account of the serious allegations made against him and pursuant to the disciplinary policy was duty bound to pay Mr. Burns full pay (page 96 paragraph 6.11). The claimant raised a concern that Mr. Burns was paid in full whilst suspended whilst she was advised to take sick pay and did not receive special leave pay. The respondent was not asked directly at the tribunal hearing why the claimant had not been granted special leave and whether this was discriminatory. From the reading of the relevant contract there does not appear to be any contractual right for an employee to obtain full pay on special leave.
73. The Tribunal found the failure to inform the claimant promptly about Mr. Burns presence at the home on 18 May was very poor organisation on the part of the respondent. The respondent failed to contact the claimant in time to stay away from Serene; this failure led to the claimant coming to work and seeing Mr. Burns in the car park. Sian or Danny should have called the claimant to inform her not to attend on 18 May or changed her shift again so that this would have ensured the claimant would not come into contact with Mr. Burns. However, the claimant accepted at the tribunal hearing that this lack of organisation on the part of the respondent was not by reason of her sex. However, she was left feeling unprotected and she was ushered off the site.
74. Mr. Sam Probert was appointed as investigator of the complaints. Pursuant to the respondent's harassment and bullying policy (page 89 at para 5.10) the investigator should investigate the complaint as thoroughly as possible. The Tribunal did not hear evidence from Mr. Probert. He mentioned briefly at page 156 the allegation of Mr. Burns touching the ankle and knee of Ella

concluding that it could not be proved or disproved because it was one word against another but he failed to identify as part of the investigation (page 125-6; 152-155) the allegations of touching of the claimant despite it being mentioned page 115. The physical touching of co-workers were the most serious allegations made against Mr. Burns but they were not pursued by the respondent for inadequate reasons.

75. Mr. Probert conducted a number of interviews including with the claimant on 8 June 2020 (pages 133-7); Ella Preece (page 137-140); 18 June 2020 Marilyn Falconer (p.140-1); Eilish Stanley (p.142-4); and Peter Amison (p.144-5). Mr. Probert also interviewed Mr. Burns on 2 July 2020 (p.126-132) and on 16 July 2020 Jessica Clarke (page 146-7) and Tara Vickers (p.147-8). Mr. Burns response to the allegations is that he had not referred to the claimant as a piece of fluff but said the women looked like dolls in the photo; he felt his words were twisted; he was concerned about the weight of some of the young people. He described no one speaking to him on a shift. He accepted he commented about the number of condoms. He accepted he *"randomly said I don't sleep with my partner"* (page 130). In respect of the allegation of touching of the ankle and knee of Ella in the context of describing an injury, Mr. Burns said *"No I wasn't involved in this..I didn't witness any injury.."* He did recall saying that *"I'm a feeder and I said that I would fatten her up.."* Eilish statement says that he was asking whether female members of staff were married and when asked why by a young person Mr. Burns said *"well if she could cook maybe I would want to get to know her."* She corroborated the comment that Mr. Burns said *he's not missing out on anything*. Mr. Amison stated that Mr. Burns pointed to a photograph with the claimant in and stated *"nice bit of fluff"*.
76. At an interview with the claimant on 8 June 2020 (pages 133-7) the claimant was asked (page 134) when was the first instance she thought she was not happy about something or that is not right and the claimant stated it was the first time were left alone at 11pm *"aren't you a lucky girl getting to sleep with me."* The claimant found this offensive because she was not a girl, she was married with two children and it was not the sort of thing you should say as a member of staff or that you should say anyway. She had been working with Mr. Burns for about one week. The next incident reported was the discussion with Eilish about cot death. The claimant then said he talked about his own relationship and stated although he was not sharing sharing a bed with his partner *"he was not missing out"*. This was alleged to have been said in the lounge in front of the young people. The claimant also alleged that a photograph had been taken with the young people on a go - karting trip and Mr. Burns had picked up the photo and said *"She is a bit of allright. When do I get to meet her"*; he meant the claimant. He was alleged to have shown the photograph to another male member of staff and said *"who is that bit of fluff she is a bit of all right."* He told the claimant that when the picture disappears then she should be worried. The claimant alleged this had a sexual connotation. This was in the presence of Maz (Marilyn Faulkner). He told the claimant that older men like curvy women and younger men like skinny women. The claimant alleged he had made comments to Ella *"what is a girl like you working here"*. He made comments about her big eyes and lips and stating older men liked curvy women and

younger men liked skinny women and that if she lived with him he would feed her up on cream cakes. Ella had told the claimant Mr. Burns had said this. The claimant stated that Mr. Burns was clever and did not say the comments out loud (page 135). The claimant also said that Mr. Burns had made comments about the girls and their weight stating *"Oh my god look at her stretch marks my missus does not have stretch marks like that."* This comment was about one of the young people and he made it to Ella. She described that it moved to the next level when she was alone with Mr. Burns. He touched her arm, leg or knee if making a joke and he was very clever about it. He looked up a male colleague on social media. He was also able to describe Ella's boyfriend in detail and asked the claimant about her husband to find out what he looked like. He did not make comments to the young people directly but make comments about them to staff. He described one young person *"She has piled on the weight."* The claimant recalled going into the office and Mr. Burns was doing the medications and said *"bloody hell that girl has a lot of condoms I have never used that many in my life does she ever ask for them."* She was not asked by Mr. Probert in any detail about the touching allegations.

77. The claimant made clear to Mr. Probert how badly she was affected. Mr. Probert told the claimant that Sian Thomas Jones would have a supervision with her on her return The claimant was unhappy about this because it did not make clear what her options were (page 204).
78. On 9 June 2020 (page 203) the claimant raised her concern about pay. Mr. Burns was placed on full pay whilst the allegations were investigated whilst the claimant was informed to take sick pay. She had to return to work because she was the sole earner in her household; she made the choice of keeping the roof over her head over her mental health and she was placed in this position by the respondent. She felt she should have been paid compassionate leave. The claimant was not sure about who the decision maker was in the respondent
79. On 21 July 2020 the investigation report was completed (pages 125 to 157) which recommended disciplinary action against Mr. Burns. His conclusion was that despite only having worked at Serene for a short amount of time and having only completed a handful of shifts with some members of staff, Mr. Burns has at times made staff feel uncomfortable with some of the comments which he has made. This appears to be comments to and about female staff in particular. Although Mr Burns denied the majority of the comments Mr. Probert concludes *"it should be considered that more than one staff member is able to provide an account of when they have heard JB discuss his sleeping arrangements with his partner, cot-death and the physical appearance of staff (male and female)."* Mr. Probert, the investigator specifically assessed whether Mr. Burns had given a good explanation about why people had made these allegations against him; Mr. Burns had stated that no one speaks to him and it is bullying (page 129). However, Mr. Probert concluded *"I did not feel that JB was able to provide a genuine reason for staff making these allegations, this despite having spoken to staff whose names he provided as being able to support his*

*defence. Although the staff spoken with did not raise any concerns about JB's conduct, this does not disprove the existing concerns..".* The mitigation put forward by Mr. Burns was expressly rejected by the investigator.

80. The Tribunal heard from both the claimant and Mr. Burns about the allegations. The claimant was subject to a detailed cross examination by the respondent in respect of alleged inconsistencies in her evidence and it was suggested to the claimant that she should not be believed. The Tribunal found the respondent's approach at the hearing to be contradictory to the respondent's own investigation report; the conclusion of which was to find that the claimant's allegations were true. In the course of cross examination, the claimant did take objection or insult to some of the questions put by the respondent and expressly stated she refused to answer. This was an unhelpful approach by the claimant.
81. The Tribunal having heard both the claimant and Mr. Burns at the hearing preferred substantially the evidence of the claimant. The Tribunal concluded that some realism should be adopted as to the accuracy of recollections of events and that they will not be absolute perfection. The respondent made much of the fact that in respect of the physical touching allegations the claimant has added reference to the touching of "a hip"; and added that Mr. Burns was "leering". The claimant was unable to recall the date when Mr. Burns said "*I bet you're a handful*" and looked her up and down. The Tribunal accepted her explanation that although this latter comment was not included in her email dated 13 May she had previously spoken to her manager Danny about this and a number of comments from Mr. Burns and that she failed to mention this at the time of her interview with Mr. Probert because she was upset. The Tribunal found that this comment was sexually motivated. Overall, the Tribunal concluded that this did not change the veracity of the claimant's evidence who was recalling the events some time before and she was not asked by Mr. Probert or anyone else from the respondent about the specific particulars of the physical touching allegations at page 115 of her grievance. The Tribunal concluded that the claimant was doing her best in terms of recalling events which were very distressing and painful to her.
82. Mr. Burns when asked about the allegations tended to state "*it was not his recollection*". He said he raised his concerns about the lack of acceptance by staff at his supervision with Sian but this was inconsistent with the notes which raised his substantial concerns that young people did not accept him. The Tribunal did not accept that the Mr. Burns was picked on by members of staff and preferred the evidence of the claimant that she was a professional colleague. He accepted he made a comment that older males tend to prefer larger ladies as his opinion and women in the photograph wearing make up looked like dolls. He accepted that he used the word "girls" to describe the females in the picture. The comments about the number of condoms the young person had in the medication box was a comment he stated out of concern for the young person. He said he did not intentionally brush against the claimant, space in the kitchen was tight. He denied picking up a picture (of the claimant) and stating she was a bit of all right or touching Ella. He

could not recall making a comment about a young person and comparing his partner's stretch marks. Mr. Burns stated that some of his comments were taken out of context including the allegation that he stated to the claimant she was a lucky girl to be sleeping with him (on a sleep in at Serene) which was said sarcastically. He did not accept that this had sexual connotations. Mr. Burns evidence was that he said "aren't you lucky." The Tribunal found Mr. Burns tended to deflect and blame others and did not find him a credible witness.

83. In respect of the claimant's allegation that Mr. Burns said he looked up staff on social media, this too was not mentioned in her grievance. The claimant gave evidence that Mr. Burns looked up a male member of staff on social media; this was referred to in her interview with Mr. Probert. The Tribunal did not consider that this was sexually motivated at all.
84. In respect of Mr. Burns making comments about a young person's weight, the claimant accepted that part of the role that she and Mr. Burns carried out was to deal with all aspects of a young person's health and he was right to raise the weight of a young person during supervision. The claimant eventually accepted that this was not raised as a sexual harassment allegation.
85. The Tribunal accepted the claimant's explanation that the kitchen was not a narrow galley kitchen but had an island in its centre. The claimant asserted that Mr. Burns did look at a picture of her and say "who is that..she's a bit of all right or she's a bit of fluff" and also that he stated you need to worry when it disappears; the Tribunal found the claimant credible and accepted her evidence and found Mr. Burns comments to be sexually motivated.
86. In respect of the comments made by Mr. Burns about the number of condoms a young person had, the claimant felt that this was inappropriate but she said it was not sexual harassment. In respect of the claimant's allegations that Mr. Burns brushed past her or squeezed past her touching her hips, the claimant stated that she had raised this with her manager and accepted it was not articulated in her written grievance or interview but she has raised inappropriate touching in her grievance. The Tribunal accepted that the claimant had stated in her grievance she was inappropriately touched and accepted the claimant's evidence that Mr. Burns did squeeze past her. Mr. Burns had denied this in his evidence but the Tribunal noted corroborative evidence of this allegation in the bundle from Maz Falconer (page 150).
87. On 31 July 2020 Mr. Burns attended a disciplinary hearing before Mrs. Duckett. (p.158-164). Mrs. Duckett, Registered Manager of Hemford. She was a senior support manager in the Child Sexual Exploitation Shropshire. She had received training in equal opportunities and was familiar with Cambian's policies on equal opportunities and anti-bullying and harassment. She was supported by Laura Clothier, Regional HR Advisor.
88. In the course of the disciplinary hearing Ms. Duckett stated "*I am not going to go through the report because a lot of it has been covered by Sam the*

*investigations manager. It was really that I want to get to my thinking around how you are feeling but also how you have supported prior to this".* The Tribunal found this approach to be very unusual in particular as this was a disciplinary hearing dealing with sexual harassment allegations found to be credible following an investigation.

89. Mr. Burns stated that he was absolutely disgusted by the claimant's behaviour. He felt that his account about his son sleeping in his bed was sexualized. He said there was an inconsistency in what he is alleged to have said to Eilish or that a young person was present. He disputed the allegations but did say he said he had a full marriage. He said he was ignored for the first hour of the day and he had informed Sian about this. He said he did have concerns about the young persons weight but did not say it to their faces. He could not recall saying that a young person has stretch marks worse than his wife. He suggested that he was not accepted at Serene House. He said that he was painted as a sex pest because his son slept in his bed. The Tribunal finds that the fact that Mr. Burns slept with his son in a bed was not the concern raised by the claimant. Mr. Burns stated that he was not denying anything but things were blown out of proportion. Mr. Burns appeared to trivialise the complaints. He said he had made complaints about his treatment two days before he was suspended. The Tribunal finds that Mr. Burns made this complaint on the day he was suspended. He described the claimant who was less cold towards him, loaded the bullets and Eilish loaded the gun. He described looking at a photograph because he recognised someone in the picture as someone he went to school with. He said that the claimant told him to put down the photo. He admitted that he referred to Hayley as a "doll". He acknowledged that he might have said to the claimant about the photo "are you worried about it going missing". He disputed that he touched Ella's ankle or knee. He said to the claimant about being the unlucky buggler on the shift doing a sleep in with him. Mr. Burns discussed his experience before moving to Serene stating (page 164) "*..The only thing I struggled with was getting used to working with girls and there was the complaint but this is concerning having comments like this when there had been nothing. 7 or 8 complaints in a short time. ...I do not go around making sexualized comments and having my child in my bed with me it has been blown out of proportion. I wear my heart on my sleeve had only just had to leave Sandiway. It was never said in a bad way.*"
90. This hearing was reconvened on 7 August 2020 (page 165-6). By this stage Mrs. Duckett had read through the supervision record with Sian Thomas Jones. Mr. Burns was informed he would be given an outcome as soon as she could. Her evidence to the Tribunal is that she was aware that Mr. Burns had been moved to Serene from another home but was unaware of the context of the allegation and did not look into it.
91. Mrs. Duckett did not read the claimant's grievance at page 115. Ms. Duckett did not carry out any independent investigation of her own. She did not discuss the touching of the claimant with Mr. Burns.



92. On 7 August 2020 (page 278 -9) Laura Duckett reported that Mr. Burns had commented that the women in the picture looked like dolls because they were wearing makeup and felt the staff had colluded between themselves. He had accepted that the girl was tubby; a matter he raised in supervision. He said that his comments were taken out of context. On this basis Mrs. Duckett concluded that Mr. Burns should remain employed and to move from Serene House (and Mr. Jack Smallman regional manager agreed) and to transfer to Luana, another home of the respondent. His probation was extended for a further 3 months. He was to have regular supervisions to ensure that he was supported and his conduct in the home was monitored. Mr. Burns was to read and sign that he understands the code of conduct and the harassment and bullying policy.
93. Further Ms. Duckett recommended “*..Jason needs to be aware of his peers and what he may feel is a joke or banter and that they may not feel this is appropriate and could take offence from his comments..*” Ms. Duckett further commented that “*I feel it is evidence that Jason moved to Serene at a difficult time where staff relationships were torn and this may have impacted on positive relationships not being built. There was clearly resentment to Jason into Serene house at the time he did..I have received Jason’s supervisions and a statement Jason had sent to his line manager – this mitigates some of the investigation report as it is clear that Jason had also been subject to bullying at times.*”
94. Ms. Duckett’s evidence is that she discussed the comment about sleep in and the claimant being the lucky one and Mr. Burns said it was jokey. This was her first disciplinary and she was supported by Human Resources. She said she wanted to hear Mr. Burns side of the story. She did not believe the comments about men liking larger women was sexualized in anyway. She felt there was a bullying prejudice against Mr. Burns as he was coming into Serene and Jess had to leave another home and staff felt upset. She accepted this without any independent investigation of her own or any corroborative evidence and accepted the mere assertions of Mr. Burns that this was true. At the time of her decision she was unaware of whether the previous investigation into Mr. Burns had been concluded or the nature of those allegations. She felt that Mr. Burns was having a very stressful time and felt extending probation was the appropriate sanction.
95. The Tribunal found these conclusions unsustainable. There was no acknowledgement by Ms. Duckett of the serious complaints of sexual harassment made by the claimant or Ella of physical touching by Mr. Burns. Ms. Duckett informed the Tribunal that she did not read the report in full and therefore did not notice the mention of any physical assaults to colleagues. Mr. Burns had not complained about bullying from colleagues during his supervision with Sian on 7 April 2020. Infact, his concern at this stage was that he felt he was not accepted by the young people (page 207). Mr. Burns first mentioned staff talking about him with a young person in the home in a statement made on 18 May 2020 11.48 a.m. prior to his suspension that day

(page 215). He did not mention “bullying” in this statement nor did he identify either the claimant or Ella as perpetrators of bullying against him. The Tribunal was not satisfied the conclusions reached by Ms. Duckett could be explained by mere lack of her experience in investigations or her negligence. Her conclusions were not based on any interviews with the complainants so that she could not reasonably engage in a consideration of the effect of the alleged harassment upon the complainants. There was no consideration of similar alleged conduct against a young person by Mr. Burns in Sandiway. Further, her conclusions flew in the face of the investigator’s conclusions who had interviewed Mr. Burns as well as the claimant and Ella and supporting witnesses and found the allegations to be true. The Tribunal found Ms. Duckett’s findings so perverse as to lead it to conclude that sexual harassment allegations made by women were demeaned, minimised, not taken seriously by senior management and the female complainants were not believed. Instead Ms. Duckett accepted the version of events by Mr. Burns, a male colleague that he was bullied in the absence of any investigation or corroborative evidence; he merely asserted this.

96. On 10 August 2020 Mr. Hornby emailed Shona Watson, Laura Duckett and Jack Smallman stating that Jack agreed with the outcomes namely that Mr. Burns should return to work and transfer to Luana (page 277).
  
97. On 18 August 2020 the outcome of the disciplinary hearing was sent to Mr. Burns. He was informed that no formal disciplinary action will be taken against him on this occasion. His suspension was lifted with immediate effect. He could return to work (page 167) but was transferred to another house. It was stated that he should nevertheless strive to improve his conduct in the workplace. The Tribunal could not find this in the written notes of the meeting. His probationary period was extended for a further three months to allow him to have regular supervisions to ensure he was supported during this time. He was requested to re-familiarise himself with the respondent’s code of conduct policy and the harassment and bullying policy and to sign he understood those policies. He was informed he needed to be mindful of his peers and his responses in relation to professional boundaries. He was informed he needed to be aware that his perception of a joke or banter can be different o perception of others and people could take offence from your comments. He was conduct continued to be monitored. He was advised that any repeat of similar misconduct is likely to lead to formal disciplinary action.
  
98. Pursuant to the respondent’s Harassment and Bullying Procedure a complainant is entitled to be informed about the outcome of a harassment and bullying complaint (see paragraph 5.16 of the policy). The claimant was a complainant and was entitled to be informed about the conclusion. However, the claimant was not so informed. No explanation has been put forward by the respondent as to why the policy was not followed. The claimant complained about this in her email dated 6 September 2020 page 170 and felt that this was indicative of the fact her complaint was not taken seriously (page 179-180). Mr. Offer accepted that the claimant should have

been told (see page 189) in his letter dated 20 November 2020 but he does not appear to have asked anyone why the claimant was not so informed. There is no explanation as to why the policy was not followed. Sian Thomas Jones informed the claimant at the time that her complaints were treated as a safeguarding issue only and not a sexual harassment matter (page 175). Taking account of the nature of the serious allegations made against Mr. Burns and the context in which he worked, the care of vulnerable young women, the tribunal was dissatisfied that the claimant as a complainant was not kept informed about the outcome of her complaint. It demonstrated a lack of regard of the serious impact upon the claimant at the hands of Mr. Burns.

99. On 12 August 2020 p.220 Sian informed the claimant Mr. Burns was to be moved to another house.
100. On 6 September 2020 the claimant lodged her grievance (page 170-1). She felt the decision made by the Cambian group and management team was unfair. She stated *"I feel has not been taken seriously and no proper action has been taken. Allowing sexual harassment in the workplace, temporarily suspending the assaulter on full pay whilst forcing the victims to not be able to work and even being sent home. Not only then allowing the assaulter to return to work but then promoting them into a higher position of power in which they could then go on to abuse and take advantage of your own companies staff members and even the young girls which you have a duty of care to protect from such people. Sexual harassment should never be allowed in any workplace let alone a workplace that's sole focus is to safeguard young women who have been sexually exploited from further harm."* Jack Smallman asked the claimant to clarify whether she wanted her email to be processed as a complaint or grievance, whether it was towards the company or myself individually and if the claimant's line manager was aware of the content of this email (page 169-170). On 7 September 2020 the claimant confirmed that *"This is a grievance on how the case was handled and against the persons involved in the process and final decisions"*
101. Sian Thomas Jones offered the claimant the respondent's counselling service (page 221) and requested whether she could do anything else to support the claimant but the claimant said there was nothing that Sian could do at the moment. The claimant's evidence to the Tribunal is that she did not trust Cambian's counselling service.
102. The claimant was interviewed about her grievance by Mr. Mahmood, Regional Manager for Greater Manchester, on 16 September 2020 (p.175-180). The claimant stated she was not happy with the decision as she had been told that her complaint would be investigated. She said it was a long time before she was told by her manager that it was a safeguarding issue as the young people were involved. She stated that she had put a complaint in about sexual harassment but it was not investigated.
103. Mr. Mahmood was ill prepared for the meeting; *"Can I ask what exactly did you raise? Was it concern in relation to YP?"* He appeared to know very

little about the background having only read the summary of the report and did not know if any action was taken against Mr. Burns or whether the claimant had received any feedback. He conceded at the meeting he needed more information and needed to speak to Mr. Probert as he did not know the outcome.

104. By email dated 1 October 2020 (page 168) to Sian Thomas Jones the claimant resigned her employment. She stated *"Please accept this letter as notice of my resignation from my position as RCW at Serene House effective one month from todays date 2/10/2020. It is of great sadness that I am handing in my notice of employment with you. I have received an offer as a team leader with another company which promises better opportunities for professional growth. I will miss everyone that has been through my journey at Serene House and thank you for everything and wish you, the staff and young people the best for the future."*
105. Under cross examination the claimant was asked at this stage whether she had trust and confidence in her employer and she stated she had her doubts. She stated she handed in her resignation because she had no choice.
106. The claimant had a supervision with Sian Thomas Jones on 8 October 2020 (see pages 218 to 219A; wrongly dated 8 September 2020). In this record it is noted that the claimant had stated she was looking at a new position as a Team Leader due to no progression in Serene. Although the claimant disputed this record and stated she had never seen it before, the Tribunal found that it was likely that it was a true record and the reasons for leaving set out in the record were consistent with the email resignation submitted by the claimant. In the meeting the claimant also stated that she did not feel supported by the company. There was also a discussion about payment of wages. Sian stated that the claimant chose to take annual leave instead of unpaid leave; she was given 3 days annual leave when four shifts were booked and then taken off and not paid.
107. On 7 October 2020 Ella Preece was interviewed (page 172-3) by Ash Mahmood. He was ill prepared for this meeting too and was unaware that Ella had raised a complaint (page 172). He invited Ella Peerce to provide a copy of her statement to him. It would have been a reasonable expectation that Mr. Mahmood would have prepared for the meeting.
108. On 8 October 2020 the claimant lodged her ET1 (page 5- 16) at the tribunal complaining about sexual harassment. She stated she did not claim unfair dismissal because she was not in a good state of mind
109. Sian Thomas Jones completed a leavers form on 9 October 2020 (page 226) which stated that the claimant had given one months notice. Her leaving date was 2 November 2020. The reason for the claimant leaving the respondent's employment as "new job as team leader". In the comment section she wrote *"..there has been concerns raised about the way she*

*reports concerns or issues and will avoid the line manager when doing this..*". This commentary was unexplained in the witness evidence.

110. On 19 October 2020 Mr. Mahmood prepared a draft outcome letter (page 250-1) and dismissed the claimant's grievance. This letter was not infact sent to the claimant In the outcome letter he rejected the claimant's contention that the claimant's sexual harassment complaint towards a co-worker Jason Burns was not taken seriously. He stated he had reviewed all documents. He stated "*I am confident that the company investigated your allegation thoroughly..I can confirm this investigation did not only investigate the safeguarding aspects of the allegation and that all aspects of the allegations were considered and investigated.*" This ignored the fact that the investigation report summarised the claimant's complaints but failed to include an allegation that the claimant had been physically touched by Mr. Burns. The allegation of touching was supported by the evidence of another witnesses (see Maz Falconer's statement page 150). Mr. Mahmood apologised to the claimant for the respondent's failure to follow procedure. Mr. Mahmood stated the claimant should have been informed about the outcome of the investigation into the allegation and he stated that the failure to do so was an error. A formal notification should have been sent to the claimant informing her whether company is instigating disciplinary action against the employee or taking no further action. He stated that Mr. Burns was never promoted.
111. Mr. Offer's evidence is that Mr. Mahmood had to take leave of absence from work for personal reasons. This held up the grievance process and it was decided that we would need to restart it rather than wait until Mr. Mahmood was able to return to work. The Tribunal notes that Mr. Mahmood appears to have reached conclusion to his investigation dated 19 October 2020. The claimant did not receive the draft conclusion of the investigation. The respondent re-started the investigation. There was no explanation for this.
112. The respondent informed the claimant that Mr. Mahmood who was dealing with the investigation was on annual leave and not due back for a few weeks (page 182).
113. On 27 October 2020 Mr. Offer interviewed Sian Thomas Jones (page 252 to 255). Ms. Jones stated that she had a previous complaint about Mr. Burns at Serene (from Elisih) which she raised with her regional manager and she was told to deal with it in a supervision. In respect of the claimant's complaint, she had no authority to suspend Mr. Burns; she required permission to do so. She enquired with Mr. Offer "how we protect female in Luana" (the home Mr. Burns had gone to). She had raised this with Mr. Smallman but Mr. Offer stated it was not within his remit and it should be raised with Mr. Burns manager.
114. On 28 October Mr. Offer held a grievance hearing with the claimant (page 181-6). The claimant complained at this meeting that this was the third meeting she had about her complaint dated May 2020. The claimant stated that no one seems to know who is doing what and these meetings

seem to not be going anywhere. The claimant felt her complaint was being brushed under the carpet. The claimant did not want to continue with the interview as she had sought legal action. The claimant stated *"When you look at the organisation where YPs were sexually abused and you have man that works there thinking that he can put hand on women and use sexual innuendo and now he is working in another home.."* and she alleged it was not taken seriously.

115. Mr. Offer also interviewed Jack Smallman on 28 October and 13 November 2020 (pages 256 – 260). Mr. Smallman was unable to explain why when he received Ms. Watson's out of office email that he failed to contact Sarah Lumb, another HR partner. Mr. Smallman authorised Mr. Burns moved to Luana following the disciplinary hearing with Ms. Duckett. He felt he risk assessed the situation with Ms. Jones and kept the claimant and Mr. Burns apart. Mr. Offer in his grievance outcome letter dated 20 November 2020 (page 187-190).
116. On 20 November 2020 page 187, Mr. Offer provided his formal grievance outcome. He stated *"I have also reviewed the management investigation report following the investigation and I am satisfied that all aspects of your complaint were fully explored and investigated thoroughly and impartially"*. From questioning of the panel Mr. Offer did not recall seeing the claimant's grievance at page 108; although the grievance does appear at page 149 of the management investigation report. He was asked whether he had noted that the touching allegations made by the claimant had not been considered by Mr. Probert, he stated that he assumed not; that was not considered. The Tribunal were not persuaded that Mr. Offer could be satisfied that investigation fully considered the claimant's complaints in the light of this omission. He had not considered the disciplinary outcome of Mr. Burns as it was not part of her grievance as the claimant did not know anything about it.
117. On 25 November 2020 (page 194) the claimant text Sian Thomas Jones stating *"I think I made a rash decision and the time away made me realise that Serene became like a family and I miss everyone! Is my position still available x"*. The claimant's evidence is that this was a moment of weakness. She had a good relationship with the team and she missed the house.
118. The claimant requested from her colleague, Jessica Clarke a personal reference. On 9 November 2020 Ruth Hinds emailed Jessica Clarke requesting a character reference. Jessica Clarke forwarded this email on the same date to her work email and sent on to the home manager Sian. The email was forwarded by Sian to the references department of the respondent stating *"..I have explained to Jess this needed to go through the correct process as jess still worked for Cambian it needs to go through to the reference email so she shared with me to pass on.."* Jessica Clarke was told by Sian she could not provide this reference. The evidence of Sian to the Tribunal is that she understood that the claimant was seeking a work reference and on that basis it needed to follow a particular procedure. There

was no difficulty giving a personal reference. She denied that a refusal to give the reference was anything to do with the claimant's harassment allegations. The Tribunal rejects this evidence. The email from Ruth Hinds is very clear; it asks for a character reference (page 228) which Sian was sent by Jessica Clarke. It is clear in the email the reference sought was for a character reference. The refusal to give the claimant a character reference by the respondent is not adequately explained by the respondent. The Tribunal infer taking account of the clarity of the email which was sent to Sian that the character reference was refused because the claimant had raised harassment allegations against the respondent.

119. The claimant disputed the calculation of her hours (page 237 to 8). She was unsure whether she has been incorrectly as retaliation for her complaints. She felt she should have had sleeps ins paid the following month and she was not so paid.
120. The claimant provided two statements by way of written representation to the Tribunal; one from Marlyn Falconer (page 195) dated 23 January 2021 which stated she had witnessed Mr. Burns entering the office and squeezing in next to June on her left side nearest the filing cabinet. She recalled Mr. Burns had told June he had asked another member of staff "*who the bit of fluff was*" and that she need not worry unless the picture went missing. She recalled that the claimant was visibly shaken. Further the claimant provided Ella Peerce's statement dated 4 January 2021; this states that she made two statements about Mr. Burns behaviour in the workplace and that his conduct made her feel uncomfortable. The Tribunal noted that neither Marlyn Falconer or Ms. Preece attended the Tribunal to give evidence so were not subject to cross examination by the respondent. Ms. Preece had been interviewed by Mr. Probert.
121. Mr. Burns training record included in the bundle was not his training record (pages page 276). The record includes training in equality and diversity on 12 October 2019 when Mr. Burns was not actually employed by the respondent. The claimant raised this issue and the respondent obtained a witness statement from Ms. Coyle, Learning and Development Administrator who explained that the respondent employed two Jason Burns and their training records had been migrated into one record in error. The correct training record of Mr. Burns was the document attached at page 2 of her statement. The relevant training record of Mr. Burns was at page 2 attached to her statement. There was no attendance by Mr. Burns of a specific equality and diversity training course (in comparison to the original record provided).

#### Submissions

122. The respondent had provided a list of cases at the commencement of the case **Morrow v Safeway Stores plc (2002) IRLR 9; British Aircraft Corporation Limited v Austin (1978) IRLR 332; M. I. Sharfudeen v T J Morris Limited (UKEAT/0272/16); Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 1; Madarassy v Nomura International plc (2007) EWCA Civ 33; The Law Society v Bahl (EAT/1056/01) & EAT/1058/01 and Bahl v The Law Society v Bahl (2004) EWCA Civ 1070; Laing v Manchester City Council (2006) ICR 1519; Teva (U.K.) Limited v Goubatchev (UKEAT/0490/08)**. Mr. Crow added three further cases **Agoreyo v Lambeth London Borough Council (2019)**

- ICR 1572; Mezey v South West London & St George's Mental Health NHS Trust (2007) EWCA Civ 106. Rathakrishnan v Pizza Express Restaurants Limited (2016) IRLR 278.** provided a written submission an
123. On behalf of the respondent Mr. Crow submitted that the claimant had not established a breach of the implied term of trust and confidence of allowing Mr. Burns to behave in a sexual manner around a young person. The respondent denied that Mr. Burns behaved in a sexual manner around young persons; the respondent took proactive steps to ensure that such behaviour did not occur. He submitted it was not put to Sian Thomas Jones that she received a complaint of sexual behaviour around young persons and/or that she had failed to respond appropriately.
124. The respondent submitted that the respondent was entitled to exercise its discretion as to suspension and was entitled to take all relevant circumstances into account. The decision to transfer Mr. Burns rather than suspend Mr. Burns was not an act directed against the claimant or any staff; it was not treatment of the claimant.
125. In respect of the allegation that the respondent failed to investigate the claimant's complaints properly Ms. Duckett conceded that she did not recall reading the claimant's email dated 13 May 2020 or considering the allegation. It is admitted that there was no sufficient investigation of the allegation of touching on the arms and legs insofar as it related to the claimant and Mr. Probert had not identified it as a specific or separate allegation. Otherwise, it was submitted that there was a sufficient investigation and a disciplinary process was undertaken.
126. The respondent denied that the claimant was unsupported by failing to ensure she would not come into contact with Mr. Burns. It was submitted that the claimant's Sunday shift was changed to a Saturday shift. She was instructed to come in late on Monday given the expectation that authorisation for suspension would have been received by then. It was admitted a warning call could have been made on Monday when it became apparent that the claimant might attend whilst Mr. Burns had not yet been suspended. The claimant complained about being asked to stay away from work whilst Mr. Burns remained at work (pending authorisation to suspend). Equally the claimant later complained at not being granted paid leave after Mr. Burns had been suspended. It cannot be right that the respondent would be in breach of contract whether it asked the claimant to stay away or to come in. The respondent had to balance considerations of confidentiality the need for authorisation for suspension and the claimant's desire to be kept apart from Mr. Burns. The fact that the claimant saw Mr. Burns from the car park is not a breach of the implied term of trust and confidence.
127. In respect of the allegation of not supporting the claimant by refusing the request for paid time off (instead informing her that it would have to be sick pay when Mr. Burns was suspended on full pay) is for a period in early June. If the claimant was not well enough to attend work, she was contractually bound to attend unless she booked annual leave. There was no express or implied contractual requirement for paid compassionate leave whilst the matter was investigated so that a failure to agree to such leave does not amount to a breach of the implied term of trust and confidence.
128. The respondent does not contend the claimant affirmed the contract but does not accept the claimant has proved she resigned because of the breach. The respondent relied upon the claimant's letter of resignation,



supervision notes of 8 October 2020 and Sian Thomas Jones understanding which can only have been gained by virtue of what the claimant told her. There is no recording that the claimant resigned in response to the actions of Mr. Burns or the handling of her complaint. The respondent relied upon the claimant's evidence in cross examination that at the time of resigning she was trusting Cambian to investigate her concerns. It was submitted that if the claimant subsequently lost that trust it cannot be the reason for resignation. Her claim form did not hint that her provision of notice was related to sexual harassment or the handling by it by the respondent. Further the claimant's text message at page 194 is entirely inconsistent with the claimant's subsequent assertion that she believed trust and confidence had been destroyed. In respect of the failure to investigate; this could not have been in the mind of the claimant at the time of resignation because she had not seen the documentation.

129. The respondent submitted that the claimant's evidence was unreliable. Mr. Crow referred to the claimant's evidence where she described Mr. Burns stated that they did not share a bed but he was not missing out and compared this to the comment as "*discussing his intimate relationship with his partner in great detail*". It was submitted that this was inaccurate and casts doubt on the claimant's recollection. The looking at someone's social media could not be perceived as sexual harassment. Mr. Crow submitted that during cross examination, the claimant refused to answer questions. The claimant misquoted evidence describing that she was denied a right of accompaniment; a transfer should not be allowed for someone under investigation; contending Mr. Burns admitted "the sleep with me" comment when he admitted only "aren't you lucky". It was submitted it was implausible that she failed to raise her concerns with her manager Sian Thomas Jones from 10 April to 13 May. It was submitted the extent of the omissions and inconsistencies in the claimant's account of the sexual harassment adds to the concerns as to the reliability of her account.
130. The direct sex discrimination claim was denied. Insofar there is a finding of dismissal due to a failure to properly to investigate there can be no safe basis to infer that either Mr. Probert or Ms. Duckett were motivated consciously or subconsciously to do a poor job of the investigation/disciplinary process because the claimant was a woman. There may have been short comings but the respondent was attempting to do its best.
131. The claimant provided a written closing submission and added to it orally. The claimant stated that the respondent did breach the term trust and confidence. The claimant stated Mr. Burns had admitted under oath to using sexualized language and comments. Alex Hornby and Ms. Duckett had permitted Mr. Burns to move from house to house. Ms. Duckett, Jack Smallman, JO AM by statements or under oath did not investigate the claimant's complaint of sexual harassment as sexual harassment in the workplace. Sian Thomas Jones by admission under oath said she would only pay sick pay. The claimant submitted that she gave one months' notice to leave and resigned because she was unable to work as part of the team.
132. The claimant submitted that she had been directly discriminated against because of sex because the respondent failed to respond appropriately to her complaints of sexual harassment; the claimant was informed that it was investigated as a safe-guarding concern as opposed to a sexual harassment

allegations. Sian Thomas Jones had stated she could not protect the claimant from coming into contact with the claimant; she admitted she should have called the claimant and suggested that the claimant did not come into work prior to Mr. Burns suspension; the claimant was informed that the claimant would have to take sick pay (the claimant was not offered compassionate leave for a short period).

133. The claimant relied upon the written statements in the investigation and evidence given to establish sexual harassment and submitted it was unwanted. The touching, innuendos and brushing past were acts of a sexual nature leaving her anxious, humiliated and degraded. The respondent did not take reasonable steps to prevent Mr. Burns from harassing or from doing anything of that description.
134. In respect of victimisation, she stated that Sian Thomas Jones had Ms. Clarke should have been able to provide the claimant with a personal reference but it was refused. Further the wage information was unclear.
135. In respect of limitation the claimant's submitted that the claims were presented in time as Cambian delayed the investigation by not investigating this as sexual harassment.
136. The respondent commented on the claimant's submission and noted that the claimant had not put to the respondent's witnesses that reasonable steps were not taken.

#### Conclusion

137. The Tribunal concludes as follows :-

#### Constructive unfair dismissal:

138. The starting point is that the claimant has the burden of establishing on the balance of probabilities that the respondent breached the implied term of 'trust and confidence' (a fundamental/repudiatory breach) in the manner alleged. The case law establishes that the Tribunal must consider whether (a) the respondent conducted itself in a manner calculated or likely to seriously damage the relationship of trust and confidence between the employer and the employee and (b) without reasonable and proper cause. The Tribunal consider each of the claimant's allegations :-
139. (i) Allowing JB to behave in a sexual manner around young persons  
The Tribunal finds that this allegation is not established on the evidence. The claimant and her colleague's allegations were sexual harassment allegations against them as opposed to young persons. Mr. Burns accepted in his evidence that he made remarks about a young person's stretch marks and about young persons' weight and the possession of a number of condoms but this was not in the presence of young persons. The claimant conceded in her evidence that the allegations about condoms and weight of young people were not sexual harassment. Following allegations of sexual harassment made by the claimant and her colleague, he was suspended albeit after a delay. In this respect the Tribunal rejects that the respondent allowed Mr. Burns to behave in a sexual manner around young persons.

(ii) Allowing Mr. Burns to move to another house whilst under investigation, notwithstanding the nature of the allegations being investigated (which claimant says were allegations of 'sexual harassment')

This allegation from the cross examination by the claimant to the respondent's witnesses concerns the movement of Mr. Burns from Sandiway to Serene home following allegations made by a young person. The evidence available to the Tribunal is that a young person made an allegation of sexual harassment that Mr. Burns had said to her "are you sexually frustrated". A risk assessment undertaken at the time by the respondent did not consider the potential impact of such an alleged comment on a vulnerable young person's mental health. Mr. Burns was moved to Serene on 10 April and Sian Thomas Jones undertook a risk assessment on 13 April 2010. The Tribunal concluded that the inadequacy of the risk assessment permitted Mr. Burns to be moved to another home. If the respondent had taken into account the serious nature of the young person's allegation and the effect on her mental health, it is likely that Mr. Burns would have been suspended as opposed to being moved on. The Tribunal concludes that for the respondent to have acted in this manner was likely to damage the trust and confidence between the employer and employee and in the absence of an adequate risk assessment there was no reasonable or proper cause.

(iii) Not investigating Claimant's complaints 'properly'

The Tribunal finds on the evidence that the claimant's complaints were not investigated properly. First, Mr. Probert did not fully investigate all the complaints raised by the claimant including physical touching by Mr. Burns. Sexual assault is a serious allegation and Mr. Probert's investigation did not consider this in respect of the claimant. Further there did not appear to be any engagement by Ms. Duckett, disciplinary officer, as to the effect of the alleged harassment on the claimant and her colleague. Ms. Duckett admitted in evidence she did not read the grievance submitted by the claimant. Mr. Duckett as disciplinary officer accepted the allegation by Mr. Burns he was bullied in Serene home without further investigation with the claimant or any other witness. She accepted Mr. Burns assertion that this was correct. The Tribunal is satisfied that the claimant's complaints were not investigated properly by the respondent. This was likely to seriously damage the relationship of trust and confidence between the employer and employee and there was no reasonable and proper cause.

(iii) Not supporting the claimant by failing to ensure the claimant would not come into contact with Mr. Burns

The Tribunal finds that the respondent did fail to support the claimant by failing to take reasonable steps to ensure that the claimant did not come into contact with Mr. Burns. There was an unacceptable delay in the suspension of Mr. Burns following the claimant and her colleague raising complaints about Mr. Burns behaviour. Mr. Smallman did not provide direct evidence to the Tribunal but during his interview with Mr. Offer on 28 October and 13 November 2020 he was unable to offer any explanation as to why when he received Ms. Watson's out of office email he failed to contact Sarah Lumb another HR partner. Although Sian Thomas Jones did swap the shifts of the claimant so that she did not have to work alongside Mr. Burns, Ms. Sian Thomas Jones conceded in evidence that she could have called the

claimant earlier in the day on 18 May to ensure she did not attend work until after the suspension of Mr. Burns. The respondent's lack of organisation so to prevent the claimant having any contact with Mr. Burns indicated the respondent did not have the matter as a priority and indicated a dismissive attitude of the significant effect on the claimant of seeing the perpetrator in the car park. The Tribunal finds that this conduct was likely to seriously damage the relationship of trust and confidence between the employer and employee and there was no reasonable and proper cause.

(iv) Not supporting the claimant by refusing the request for paid time off (instead informing her that it would have to be sick pay when JB was suspended on full pay).

The respondent's disciplinary policy gives the respondent a right to suspend employees subject to disciplinary investigations on full pay. There is no provision within the claimant's contract to provide special leave to the claimant in the circumstances where a perpetrator is suspended. The Tribunal do not find this allegation made out. Although refusing the request for paid time off work is likely to seriously damage trust and confidence between employee and employer there was just cause (namely no contractual provision).

140. The Tribunal concluded that the cumulative effect of allowing Mr. Burns to move to another home whilst under investigation, not investigating the claimant's complaints properly and not supporting the claimant to ensure she did not come into contact with Mr. Burns could amount to a repudiatory breach of the implied term of trust and confidence.

Did the claimant affirm the contract before resigning:

This is no longer a live issue between the parties and is not pursued by the respondent.

Was the resignation in response to the respondent's conduct/fundamental breach

141. The Tribunal has not found this an easy issue in the light of the claimant's evidence and the evidence of Sian Thomas Jones. The case of **Wright v North Ayrshire Council** establishes that where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning. The tribunal takes account of the claimant's resignation letter (see page 168) dated 1 October 2020. This gave no hint whatsoever that the claimant was resigning her employment with the respondent for any other reason than having a job opportunity elsewhere as a team leader. At a supervision on 8 October 2020 in accordance with the notes made by Sian Thomas Jones the claimant stated she had an opportunity as a team leader elsewhere as there was no job progression at Serene House. The claimant mentioned she did not feel supported in the company but this was not particularised and there is reference to the pay. Furthermore when the claimant lodged her claim on 8 October 2020 following her resignation she did not make a complaint about unfair dismissal. The Tribunal notes that the claimant's evidence to the Tribunal is that she was not in a good state of mind at the time of issuing her

claim. However on the balance of probabilities the Tribunal preferred the evidence of Sian Thomas Jones which was corroborated by her notes of the meeting and the other evidence, that the claimant's reason in resigning her employment with the respondent was to seek further job opportunities as a team leader elsewhere. The sexual harassment by Mr. Burns formed the subject matter of her claim to the Tribunal but she has not established on the evidence that it played a part in her decision to resign her employment.

142. In these circumstances the Tribunal finds that the claimant did not resign her employment with the respondent by reason of a repudiatory breach of contract and there was no unfair constructive dismissal.

Wrongful dismissal

143. The Tribunal do not find in the circumstances that the claimant has established a wrongful dismissal.

s.13 Direct Discrimination because of sex:

144. The burden rests upon the claimant to establish a prima facie case of direct discrimination because of sex. This requires the claimant to show that she was treated less favourably than others were or would have been treated. The bare facts of difference in status and a difference in treatment are not without more sufficient for a Tribunal to conclude the respondent acted in a discriminatory manner. If the claimant discharges this burden, then the respondent must explain the reasons for its treatment and establish it had nothing whatsoever to do with sex.

145. The list of issues identified by a previous Tribunal requires consideration of whether the claimant has proved that the respondent dismissed her by not investigating the claimant's complaints properly; not supporting the claimant by failing to ensure the claimant would not come into contact with Mr. Burns and not supporting the claimant by refusing the request for paid time off. It then considers whether that less favourable treatment was because of the claimant's sex and/or because of the protected characteristic of sex more generally.

146. The Tribunal has already considered the evidence above in regard to the allegation that the respondent did not investigate the claimant's complaints properly. The Tribunal finds that it did not. The Tribunal did not hear any evidence from Mr. Probert as to why he failed to consider and investigate the allegations of touching by Mr. Burns against the claimant. Further the Tribunal was not satisfied by the conclusions reached by Ms. Duckett that Mr. Burns was bullied as an explanation for allegations being made against him in the absence of speaking to the complainants or testing this evidence. The Tribunal concluded that this was not mere inexperience or incompetence on the part of Mr. Probert or Ms. Duckett and on the balance of probabilities concluded that the claimant's complaints were not investigated properly because she was a woman. The Tribunal compares the treatment of Mr. Burns who alleged he was bullied and he was believed in the absence of any corroborative evidence or investigation.

147. The Tribunal has already considered above that the respondent did not support the claimant by failing to ensure that the claimant would not come into

contact with Mr. Burns. The Tribunal reached the conclusion that there was poor organisation and that this occurred because the claimant's lack of contact with the perpetrator was not given the priority it should have been by the respondent. The claimant conceded this lack of organisation was nothing to do with her sex.

148. However, the Tribunal has considered the evidence above and does not find that there was a lack of support for the claimant by refusing the request for paid time off (instead informing her that it would have to be sick pay when Mr. Burns was suspended on full pay). There was a contractual entitlement to pay an employee such as Mr. Burns when suspended full pay. There was no such contractual right to pay the claimant paid time off. This decision had nothing whatsoever to do with sex.

149. The direct discrimination allegation is framed in the case management order so that the claimant has to establish a prima facie case she was dismissed because the respondent failed to respond appropriately to the claimant's complaints of sexual harassment for the above matters. From the previous findings made by the Tribunal it does not find a causative link that the claimant resigned for these reasons and this claim fails.

s.26(1) and s.26(2) Harassment:

150. The Tribunal had the benefit from hearing from the claimant and from Mr. Burns. Despite a very detailed and thorough cross examination of the claimant, the Tribunal as set out above, found her evidence substantially credible when compared to the evasive and unpersuasive evidence of Mr. Burns. The Tribunal will consider the allegations in turn.

(a)Mr. Burns unnecessarily brushing past the claimant touching her arms, legs and body from April 2020 until his suspension on 18.5.20

On the balance of probabilities, the Tribunal found that Mr. Burns did brush past the claimant so touching her arms, legs and body on occasions between April 2020 until his suspension on 18 May 2020. The claimant's allegations were supported by a witness (see page 150). The Tribunal reject Mr. Burns suggestion that this might have occurred because of "confined spaces". This conduct was unwanted and related to the claimant's sex and was of a sexual nature. The Tribunal takes account of the claimant's obvious upset, her grievance referencing touching and considers that unwanted touching would violate the claimant's dignity and create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

(b)Mr. Burns making comments about a picture of the claimant with clients: :who is that in the picture; when do I get to meet her; she's a bit of alright"

On the balance of probabilities the Tribunal found that Mr. Burns did say about a picture which the claimant featured in (and about her) "Who is

that in in the picture, when do I get to meet her; she's a bit of alright." The claimant evidence is supported by a witness (page 144) Peter Amison. This conduct was unwanted and related to the claimant's sex and was of a sexual nature. The Tribunal takes into account the claimant's upset; she included this issue in her grievance. Such unwanted conduct would violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

(c)(on or about 11<sup>th</sup> or 12<sup>th</sup> May) Mr. Burns coming close to C, putting the picture in her face and saying, "who's that bit of fluff, she's a bit of alright" and "it's when the picture disappears you need to worry love";

On the balance of probabilities, the Tribunal found that Mr. Burns did do and say this. The claimant mentioned something very similar to this in her grievance at page 108 and was corroborated by two witnesses (p144 and page 150). The Tribunal finds that this was unwanted conduct and had the proscribed effect.

(d)(on or about 11<sup>th</sup> or 12<sup>th</sup> May) Mr. Burns making similar comment to P. Amerson;

On the balance of probabilities, the Tribunal found that Mr. Burns did do and say this. The claimant mentioned something very similar to this in her grievance at page 108 and was corroborated by two witnesses (p144 and page 150). The Tribunal finds that this was unwanted and had the proscribed effect.

(e)Mr. Burns making comments to the claimant : "aren't you a lucky girl getting to sleep with me" when on night shifts with the claimant;

On the balance of probabilities the Tribunal finds that Mr. Burns did say this to the claimant. It was mentioned in the claimant's grievance (page 108). Mr. Burns told the Tribunal he said something similar but with a sarcastic emphasis. He understood it could have sexual connotations but it wasn't how he said it. The Tribunal did not find Mr. Burns' evidence credible (page 161). This conduct was unwanted. It was connected to the claimant's sex and was of a sexual nature and had the proscribed effect.

(f)Mr. Burns asking the claimant if she was happily married, where she lived and what her husband looked like;

On the balance of probabilities, the Tribunal do find that Mr. Burns did say these things to the claimant and this is corroborated by the claimant's colleague, (page 148). The Tribunal finds that this was unwanted and related to the claimant's sex and of a sexual nature. In the context of a work environment such questions are inappropriate and totally irrelevant. The comments had the proscribed effect.

(g)Mr. Burns saying he had checked staff on social media before starting at the house

Under cross examination the claimant refused to answer questions about this. Although the claimant did take offence to being challenged about this allegation, it was unhelpful for her to take this stance. The Tribunal is not satisfied this allegation was established. In the context that Mr. Burns

was alleged to have looked up males as well the Tribunal did not consider it could be related to sex in any event.

(h)(in the dining room) Mr. Burns looking the Claimant up and down, smirking, and saying "I bet you're a handful"

On the balance of probabilities, the Tribunal did not find this allegation made out. It was a totally new allegation which the Tribunal could find no reference to in any of the paperwork. The Tribunal rejects this allegation.

(i)Mr. Burns saying that "men liked curvy women and boys liked skinny girls", whilst looking the claimant and Ella Preece up and down;

On the balance of probabilities, the Tribunal found that Mr. Burns did say this and in fact Mr. Burns admitted he did say this but he was expressing his opinion. The claimant referenced this comment in her grievance (page 108). The Tribunal finds that this comment was unwanted and related to the claimant's sex and or of a sexual nature. In a work environment dealing with young women who had been sexually exploited such comments were wholly unnecessary and irrelevant. This draws the Tribunal's conclusion that to make such a comment was related to the claimant's sex and of a sexual nature and had the proscribed effect.

(k)Mr. Burns making comments about clients with regard to their stomach and breasts, and drawing comparisons with his partner

Mr. Burns evidence about this is and that he did make remarks about stretch marks and compared these to his partner's. In the context of a sexual exploitation unit in a work environment, the comments were unnecessary and irrelevant. The Tribunal finds that the comments were unwanted, were of a sexual nature and created an intimidating and degrading environment.

(l)During a medication count: JB saying "she's got a lot of condoms, does she use them?"

Mr. Burns evidence is that he did make a comment about the number of person's condoms. The Tribunal is not satisfied that any comments about this by Mr. Burns was out of his concern for the young person. However the claimant conceded in cross examination the comments were inappropriate but that this was not sexual harassment so that the Tribunal does not uphold this allegation.

(m)The respondent telling the claimant that her allegations 'were not investigated as sexual harassment of the claimant but rather as a safeguarding issue of the clients'.

Sian Thomas Jones accepts that she did tell the claimant this. The Tribunal finds that this was unwanted conduct but was not because of the claimant's sex or of a sexual nature. Sian was simply passing on her understanding of the nature of the investigation. From the evidence Sian Thomas Jones was incorrect.

(n)The Respondent made the claimant to feel that it was her fault.

The claimant on her evidence relied upon being sent away from work (when she saw Mr. Burns in the car park) and gave evidence that she



was asked in the course of the grievance interview why she “did not remove herself ?” The claimant did genuinely feel she was being blamed by having to leave the workplace prior to Mr. Burns being suspended on 18 May 2020. The context is that the respondent’s decision to suspend Mr. Burns was subject to an unacceptable delay and there was poor organisation on the part of the respondent by failing to keep the claimant out of sight of Mr. Burns prior to suspension. It was inevitable that due to this poor organisation and failure to treat the separation of the claimant and Mr. Burns due importance that if they came into contact the claimant would be sent away. The Tribunal finds that sending the claimant away from work in this context was unwanted conduct. However, the claimant conceded in her evidence that this disorganisation was not related to her sex so that the Tribunal do not find this particular allegation made out. The Tribunal heard evidence from the claimant and not Mr. Probert. The tribunal finds the claimant credible and that the claimant was asked why she did not remove herself by the respondent. It was victim blaming and the claimant was made to feel the harassment she had endured was her fault. The Tribunal concludes that this question demonstrated a stereotypical view that a woman must have contributed or could have avoided such harassing conduct. This was unwanted conduct, it did indeed relate to the claimant’s sex, and violated the claimant’s dignity and created a hostile and offensive environment for the claimant.

Reasonable Practicable defence.

151. If required, has R proved that took all reasonable steps to prevent JB from harassing, or from doing anything of that description (per s.109(4) Eq Act 2010).

The respondent contended that the respondent was asked no questions by the claimant about this. The respondent has the burden of establishing that it took all reasonable steps (emphasis by HHJ Tayler in the case of **Allay (UK) Limited v Gehlen**). On the balance of probabilities, the Tribunal is not satisfied that the respondent took all reasonable steps. Mr. Burns told the Tribunal in previous employment he had training in equal opportunities/diversity and that when he joined the respondent he underwent an induction which referred to such matters. The Tribunal has not seen these documents or the extent of such training made available to Mr. Burns. However following clarification that the original training record referring to a separate and specific module of equal opportunities training was not actually the record of Mr. Burns but another Mr. Burns; the Tribunal concluded that the claimant had not attended a separate course on equal opportunity/diversity. Further Mr. Burns had only two supervisions; one on 7 April at Sandiway and a second on 27 April at Serene. On the basis that Mr. Burns was on probation and had no experience of young women in sexual exploitation the Tribunal found that this was inadequate in terms of providing Mr. Burns with any guidance or mentoring. In the supervision with Sian Thomas Evans on 27 April 2020, Mr. Burns confessed he was struggling looking after girls. By the time Mr. Burns moved to Sandiway following an allegation of “inappropriate language” to a young person he had still not been given the induction booklets or read the policy (see the supervision record and recommendations of Sian Thomas Jones). Sian Thomas Jones mentions in her notes of that supervision that Mr. Burns has been given the

code of conduct and policy and induction booklets to complete. There is no evidence that the respondent made any checks on Mr. Burns thereafter to see whether he had. On the available evidence the Tribunal are not satisfied that the respondent took all reasonable steps to prevent Mr. Burns from committing sexual harassment.

Victimisation:

152. The respondent admits that the claimant's email complaint of dated 13 May 2020 amounted to a protected act pursuant to section 27 (2)(d) of the Equality Act 2010.

(a) On or about 10<sup>th</sup> or 11<sup>th</sup> November 2020, by Abigail Jessica Clarke saying that she could not provide a reference for the Claimant;

Ms. Clarke accepted in her evidence that the claimant had requested a character reference. There is no rule against the respondent's employees providing character references; only work references must go through a central department. Ms. Clarke emailed the request from the claimant's new employer to Sian Thomas Jones who said "we don't give work references" and that she needed to pass this to the reference department. The email was clear; the claimant's employer was not requesting a work reference but a character one. The Tribunal is not satisfied, in the context of a clearly worded email request for a character reference, that there could have been any confusion on the part of the respondent as to what the claimant was seeking. The refusal to provide such a reference is a detriment namely a disadvantage. The reason not to provide to the claimant is adequately explained and the Tribunal conclude that the refusal to provide a character reference was because the claimant had done a protected act.

(b) By the Respondent failing to make the Claimant's wages clear in October 2020

The Tribunal is not satisfied that there was a lack of clarity on the part of the respondent as to the claimant's wages in October 2020. The claimant was unhappy with the fact that she was not owed the amount she contended for.

(c) By the respondent saying, in November 2020, that the Claimant owed the Respondent about £235.

The claimant had taken too much holiday; that is beyond her holiday entitlement and in those circumstances the respondent was entitled to request the sum back. This had nothing whatsoever to do with the fact that the claimant had complained about discrimination.

Limitation (not simply related to the harassment claims):

153. Were C's complaints presented in time? If not, should there be an extension of time?

The last act of sexual harassment took place on 13 May 2020. The claimant was also subject to victimisation in November 2020. The respondent failed to inform the claimant in accordance with its own policy what had actually happened in respect of her grievance; a matter acknowledged by Mr. Offer in his outcome letter dated on 20 November 2020. There was a significant delay on the part of the respondent from May 2020 to November 2020 to formally inform the claimant as to what had happened in respect of her grievance. The claimant instigated the internal grievance procedure in May 2020; and followed this through with a further complaint in September 2020 because she still had not been offered what had happened to her grievance and by then had been told by a manager it was not investigated; it was treated as a safe-guarding matter. Mr. Mahmood who initially was appointed to look into this grievance did not complete his investigation and appears to have drafted an outcome having failed to complete the investigation but did not send it to the claimant. Mr. Offer eventually was appointed and provided the claimant with an outcome on 20 November 2020. The claimant lodged her complaint in October 2020.

154. The length of delay and reason for delay are due to the fact that the claimant was proceeding with her internal grievance having not been properly informed by the respondent of the outcome in accordance with its policy. The procedure then followed by the respondent to investigate the claimant's second grievance was protracted. The claimant informed the Tribunal that she hoped that the respondent would look into her grievance.

155. In accordance with the Court of Appeal case of **Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23** the Tribunal focus on the most relevant factors (of section 33 of the Limitation Act 1980 and do not treat it as a checklist); (a)the length of and reasons for the delay and (b)whether the delay has prejudiced the respondent. The claimant has given adequate evidence as to how she was proceeding and hoping that the respondent would investigate. The Respondent has suffered no evidential prejudice in the short delay of bringing the claim to the Tribunal.

156. Insofar that any complaint is out of time, the Tribunal determines that it is just and equitable to extend time.

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**Employment Judge**

Dated: 25 January 2022P

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