EMPLOYMENT TRIBUNALS

Claimant: **D**
Respondents: **(1) Guy's and St Thomas' NHS Foundation Trust**
(2) Mr Piers Wright
(3) Mr Oliver Williams

On: **22 – 25, 28 & 29 March 2022**

At: **London Central Employment Tribunal**

Before: **EJ Brown**

Members: **Ms Z Darmas**
Mr D Shaw

Representatives:
Claimant: **Ms H Platt, Counsel**
Respondent: **Mr R Dunn, Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Claimant's complaints of direct sex discrimination, harassment related to sex and harassment of a sexual nature, under ss26(1)(2)&(3) Equality Act 2010, all fail, against all the Respondents, and are dismissed.**

2. **The First Respondent unfairly constructively dismissed the Claimant.**

3. **The First Respondent wrongfully dismissed the Claimant.**

4. **The Claimant's claim for unlawful deductions from wages fails.**

5. **A remedy hearing will take place on 21 July 2022.**

REASONS

1. The Claimant brings complaints of direct sex discrimination, harassment related to sex and sexual harassment under *ss26(1)(2)&(3) Equality Act 2010*, ordinary constructive unfair dismissal, sex discriminatory dismissal, wrongful dismissal and unauthorised unlawful

deductions from wages. The First Respondent is her former employer. The Second Respondent is the Claimant's former line manager. The Claimant and the Second Respondent had a consensual sexual relationship before the events in question in this claim. The Third Respondent is also a former manager and colleague of the Claimant.

2. The parties had agreed the issues in the claims as follows:

Claims

1. The claims against the First Respondent for:

1.1. Direct sex discrimination (section 13(1), Equality Act 2010).
1.2. Harassment related to sex (section 26(1), Equality Act 2010).
1.3. Sexual Harassment (section 26 (2) and (3) Equality Act 2010)
1.4. Ordinary constructive unfair dismissal (section 94(1), Employment Rights Act 1996)
1.5. Discriminatory dismissal (section 39 Equality Act 2010)
1.6. Unauthorised unlawful deduction from wages

2. The claims against the Second Respondent for:
2.1. Harassment related to sex (section 26(1), Equality Act 2010).
2.2. Sexual Harassment (section 26(2) and (3) Equality Act 2010).

3. The claims against the Third Respondent for:
3.1. Harassment related to sex (section 26(1), Equality Act 2010).

Jurisdiction

4. In respect of C's allegations of discrimination predating 30 September 2020, did these form part of a continuous course of conduct continuing to that date?

5. If not, is it just and equitable to extend time?

Direct sex discrimination

6. Has R1 treated C in the following ways?

6.1. Since being promoted to band 7:
6.1.1. In March 2017 Piers stopped the Claimant doing stock management stating, ' he could not work well with me'. The stock management was then handed to her male colleague.
6.1.2. The Claimant has not been afforded the same opportunities as her male colleagues. The Claimant's male colleagues have responsibilities such as training, development and stock management; these are desired when interviewing for band 8 roles.
6.1.3. The Claimant worked independently as a band 7 Cardiac Physiologist for several months to a year, before being promoted to band 7. She was successful in a promotion in July 2017 and her pay was only increased from October 2017. In contrast, in July 2019 a colleague Samuel (G) was successfully appointed a band 7 and back paid several months.
6.1.4. In about December 2018, a position for a band 8a physiologist was created to persuade her colleague Nathan Hillier to come back to the Trust. This position was not advertised and I was not offered to apply for it. [§8 GOC]

6.2. In January 2018, I prepared the team's rota. Piers totally ignored my email and immediately after came into the office to speak to me. In raised voice and an aggressive

manner he told me it was not my place to get involved with management duties. I was not better than him and he could find me more suitable 'little tasks' to do if I was bored. My band 7 colleague Steve Vance has completed the monthly rota on numerous occasions when Piers was stressed and he never received this kind of treatment. [§13 GOC]

6.3. Training opportunities denied: On 7 November 2019, I contacted Piers for authorisation to attend a training course. Piers did not reply until 14 November 2019, by which point my colleague Steve had requested half day time off in lieu ('TOIL'). Piers rejected my request on the grounds of short staff. Following this decision Piers booked TOIL on the same day the course would have taken place. [§19 GOC]

6.4. In about April 2020 I asked why Piers wanted me to work alone. Nicky said, 'Piers feels that men are better at training', that is why I was often scheduled without trainees for support. [§25 GOC]

6.5. Grievance rejected: On 11 December 2020 C's grievance was rejected and the investigation did not take into consideration C's evidence provided following the investigation meeting. Some of C's concerns were not addressed at all. Despite the finding that I had been treated differently due to the breakdown of my relationship with Piers, it was suggested that myself and Piers undergo mediation. [§38 GOC]

6.6. C was (constructively) dismissed on 18 December 2020.

7. If so, in respect of each treatment, was C treated less favourably than an actual or hypothetical comparator? C relies on a hypothetical comparator being a male Senior Chief Cardiac Physiologist.

8. Was C's sex the reason for any less favourable treatment?

Harassment because of sex

9. Did R engage in the following conduct?

9.1. In about 2015 Piers told the Claimant on several occasions that no one at work including the managers would believe a girl student over a man, who is more senior in his role. From September 2015 several of the Claimant's workplace friendships broke down because of Piers' actions. He had discussed our past relationship with our colleagues and has given me the cold treatment.. [§6 GOC]

9.2. The treatment at §6.1 above. [§8 GOC]

9.3. On 26 May 2017 Piers shouted at the Claimant in front of the entire team. [§9 GOC]

9.4. On 8 June 2017 Piers followed the Claimant out of work and waited for her outside Waitrose. The next day he asked the Claimant if the bottle of wine she had bought was for her 'new sex partner'. [§11 GOC]

9.5. In September 2019 when one of the physiologists Josh left his duties were distributed amongst the remaining team. Piers allocated a filing task to the Claimant. The Claimant requested another responsibility, like training, Piers said she would enjoy her 'little filing job'. [§12 GOC]

9.6. In January of 2018, Piers ignored the Claimant's email about the rota. In raised voice and an aggressive manner he told her it was not her place to get involved with management duties, she was not better than him and he could find her more suitable 'little tasks' to do if she was bored. [§13 GOC]

9.7. On about 19 August 2018 Piers reminded everyone to hang cables up. The Claimant had worked in the lab that day. She told everyone that she struggled to reach the old hooks and now that they had been changed it was even worse. Following a WhatsApp chat about this on about 22 August 2018 Sam G laughed and said "it's funny that you can't reach the cables". Piers replied, "They can't be moved, we will get you a little step, a little tiny step stool" Piers then laughed. The Claimant was shouted at by Piers if they were not properly hung. Later a male nurse complained about the hooks and they were moved. [§15 GOC].

9.8. On 22 October 2018 Piers became very aggressive and shouted at the Claimant in the control room in front of other staff members and a patient. Piers later undermined the Claimant by saying he was 'always letting you go home', and that she was stupid for saying otherwise. [§16 GOC]

9.9. On 23 October 2018, the Claimant approached management for mediation with Piers which was ignored. Piers was also extremely unfair towards the Claimant when allocating lucrative Saturday waiting list initiative shifts. [§17 GOC]

9.10. Treatment detailed at §6.3 [§19 GOC]

9.11. On 21 November 2019 in a staff meeting Oliver said 'Vicky had allowed some members of staff to act almost fraudulently by claiming their overtime as TOIL instead of pay and that will now stop'. Most staff are aware the Claimant chose to claim TOIL so it felt quite clear who Oliver was referring. [§20 GOC]

9.12. In about November 2019, the Claimant requested to attend training courses. Piers came to find the Claimant in the lab and shouted 'do not think you are going on all those courses'. All her requests for training have been rejected, ignored, or not dealt with in a timely manner meaning there were no places available. [§21 GOC]

9.13. The only occasion in the last three years when Piers has put the Claimant forward for a course was when he suggested around February 2020, that she attend a course in Belgium despite the fact that she had booked annual leave on these dates. Piers was aware that her annual leave was booked for her wedding. [§22 GOC]

9.14. From about August 2018 when the Claimant moved to live with her new partner in Essex, Piers was on a quest to make her life difficult with no work-life balance. In February 2020 Piers published the rota for March and once again the Claimant had to bring the same issues to his attention, re lates/LDOs etc. Claire O'Neil told the Claimant Piers was in pacing clinic 'moaning' to other colleagues about the Claimant's issues with the rota. He asked Claire 'how long does it actually take her to get home anyway?' [§23 GOC]

9.15. It was common knowledge the Claimant had just cancelled her June wedding due to COVID, Piers was aware. On 19 March 2020 he kept asking what was wrong with a smug attitude, trying to provoke a reaction. The Claimant asked him to leave her alone several times. [§24 GOC]

9.16. In about April 2020 Nicky confirmed Piers had asked her to roster the Claimant to work alone more frequently than her peers. On 12 of June 2020, witnessed by Claire O'Neill, Nicky said that, 'Piers feels that men are better at training'. [§25 GOC]

9.17. In May 2020 Piers reconfigured the EP labs with the help of all the other EP physiologists without the Claimant. The Claimant was not asked for her input and was not even told it was happening. She was given a short tour around the labs and was expected to work alone as normal. Piers sent an email on 29 May 2020 thanking all the team for their help. [§26 GOC]

9.18. On 1 July 2020 Piers expected the Claimant to stay late but she was not rostered or asked to work late. Piers had previously requested we arrive no later than 4.55 pm for handover whereas he took over from the Claimant at 5:05pm. The way Piers did this made it sound like the Claimant was causing a fuss and he was doing her a favor, in front of other colleagues. [§27 GOC]

9.19. On 2 of July 2020 the rota was published, 4 out of 5 late shifts the Claimant was allocated did not comply with her working arrangements. There were other staff available on all these days. [§28 GOC]

9.20. On 10 July 2020 at a staff meeting on Teams Oliver singled the Claimant out as 'taking the piss'. Oliver said that 99% of people were open, honest, and reliable and trustworthy, the other 1% take the piss. This caused the Claimant to have a panic attack. [§29 GOC]

10. If so, in respect of each conduct, was it unwanted?

11. If so, in respect of each unwanted conduct, was it related to C's sex?

12. If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

13. If any unwanted conduct had the effect set out above, was it reasonable in all the circumstances for it to have that effect?

Harassment of a sexual nature

14. Did R engage in the following conduct?

14.1. On 17 January 2017 during a team training session in Pacing clinic Piers sat next to the Claimant on a bed/bench. He then brushed his hand along her lower back and squeezed her bottom, giving her suggestive looks. [§7 GOC]

14.2. In about June 2017 Piers commented 'Oh is that your newest sex partner?' He said this loudly so colleagues could hear. Soon after the incident, on or around 6 June 2017 Piers stood at the end of the corridor staring at the Claimant up and down and said loudly 'I am looking, and it looks good'. [§10 GOC]

14.3. Treatment detailed at §9.4. [§11 GOC]

15. If so, in respect of each conduct, was it unwanted?

16. If so, in respect of each unwanted conduct, was it of a sexual nature?

17. If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

18. If so, was it because of C's submission and / or rejection to any unwanted conduct.

19. If any unwanted conduct had the effect set out above, was it reasonable in all the circumstances for it to have that effect?

Constructive unfair dismissal

20. Did R breach the term of trust and confidence as follows?

20.1. C relies on the allegations of discrimination and harassment above whether they amount to breaches of the Equality Act 2010 or not.

21. If so, was any such breach sufficiently serious as to justify C in treating her contract of employment as being at an end?

22. If so, did C resign in response to any such breach?

23. Did C delay terminating her contract of employment so as to affirm her contract of employment or waive any breach?

Wrongful dismissal

24. If C succeeds in showing she was constructively dismissed, is she entitled to notice pay?

Unlawful deduction from wages

25. Did the First Respondent unlawfully deduct wages from the Claimant's pay in respect of the Claimant's promotion in July 2017? [§8 GOC]

Personal injury

26. If any of the Respondents are found to have discriminated against the Claimant, did that discrimination cause personal injury to the Claimant (the Claimant alleges psychiatric damage)? If so, what damages should be awarded?

Remedy

27. What remedy is C entitled to (if any)?

The Conduct of the Hearing

3. The Hearing was conducted remotely by CVP. It proceeded smoothy and any connection issues were promptly resolved. The Tribunal heard evidence from the Claimant. It heard evidence from Piers Wright, the Second Respondent, Oliver Williams, the Third Respondent and David Shrimpton, who conducted the Claimant's grievance appeal. The Tribunal had a witness statement by Gail Lyons, who decided the Claimant's grievance. Ms Lyons did not

give evidence and the Tribunal attached appropriate weight to that evidence. The Tribunal, however, also had contemporaneous documentation concerning the grievance.

4. There was a Bundle of documents. Page references in these Reasons refer to that Bundle. The parties made written and oral submissions. The Tribunal reserved its judgment.

Anonymity

5. Claimant has lifelong anonymity pursuant to *s1 Sexual Offences (Amendment) Act 1992*, whereby there is a lifetime prohibition on publication of any matter which is likely to lead to members of the public identifying the alleged victims of sexual offences.

6. On the second day of the Final Hearing 24 March 2022, the Judge raised allegation 14.1. with the parties: " *On 17 January 2017 during a team training session in Pacing clinic Piers sat next to the Claimant on a bed/bench. He then brushed his hand along her lower back and squeezed her bottom, giving her suggestive looks. [§7 GOC]".*

7. The Judge said that this could be an allegation of a sexual offence, in respect of which the Claimant might be entitled to lifelong anonymity. She asked the parties to address the Tribunal on the implications for the Tribunal's judgment and for the conduct of the proceedings.

8. The parties then agreed that the Claimant and the individual Respondents should be anonymised indefinitely, and that they should not be identified in the press, indefinitely. The parties agreed that the particular Hospital in the Respondent Trust, at which the Claimant and Respondents worked, should not be named in the Judgment or during the hearing. The Claimant said that she had made an allegation of a sexual offence and was herself entitled to anonymity. However, she said that she had worked in a very small speciality, with only 4-5 people at her hospital working in the EP discipline, so that at the Claimant could easily be identified by anyone working in that field, by reference to the other individual Respondents and the individual hospital itself.

9. The Judge said that the parties' agreement was not conclusive and that the Tribunal must give effect to the principle of open justice and to the right of freedom of expression, even if they compete with the Claimant's right to privacy.

Anonymity Law

10. Where a Claimant makes an allegation of an act which would be a sexual offence under *Sexual Offences Act 2003*, the Claimant is protected *by s1 Sexual Offences (Amendment) Act 1992*, whereby there is a lifetime prohibition on publication of any matter which is likely to lead to members of the public identifying the alleged victims of sexual offences.

11. *s3 Sexual Offences Act 2003* provides, "3(1) A person (A) commits an offence if–(a) he intentionally touches another person (B), (b) the touching is sexual,(c) B does not consent to the touching, and (d) A does not reasonably believe that B consents."

12. The *Sexual Offences (Amendment) Act 1992* does not apply to the perpetrators of such assaults; it applies to victims only. In *A v X* [2019] IRLR 620 EAT Soole J said, at paragraph [70], that an Employment Tribunal Judgment is a publication which must be anonymised.

13. The Tribunal's powers are contained in *s11 ETA 1996* and *r50 ET Rules 2013.*

14. *s11 ETA 1996* provides

" **Restriction of publicity in cases involving sexual misconduct**

(1) [Employment tribunal] procedure regulations may include provision—(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and provision—

(b) for cases involving allegations of sexual misconduct, enabling an [employment tribunal], on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal."

15. *R50 ET Rules of Procedure 2013* provide:

"**Privacy and restrictions on disclosure 50.—**

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
(3) Such orders may include— (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.
(5) Where an order is made under paragraph (3)(d) above— (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification; (b) it shall specify the duration of the order; (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and (d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing. 21 (6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998(a)..

16. In *A v X* [2019] IRLR 620 EAT Soole J considered the appropriate use of the Tribunal's powers to make restricted reporting and anonymity orders. At para 60 he summarised the relevant principles:

"(1) The starting point is the rule that, outside the area of statutory and established exceptions, the open justice principle has universal application, except where it is strictly necessary to depart from it in the interests of the administration of justice.
(2) However s 11 ETA and r 50 provide one of those statutory exceptions. Thus r50(1) imposes a less onerous test than the strict necessity test of the general rule, namely necessity 'in the interests of justice or in order to protect the Convention rights of any person'. Convention rights include the qualified or art 8 right to honour and reputation. Nor does r 50(2) provide a test of strict necessity. Rather, it requires that 'full weight' be given in the balancing exercise to the principle of open justice and to art 10.
(3) The observations of this Tribunal in the cited 1997–1998 decisions provide support for the proposition that the jurisdiction is not so constrained; see the above citations from *Vincent* and *Associated Newspapers*.
(4) Limited as it is on this point, the ministerial statement admitted in those decisions pursuant to *Pepper (Inspector of Taxes) v Hart* [1993] IRLR 33 includes the observation that the clause which became s 11 offered 'valuable protection to the victims of and witnesses to sexual harassment and indeed to anyone who is falsely accused of such harassment': see Associated Newspapers at p 572. Of course, that begs the question of whether the allegation is true or false; but that is a matter for adjudication in the substantive hearing.
(5) The observations of Underhill P in *Traditional Securities* and *F v G* predate the revision of r 50 with its specific reference to the protection of Convention rights. I also respectfully consider that this statutory time limitation of RROs until promulgation of the judgment is consistent with an approach which permits protection of the perpetrator in his art 8 rights, independently of any adverse effects on the administration of justice, until adjudication on the truth of the allegation
(6) The decisions concerning post-promulgation restrictions (eg *Roden* and *Fallows*) are to be distinguished for that very fact. By that stage the decision has been promulgated or the case has settled. In consequence those decisions fall outside the statutory exception limited in time by s 11(1)(b), and in consequence reflect the test of strict necessity and the limited weight given to art 8 considerations in that balancing exercise: see eg Fallows at paras 42 and 48–50. (7) It does not follow from this approach that an Order will routinely be granted in a pre-promulgation application within r 50. It is a matter of judgment in each case, having regard to the particular evidence relating to art 8 and giving full weight to the principle of open justice and to art 10."

17. At para 61 Soole J emphasised at that the starting point was the concept of "open justice": "….it was necessary also to give full weight to the point, restated in Khuja, that press reporting of legal proceedings is an inseparable part of the concept of open justice. This aspect of open justice includes names and contemporaneity and proceeds on the basis that the reporting will be lawful, namely fair and accurate. The public interest in that part of the principle involves a consideration distinct from the art 10 right to freedom of expression which the Judge did take into account….".

Discussion and Decision
Claimant – Indefinite Anonymity and Restricted Reporting Orders

18. In this case the Claimant made an allegation of sex harassment against R2, including an allegation that he squeezed her bottom. This was an allegation which could come within *s3 Sexual Offences Act 2003.* As such, the Claimant is protected by *s 1 Sexual Offences*

(Amendment) Act 1992, whereby there is a lifetime prohibition on publication of any matter which is likely to lead to members of the public identifying the alleged victims of sexual offences.

19. As made clear by Soole J in at para [70] of *A v X* [2019] IRLR 620 EAT, that protection applies to the publication of the Tribunal's judgment.

20. To give effect to the *Sexual Offences (Amendment) Act 1992* protection, it was necessary to make an anonymity order in respect of the Claimant of indefinite duration in the interests of justice - under *Rule 50(3)(b) ET Rules of Procedure 2013*- that is, that the identity of the Claimant should not be disclosed to the public, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.

21. When considering making orders under *r50*, the Tribunal must take full account of the principle of open justice and the right to freedom of expression. Open justice will often include the publication of names.

22. However, balancing the Claimant's *Article 8* rights, it was proportionate to protect her right to privacy, as the alleged victim of a sexual offence, by preventing her name being published in the future (whether by the Court itself or by any other person) and anything which might identify her, while making no other restriction on the reporting of the proceedings. Such orders are of indefinite duration because the test of strict necessity is satisfied in the case of a victim of an alleged sexual offence.

23. Both parties suggested that the Second and Third Respondents' identities needed to be protected to ensure that the Claimant was not identified. The Tribunal accepted that all 3 parties worked in a very small discipline and that other people working within it (and certainly colleagues) might be able to identify the Claimant by reference to the Second Respondent. The Tribunal made an order anonymising the Second and Third Respondents until promulgation. Time limited Restricted Reporting and Anonymisation Orders can hold the line until promulgation of judgment.

24. The Tribunal decided that it was not necessary to give anonymity to the Second and Third Respondents after promulgation of the Judgment to preserve the Claimant's anonymity. Neither the Claimant nor the Second and Third Respondents work now at the hospital where the events in question occurred. From the evidence, the Claimant no longer works in the small discipline in which she was employed at the times relevant to this case. As time has progressed, the identification of the Claimant by reference to R2 and R3 has become considerably less likely.

25. Balancing the principle of open justice and rights to freedom of expression with the Second and Third Respondents' right to privacy, the Tribunal considered that the Second and Third Respondents were adequately protected by the terms of the Judgment, which has rejected the Claimant's allegations against them. Otherwise, the principles of open justice and freedom of expression must prevail.

Findings of Primary Fact

26. The Claimant commenced employment with the First Respondent on 6 August 2012 as a Cardiac Physiologist. The Claimant was a student, completing her studies, when she was

first employed, but at all times she was employed in a substantive post. The First Respondent is a London Hospital Trust.

27. Throughout the Claimant's employment the Second Respondent was employed by the Hospital Trust as a Senior Chief Cardiac Physiologist at Band 8. The Third Respondent was employed by the Hospital Trust as a Principal Cardiac Physiologist.

28. The Claimant was promoted to Band 6 on 30 June 2014.

29. The Claimant and the Second Respondent kissed at their 2012 work Christmas party. It was not in dispute that, by February 2013, the Claimant and Second Respondent had commenced a relationship. The Claimant was then aged 26 and the Second Respondent was aged 37.

30. The circumstances of the relationship were not auspicious. The Second Respondent had been in a relationship and his partner had also had a baby in February 2013. The Second Respondent and his partner nevertheless continued to live together, which the Claimant found disconcerting. The Second Respondent and the Claimant, at times, expressed deep feelings for one another during the relationship. However, the Second Respondent never moved out of his home with his partner and child. Both the Claimant and the Second Respondent told the Tribunal that they had each tried to end their relationship at different times.

31. The Tribunal did not find that the Claimant had tried to end the relationship, but the Second Respondent had continued to pursue her. The Tribunal found that the later stages of their relationship were characterised by doubt on both sides. The facts tended to suggest that it was the Second Respondent who ultimately ended the relationship.

32. The Second Respondent had also met his partner in work. It was put to him in cross examination that he had a significant history of workplace sexual relationships. He denied this. In the absence of any detailed evidence on the subject, the Tribunal accepted his denial.

33. There was a dispute of fact about when the relationship between the Claimant and the Second Respondent ended. However, it was clear to the Tribunal, on both parties' evidence, that the relationship was never resurrected after September 2015, when the Second Respondent told the Claimant that his partner was pregnant again. It was clear that the Claimant was devastated by this news and was very unhappy for many months afterwards, as a result of the final demise of their relationship.

34. Around September 2015 the Claimant sent the Second Respondent many angry and unhappy text messages about their relationship and the way in which she felt she had been treated. Some of the messages could be seen as threatening in tone. The Second Respondent took screenshots of these messages. He told the Tribunal that he did so because he was worried that the Claimant might raise the relationship in the workplace. He told the Tribunal that he believed that the Trust would only see the relationship as a senior male taking advantage of a junior female. The Tribunal accepted that the Second Respondent was concerned that that his career would be affected if the Claimant complained about the relationship.

35. In late 2015 the Second Respondent told his manager, Vicky Griffiths, about the relationship. Ms Griffiths told the Second Respondent that he had been very stupid to have embarked upon it. Both the Claimant and the Second Respondent told the Tribunal in oral evidence that Ms Griffiths took little or no action to address the tension between them. On both their

evidence, however, neither the Claimant nor the Second Respondent wanted to complain formally to HR about their previous sexual relationship.

36. The Claimant also threatened to tell the Second Respondent's partner about the relationship, but ultimately he did that himself.

37. The Claimant told the Tribunal that, in the summer of 2015, the Second Respondent became cold and dismissive towards her and their relationship began to break down. She said that, on several occasions, he had told her that no one at work, including the managers, would believe a 'silly little girl' over a man, who was more senior in his role. The Claimant was cross examined about this evidence. She said, " I had never discussed the relationship with colleagues so it was not said in front of anyone. He said this many times – some over phone and some in hospital."

38. The Second Respondent denied he had said this. He told the Tribunal that this was a complete fabrication on the part of the Claimant.

39. The Claimant made entries on her smartphone about various interactions between the Second Respondent and her. The notes started from 17 January 2017. There were no notes of the Second Respondent saying that no one would believe a silly little girl. In evidence, the Claimant gave no details of when and where and in what circumstances the Second Respondent said these things.

40. In the absence of dates and times and the circumstances of these alleged statements, and without any other corroboration, the Tribunal was unable to find, on the balance of probabilities, that the Second Respondent had said 'that no one at work, including the managers, would believe a 'silly little girl' over a man, who was more senior in his role.'

41. The Claimant also told the Tribunal that the Second Respondent told colleagues in the workplace about the breakdown of their relationship and the Claimant's reaction to it – and that this affected these colleagues' relationship with the Claimant. In the absence of further particulars, however, the Tribunal was unable to find what the Second Respondent might have said and to whom.

42. The Claimant told the Tribunal that, on 17 January 2017, in a training session, in Pacing clinic, the Second Respondent brushed his hand along her lower back and squeezed her bottom, giving her suggestive looks.

43. She relied on her electronic diary entry which said, "17/01/2017 During a team training session in Pacing clinic Piers sat next to me on a bed/bench. He brushed his hand along my lower back and squeezed my bottom, giving me suggestive looks. I froze and did not say anything as did not want to interrupt [sic] the training session, I moved as soon as I could." P185.

44. In cross examination the Claimant could not recall what was the subject of training session or the others who attended it.

45. The Claimant did not raise the matter with the Second Respondent at the time.

46. The Claimant told the Tribunal that she went back to the notes she made and added to them. The notes reflect this; in places, the Claimant adds comments on past entries. For example, she comments, 'I did later discuss these issues' , p185, 'I sent this email', p 189, 'Example of Piers ignoring my request', p 198.

47. The Claimant also added texts and emails to the notes, for the purpose of her grievance, for example, p989.

48. When making findings on the events recorded in the Claimant's notes, therefore, the Tribunal bore in mind that the notes were not a contemporaneous record, but had been added to later, perhaps on a number of occasions. This meant that the notes could not be seen as a reliable contemporaneous record.

49. It was not clear when the Claimant's diary entry for 17 January 2017 was made, or whether the complete diary entry for 17 January was made at one time, or whether separate sentences were added at different times.

50. The Second Respondent did not recall any training session and denied that he had done what the Claimant alleged.

51. The Claimant gave very little other context for this alleged physical contact. On the very scant alleged facts, the Tribunal did not conclude, on the balance of probabilities, that any contact occurred between the Claimant and the Second Respondent at the alleged time; or if any contact did occur, that it happened in the way the Claimant described. The Tribunal makes clear that it did not find, on the balance of probabilities, that the Second Respondent touched the Claimant in a deliberate and sexual manner.

52. The Claimant told the Tribunal that, since being promoted to band 7, she had asked for extra responsibilities. She said that Ms Griffiths had put her in charge of stock management in March 2017 . She told the Tribunal, *" I was put in charge, I was excited, I put laminates in stock room. The following day I went into the stock room and laminates were removed. I asked where they were, Ms Griffiths told me that the Second Respondent felt we could not work well together."* The Claimant told the Tribunal that the stock management was then handed to her male colleague.

53. She relied a timeline she had made for her Tribunal claim, p988, which included the following account, "My colleague Sarah Lewis was leaving the Trust. My manager said she would like me to take over her responsibility of device stock management. She said I was organised/ capable and ready to step up and take on managerial responsibilities ahead of applying for a band 7 post. I was extremely pleased and set to work right away making a few changes, printed and laminated labels and implemented a new system to ensure we did not run too low on these important devices. I was so pleased I was finally being given a chance to prove myself, The next day I arrived into work to find my labels torn off the shelves and thrown in the staff office. Vicky told me Piers did not want me to take on this responsibility, He instead invited one of my colleagues Steve to take over. I was extremely upset but asked if there was anything else I could do. She said no."

54. The Second Respondent denied that the Claimant had ever been given responsibility for EP stock management. He said that he had always carried out EP stock management himself, with occasional assistance from both female and male colleagues, including Sofia Santos and Steve Vance.

55. The Tribunal accepted the Claimant's evidence that Vicky Griffiths did ask the Claimant to undertake, or assist with, EP stock management.

56. The Claimant did not continue to carry out this role. The Second Respondent continued to do the role, without help from the Claimant.

57. The Tribunal accepted the Claimant's evidence that Ms Griffiths took the role away from the Claimant and that the reason given for this was the Claimant and the Second Respondent could not work well together. However, the Tribunal also found that the role was not then given to a man. The Second Respondent had been in ultimate charge of EP stock management throughout and continued to be so, but he asked for help from both male and female colleagues in this task.

58. The Claimant told the Tribunal that, on 16 May 2017 when the Claimant was having a discussion about John Gray, the Second Respondent asked, 'Oh is that your newest sex partner?'.

59. She relied on her diary entry, "16/05/2017 My friend Tim was interviewing the author John Gray, I was excited about this. Whilst Piers and I were working together in the lab Piers asked me what it was about and replied, 'Oh is that your newest sex partner?' He said it quite loud so colleagues could hear, it was most inappropriate, made me feel embarrassed and very uncomfortable." P185.

60. The Second Respondent said that that was not the type of language he would use.

61. The Claimant told the Tribunal that she was in a new relationship at the time and that Second Respondent was aware of it. She had talked about her new partner in the workplace.

62. The Tribunal considered that the expression "sex partner" was not consistent with the language that the Second Respondent appeared to use when interacting with the Claimant around the same time. The Tribunal noted that, for example, on 5 July 2017 at 00.24 the Second Respondent texted the Claimant, "You looked beautiful tonight btw. Although I shouldn't mention it I thought I'd tell you…. Sorry. Shouldn't have said" P663. The Tribunal noted that the Second Respondent excused himself for saying the Claimant "looked beautiful". It considered that it was unlikely that, at the same time he would have asked the Claimant about her "sex partner" when he implicitly apologised for a comment which was much milder.

63. The Tribunal concluded that the Second Respondent did not ask the Claimant 'is that your new sex partner?'

64. The Claimant told the Tribunal that, on 26 May 2017, the Second Respondent shouted at her in front of the entire team that she did not do her job properly. She told the Tribunal that she felt that he treated in in this way because of their relationship not working out and that he was never similarly hostile towards anyone else. The Claimant drew the Tribunal's attention to text messages with colleagues wherein she discussed this incident, pp 988-989. In those messages the Claimant said that she had just had a "massive argument" with the Second Respondent and hated him. She said that he "went mental" in front of everyone. Her colleague commented in reply, " Aw he does this and it just makes the day horrible… I just tried to tell him to be nicer to people more because I was pissed off because he did this to me and it's not right.." p989.

65. The Second Respondent told the Tribunal that the working environment was a highly pressurised one and that people would shout and swear. In evidence, the Claimant agreed that Consultants shouted during procedures.

66. The Tribunal noted that, while the Claimant gave evidence that the Second Respondent singled her out for hostile treatment, her colleague had commented “he does this” and said that the Second Respondent had done the same to the colleague.

67. The Tribunal concluded that Second Respondent did shout at his colleagues and did not single Claimant out for this unpleasant treatment. It noted that he had been advised to ‘Be nicer to “people”’ generally, p989.

68. The Claimant told the Tribunal that, on 2 June 2017 the Second Respondent stood at the end of the corridor staring at the Claimant up and down and said loudly, ‘I am looking, and it looks good’. Her electronic diary notes stated, “02/06/2017 I had got ready to go out after work and had come back up to labs to collect my phone. Piers stood at the end of the corridor staring at me up and down. He said I’m looking and it looks goooood' this together with the look on his face as he watched me walk down the corridor made me feel incredibly uncomfortable. P185.

69. The Second Respondent denied this. He said that he would not make such comments.

70. The Tribunal noted that on 5 July 2017 the Second Respondent texted the Claimant saying “You looked beautiful tonight btw. Although I shouldn’t mention it I thought I’d tell you.” P663. Their text exchange continued into the early hours of the morning and included discussion about the Claimant’s appearance and hairstyle. The Tribunal also noted that, in June and July 2017, the Claimant and Second Respondent frequently sent each other very friendly and jocular texts from 15 June 2017, p659, almost daily and until the end of July 2017, p672. On 19 and 29 July 2017 they sent each other about 30 texts. The Tribunal noted that the Claimant used very familiar terms of address to the Second Respondent including, ‘cutie’ and ‘darling’. In the context of the Claimant and Second Respondent making light-hearted comments to each other, including about the Claimant’s appearance, the Tribunal considered that the Second Respondent might well have made a jocular comment to the Claimant about her looking good when she was going out for the evening.

71. The Claimant gave evidence that, on 8 June 2017, the Second Respondent followed the Claimant out of work and waited for her outside Waitrose. She said that, the next day, he asked the Claimant if the bottle of wine she had bought was for her ‘new sex partner’. She relied on her electronic note, “8/06/2017 I left work at ~8-9pm, i walked down Britten street towards Sloane Square, I turned around and noticed Piers was standing at the top of the road staring at me. He began following me, I turned on to Kings Road and into Waitrose. He was waiting at the entrance as I left and i rushed passed him. The next day he asked if the bottle of wine I had bought was for my 'sex partner'.” P185. The Claimant said that she had been discussing her new partner in work.

72. The Second Respondent denied that he had followed the Claimant from work, but said that he was already buying cigarettes in the nearby Waitrose. He denied that he had used, or would use, such words the following day.

73. The Tribunal considered that it was likely that the Claimant and Second Respondent would occasionally coincide in the local Waitrose, and walk to Waitrose to buy provisions at a similar time after the working day. It is normal for colleagues to coincide on their way out of work.

74. The Tribunal concluded that the Second Respondent may have asked whether Claimant had been buying wine to drink with her new partner, whom the Claimant had been openly

discussing in workplace. The Claimant and Second Respondent appeared to have a companionable relationship at the time. Very shortly after this date, the Claimant and Second Respondent were exchanging friendly numerous texts on a daily basis, p659. The Tribunal noted that, during June 2017, the Claimant told the Second Respondent that she was happy at work, p664; asked to borrow a small amount of money from him, p 665; called him 'cutie' with kisses, p 666,667, and referred to him as 'Champion', p 673. This appeared to reflect an intimate friendship, encompassing both personal and professional interactions.

75. However, again, the Tribunal accepted the Second Respondent's evidence that he did not use the term " sex partner" when talking to the Claimant. This was inconsistent with the tone of his contemporaneous exchanges with the Claimant.

76. The Claimant was line managed by Vicky Griffiths (Band 8 Head of Cardiophysio Department) from the commencement of employment until November 2019.

77. The Claimant was successful in promotion to a band 7 Chief Cardiac Physiologist in July 2017. The Second Respondent was on the panel which promoted her. Her pay was increased from October 2017. In their text exchanges, the Claimant thanked the Second Respondent for being "lovely" to her in the interview, p668. In July 2019, another colleague, Sam Griffiths, was also appointed to a Band 7 post. He was back paid for several months, for doing the Band 7 role. The Second Respondent accepted that this was factually correct. He could not offer an explanation. In cross examination. he was asked whether he expected that the Claimant's Band 7 job would have started immediately after her interview. He responded, "To my knowledge, yes… it was in the control of Vicky Griffiths… Yes, it would be unfair to expect them to do a role they are not being paid for."

78. The Claimant told the Tribunal that her colleagues, Steve and Josh, were promoted at the same time that she had been. She said that Steve would not have been paid as a Band 7 – he would not have had the capability to work alone as an EP practitioner immediately following his promotion. She said that she did not know about Josh's situation.

79. Mr Williams told the Tribunal that Sam Griffiths had already been working as a Band 7 role before his promotion, but that the Claimant had not been undertaking the responsibilities of the higher band before her promotion, so her pay was increased from the date she actually started in the Band 7 role.

80. Mr Williams said of Sam Griffiths, "He worked completely independently in EP and pacing implants. Sam Griffiths was generous with his time and would arrange training outside of work and generally stood out in his ability." He said that Vicky Griffiths (no relation) had made the decision to pay Sam Griffiths at a band 7 rate immediately on his promotion.

81. It did not appear to be in dispute that Mr Griffiths was an excellent Physiologist, and had a Masters from the NHS Scientist Training Programme in Cardiac Physiology. It was not in dispute that he subsequently started to train as a doctor.

82. In January 2018 Claimant prepared the team's rota. She sent it to the Second Respondent on 2 January 2018, saying, "Use it or throw it away but did this quickly to help you out :) ", p194. The Claimant commented on this email in her grievance – it did not appear that she had made any contemporaneous note at the time.

83. It appeared that there were numerous email exchanges between the Second Respondent and the team about the team's rotas for "long days off "at this time – pp 193 – 198. The Claimant made a number of requests for changes in rotas in 2018.

84. The Second Respondent agreed in evidence that he felt that the Claimant made a lot of requests about rotas.

85. The Claimant told the Tribunal that, after she had sent her draft rota to the Second Respondent, he came into the office and told her aggressively that it was not her place to get involved with management duties and that he could find her more suitable 'little tasks' to do if she was bored. She told the Tribunal that her band 7 colleague, Steve Vance, completed the monthly rota on numerous occasions when the Second Respondent was stressed and the Second Respondent never treated him in that way.

86. The Second Respondent gave evidence that he did not use the rota because he had probably completed the rota himself already. He said that he considered it was his responsibility to compile the rota and only when his mother was seriously ill in hospital had Steve Vance offered to help. The Second Respondent told the Tribunal, "He said, 'I really enjoy these things, shall I have a go?' and I said, 'knock yourself out'. The Second Respondent told the Tribunal that the situation occurred organically. He said that, from then on, Mr Vance and the Second Respondent would share the responsibility for compiling the rota and that when Mr Vance left the Trust, the Second Respondent took the job back.

87. The Tribunal found that the Second Respondent's evidence was clear and compelling on this issue. It found that it was his role to prepare rotas, but that he later accepted help from Mr Vance because of particular family pressures at the time.

88. The Tribunal also found that there was tension between the Claimant and Second Respondent about rotas generally, but it did not accept that the Second Respondent shouted at the Claimant, or told her that he would find her alternative 'little jobs'.

89. In summer 2018 the Claimant moved house to Mersea, in Essex. The travelling time between the Claimant's home and the Hospital was 2 – 2.5 hours. The Claimant preferred not to work late on Tuesday night before her "long day off" on Wednesdays, so that she could go home on Tuesday night rather than travelling on Wednesday morning, on her day off.

90. She told the Tribunal that, on 22 October 2018, the Second Respondent became very aggressive and shouted at her in the control room in front of other staff members and a patient and later said he was 'always letting her go home', and that she was stupid for saying otherwise. In her diary entry for the day, the Claimant wrote, p201, "Piers said goodbye to TWs team after finishing the case and I told him I was surprised to be staying, given our earlier agreement and my lengthy commute after what was going to be a long case with Dr Wong (~10pm finish). He became very agressive towards me, shouting at me in the control room in front of other staff members during the ongoing case. He then explained he was always coming to let me go home. I tried to talk to him calmly and quietly and repeatedly asked him to stop being aggressive, he did not. I eventually left to go home, as agreed. I was very upset as Piers had shouted at me in front of colleagues, then tried to undermine me by saying he was 'always letting me go home', and that I was stupid for saying otherwise. This was untrue."

91. The Second Respondent told the Tribunal that he needed not to work Tuesday nights because his partner worked those nights and he was needed for childcare duties. He told he

Tribunal that he believed the Claimant's commuting distance was not sustainable. He said he did not remember being aggressive and that, on the Claimant's own case, on the evening in question he had told her to go home and had not required her to stay in work.

92. The Tribunal found that there was clearly tension between the Claimant and the Second Respondent about the rota, which inevitably arose from competing needs. It found that the Second Respondent may well have shouted at the Claimant on 22 October 2018 when she wanted to go home.

93. The Claimant told the Tribunal that, on 23 October 2018, she approached Vicky Griffiths, asking for mediation with the Second Respondent. She said that this request was ignored. The Second Respondent did not know of the request. In evidence, he said he believed mediation would have been a good idea.

94. It therefore appeared that Ms Griffiths made the decision not to pursue mediation between the Claimant and the Second Respondent. This was nothing to do with the Second Respondent's views on the matter.

95. The Claimant also told the Tribunal that the Second Respondent was extremely unfair towards her when allocating lucrative Saturday Waiting List ("WLI") Initiative shifts.

96. The Second Respondent told the Tribunal that he tried to balance rotas for lucrative late shifts and Waiting List Initiatives out over a month, so that all eligible staff were given an equal share. He said that the Saturday Waiting List Initiative ("WLI") shifts were the most lucrative.

97. He drew the Tribunal's attention to records for the years 2017 – 2020, which showed that the Claimant had been given at least as many, if not more, of these shifts than her colleagues each calendar year; WLI rotas 2017 to 2020, pages 613 - 614. The Claimant accepted in evidence that she worked 8 Saturdays in 2017 and 7 Saturdays in 2018, the joint highest number compared to her colleagues. She accepted that, in 2019, she worked the joint highest number and, in 2020, the joint second highest number of Saturdays.

98. The Claimant said that she had approached management about unfair allocations and that she had spoken to the Second Respondent, who had then changed the rota. She explained that the records showed no clear bias because the rotas were changed.

99. However, the Tribunal noted that, over 4 consecutive years, the Claimant was given a fair share of shifts. The Second Respondent must have been giving the Claimant a fair allocation even before the Claimant complained. The Tribunal concluded that it was unlikely that he would have suddenly changed this practice. Accordingly, it decided that the Claimant was given a fair (at least equal to her colleagues) allocation of lucrative shifts.

100. Vicky Griffiths retired in 2019 and it was decided that no single manager would be appointed to undertake her role. The 5 existing Band 8 managers jointly assumed Ms Griffiths' responsibilities. After November 2019, therefore, 5 Band 8 Managers, including the Second and Third Respondents, managed the Claimant. The Second Respondent became Head of Electrophysiology ("EP"), the Claimant's specialist discipline.

101. It was not in dispute that 2 of the 5 senior Band 8 managers were women.

102. The Claimant told the Tribunal that, December 2018, a Band 8A Role was created and given to a man, Nathan Hillier.

103. The Second Respondent gave evidence that Mr Hiller had previously worked at the Trust until 2015. He said that Vicky Griffiths had had an idea to have a “high level” EP person as an educator in the department and that she had Mr Hillier and Sarah Whittaker-Axon, from St Barts, in mind. At the time, Nathan Hillier was working in industry and was considering a move back into the NHS. However, the Second Respondent told the Tribunal that the money was eventually used to promote Kalah Baneel (a female) from a Band 6 to a Band 7 in EP in January 2020, following a successful interview.

104. The Claimant did not contradict this in evidence. The Tribunal accepted the Second Respondent’s evidence and found that Nathan Griffiths was not offered a band 8A role.

105. The Claimant gave evidence that, on 19 / 22 August 2019 the Second Respondent reminded everyone to hang their cables up in the Cath Lab on the hooks provided. The Claimant could not reach the hooks. She said that Sam Griffiths had joked about her not being able to reach and that the Second Respondent had replied that the hooks could not be moved, and had laughed, “we will get you a little step - a little tiny step stool”, p205. The Claimant said that, when a male nurse later complained about the hooks, they were moved. Her note, at p205, simply said that a nurse colleague had made the complaint.

106. The Second Respondent told the Tribunal that he had reminded everyone that they should hang up their cables on the hooks, to stop them being damaged. The hooks were attached to a wooden strip across the wall of the Cath Lab. The original long hooks had broken and shorter replacement coat hooks had been attached to the wooden strip as they could not be screwed directly into the wall on account of its lead lining and radiation protection. The Second Respondent agreed that the Claimant had been struggling to reach the hooks and told her that she could use either the patient step or a kick stool.

107. Ms Platt, for the Claimant, invited the Tribunal to accept that the Second Respondent had described such a stool as “little”, in a belittling manner. She observed that, elsewhere in his oral evidence, the Second Respondent had referred to a “little local arrangement” agreed between the Claimant and Vicky Griffiths.

108. The Tribunal did not accept that the Second Respondent had emphasized the small nature of the stool, or belittled the Claimant. It accepted the Second Respondent’s detailed description of the events and found that he suggested that the Claimant use a kick step, to assist her.

109. In September 2019 when one of the physiologists, Josh, left, his duties were distributed amongst the remaining team. The Second Respondent allocated a CD filing task to the Claimant. The Claimant told the Tribunal that she requested another responsibility, like training, but the Second Respondent said she would enjoy her ‘little filing job’. The Second Respondent emphatically denied having said this. In evidence, he agreed that the CD filing task was not the most exciting job. He said that the Claimant had asked for a job and did not seem unhappy with her task. He said that the team had no administrative support, so the job needed to be done and Josh, a man, had previously done the job.

110. The Tribunal accepted his evidence on all this. The Second Respondent gave the Claimant a filing task which needed to be done and which had also been undertaken by a man. The Tribunal accepted his denial that he had belittled the job. The Claimant did not make a note about this at the time and there were no email exchanges between them on the subject.

111. The Claimant told the Tribunal that, in late 2019, she was struggling to use new features on an EP machine because she had not had enough training and had not been rostered to work with the company representatives who demonstrated the systems as frequently as her male colleagues. She told the Tribunal that Professor Sabine Ernst commented that she was falling behind and the EP department was turning into 'boys club'; and that the Claimant needed to push for more training and more time with the company representatives. The Claimant made a note of this and relied on it later in her grievance, p 1018.

112. In evidence, the Claimant accepted that, in fact, in 2019, she was not rostered on her own more frequently than others.

113. Later, in 2020, she was rostered on her own much more often than her colleagues. At that time, there were only 3 EPs who could work on their own – the Claimant, the Second Respondent and Sam Griffiths, following the departure of Josh Parslow, and the locum Jeff Cooper. The Second Respondent told the Tribunal that the department was short staffed at the time and all experienced EP staff were required to work alone in EP at some point.

114. On 7 November 2019, a company representative invited the Claimant to attend a course to learn more about a new piece of equipment. The Claimant contacted the Second Respondent for authorisation. The Second Respondent did not reply until 14 November 2019, by which time a colleague, Steve, had requested half day time off in lieu ('TOIL'). The Second Respondent then rejected the Claimant's request on the grounds of short staff. He booked TOIL himself on the same day the course would have taken place.

115. The Second Respondent agreed in evidence that he had delayed in responding to the Claimant. He said that he had stressful personal issues, as his partner had thyroid cancer and his mother was sadly dying. He said, "I was under strain. I was running a busy department. I missed the boat and I apologise."

116. The Tribunal considered that the Second Respondent appeared to be genuine in his apology and accepted his evidence that he had mistakenly delayed answering the Claimant's request because of his personal circumstances.

117. On 21 November 2019 the Claimant requested to attend the following training courses: "Ensite Precision - Discovery : 2nd-3rd March 2020. EP for Enthusiasts : 11th-12th March 2020. Ensite Precision - Expert insight- 1st May 2020. Advanced EP skills : 13th-14th November 2020." She told the Tribunal that the Second Respondent came to find the Claimant in the lab and shouted, 'Do not think you are going on all those courses'. She said that all her requests for training had been rejected, ignored, or not dealt with in a timely manner, meaning that there were no places available for her.

118. The Second Respondent told the Tribunal that he did say that it wouldn't be possible for the Claimant to attend all the courses she proposed, but that he had asked her which ones she preferred.

119. On 21 November 2019 at 19.19 the Claimant emailed the Second Respondent saying, "Thank you for coming to speak to me earlier regarding the below courses. I would like to be considered for the Ensite Discovery course in the first instance. If any of the other courses are possible, I would be most grateful." P208.

120. The Tribunal considered that this contemporaneous email appeared to support the Second Respondent's account – that he had told the Claimant that she would not be able to attend

all the courses she had requested, and had asked her which one she preferred. It appeared, from the tone of the Claimant's email, that she had accepted the Second Respondent's earlier advice with equanimity.

121. On 21 November 2019 a staff meeting was held following Vicky Griffiths' departure. At the meeting, Oliver Williams, the Third Respondent, said that 'Vicky had allowed some members of staff to act almost fraudulently by claiming their overtime as TOIL instead of pay and that will now stop'. The Claimant told the Tribunal that most staff were aware the Claimant chose to claim TOIL, rather than pay, for working overtime, so she felt that it was clear that Mr Williams was referring to the Claimant.

122. The Second and Third Respondent agreed in evidence that the Claimant had had a local agreement with Vicky Griffiths that she would be permitted to use her overtime as TOIL, rather than be paid for it.

123. The Second Respondent agreed in evidence that no one else claimed TOIL, rather than pay, for overtime and that, if there was a discussion about overtime and TOIL, the only person who was being referred to was Claimant.

124. The Tribunal found that Mr Williams announced, in the staff meeting, that staff would not be permitted to claim TOIL for working overtime. It found that Mr Williams had acted very inappropriately in publicly withdrawing an agreement which the Claimant had made with Vicky Griffiths. The Tribunal accepted the Claimant's evidence that she was embarrassed and felt the change had been sprung upon her and that she had been singled out in a public meeting.

125. However, the Third Respondent denied that he had said that the practice of claiming TOIL was fraudulent. He said that he had used this description in summer 2020 in relation to people who were mis-recording their hours and claiming for work they had not done. The Tribunal will return to this issue in its decision.

126. The Claimant told the Tribunal that, in February 2020, the Second Respondent published the rota for March 2020 and, once again, the Claimant had to bring issues to his attention regarding the allocation of lates and Long Days Off. She said that Claire O'Neil had informed her that the Second Respondent had been in pacing clinic 'moaning' to other colleagues about the Claimant's issues with the rota. He had asked Ms O'Neil, 'How long does it actually take her to get home anyway?'

127. The Second Respondent told the Tribunal that it was very difficult to accommodate everyone's needs with the rota. He said that the Claimant asked for more changes than others. The Tribunal accepted the Claimant's evidence that the Second Respondent moaned about her to colleagues in the context of her asking for further changes to the rota.

128. In February 2020 the Second Respondent put the Claimant forward for a course in Belgium in June 2020, despite the fact that she had booked annual leave for her wedding on those dates.

129. The Claimant later recorded, "In February Piers telephoned the lab I was working in to discuss these courses. My preferred course in March was now fully booked. 2 other colleagues were attending a different course with the same company in March. He said he could not find my email with the other dates so he had booked me on another course but wasn't sure if the date would suit. The 2 day course was in Brussels, on 20th June" p208.

130. The Second Respondent agreed that he had booked the Claimant on that June 2020 course. He said that he was aware she had booked leave around that time but, because there was no space on an earlier course, he had booked the June course in case it might suit, as he was not sure of her precise wedding dates.

131. The Tribunal accepted the Second Respondent's account – it was partially corroborated by the Claimant's own notes.

132. The Claimant told the Tribunal that, in March 2020, it was common knowledge in the department the Claimant had just cancelled her June 2020 wedding due to COVID. She gave evidence that, on 19 March 2020 the Second Respondent kept asking her what was wrong with a smug look on his face, trying to provoke a reaction. The Claimant said that she had asked him to leave her alone several times.

133. The Second Respondent agreed in evidence that the Claimant had appeared very upset in work. He gave evidence that he had told her that her managers were concerned about her, and that she should talk to someone, even if not to him.

134. Mr Williams texted the Claimant, p210, sympathising and offering her some time off work. He said he would keep Piers and Nick out of any conversations, p210. The Claimant replied, saying that she appreciated the matter being kept between Karen Lascelles, Mr Williams and the Claimant, p211.

135. On the evidence, the Tribunal found that the Second Respondent was concerned, along with other managers, about the Claimant's distress. He spoke to her about this, but withdrew from further involvement and allowed the Claimant to confide in others. The Tribunal considered that the Claimant's distress was handled sensitively by her managers and she was able to discuss her concerns with a small group of 2 managers.

136. The Claimant told the Tribunal that, in April 2020 and 12 June 2020, another manager, Nicky, told the Claimant that the Second Respondent had asked her to roster the Claimant to work alone more frequently than her peers. Nicky told the subsequent investigation into the Claimant's grievance that, when she had asked the Second Respondent why the Claimant was rostered on her own more than others, he had commented that she didn't do things the way he liked. Nicky said that she had advised the Second Respondent to talk to the Claimant about the issue.

137. However, the Claimant told the Tribunal that, on 12 June 2020, Claire O'Neill had heard Nicky saying, 'Piers feels that men are better at training'. During the later grievance investigation, Nicky robustly denied that the Second Respondent had said this and said she would have challenged him if he had.

138. In evidence, the Second Respondent told the Tribunal that he had commented to Nicky that he had heard rumours from others about the Claimant's work. He explained that he was referring to Steve Vance grumbling that the Claimant did not aways pull her weight when she was training others. He agreed that he had not spoken to the Claimant about this.

139. The Tribunal noted that Claire O'Neill had not given evidence at the Tribunal. When asked, during the grievance investigation, Nicky had denied that the Second Respondent had told her that he thought that men were better at training.

140. On all the evidence, the Tribunal found that the Second Respondent did not say that he believed that men were better at training. He did ask that the Claimant be rostered on her own more than colleagues, so that she would train junior colleagues less frequently. The Second Respondent had heard complaints that the Claimant did not pull her weight when she was training juniors.

141. On 29 May 2020, during the first Covid19 lockdown, the Second Respondent reconfigured the EP labs along with other EP physiologists. The Claimant told the Tribunal that she was not asked for her input into this reconfiguration and was not even told it was happening. She gave evidence that she had only become aware of the reorganisation when the Second Respondent sent an email on 29 May 2020 thanking all the team for their help.

142. It was put to the Second Respondent in cross examination that he had specifically not invited the Claimant to assist with the lab reorganization.

143. He responded that he had thought that he had walked into a clinic and had asked Claire O'Neill and the Claimant, at the same time, if they wanted to help. He said that they would have been more than welcome and that he thought he had invited everyone.

144. The Tribunal considered the Second Respondent to have been credible when he said that he believed that he had invited the Claimant and Claire O'Neill together. It found that the Second Respondent believed he had invited all staff to help reconfigure the EP equipment if they had wanted to; and that none of the EP Physiologists was excluded.

145. On 1 July 2020 the Second Respondent had not rostered anyone to stay late. The Claimant told the Tribunal that it nevertheless transpired that he expected the Claimant to stay late. She said that he had previously requested that staff arrive no later than 4.55 pm for handover to evening staff, whereas he took over from the Claimant at 5:05pm that day - and made it sound like the Claimant was causing a fuss about leaving for the evening and that he was doing her a favour in allowing her to leave, in front of other colleagues.

146. The Second Respondent told the Tribunal that this was the first roster being worked after covid and that only a 9 – 5 service, from one lab, had been rostered. He said that the work had unexpectedly continued after 5pm. The Second Respondent said that he had nevertheless agreed to stay late. He conceded that he might have been a little irritated about staying on, when one of them had to stay and he was required to take over from the Claimant. He said that he was, in fact, helping her.

147. The Tribunal accepted the Second Respondent's evidence. It was entirely credible that a limited roster had been implemented following the 2020 covid lockdown and that no one had been rostered to work late. It was equally credible that the Second Respondent might have been peeved that it was he, rather than the Claimant, who ended up working late, when neither of them had been rostered to do so.

148. The Claimant told the Tribunal that a rota was published on 2 July 2020 with 4 out of 5 late shifts allocated to the Claimant, which did not comply with her working and travelling arrangements. The Claimant told the Tribunal that there were other staff available on all these days, so there was no good reason for this.

149. The Second Respondent agreed that he made mistakes with the roster. He said of this particular roster, "I don't recall – that is probably true. I apologise for that. It was disorganised

– we were emerging from covid – I don't think it was deliberate. We were not doing lates – names on a rota for late shifts didn't mean anything."

150. Again, the Tribunal found that the Second Respondent's explanation was credible. It accepted that he did not deliberately roster the Claimant for 4 late shifts which did not suit her arrangements. It accepted that, so soon after the national lockdown, the Second Respondent believed that late shifts were not being worked, so that nominal late shift allocations would not be worked anyway.

151. On 10 July 2020 a staff meeting was conducted on Teams. During that meeting Oliver Williams said that 99% of people were open, honest, and reliable and trustworthy, but that "the other 1% take the piss". The Claimant told the Tribunal that Mr Williams had singled her out in saying this.

152. Second Respondent gave evidence that 2-3 people in the team were not filling in time sheets properly – people were not turning up when they said they had. He said that it was "not just [the Claimant] but it included [the Claimant]." The Second Respondent was unable to name the other 2 employees.

153. The Third Respondent agreed that he had used the words complained of, but said there were 3 people about whom he was talking.

154. The Tribunal found that Mr Williams used this very robust language in a meeting, implying that some colleagues were dishonest. The Tribunal considered that this was very strong language to use to describe staff in front of their colleagues. It considered that the words would have created a hostile environment.

155. The Tribunal found that the Claimant knew that Mr Williams was talking about her.

156. On 10 July 2020 the Claimant sent an email to HR with the title, "PLEASE HELP ME". In her email she said, "Following on from years of bullying and harassment which I have discussed with your HR business partners in August 2019 (Rebecca Ball) and February 2020 (Gary Clarke) I have been singled out as 'taking the p*ss' in our staff meeting today. This is not the first time I have been singled out in this way. Following this I suffered a panic attack. I do not know what to do but cannot go on like this. This abuse is affecting my work & home life, relationships, mental & physical health."

157. The Tribunal considered that this showed the Claimant was very distressed by Mr Williams' words in the 10 July 2020 staff meeting.

158. The Claimant had previously been in communication with HR in 2020. In early March 2020, she had emailed Rebecca Ball at HR, saying that she was struggling, p116.

159. On 4 March 2020 the Claimant met with Gary Clarke in HR, p122. Her later note that that Mr Clarke "..said he would speak to his manager that week but 'was concerned, felt it had gone beyond mediation and that the grievance process should be commenced ASAP." P209.

160. On 14 July Gary Clarke sent the Claimant the Respondent's Bullying and Harassment Policy and Grievance Procedure, p144. The Claimant then spoke with Ore Ediale at HR on 16 July 2020, but was concerned by what she understood Ms Ediale to have said during the conversation. The Claimant understood that Ms Ediale had discussed with Mr Williams the

fact that the Claimant intended to bring a grievance. She complained about this to HR on 28 July 2020, p146.

161. On 17 September 2020 the Claimant submitted a formal grievance, p161. In it, she said that she had not been afforded the same opportunities as her male colleagues, who had responsibilities such as training, development and stock management. The Claimant said that her requests to go on training courses had been rejected and that she had been excluded from team tasks like reconfigring the EP labs during covid. The Claimant said that Professor Sabine Ernst, Consultant in Electrophysiology, had remarked the Claimant needed to seek more training as she was being "left behind and the EP Physiologists was being turned into 'boys club'". The Claimant also said that she had been rostered to work alone more than her colleagues, without adequate breaks or assistance. The Claimant complained that she had been singled out in staff meetings. She said that she had been criticised for taking TOIL in respect of overtime and she said, " On the second occasion during a staff meeting which I attended on MS Teams Olly said 99% of people were open, honest, reliable and trustworthy, the other 1% take the piss. This was referring to lieu days off three days after they had tried to cancel my lieu day at 12 hours' notice following a period of self-isolation while awaiting my partners COVID test. There are only three members of staff who have the working pattern Olly was referring to. It was clear l was the 1% Oily was referring to as taking the piss." The Claimant also complained about the Second Respondent's conduct towards her since the breakdown of their relationship. She said, amongst other things, "On several occasions since the end of the relationship Piers has made comments which I would regard as sexual harassment and one occasion he touched me inappropriately. Piers has openly discriminated against me based on my gender..". The Claimant also complained that "When interviews for roles in the department are carried out Oily would regularly comment on the attractiveness of the female candidates. These comments were usually in pacing clinic in front of myself and other colleagues. Comments would be made about the female candidates' breasts and on one occasion how a candidate could have been a model. These comments left me feeling like a piece of meat." The Claimant said that she would like her entire grievance to be heard and considered fairly.

162. The Claimant attended a grievance hearing on 8 October 2020 conducted by Gail Lyons, Associate Director for Private Practice. Mr Widdowson, from HR, also attended the meeting. The Claimant noted of this meeting, "After about 1 hr 15 min, Gail was wrapping up the meeting, I told her I had not had enough time to fully discuss all my issues fully. She told me to add it to my evidence. I was told I would receive a recording/transcript of this meeting, I did not." p1038.

163. Ms Lyons also interviewed Oliver Williams, Claire O'Neill, Nicola Kebell, Karen Lascelles and Piers Wright, during the grievance investigation. She produced a grievance investigation report on 20 November 2020, p 323.

164. On 11 December 2020, p493 Ms Lyons wrote to the Claimant, telling her the outcome of her grievance. Ms Lyons listed 9 complaints made by the Claimant: That she had not been afforded the same opportunities, or given additional responsibilities, as her male colleagues and that she had been prevented from attending courses; That she had been scheduled to work alone, rather than being scheduled to train colleagues; That the Second Respondent did not explain changes to her; That she had been scheduled to work alone on complex procedures more often, without breaks and assistance; That she had been singled out for criticism in 2 staff meetings; That the Second Respondent had run over her foot with a trolley and slammed the door, bruising her hand; That Band 8 jobs had been created for male

members of staff; That the Claimant had not been given appropriate additional responsibilities.

165. Ms Lyons did not uphold any of the Claimant's complaints, save that she partially upheld the Claimant's complaint that she had been singled out in meetings. She said that the Claimant had been treated differently due to the Claimant and Second Respondent's historic relationship. Ms Lyons recommended that the Claimant and the Second Respondent undergo mediation (if agreed by both parties), with an experienced qualified appointed mediator, to resolve their conflict and attempt to address and improve their working relationship.

166. On 18 December 2020 the Claimant appealed the grievance outcome, p587. She said that the outcome had been significantly delayed and that she had not had time, at the grievance hearing, to address all her grievances. She said, "No attempt has been made within this past nine weeks to hear my Grievance fully. It is evident from many of the outcomes, factual errors and omissions within the report that I was not fully heard or understood." The Claimant addressed each of the findings of the grievance. She said, "The outcome did not discuss episodes of sexual harassment by Piers as detailed in my evidence. From memory, I was also not allowed to discuss these events during the investigation meeting." P590.

167. The Claimant concluded her letter of appeal by saying, "Given the length of time this process has taken, the failure of the Trust to follow their own policy's pertaining to the grievance process and the Trust's disregard for my mental wellbeing, I have been left with no choice but to resign with immediate effect." P592.

168. The Claimant's chronology, which she provided to the grievance investigation, contained the following entry: "17/01/2017 - During a team training session In Pacing clinic Piers sat next to me on a bed/bench. He brushed his hand along my lower back and squeezed my bottom, giving me suggestive looks. I froze and did not say anything as did not want to interrupt the training session, I moved as soon as I could. This made me feel sick." P987.

169. The Tribunal concluded, on the facts, that the grievance investigation did not consider the Claimant's allegation that the Second Respondent had touched her inappropriately. Ms Lyons did not ask the Claimant or the Second Respondent about it, nor did she provide any outcome on it.

170. Nor did Ms Lyons address the Claimant's allegation, as detailed in her chronology of diary entries that, "On several occasions since the end of the relationship Piers has made comments which I would regard as sexual harassment." These allegations, and the particulars of them in the Claimant's chronology, which she submitted to the grievance investigation, were not addressed in the grievance outcome at all.

171. Ms Lyons did not give evidence to the Tribunal to explain the omission. She did not address it in her witness statement.

172. The Second Respondent produced a detailed response to the Claimant's grievance, p605. This was included as an appendix to Ms Lyons' report. In his grievance response, the Second Respondent said, "I completely refute any allegations that I have made comments which would be regarded as sexual harassment and I have never touched her inappropriately. These remarks are false in every way. I am shocked that she would even say that and disappointed and hurt that she would stoop that low as to accuse me of anything so unpleasant. I have never discriminated against the Claimant], based on her gender or for any other reason." P618.

173. The Tribunal noted that the Second Respondent clearly understood that the Claimant was alleging, as part of her grievance, that he had made comments which amounted to sexual harassment and had touched her inappropriately.

174. Mr Shrimpton, who conducted the grievance appeal, initially told the Tribunal that the Claimant had not complained of sex discrimination in her grievance. In cross examination, he eventually conceded that she had, when the words of the grievance were put to him. The Tribunal considered that his understanding of the Claimant's grievance was extremely poor.

175. On 18 December 2020 the Claimant resigned with immediate effect. She contacted ACAS on 29 December 2020 and received an ACAS ECC on 13 January 2021. The Claimant presented her claim to the Tribunal on 2 February 2021.

Relevant Law

176. By *s39(2)(c)&(d) Equality Act 2010,* an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

177. By *s40(1)(a) EqA 2010* an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

178. Direct discrimination is defined in *s13 EqA 2010*. Harassment is defined in *s26 Eq A*.

179. The shifting burden of proof applies to claims under the *Equality Act 2010*, *s136 EqA 2010*.

Direct Sex Discrimination

180. Direct discrimination is defined in s13(1) EqA 2010: "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

181. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 Eq A 2010.

182. Sex is a protected characteristic, s4 EqA 2010.

183. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

184. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

185. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Harassment

186. By *ss.26(1) & (2) EqA 2010:*

" (1) A person (A) harasses another (B) if —

(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if —

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b)."

187. Harassment under *s.26(1)* must be related to a relevant protected characteristic. Harassment under *s.26(2)* need not be related to a relevant protected characteristic, but must be of a sexual nature. In both cases, the conduct must be unwanted and must have the proscribed purpose or effect.

188. *S26(3) EqA 2010* provides:

"(3) A also harasses B if —

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

189. The Equality and Human Rights Commission Guide to Sexual Harassment and Harassment at work provides:

§2.22: Sexual interaction that is invited, mutual or consensual is not sexual harassment because it is not unwanted. However, sexual conduct that has been welcomed in the past can become unwanted. Example: A female worker has a brief sexual relationship with her supervisor. The worker tells her supervisor that she thinks it was a mistake and doesn't want the relationship to continue. The next day, the supervisor grabs the worker's bottom, saying 'Come on, stop playing hard to get'. Although the original sexual relationship was consensual, the supervisor's conduct after the relationship ended is unwanted conduct of a sexual nature.

§2.23. The third type of harassment occurs when: a worker is subjected to unwanted conduct of a sexual nature or related to sex, the unwanted conduct has the purpose or effect of violating the worker's dignity, or creating an intimidating, hostile degrading, humiliating or

offensive environment for the worker, and the worker is treated less favourably because they submitted to, or rejected the unwanted conduct (s.26(3)). Example: In the previous example, the worker responds to the supervisor's behaviour saying, 'Get off me, I'm not playing hard to get!' After that, the supervisor starts to make things more difficult for the worker, giving her more work to do than others and being more critical of her work. The supervisor is treating the worker less favourably because she rejected his unwanted conduct.

Burden of Proof

190. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010*.

191. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

192. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

193. The EAT restated in *London Borough Of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council* [1997] IRLR 229: 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Unfair Dismissal

194. *S94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

195. By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

196. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

a. The employer has committed a repudiatory breach of contract. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9;
b. The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons* Ltd [1978] ICR 744;
c. The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

197. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

198. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680, and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

199. The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

200. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

201. In *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 the EAT (Morison J presiding) accepted that there was an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

202. In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703 the Court of Appeal held that the employee must resign in response, at least in part, to the fundamental breach by the employer; per Keene LJ: "The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

203. If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so, whether the dismissal was in fact fair under *s98(4) ERA.* In considering *s98(4),* the ET applies a neutral burden of proof. It is not for the Employment Tribunal to substitute its own decision for that of the employer.

Discussion and Decision

204. The Tribunal took into account all its findings of fact in coming to its conclusions. For clarity however, it has addressed individual allegations separately.

205. 9.1. "*In about 2015 Piers told the Claimant on several occasions that no one at work including the managers would believe a girl student over a man, who is more senior in his*

role. From September 2015 several of the Claimant's workplace friendships broke down because of Piers' actions. He had discussed our past relationship with our colleagues and has given me the cold treatment." [§6 GOC] (harassment because of sex)

206. This allegation was not made out on the facts. The Tribunal did not find that the Second Respondent said 'that no one at work, including the managers, would believe a 'silly little girl' over a man, who was more senior in his role.' In addition, in the absence of any real particulars from the Claimant, the Tribunal was unable to find that the Second Respondent said anything to his colleagues about the relationship.

207. Insofar as there was an uncomfortable atmosphere between the Claimant and the Second Respondent at times, it was clear to the Tribunal that this was because their relationship had broken down and both felt unhappy about the way in which the other had acted towards the end of it. The Tribunal considered, on all the facts, that this was a mutual feeling, not uncommon when a relationship has ended unhappily, whatever the sex of the participants. This mutual feeling was not created by the Second Respondent alone and was not because of the Claimant's sex, or because of her rejection of his sex harassment, but because of their unhappy parting of ways.

208. The Tribunal makes clear that it has not found that the Claimant rejected, or submitted to, sex harassment during her relationship with the Second Respondent. On the facts, it found that their sexual relationship was wanted and mutual while it lasted. The Claimant was unhappy that it had finally ended. The Tribunal did not find that the Claimant had consistently tried to end the relationship, or the Second Respondent had continued to pursue her. There were doubts on both sides towards the later stages of the relationship. The facts tended to suggest that it was the Second Respondent who ultimately ended it.

209. *14.1. On 17 January 2017 during a team training session in Pacing clinic Piers sat next to the Claimant on a bed/bench. He then brushed his hand along her lower back and squeezed her bottom, giving her suggestive looks*. [§7 GOC] (Harassment of a sexual nature).

210. This allegation was not made out on the facts. The Tribunal did not find that any physical contact occurred between the Claimant and the Second Respondent - or, if any contact did occur, that it happened in the way the Claimant described. The Tribunal did not find, on the balance of probabilities, that the Second Respondent touched the Claimant in a deliberate and sexual manner.

211. *14.2. In about June 2017 Piers commented 'Oh is that your newest sex partner?' He said this loudly so colleagues could hear. Soon after the incident, on or around 6 June 2017 Piers stood at the end of the corridor staring at the Claimant up and down and said loudly 'I am looking, and it looks good'. [§10 GOC] (harassment of a sexual nature).*

212. The Tribunal concluded that the Second Respondent did not ask the Claimant 'is that your new sex partner?'

213. The Tribunal noted that, in June and July 2017, the Claimant and Second Respondent frequently sent each other very friendly and jocular texts from 15 June 2017, almost daily, until the end of July 2017. The Claimant used very familiar terms of address to the Second Respondent including, 'cutie' and 'darling'. In the context of the Claimant and Second Respondent making light-hearted comments to each other, including about the Claimant's appearance and hairstyle, the Tribunal considered that the Second Respondent might well have made a jocular comment to the Claimant about her "looking good" when she was going out for the evening.

214. The Tribunal did not find that the Second Respondent's comment was "unwanted conduct". At the time, the Second Respondent and the Claimant were using mutually affectionate and appreciative language in text exchanges. The Second Respondent's comment was consistent with that mutually affectionate period in their interactions. Even if the conduct was unwanted by the Claimant, in the circumstances of their mutual appreciation at that time, the Tribunal was satisfied that that the conduct had neither the purpose nor effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was not reasonable for it to do so, taking into account all the circumstances.

215. *9.2. and 6.1 - relied on as harassment because of sex and direct sex discrimination:*

216. *"6.1. Since being promoted to band 7: 6.1.1. In March 2017 Piers stopped the Claimant doing stock management stating, ' he could not work well with me'. The stock management was then handed to her male colleague.*

217. The Tribunal accepted the Claimant's evidence that Ms Griffiths took the stock management role away from the Claimant and that the reason given for this was the Claimant and the Second Respondent could not work well together. However, the Tribunal also found that the role was not then given to a man. The Second Respondent had been in ultimate charge of EP stock management throughout and continued to be so, but he asked for help from both male and female colleagues in this task.

218. The Tribunal concluded that the Respondents had shown that the reason the stock management was removed from the Claimant was not because of sex – the task was given to both male and female colleagues instead. It may well have been related to some continuing awkwardness arising from the end of the Claimant and Second Respondent's previous relationship. However, as the Tribunal has decided, that was not because of, or related to "sex"; the Tribunal was satisfied that Ms Griffiths would have taken the stock management task from any person, whatever their sex, if their former partner has said they could not work well together in the same circumstances of an unhappy relationship breakup.

219. Accordingly, both the direct sex discrimination and sex harassment claims in this regard fail.

220. *6.1.2. The Claimant has not been afforded the same opportunities as her male colleagues. The Claimant's male colleagues have responsibilities such as training, development and stock management; these are desired when interviewing for band 8 roles. Relied on as harassment because of sex and direct sex discrimination.*

221. Tribunal found that it was the Second Respondent's role to prepare rotas, but that he started to accept help from Mr Vance because of particular family pressures at the time. The Tribunal also found that there was tension between the Claimant and Second Respondent about rotas generally, but it did not accept that the Second Respondent shouted at the Claimant, or told her that he would find her alternative 'little jobs'. The Second Respondent did not say that he believed that men were better at training. He did ask that the Claimant be rostered on her own more than colleagues, so that she would be training junior colleagues less frequently. This was because he had heard complaints that the Claimant did not pull her weight when she was training juniors. The Tribunal refers to its findings on stock management. On all the facts, and taking together all the allegations and its findings, the Tribunal found that, insofar as the Claimant was not given the same amount of responsibility for stock management or training, this was not in any way related to her sex. Even taken together, the Tribunal was satisfied that the allocation of duties to the Claimant was done for practical, day-to-day management reasons as the Second Respondent described.

222. *6.1.3. The Claimant worked independently as a band 7 Cardiac Physiologist for several months to a year, before being promoted to band 7. She was successful in a promotion in July 2017 and her pay was only increased from October 2017. In contrast, in July 2019 a colleague Samuel (G) was successfully appointed a band 7 and back paid several months. Relied on as harassment because of sex and direct sex discrimination.*

223. The Claimant was promoted at the same time as her male colleagues, Steve and Josh. Steve, who could not work alone as an EP practitioner immediately following his promotion, was not paid immediately as a band 7 Cardiac Physiologist. There was no evidence about whether Josh was paid immediately on promotion at the higher rate.

224. A year later, Sam Griffiths, who had been working completely independently in EP and pacing implants, was promoted and paid immediately at the promotion rate. Vicky Griffiths (no relation) had made the decision to pay Sam Griffiths at a band 7 rate immediately on his promotion.

225. On all the evidence, the Tribunal considered that the Claimant had not shifted the burden of proof to the Respondents to show that the difference in treatment between her and Sam Griffiths was because of, or related to, sex. There was no evidence the Claimant's male colleagues, who were promoted at the same time as she was, were given their pay rises earlier than the Claimant (one was definitely not). The Tribunal considered that these were more appropriate comparators, in that they were promoted at the same time and therefore in the same circumstances at the Claimant. The fact that a sole male colleague was treated differently a year later was not evidence from which the Tribunal could conclude that the treatment was related to sex. The Tribunal took into account the cases of *Madarassy v Nomura International plc.* and *Network Rail Infrastructure Ltd v Griffiths-Henry* in coming to its decision.

226. *6.1.4 In about December 2018, a position for a band 8a physiologist was created to persuade her colleague Nathan Hillier to come back to the Trust. This position was not advertised and I was not offered to apply for it. [§8 GOC]. Relied on as harassment because of sex and direct sex discrimination.*

227. This allegation failed on the facts. The Tribunal accepted the Second Respondent's evidence. A band 8a physiologist role was not, ultimately, created and Nathan Griffiths was not offered it.

228. *9.3. On 26 May 2017 Piers shouted at the Claimant in front of the entire team. [§9 GOC] (harassment because of sex)*

229. The Tribunal found that the Second Respondent did shout at the Claimant on 26 May 2017. Unreasonableness on its own is not sufficient to shift the burden of proof to the Respondent to show that the treatment is unrelated to sex. On the facts, the Tribunal concluded that, unfortunately, Second Respondent shouted at his colleagues generally and did not single Claimant out for this unpleasant treatment. He was asked by another colleague to 'Be nicer to "people"' generally, p989. While the Second Respondent was clearly unreasonable and inappropriate in shouting at the Claimant in front of the team, the Tribunal was satisfied that this unwanted conduct was not because of sex.

230. *9.4. On 8 June 2017 Piers followed the Claimant out of work and waited for her outside Waitrose. The next day he asked the Claimant if the bottle of wine she had bought was for*

her 'new sex partner'. [§11 GOC] (harassment because of sex and harassment of a sexual nature)

231. This allegation failed on the facts. The Tribunal found that the Claimant and Second Respondent were likely occasionally to coincide in the local Waitrose, or to walk to Waitrose to buy provisions. It did not find that the Second Respondent had followed the Claimant. He did not ask about a "sex partner". The Tribunal accepted that the Second Respondent may have asked whether Claimant had been buying wine to drink with her new partner, but it did not find that he used the term " sex partner".

232. *9.5. In September 2019 when one of the physiologists Josh left his duties were distributed amongst the remaining team. Piers allocated a filing task to the Claimant. The Claimant requested another responsibility, like training, Piers said she would enjoy her 'little filing job'. [§12 GOC] (harassment because of sex).*

233. The Tribunal found that the Second Respondent gave the Claimant a filing task which needed to be done and which had also been undertaken by a man. The Tribunal accepted his denial that he had belittled the job. The Tribunal was satisfied that the allocation of the file task to the Claimant was not related to sex.

234. *9.6. In January of 2018, Piers ignored the Claimant's email about the rota. In raised voice and an aggressive manner he told her it was not her place to get involved with management duties, she was not better than him and he could find her more suitable 'little tasks' to do if she was bored. [§13 GOC] (harassment because of sex)*

235. *6.2. In January 2018, I prepared the team's rota. Piers totally ignored my email and immediately after came into the office to speak to me. In raised voice and an aggressive manner he told me it was not my place to get involved with management duties. I was not better than him and he could find me more suitable 'little tasks' to do if I was bored. My band 7 colleague Steve Vance has completed the monthly rota on numerous occasions when Piers was stressed and he never received this kind of treatment. [§13 GOC] (direct sex discrimination)*

236. This allegation failed on the facts. The Tribunal found that the Second Respondent did not shout at the Claimant, or tell her that he would find her alternative 'little jobs'.

237. *9.7. On about 19 August 2018 Piers reminded everyone to hang cables up. The Claimant had worked in the lab that day. She told everyone that she struggled to reach the old hooks and now that they had been changed it was even worse. Following a WhatsApp chat about this on about 22 August 2018 Sam G laughed and said "it's funny that you can't reach the cables". Piers replied, "They can't be moved, we will get you a little step, a little tiny step stool" Piers then laughed. The Claimant was shouted at by Piers if they were not properly hung. Later a male nurse complained about the hooks and they were moved. [§15 GOC]. (harassment because of sex)*

238. The Tribunal preferred the Second Respondent's evidence on this issue. He did remind all colleagues to hang up their cables on the hooks at the end of the day, to stop cables being damaged. The hooks were attached to a wooden strip across the wall of the Cath Lab, because they could not be screwed directly into the lead-lined. The Claimant had been struggling to reach the hooks and the Second Respondent suggested that she could use either the patient step or a kick stool. He did not emphasise the word "little" or "tiny" in doing so. The Tribunal found that the Second Respondent made a practical suggestion to resolve

the Claimant's difficulty and that his suggestion was not related to sex in any way. This was not sex harassment.

239. *9.8. On 22 October 2018 Piers became very aggressive and shouted at the Claimant in the control room in front of other staff members and a patient. Piers later undermined the Claimant by saying he was 'always letting you go home', and that she was stupid for saying otherwise. [§16 GOC] (harassment because of sex)*

240. The Tribunal found that there was tension between the Claimant and the Second Respondent about the rota, which inevitably arose from their competing needs. It found, on the balance of probabilities, that the Second Respondent shouted at the Claimant on 22 October 2018 when she wanted to go home. It accepted that the shouting was unwanted by the Claimant.

241. However, the Tribunal did not consider that the Claimant had shown facts from which it could conclude that this conduct was related to sex. It has already found that the Second Respondent shouted at colleagues generally. In this instance, where there were tensions due to the Claimant and Second Respondent's conflicting needs to go home from work, the Tribunal considered that there was nothing to indicate that the conduct was related to sex.

242. *9.9. On 23 October 2018, the Claimant approached management for mediation with Piers which was ignored. Piers was also extremely unfair towards the Claimant when allocating lucrative Saturday waiting list initiative shifts. [§17 GOC] (harassment because of sex)*

243. The First Respondent did not offer mediation to the Claimant. The Second Respondent would also have been interested in mediation. Taking into account all of the facts of the case, there was nothing to indicate that the refusal of mediation was related to sex. The burden of proof did not shift to the First Respondent.

244. On the facts, the Claimant was given a fair allocation of lucrative shifts. Her allocation of these shifts was at least equal to, if not greater than the allocation to her colleagues.

245. *9.10. Treatment detailed at §6.3 [§19 GOC] Training opportunities denied: On 7 November 2019, I contacted Piers for authorisation to attend a training course. Piers did not reply until 14 November 2019, by which point my colleague Steve had requested half day time off in lieu ('TOIL'). Piers rejected my request on the grounds of short staff. Following this decision Piers booked TOIL on the same day the course would have taken place. [§19 GOC] (harassment because of sex and direct sex discrimination)*

246. *9.12. In about November 2019, the Claimant requested to attend training courses. Piers came to find the Claimant in the lab and shouted 'do not think you are going on all those courses'. All her requests for training have been rejected, ignored, or not dealt with in a timely manner meaning there were no places available. [§21 GOC] (harassment because of sex)*

247. *9.13. The only occasion in the last three years when Piers has put the Claimant forward for a course was when he suggested around February 2020, that she attend a course in Belgium despite the fact that she had booked annual leave on these dates. Piers was aware that her annual leave was booked for her wedding. [§22 GOC] (harassment because of sex)*

248. *6.3. Training opportunities denied: On 7 November 2019, I contacted Piers for authorisation to attend a training course. Piers did not reply until 14 November 2019, by which point my colleague Steve had requested half day time off in lieu ('TOIL'). Piers rejected my request on the grounds of short staff. Following this decision Piers booked TOIL on the same day the course would have taken place. [§19 GOC] (direct sex discrimination)*

249. The Tribunal addressed these allegations together because they arose from the same course of events.

250. The Tribunal found that, due to extremely distressing family circumstances, the Second Respondent overlooked the Claimant's request on 7 November 2019. In the same month, the Claimant asked to go on 3 external courses and the First Respondent told her that would not be possible, but to choose the course she was most interested in. At the time, the Claimant accepted this without demur. The Second Respondent later proposed a training course which, to his knowledge, clashed with annual leave booked for the Claimant's wedding. However, the Tribunal accepted his evidence that there was no space on the earlier training course, so he had booked the June training for the Claimant in case it might suit her, as he was not sure of her precise wedding dates.

251. The Tribunal accepted the Second Respondent's evidence regarding his actions in respect of each of these training events. These day to day management decisions reflected the practicalities of each situation and were not related to sex, or because of sex. His whole course of conduct reflected the inevitable tension between running a busy service and ensuring that staff attended external training courses on dates which were not controlled by him. Hs actions were neither sex harassment nor direct sex discrimination

252. *9.11. On 21 November 2019 in a staff meeting Oliver said 'Vicky had allowed some members of staff to act almost fraudulently by claiming their overtime as TOIL instead of pay and that will now stop'. Most staff are aware the Claimant chose to claim TOIL so it felt quite clear who Oliver was referring. [§20 GOC] (harassment because of sex)*

253. The Tribunal found that Mr Williams announced, in the staff meeting, that staff would not be permitted to claim TOIL for working overtime. It found that Mr Williams had acted very inappropriately in publicly withdrawing an agreement which the Claimant had made with Vicky Griffiths. The Tribunal accepted the Claimant's evidence that she was embarrassed and felt the change had been sprung upon her and that she had been singled out in a public meeting.

254. However, having considered all the evidence, the Tribunal preferred the Third Respondent's evidence that he did not, in this meeting, describe the practice of claiming TOIL as fraudulent. Later, in summer 2020, he did say that people who were mis-recording their hours and claiming for work they had not done were "almost fraudulent". The Third Respondent was clear in his recollection and was able to explain his choice of words on each occasion.

255. The Tribunal considered whether it could conclude that Mr Williams' public and inappropriate withdrawal of the Claimant's agreement with Vicky Griffiths was related to sex. The Third Respondent denied that it was. The Tribunal noted that he appeared to have a practice of criticizing his colleagues' conduct in public meetings, rather than addressing matters individually. The Tribunal found that this style of management was oppressive and humiliating and it was reasonable for the Claimant to feel this. However, the Tribunal concluded that the Third Respondent's actions were not related to sex. They were poor management; but the Third Respondent also treated others in a similar way in summer 2020.

256. *9.14. From about August 2018 when the Claimant moved to live with her new partner in Essex, Piers was on a quest to make her life difficult with no work-life balance. In February 2020 Piers published the rota for March and once again the Claimant had to bring the same issues to his attention, re lates/LDOs etc. Claire O'Neil told the Claimant Piers was in pacing clinic 'moaning' to other colleagues about the Claimant's issues with the rota. He asked Claire 'how long does it actually take her to get home anyway?' [§23 GOC] (harassment because of sex)*

257. *9.19. On 2 of July 2020 the rota was published, 4 out of 5 late shifts the Claimant was allocated did not comply with her working arrangements. There were other staff available on all these days. [§28 GOC] (harassment because of sex)*

258. The Tribunal addressed these allegations together because they concerned the same issue over time.

259. The Tribunal accepted that the Claimant's evidence that the Second Respondent moaned about her to colleagues, in the context of the Claimant asking for further changes to the rota. The Second Respondent considered that it was difficult to accommodate everyone's needs on the rota and he perceived that the Claimant asked for more rota changes than others.

260. The Tribunal accepted the Second Respondent's evidence that, on 2 July, he did not deliberately roster the Claimant for 4 late shifts which did not suit her arrangements. It accepted that, so soon after the national lockdown, the Second Respondent believed that late shifts were not being worked, so that nominal late shift allocations would not be worked anyway. The Tribunal found that the Second Respondent was not being vindictive towards the Claimant or "making her life difficult".

261. Taking into account all the evidence, the Tribunal found that the Second Respondent did not deliberately design rotas to inconvenience the Claimant. It accepted, as a matter of common sense and workplace experience, that it is very difficult to accommodate all employees' shift preferences. Her long commuting time meant that the Claimant had strong preferences as to the shifts she worked, and she asked for changes when the rotas did not reflect her preferences. The Tribunal found that the Second Respondent's actions were not related to sex. He moaned because he was frustrated by the Claimant's requests for rota changes, in the circumstances that it was difficult to accommodate everyone. His conduct was not harassment related to sex.

262. *9.15. It was common knowledge the Claimant had just cancelled her June wedding due to COVID, Piers was aware. On 19 March 2020 he kept asking what was wrong with a smug attitude, trying to provoke a reaction. The Claimant asked him to leave her alone several times. [§24 GOC] (harassment because of sex)*

263. The Tribunal's findings of fact did not accord with the Claimant's description. The Tribunal found that the Second Respondent was concerned, along with other managers, about the Claimant's distress. He spoke to her about this, but withdrew from further involvement and the Claimant she was able to discuss her concerns with a small group of 2 other managers. The Tribunal considered that the Claimant's distress was handled sensitively by her managers. The Tribunal was satisfied that the Second Respondent's actions were not related to sex in any way and, therefore, did not amount to harassment because of sex.

264. *9.16. In about April 2020 Nicky confirmed Piers had asked her to roster the Claimant to work alone more frequently than her peers. On 12 of June 2020, witnessed by Claire O'Neill, Nicky said that, 'Piers feels that men are better at training'. [§25 GOC] (harassment because of sex)*

265. *6.4 In about April 2020 I asked why Piers wanted me to work alone. Nicky said, 'Piers feels that men are better at training', that is why I was often scheduled without trainees for support. [§25 GOC] (direct sex discrimination)*

266. On all the evidence, the Tribunal found that the Second Respondent did not say that he believed that men were better at training.

267. Professor Sabine Ernst commented that the Claimant was falling behind and the EP department is turning into 'boys club'. She said the Claimant needed to push for more training and more time with the company representatives. The Second Respondent did ask that the Claimant be rostered on her own more than colleagues, so that she would be training junior colleagues less frequently. There was no evidence, however, that the Second Respondent was aware of what Professor Ernst had said. Rather, the Second Respondent had heard complaints that the Claimant did not pull her weight when she was training juniors. His reasons for rostering her of her own were not related to sex, or because of sex. Rostering the Claimant alone more frequently than others was therefore not harassment because of sex, or direct sex discrimination.

268. *9.17. In May 2020 Piers reconfigured the EP labs with the help of all the other EP physiologists without the Claimant. The Claimant was not asked for her input and was not even told it was happening. She was given a short tour around the labs and was expected to work alone as normal. Piers sent an email on 29 May 2020 thanking all the team for their help. [§26 GOC] (harassment because of sex)*

269. The Tribunal found that the Second Respondent believed he had invited all staff to help reconfigure the EP equipment if they had wanted to; and that none of the EP Physiologists was excluded. The Second Respondent did not exclude the Claimant.

270. *9.18. On 1 July 2020 Piers expected the Claimant to stay late but she was not rostered or asked to work late. Piers had previously requested we arrive no later than 4.55 pm for handover whereas he took over from the Claimant at 5:05pm. The way Piers did this made it sound like the Claimant was causing a fuss and he was doing her a favor, in front of other colleagues. [§27 GOC] (harassment because of sex)*

271. The Tribunal accepted the Second Respondent's evidence that this was the first rota being worked after covid and that only a 9 – 5 service, from one lab, had been rostered. The work had unexpectedly continued after 5pm. He had, nevertheless, agreed to stay late, but was irritated about doing so, instead of the Claimant staying late. It was clear to the Tribunal that this was not related to sex in any way. The Second Respondent's irritation was a natural human reaction. This was not harassment related to sex.

272. *9.20. On 10 July 2020 at a staff meeting on Teams Oliver singled the Claimant out as 'taking the piss'. Oliver said that 99% of people were open, honest, and reliable and trustworthy, the other 1% take the piss. This caused the Claimant to have a panic attack. [§29 GOC] (harassment because of sex)*

273. On 10 July 2020 a staff meeting was conducted on Teams. During that meeting Oliver Williams said that 99% of people were open, honest, and reliable and trustworthy, but that "the other 1% take the piss". The Claimant believed l that Mr Williams had singled her out in saying this. Both the Second and Third Respondents told the Tribunal that there were 2 – 3 people to which the comments referred.

274. The Tribunal found that Mr Williams used this very robust language in a meeting, implying that some colleagues were dishonest. It considered that this was very strong language to use to describe staff, in front of their colleagues. It considered that the words would have created a hostile environment for the Claimant.

275. The Tribunal considered whether the words related to sex. It was satisfied that they did not. There was little evidence to suggest that his words were related to sex, rather than that they

were directed to employees' conduct and were expressed in Mr Williams' characteristically indiscreet manner. Mr Williams denied that his comments were connected to the Claimant's sex. The Tribunal accepted that Mr Williams was not addressing the Claimant alone, even though she felt that he was.

276. *6.5. Grievance rejected: On 11 December 2020 C's grievance was rejected and the investigation did not take into consideration C's evidence provided following the investigation meeting. Some of C's concerns were not addressed at all. Despite the finding that I had been treated differently due to the breakdown of my relationship with Piers, it was suggested that myself and Piers undergo mediation. [§38 GOC] (direct sex discrimination)*

277. *6.6. C was (constructively) dismissed on 18 December 2020 (direct sex discrimination and constructive unfair dismissal)*

278. The Tribunal concluded that the grievance investigation did not consider the Claimant's allegation that the Second Respondent had touched her inappropriately. Ms Lyons did not ask the Claimant or the Second Respondent about it, nor did she provide any outcome on it. Nor did Ms Lyons address the Claimant's allegation, as detailed in her chronology of diary entries that, "On several occasions since the end of the relationship Piers has made comments which I would regard as sexual harassment." These allegations, and the particulars of them in the Claimant's chronology submitted to the grievance investigation, were not addressed in the grievance outcome at all.

279. The Tribunal concluded that that the failure to address these allegations amounted to detriment. They were serious allegations and the Claimant would reasonably have expected that the First Respondent would conduct an investigation into them and give an outcome, with some explanation of that outcome. A reasonable employee would feel disadvantaged by her employer's failure to acknowledge serious concerns and explain how the employer has dealt with them. The employee would inevitably feel that they had not been taken seriously and would feel uncertain about how to approach the workplace when some concerns had been completely ignored.

280. Ms Lyons did not give evidence to the Tribunal to explain the omission. She did not address it in her witness statement. Mr Shrimpton's evidence did not assist the Tribunal. He asserted that the Claimant had not complained of sex discrimination in her grievance. His assertion was plainly and inexplicably wrong.

281. The Tribunal considered whether the Claimant had shown evidence from which it could conclude that the First Respondent's failure to address her allegations of sex harassment and inappropriate touching were because of sex. The Tribunal decided that the failure to deal with these serious allegations was unreasonable. However, it reminded itself that "..the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one."

282. Furthermore, Ms Lyons did address most of the Claimant's complaints, including complaints that she had been treated less favourably than male colleagues.

283. The Tribunal concluded that the Claimant had not shown facts from which it could conclude that the failure to address these allegations was because of sex. The direct sex discrimination claim, in this respect, failed.

284. All the Claimants sex discrimination and sex harassment complaints, against all Respondents, therefore failed.

Unfair Dismissal

285. However, the Tribunal concluded that the failure to address these serious allegations did breach the duty of trust and confidence between employer and employee. The Tribunal took into account the fact that the Tribunal has not upheld the particular allegations of touching and sex harassment. Nevertheless, the Tribunal considered that it was a fundamental part of the duty of trust and confidence for the employer to at least acknowledge that these serious allegations had been made and to provide an outcome to them, so that the Claimant would know where she stood.

286. The Tribunal rejected the First Respondent's contention that the Respondent had reasonable and proper cause for its grievance outcome. The Tribunal acknowledged the sheer scope of the Claimant's grievance, which related to matters going back many years. The Tribunal agreed that the First Respondent was entitled to take a reasonable and proportionate approach to such an extensive grievance. It noted that the grievance investigation took place during the covid pandemic. The Tribunal noted that Ms Lyons met with the Claimant on 13 October 2020 for over an hour, that Ms Lyons interviewed 5 other people and that Ms Lyons prepared a detailed grievance outcome on 11 December 2020, in relation to most of the Claimant's allegations.

287. However, the allegations which Ms Lyons ignored were not minor or trivial. They could reasonably be considered to have been some of the most serious in the Claimant's grievance.

288. The First Respondent accepted that Ms Lyons should have discussed the sexual harassment allegation with the Claimant in the grievance meeting. It relied on the fact that Ms Lyons had been provided with the Claimant's written evidence in relation to those allegations in any event. The Tribunal concluded that the First Respondent might conceivably have had reasonable and proper cause for not exploring those matters further in the grievance meeting, when Ms Lyons already had the Claimant's written allegation and documents. However, the Tribunal decided the First Respondent did not have reasonable and proper cause for failing to provide an outcome to the allegations.

289. The Tribunal decided that the delay in providing an outcome, alone, would not have been sufficient, during covid times, to amount to a breach of the duty of trust and confidence. However, the Tribunal considered that the delay compounded the First Respondent's failure, without reasonable or proper cause, to provide an outcome to the Claimant's allegations that the Second Respondent had touched her inappropriately and had made comments which amounted to sexual harassment.

290. The Tribunal did not find that the First Respondent's conduct in relation to the grievance breached its duty of trust and confidence in any other way. Ms Lyons investigated and provided a reasoned outcome to the Claimant's other complaints. She partially upheld the Claimant's compliant about being singled out in meetings. Mediation was a reasonable outcome to the Claimant's other complaints.

291. The Claimant resigned in response to the grievance outcome. In her combined grievance appeal and resignation letter, she specifically complained, "No attempt has been made within this past nine weeks to hear my Grievance fully. It is evident from many of the outcomes, factual errors and omissions within the report that I was not fully heard or understood." … "The outcome did not discuss episodes of sexual harassment by Piers as detailed in my evidence. From memory, I was also not allowed to discuss these events during the investigation meeting." P590.

292. The Claimant concluded her letter by saying, “Given the length of time this process has taken, the failure of the Trust to follow their own policy's pertaining to the grievance process and the Trust's disregard for my mental wellbeing, I have been left with no choice but to resign with immediate effect.”

293. The Tribunal considered that the Claimant resigned in response to the unsatisfactory grievance outcome, which included its failure to address her sexual harassment allegations. She resigned, in part at least, in response to the First Respondent failing to provide a grievance answer to those allegations, *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703

294. The Claimant did not delay in resigning, as she did so on 18 December 2020, only a week after the grievance outcome on 11 December 2020. She did not affirm the contract.

295. The Claimant has proven that she was constructively dismissed.

296. The First Respondent did not put forward a positive case regarding a fair reason for her dismissal. Given that Ms Lyons did not give evidence, and Mr Shrimpton’s evidence in relation to the grievance was unreliable, the Tribunal did not have evidence of a potentially fair reason for dismissal.

297. The Tribunal decided that the First Respondent unfairly constructively dismissed the Claimant.

298. The parties agreed that arguments relating to *Polkey* would be addressed at a remedy hearing.

Wrongful Dismissal

299. The Claimant was entitled to resign without notice in response to the First Respondent’s fundamental breach of contract. She is entitled to her notice pay.

Unlawful Deductions from Wages

300. The Tribunal did not see a letter of appointment, showing that the Claimant had been appointed to a Band 7 Salary from July 2017. There was no evidence that she was appointed to the promoted role earlier than the date on which she was paid at the promoted rate. The Tribunal concluded that the Claimant was not contractually entitled to higher wages at any relevant time. The First Respondent did not make unlawful deductions from the Claimant’s wages.

Remedy Hearing

301. A remedy hearing will take place on 21 July 2022.

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Employment Judge Brown 27 May 2022

Sent to the parties on:

27/05/2022.

For the Tribunal