Case Number: 3311744/2020
3313454/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
P	**v**	Crest Nicholson Operations Limited

Heard at: Cambridge

On: 13, 14 and 15 (am) March 2023
In Chambers: 15 (pm) and 16 March 2023

Before: Employment Judge Tynan

Members: Ms K Omer and Ms D Clarke

Appearances
For the Claimant: Mr Liam Varnam, Counsel
For the Respondent: Mr Peter Edwards, Counsel

RESERVED JUDGMENT

1. The Claimant's complaints of harassment pursuant to s.26(2) of the Equality Act 2010 succeed insofar as:

    a. The Respondent's employee (hereafter referred to as "the Site Manager") attempted to kiss the Claimant on 28 November 2019 whilst travelling in a taxi from the Respondent's Christmas party to the hotel at which the Claimant was staying that evening;

    b. The Site Manager raped the Claimant in her hotel room on 28 November 2019; and

    c. The Site Manager attempted to telephone and/or message the Claimant on 16 December 2019.

2. The Respondent is liable for the acts of the Site Manager referred to in paragraph 1 above as they were done by the Site Manager in the course of his employment with the Respondent.

3. The Claimant's remaining complaints of harassment and her complaint that she was directly discriminated against contrary to s.13 of the Equality Act 2010 are not well founded and are dismissed.

4. Pursuant to s.123 of the Equality Act 2010, the Tribunal determines that it would be just and equitable to extend time for the Claimant to bring the claims referred to in paragraph 1 above, notwithstanding they were notified to ACAS under the Early Conciliation Scheme and thereafter pursued by way of a Claim to the Employment Tribunals outside the primary time limit for notifying and, subsequently, bringing, such claims.

RESERVED REASONS

1. The Claimant has brought two claims against the Respondent. Her first claim, that she was harassed in contravention of section 26(2) of the Equality Act 2020 ("EqA 2010"), was presented to the Employment Tribunals on 18 September 2020 following ACAS Early Conciliation between 13 August 2020 and 13 September 2020. Her second claim, that she constructively dismissed and that her constructive dismissal was an act of direct sex discrimination, was presented to the Employment Tribunals on 12 November 2020 following ACAS Early Conciliation on 12 November 2020.

2. On 12 April 2021 Regional Employment Judge Foxwell made a Restricted Reporting Order prohibiting the public reporting in Great Britain of information that might lead to the Claimant being identified by the public as a party to or otherwise involved in the proceedings. That Order remains in force indefinitely. The Claimant's name has also been anonymised in order to prevent her from being publicly identified.

3. The issues to be determined in the case were agreed between the parties and are recorded in the Case Management Summary of the matters discussed and agreed at the Case Management Preliminary Hearing on 15 July 2022. The key alleged factual events are recorded at paragraphs B(2) and C(6) of the List of Issues and relate to a Christmas party held on 28 November 2019.

4. The Claimant gave evidence at Tribunal. She was a truthful and straightforward witness. For reasons we shall come back to, she has an incomplete recollection of certain of the events upon which her Claim is founded.

5. We heard evidence on behalf of the Claimant from Wendy Hall who also worked for the Respondent. She gave evidence as to the alleged culture in the Chiltern Region where she and the Claimant both worked and also about events prior to and during the 28 November 2019 Christmas party.

6. On behalf of the Respondent we heard evidence from Jane Cookson, Group HR Director. Her recollection of the sequence of events is incomplete given the passage of time. For various reasons, including the national lockdown during the initial months of the Covid pandemic in 2020, Ms Cookson never met with the Claimant before the Claimant went sick on

6 August 2020 and subsequently resigned her employment on 20 October 2020.

7. In addition to the parties' witness statements, on the parties' joint instructions, Dr Alexis Bowers, Consultant Psychiatrist has produced a Psychiatric Report in respect of the Claimant. The Report runs to some 61 pages. Although Dr Bowers was not called to give evidence, we confirm that we have read his Report in full.

8. We did not hear evidence from the Site Manager. Neither party sought to secure his attendance at Tribunal, whether on a voluntary basis or under compulsion of a Witness Order. We understand their respective reasons in this regard. In any event, even had the Site Manager attended the hearing, we would have been obliged to remind him of his privilege against self-incrimination. Mindful of the fact that the Site Manager has not been afforded an opportunity within these proceedings to rebut the allegations, but more importantly given the risk that this might lead to the Claimant becoming publicly identifiable, we have not thought it necessary to identify the Site Manager by name.

9. There was a single agreed Bundle for the Final Hearing, initially running to 437 pages, albeit supplemented by various text or WhatsApp messages between the Claimant and a colleague, Natalie Wilson over the period 29 November 2019 to 15 July 2022. The page references in this Judgement are to the corresponding pages of the Hearing Bundle.

10. We heard detailed oral submissions from both Counsel, in each case accompanied by detailed written submissions. Mr Edwards additionally produced a helpful chronology of events. We were provided with two separate Bundles of Authorities, albeit there was overlap between them. In coming to this Judgment we have re-read both the written submissions and our notes of Counsel's oral submissions. We have been greatly assisted by them.

Findings of Fact

11. The Respondent is a national housebuilder of high quality homes. The Claimant was employed by the Respondent from 25 February 2019 until 20 October 2020, when she resigned her employment with immediate effect. She had by then been on sick leave continuously since 6 August 2020, initially having being certified by her GP with depression and, thereafter, stress and depression (pages 225, 234 and 238).

12. Having run her own business for many years, the Claimant's decision to join the Respondent reflected a conscious career move on her part. We accept her evidence that she greatly enjoyed working for the Respondent, relished the challenges that came with the job and had aspirations to progress further within the Respondent.

13. The Claimant's Principal Statement and Terms and Conditions of Employment is at pages 121 – 132 of the Hearing Bundle. Clause 3.3 provides:

> "The Company attaches great importance to the health, welfare and safety of all its employees, contractors, visitors and the public, and has established Health and Safety rules. It is an express term of your employment that you will be required at all times to comply with the Company's Health and Safety Policies, Rules, Regulations and Working Practices. For your information details are set out on the Company's intranet. In addition, the Company's Health and Safety Policy Manual is available for reference by any employee at all places of work, including construction sites."

It may reasonably be assumed that this emphasis upon health, welfare and safety reflects in particular that the Respondent operates multiple construction sites, with all their attendant risks. Regrettably, for reasons we shall come to, these documented standards and expectations were not reflected in how the event on 28 November 2019 was organised or managed on the day.

14. The Claimant's documented core days of work were Thursday to Monday, including weekends. However, it was common ground between the parties that Thursday 28 November 2019 was a non-working day for the Claimant. We were not told whether this was a one-off situation or reflected a change to the Claimant's initial documented working arrangements.

15. Although the Site Manager's Principal Statement and Terms and Conditions of Employment is not included in the Hearing Bundle, we note that the Claimant's Statement derives from a template document *"Staff – Site Based Contract".* We infer from this that the Site Manager (and indeed a second Site Manager within the Chiltern Region, Mr Cox) was employed under the same core terms and conditions as the Claimant.

16. An extract from the Respondent's Health and Safety at Work documents at page 327 of the Hearing Bundle contains the following specific reference to staff security:

> "Attacks on site staff are extremely rare. However, your personal safety is of paramount importance to the Company. Never put yourself at unnecessary risk and always follow these guidelines…"

We return later in this Judgement to the question of whether the Respondent's staff, and the Claimant in particular, were placed at unnecessary risk on 28 November 2019.

17. At the time of the events in question, the Claimant worked at the same site as the Site Manager. By the time of her resignation in October 2020, the Claimant was working at a new site albeit still within the Chiltern Region.

The Site Manager had by then long since been dismissed from the Respondent's employment.

18. The Claimant and the Site Manager had both attended weekly site meetings and interacted across the site from time to time. The Claimant confirmed that she had not experienced any inappropriate behaviour from the Site Manager prior to 28 November 2019 and had no reason to perceive him as posing a risk to her.

19. When they worked at the same site, the Claimant did not report to the Site Manager. Instead, she reported to another Manager who was at an equivalent level to the Site Manager. We were not told how many direct reports the Site Manager had. He reported to Tristan Tomkins, Build Manager. As we shall return to, Mr Tomkins observed the Claimant and the Site Manager at various points on 28 November 2019.

20. The site at which the Claimant and the Site Manager worked was one of a number of development sites which together comprised its Chiltern Region. On 28 November 2019, the Respondent hosted a Chiltern Christmas party at the Piano Works in London. The event commenced at 1pm and a free bar operated all day. Out of 111 colleagues in the Chiltern Region, approximately 84 attended the party including, we find, the Managing Director of the Chiltern Region. Although it is common ground between the parties that it was a non-working day for the Claimant, we accept the Claimant's evidence that it would have been a scheduled working day for the Site Manager, and her further evidence that there was some level of expectation that staff would attend the event, particularly as those staff for whom it was a scheduled working day would otherwise be required to take the day as annual leave should they choose not to attend.

21. Staff who attended the event were reimbursed their expenses associated with attending the event, up to a limit of £50. The Respondent was not prescriptive as to what expenses were covered. We find that staff were able to claim their train fares to London, travel on the Underground, taxi fares and the cost of overnight accommodation (even if the £50 limit meant that the full costs would not be met by the Respondent). The Chiltern Region extends from the furthest reaches of Greater London to the West Midlands and Leicestershire in the North. The Claimant was one of those attending from further afield and accordingly did not have the realistic option of travelling home in the evening unless she left the party early. She made arrangements to share a hotel room with two female colleagues in order to keep their personal expenditure to a minimum.

22. Whilst satisfied that the hotel room and any trains or taxis were not organised for staff by the Respondent, we were not taken to any materials in the Hearing Bundle which evidence the expenses, or any part of them, that were claimed respectively by the Claimant and the Site Manager. During cross examination, the Claimant confirmed that she had claimed expenses from the Respondent but Mr Edwards did not explore this further with her. In her witness statement, Ms Cookson states that the Claimant

did not claim expenses for the hotel room or any taxis, though she does not identify her source of information in this regard. She does not say what, if any, expenses were claimed by the Site Manager. Although we would expect the Respondent to have retained copies of the Claimant's and the Site Manager's respective expense claims and supporting vouchers, and also presume that relevant records are maintained within the Respondent's accounting systems, there are no such materials in the Hearing Bundle. That is surprising given the issues we must determine and the Respondent's disclosure obligations in relation to them. There is, however, evidence at pages 313 to 315 of the Hearing Bundle that the Claimant's two colleagues claimed £50 each in respect of the costs of the hotel room that they shared with the Claimant on 28 November 2019. Even assuming for these purposes that no part of the Claimant's expense claim related to the costs of the hotel room, very nearly two-thirds of the total costs of the hotel room were met by the Respondent.

23. On arriving in the West End of London on 28 November 2019, the Claimant found a pub near the Piano Works where she could change her footwear and get ready for the party. She was given a glass of prosecco on arrival at the venue. Thereafter, according to an account of the event she provided to the police on 5 December 2019 (page 15 of the Medical Bundle), the Claimant drank five or six bottles of beer over a seven hour period. There was a sit down meal from approximately 2pm which seems to have lasted at least a couple of hours. There is photographic evidence of the Site Manager at the Claimant's table by 3.48pm. We accept the Claimant's evidence that she mentioned to Ms Hall at the party that whenever she turned around the Site Manager seemed to be there. We also accept that Ms Wilson subsequently disclosed to the Claimant that she had mentioned to another colleague at the party that the Site Manager had not left her alone. We find that the Site Manager had begun to pay attention to the Claimant before the sit down meal had finished and that this was noticed by both the Claimant and Ms Wilson, even if it was not necessarily a cause for embarrassment or concern. Nevertheless, we find that to the extent the Site Manager began to pay attention to the Claimant, this was not sought by the Claimant or wanted. On the other hand, and being particularly careful not to read too much into a single image, the photograph of the Claimant and the Site Manager, at page 344 of the Hearing Bundle, evidences that at 3.48pm the Claimant was seemingly sufficiently comfortable to lean in close to the Site Manager for the purposes of a photograph.

24. Within a relatively short period of time of the photograph being taken, we find that the Claimant and her colleagues had moved from their lunch table to a separate seating area within the Piano Works where they continued to consume alcohol.

25. Approximately three weeks later, the Respondent commenced an investigation into the events at the Chiltern Christmas party. On the evidence available to the Tribunal, it was not an extensive or thorough investigation. The Investigating Officer, Mike Robb, Group HR Manager

with responsibility at that time for the Chiltern Region, interviewed just three witnesses, together with Ms V, one of the Claimant's colleagues who had by then raised a formal complaint regarding the Site Manager's conduct at the party. Although Mr Robb started each meeting by asking open questions of each of them, we consider that Mr Robb failed to explore and clarify a number of important matters. In particular, he failed to establish a clear chronology of events.

26. It is not in dispute that the Site Manager sexually harassed Ms V at the party, and indeed that he did so in plain site of others. Ms V's account is at pages 301 – 302 of the Hearing Bundle. She refers to a drinking game which began *"prior to sitting down to eat"*. Mr Robb failed to explore with Ms V whether this was prior to the main lunchtime meal or the evening buffet, or otherwise endeavour to place this drinking game within a structured chronology. Ms V described the Site Manager as having become *"quite drunk"* and *"getting touchy feely".* The fact that he was described by Ms V as intoxicated indicates to the Tribunal that this is unlikely to have been at an early stage in the event but instead some hours into it. Ms V went on to report that the Site Manager,

> *"…started to put his hand around* [her] *and inside of her jacket across her chest,* [she] *asked him to stop. She felt uncomfortable about it. [The Site Manager] groped her on her buttocks later while she was talking to Jackie Yarwood."*

In the first instance therefore, Ms V was describing two potential sexual assaults.

27. Miss V claimed that *"lots of people"* had witnessed the Site Manager's behaviour and had found it funny. That is a particularly troubling observation as it would indicate a basic lack of awareness and understanding of dignity and respect amongst certain members of the Respondent's staff. Ms V said that the Site Manager's behaviour had become progressively worse and that he had subsequently pinned her against a pillar and groped her across both breasts. As described by Ms V, she was therefore subjected to a third, more serious, sexual assault.

28. The Site Manager's harassment of Ms V was observed by Mr Cox, another Site Manager within the Chiltern Region. When interviewed on 19 December 2019, Mr Cox described the harassment as having taken place between 4pm and 6pm. He said,

> *"I saw [the Site Manager] grab her inappropriately from behind under the crotch. She bolted straight upright and turned around, and came to sit with myself and Sam. She said to Sam* – "did you see that?" – *or words to that effect. Sam said no she hadn't, but I said that I had. She said,* "he keeps doing it"*."*

From the interview record at pages 143 and 144 of the Hearing Bundle, and assuming in this regard that he interviewed Ms V before Mr Cox given that she was the person who was raising a complainant, Mr Robb did not

explore Ms V's account further with Mr Cox,. In particular, Mr Robb does not seem to have taken any steps to clarify with Mr Cox (or Ms V) whether this first incident described by Mr Cox was the same incident during which Ms V said she had been pinned to a pillar and groped across her breasts, or one of the two earlier incidents referred to by her when interviewed. Unfortunately, the notes of Mr Robb's interview with Ms V are undated and untimed, with the result that we cannot be certain whether she was interviewed before or after the three witnesses were interviewed. It reinforces that Mr Robb was not meticulous in his investigation.

29. Mr Cox told Mr Robb on 19 December 2019 that he had suggested to Ms V that she sit with him and Sam, and that if the Site Manager caused any further trouble he would have a word with him. Some while later, Ms V got up to talk to others and moved a short distance away from Mr Cox and Sam. Mr Cox observed the Site Manager approach Ms V. He told Mr Robb that the Site Manager had *"put his hand up her crotch"* again. Since this was not explored further with Mr Cox, Ms V or anyone else, we do not know whether, for example, Mr Cox was describing the same incident during which Ms V said that her buttocks had been groped by the Site Manager.

30. Having witnessed this further incident, and having already been told by Ms V following the first incident witnessed by him that the Site Manager "keeps doing it", Mr Cox intervened in the situation. He told the Site Manager,

> *"She doesn't appreciate that, don't touch her."*

We find that the Site Manager became immediately aggressive in response and effectively threated Mr Cox with violence, asking him if he wanted a fight. Mr Cox stood his ground and reiterated that Ms V did not welcome his behaviour. It seems that the Site Manager then moved away from the group, though he remained at the party. Mr Cox's recollection on 19 December 2019 was that he had seen the Site Manager once or twice more, albeit outside the venue when,

> *"he was with another girl with blond hair, a bit older than [Ms V]".*

We find that this 'girl' was the Claimant. Mr Cox said,

> *"They looked a bit worse for wear".*

Given what he had witnessed earlier, and as we shall return to, we think this should have raised a red flag.

31. Notwithstanding Mr Cox told Mr Robb that Sam may have witnessed at least some of the Site Manager's behaviour on 19 December 2019, and that another colleague Charlotte was seemingly present when Mr Cox had been threatened, there is no evidence in the Hearing Bundle that Sam or Charlotte were interviewed by Mr Robb, or otherwise approached in relation to the matter. We find that inexplicable.

32. Although Ms V reported that she had been sexually assaulted by the Site Manager whilst talking to Ms Yarwood, Ms Yarwood did not witness the assault, though did witness the resulting altercation between the Site Manager and Mr Cox. She said that the two men had to be physically separated. Ms Yarwood described the altercation as having occurred between 5.30 and 6pm. She went on to say that Mr Cox had said to the Site Manager, *"enough was enough"*.

33. The Claimant seemingly did not witness any of these events. The last photograph that she took on 28 November 2019 is time stamped at 6.20pm. There is evidence that the Claimant was in the Site Manager's company as the evening progressed, specifically that they were on the dance floor together and that at some point the Claimant ended up on the floor. However, there is no evidence, and the Claimant cannot recollect, that she was dancing with the Site Manager, alternatively that he was in close proximity to her at the point in time when she ended up on the floor. Her Tribunal claim is pursued on the basis that the Site Manager tried to dance with her and pushed her to the floor. Whilst the Respondent does not dispute, and we accept, that she injured her leg in the course of the evening, there is simply no evidence as to when, where or how the Claimant sustained her injuries. Notwithstanding her claim, in terms of her evidence at Tribunal, she could not say whether she had been pulled over, pushed or had simply fallen. The Claimant has the burden of proof in the matter. Although she has advanced a positive case that she was pushed over by the Site Manager, in reality there is no evidence to support the allegation. It is ultimately speculation on the Claimant's part given she has no recollection in the matter. We agree with Mr Edwards that the most likely explanation is that the Claimant tripped and fell because she was intoxicated.

34. Mr Tomkins was interviewed on 19 December 2019. Mr Tomkins had nothing to say in relation to Ms V. Instead, he spoke of the Claimant's and Site Manager's interactions. Mr Tomkins, who said that he was not drinking alcohol at the party, reported seeing the Claimant and the Site Manager drinking together at the bar for ten or fifteen minutes. Whilst he said this was most likely *"after about 6"*, as we have observed already, Mr Robb did not establish a clear chronology and timeline of events. We cannot conclude, as Mr Edwards invited us to, that if Mr Tomkins saw the Claimant drinking with the Site Manager she must have drunk more than the five or six bottles of beer that she told the Police she had drunk. Nevertheless, we note that Mr Tomkins described the Site Manager to Mr Robb as having been in a *"bad state - drunken",* and that he said the Claimant was the same.

35. During cross examination and also in his closing submissions, Mr Edwards placed some weight upon Mr Tomkins' statement, particularly given that he was not drinking. However, it is noteworthy that Mr Tomkins subsequently refused to sign the statement in connection with the related Police investigation. Mr Tomkins did not give evidence at Tribunal. In

coming to a view as to what happened on 28 November 2019, we weigh in the balance that, even putting aside the limitations of the Respondent's internal investigation, its primary focus was the Site Manager's behaviour in relation to Ms V. Mr Robb did not speak to others who had attended the event who might have witnessed events relevant to the Claimant. Whilst we certainly do not disregard what Mr Tomkins said when interviewed, it was not part of a focused, balanced investigation that included taking statements from a range of attendees.

36. The Claimant alleges that the Site Manager spiked her drink. There is simply no evidence on which we can reasonably and properly make any finding to that effect. Neither Ms V, nor the three witnesses interviewed in December 2019, suggested that the Claimant's drink had been spiked, (whether by the Site Manager or anyone else). In an undated WhatsApp message at page 271 of the Hearing Bundle, Ms V wrote,

> *"…weirdly enough I wondered if I was spiked as I didn't drink nearly as much as I normally would and I completely blacked out too. I had no clue how I got home, I had no recollection of leaving or making it home and my Mum said I called her balling [sic] my eyes out and she had to guide me home."*

That message falls some considerable way short of evidence from which might reasonably infer that Ms V's or the Claimant's drinks were spiked on the evening of 28 November 2019. The Claimant endeavoured to arrange a blood and/or urine test to establish whether her drink may have been spiked, but without success. The Claimant herself did not observe anything untoward. In paragraph 14 of her witness statement, the Claimant states that she found it difficult to walk and talk on 28 November 2019 and compares herself to how others were. Putting aside that people have widely varying tolerances for alcohol, we consider that it is speculation on the Claimant's part as to whether she had consumed the same volume of alcohol as others had.

37. The suggestion that the Claimant's drink may have been spiked seems to have emanated from one of the Claimant's colleagues who apparently said to the Claimant the following day,

> *"One minute you were fine and the next minute you were off the scale".*

38. Similarly, Ms Wilson told her,

> *"It would make a lot of sense if your drink had been spiked. You really didn't drink any more than us and yet you were in a much worse state."*

Again, she had no ability to objectively assess how much alcohol the Claimant had consumed relative to others.

39. Ms Hall later told the Claimant that she had made eye contact with the Site Manager on at least two occasions, but that he,

"Looked like he had seen a ghost".

When questioned about this at Tribunal, Ms Hall was very clear that she had seen no evidence that the Claimant's drink had been spiked, let alone that the Site Manager was responsible for this.

40. It is entirely understandable that the Claimant might seek to make sense of the life changing events that unfolded on 28 November 2019. It is not uncommon for victims of sexual violence and sexual abuse to experience feelings of shame and to believe that they are somehow to blame in the matter. Whilst we appreciate that the Claimant continues to struggle to comprehend how she ended up in a hotel room with the Site Manager on the evening in question, in our judgement, in seeking to navigate these natural but difficult thoughts and emotions, the explanation that her drink was spiked has gained currency in the Claimant's mind and has been reinforced through discussing the matter with others. However, it does not have a reasonable evidential basis.

41. We find that the Claimant's drink was not spiked, but that by early evening the Claimant had effectively become incapacitated through alcohol and that she remained incapacitated through the remainder of the evening. This does not imply any judgement on the part of the Tribunal. The Claimant bears no responsibility for the Site Manager's actions towards her that evening. Indeed, for reasons we shall come back to, we consider that the Respondent failed to fully discharge its responsibilities to protect her.

42. As we have noted already, the Claimant seemingly did not witness nor indeed does it appear that she was made aware on 28 November 2019 of the Site Manager's behaviour in relation to Ms V. We find that, incapacitated through alcohol, she was simply not in a position to perceive, let alone assess, any risks to her personal safety. Unfortunately, she lacked sufficient presence of mind to ask a female colleague to escort her back to her hotel or even place her safely into a taxi. Instead, we find, to the limited extent she was capable of exercising any judgement in the matter, that she placed her trust in the Site Manager as a known senior colleague, even if he was not her Line Manager. One of the Claimant's very few recollections that evening is walking behind the Site Manager across Leicester Square as he wheeled her overnight case. Her misplaced sense of trust in the Site Manager led her first to get into a taxi with him, where he made an initial unwanted advance when he tried to kiss her, and thereafter resulted in her allowing him to accompany her back to her hotel. Notwithstanding her intoxicated state, we think it relevant that when the Site Manager tried to kiss the Claimant in the taxi her instinctive response was to reject his advance and thereby make clear to him that his conduct was unwelcome. That is at odds with Mr Tomkins' perception of a consensual situation and, as we shall return to, his unattractively expressed presumption that they must have been intending to sleep together.

43. The Site Manager raped the Claimant in her hotel room on 28 November 2019. We find that she did not consent to any form of sexual activity with him and indeed find that in her intoxicated state she lacked essential capacity to give such consent. She has only a limited recollection of the events in the hotel room. She woke to find the Site Manager sexually assaulting her, describing what happened to her as rough and painful. We accept her account of what happened, including that she froze and then passed out, subsequently regaining consciousness when she found the Site Manager on top of her. She passed out again and when she came to again experienced a sense of shock. She has a vague recollection of the Site Manager washing his hands and also recalls being woken momentarily when her colleagues returned to the hotel room they were sharing together. The Claimant suffered internal bleeding and bruising. We find her account and her injuries to be consistent with the Site Manager's increasingly sexually aggressive behaviour towards Ms V earlier in the evening, his aggression and threats of violence directed at Mr Cox and his predatory behaviour towards the Claimant in the taxi.

44. On 5 December 2019, the Claimant attended a Sexual Assault Referral Clinic as she was still experiencing considerable internal pain. In the course of examination, the Claimant's badly bruised leg was noted, along with other bruises to her legs, inner thighs and at the bottom of her spine just above her bottom. Internal vaginal bruising was also noted.

45. Two days later, the Claimant confided in a work colleague. Approximately two weeks later she confided in her Manager who in turn spoke with Mr Robb on the morning of 16 December 2019 without the Claimant's knowledge or consent and told him that the Claimant had alleged she had been raped by the Site Manager. Mr Robb immediately informed Ms Cookson, again without first discussing or agreeing this with the Claimant. Whilst we consider that the Claimant's Manager and Mr Robb each acted in good faith, nevertheless it caused the Claimant considerable distress. As an HR professional, Mr Robb should have had a clearer appreciation of the legal and ethical considerations involved. Some months later the Claimant learned that the work colleague in whom she had initially confided had likewise breached her confidence.

46. In the meantime, on 14 December 2021, the Claimant disclosed to her husband what had happened on 28 November 2019. She took 14 to 20 December 2021 as annual leave.

47. The Site Manager was suspended on 16 December 2019. Ms Cookson does not state when this was, but the Claimant believes it was around lunchtime. There is no evidence in the Hearing Bundle and the Claimant's witness statement does not indicate when the Site Manager contacted her on 16 December 2019 except that it was in the aftermath of his suspension. In paragraph 56 of her witness statement the Claimant refers to various calls and texts. We find, on the balance of probabilities, that these commenced during normal working hours even if they may have continued beyond working hours. Towards the end of the working day on

16 November 2019 Ms V raised a formal complaint with the Respondent in relation to the Site Manager's conduct on 28 November 2019.

48. In contacting the Claimant on 16 December 2019, the Site Manager acted in contravention of a very clear instruction from the Respondent, given to him at the point of his suspension and confirmed in writing the same day (page 142) that he must not contact anyone at the company. He had previously called the Claimant on 29 November 2019 bringing pressure to bear upon her on that occasion not to disclose what had happened on 28 November 2019 as,

> *"Both our families have a lot to lose".*

We infer that on both occasions he was seeking to coerce her.

49. The Claimant's Manager, who was evidently concerned for the Claimant and supportive of her, told the Claimant not to come back to work until after the Christmas holiday period. The Claimant was not asked to provide a Fit Note and her salary was maintained at its full level. On her own evidence, the Claimant returned to work in January 2020 hoping that work would act as a positive distraction. In an email to her Manager dated 2 January 2020, the Claimant wrote,

> *"To be absolutely honest, I don't know if I am ready to come back yet. I am still feeling very low, quite anxious and clingy, but I am aware that work will be a positive distraction and therefore could be good for me. Also, the longer I am off, the harder it will be to return."*

50. The Claimant had by then began to receive counselling that was available to her through the Respondent's Employee's Assistance Programme. She was eligible to receive up to eight counselling sessions. In further email exchanges with her Manager on 2 January 2020 she wrote,

> *"I just feel so pathetic!"*

We conclude that she took some personal responsibility for what had happened to her and find that that she experienced feelings of guilt and shame.

51. The Claimant had what was effectively a short phased return to work, with effect from 6 January 2020. Whilst she was aware that Ms V had by then raised a formal complaint about the Site Manager's conduct on 28 November 2019, she did not feel strong enough herself to make a formal complaint in circumstances where the matter was being progressed as a Police investigation.

52. The Site Manager was dismissed from the Respondent's employment on 8 January 2020, having failed to attend a scheduled Disciplinary Meeting. The matter under investigation was stated to be,

> *"Sexual misconduct against a Crest Nicholson employee at the Chiltern staff Christmas party on 28 November 2019".* (pages 156 and 157)

53. We accept the Respondent's evidence that the Site Manager was dismissed by reason of his conduct in relation to Ms V, the Respondent having come to the view that it may complicate and delay matters if it sought to pursue disciplinary proceedings in connection with a matter that was the subject of an ongoing Police investigation. The Respondent was satisfied that the allegations raised by Ms V were sufficiently serious that, if upheld, they would warrant the Site Manager's summary dismissal.

54. The Claimant first contacted the Police on 23 December 2019 and underwent an initial Police interview the following day, 24 December 2019, followed by a more detailed video interview on 15 January 2020. Exactly fifteen months later, on 15 April 2021, the Claimant was informed by the CPS that it considered there to be insufficient evidence to continue against the Site Manager.

55. In the weeks and months following the Claimant's return to work in January 2020, she had what can be described as good and bad days. For example, she emailed her Manager on 27 January 2020 to say that she had had a wobble (page 162). Work served to remind the Claimant of the party and of the events that evening. On 18 February 2020, the Claimant closed her site and left work early as she was becoming tearful at work and wanted some time on her own with her husband before collecting their children. She did not feel safe if she did not have her safety App turned on. The Claimant was referred by the Respondent for an Occupational Health Assessment which was undertaken on 2 March 2020. Jennifer Brodie, the Occupational Health Nurse, produced a Report the same day in which she confirmed that the Claimant was then fit for work, but that there was the potential for absences due to the ongoing Police investigation (pages 167 and 168). Ms Brodie recorded that the Claimant had asked her to thank the Respondent for its continued support. She noted that the Claimant's Manager had been supporting her on site one day a week. She had also discussed with the Claimant a strategy for managing the Claimant's understandable feelings of anxiety when she was working on site alone. Towards the end of her Report, Ms Brodie wrote,

> *"At present, she does enjoy her role and is coping with the challenges well".*

56. Within a couple of weeks, the Claimant began to experience heightened feelings of anxiety when asked to work with two individuals who she had come to believe had been involved at some level in the harassment of Ms V on 28 November 2019. She drafted a lengthy email to her Manager and Mr Robb and sent this to her husband for his comments on 17 March 2020. Whilst it seems that the email was never sent, nevertheless it serves as a contemporaneous record of the Claimant's thoughts and feelings. She wrote,

> *"…Believe it or not, I feel incredibly guilty that [the Site Manager] has lost his job, although he very much deserved to. However, being a wife and a mum myself I can't stop thinking about what his family are going through and I really don't think I can bear any more guilt or another family's life being turned upside down.*
>
> *…I absolutely love my site and I really respect [T] and his team's work, actually it makes selling the homes absolute pleasure. I am not sure what the best way forward is, from a work perspective I don't want anything to change, but also not sure if I can continue working with [S] and [T] under the current circumstances.*
>
> *…I really appreciate all the help and support you both and all within Crest have given me so far. I am aware that my reaction on Sunday to [Ms V's] news might seem like an overreaction, however, my feelings are still quite raw, I assure you that the last thing I want is to cause either of you any more trouble.*
> *I will admit that I completely under estimated how many set backs there would be and how easy and out of the blue they can happen."* (page 173)

57. The Claimant sent a shorter revised draft of the email to herself later the same day (page 175). She was evidently struggling to decide what to do for the best.

58. On 23 March 2020, the country went into its first national lockdown as a result of the Coronavirus pandemic. Along with many of her colleagues, the Claimant was furloughed. It seems the Claimant had difficulty in securing further counselling sessions. As far as we can discern from the Hearing Bundle, the Claimant had no further counselling sessions after the end of March 2020, notwithstanding Ms Brodie had recognised their benefit to the Claimant and recommended that the sessions should be extended. Whilst the available evidence at Tribunal was not entirely clear, in an email dated 4 May 2020 to her Manager, it was evidently the Claimant's understanding that the Respondent had decided to no longer provide counselling sessions. The Claimant wrote,

> *"This change and decision has had a huge impact on me, not least because it was not communicated to me that I would no longer be getting the support I had been told I would get. So I haven't had a counselling session now for five weeks which is having an effect on my mental wellbeing."* (page 200)

59. She went on to refer to the continuation of counselling as *"crucial".* Subsequently, on 12 May 2020, the Claimant said in an email to Stephanie Fleming of the Respondent that she was,

> *"…having a meltdown of my own and so I really need to access the counselling services."* (Page 202)

60. The Claimant returned to work from furlough leave on or around 18 May 2020. On 20 May 2020, she discovered that the Site Manager's bail conditions had been removed.

61. As a result of a reorganisation within the Respondent's business, the Claimant moved to a new site in or around June 2020 in order that she would remain within the Chiltern Region with the same Manager. On 29 June 2020, she emailed the Manager telling her that she had had a really bad day and that she had,

> *"…ended up just driving around for nine hours".*

62. At some point in June 2020, the Claimant took legal advice from the firm that represents her in these proceedings. They are a firm of specialist employment law solicitors. There is no suggestion in these proceedings that the Claimant was other than fully and correctly advised as to her legal rights and regarding the options available to her.

63. In or around this time, the Claimant commenced counselling with a new Counsellor / Therapist. However, the Claimant was evidently still struggling. On 24 July 2020, she emailed her Line Manager,

> *"I am really sorry… but I am going to have to lock up and go home. I am a complete mess and I just can't pull myself together. I keep bursting into tears – thank god I haven't had any visitors. I have rearranged my reservation appointments for Sunday."* (Page 219)

64. As noted already, on 6 August 2020 the Claimant was certified unfit for work by her GP with depression. She was subsequently certified as unfit with stress and depression.

65. It seems that the Claimant and her Manager spoke on Tuesday 18 August 2020. The Claimant sent her Manager a lengthy email on 20 August 2020 following their call, which she said had left her feeling quite upset and

> *"…that I need to defend myself on a number of points that you raised".*

She documented that it had been suggested by her Manager that her medication was impairing her ability to perform her job (pages 231 to 233). This prompted a detailed email in response from the Claimant's Manager. Referring it seems to the period leading up to her sickness absence, the Claimant's Manager wrote,

> *"You've been very honest calling me when you are going to be late to work having had a rough night and needing time to get yourself up and running, anxiety leaving home, forgetting your laptop and traffic issues / road closures. You have said it is hard for your to concentrate, your mind keeps going over events. You have called me from work in tears saying you can't stay, you need to leave and go home. Again, during our phone call, me referring to the medication and your job is me recognising the issues you are experiencing at the moment, that the medication is designed to help you switch off a bit and how this could impact your performance in the role and I actually said I did not want you to lose confidence in your ability in the role by feeling you are under performing which is basically what you now think I am doing. You are open with me*

> *on your struggles and I do all I can to support them. We are talking as it is around you coming back to work, naturally I would discuss this, if I ignored it I would not be supporting you and not doing my job. Again, it is not a critique, but recognition."* (Page 230)

66. In follow up internal emails the Claimant's Manager described the situation with the Claimant as having reached

> *"…a dangerous stage for me".*

She wrote,

> *"This is extremely difficult for me to manage as in my opinion as a Manager she is not fit for work, I don't believe two more weeks off with an increase in anti-depressants and sleeping tablets will fix things, personally I believe this is a long term fix."*

She went on to say,

> *"I have had zero training in this field and don't want to get it wrong."*

(Page 229)

67. By 12 August 2020, the Claimant had had a number of counselling sessions with her new Counsellor / Therapist, who wrote to the company's Healthcare Provider requesting an extension and agreement to fund a further 12 sessions. The Counsellor / Therapist wrote,

> *"…She had, until this week, made a successful return to work. Whereas she reports enjoying her job and having experienced success she is, at the same time, constantly re-triggered by circumstances or staff members who remind her of the incident. This results in constant stress, a feeling of being overwhelmed and a struggle to concentrate..."* (pages 226 and 227)

68. The Counsellor / Therapist went on to note that during a meeting the previous day, 11 August 2020, the Claimant described experiencing symptoms consistent with anxiety, moderate depression and PTSD. The Claimant had apparently filled out the IES-R diagnostic questionnaire which explores trauma. Her scores had placed her in the severe bracket of likely PTSD. That provisional assessment was effectively subsequently confirmed by Dr Bowers. At paragraph 175 of his Report, Dr Bowers states,

> *"In relation to a psychiatric condition, on the balance of probabilities, the Claimant developed a post-traumatic stress disorder (ICD-10, F43.1) following the incidents which allegedly took place on 28 November 2019."*

69. He goes on to say at paragraph 198 of his Report,

> *"The onset of this condition occurred within 3 to 4 weeks of the alleged index incident occurring and on the balance of probabilities, completely*

resolved by 14 October 2021 when the Claimant started to reduce her anti-depressant medication."

70. Dr Bower further observes at paragraph 223 of his Report,

"I would aver that dealing with a legal claim in addition to managing her psychiatric symptoms through the first year post-alleged index incident, would have been too much for the Claimant to emotionally cope with."

71. At paragraph 79 of her witness statement, the Claimant states that she was so traumatised by what happened on 28 November 2019 that her menstrual cycle was badly affected and that she did not have a period for over 11 months. She believes that this was because of the stress, anxiety, depression and trauma that the rape had caused. Her evidence in this regard was not challenged by the Respondent.

72. The Claimant first notified ACAS of a potential claim against the Respondent on 13 August 2020. The first Early Conciliation Certificate was issued on 13 September 2020 (page 7). The Claimant resigned her employment on 20 October 2020. Her resignation letter is at page 243 of the Hearing Bundle. As we shall return to, we are satisfied that it reflects the reasons for resignation operating in the Claimant's mind, even if she had other issues of concern which she shared with Ms Wilson in text or WhatsApp messages that were provided to the Tribunal.

The Law and Conclusions

<u>The First Claim – the harassment complaints</u>

73. Section 26 of the Equality Act 2010 ("EqA") provides,

> (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).

74. The Claimant's complaints of harassment are pursued under section 26(2).

75. Section 109 of EqA 2010 additionally provides,

> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

76. We have already set out why the factual allegations that underpin the complaints identified as Issues B(2)(iii) and (iv), and which are additionally relied upon by the Claimant as fundamental breaches of contract, have not been established. Having failed to establish the primary facts, any complaints pursued in reliance upon them equally cannot succeed.

77. As regards those allegations that have been upheld by the Tribunal, namely Issues B(2) (i), (ii) and (v) – in the case of (v) limited to the Site Manager's conduct on 16 December 2019 - in each case the Site Manager's conduct was unwanted. His conduct in the taxi and hotel room on 28 November 2019 was plainly of a sexual nature. The Respondent has not suggested otherwise. Although Mr Edwards made no submissions on the point, in our judgement the Site Manager's actions on 16 December 2019 were also of a sexual nature, in that he was seeking to exploit what he perceived to be his relative position of power as a man to coerce her into not reporting or disclosing what had happened on 28 November 2019.

78. The key legal issue to be determined by the Tribunal is whether the Site Manager's conduct towards the Claimant was, in each case, done in the course of his employment with the Respondent. It is only if they were done in the course of his employment that the Respondent is liable for those acts.

79. Mr Edwards' primary submission on this issue is unequivocal:

> *"Finding that the Respondent is liable for the criminal act of rape committed outside of working hours, in a location wholly unrelated to the Respondent would be a dramatic – and legally impermissible – extension of the vicarious liability* "course of employment" *principles."* (paragraph 52 of his written submissions)

He makes the point again at paragraph 56 of his written submissions. For reasons we shall explain, we do not consider that it is appropriate to frame what happened on 28 November 2019 in those terms.

80. The key Legal Authorities are as follows:

a. Chief Constable of Lincolnshire Police v Stubbs [1999] IRLR81;

b. Sidhu v Aerospace Composite [2000] IRLR602;

c. Forbes v LHR Airport [2019] IRLR890;

d. Jones v Tower Boot Co. Limited [1997] IRLR168; and

e. Livesey v Parker Merchanting Limited [2004] UKEAT/0755/03.

81. In the course of his eloquent oral submissions, Mr Edwards developed his primary submission above. He expressed the view that the Tribunal would be in error if it was to have regard to the Site Manager's conduct towards Ms V on 28 November 2019 in determining whether the Site Manager's actions in relation to the Claimant were done in the course of his employment. Again, for the reasons we shall explain, we do not agree.

82. Our starting point is the Court of Appeal's Judgment in Jones. Mr Edwards highlights that Jones was a case involving the commission of clearly inappropriate acts in the workplace, during working hours, using equipment provided by the employer to the perpetrator in connection with their work, namely a screwdriver. In the course of his Judgment, Lord Justice Waite observed,

> "Tribunals are free, and are indeed bound, to interpret the ordinary and readily understandable, words "in the course of employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances within or without the workplace, in or out of uniform, in or out of rest-breaks all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each Industrial Tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort."

83. Since the Court of Appeal's Judgement in Jones, there have been significant developments in the common law regarding vicarious liability in tort. Nevertheless, we have held firmly in mind that we should not seek to draw parallels from that evolving body of case law, much of which has been concerned with the imposition of vicarious liability for acts of sexual abuse, sexual exploitation and other sexual impropriety. Our task as a Tribunal remains firmly rooted in the language of the statute.

84. Drawing on the key legal authorities above, Mr Edwards identifies four factors to which the Tribunal should have regard in coming to a conclusion as to whether the ordinary layman would consider the Site Manager to have acted in the course of his employment:

    a. Whether the acts took place in the workplace or an extension of the workplace.

       Mr Edwards' submits that the taxi and hotel room could not arguably be said to be either, though the taxi was of course the means by which the Claimant and the Site Manager travelled away from the party, which party Mr Edwards accepted could be regarded as an extension of the workplace. It seems to us unlikely that the ordinary laymen would, in every case, inevitably make a distinction between acts committed at a social event and acts committed on

the way to or from such an event. As Jones makes clear, in each case it will depend upon the circumstances.

Mr Edwards' assertions in his written submissions that the Claimant and the Site Manager paid for the taxi themselves and that the taxi and hotel were wholly unrelated to work, do not have an entirely solid evidential foundation. On the contrary, the limited available documentary evidence is that the Respondent met at least a significant proportion of the costs of the hotel room. Furthermore, it is not in issue that the Claimant and Site Manager would each have been able to claim up to £50 from the Respondent in respect of their total expenses incurred in connection with the event (and indeed we accept the Claimant's evidence at Tribunal that she made such a claim). Whether or not the Claimant or the Site Manager claimed for the taxi and, in the case of the Claimant, whether or not she claimed anything for the hotel room in addition to the £100 claimed in total by her colleagues, their ability to claim up to £50 in expenses would have limited their personal out-of-pocket expenses and, as a matter of common sense, would have facilitated their attendance at the party. In our judgement, whilst certainly not determinative of the matter, these are nevertheless relevant circumstances to which the ordinary layman would have regard in assessing whether the taxi and hotel might be regarded as an extension of the workplace and in an overall assessment of whether the Site Manager acted in the course of his employment.

As regards the Site Manager's attempts to contact the Claimant on 16 December 2019, he was suspended from his employment at the time. Whilst the acts did not take place therefore in the workplace, given that he was suspended we conclude that the ordinary layman would not regard his absence from the workplace as determinative of the question of whether the acts were carried out in the course of employment. We return to this issue at sub-paragraph (d) below.

b. Whether the acts took place during working time or outside normal working hours.

We were not told what the Site Manager's normal working hours were, but proceed on the assumption that the building site managed by him was operational during the day rather than in the evening or at night. We conclude that the events in the taxi and at the hotel on 28 November 2019 happened outside the Site Manager's normal working hours, albeit as we shall return to, they were the culmination of a course of conduct that likely began during normal working hours given that Mr Cox placed the harassment of Ms V as having occurred between 4pm and 6pm. In our judgement, the ordinary layman would have regard to the fact that 28 November 2019 was a normal working day for the Site Manager and that he was paid his normal salary that day (indeed, that this acted as an incentive for him to attend the party, since otherwise he would have

had to have taken a day's leave) in arriving at an overall assessment of whether he acted in the course of his employment.

In our findings at paragraph 47 above, we have identified that the Site Manager contacted the Claimant during his normal working hours on 16 December 2019, even if he was then suspended.

c. Whether the perpetrator used equipment provided by the employer for the purposes of their employment in carrying out the acts in question.

As above, we do not know what expenses were claimed by the Site Manager and the Claimant, though the taxi and hotel room were at least facilitated by reason of the £50 allowance available to them. As set out in our findings above, as minimum the Respondent paid nearly two-thirds of the costs of the hotel room.

There is no information before the Tribunal to suggest that the Site Manager contacted the Claimant on 16 December 2019 using a work phone.

d. The nature of the acts and their nexus with the perpetrator's employment.

Mr Edwards submits that the nexus was "clearly broken" once the Claimant and Site Manager left the party. His statement, as part of that submission, that the Claimant "voluntarily" got into the taxi with the Site Manager does not fully reflect the reality that she was intoxicated through alcohol and has only a hazy recollection of walking across Leicester Square and, thereafter, being accosted by the Site Manager once in the taxi.

Mr Edwards submits that the fact the Site Manager was employed in a managerial level role is of limited relevance particularly given he was not the Claimant's Manager. Whilst it is the case that he was not her Manager, nevertheless, we consider that the ordinary layman would regard his status and perceived authority as a relevant consideration as part of the overall circumstances. He was someone at a more senior level in the hierarchy of the organisation than the Claimant and pertinently was a Manager at the site at which the Claimant worked. He was someone the Claimant trusted and in our judgement, in so far as the Claimant was capable of exercising any judgement in the matter given her intoxicated state, that trust derived in part from his standing as a Manager, including their weekly site meetings and other interactions.

As regards the Site Manager's actions on 16 December 2019, these are not addressed in Mr Edwards' written submissions. The Site Manager was suspended from his employment when he contacted the Claimant. In our judgement, it cannot have been Parliament's

intention when enacting the Equality Act 2010 that perpetrators of harassment and their employers should avoid liability for acts of harassment occurring during periods of suspension. During suspension, the employment relationship continues and the suspended employee remains subject to their duties of employment, including the implied duty of trust and confidence, even if they are not required to work and will very likely be instructed not to attend their place or work. In this case, the Site Manager was suspended in order to facilitate an investigation and, whilst suspended, the Respondent insisted that he should not enter its premises or discuss the matter with other colleagues potentially involved in the incident. In contacting the Claimant, he did precisely that which he had specifically been instructed not to do. At that point in time this was essentially all that was then expected of the Site Manager in terms of his employment with the Respondent. The instruction was with a view to protecting, amongst others, the Claimant and Ms V, safeguarding evidence and ensuring the integrity of the investigation. In seeking, as we have found, to coerce the Claimant, the Site Manager was actively seeking to interfere in and undermine the investigation. In our judgement, that provides a clear nexus to the Claimant's employment.

85. We explored with Counsel comments of His Honour Judge Ansell in Livesey. Livesey was a case that also involved a Christmas party. Having identified that the Employment Tribunal was in error as regards the Claimant's constructive dismissal complaint and that the employer was liable for Mr Newton's actions certainly up to the time of the events occurring within the Christmas party, His Honour Judge Ansell went on to say,

> *"However, where does that leave the assault in the car? As we have previously indicated, for the purposes of the Sex Discrimination Act the majority lay members sought to draw a distinction between this act and the events occurring actually at the party, though without giving any reasons as to why they drew that distinction, save that in paragraph 38 they set out that each case must depend on its own facts. Mr Gordon argues that on this important issue, the Tribunal should have given reasons for their decision – see English – v – Emery Reimbold & Strick [2003] IRLR710. He further argues that whether under the Sex Discrimination Act or in common law, the majority of the Tribunal were in error in seeking to draw a distinction between the events which occurred at the party and those in the car on the way home. In common law, we can see no grounds for making any distinction, applying the modern approach to vicarious liability, as laid down in the Lister case. Mr Newton, the Deputy Manager, where Ms Livesey worked, and presumably the most senior employee at that location, clearly embarked on a course of sexual harassment, which as the Tribunal found, had become cruder and more offensive as time went by and which culminated in the events during and after the Christmas party. Bearing in mind that continuous course of conduct, it would seem to us totally unrealistic to draw any distinction between the events which occurred in the party and those immediately afterwards in the car. These were serious acts for which the employer*

was vicariously liable and therefore amounted to a fundamental breach on the part of the employer which would have entitled the employee to resign."

86. Mr Edwards notes that Mr Newton had been sexually harassing Ms Livesey over several months and making sexist comments which had become cruder and more offensive as time went by. In this case, the Claimant readily accepted in the course of cross examination that she had not previously been sexually harassed by the Site Manager, so that there was no continuous course of conduct in the sense in Livesey. Nevertheless, the Site Manager did embark upon a course of conduct on 28 November 2019. To borrow from His Honour Judge Ansell, we conclude that the ordinary layman would regard as unrealistic any attempt to draw a distinction between the Site Manager's conduct at the party itself (even if this was primarily directed at Ms V, and thereafter at Mr Cox when he sought to intervene on her behalf), in the taxi shortly after leaving the party and, subsequently, in the hotel room. Whilst we do not know or speculate as to what was in the Site Manager's mind when he went to the party on 28 November 2019, in our judgement, by late afternoon on 28 November 2019 the Site Manager had embarked upon a course of harassing conduct, albeit initially directed at Ms V even if the Claimant and a colleague perceived the Site Manager to be also paying her attention. In terms of the overall circumstances that might reasonably inform the ordinary layman's assessment of the Site Manager's actions, it is relevant, we think, that the Site Manager persisted in his initial harassment of Ms V and did so openly in front of others, notwithstanding Ms V made clear to him that his conduct was unwelcome. It was the start of a pattern of behaviour that day and in the following days. Even after Ms V physically moved away from the Site Manager when he would not stop harassing her, he still would not accept this as a clear indication that his conduct was unwelcome. Looked at objectively, the Site Manager's conduct evidences that by late afternoon on 28 November 2019 he had ceased to respect Ms V's dignity or the dignity of others who were witness to his behaviour and who did not find it funny; he was engaged in a course of conduct that had both the purpose and the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for them, in spite of it being made quite clear to him firstly by Ms V and subsequently by Mr Cox that his conduct was entirely unwanted. Critically, when his conduct was challenged by Mr Cox he became aggressive and threatened violence. That was plainly harassment of Mr Cox within the ambit of section 26(1) of EqA 2010 and evidences to us an ongoing escalating pattern of aggressive, determined behaviour.

87. As we have indicated already, we consider that Mr Edwards is seeking to frame the events through a particular prism. In our judgement, the ordinary layman would regard the Site Manager's conduct in the taxi, in the hotel room and thereafter on 16 December 2019 as the continuation of and inextricably linked to the harassment that preceded it at the Piano Works bar on 28 November 2019, even if that harassment was initially directed at Ms V and thereafter at Mr Cox. The Site Manager's conduct

towards Ms V was aggressive, sexually predatory behaviour. According to Ms V he pinned her against a pillar and groped her breasts. According to Mr Cox, he twice grabbed her crotch, and did so publicly in view of others. Thereafter, the Site Manager exhibited the same aggressive and determined, indeed controlling, behaviour towards Mr Cox and the Claimant, and towards other colleagues in so far as he evidently felt that he could harass Ms V and threaten Mr Cox with impunity in front of them. In the same vein, he made advances to the Claimant in the presence of a taxi driver. From beginning to end, the Site Manager was engaged in conduct that was unwanted and which he knew to be unwanted. When his wants and demands were not met and were challenged this was met: in the case of Ms V, with a serious public sexual assault during which she was pinned to a pillar; in the case of Mr Cox, with threats of violence; and in the case of the Claimant, by raping her and causing her internal vaginal bruising, and thereafter seeking to coerce her and secure her silence on the basis their respective families had a lot to lose.

88. In the circumstances as we have just summarised them, and as are further described in paragraph 84 above, we conclude that the ordinary layman would say that the events in the taxi and in the Claimant's hotel room on 28 November 2019, together with the Site Manager's actions on 16 December 2019, were done in the course of his employment, rather than isolated, discrete acts outside the ambit of his employment, and accordingly, pursuant to section 109 of the Equality Act 2010, that the Respondent is responsible for those acts of his.

89. Subject to jurisdictional time limits, Issues B(2)(i), (ii) and (v) (in the latter case, limited to the Site Manager's actions on 16 December 2019), within the First Claim, are well founded.

The Second Claim – the discriminatory constructive dismissal

90. The Claimant relies upon the alleged acts of harassment as fundamental breaches of her contract of employment. Subject to the Tribunal's findings of fact, it does not appear to be disputed by the Respondent that the alleged acts, if upheld, collectively or individually amount to fundamental breaches of contract. Nevertheless and for the avoidance of doubt, in our judgement Issues B(2)(i), (ii) and (v) - in the latter case, limited to the Site Manager's actions on 16 December 2019 - were both collectively and individually repudiatory breaches of the Claimant's contract of employment entitling her to resign her employment.

91. The matters relied upon by the Claimant as justifying her resignation are not, however, limited to the acts of harassment above. The Claimant asserts that the Respondent was also in fundamental breach of contract in allegedly failing to put safeguards in place to protect its staff at the Christmas party (Issue C(6)(i)).

92. Mr Edwards' first point is that the Respondent had not encountered any issues previously at any Christmas party. In our judgment, an employer has a responsibility to act pro-actively, rather than reactively, to identify

and safeguard against risks to the health, wellbeing and safety of its staff. The Christmas party started at 1pm and continued late into the evening. Throughout, unlimited free alcohol was seemingly available to the attendees. Mr Varnam, not unreasonably, describes the party as an alcohol-fuelled event. Making alcohol freely available to employees at a party that extends over many hours self-evidently carries risks. Even if it might be suggested that a formal risk assessment would have been disproportionate, it would have been a simple matter for a light touch communication to have been issued by the Respondent to attendees ahead of the event, encouraging them to enjoy themselves but also reminding them of the standards of behaviour expected of them. In our judgement it would have been reasonable to delegate overall responsibility for the event to a senior Manager and to have communicated to attendees in advance who this would be should they have any issues or concerns on the day.

93. Mr Edwards highlights that Mr Cox sought to censure the Site Manager. It is not in dispute between the parties that Mr Cox's immediate instinct on 28 November 2019 was to protect Ms V when he observed the Site Manager's behaviour towards her. He is to be commended for intervening to protect Ms V and for standing his ground in the face of an aggressive reaction from the Site Manager. We do not lose sight of the fact that he was himself harassed by the Site Manager. Nevertheless, it is equally important to remember that he was not coming to the aid of a stranger in a bar that day. Ms V was a work colleague and Mr Cox was a Manager who was under an obligation to uphold and comply with the Respondent's Health and Safety Policies, Rules, Regulations and Working Practices. The Respondent's documented Policy was that the personal safety of its staff was of paramount importance to the company. The Respondent, of course, has general duties to its employees under the Health and Safety at Work etc. Act 1974. Employees too have duties while at work, including to take reasonable care of the health and safety of others who may be affected by their acts or omissions at work – Section 7 of the 1974 Act. We have accepted the Claimant's evidence that the Managing Director of the Chiltern Region was in attendance at the event. Mr Tomkins, to whom the Site Manager reported, was also present. By his own account, Mr Cox twice witnessed a colleague sexually assault another colleague before then being threatened with violence when he sought to intervene. Faced with such serious and alarming behaviour, Mr Cox did not escalate the issue to the Managing Director, the most senior level employee in attendance at the event. Nor it seems did he think to raise the matter with the Respondent in the following days. In our judgement this reflected a serious breach of the Respondent's statutory and contractual duties to Ms V and to the Claimant, and indeed to anyone else then present at the party who might have been at risk from or affected by the actions of the Site Manager. If an attendee at the party had slipped and been injured as a result of a spilled drink or similar hazard, we do not think it would be suggested by the Respondent that on becoming aware of the hazard the attendees would have had no further responsibility in the matter. The risk here was obvious, serious and immediate. The Site Manager represented

a clear and present danger. He was drunk, had sexually assaulted a colleague at least twice, pinning her against a pillar during the latter assault, and had squared up to another colleague. The situation cried out for a decisive intervention.

94. Mr Edwards submits that there was no reason to suspect that the Site Manager would act in the way that he did towards the Claimant. We disagree; to recap, Mr Cox described seeing the Site Manager grab Ms V "inappropriately from behind under her crotch", was told by Ms V that "he keeps doing it", and witnessed the Site Manager approach her a second time and "put his hand up her crotch". He was threatened with violence by the Site Manager when he sought to challenge him. As we have already observed, this all occurred in front of others. In our judgement, there was every reason for the Respondent to suspect that the Site Manager's actions may continue and indeed escalate. For his part, Mr Cox ought reasonably to have reported the situation immediately to the Managing Director, alternatively to Mr Tomkins, the Build Director so that they might take action. On any reasonable and sensible view, the Site Manager should have been excluded from the party and suspended from his employment either immediately or at the earliest possible opportunity. Indeed, arguably, consideration should have been given to involving the Police.

95. Mr Tomkins, displayed a particularly cavalier attitude in the matter given his seniority and what he observed to be the Claimant's significant intoxication. Notwithstanding his claim, when interviewed on 19 December 2019 that,

> *"When sober you see everything clearly."*

he still thought fit to make the following observation regarding the fact the Claimant and the Site Manager had left together,

> *"I knew [the Site Manager] had booked a hotel, when I saw them walking upstairs leaving the club I just presumed that was it. These things seem to always happen on Christmas parties."* (page 145)

We have no reason to believe that Mr Tomkins was aware by 19 December 2019 that the Claimant had been raped, but in our judgement those final comments do not evidence much clarity or insight on Mr Tomkins' part. He was referring to a married female colleague whom he considered to be in a "bad state - drunken", yet presumed the situation was consensual as "these things always seem to happen", it appears without reflecting on whether the Claimant was in a fit state to leave the venue and, if she was or indeed even if she was not, whether it was appropriate for the Site Manager to accompany her or more appropriate, for example, for a female colleague to accompany her and ensure her safety and wellbeing. We consider that the Claimant was left by Mr Tomkins to fend for herself, sadly something that night which she was ill-equipped to do.

96. For all the reasons above, we uphold the Claimant's complaint that the Respondent failed to put reasonable safeguards in place to protect its staff at the Christmas party.

97. In order to succeed in her dismissal complaint, the Claimant must have resigned in response to the breaches and not for some other reason. However, the breaches need not be the sole or main reason for the resignation, they need only have been a material factor in her decision to resign. We do not accept Mr Edwards' suggestion in the course of his oral submissions that the Claimant's stated reasons for resigning her employment were not her actual reasons, specifically his reliance upon a message the Claimant sent Ms Wilson on 5 January 2021 (page 458 of the Hearing Bundle). We are in no doubt whatever that the stated reasons in the Claimant's resignation letter were the reasons operating in her mind at the time of her resignation, even if she was also experiencing triggers at work and feeling vulnerable around the site team, as well as uncomfortable about the fact the Respondent's Senior Management knew about the rape. In our judgement, the events of 28 November and 16 December 2019 remained front and centre in the Claimant's mind when she resigned. The issues referred to in the message of 5 January 2021 were peripheral.

98. However, we agree with Mr Edwards that the Claimant affirmed the contract and waived the breaches.

99. Our starting point in this regard is the Judgment of Lord Denning in Western Excavating v Sharp [1977] IRLR221, in which he said that an employee,

> *"…must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

100. The other classic, more detailed formulation is the Judgment of Mr Justice Browne-Wilkinson (as he then was) in WE Cox Toner (International) Limited v Crook [1981] IRLR443,

> *"The general principles of contract law applicable to a repudiation of contract are that if a party commits a repudiatory breach of contract, the other party can choose either to affirm the contract and insist of further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must, at some stage, elect between those two possible courses: if he affirms the contract, his right to accept the repudiation is at an end… Affirmation of the contract can be implied if the innocent party calls on the guilty party for the performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligations. Moreover, if the innocent party himself does acts which are only consistent with he continued existence of the contract, such acts will normally show affirmation of the contract…"*

101. The Claimant did not resign her employment until 20 October 2020, some ten months after the last of the breaches, namely the Site Manager's calls and messages to her on 16 December 2019. In our judgement, the Claimant affirmed the contract at an early stage, namely early in January 2020 when she returned to work feeling reassured and safe in the knowledge that the Site Manager had been dismissed from the Respondent's employment. For better or worse, she then felt able to continue in the Respondent's employment and derived a sense of security from knowing that whatever the Site Manager did next, as long as she remained in the Respondent's employment there was little or no chance of encountering him. Her ability to have ongoing trust and confidence in the Respondent was bolstered by what she perceived to be its support of her in the immediate aftermath of the disclosure that she had been raped: specifically, the perpetrator had been suspended and then dismissed, counselling had been made available to her under the Respondent's Employee Assistance Programme and the Claimant's Line Manager in particular, had demonstrated genuine concern, empathy and compassion for her situation. In our judgement it is irrelevant that symptoms of PTSD may not have been apparent, or at least understood, in those initial few weeks, or that by the time of her resignation, the Claimant was absent from work with depression and had a different view of the Respondent's response and culpability in the matter. Having, we find, affirmed the contract in January 2020, her right to accept the repudiation was at an end; the law does not afford her the opportunity to change her mind, even if it would have afforded her a reasonable period of time in which to arrive at any decision.

102. We did explore with Counsel whether it was relevant that the Claimant did not take legal advice until June 2020. In Western Excavating, Lord Denning made no reference to an employee needing to be aware that the conduct in question is a repudiatory breach of contract before they can be said to have affirmed the contract. Nevertheless, we think that there will be cases in which an employee's lack of knowledge of the legal position may mean that affirmation cannot be implied. The point was not pursued by Mr Varnam in the course of his submissions. But even if the Claimant's lack of knowledge of her legal rights might have been said by him to be a relevant factor, the Claimant continued in the Respondent's employment once she had the benefit of specialist employment law advice in June 2020. The fact that she commenced ACAS Early Conciliation on 13 August 2020, and thereafter presented a discrimination complaint to the Employment Tribunals, but did not resign her employment and claim constructive dismissal, provides the clearest evidence to us that she had affirmed the contract and, regardless of the fact that her right to accept the repudiation was at an end, that she remained of the view, for better or worse, in June 2020 that she would continue in the Respondent's employment despite everything that had happened. In the circumstances the Second Claim cannot succeed.

Jurisdictional Time Limits

103. Whilst we find ourselves in disagreement again with Mr Edwards insofar as we consider that there was conduct extending over a period, the Site Manager's attempts to coerce the Claimant on 16 December 2019 being inextricably linked to his related conduct on 28 November 2019, such that time only runs from 16 December 2019, it still means that the Claimant's complaints are significantly out of time, having been notified to ACAS under the Early Conciliation Scheme just over five months out of time, with the claim itself being presented to the Employment Tribunals just over six months out of time. The question is whether it would be just and equitable to extend the primary time limit.

104. S.123 of the Equality Act 2010, provides as follows:

> 123. Time Limits
>
> (1) Subject to sections 140A and 140B, proceedings on a complaint within s.120 may not be brought after the end of-
>
> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
> (b) Such other period as the employment tribunal thinks just and equitable.

105. The Tribunal has a wide discretion as to whether it would be just and equitable to extend time, though the burden rests with the Claimant to demonstrate that it would be just and equitable to do so. There is no presumption in favour of an extension, on the contrary the primary time limits are there to be observed. Tribunals must consider all relevant factors when considering whether to exercise discretion to extend time. This can include the factors in s.33(3) of the Limitation Act 1980, including the length of, and reasons for, the delay and whether the Respondent has been prejudiced by the delay. We have been considerably assisted by Mr Edwards' review of the relevant legal authorities in paragraphs 91 to 99 of his written submissions. We do not rehearse what is said by him there, though our immediate comments above partly reflect those authorities.

106. If time is extended in this case, there is the obvious and material prejudice to the Respondent of having to meet a claim which would otherwise be out of time. We agree with Mr Varnham that there has been no, or no material, forensic prejudice to the Respondent in this matter, since the alleged rape came to its attention within a matter of a few days. There was every opportunity therefore, indeed we think every obligation on the Respondent, to interview witnesses and secure evidence. If the chronology and timeline of events is unclear, that is a reflection of the quality of Mr Robb's investigation rather than a result of any delay on the part of the Claimant in intimating a claim. Whilst we can understand why the Respondent took the course that it did, namely, it proceeded against the Site Manager solely in reliance upon Ms V's allegations against him, nevertheless that was the Respondent's decision in the matter, as was its decision only to interview Mr Tomkins in relation to the Claimant. It is not

suggested that the Claimant was consulted about or agreed to the ambit of the investigation being limited in the way that it was.

107. We weigh in the balance that at some point in June 2020, the Claimant was in possession of specialist employment law advice. Thereafter, she did not notify her potential complaints to ACAS under the Early Conciliation Scheme for a further two months or so. However, in our judgement it is just and equitable that the Claimant should have had time to consider her position, specifically whether she felt able to commit to a litigation process in which she would be required to 're-live' past traumatic events. The overwhelming weight of evidence is that by June 2020, the Claimant was struggling significantly, to the extent that on 29 June 2020 she had driven around for nine hours. In July 2020, the Claimant was sufficiently badly affected that she closed the site and left early, telling her Manager she was a *"complete mess"*. By 6 August 2020, she had been certified by her GP with depression. It cannot be the case that her diagnosis coincided with the first day on which she experienced symptoms consistent with depression. Dr Bowyers' professional opinion is that she had developed a post-traumatic stress disorder within three to four weeks of the events of 28 November 2019 and that her PTSD incorporated feelings of depression and stress amongst its other symptoms. That is consistent with the Claimant reporting "*feeling very low, quite anxious and clingy"* in early January 2020, subsequently having a wobble and then reporting being tearful at work in February 2020, experiencing heightened feelings of anxiety and setbacks in March 2020, often out of the blue, and reporting impacted mental wellbeing and a meltdown in May 2020, in addition to the matters in June and July already referred to.

108. In our judgement, this is a case in which there are compelling reasons to exercise discretion in favour of the Claimant and extend time. Given that she was traumatised by the rape and required a significant number of counselling sessions and given how unwell she eventually became, we are satisfied that the Claimant acted as promptly as she reasonably could once aware of her legal rights in the matter. We agree with Dr Bowers that dealing with a legal claim in addition to managing her psychiatric symptoms during the first year following the rape would have been too much for the Claimant to emotionally cope with. Having secured specialist legal advice in June 2020, we are satisfied that the Claimant thereafter progressed her First Claim as soon as she was emotionally capable of doing so, even if ironically she had by then been certified unfit for work with depression. If anything, we conclude that once the Claimant went sick she was better placed to focus her attention on her legal situation whereas until then we conclude that all of her emotional energy had been invested in simply keeping going at work.

109. We consider that the Claimant would experience significant hardship and a profound injustice if she was precluded from securing a remedy in respect of the acts for which we have found the Respondent to be liable. Decisions to extend time should be the exception rather than the rule. In our judgement, this is an exceptional case where the justice and equity of

the matter requires that time be extended on the basis that the hardship and injustice of not extending time significantly outweighs the hardship and any injustice to the Respondent of having to satisfy a well-founded out of time claim. We are satisfied that the cogency of the evidence has been unaffected by any delay and, indeed, there has been no contention by the Respondent to the contrary.

110. The parties will be notified separately of a date for a Remedy Hearing, together with Case Management Orders in respect of that Hearing.

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Employment Judge Tynan

Date: 20 April 2023

Sent to the parties on: 15 May 2023

For the Tribunal Office