EMPLOYMENT TRIBUNALS

Claimant: Mr S Nunns

Respondents: SBH Windermere Limited (1)
Mr A Wilson (2)

Heard at: Manchester **On:** 31 May – 2 June 2023

Before: Employment Judge Phil Allen
Ms C Linney
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondents: Miss E Afriyie, litigation consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was harassed by the first and second respondent as a result of the second respondent engaging in unwanted conduct of a sexual nature in the ways identified below. Those claims for unlawful harassment against both the first and second respondent under section 26 of the Equality Act 2010 succeed. The unlawful harassment found was:

1.1 That from 3 November 2021 the second respondent hugged the claimant, the hugs being more frequent and increasingly long;

1.2 That from 3 November 2021, whilst driving the claimant home, the second respondent would slap the claimant's knee-cap followed by a light squeeze and a shake, and between 7 and 9 November 2021, whilst driving the claimant home, the second respondent touched the claimant's knee and placed his fingers on the claimant's inner thigh;

1.3 That on 3 November 2021, and on a date between 20 and 26 December 2021, the second respondent placed his hand on the claimant's bottom;

1.4 That on a date between 1 and 14 December 2021, the second respondent caressed the claimant's left nipple;

1.5 That in early January 2022, the second respondent sang "*The Ballad of Barry & Freda It*", a Victoria Wood sketch, in front of the claimant and, during this, the second respondent attempted eye contact with the claimant when signing the title, and made gestures during the time he was singing the song;

1.6 That in mid to late February 2022, the second respondent massaged the claimant's back and shoulders; and

1.7 That in late March 2022, the second respondent hugged the claimant, kissed him on the forehead, and told him "*love you*".

2. The claims for unlawful harassment as detailed at 1 above, were entered at the Tribunal within the time required and the harassment found all consisted of conduct extending over a period, the end of which was in late March 2022.

3. The claimant's other claims for harassment against the first and second respondent (whether identified as separate allegations or as other dates/parts of the allegations which have been found), did not amount to unlawful harassment of the claimant applying section 26 of the Equality Act 2010. Those claims against both the first and second respondent are dismissed.

4. The first respondent did not make unauthorised deductions from the claimant's wages as alleged. The claim for unauthorised deduction from wages under section 23 of the Employment Rights Act 1996 is dismissed.

5. The respondents' application to maintain the anonymisation order previously made in this claim is refused. Accordingly, the restrictions on reporting the names of the parties in this claim which were previously put in place under rule 50 of the Employment Tribunals rules of procedure, cease to apply as at the date that this Judgment is made.

REASONS

Introduction

1. The claimant was employed by SBH Windermere Limited (a company which is described in this Judgment as the first respondent) as the Head Chef at a hotel from 23 October 2021 until his resignation effective on 22 July 2022. The claimant claimed that he was sexually harassed by Mr A Wilson (who is referred to in this Judgment as the second respondent), the General Manager of the hotel. He also claimed that there were unauthorised deductions made from his wages, after he was paid statutory sick pay only for his absence between 23 March 2022 and the date of termination of his employment.

Claims and Issues

2. The issues were broadly identified at the preliminary hearing (case management) conducted in this case on 23 December 2022. However, as further particulars were required from the claimant and the respondent had leave to amend its grounds of response, the parties were required to subsequently agree a list of issues. Unfortunately, the parties never did so.

3. A list of issues had been drafted by the respondent and included in the hearing bundle at the start of the hearing. It had not previously been agreed by the claimant. The harassment alleged was based upon the timeline document which the claimant had prepared following the preliminary hearing (and which was copied into his witness statement). The issues were outlined and confirmed with the parties at the start of the hearing, who agreed that those were the issues they believed needed to be determined.

4. The issues identified were as follows:

Sexual harassment – s. 26(2) Equality Act 2010

1. Did the respondents do the following things?

   The claimant says:

   1.1 On 31 October 2021, the second respondent said to the claimant "*oh, dear I didn't realise you were..*" and then made a series of gestures [this allegation was that the comment was made after it had been identified that the claimant had previously had a boyfriend].

   1.2 On 1 November 2021, the second respondent stated "*do you need some time alone dear?*" or "*I'll put olive oil on the orders list again then, shall I?*". [This allegation was alleged to relate to the shape of a vegetable].

   1.3 On 1 November 2021, the second respondent faked an orgasm when eating the claimant's food followed by hugging/kissing/or dry-humping the claimant.

   1.4 Between 1-17 November 2021, the second respondent hugged the claimant more frequently and the hugs became increasingly longer.

   1.5 Between 1-17 November 2021, the second respondent insisted on driving the claimant home. During the car journeys, the second respondent would slap the claimant's kneecap followed by a light squeeze and shake of his knee cap.

   1.6 On 3 November 2021 and between 20-26 December 2021, the second respondent placed his hand on the claimant's bottom.

   1.7 Between 7-9 November 2021, the second respondent touched the claimant's knee and placed his fingers on the claimant's inner thigh whilst driving him home.

1.8 Between 1-14 December 2021, the second respondent caressed the claimant's left nipple [this was an allegation that it occurred on an occasion between those dates].

1.9 In mid-December to January 2021, the second respondent stated he had "*worked up a sweat eyeing up a 16-year-old boy*" and that he was jealous of the aunt sharing a bed with him as a child.

1.10 In early January 2022, the second respondent forced the claimant to watch him sing "*The Ballad of Barry & Freda It*" a Victoria Wood sketch. During this, the second respondent attempted eye contact with the claimant when signing the title. the second respondent made gestures during the time.

1.11 In mid-late February 2022, the second respondent would massage the claimant's back and shoulders.

1.12 In late March 2022, the second respondent hugged the claimant, kissed him on the forehead and told him "*love you*" prior to the second respondent going on holiday.

2. If so, was that unwanted conduct?

3. Was the conduct of a sexual nature?

4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5. If not, did it have that effect?

Arrears of pay

6. Is the claimant entitled to full pay for his period of sickness between 22 March 2022 up to his termination?

   6.1 The respondent contends that there is no contractual entitlement for full pay during a period of sickness and the claimant received Statutory Sick Pay (SSP) as per his contractual terms.

5. The claims for arrears of pay can only be claims against the first respondent as the employing company and were not considered to be a claim against the second respondent.

6. In the case management order made following the preliminary hearing on 23 December 2022 (443), it was identified that the respondents had highlighted that there may be time limit issues with the claimant's claim. It was stated that, if this was the case, it was to be raised in the amended response and dealt with in the agreed list of issues. Neither the amended response nor the list of issues raised any time issues.

7. The claimant raised an issue about medical documentation which could be relevant to a remedy decision. As a result, and in the light of the time available for the hearing, the parties agreed that the hearing would determine liability issues only. Remedy issues were left to be determined later, if the claimant succeeded in any of his claims.

Procedure

8. The claimant represented himself at the hearing. Miss Afriyie, litigation consultant, represented both of the respondents at the hearing.

9. The hearing was conducted by CVP remote video technology with the agreement of the parties.

10. An agreed bundle of documents was prepared in advance of the hearing. The bundle was somewhat incomplete and some documents which had been omitted were identified during the hearing and added to it (including the grievance appeal decision and the transcript of the grievance appeal meeting). When the additional pages were included, the bundle ran to 513 pages. The Tribunal did not read the entire bundle, it read only the pages which were referred to in the witness statements or which were referred to during the hearing, and/or which it was asked to read. The page-numbered bundle had not been received by the claimant until it was received by him by post during the first morning of the hearing. On the first morning the claimant explained that he had no interest in the bundle and there was no suggestion from him that the hearing should not proceed. On the second day of the hearing the claimant made references to the late receipt of the bundle, but he was able (and did) ask questions of witnesses with reference to the relevant documents in the bundle. At no time did the claimant apply to have the hearing postponed or delayed.

11. Relevant to the issues to be determined at the hearing was a song by Victoria Wood. Initially the Tribunal indicated that it did not believe that it needed to watch a clip of the song being sung by Victoria Wood, but after discussion it sought views from the parties about whether it should do so. The claimant was of the view that the panel should; and the respondents said that they had no objection to the Tribunal doing so. Accordingly, the claimant provided a link to a You Tube recording of Victoria Wood singing the song, and the Tribunal panel members watched the clip outside of the hearing during the lunch break on the second day. The claimant also provided a recording of the grievance appeal meeting with Mr Lynch on 6 May 2022 and requested that the panel listened to a particular part of the recording to which he referred. As the respondents had no objection, the Tribunal listened to the relevant part of the recording.

12. The Tribunal was provided with witness statements from: the claimant; the Second Respondent; Ms Beverly Flint, Group People Manager for the First Respondent's parent company; and Mr Ivan Lynch, Regional Operations Manager for the First Respondent's parent company. The Tribunal read the witness statements on the first morning of the hearing.

13. The Tribunal heard evidence from the claimant, who was cross examined by the respondents' representative, before being asked questions by the Tribunal. As the claimant made clear during the hearing, he has autism and ADHD. His

neurodiversity was taken into account throughout the hearing in the way that the hearing was conducted, and it was accepted that, on occasion, he had difficulty: in identifying the relevant documents; in organising questions or answers in the way that would be expected of others; and in his responses to questions, which reflected his neurodiversity and his own way of understanding issues. The Tribunal made adjustments for the claimant, including taking longer breaks and allowing the claimant for a period to turn his camera off when asking questions of one of the respondents' witnesses (to which the respondents' representative did not object).

14. On the second day, the Tribunal heard from each of the respondents' witnesses, who were cross examined by the claimant and were asked questions by the Tribunal. For the second respondent, the Employment Judge asked a number of questions (based upon the list of issues) which he felt the second respondent should have been asked by the claimant, and the claimant was also allowed to ask further questions as cross-examination, which he had identified in the light of the Judge's questions.

15. After the evidence was heard, each of the parties was given the opportunity to make submissions. Oral submissions were made on the morning of the third day by: the respondents' representative; and the claimant. During submissions the claimant provided a link to a website which provided information regarding grooming which he asked the Tribunal to read, to which the respondents did not object.

16. Judgment was reserved and accordingly the Tribunal provides the liability Judgment and reasons outlined below.

17. The Tribunal was grateful to the claimant and the respondent's representative for the way in which the hearing was conducted. The claimant ably represented himself.

Anonymity order

18. On receipt of the claim, it had been identified that Rule 50 applied to these proceedings. At the preliminary hearing on 23 December 2022 (as recorded in the case management order (444)) it was agreed that the anonymisation order would remain in place until the promulgation of the final Judgment. The case management order stated that if the parties wished to apply for a variation of the order, they should do so at the end of the final hearing.

19. Prior to the hearing being adjourned for the Tribunal to consider and reach its decision, the issue was raised with the parties. Neither party had made an application to continue the anonymisation order after Judgment had been issued. The claimant did not want the anonymisation order to be maintained at Judgment. After taking instructions, the respondents' representative applied to maintain anonymisation following the Judgment (so that the Judgment itself as issued would remain anonymised). The respondents' representative briefly explained why the respondents wished anonymity to be maintained, and the claimant confirmed that his position remained that anonymity should cease at Judgment.

20. The Tribunal sought the views of the parties on whether the decision on anonymisation could be reserved and determined at the same time as the

substantive issues. The respondents agreed to that approach and supported it. The claimant objected to that approach and asked that a decision be made at the hearing. The Tribunal adjourned briefly and, after doing so, returned and informed the parties that it would determine the application to maintain anonymisation alongside and at the same time as determining the substantive issues. The reason for doing so was because the Tribunal found the issue to be one which was complex and required some thought and consideration.

Facts

21. The claimant commenced employment with the first respondent on 23 October 2021. He was appointed to be the Head Chef at the Windermere Manor Hotel operated by the first respondent. It was the claimant's first role as a Head Chef. It was clear from his evidence that the claimant was excited about the employment and passionate about the role. From the evidence heard, it appeared that the claimant's appointment was a success and the Tribunal heard evidence from the second respondent about how good the claimant's food was.

22. The second respondent is the General Manager at the Windermere Manor Hotel. He was the most senior member of staff at the hotel and was responsible for it. It was common ground that he worked long hours for the first respondent and was committed to making the hotel a success. He placed great emphasis upon his belief that the staff who worked at the hotel were a family.

23. The second respondent is part of a group of companies which operates a significant number of hotels. Ms Flint and Mr Lynch, from whom the Tribunal heard evidence, are employed by Starboard Hotels Ltd, the parent company of the first respondent.

24. The Tribunal heard evidence about the claimant's interview for his role with the first respondent. He was interviewed by the second respondent. It was agreed that the interview went very well. The interview concluded with a hug. The claimant believed that the hug had been initiated by the second respondent by the manner in which he shook the claimant's hand, the second respondent believed that the claimant had initiated the hug. It was the evidence of both of them that, at the time, the hug was reciprocal.

25. The claimant worked in the kitchen at the hotel. Both parties agreed that, from the start of the claimant's employment, the claimant and the second respondent hugged each other (on occasion) and, at first, those were hugs which were reciprocal. The Tribunal also heard evidence that both the claimant and the second respondent, on occasion, hugged other employees working at the hotel. The second respondent's evidence was that hugging was a thing in the hotel.

26. It was the claimant's evidence that on 31 October 2021 he had a conversation with a colleague in which they were discussing past relationships and the claimant talked about his ex-fiancée, who had been male. The claimant said that the second respondent overheard the conversation and said "*Oh, dear I didn't realise you were one of them*". The claimant's evidence was that the statement was accompanied by foot and hand gestures. The second respondent denied that such a conversation

ever took place and denied that he was made aware that the claimant had previously had a boyfriend.

27. The claimant commuted four miles each way to work at the hotel. Initially he cycled to and from work or caught a bus. He later purchased a motor bike (the claimant said to avoid having to take lifts from the second respondent). The claimant's evidence was that the second respondent persistently offered him a lift home. Initially he refused as he did not want to cause the General Manager additional effort. From 1 November until 17 November, the claimant was given lifts home by the second respondent. The second respondent did not dispute that he gave lifts to the claimant; but did dispute that he persistently offered lifts. The Tribunal also heard evidence that, on occasion, others would also be given lifts by the second respondent and would also be in the car on occasion at the same time.

28. It was common ground between the parties that, on one occasion, when the second respondent had driven the claimant home after his shift, the claimant had become agitated about Costa Coffee, where he had previously worked and who the claimant asserted owed him money. He had stated that he wanted to break in and take their coffee machines, until he got paid the wages due. The second respondent tried to calm the claimant down. He placed his hand on the claimant's knee whilst trying to reassure him and stop him from doing anything silly. It was clear that there was no sexual connotation to this occurrence. The date of this occurrence was not evidenced.

29. It was the claimant's evidence that, initially, on the journeys when the second respondent gave him a lift home, the second respondent would tell him what a great job he was doing and would give a jovial slapping of the claimant's knee-cap, followed by a light squeeze and a shake. It was the claimant's evidence that, the second respondent's hand would begin to linger a little longer each time he touched the claimant's knee. At some time between 7 and 9 November 2021 the second respondent would gently squeeze the claimant's knee (without the jovial slap first). The claimant said that the time spent with the second respondent's hand on the claimant's knee gradually increased and the second respondent would tentatively move his fingers. Later the claimant alleged that the second respondent moved his fingers to the claimant's inner thigh, something which he particularly noted to have occurred in the period between 7 and 9 November 2021. The respondents disputed this evidence. The second respondent's evidence was that the only time he could recall touching the claimant when driving him home, was on the occasion detailed in the previous paragraph.

30. In his witness statement the claimant asserted that from 1 November 2021 the second respondent made inappropriate comments and sexual references to food. He gave an example of when the claimant had carried a cucumber and the second respondent had made a suggestive look, and said "*do you need some time alone dear*" or "*I'll put olive oil on the orders list again, shall I?*" The claimant also referred to the second respondent, at times, faking an orgasm when eating the claimant's food, followed by a hug, a kiss on the forehead, or (what he described as) mildly dramatised dry humping. The second respondent's witness statement did not address this allegation at all, albeit in answers to questions he denied the reference to olive oil and the alleged response to the claimant's food. When answering questions, the claimant explained that, at the time, the responses to his food were

endearing, complementary and flattering, and the claimant put it down to banter. He explained that those were not the issues which he was at the Tribunal to discuss.

31. It was the claimant's evidence that the second respondent placed his hand on the claimant's bottom whilst he was in his office on 3 November 2021. The claimant described himself as having headed out the back door of the hotel after the first occasion, having suffered a mild panic attack, when he phoned his mother. The claimant also described the second respondent as having done the same thing at least weekly and periodically throughout employment. The claimant also gave evidence that the second respondent again touched the claimant's bottom during the third week of December. On that occasion (for the first time) the claimant explained that he gained the courage to look the second respondent in the eye and remove his hand from his bottom. The second respondent denied that he put his hand on the claimant's bottom or touched his bottom.

32. It was the claimant's evidence that, on an occasion in the timeframe between 1 and 14 December 2021, the second respondent tried to sneak up on the claimant in his office, but the claimant had become aware that he had done so. He said that the second respondent reached into the claimant's chef's jacket and silently caressed the claimant's left nipple, before removing his hand and leaving. Some minutes later, after recovering from the shock, the claimant said that he left his office for a smoke and saw the second respondent outside the office and his statement described the way in which the second respondent then looked at the claimant. The second respondent denied that this occurred and stated that he had never put his hands over the claimant's shoulder to caress his nipple.

33. In his witness statement the claimant detailed an occasion when a family was having an early Christmas dinner at the hotel. It was his evidence that the second respondent spoke about having worked up a sweat with reference to a sixteen year old boy at the table and that he confessed to being jealous of the boy's Aunt who had talked about sharing a bed with the boy as a child. The claimant gave no evidence about how he felt about this being said, or about the impact that the second respondent's comments had upon him. Perhaps surprisingly for such a serious allegation, the second respondent's witness statement contained no reference to the incident at all. When asked questions about it, the second respondent recalled the family meal and a conversation about what the Aunt had said, but he denied saying that he had worked up a sweat as alleged.

34. It was not in dispute that the second respondent sang a Victoria Wood song, the Ballad of Barry and Freda It, to the claimant while the claimant was in his office. The claimant alleged that this occurred in early January 2022. As agreed, the Tribunal watched the You Tube clip of the song being sung by Victoria Wood. The song is a relatively well-known song, having been viewed on a large number of occasions. It is a comedic song about an older couple. The song concerns Freda propositioning her husband, being contrasted with Barry's reticence. The song has a chorus in which the line "*let's do it*" is repeated a number of times. The line is clearly and unambiguously a reference to sex. In Victoria Wood's version, the reference is clearly intended to be comic.

35. The claimant alleged that, when the second respondent sung the song, he repeatedly attempted to make eye contact with the claimant and made disconcerting

gestures towards him, particularly when singing the repeated words "*Let's do it*". The second respondent did not address this allegation in his witness statement at all, but in answering questions about it, he confirmed he had sung the song but explained it with reference to Victoria Wood coming up as a topic at the time and him being surprised that the claimant had not heard the song. The second respondent explained that songs would often come on the radio, which would be sung along to by members of staff including the claimant. The claimant was asked about the fact that the song was not something which he raised in his internal grievance. The claimant responded by explaining that he understood the point. Later, when the claimant was asked by the Tribunal whether that was an allegation which he was pursing as harassment, the claimant explained that he was and emphasised the age gap between himself and the second respondent, the fact that the second respondent was the General Manager of the hotel, the way in which the second respondent had sung the song, and the words used.

36. The claimant's evidence was that from mid to late February 2022, the unwanted physical contact picked up in frequency. In his statement he stated that the second respondent began to often, unprompted and unprovoked, massage his back and shoulders. The second respondent agreed that he would have placed his hands on the claimant's shoulders on occasion, but he denied massaging them.

37. On 3 March the claimant sent an email which said that he was intending to join the war in Ukraine and asking if his time away could be treated as a sabbatical (465). Emails were exchanged with Mr Barnes about doing so. The claimant did not leave his employment to fight in Ukraine.

38. The claimant's evidence was that, in late March 2022, prior to departing on his holiday, the second respondent gave the claimant a long goodbye hug, a kiss on the forehead, and told the claimant to look after himself and said "*love you*". It was also the claimant's evidence that the second respondent told the claimant that he loved him or simply said "*love you*" a lot for a boss. When asked about this, the claimant's evidence was that his best guess was that this began in early to mid-December 2021. When he was challenged about this allegation, the claimant agreed that he told his friends that he loved them all the time. In his witness statement the second respondent did not deny what was said.

39. Of some of the verbal comments, the claimant referred to camaraderie. When asked about the hugging, he explained that he initially did not have the same issue with doing so, it was later after the other events when he felt less comfortable about the hugs. In his evidence, the claimant also referred to having spoken to others about what had occurred since the events (such as family, friends and medical professionals) and, for some of what was alleged, it was clear that his perception of the events had altered as a result of having discussed them with others afterwards.

40. The claimant's last day in attendance at work was on 21 March 2022. He was absent from work from that date until the end of his employment.

41. The Tribunal was provided with a number of emails and text messages sent by the claimant. These included messages in which the claimant used either very familiar or friendly language towards the second respondent, or in which he referred to the second respondent in positive terms. These included:

a. An email of 28 October 2011 (407) in which the claimant said to the second respondent "*Morning sunshine!*" and ended it with "*Thanks love :) x Thanks either way! Looking forward to another cracking day!*";

b. An email of 8 November 2022 (425) from the claimant to the second respondent in which he said "*give Danny a big hug, looking forward to meeting him!*";

c. An email of 14 January 2022 (430) from the claimant to the second respondent in which he said "*Hope the pigeons don't fly off as soon as they saw you* [followed by an emoji with a squinting face with a tongue, probably used to depict laughing]";

d. An email of 18 January 2022 (420) sent by the claimant to the second respondent (in response to an email in which the second respondent had complemented the claimant to the team) "*Love AND excitement!*";

e. An email of 30 January 2022 (415) in which the claimant said to the second respondent "*right now I feel excited at the prospect of working directly under you, with your guidance and training and my vision and drive I have absolutely no doubt we can make ours the best damn hotel in Windermere!*";

f. An email of 3 March 2022 from the claimant to Mr Barnes (469) (sent when the claimant was proposing to go to Ukraine to fight and was seeking support and to be able to return to his job when he returned): "*I love Andrew and love working at the Windermere Manor Hotel*";

g. In a later email of 3 March from the claimant to Mr Barnes and others (465) (in the same context): "*I don't want to leave this job, this role, this hotel or any of the staff that have become something of a family to me*"; and

h. A text message of late March 2022 (409) when the claimant said to the second respondent "*Awesome awesome! Thanks you! I look forward to getting in and reading it! Thanks mate, enjoy your holiday! X*".

42. When the claimant was questioned about the messages which he had sent during his employment, with the contention being that the content of such messages was inconsistent with the allegations he was making, the claimant provided a number of explanations:

a. He stated that he came from Yorkshire where everyone was called duck or love. The words he used in emails and messages reflected that. He also explained that because he could not easily remember the names of others, using such expressions avoided the problems with being unable to remember;

b. He explained what was said with reference to his neurodiversity, and his inability to understand social interactions with others or to conduct himself in a way which was consistent with what others expected;

c. He emphasised that this was his first Head Chef role, and it was a job he was excited about and wished to retain. He therefore explained his responses as being those which he felt would best enable him to retain the job and keep the General Manager happy, both in order to keep the job and to retain the income which he needed;

d. With reference to a traumatic experience in early life (which he stated in the hearing but which it is not necessary to re-produce in this Judgment) he explained his response to the second respondent by reference to him accepting what had occurred by trying to bury it and not raising it, consistent with the way in which he had coped with things in early life. He referred to not wishing to create an environment of conflict; and

e. He explained that in early life he had been bullied and had no friends. That had changed in his late teens when he had made friends. As a result, he was particularly keen to gain and retain friendships and friendly connections with others, and he used terminology which he hoped made people feel good and encouraged friendly connections.

43. During his evidence, the claimant explained that the nature of his neurodiversity was that the way that he interacted with others could occasionally be misconstrued or be flat out wrong. He said he would say one thing which meant something to him, which may not have the same meaning for others and could be misconstrued. It was clear from hearing his evidence, that the way that the claimant responded to others was not the same as would be the norm for the majority of people (on some occasions). He was overly familiar with the Tribunal and in the way that he referred to things during the Tribunal hearing. The claimant himself was also clearly very aware of the challenges which he faces in interacting with others and in understanding what was the appropriate response in certain situations. It was also clear from the claimant's evidence that this, at least in part, was also reflected in a wish to please others and to ensure that others felt positively about him.

44. On 2 April 2022 the claimant raised a grievance. He did this in an email to Ms Flint (92). He stated the following:

> "*I would like to file a formal sexual harassment and assault grievances against Andrew for inappropriate behaviour, language and touching me in the workplace. The nearer his return gets the more anxious I'm getting and frankly I don't want to anywhere near that building right now".*

45. The grievance investigation was conducted by Ms Flint. She met with the claimant on 6 and 11 April 2022. The Tribunal was provided with very detailed transcripts of the meetings (98). The claimant disputed that they were complete.

46. At the start of the first meeting the claimant was asked to explain his concerns in his own words. The claimant then did so (104) by detailing some of the allegations which he evidenced at the Tribunal, but not all of them. He detailed the second respondent hugging him, which he initially said he put down to the second respondent being excited and the claimant thought he would let him have a couple of hugs. He described at some point which he thought was in his second week, the

second respondent placed his hand on the claimant's bottom, which the claimant described as having made him really uncomfortable. He detailed the allegations about what had occurred in the car when the second respondent had given the claimant lifts. He detailed the specific allegation about the occasion when the second respondent had caressed the claimant's nipple. He referred to that transporting the claimant back to specific incidents from his youth. He stated that he deserved the right to work without being molested. Following the initial open question, Ms Flint asked specific questions of the claimant which directed the meeting.

47. The claimant expressed the view (106) that because of his experiences as a child he did not think that he had dealt with what had occurred in any kind of a rational manner. He described trying to bury things like this in himself and not deal with them, when he was asked about communications (109). He said that he felt uncomfortable in what he described as "*an incredibly dysfunctional workplace*".

48. As recorded in the meeting notes, Ms Flint twice asked questions about whether there was any reason why the second respondent might have thought the his advances were welcome or that anything the claimant had done might have been misconstrued. In the Tribunal hearing the claimant was very critical of Ms Flint for asking those questions. He also was adamant that she had asked similar questions on three occasions rather than the twice that they were recorded in the notes. That was why the claimant doubted the accuracy of the detailed notes. Ms Flint's evidence was that the notes were complete.

49. As part of her investigation, Ms Flint spoke to the second respondent on 7 April (122). A transcript of that meeting was also provided. The second respondent said that the hotel was the type of place that if someone was not feeling good or was feeling upset "*you give them a hug, you give them a cuddle*". In answer to a question from Ms Flint about whether it could be described as quite a tactile environment, the second respondent confirmed "*Yes, very much so*". The second respondent referred to workplace banter. He denied placing his hand on the claimant's bottom. He stated he had only placed his hand on the claimant's knee once when driving him home and recounted the Costa Coffee discussion explained above. He denied the allegation that he had caressed the claimant's nipple. He said that he and the claimant had a good friendship which he described as like a brotherly friendship (174).

50. As part of her investigation Ms Flint spoke to others. Neither party referred the Tribunal to any of the documents which recorded those interviews or what was said.

51. Ms Flint provided her grievance outcome in a letter of 22 April 2022 (258). She detailed her investigation. She stated that she had concluded that the hotel appeared to have a very close team and a tactile culture. She explained that her review had found that there were some comments made in the kitchen over the festive period in 2021 relating to the size of pigs in blankets (when asked about this finding in the Tribunal hearing, Ms Flint could not recall who had made the comments and her letter did not record who it was). She therefore said that she partially upheld this point of the grievance. She stated that she found no evidence to support the claimant's claims of sexual assault and therefore did not uphold that point. She found point one of the grievance, partially substantiated. Part one had been stated to be the claimant's belief that the second respondent had behaved

inappropriately towards the claimant. She did not find the second point substantiated. The second point was that the claimant felt unable to resume work due to anxiety as he felt that the second respondent had sexually assaulted him. She proposed arranging a mediated meeting between the claimant and the second respondent. She confirmed the right of appeal.

52. Ms Flint also wrote to the second respondent on 25 April 2022 to confirm the outcome of the grievance (261). In that letter she said:

> *"Based on the evidence I have reviewed I conclude that Windermere Manor appears to have a very close team and has a tactile culture. However, I feel that you need to consider if this is appropriate behaviour for a General Manager, having physical contact in the form of hugs with your team members. You need additionally to consider if everyone feels comfortable with this physical, tactile environment and also consider that this could potentially be taken out of context, there could be an accidental slip of the hand or touch from the hand during a hug or this could be misread in some way resulting with the allegations that were made.*
>
> *In regard to verbal assault, whilst I appreciate that there is, what we would call, normal kitchen banter, again there needs to be some thought around what could be considered inappropriate or mistakenly taken as innuendo and could cause harm and offence to some people. As General Manager, it is part of your role to control conversations of this type and not to instigate or participate in them."*

53. In the letter Ms Flint also made recommendations about the second respondent giving lifts to staff. She told the second respondent that no further action would be taken and the matter was closed. The second respondent was not suspended during the investigation and no action was taken afterwards.

54. The Tribunal was very surprised that in neither this letter nor the letter sent on the same date following the investigation into Mr Lund's grievance, did Ms Flint instruct the second respondent to stop hugging his staff at the hotel (at which he was the most senior manager). Neither this letter nor the one sent regarding Mr Flint's allegations, made any reference to the fact that more junior staff may find hugs from the General Manager to be unwanted and may not feel able to voice that they did, especially if the environment created by the second respondent at the hotel was one of a tactile culture.

55. The claimant appealed against the grievance outcome. He was asked to provide detailed grounds of appeal, which he did in an email of 2 May (328). A central part of the claimant's appeal was that Ms Flint was biased in her handling of the grievance investigation. Mr Lynch heard the appeal on 6 May. A transcript was provided of the appeal meeting (488). It was clear from what he said early in the meeting as recorded, that Mr Lynch had determined the outcome of the appeal prior to, or at least very early in, the appeal meeting. Seven minutes into the appeal hearing Mr Lynch stated that Ms Flint had not been in any way biased and that the investigation was not biased (494).

56. In the course of the appeal meeting, Mr Lynch observed that the allegations were based on one person's word against another person's word (499) and when the claimant asked whether it was just his word against the second respondent's, Mr Lynch stated that was what it seemed to be like at the time, in all fairness (502). When asked during the Tribunal hearing, Mr Lynch confirmed that he remained of the view that for many of the allegations, it was one person's word against the others.

57. There was one issue of dispute regarding the conduct of the appeal. At approximately twenty minutes into the appeal, the claimant asked Mr Lynch (with regard to the outcome of Mr Lund's grievance), how many times Mr Lynch had accidentally touched the same person's bottom twice. Mr Lynch replied never. The claimant contended that the recording he had taken of the appeal meeting (without agreement) recorded Mr Lynch as laughing when giving his answer. When asked about this, Mr Lynch said it wasn't a laugh. The panel listened to the recording and accepted the evidence of Mr Lynch that he did not laugh, but he did make a noise when the question was asked. Listening to the recording for the relevant part of the meeting did make clear that there were errors in transcription, with references to names such as Ivan and Damian being transcribed as other words in the transcript provided.

58. Mr Lynch undertook some limited investigations following the appeal hearing. The appeal was not upheld, and an outcome was provided in a letter of 16 May 2022 (484). Mr Lynch stated there was no evidence which substantiated bias. He stated there was insufficient evidence to support the claimant's claim of being assaulted by the second respondent He said "*No evidence was introduced as to support that the hugs between you and Andrew were anything more than just hugs*".

59. The claimant made a complaint to the Police about the second respondent. No charges resulted. The second respondent wrote to the Cumbria Constabulary and made a data protection subject access request. A letter sent by the Police in response, of 9 March 2023, was provided to the Tribunal (404). The letter confirmed that the second respondent was spoken to, but not interviewed by, a Police Constable on 11 June 2022. A large part of the Constable's entry in his notebook was redacted in the letter to the second respondent. The entry concluded by stating that, at the time, there was insufficient evidence to pursue a prosecution and there was no reasonable possibility of conviction. It was recorded that the case was to be NFA (presumably meaning no further action).

60. The Tribunal was provided with the Fit Notes which the claimant had provided to the first respondent for the period when he was absent from work, all of which stated that the claimant was not fit for work. Those were dated: 13 April 2022 and covered the period from 2 April to 1 May 2022 (385); 6 May 2022 and covered the period from 1 May to 5 June 2022 (371); 8 June 2022 and covered the period from 8 June to 8 July 2022 (383); and 11 July 2022 and covered the period from 7 July to 7 August 2022 (376). Payslips for the period were also provided (400). It was confirmed that there was no payslip for March, because March's pay was stopped, but the payment made directly to the claimant outside the usual pay roll was included within the April payslip. The payslips recorded SSP as being paid, and overpayments for salary being deducted from the pay. The Tribunal was also provided with some emails in which queries were raised and responded to regarding pay roll and the

entries on the payslips during June 2022. It was Ms Flint's evidence that the claimant was paid statutory sick pay throughout his absence, with the deductions reflecting the period he was not fit to work. The claimant found it difficult to pay his living costs out of the sick pay received.

61. The claimant resigned by email to Mr Lynch on 24 June 2022 (87). The claimant referred to the way in which he had been treated since coming forward about what he described as "*the string of sexual assaults I underwent during my time working at the Windermere Manor Hotel*". He also referenced the payment issues. He said he had been continuously treated unacceptably and therefore he felt forced to resign.

62. The Tribunal was also provided with the documents which related to the grievance raised by Mr Lund, an employee of the respondent who also at the time shared a house with the claimant. He raised a grievance in an email sent to Ms Flint on 15 April 2022 in which he alleged that the second respondent had placed his hand on Mr Lund's upper bottom on two occasions.

63. Ms Flint held an investigation meeting with Mr Lund on 20 April 2022 and a transcript of what was said was provided (278). At the start of the meeting Mr Lund described the two separate incidents (279). He said that on each occasion Mr Lund and the second respondent had their arms around each other. On the first occasion Mr Lund described that he thought quite honestly that the second respondent touching his bottom had been a slip of the hand. On the second occasion Mr Lund described stepping away and saying no, to which the second respondent was said to have also said no. Mr Lund was recorded as having said that he could not remember the exact dates of the events, but he said they were at the start of November. Later in the meeting (282) when asked whether either of the two occasions had felt as if the second respondent had deliberately placed his hand on the claimant's bottom, Mr Lund stated that he did not feel that it had been deliberate. He also stated that he honestly believed that it was just a slip of the hand (289). In the meeting there was also discussion about why Mr Lund had raised the compliant and Mr Lund stated that it was to offer some assistance to his current housemate and friend who had experienced similar things (284).

64. Mr Lund resigned on 20 April 2022. Ms Flint held an investigation meeting with the second respondent on 21 April 2022 for which notes were provided (295). The second respondent described that on a couple of occasions he had given Mr Lund a hug, and Mr Lund had given him a hug (297). The second respondent said that he did not recall either of the incidents described to him where he had touched Mr Lund's bottom. Ms Flint wrote to Mr Lund on 25 April 2022 (302). She did not uphold his grievance. She found that there was no tangible evidence to suggest that what had occurred was anything other than a slip of the hand or an accidental touch as the second respondent was exiting from a hug with Mr Lund.

65. In a separate letter, Ms Flint wrote to the second respondent on 25 April 2022 (304). In that letter she recited what Mr Lund had alleged and then repeated what she had said in her letter of the same date to the second respondent regarding the claimant's grievance, about the tactile culture at the hotel and his responsibilities as a General Manager. She did not tell the second respondent to desist from hugging his staff.

The Law

66. Section 26 of the Equality Act 2010 says:

"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."

"A also harasses B if – A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect referred to"

"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

67. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** (a case referred to by the respondents' representative), stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the Employment Appeal Tribunal held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

68. The Tribunal must consider the conduct's purpose and, separately, its effect. For effect, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that the conduct had that requisite effect; the objective element.

69. The Tribunal is required to take into account what is said in the EHRC code of practice on employment. The respondents' representative emphasised that 7.8 says that sexual harassment occurs when a person engages in unwanted conduct and that unwanted essentially means the same as unwelcome or uninvited. At 7.13 the code says that conduct of a sexual nature can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching and sexual jokes (amongst other things).

70. The burden of proof provisions in section 136 of the Equality Act 2010 apply. That identifies a two stage test. However, in the circumstances of this case, the Tribunal was able to consider its view of the facts based upon the evidence heard, without detailed application of the burden of proof and the stages required.

71. In her submissions, the respondents' representative referred to the following:

a. **Weeks v Newham College of Further Education** UKEAT/0630/11 a case in which the Tribunal had been entitled to find that the relevant

conduct was not that prohibited by section 26 in particular circumstances; and

b. **Pemberton v Inwood** [2017] ICR 929 a case which considered the need for the effect of conduct to be considered using both the subjective and objective test, and the need to take account of the term "environment" when considering the statutory test set out above.

72. The claimant wished to emphasise in his submissions the definition of grooming and why he believed that a pattern of grooming applied to his case. The Tribunal was required to apply the test for harassment under the Equality Act 2010 and the definition of grooming was not therefore found to assist the Tribunal in doing so. As part of his reliance on grooming, the claimant emphasised the importance which should be attached in such circumstances to a disparity of power. The Tribunal, in considering the test for harassment, did note that the role and status of those involved was a relevant consideration in determining the issues required when considering a claim for harassment under the Equality Act. The Tribunal did not find that conduct which was not unwanted at the time that it occurred, could become unwanted conduct because at a later date the person subjected to it had formed a different view of the conduct which occurred in the light of subsequent events. That meant that the fact that the claimant now considered some of the historic conduct by the second respondent to reflect a pattern of grooming, cannot mean that the conduct at the time was unwanted or had the requisite effect on the claimant, where at the time it did not.

73. The claim for unauthorised deductions from wages must be considered under section 23 and 13 of the Employment Rights Act 1996. Section 13 of the Employment Rights Act 1996 provides that:

"*An employer shall not make a deduction from the wages of a worker employed by him unless:*

(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

(b) *The worker has previously signified in writing his agreement or consent to the making of the deduction.*"

74. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker's wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages.

75. In practice, for the unauthorised deduction from wages claim, the Tribunal needed to determine: whether the claimant was contractually due amounts which were not paid to him; whether the claimant was paid the same (or more than) he was entitled to in a payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways described and/or was reimbursement of an overpayment of wages. As already confirmed, this Judgment does not determine remedy issues. There is a distinction between: a claim that there was an unauthorised deduction from wages (which is determined in this

Judgment); and a claim that the claimant missed out on pay which he otherwise would have received as a result of harassment which he suffered (which is not).

76. In considering the application to extend the restricted reporting order, the Tribunal was required to consider rule 50 of the Employment Tribunal rules of procedure. That rule empowers the Tribunal to make an order with a view to preventing or restricting the public disclosure of any aspects of the proceedings which the Tribunal 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 1996.

77. Rule 50(2) says:

> "*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"*

78. Rule 50(3) sets out the types of order which can be made. They include an order that the identities of specified parties should not be disclosed to the public including in any document entered on the Register or otherwise forming part of the public record. They also include a restricted reporting order within the terms of section 11 of the Employment Tribunals Act 1996.

79. The relevant Convention rights are: the right to freedom of expression; and the right to respect for private and family life. At the time that the original privacy order was made, the right to a fair trial may also have been relevant, but the liability issues having been determined, that right would no longer be relevant to the application made.

80. Section 10 A of the Employment Tribunals Act 1996 does not apply to the circumstances of this case. Section 11 of the same Act provides that Regulations may include provision for cases involving allegations of sexual misconduct, enabling an Employment Tribunal to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the Tribunal. Case law has made clear that a restricted reporting order can apply to the decision and can continue to apply indefinitely after the decision has been made. Sexual misconduct includes any sexual offence, sexual harassment, and any other adverse conduct related to sex.

81. A statutory restricted reporting order can only apply directly to individuals and not to corporate bodies. However, the terms of the order can prohibit the publication of matter which is likely to lead members of the public to identify any individual named in the order (so can include the name of a corporate body in the order made, to protect the individual). The Tribunal has a discretion as to whether a restricted reporting order should be made.

82. The respondents' representative did not rely upon any specific case law or any particular right or legal provision when she made her application.

Conclusions – applying the Law to the Facts

83. As was accepted by Mr Lynch, to a significant extent the matters which needed to be determined in this case largely came down to one person's word against the other. For many of the allegations, where they were in dispute, there was no genuinely corroborative evidence. The claimant alleged that the second respondent had acted in a particular way. The second respondent denied that he had done so. The Tribunal needed to determine, on the balance of probabilities, whether it preferred the claimant's evidence about what occurred, or the second respondent's evidence.

84. Wherever there was dispute, the Tribunal preferred the evidence of the claimant to the evidence of the second respondent. The Tribunal found the claimant and the evidence that he gave, to be genuine and credible. The Tribunal did not find the second respondent's evidence to be genuine. The second respondent in the evidence which he gave about very serious allegations was too glib and off-hand. He seemed unbothered. The Tribunal found the manner in which the second respondent responded to the allegations and gave evidence to be at variance with the allegations which he faced. On balance the Tribunal did not find the second respondent's evidence to be genuine and preferred the claimant's evidence, which was found to be genuinely and truthfully given.

85. In her submissions, the respondents' representative relied upon certain inconsistencies in the claimant's evidence as undermining his credibility. In particular, she emphasised a difference in his evidence about when he had spoken to his mother about the matters alleged. The Tribunal found that the inconsistencies identified were so minor or trivial that they were of no importance in assessing his evidence and did not find that they undermined his evidence at all. A genuine witness may not accurately and consistently recount all details of what occurred. On the key central issues, the claimant's evidence was consistent and was consistent with what he said to Ms Flint when his grievance was being investigated.

86. Within her submissions, the respondents' representative placed some emphasis on the things which the claimant did and did not mention in his grievance or his grievance investigation meeting. The claimant's grievance email did not mention the details of the allegations which he made. At the start of the grievance meeting, when given the open opportunity to do so, the claimant detailed a number of the matters which he alleged before the Tribunal. He did not refer to them all. After the initial open question, the meeting proceeded as directed by Ms Flint. The key specific allegations raised by the claimant were explained at the start of the grievance meeting in a way which was entirely consistent with the evidence given at the Tribunal hearing. The Tribunal did not consider that the fact that the claimant had not mentioned all the matters alleged to Ms Flint, undermined the truth of what he said when he did so (albeit clearly what the claimant said at the start of the investigatory meeting highlighted the matters which were of the most significant concern to him).

87. The Tribunal understood the submission made on the respondents' behalf that the terminology and comments used in the claimants' emails and text messages appeared to be inconsistent with the serious matters which he alleged had occurred. It was, however, clear to the Tribunal that the claimant did not communicate in the

way that would be expected as a norm for other individuals. That was clear from the way in which he spoke to the Tribunal during the Tribunal hearing. The claimant's way of speaking was spontaneous and, on occasion, inappropriate. The Tribunal accepted each of the explanations given by the claimant for the terminology used in his emails and what was said, as explained in detail at paragraph 42. In particular, the claimant's neurodiversity and obvious difficulty in understanding the appropriate way in which to respond (in ways in which others without neurodiversity would do so), explained in part the terminology used. The claimant's childhood history also explained his wish to bury difficult experiences and not to address or raise them. The claimant's wish to please, also explained the terminology used to the claimant's manager. The motive for what was said was also relevant, the claimant's later emails to Mr Barnes being sent when the claimant was trying to ensure that he could return to the same job after going to Ukraine, and therefore reflected what he said in a wish to ensure that the job was available on his return. Whilst from other individuals in other circumstances the Tribunal may have considered that the emails and texts sent by the claimant (or some of them) might have cast doubt on the truth of what was alleged, in this case and, in particular, for the claimant with his history and neurodiversity, the Tribunal did not find that the terminology used by him in emails and texts to, and about, the second respondent, were a significant factor in determining the truth when considering the disputes of fact in the evidence.

88. The Tribunal did not find the documents referred to regarding Mr Lund and his grievance, to be of any genuine assistance in determining credibility and the evidence to be preferred. In his interview with Ms Flint, Mr Lund changed the account that he gave, later in the interview accepting that the touches may have been accidental. The Tribunal did not hear from Mr Lund himself. The Tribunal noted the relationship between Mr Lund and the claimant, and the explanation given by Mr Lund in his interview with Ms Flint as to why he had raised his grievance. The Tribunal found the documents relating to that grievance to be of no assistance in reaching its own determination.

The specific harassment allegations

89. The first allegation of sexual harassment was that, on 31 October 2021, the second respondent said to the claimant "*oh, dear I didn't realise you were..*" and then made a series of gestures. The claimant alleged that the comment and the gestures were made after it had been identified that the claimant had previously had a boyfriend/male fiancée. The second respondent denied that he knew that the claimant had previously had a boyfriend and he denied that the incident occurred. As the Tribunal preferred the claimant's evidence to that of the second respondent, the Tribunal found that the incident occurred as the claimant described.

90. The Tribunal then considered the other issues as they applied to this allegation, as set out in the list of issues as issues two to five. The first issue was whether the conduct was unwanted? At the time that this incident occurred the claimant was very early in his employment. In his witness statement and in his explanation in the grievance investigation meeting, the claimant emphasised the occasion when the second respondent first touched his bottom as being a significant occasion which changed his perception of the second respondent's conduct and approach. That did not first occur until 3 November 2021. The Tribunal appreciates that with the benefit of hindsight the claimant has looked at some of the events which

pre-dated the 3 November in a different light. However, at the time, the Tribunal found that what the second respondent said as described in this allegation (and his accompanying actions) were not unwanted. As was clear from the claimant's evidence, his view at the time was matter of fact. The Tribunal also did not find that what occurred at the time had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Whilst the conduct was of a sexual nature, the conduct did not amount to unlawful harassment.

91. The second allegation of sexual harassment was that, on 1 November 2021, the second respondent stated "*do you need some time alone dear?*" or "*I'll put olive oil on the orders list again then, shall I?*". This allegation was alleged to relate to the shape of a vegetable, and, in the course of the hearing, the claimant clarified that it was alleged that it had occurred repeatedly/frequently. Based upon the claimant's evidence, the Tribunal found that this occurred, even though it was denied. The claimant accepted that comments were made in the kitchen of this nature, and Ms Flint in her grievance investigation found that a comment was made about pigs in blankets, which was not a part of the allegations before the Tribunal. The Tribunal found that the comment was not unwanted at the time it was said and, even had it been, it did not in fact for the claimant have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The conduct was of a sexual nature. The conduct did not amount to unlawful harassment.

92. The third allegation was that, on 1 November 2021, the second respondent faked an orgasm when eating the claimant's food, followed by hugging, kissing and/or dry-humping the claimant. It was not in dispute that the second respondent appreciated the claimant's food and made appreciative noises about it. The Tribunal accepted the claimant's evidence about what he said occurred. The positive appreciation of the claimant's food was not unwanted. The precise manner in which it was displayed was not wanted. However, based upon what the claimant himself said about what occurred (see paragraph 30 above), the Tribunal found that what the second respondent said and did, did not in fact for the claimant have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The conduct was of a sexual nature. The conduct did not amount to unlawful harassment.

93. The fourth allegation of sexual harassment was that between 1 and 17 November 2021, the second respondent hugged the claimant more frequently and the hugs became increasingly longer. There was no dispute that the second respondent and the claimant hugged. The respondents' representative submitted that hugging someone was not conduct of a sexual nature. The Tribunal accepted that hugging someone may not be conduct of a sexual nature. It can be purely platonic conduct between people, without it being of a sexual nature. However, that would depend upon the nature of the hug and how and why it occurred.

94. In this case, based upon the evidence heard, the Tribunal drew a distinction between the hugs which occurred prior to the second respondent touching the claimant's bottom and the ones which occurred after that first occurred on 3 November 2021. The Tribunal found that when the claimant and the second respondent hugged before the event found below on 3 November, the hugs were not

unwanted. The hugs were not of a sexual nature. The hugs did not have the requisite effect for the claimant. The claimant himself accepted that the hugs which occurred initially, such as at the time when the claimant was interviewed, were not something which he was initially concerned about. The fact that the claimant has subsequently viewed those incidents as unwanted and having the requisite effect in the light of what has occurred since, does not mean that they were unwanted and had the requisite effect at the time. The allegation also made clear that the hugs became more frequent and longer over time. The Tribunal accepted the claimant's evidence that was true. It was clear that the frequent and longer hugs became unwelcome over time, when the initial less frequent shorter hugs had not been.

95. The Tribunal found that, once the second respondent had touched the claimant's bottom on 3 November 2021, the nature of the hugs and the claimant's perception of them changed. The Tribunal finds that the hugs after that event occurred were of a sexual nature because the nature of the hug was considered in the context of the second respondent's other conduct towards the claimant. The hugs were unwanted after the second respondent touched the claimant's bottom. The Tribunal found that the hugging after that event, violated the claimant's dignity and created a degrading, humiliating or offensive environment for him. The Tribunal found that it was objectively reasonable for the hugging to have that effect, where the hugs had become more frequent and longer, where they were hugs administered by the General Manager of the hotel (that is the most senior employee at the site), and where the second respondent had touched the claimant's bottom on at least one occasion.

96. The Tribunal considered the fifth and seventh allegations in the list together, as the seventh was effectively a continuation of the conduct in the fifth. What was alleged was that between 1 and 17 November 2021, the second respondent drove the claimant home and during the car journeys, the second respondent would slap the claimant's kneecap followed by a light squeeze and shake of his knee cap. What was also alleged was that between 7 and 9 November 2021, the second respondent touched the claimant's knee and placed his fingers on the claimant's inner thigh whilst driving him home.

97. The second respondent admitted one occasion when he had touched the claimant's knee whilst driving him home. There was no dispute that the occasion had occurred as the second respondent described, when he had endeavoured to clam down or reassure the claimant when he was expressing his views of (and potential intended actions towards) Costa Coffee. That incident, as described by the second respondent, did not amount to unlawful harassment. The action was not of a sexual nature. It was not unwanted in the context of the conversation as a whole. It did not have the requisite effect and it would not have been reasonable that it had the requisite effect (even if it had).

98. As with the previous allegation, the Tribunal also drew a distinction between the touches which occurred prior to the incident found on 3 November and any which pre-dated it. It was clear from the way in which the claimant described the knee touching, that what occurred escalated over time. The initial slaps and light squeezes which occurred before 3 November incident did not have the requisite effect on the claimant and were not therefore found to be unlawful harassment.

99. For the other allegations of knee and leg touching whilst driving, the Tribunal found that they occurred as alleged. With the exception of the one occasion addressed and accepted as having occurred by the second respondent, the Tribunal found that the touching was unwanted. The Tribunal found that the effect that the touching had on the claimant changed over time. Initially, the touches of the claimant's knee did not have the requisite effect on the claimant. However, over time and as they were repeated and became longer, the touches did have the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for him. After the second respondent touched the claimant's bottom on 3 November the touches in the car had that effect. The more extreme touches described as part of the seventh allegation certainly did so. It was reasonable for the second respondent touching the claimant as alleged in the car whilst giving him a lift home, to have had the requisite effect found on the claimant (particularly where the second respondent had previously touched the claimant's bottom).

100. Allegation six was that on 3 November 2021 and on an occasion between 20 and 26 December 2021, the second respondent placed his hand on the claimant's bottom. The original claim form described this as being something which happened consistently throughout the claimant's employment, but the Tribunal limited its decision to the two specific allegations that the second respondent did what was alleged identified in the list of issues. The Tribunal found that what was alleged occurred as evidenced by the claimant on the two occasions. The conduct was clearly of a sexual nature. The conduct had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for him. The Tribunal also found that it was, of course, entirely reasonable that such conduct had that effect.

101. Allegation eight was that on an occasion between 1 and 14 December 2021, the second respondent caressed the claimant's left nipple. The claimant gave evidence about what occurred. On balance, the Tribunal accepted his evidence that it occurred as he said, in preference to the second respondent's denial that it did. The conduct was of a sexual nature. The conduct had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for him. It was entirely reasonable that such conduct had that effect.

102. Allegation nine arose from things allegedly said by the second respondent about a diner at the hotel. The second respondent recalled a conversation about something said by the aunt who was part of the party, but he denied the main comment alleged. The claimant did mention this conversation in his witness statement, but he did not detail any effect that the conversation had on him in the statement. Unlike all the other allegations, this was not conduct directed towards the claimant. What was alleged was a very serious matter and it was of significant concern to the Tribunal. However, based upon the absence of evidence about the effect the comments had on the claimant, the Tribunal did not find that the comments made had the requisite effect on the claimant personally in order for it to amount to unlawful harassment of the claimant (or, in any event, it did not have evidence to find that it had done so).

103. Allegation ten was that, in early January 2022, the second respondent had forced the claimant to watch him sing "*The Ballad of Barry & Freda It*", a Victoria

Wood song/sketch. The claimant alleged that whilst doing so, the second respondent attempted eye contact with the claimant when signing the title and made gestures. The second respondent agreed that he had sung the song when the claimant was present in the workplace. He denied what the claimant said about the way that the song was sung towards the claimant. It was not in dispute that songs played in the kitchen had often been sung to by the first respondent's staff, including the claimant.

104. Someone singing a song in a work environment would not normally amount to unlawful harassment. In another context the singing of a particular song would not have amounted to harassment. For the reasons already explained, the Tribunal preferred the claimant's evidence to that of the second respondent. The song which is the subject of the allegation is about someone propositioning someone else for sex. The Tribunal accepted that the song was sung in the way evidenced by the claimant, with particular emphasis being placed upon the words repeated regularly throughout the song of "*let's do it*" and those words being accompanied by eye contact and disconcerting gestures towards the claimant. The second respondent singing the song and singing it in the way which it has been found he did, was considered in the context of the other harassment which the Tribunal found had occurred. The Tribunal accepted that the song, and what was emphasised in it, took on a very different tone in the light of the events which the Tribunal found had occurred.

105. The Tribunal found that the second respondent signing the specific song to the claimant in the way that he did, was unwanted conduct. The respondents' representative emphasised that the claimant was not actually forced to remain and listen to the song being sung. The Tribunal accepted that as being correct, but nonetheless in circumstances where the song was sung in the kitchen to the claimant by the General Manager of the hotel, found the conduct to be unwanted even though the claimant did not leave the room when it was sung. The Tribunal found that the words used and emphasised by the second respondent were conduct of a sexual nature, being a line which is explicitly about sex. It was clear from the claimant's evidence that the song being sung to him in that way with the relevant emphasis, had the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for him. In the way that it was sung and in the light of the harassment found to have already occurred, the Tribunal found that it was reasonable for the conduct to have that effect. It was reasonable for the claimant to find those particulars words repeatedly sung at him with that suggestion, as having had the effect required.

106. Allegation eleven was that, in mid to late February 2022, the second respondent massaged the claimant's back and shoulders. The second respondent denied that he massaged the claimant's back. He acknowledged that he would have touched the claimant's shoulders. The Tribunal accepted the claimant's evidence that the second respondent both touched and massaged his shoulders and back. In the light of what the Tribunal has found had already occurred, the Tribunal found that the second respondent's conduct was unwanted and was of a sexual nature (whilst it accepted that touching shoulders and even massage may not always be found to be of a sexual nature in other circumstances). The Tribunal found that the conduct had the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for him. In the light of the harassment found to have already

occurred, the Tribunal found that it was reasonable for the conduct to have that effect.

107. The twelfth and final allegation of harassment was that in late March 2022, the second respondent hugged the claimant, kissed him on the forehead, and told him "*love you*", prior to the second respondent going on holiday. In his witness statement the second respondent did not deny what was said. The claimant agreed in cross-examination that he told his friends that he loved them all the time. The Tribunal particularly considered this alleged incident alongside what the claimant highlighted in his witness statement, where he explained that the second respondent told the claimant he loved him or said "*love you*" a lot for a boss. Whilst the allegation to be determined was of the specific incident in later March 2022, the claimant's evidence was that similar things were said from December 2021.

108. The Tribunal accepted the claimant's evidence about what was said and what occurred on the occasion alleged. The Tribunal accepted that what occurred was unwanted. In the light of what the Tribunal has found occurred when determining the other allegations, the Tribunal found that what occurred on this occasion was of a sexual nature. The Tribunal found that the conduct had the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for him. In the light of the harassment found to have already occurred, the Tribunal found that it was reasonable for the conduct to have that effect

109. In the findings recorded above, the Tribunal has focussed on the effect of the second respondent's conduct. It has not for each allegation separately recorded whether the purpose of what the second respondent did or said was violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is not necessary for the Tribunal to determine both purpose and effect; where either is found, the conduct amounts to unlawful harassment (where the effect is found to be reasonable). For those in which it was not found that the conduct had the requisite effect, the Tribunal has also not found that was the purpose of the second respondent when he conducted himself as alleged.

110. The first respondent did not run the employer's defence and the respondents' representative put forward no argument that the first respondent was not liable for the actions of the second respondent. No submission was made that both parties would not be liable for any harassment found to have occurred. There was no contention that the allegations did not relate to matters which occurred in the course of the claimant's and/or the second respondent's employment. Accordingly, the Tribunal found that both the second respondent (personally) and the first respondent were liable for the harassment which it has found. The first respondent was vicariously liable for the second respondent's conduct which occurred in the course of his employment, as alleged.

Jurisdiction/time

111. Whilst the Tribunal raised the issue of jurisdiction and time with the parties, in the light of the harassment found to have occurred, the claim was entered in time when the last allegation found was taken into account. The harassment found was clearly a course of conduct, and therefore the relevant time to claim ran from the last

harassment found, which was when the course of conduct came to an end. Whilst there might have been time/jurisdiction issues if the last allegation of harassment found had been an earlier allegation, the other potential time issues did not need to be determined as a result of the Tribunal's findings. As the Tribunal heard evidence from the claimant and the second respondent about the allegations raised, the Tribunal would have found it just and equitable to have extended time in any event when balancing the prejudice to the parties, even had any of the allegations have been found to have been entered out of time.

Unauthorised deductions from wages

112. The claimant also claimed that there had been unauthorised deductions from his wages. He was paid statutory sick pay only when he was absent on ill health grounds. He did not receive full pay and therefore lost out as a result. As he was unable to work, he was only entitled to statutory sick pay for the period of time for which he was absent. He was not entitled to full pay for the period when he was not working on ill health grounds and was certified as not fit to work. There were no unauthorised deductions made from his wages. The Tribunal did find that the payments made to the claimant and the way in which the calculation of pay and sick pay was described on the payslips was confusing and opaque. Ms Flint was unable to explain what was said on the payslips. Nonetheless it was her evidence that what was paid to the claimant was the statutory sick pay to which he was entitled and, accepting that evidence, there was no unauthorised deduction made from the claimant's wages.

113. The Tribunal will need to go on and determine the remedy due to the claimant as a result of the unlawful harassment which it has been found he was subjected to by the respondents. When determining that remedy, the claimant will be able to argue that the loss of pay during the period when he received statutory sick pay only, was a loss arising from the harassment. The decision reached in the claimant's unauthorised deduction from wages claim, does not preclude the claimant pursing that argument as part of the remedy which he is seeking from the unlawful harassment found.

Privacy and restricted reporting order

114. In the Order which she made following the preliminary hearing on 23 December 2022, Employment Judge Ainscough ordered that the anonymisation order which anonymised the names of the parties on the Register and which restricted them from being reported, would remain in place until promulgation of the final Judgment. Whilst the order did not distinguish between liability and remedy Judgments, the Tribunal read that order as referring to the liability Judgment. The order highlighted that should the parties wish to apply for a variation to the order, they would be able to do so at the end of the final hearing (444).

115. At the end of the hearing neither party raised the possibility of the order being extended. The Tribunal raised the issue. The claimant confirmed that he did not want the anonymisation order to remain in place. He wanted the Judgment to include the names of the parties. The respondents' representative took instructions and confirmed that the respondents did wish to apply for the anonymisation and restricted reporting order to remain in place, and for the parties' names to be

anonymised on the Judgment entered on the Register. She sought such an order because the second respondent was named as a party and an order would be important for his career. It was also sought on behalf of the first respondent, that is for the company as a whole. No specific reasons were advanced as to why the order sought was important for either of the respondents, save for the generic and obvious reason why the respondents would not want to be named in a Judgment containing claims such as these.

116. The law as it applies has been set out above. The Tribunal must give full weight to the principle of open justice and the principle of freedom of expression. The claimant wished to have the parties named in the Judgment, so his article eight rights were not engaged. The second respondent's right to respect for his private and family life was engaged. The competing rights must be balanced. The need to anonymise the Judgment or restrict the reporting of the name of the first respondent, would follow from the second respondent's rights and would enable his identity to be protected. There could otherwise be no valid reason to restrict the reporting of the first respondent's name, save to the extent necessary to protect the second respondent's rights.

117. The Tribunal considered very carefully whether the restricted reporting order should be extended indefinitely to protect the second respondent's article eight rights. The Tribunal noted what was said in Rule 50(2). The principle of open justice is very important. The Tribunal has heard no particular reason why the restriction should be extended to protect the second respondent, save for that which would apply to any respondent about whom allegations of this nature were made. As a result, the Tribunal has decided that the anonymisation order should not be extended. The importance of the principle of open justice tipped the balance in favour of the parties being named. The Tribunal decided that the Judgment should be issued with the parties' names included in it. The restricted reporting order should not continue to restrict the inclusion of names in this Judgment or on any entry of this Judgment on the Register. In reaching this decision, the Tribunal considered it important that the claimant himself was adamant that he did not want the anonymisation order extended (and therefore his right to respect for his private life were not engaged in the balance being undertaken).

Summary

118. For the reasons explained above, the Tribunal found that the claimant was subjected to unlawful harassment of a sexual nature by the respondents in a number of the ways alleged (but not all). The claim for unauthorised deductions from wages did not succeed.

119. The remedy due to the claimant from the respondents will need to be determined at a further hearing. Case managements orders will be made and detailed separately. The case will be listed for a remedy hearing time estimate one day, to be conducted by CVP remote video technology.

Employment Judge Phil Allen
20 June 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 JUNE 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.