EMPLOYMENT TRIBUNALS

Claimant: **KJ**

Respondent: **British Council**

Heard at: **East London Hearing Centre**

On: **7, 8, 9,10,13 March 2023 & 14 March 2023 in Chambers**

Before: **Employment Judge S Shore**

Members: **Ms P Alford**
Mrs M Legg

Representation

For the Claimant: **Mr C Milsom (Counsel)**

For the Respondent: **Mr B Frew (Counsel)**

AMENDED RESERVED JUDGMENT AND REASONS

The unanimous judgment of the Employment Tribunal is that:-

(1) The claimant's claim of constructive unfair dismissal under section 94 and section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") succeeds.

(2) No deduction from any award for unfair dismissal shall be made under the principle of contributory conduct in sections 122 or 123 of the ERA 1996.

(3) A deduction of 35% shall be made from any award for unfair dismissal under the principle set out in the case of Polkey v A E Dayton Services Ltd [1987] UKHL 8.

(4) The claimant's claims of direct discrimination because of the protected characteristic of sex under section 13(1) of the Equality Act

2010 ("EqA 2010") by the findings of the SUC that delivered a decision on her grievance by:

4.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's harassing actions by dismissing his behaviour as having been encouraged by her;

4.2. Concluding that Mr Reilly's mental health and the confusing nature of the claimant's messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her:

4.3. Failing to uphold the complaint of sexual harassment buy concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment all fail as we have found that the acts were acts of harassment related to the protected characteristic of sex.

(5) The claimant's claims of direct discrimination because of the protected characteristic of sex under section 13(1) of the Equality Act 2010 ("EqA 2010") by unfairly dismissing the claimant succeed.

(6) The claimant's claims of harassment related to sex under section 26(1) EqA 2010 are determined as follows:

6.1. the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021) succeeds.

6.2. The perverse and unreasonable findings of the SUC which;

6.2.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged fails;

6.2.2. Failed to recognise Mr Reilly's treatment of the claimant as contributing harassment prior December 2020 and sexual harassment at all succeeds; and

6.2.3. justified and romanticised Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand where things went wrong succeeds.

(7) The claimant's claim of harassment of a sexual nature under section 26(2) EqA 2010 succeed.

(8) The claimant's claim of victimisation under section 27 of the EqA 2010 fails.

(9) <u>A deduction of 35% shall be made from any</u> award for discrimination under the principle set out in the case of Chagger v Abbey National plc [2009] EWCA Civ 1202 CA.

(10) The Tribunal has listed a further preliminary hearing for 15 April 2024 to determine how it will deal with the question of remedy.

REASONS

Background

1. The claimant was employed by the respondent, a registered charity that is an executive non-departmental public body sponsored by the Foreign, Commonwealth & Development Office ("FCDO") of the UK Government that works in over 100 countries. At the termination of her employment, the claimant was employed as a Teaching Centre Cluster Lead Maghreb, based in Morocco. The claimant's employment began on 1 January 2011 and ended on 22 November 2021. The claimant started early conciliation with ACAS on 6 January 2022 and obtained an ACAS early conciliation certificate on 10 January 2022.

2. The claimant's claims all arise out of allegations that she was subjected to acts of direct sex discrimination, harassment related to sex and of a sexual nature and of victimisation. The initial allegations made by the claimant were against a colleague, Tony Reilly. The claimant's allegations were expanded to include the way that the respondent dealt with the complaints. The claimant ultimately resigned and claims constructive unfair dismissal.

3. The claimant presented her ET1 and particulars of claim on 17 February 2022 [10-44]. The respondent presented its ET3 and grounds of resistance on 7 April 2022 [45-56]. The tribunal sent the parties an acknowledgement of claim, notice of the claim, and notice of hearing on 10 March 2022. The notice of hearing advised the parties of a preliminary hearing for case management by telephone on 26 September 2022. The Employment Judge who chaired this hearing conducted the preliminary hearing and made case management orders dated 11 October 2022 that were sent to the parties on 13 October 2022 [60-69]. The Tribunal sent the parties notice of the full merits hearing on 14 October 2022. It listed this hearing for five days by remote video hearing.

4. On 26 January 2023, the claimant wrote to the Tribunal [83-85] with an application to amend the claimant's claim to include a claim of victimisation which was said to be an act of "relabelling".

5. The application was submitted together with new grounds of complaint and a list of issues relating to the victimisation claim [86-89].

6. In correspondence between the parties [90-91], the claimant confirmed that she was seeking to add the claim of victimisation to existing claims, not in substitution for existing claims and the respondent sought leave to submit amended response. The matter was agreed between the parties. An amended response was presented on 1 February 2023 [93-105].

7. Pursuant to the case management order of 11 October 2022, the parties prepared and produced a neutral chronology; a cast list; a list of the key documents in the file; and a bundle of witness statements; together with a bundle of documents consisting of 894 pages. If we refer to any of the documents in the bundle, we will indicate the relevant page numbers from the bundle in square brackets. If we refer to any paragraphs within a document, we will use the silcrow symbol (§) to indicate the paragraph numbers.

The law

8. The statutory law is contained within the ERA 1996 and the EqA 2010. We reproduce below sections 95(1)(c) and 98(4) of the ERA 1996 and sections 13, 26, 27, 123 and 136 of the EqA 2010.

9. For the purposes of the unfair dismissal claim, the relevant section of the ERA 1996 is section 98.

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical, or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

10. The relevant sections of the EqA 2010 are:

13. Direct discrimination

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

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

(a) age;

(b) disability;

(c) gender reassignment;

(d) race;

(e) religion or belief;

(f) sex; and

(g) sexual orientation.

26. Prohibited conduct (Harassment)

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.

In deciding whether conduct has the effect referred to, 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.

27. Victimisation

A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(c) making an allegation (whether or not express) that A or another person has contravened this Act.

Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

123. Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) *an employment tribunal…*

11. We were referred to many precedent cases by Mr Frew and Mr Milsom in their

closing submissions. We considered all the case law that was presented before making our decision.

The issues

12. The issues in the claim were set out in the case management order of 11 October 2022 with the additional issues submitted with the claimant's application to amend her claims to include the complaints of victimisation [88-89].

13. It was agreed that the issues in the case were:

1 Constructive dismissal

1.1 Was the Respondent in repudiatory breach of (i) the implied term of mutual trust and confidence; and / or (ii) the duty to provide a safe and suitable working environment, free from unacceptable behaviour by reason, either individually or cumulatively, of:

1.1.1 "The harassment from Mr Reilly, for which the Respondent is vicariously liable";

1.1.2 "The failure to proactively or reactively protect the Claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it";

1.1.3 "The delay in investigating and responding to the complaints";

1.1.4 "The inadequate support and communication provided to the Claimant during the investigation" and/or

1.1.5 "The perverse and unreasonable findings of the Panel."

1.2 Did the Claimant's resignation arise from one breach or a 'last straw' in a series of breaches?

- The Claimant relies upon the breaches listed above as a series, culminating in the 'last straw' being breach 1.1.5 above.

1.3 Did the Claimant resign without delay?

1.4 If the Claimant was dismissed, was there a potentially fair reason for their dismissal?

2 Direct Sex discrimination

2.1 Was the Claimant treated less favourably because of sex? The acts of less favourable treatment relied upon are;

2.1.1 "The perverse and unreasonable findings of the Panel which;

2.1.1.1 Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's criminal actions by dismissing his behaviour as having been encouraged by her;

2.1.1.2 Concluding that Mr Reilly's mental health and the confusing nature of the Claimant's messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her. Mr Reilly was a man, almost twice the age of the Claimant and a person of senior influence in Morocco. She felt responsible for him and felt terrified and isolated by his behaviour;

2.1.1.3 Failed to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment;

2.1.1.4 The Claimant's constructive dismissal, pursuant to section 39(2)(c) EqA 2010."

2.2 If so:

2.2.1 When did the alleged acts of less favourable treatment occur?

2.2.2 Who are the alleged discriminators?

2.2.3 Who are the comparators relied on?

Mr Reilly and/or a hypothetical comparator

3 Harassment

Harassment related to sex

3.1 Did the Respondent engage in unwanted conduct related to sex?

3.2 What was the unwanted conduct?

- *The unwanted conduct relied upon is:*

3.2.1 the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021 (wrongly recorded as 2020)*; and*

3.2.2 The perverse and unreasonable findings of the Panel which;

3.2.2.1 Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged;

3.2.2.2 Failed to recognise Mr Reilly's treatment of the Claimant as contributing harassment prior December 2020 and sexual harassment at all; and

3.2.2.3 Justified and romanticised Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand where things went wrong".

3.3 Who was the alleged harasser?

3.4 When did the alleged acts take place?

3.5 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.6 Was it reasonable for the alleged harassment to have the alleged effect on the Claimant in the circumstances?

3.7 Are the Claimant's claims in relation to Mr Reilly out of time as they occurred more than 3 months before 17 February 2022?

3.8 If so, is it just and equitable to extend time under s.123 Equality Act 2010?

Harassment of a sexual nature

3.9 Did the Respondent engage in unwanted conduct of a sexual nature?

3.10 What was the unwanted conduct?

The unwanted conduct relied upon is the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021(wrongly recorded at 2020)*)*

3.11 When did the alleged acts take place?

3.12 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.13 Was it reasonable for the alleged harassment to have the alleged effect on the Claimant in the circumstances?

3.14 Are the Claimant's claims in relation to Mr Reilly out of time as they occurred more than 3 months before 17 February 2022?

3.15 If so, is it just and equitable to extend time under s.123 Equality Act 2010?

4 Victimisation – s27 EqA 2010

4.1 Did the Claimant do a protected act?

The protected act relied upon is the submission of the formal complaint by the Claimant on 23 June 2021.

The Claimant asserts that this was a protected act, pursuant to section 27(2)(d) EqA 2010.

4.2 Was the Claimant subjected to a detriment?

The detriments relied upon are;

4.2.1 The perverse and unreasonable findings of the Panel which;

4.2.1.1 Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged by her;

4.2.1.2 Failed to recognise Mr Reilly's treatment of the Claimant as constituting harassment prior to December 2020 and sexual harassment at all;

4.2.1.3 Concluded that Mr Reilly's mental health and the confusing nature of the Claimant's messages were mitigation or an excuse for his actions, while failing to recognise the relatively vulnerability of the Claimant;

4.2.1.4 Justified and romanticised Mr Reilly's behaviour by concluding that his messages

"has the tone of a spurned lover trying to understand where things went wrong";

4.2.1.5 Failed to uphold the complaint of sexual harassment by concluding that unwanted, physical touching on two separate occasions did not constitute sexual harassment;

4.2.2 Her constructive dismissal, pursuant to section 39(2)(c) EqA 2010.

4.3 Did the Respondent subject the Claimant to one or more of the detriments because she did the protected act?

5 Remedy

5.1 Is the Claimant entitled to receive compensation?

5.2 If so, what sum?

5.3 Has the Claimant mitigated their loss?

5.4 Has there been a breach of the ACAS Code and should any uplift or deduction be made?

5.5 Should a recommendation be made by the Tribunal?

There were a number of matters that arose concerning the List of Issues that are dealt with below.

The Hearing

14. The hearing started at 10:00am on the first day. We had not completed our reading but wished to speak to the representatives about a number of preliminary matters.

15. It was not clear from the papers we had read what the outcome of the claimant's application to amend her claim had been, although we could see that the respondent's amended response [93-105] had addressed the matters that the claimant had sought to add. It was confirmed that the application was consented to by the respondent.

16. Mr Milsom submitted a LinkedIn exchange initiated by Tony Reilly to another employee of the respondent, HL dated between 11 and 21 June 2021 that the claimant wished to include in the bundle. Mr Frew raised no objection, so the document was added and given page number 894.

17. Mr Milsom made an application for a restricted reporting order to apply to the claimant under rules 50(1) and 50(3)(d) of the Employment Tribunals Rules of Procedure 2013 and section 11 of the Employment Tribunals Act 1996. After

considering the matter and in the absence of any objection by the respondent, we made the RRO. It was drafted on the same day and its contents were agreed by the parties. The RRO remains in force for the lifetime of the claimant. The claimant will be identified as KJ in the public record of this case. This is a case where 'jigsaw identification' is a real possibility.

18. Mr Frew advised the Tribunal that the respondent now conceded the issue at paragraph 3.2.1 of the List of Issues. The point conceded was the claimant's allegation of harassment of a sexual nature under section 26(2) of the EqA and harassment related to the protected characteristic of sex under section 26(1) of the same Act that:

> *"…the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021…"*

19. We indicated that we would rely on the claimant's unchallenged evidence on the point.

20. Mr Frew asked whether the Tribunal would deal with the issue of **Polkey**/**Chagger** and contributory fault in our determination on liability. We indicated that we would and we have. We found that it would assist the parties in reaching a negotiated settlement if the claimant was successful on liability. It would also assist the actuary who will be instructed to calculate pension loss.

21. We discussed the timetable for the hearing. There were many documents to read and it was suggested by Mr Milsom that we take the rest of the first day to complete our reading. It was suggested that the claimant could give evidence for the whole of day 2 and the respondent's witnesses could be heard in days 3 and 4 with submissions on day 5. The proposal was agreed. We closed the hearing at 10:20am and competed our reading.

22. We reconvened at 10:00am on the second day of the hearing. Mr Frew indicated that he would complete his cross-examination of the claimant before lunch that day. We took regular beaks during the evidence of all witnesses.

23. The claimant gave evidence on affirmation and produced her evidence in chief as a witness statement dated 22 February 2023 that consisted of 192 paragraphs. Mr Milsom asked the claimant a few supplementary questions. The claimant was cross-examined by Mr Frew until 13:06pm, when we took lunch. After lunch, we advised the parties that a newly appointed Employment Judge was joining the hearing as an observer. They would take no part in the decision-making process.

24. The Tribunal asked the claimant some questions until 14:40pm.There was no re-examination. The claimant's case closed at the end of her evidence at 14:40pm and we took a ten-minute break.

25. The first witness for the respondent was Alison Ball, who was Director Teaching & Learning, Middle East, and North Africa (MENA) for the respondent and the claimant's line manager. Ms Ball gave evidence on affirmation and produced a

witness statement that consisted of 24 paragraphs. Mr Frew asked a few supplementary questions from 15:00pm to 15:17pm before Mr Milsom cross-examined the witness until 15:55pm. The Tribunal asked questions for five minutes before the witness was released and we ended proceedings for the day at 16:00pm.

26. The third day began at 10:00am with the evidence of Christine Wilson, who was Interim Director, Research & Insight, for the respondent and who conducted the investigation into the claimant's grievance that was submitted on 23 June 2021 [149-150]. Ms Wilson gave evidence on affirmation and produced a witness statement dated 20 February 2023 that consisted of 60 paragraphs. There were no supplementary questions. Mr Milsom cross-examined the witness from 10:05am to 15:07pm with a break for lunch. The Tribunal asked one question of the witness. Mr Frew asked the witness one re-examination question. The witness was released at 15:10pm.

27. The third witness for the respondent was Andrew Williams, who was the respondent's Chief Operating Officer and chair of the respondent's Speak Up Committee. He gave evidence on affirmation and produced a witness statement dated 20 February 2023 that consisted of 50 paragraphs. Mr Williams' evidence started at 15:20pm. There were no supplementary questions. Mr Milsom cross-examined the witness from 15:20pm to 16:36pm when we broke for the day. Mr Williams was given the warning given to witnesses about not speaking to anyone about the case.

28. The fourth day began at 10:05am with a brief discussion about how the parties would make closing submissions.

29. Mr Milsom continued the cross examination of Mr Williams at 10:10am. We took a break at 11:33am for 12 minutes before continuing to 12:45pm. The Tribunal then asked questions until 13:00pm when we took lunch. There was no re-examination.

30. We restarted at 14:00pm with the respondent's fourth witness, Christopher Rawlings, who was Regional Director, MENA for the respondent and who made the decision in the claimant's grievance appeal. Mr Rawlings gave evidence on affirmation and produced a witness statement dated 20 February 2023 that consisted of 30 paragraphs. Mr Frew asked no supplementary questions. Mr Milson cross-examined the witness from 14:00pm to 14:50pm. The Tribunal asked questions from 14:51pm to 14:55pm. There was no re-examination.

31. We asked the parties to exchange skeleton arguments by 10:00am on the fifth day (Monday 13 March 2023) and advised that we would start the hearing on that day at 12:30pm. Both parties complied with our request. We received and read the skeleton arguments of Mr Milsom and Mr Frew.

32. The hearing started at 12:30pm. The Tribunal met online before the start of the hearing to discuss our approach to the task of making our decision. Two people joined the virtual room during our discussion.

33. When the representatives and parties joined the hearing, we advised Mr Milsom

and Mr Frew what had happened. We were naturally concerned as to who the individuals were and what they may have heard. Counsel made enquiries and Mr Milson advised that the two people were a friend of the claimant and the claimant's solicitor. Nothing had been heard that was untoward and neither side had any issues arising from the incident.

34. We heard closing submissions from Mr Frew, who spoke for 55 minutes and Mr Milsom, who spoke for exactly the same amount of time. Both their skeleton arguments were very detailed.

35. We indicated that we were going to reserve our decision on liability and set a provisional hearing date for a preliminary hearing to discuss remedy if the claimant was successful in one or more of her claims.

36. **Note from Employment Judge Shore – It is entirely my responsibility that it has taken far too long to produce this Judgment and Reasons, for which I can only offer my sincere and profuse apologies to the parties, the representatives, and my colleagues. Following the hearing, I had to deal with several personal matters that reduced the time I had available to complete what was a complicated decision in a complex case, whilst also fulfilling my obligations to ongoing hearings and family duties.**

37. As the claimant has been successful, we will use the preliminary hearing listed for 15 April 2024 to discuss how the Tribunal will approach the issue of remedy.

Findings of Fact

Preliminary Comments

38. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's evidence over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing to complete disclosure or obtain more documents or call additional evidence, so we have dealt with the case on the basis of the documents produced to us, the witness evidence produced, and the claim as set out in the List of Issues.

39. The claimant made several serious allegations against Tony Reilly, who was Country Director, Morocco for the respondent, in her grievance and in these proceedings. Mr Reilly was neither a party to or a witness in this case and therefore was not given any opportunity at the hearing to rebut any of the allegations made against him. However, we are required to make findings of fact about the allegations made by the claimant in these proceedings and we have done that.

Undisputed Facts

40. We should record as a preliminary finding that many relevant facts were not disputed, not challenged, or were agreed by the parties. In fact, the decisions we had to make were less about what happened, but what interpretation we ought to put on what happened. We therefore make the following undisputed findings of fact:

    40.1. The claimant was employed by the respondent, a registered charity that is an executive non-departmental public body sponsored by the Foreign, Commonwealth & Development Office ("FCDO") of the UK Government that works in over one hundred countries. At the termination of her employment, the claimant was employed as a Teaching Centre Cluster Lead Maghreb, based in Morocco. The claimant's employment began on 1 January 2011 and ended on 22 November 2021. The claimant started early conciliation with ACAS on 6 January 2022 and obtained an ACAS early conciliation certificate on 10 January 2022.

    40.2. The claimant presented her ET1 and particulars of claim on 17 February 2022 [10-44]. The respondent presented its ET3 and grounds of resistance on 7 April 2022 [45-56]. The tribunal sent the parties an acknowledgement of claim, notice of the claim, and notice of hearing on 10 March 2022. The notice of hearing advised the parties of a preliminary hearing for case management by telephone on 26 September 2022. The Employment Judge who chaired this hearing, conducted the preliminary hearing, and made case management orders dated 11 October 2022 that were sent to the parties on 13 October 2022 [60-69]. The Tribunal sent the parties notice of the full merits hearing on 14 October 2022. It listed this hearing for five days by remote video hearing.

    40.3. The claimant was employed under a contract dated 27 May 2016 [106-112] that referred to grievance procedures available on the respondent's intranet. The grievance procedure was stated to be non-contractual [111].

    40.4. On 17 September 2018, the claimant was sent a letter varying her terms of employment [113-114] that effected her relocation to Rabat, Morocco as Teaching Centre Cluster Lead Maghreb/Teaching Centre Manager Morocco for a fixed term that was to start on 7 October 2018 and end on 6 October 2021. The variation of contract increased the claimant's salary and pay band to Senior Management Broadband, Senior Managers and Professionals. The claimant signed the amendment on 17 September 2018 [114].

    40.5. The respondent had policies on:

        40.5.1. Bullying and Harassment dated March 2019 [848-856];

        40.5.2. Bullying and Harassment Guidance dated March 2019 [857-860];

40.5.3. A Guide to Speak Up Policy dated October 2021 [861-870];

40.5.4. Speak Up Policy dated 28 October 2021 [871-874]; and

40.5.5. Code of Conduct dated 16 November 2022 [875-881].

40.6. The respondent's Speak Up Committee was established in May 2021 and was chaired by the respondent's CEO, Andrew Williams. The Speak Up Policy Guide [870] stated that its purpose was to make sure that the Speak Up Policy was upheld. The Speak Up Committee's responsibilities were to:

40.6.1. Oversee concerns raised which might have financial, reputational, or organisational impact,

40.6.2. Oversee ongoing investigations, outcomes, and follow up actions of such cases.

40.6.3. Ensure there is monitoring and recording of new and existing cases, risks, and trends, making recommendations for mitigation.

40.7. In or around August 2019 Tony Reilly replaced the previous Country Director for Morocco. The Country Director was, effectively, the respondent's top person in a country. It was agreed that Mr Reilly had no line management responsibility for the claimant. The claimant's evidence that she would attend weekly Country Leadership Team Meetings that were chaired by Mr Reilly was not challenged. Neither was her evidence that she reported into the English and Exams Team, whereas Mr Reilly, as the Country Director reported into the Global Network Team.

40.8. The claimant's evidence that the Country Director had a duty of care, as country lead, for the wellbeing of people in their country was not challenged. The respondent's Speak Up Committee, in its Draft – Investigation Report dated 22 October 2021 [628 (§4)] noted that Mr Reilly as Country Director "…therefore had a duty of care to [the claimant] given her circumstance." The respondent's response accepted that it was vicariously liable for the actions of Mr Reilly, and it was conceded on the first day of this hearing that the respondent accepted that the claimant was subjected to harassment related to sex or of a sexual nature. Its case is that the claims are, however, out of time. The respondent accepts the acts alleged against Mr Reilly between, "…October/November 2020 and February 2021". The acts alleged of Mr Reilly are submitted not to be part of a continuing act. The acts alleged between February 2021 and April 2021 are not accepted to be acts of harassment based on a protected characteristic.

40.9. The claimant's evidence that, prior to the Covid-19 pandemic that began in early 2020, she and Mr Reilly would communicate a couple of times a week regarding her role in teaching English and that she and Mr Reilly

did not meet or communicate socially outside work hours was not challenged.

Pandemic

40.10. It was agreed that Morocco entered a strict lockdown in March 2020. The claimant's evidence that she could only leave her home to visit the supermarket or pharmacy and that there were tanks and checkpoints at all intersections was unchallenged. The claimant had to begin teaching online for the first time using new software.

40.11. The claimant's usual friendship group had returned to the United Kingdom. The claimant was required to remain in Morocco as her role was deemed to be business critical.

40.12. It was not disputed that Mr Reilly began to communicate with the claimant (usually via WhatsApp) outside normal working hours. Her perception that the communication was "…more like a friend looking out for another friend during a difficult situation." was not challenged.

40.13. The claimant's evidence was that she trusted Mr Reilly, who was the respondent's most senior employee in Morocco and was 27 years her senior. She regarded their relationship at that time as "platonic and entirely professional."

Family

40.14. The claimant learned that her father was seriously ill in April 2020. As Mr Reilly was a member of the British Embassy's Crisis Team in Morocco, the claimant contacted him for updates on the changing travel restrictions and the availability of return flights to the UK. He kept in frequent touch with her to offer support. The claimant's father died in June 2020 and the claimant was able to return on an emergency flight that was facilitated by Mr Reilly using his contacts. She remained in the UK before returning to Morocco in September 2020.

Allegations concerning Mr Reilly

40.15. The claimant had disclosed to Mr Reilly that she was struggling with her mental health because of the circumstances of her father's illness and death. Her unchallenged evidence was that Mr Reilly disclosed that he was also struggling with his mental health because of bereavement that had affected him, the breakdown of his marriage and the lockdown.

40.16. The claimant alleges that Mr Reilly's behaviour towards her changed in tone towards the end of October 2020. Her evidence (§ 22) stated that "…his messaging became flirtatious." The respondent has conceded that Mr Reilly's behaviour from October 2020 until April 2021, as set out in the substance of the claimant's complaints (23 June 2021 [149-150]) and interviews with the respondent of 26 August 2021 [284-300] and 8 September 2021 [473-481]) constituted harassment of a sexual nature

and harassment related to the protected characteristic of sex. We find it necessary to list the acts alleged by the claimant at the time that are now accepted by the respondent as credible, as they are accepted findings of fact. The paragraphs below are our summary of the claimant's complaints in her grievance and her two meetings. We have edited out references to the claimant's name/initials have and added clarification in square brackets:

Email 23 June 2021 [149-150]

40.17. In her email of 23 June 2021 [149-150] the claimant made allegations that were set out in broad bullet points as follows:

40.17.1. Over a period of several months, beginning around October/November 2020 and continuing until February 2021, I personally experienced behaviour from Tony which I would describe as sexual harassment. Referring to the Bullying/Harassment Policy, the following specific points from Appendix 1 are all examples of behaviour that I experienced:

40.17.2. Unwelcome sexual advances;

40.17.3. Physical contact and touching;

40.17.4. Written or verbal comments of a sexual nature;

40.17.5. Intrusive questions about a person's private or sex life, and discussing your own sex life and/or sexual preferences; and

40.17.6. Criminal behaviour, including ~~sexual assault~~, stalking, ~~indecent exposure and offensive communications~~ (Note- the strikethroughs were in the document at page 150).

Meeting 26 August 2021 [284-300]

40.17.7. In October 2020, [the claimant] continued to receive messages from TR. Messages from TR previously had been friendly, but now the messages started to become quite flirtatious, and [the claimant] remembered one specific dinner that TR had organised for [the claimant] and two of [her] friends who work at the embassy and people that Tony also knew went out for dinner. [The claimant] remembered feeling incredibly anxious about that dinner for some reason she was panicking about it and did not recognise why at the time.

40.17.8. After the dinner, TR drove [the claimant] home. TR came into [the claimant's] house) and they had some drinks. [The claimant] did not really remember whether she invited TR

in or not, she said she had drunk a lot due to the anxiety around the whole evening.

40.17.9. [The claimant] remembered on that evening though that TR had shared a lot of detail about his separation from his wife and [the claimant] said she also shared some information about her relationship.

40.17.10. Towards the end of October 2020 [the claimant] hosted a large Halloween party that TR attended but left without saying goodbye. [The claimant] received a message on WhatsApp from TR that night, which she said was clearly flirtatious. It said:

"If I'd stayed, I would have stayed."

40.17.11. The morning following the Halloween party, which was a weekend, [the claimant] recalled that TR offered, about four or five times, to come around to her home and help clean up. [The claimant] said that was when things started to become a bit more flirtatious.

40.17.12. **[The claimant]** said she did not want to hide anything (from the investigator) and that initially she did flirt back. She thought at times that maybe she was interested (in TR).

40.17.13. [The claimant] recognised that she and TR had developed a friendship and at times [the claimant] thought she might be interested, however it quickly and repeatedly became very clear to her that his behaviour towards her was becoming obsessive. It was having a real impact on her mental health. She did not want it to develop into anything romantic and **[the claimant]** made several attempts to make that clear (to TR)

40.17.14. [The claimant] clarified what she meant by obsessive messaging. She said TR messaged constantly, all hours of the night and morning, without her necessarily responding.

40.17.15. [The claimant] said the messages were quite romantic in nature. She has shared some examples on the SharePoint folder.

40.17.16. [The claimant] provided background and context of an incident that occurred on 9 November 2020. She was still at the point where she was being quite flirty (with TR) and then suddenly she said she had "a wakeup call."

40.17.17. [The claimant] referred to an incident when she had gone to the beach 3 hours south [of where she lived] with some

friends for the weekend. She told TR, who said he was going to go. He said he set his alarm for 5:30 in the morning and was going to turn up. [The claimant] said she just felt very uncomfortable and suddenly wanted to stop the thing. So, on 8 November 2020, TR was messaging a lot as usual. It was a workday and TR was asking to come to see [the claimant] as he did almost every day.

40.17.18. [The claimant] said by this point of time, she knew that she had to have a conversation with TR to make this situation stop. [The claimant] agreed for TR to come and see her. She told him she was not feeling great, but she needed to talk to him. [The claimant] was very determined before TR arrived that she would say what she needed to say and that would be it. It would be clear and then the problem would be solved.

40.17.19. TR Arrived. [The claimant] sat on a garden seat that is really small two-seater sofa (she also had two armchairs next to each other). TR sat on the small seat next to [the claimant]. She felt very uncomfortable about that because he was very, very close and that it was not a very good angle for her to say what she needed to say.

40.17.20. The claimant started to explain to TR that she was not interested [in him], she was very much in love with her partner, she did not want any romance or a relationship, and, despite the flirtation there had been, she did not want anything else. While she did this, TR's hand was on her back trying to just stroke her back underneath her T-shirt. [The claimant] tried to continue but TR was rubbing his hand on her back and then up and down her neck. She was shocked by TR's behaviour.

40.17.21. [The claimant] told TR that she needed to take her dog for a walk and asked him to leave. TR left and [the claimant] thought the message had sunk in for him because TR sent many messages on 9 November 2020 9th of November, which were depressive. **[The claimant]** further said that for some reason TR thought that **[the claimant]** was going to turn up at his place the next day. But **[the claimant]** never, ever suggested that or ever did that kind of thing.

40.17.22. CW thanked **[the claimant]** for sharing the incidents and referenced to evidence **[the claimant]** shared where she has talked about something that happened, on the 18th of November. (CW had earlier mistaken date to be 13th but immediately clarified it was 18th) CW asked **[the claimant]** if she could talk through that.

40.17.23. CW quoted that **[the claimant]** said she cannot see

messages after an incident and requested **[the claimant]** to provide some information on it. Correction from **[the claimant]**: CW was referring to photos uploaded of a handwritten card received 19 Nov, saved in the 'Gifts, notes, cards' folder. I saved the photos as 'card after incident 18 Nov'. CW asked me to describe that incident. CW initially mentioned 13 Nov, which happened to be the date of a smaller incident, so I briefly explained that before going on to talk about the 18 Nov.

40.17.24. [The claimant] talked about a smaller incident on the 13 November 2020 where TR said in a message “decided to drive to yours hovered outside wondering whether to call”.

40.17.25. [The claimant] said that 18 November 2020 was a public holiday in Morocco, it may be a Friday; she remembered waking up feeling very tired that day.

40.17.26. [The claimant] wanted to use the public holiday to go for a long bike ride, which was how she tended to deal with her mental wellbeing. She planned to meet her friend, for a drink in the afternoon at about 5:00pm or 6:00pm. As she was leaving after the drinks with her friend around 7:00pm; she started to get a lot of angry messages form TR. The messages were basically, that he was upset that [the claimant] had not spent any time with him on the public holiday. The messages were quite aggressive in tone.

40.17.27. She did not reply and went home to talk to her partner and then had a shower. When she came out of the shower, she saw three missed calls from TR. She looked out the window and she could see TR’s car. [The claimant] informed the investigator that she could see the road from her house. [The claimant] said TR was sat in his car, calling. She sent a message saying she had been in the shower at the time he had tried to call that asked him to “Please go.” TR left. He threw a packet of Strepsils that he had brought for [the claimant] because she had sore throat over the wall of her house. The next day, he was apologetic.

40.17.28. TR said he apologised and sent a long, handwritten card round with the office driver.

40.17.29. [The claimant] spoke about excessive gifting. She included some photos as examples of everything that she received, apart from other small things like chocolate or packet of biscuits, that TR sent round with the office driver. [The claimant] did not want the gifts and often sent them back.

40.17.30. The key example of excessive gifting was on her birthday

at the end of November. [The claimant] felt that the Vase, in particular, was used only to enable TR to deliver it to her home himself. It was an expensive of pottery from Morocco. TR would say “I've got a gift for you can you come and pick it up or can I come and drop it off.” [The claimant] found it quite hard to say point blank “no” at that stage, so she took the vase. She had since given all of this stuff away.

40.17.31. Another example was when [the claimant] was going to Marrakech for her birthday weekend with her three friends. TR gave her a gift bag to take with her to Marrakech that seemed to be small items. It turned out to be a spa voucher with a message, some chocolates with it and so on.

40.17.32. [The claimant] felt uncomfortable about the gift itself, but she did not know what else to do except say thank you for these things because if she had not “…we got onto the emotional situation.”

40.17.33. At the end of her birthday weekend, TR knew the day [the claimant] was driving back. On 2 December 2020, he left flowers inside the ‘garage’ of her home which, [the claimant] said was another really horrible incident.

40.17.34. Her house was a detached house, with large high walls all around and the garage was a kind of basement parking area. There was a small door in the garage that led into [the claimant’s] house. TR left the flowers inside that door.

40.17.35. [The claimant] stated that her house is important; it is a safe space, and she did not know how TR had left the flowers (there), she did not know what to do except to say thank you. but she said to the investigator, “…it terrified the life out of me.”

40.17.36. TR sent [the claimant] a Christmas gift of a big box of spa type products. It was sent after Christmas 2020 after, her third or fourth attempt, made with the support of her line manager (Alison Ball) and TR’s Line manager (Elizabeth White), to stop TR’s behaviour.

40.17.37. TR sent the gift round in January with the office driver with a card that [the claimant] said “just made me, the message just made me feel so sick because I genuinely didn't want it and his message - shush! implies that somehow I was being coy or pretending that I didn't want it and I did. I really did not.”

40.17.38. [The claimant] said that she actually did not want the gift and because she had refused this gift for so long, every

time TR brought it up between Christmas time and 21 January 2021. His last attempt was to send it with the driver because [the claimant] had refused to go and get it herself; she also refused to let TR bring it over personally.

40.17.39. [The claimant] said the evidence that was uploaded by her demonstrated a pattern between her attempts to make TR stop that would often lead to an increase in what she felt was harassment and excessive messaging and "…trying to make me feel very very responsible for his wellbeing. He made it very clear in a lot of detail, like overwhelming detail for me in messages that he was struggling that he was crying, it was just it was a huge burden on me and it was one of the hardest things too; it was the reason why I found it so difficult, I think to cope with this situation and to make clearer to stop it more clearly because I felt responsible, I was made to feel responsible for his wellbeing."

40.17.40. [The claimant] said TR would use phrases like 'I thought you cared, look, look how I supported you when your father was dying' that made her fell that somehow, she owed him something. The claimant said that TR's streams of depressive messages coming in the evening, really wore her down emotionally. She said she did not know whether TR did it intentionally; but it was definitely selfish. In many messages, TR said things like 'I know, I should let you switch off' or 'I know you don't want to hear this, but this is how I feel."

40.17.41. [The claimant] said she felt exhausted, and at the same time, she was also under a lot of (personal) pressure. TR knew that [the claimant] was under the pressure of supporting her mother, solely for the first time in her life, and her mother was dependent on [the claimant] for her (mother's) happiness suddenly and in this situation, suddenly she also had TR, who knew that situation, also making himself dependent on her for his happiness.

40.17.42. In response to a question about other incidents of unwelcome sexual advance, unwanted touching, and physical contact, [the claimant] mentioned there was another incident about a week after the attempt to make it stop on 8 November 2020. Her attempt [to make Tr behaviours stop] had clearly failed; so, she tried again on the 14 November 2020 in person, because TR been sending depressive messages all week.

40.17.43. Based on the previous incident, [the claimant] wanted to meet in a neutral space and wanted it to be public so she suggested a specific bar/coffee place that she knew where it was unlikely that anyone that she or TR knew in common

would be at.

40.17.44. When [the claimant] suggested they meet there, TR messaged something like 'I don't think I can handle hearing what you have to say in public; I'm not sure how I'm gonna feel about what it is that you need to say; can we have the conversation at mine; mine or yours'

40.17.45. The claimant considered TR's request and decided it was easier to leave than make someone leave, so agreed to go round to TR's house. She knew that TR had a live-in gardener, so it was not completely alone, unlike a meeting at her own house. The claimant said she was very clear about her situation, clearer than she thought or felt, clearer than she had been the previous week. She made it clear that she was not interested and that she was in love with someone else. She told TR she was overwhelmed by all the messaging from him. [The claimant] was wearing shorts that day and TR put his hand on her and started stroking her thighs as she was saying what she wanted to say. The claimant made an excuse and left. [The claimant] clarified that aside from that, there were no "major kind of aggressive advances."

40.17.46. [The claimant] added that there were occasions where TR was clearly looking to kiss her but he never did and never to such an extent where she couldn't just walk away a bit and create the distance and avoid it, [the claimant] said "…but it was pretty clear, what he was thinking about…his intentions were on those occasions",

40.17.47. [The claimant] said there he never kind of initiated anything beyond these two incidents of physical contact against her will.

40.17.48. TR would send two types of messages. He talked about wanting to and he talks about fantasies and so on. But he also, on the 29 November 2020 said, "I can respect to and need to touch you a couple of times, so he does acknowledge in writing that he did succumb to this need (to touch **[the claimant]** a couple of times)

40.17.49. [The claimant] considered that TR had stalked her. She referred the beach outing when TR said he set an alarm on was going to turn up on when [the claimant] was with her friends at the beach for the weekend. On another occasion on 8 or 9 November 2020 TR said he thought about coming to yoga class in the park where [the claimant] used to go and watch from a safe distance, but that she "might ... think it is weird."

40.17.50. There were more incidents, but [the claimant] had not been able to find supporting evidence. 13 November 2020 had been mentioned already very briefly when TR had hovered outside [the claimant's] house. She said she knew that happened a couple of times, but [the specific examples given] were the ones that had supporting messages/evidence.

40.17.51. TR messaged [the claimant] on 20 November 2020 to say he had driven past a bar thinking she might be there. It was a place she used to go to regularly on a Friday night with her friends. In his message, TR said that if he had seen her car or bike, he would have come in.

40.17.52. TR's behavior continued into early 2021, at which point [the claimant] brought in her and TR's line managers. TR's line manager [Elizabeth White] asked [the claimant] to share some background about how this happened, which she did.

40.17.53. Ms White and Ms Ball (the claimant's line manager) advised the claimant that she should be clearer in her communication to TR saying she did not want anything to happen. That advice caused the claimant to write an email to TR dated 14 December 2020 [264].

40.17.54. TR sent an email back on the same day [264] with an apology and an acknowledgement that his behavior was wrong. The message made the claimant feel relieved, but that feeling did not last.

40.17.55. TR continued messaging the claimant. She blocked him on WhatsApp in February 2021 but still received messages on Microsoft Teams like, "I don't understand why we can't be friends."

40.17.56. TR's behaviour [after February 2021] had not been harassment as a behavior. Sometimes he had sent message over teams that were a little bit more friendly than that might have with another colleague.

40.17.57. In early June 2021, a friend of [the claimant], who worked at the Embassy said, that a friend of the claimant's friend, who is in Rabat, Morocco, used to work for the British Council for 16 years and asked who the country director was. [The claimant's] friend told her it was Tony Riley. The claimant's friend said there had been incidents of a similar nature [to those alleged by the claimant] (and also more physical allegations) when TR was in Sri Lanka for the respondent.

Meeting 8 September 2021 [473-481]

40.17.58. After the claimant had sent TR the email of 14 December 2020 [263], TR had made several attempts and requests to meet in person. The key period of his requests to meet in person were made over the Christmas 2020 break. The messages asked the claimant to meet him and said that he did not want to be alone. The messages continued in February and March 2021.

40.17.59. TR turned up at social events that he would have known the claimant would be attending. The claimant accepted that TR had a right to be there, but it made her extremely uncomfortable.

40.17.60. There had been no social communication from TR since the grievance had been submitted on 23 June 2021.They had continued to have one-to-one meetings regarding work twice a month, but these had stopped in May 2021.

40.17.61. TR had sent the claimant pictures of himself half dressed and in a wet suit. These had been included in the claimant's submitted pictures and documents but were not specifically referenced in the previous meeting.

40.17.62. The claimant had dined with TR on 4 December 2020 in hope that she could resolve their situation. TR had talked about his sex life and told the claimant on the way home that their situation may become romantic.

40.17.63. The claimant clarified the incident on 18 November 2020. She had received a message from TR earlier in the day that had worried her. She had sent TR a message saying that she hoped he was OK. He did not respond. The claimant had to pass TR's house on the way home from drinks wit her friends. She rang the doorbell but there was no answer. She could hear the gardener and his children. She left and went home. She then started to receive the angry messages from TR.

40.17.64. The claimant confirmed that she had moved from Rabat to Marrakech to put distance between herself and TR.

40.17.65. The claimant mentioned the colleague who TR had reached out to via LinkedIn on 11 June 2021 [894].

Claimant's early interactions with management about Mr Reilly's behaviours

40.18. The claimant spoke to her line manager, Alison Ball about Mr Reilly's behaviour on 6 December 2020. Ms Ball's evidence (§ 6) confirms the

approximate date. Her email to Christine Wilson of 1 September 2021 [133] specifies that the date of the conversation was 6 December 2020. The claimant's evidence in chief was that the conversation was on 7 December 2020, which we find to be probably incorrect, but the date is of no consequence.

40.19. It was the agreed evidence of the claimant and Ms Ball that it they decided that the claimant should contact Mr Reilly's line manager, Elizabeth White.

40.20. On 7 December 2020, the claimant emailed Ms White at 5:55pm with the subject line "Chat in confidence". The content of the short email was that the claimant had "some concerns" about Mr Reilly that she would like to share.

40.21. Ms White replied at 4:39pm on the same day and suggested a time and date for a call. That call took place on 8 December 2020. Ms White took notes [117-118]. One of the notes read "…but now different, and I think it is sexual harassment…saying some things not appropriate." The claimant also expressed concerns about Mr Reilly's mental health.

40.22. Ms White said she would speak to Mr Reilly.

40.23. On 9 December 2020, Mr Reilly sent the claimant two WhatsApp messages [219] that included the following:

> *"This is the last of the serious WhatsApp shit from me. I think we should talk instead of doing this stupid thing back & fortheing (me to blame for most if not all of it) from now on. I have fallen for you [claimant's name] and I've made a complete Wibur's breakfast of it. Let's try a different approach. [Lemon emojis] lemons for anything I've said or domne that's hurt you or selfishly added to your emotional load. I think you are a special person. I care about you & hope we can find a way of being as close as possible without any more of this kind of shit. I don't know what love is but this feels pretty near to it.*
>
> *Take cate T [heart emoji]"*
>
> *"This is so fucking hard. Hope you're OK. Take care.*

40.24. On 11 December 2020, Mr Reilly turned up at a bar where the claimant was with friends. Her WhatsApp message of the same date to a friends group expressed her annoyance [709-711]. Mr Reilly messaged the claimant at 8:00pm, "*Sorry. I shouldn't have come. Just wanted to see you x*" [219]. He sent more messages that evening, the last one of which said, "*How I wish I could wrap my arms around you now [face blowing kiss emoji]"* at 11:03pm [240].

40.25. The claimant emailed Mr Reilly on 14 December 2020 at 13:17pm [264] in which she explained why she had shut him out. She told Mr Reilly

that his behaviour over the last few weeks had been, at times, totally unacceptable and set out allegations that he had breached or attempted to breach her personal space, physically and emotionally as well as her home. He had followed her to places or tried to find her. The claimant wrote that she did not believe that the behaviour was malicious, but that it was tantamount to harassment. She told Mr Reilly that she had spoken to Ms Ball and Ms White about his behaviour.

40.26. Mr Reilly replied by email within 90 minutes [264-265] and expressed his genuine sorrow. He said:

> *"I recognise the behaviour you've described and I am really sorry for the distress I have caused you. It is unacceptable and I am not going to attempt to justify it."…*
>
> *"I need to listen reflect & learn from this – but for now I am just sorry."*

40.27. The claimant spike to Ms White on 14 December 2020 and advised her what had happened.

40.28. Ms White emailed the claimant on 14 December 2020 at 14:41pm [267]. Her email included the following paragraphs:

> *"Quick update from me before you catch up with Tony tomorrow – I let him know today that I raised my concerns about his wellbeing with you and Alison last week. I also explicitly re-iterated that his recent behaviour has been unacceptable and unwelcome. I felt I had to put this in writing to him earlier today, after some more issues over the weekend.*
>
> *He has recognised his behaviour as harassment and apologised quite seriously. I'm confident that will be the end of it now, and grateful for your help navigating this situation!*
>
> *I do worry about his wellbeing while wanting to spare him any professional embarrassment. I trust that you'll be able to focus on the wellbeing side of things when you talk to him."*

40.29. The claimant replied at 15:39pm [267] and advised Ms White of the contents of her email to Mr Reilly of 14 December [264] and his response [264-265]. She indicated that, "I am confident that will be the end of it now, and grateful for your help in navigating the situation!"

40.30. However, Mr Reilly continued to message the claimant by email on 18 December 2020 [265], and 24 December 2020 [265-266] and by WhatsApp [243-249]. In his email, Mr Reilly expressed his regret at his actions and admitted that his "…intense, irrational and inappropriate behaviour…" had been "selfish" and that he "…should have exercised more self-control, restraint and self-awareness."" He volunteered that his behaviour was "…tantamount to harassment."

40.31. The claimant reported Mr Reilly's actions to Ms White on 22 December 2020 [138-139]. Ms White replied the same day [138] but did not commit to doing anything more than calling Mr Reilly every day to see how he was.

40.32. On 24 December 2020, Mr Reilly sent the claimant a picture of himself naked from the waist up [226]. She told Mr Reilly that she did not want to receive any such pictures from him.

40.33. Mr Reilly continued to send WhatsApp messages to the claimant into February 2021 [249] until the claimant blocked him on the platform on 18 February 2021. Mr Reilly used Teams Chat to communicate with the claimant about matters that concerned their personal lives rather than work between January 2021 and 29 April 2021 [535-540]. There was a final Teams Chat message on 3 August 2021 [541].

40.34. No formal action was taken by Ms Ball, Ms White, or anyone at the respondent against Mr Reilly in relation to the allegations made by the claimant between her first reporting the matter in December 2020 and 15 June 2021.

Formal Complaint

40.35. The claimant's evidence (§§ 83 and 84 of her witness statement) was that the catalyst which made her make a formal complaint about Mr Reilly's behaviour was when a friend who worked in the British Embassy in Rabat told her that Mr Reilly had been accused of stalking and harassment when he had been based in Sri Lanka and other places. It was agreed evidence that the claimant raised this with Ms Ball in their catch-up meeting on 15 June 2021. Ms Ball kept a note on the meeting [143] that said, *"Previous issues in Tony's postings…. around sexual harassment."*

40.36. The claimant submitted a formal complaint to Kate Harris, Regional HR Director (MENA) on 23 June 2021 [155-156] which alleged that Mr Reilly had breached the respondent's Code of Conduct and its Bullying and Harassment Policy. She provided a very brief bullet point summary of the matters about which she was complaining.

40.37. Her complaint was of sexual harassment from October/November 2020 to February 2021 that included examples of:

40.37.1. Unwelcome sexual advances;

40.37.2. Physical contact and touching;

40.37.3. Written or verbal comments of a sexual nature;

40.37.4. Sexual remarks or contact on social media;

40.37.5. Intrusive questions about a person's private or sex life, and discussing your own sex life and/or sexual

preferences; and

40.37.6. Criminal behavior, including ~~sexual assault~~, stalking, ~~indecent exposure and offensive communications~~.

40.38. The examples given by the claimant that are reproduced above were taken straight from the respondent's Bullying and Harassment Policy [852]. The claimant had struck through the parts of paragraph 40.36.7 that did not apply to her allegations against Mr Reilly.

40.39. The respondent accepts that the claimant's grievance was a protected act under section 27 of the EqA 2010.

40.40. Kate Harris acknowledged receipt of the claimant's grievance on 24 June 2021 [155]. Her response was brief – *"Thanks for sending this on – I can see how difficult it has been and still is. I will review and get back to you soon."*

40.41. The claimant respondent to Ms Harris on the same day [155] and asked to be given a heads up as to when Mr Reilly was made aware of the compliant.

40.42. Ms Harris wrote to the claimant on 28 June 2021 [154-155] to advise that she had discussed the complaint with Yogita Kaul, the respondent's ER lead for MENA, who was going to find someone to lead the investigation. Ms Harris indicated that the respondent should have someone confirmed by early the following week. The claimant was assured that either Ms Harris or Ms Kaul would let her know when Mr Reilly was made aware of the allegations. The claimant was offered support by Ms Harris and was reminded of the availability of the respondent's Employee Assistance Programme (EAP) service.

40.43. The claimant sent chasing emails to Ms Harris, Ms Kaul and Nita Bewley, HR Director Global Employee Relations [154-156], [161-162], and [144-145].

40.44. The bundle contained internal correspondence between members of the respondent's HR function discussing who may be appointed to lead the investigation [152-153]. Ms Yogita emailed the claimant on 7 July 2021 [161] to advise her that they were still looking for an investigator. The bundle then shows more internal correspondence between the HR function in an attempt to find an investigator.

40.45. The Speak Up Committee was notified of the complaint on 16 July 2021 [171]. The email was addressed to Andrew Williams, the Chair and three others. It noted that, *"From experience we know it is difficult to identify colleagues within GNT who will investigate Country Directors."* However, Christine Wilson had been identified as a potential investigator. She accepted the role on 19 July 2021.

40.46. The claimant was notified of Christine Wilson's appointment as

investigator by email on 23 July 2021 [146-147] and was asked if it would be possible for her to meet Ms Wilson the following week. The clamant and Ms Wilson exchanged emails on 26 July 2021 [174-176].

40.47. The Speak Up Executive Committee met on 27 July 2021 [178-185]. The minutes were redacted, save for the parts that concerned the claimant's grievance. The minutes included the following:

> *"ER08-2021 (Morocco) (Paper SU-2021-13A)*
>
> *2.6. The Head of ER provided a status update on the case and asked the committee for a decision on whether it should be reported as a serious incident to the Charity Commission.*
>
> *2.7. The committee asked the Head of ER to reiterate i) why the individual involved has not been suspended and ii) when they will be informed of the allegations against them. The Head of ER explained that i) the main reason for not suspending is that there is no immediate safeguarding risk and ii) the individual will be informed of the allegations against them a week before the investigator is able to begin work on this. To inform them any sooner would result in a hiatus that would be unfair to them and unhelpful for the investigation…*
>
> *2.9. In the discussion that followed, the committee noted:*
>
> *• that there are historic, anecdotal allegations of a similar nature against this individual in other regions*
>
> *• the benefits of reporting the incident to the Charity Commission at an early stage*
>
> *• that when the FCDO becomes the British Council's principal regulator they will be sighted on this and other serious incidents reported to the Charity Commission.*
>
> *2.10. The committee DECIDED that case ER08-2021 (Morocco) should be reported as a serious incident to the Charity Commission.*
>
> *• Action: Head of ER to send Head of Corporate Affairs a case summary for the purposes of Serious Incident Reporting to the Charity Commission."*

40.48. The initial meeting between the claimant and Ms Wilson took place on 28 July 2021. Ms Wilson kept no notes of the discussion. The claimant prepared a contemporaneous note [882-888] that was not shown to the respondent until the disclosure process in these proceedings. It set out a chronological list of her interactions with Mr Reilly from 22 March 2020 to 2 December 2020.

40.49. Ms Wilson was on leave from 30 July 2021 to 16 August 2021.

40.50. The claimant moved house from Rabat to Marrakech in August 2021.

40.51. On Ms Wilson's return from leave, she sent the claimant an email dated 17 August 2021 [207] with the Terms of Reference (ToR) for the investigation [208-210] signed off by the Stand Up Committee for review and feedback. The purpose of the investigation was stated to be:

> *"To investigate and obtain all relevant facts in relation to concerns raised by [the claimant] in her email dated 23 June 2021 and to provide an objective and independent report on the concerns.*
>
> *The Investigator shall treat the issues, all aspects of the investigation and the report as confidential. All those involved in the investigation and/or attending interviews (including any companions), will be reminded of their obligations of confidentiality.*
>
> *The investigation report will be provided to the Speak Up Committee, who will decide the outcome.*
>
> *The concerns relate to allegations of personally experienced behaviours which are felt to fall within the definition of sexual harassment under British Council policy on Bullying and Harassment. Concerns are also raised that these behaviours may also have been experienced by other female colleagues in country and in countries in which the Country Director had been based previously, for example, Sri Lanka."*

40.52. Ms Wilson notified Mr Reilly that "Bullying and Harassment concerns had been raised by another employee who makes allegations against you." on 18 August 2021 [214-215]. She proposed a meeting on 27 August 2021 and said that Mr Reilly would be provided with details during the meeting. Mr Reilly replied on 20 August to confirm his attendance and that he would be supported by Andrew Spells, Head of Wellbeing for the respondent.

40.53. The claimant was interviewed on Microsoft Teams by Ms Wilson on 26 August 2021. Ms Kaul attended as note-taker. The claimant was supported by Abby Kumar, Deputy Director HR, MENA. Minutes were produced [284-300] that show that the meeting was mainly an opportunity for the claimant to give more details about her allegations.

40.54. Ms Wilson notes in her paragraph 22 of her evidence that the claimant produced several sets of documents to a SharePoint file in support of her allegations:

40.54.1. WhatsApp exchanges between the claimant and Mr Reilly between 13 November 2020 and 24 December 2020 [218-226] uploaded on 23 August 2021;

40.54.2. WhatsApp exchanges between the claimant and Mr Reilly between 9 November 2020 and 12 February 2021 [230-258] uploaded on 24 August 2021;

40.54.3. WhatsApp exchanges between the claimant and Mr Reilly between 9 November 2020 and 14 November 2020; email exchanges between the claimant and Mr Reilly between 14 December 2020 and 24 December 2020; and email exchanges between the claimant and Ms White between 9 December 2020 and 22 December 2020 [259-273] uploaded on 25 August 2021;

40.54.4. A summary account of events on 17-18 November 2020 with supporting WhatsApp exchanges between the claimant and Mr Reilly dated between 21 October 2020 and 18 November 2020; and summary account of events over the 2020 Christmas period; and WhatsApp exchanges between the claimant and Mr Reilly between 20 December 2020 and 29 December 2020 [490-513]; and

40.54.5. Extracts of the claimant's MS Teams chat between her and Mr Reilly between January and August 2021 with commentary; and emails from Mr Reilly to the claimant dated 28 and 29 April 2021 [535-544] uploaded on 15 September 2021.

40.55. Ms Wilson interviewed Mr Reilly on MS Teams on 27 August 2021. An aide memoire was taken of the meeting and agreed by Mr Reilly [452-470]. Ms Kaul was the note taker. Mr Spells attended to support Mr Reilly. The meeting started by giving Mr Reilly the opportunity of describing his relationship with the clamant and then went on to discuss some of the specific allegations.

40.56. Following the meeting, Ms Kaul uploaded all the evidence the claimant had submitted (except the claimant's email exchange with Ms White) to a secure SharePoint for Mr Reilly to access. The claimant was told this had been done on 27 August 2021 [305]. On 27 August, the claimant asked Ms Kaul if any evidence produced by Mr Reilly would be shared with her. Ms Kaul's response was that any evidence which contradicted the claimant's account would be shared but evidence that clarified or verified the allegations may not [304-305].

40.57. On 1 September 2021, Mr Reilly submitted an email [429-430] with a Word attachment [431-448] that consisted of transcripts of WhatsApp messages between him and the claimant for the period 1 November 2020 to 20 January 2021. He did not submit screenshots of the WhatsApp messages or copies of any photographs (the images were blurred out).

40.58. On 1 September 2021, Ms Wilson interviewed Alison Ball as part of the grievance process. An aide memoire was kept of the meeting [306-

312]. On the same date, Ms Wilson wrote to the claimant [428] to advise her that the investigation was ongoing and ask her if her contact who had mentioned Mr Reilly's alleged conduct in Sri Lanka would be prepared to come forward, even if it was off the record.

40.59. The claimant was interviewed by Ms Wilson again on MS Teams on 8 September 2021. Meeting Notes were prepared [473-481]. Ms Wilson outlined some of the things that Mr Reilly had provided in his response, which Ms Wilson described as "intimate." Ms Wilson mentioned the claimant's return trip from the spa on 1 December 2020 and the messages and photos she had sent Mr Reilly. She also mentioned the messages the claimant had sent on 26 and 29 December 2020.

40.60. The meeting concluded with Ms Wilson indicating that she hoped to conclude her interviews that week.

40.61. Ms Wilson interviewed Elizabeth White on 9 September 2020 [482-487]. On 14 September 2020, Ms Kaul interviewed the claimant's contact who had spoken about Mr Reilly's alleged conduct in Sri Lanka, but they had no direct experience of the matters alleged and would not pass on the details of those who did. It is regrettable that no notes of the conversation were kept. Ms Wilson interviewed Martin Fryer, Deputy Regional Director, on 15 September 2020 [553-557].

40.62. The claimant chased updates on the process and report between 17 September 2021 and 3 November 2021 [313-317]. Ms Kaul responded.

40.63. Ms Wilson attended the Speak Up Committee on 6 October 2021, which only dealt with the claimant's grievance [562-563]. The chair of the meeting, Andrew Williams stated that the purpose of the meeting was for the SUC – in its capacity as Case Assessment Panel - to review the initial findings of Ms Wilson's investigation. Ms Wilson summarised the case and explained the approach used to conduct the investigation. She discussed her initial findings and the evidence upon which her findings were based.

40.64. The minute [563] records that the following points were discussed:

40.64.1. A clarification of the timelines of events, *"particularly for the behaviour considered to show potential stalking."*

40.64.2. The evidence for the behaviour considered to be stalking;

40.64.3. The importance of following every avenue to establish whether Mr Reilly had engaged in conduct similar to that with which he was now accused, including interviewing him; and

40.64.4. An explanation of the apparent discrepancy between the findings of not enough evidence to substantiate the allegation of written/verbal comments of a sexual nature

with the investigator's account of intensely intimate messages.

40.65. Ms Wilson was tasked to interview Mr Reilly about the historical matters and finalise the investigation report and submit it to the SUC by 15 October 2021. The SUC would convene after the receipt of Ms Wilson's investigation report.

40.66. Ms Wilson interviewed Mr Reilly on 15 October 2021 by MS Teams. Ms Kaul took notes and Mr Reilly was again supported by Andrew Spells. The minutes of the meeting [570-572] were agreed by Mr Reilly by email on 15 October 2021 [568], save for the typos in the notes and a point of clarification that he wished to stress; that there were four or five weeks of *"intense back & forth, turmoil and mixed messages between [the claimant] and I…This began when the [the claimant] declared an attraction/affection for me that was not evident up until then."*

40.67. Ms Wilson asked a single question of Mr Reilly about the Sri Lanka allegations: *"[Are you] aware or has there ever been alleged either under Bullying & Harassment, harassment or Sexual harassment during [your] British Council career (sic)?"*

40.68. Mr Reilly's answer [571] was:

> *"There has never been any complaint of sexual harassment. There was an anonymous note to either the CEO's office or a senior officer, which was a long litany of compliant, which fitted roughly under the Harassment umbrella (of British Council policies). This complaint it was investigated into as per British Council policies and the claims were not upheld."*

40.69. The grievance report was completed on 22 October 2021 [577-591]. It set out the timeline of the interviews undertaken. It listed the documents that were appended [579] as follows:

> *"WhatsApp messages:* **[the claimant]** *and TR shared WhatsApp messages from 1st November 2020 until 19th February 2021. Approximately 250 + WhatsApp messages reviewed.*
>
> *Emails: There were emails shared by* **[the claimant]** *as evidence.*
>
> *Pictures of gifts and cards were also shared by* **[the claimant]**.
>
> *Written statements/clarification: In addition, both* **[the claimant]** *and TR shared written responses providing clarification to some of the messages after their interviews.*
>
> *MS Teams Messages:* **[the claimant]** *also shared MS Teams messages as evidence."*

40.70. The report then addressed the specific allegations, including details of the interviews and evidence and Ms Wilson's reasoning and her conclusion as to the "potential" finding.

Unwanted sexual advances

40.71. Ms Wilson stated *"Apart from the two incidents of unwanted physical touching detailed below, there is no evidence of unwanted sexual advances."* Ms Wilson found that she did not *"…find that there is evidence for this allegation to be upheld."*

Physical contact and touching

40.72. Ms Wilson found [581], *"I believe that there is evidence to uphold this allegation."*

Written or verbal comments of a sexual nature

40.73. Ms Wilson's finding [581] was:

> *"The evidence suggests that while* **[KJ]** *had attempted to realign their relationship with Tony away from the intense and intimate – she says this happened in November – both she and Tony were still messaging in an intimate fashion into December. This included sharing of messages and photos – intimate and perhaps suggestive, rather than sexually explicit, from what I understand – and messages, also intimate.*
>
> *After* **[KJ]** *initiated the conversation with Alison Ball and then Elizabeth White, which led to her email to Tony and his apology, while messaging continued between them – generally initiated by Tony – there is no evidence of written comments of a sexual nature."*
>
> *As both parties were involved in these messages until* **[KJ]** *took clear action to bring this phase of the relationship to an end,* ***I do not recommend upholding this allegation****."*

Sexual remarks or contact on social media

40.74. Ms Wilson found that no evidence was put forward to support this allegation.

Intrusive questions about a person's private or sex life, and discussing your own sex life and/or sexual preferences

40.75. Ms Wilson only found one reference in the documents to events that could be interpreted under this heading: a dinner that the claimant and Mr Reilly shared on 4 December 2020 [581]. She noted that both had been drinking on the night in question. Ms Wilson's finding was:

"[The claimant] also stated in the interview that Tony had talked about his sex life that night. In a WhatsApp message he indicates he may have "overshared."

The following evening Tony sent [the claimant] a couple of WhatsApp messages that are much more intimate and of a sexual nature (outlined in the allegation above regarding unwanted touching: "me trying to resist finding some soft skin to touch with my wandering hands. You okay? Xx" and "There was just a kiss scene in Wanderlust....teenage son learning to how to kiss softly... made me think <a kiss icon>."

This is the only concrete reference in the evidence and interviews in terms of Tony discussing his sex life. Both parties had been at dinner together and had been drinking.

There was no evidence presented that he asked **[KJ]** *about her sex life. Both parties appear to have discussed their relationships and private lives on a few occasions during this period.* ***I do not believe there is evidence here to uphold this allegation****."*

Stalking

40.76. Ms Wilson's findings [582-583] were as follows:

"In two interviews and in her evidence, [the claimant] has outlined a number of incidents she describes as related to the behaviours above, namely:

o 13th November where Tony says in a WhatsApp message that he drove to her house and "hovered outside" but "felt like a stalker."

o 18th November where had expressed anger (over WhatsApp) that she had not chosen to spend time with him on a day off. She went to his house to check he was OK as he had not replied to a message she sent, but then decided not to go in. He later drove to her home, sat in his car and phoned three times ([the claimant] did not answer) and then Tony left her some Strepsils inside her front gate.

o 20th November driving past a bar where he thought she'd be but didn't see her bike there so he didn't go in.

o 2nd December where he went to her house, knowing she would not be there (although thinking her maid might be), and went on to the property without permission by climbing over the gate, entered the garage and left flowers by the door. In her interview [the claimant] stated that this "terrified" her. I

would note that in a message to Tony on 9 January 2021 that he never made her feel unsafe.

o 9th December where he went to a bar knowing she would be (Tony mentions this in a WhatsApp message).

• There were also two messages from Tony to [the claimant] that suggested that he wanted to follow her and to be where she was – once to go where he knew she was going with friends (he said he would set his alarm early so he could go there) and once when he said he knew she would be doing yoga in the park so he would go to watch from a safe distance but thought [the claimant] might think it weird.

o "I thought about walking down to the forest and sitting at a safe distance just to see you. Didn't partly because I thought you'd think it was a bit weird, intense, obsessive…"

• Tony acknowledges there were occasions where he wanted to see her. He explained one of the incidents that [the claimant] mentioned – when she was out shopping and Tony suddenly appeared there – by saying she messaged him saying she was shopping, and where she was, and because he was nearby and wanted to see her he went to the supermarket where she was. Referring to the agreed notes from our first interview, Tony said he did not think it was fair to characterise this is stalking, but agreed that he was "lonely" and there were times when "he wanted to see her just simply to see and talk to her, nothing more intense than that."

• Rabat is a small city and it seems from conversations with both parties that the likelihood of bumping into acquaintances while shopping or socialising is high.

• In her email to Tony of 14th December, [the claimant] alludes to the behaviour above, stating that his behaviour made her very uncomfortable, that he has "breached or attempted to breach her personal space, physically and emotionally, and her own home, that he has followed her to tried to find her". She states it is tantamount to harassment.

• His reply includes the following: "I am genuinely sorry…I recognize the behavior [sic] you've described and I am really sorry for the distress I have caused you. It is unacceptable and I am not going to attempt to justify it…I have developed strong feelings for you. However, I haven't managed or controlled them appropriately. Feelings are not an excuse for harassing someone or causing them distress." In a subsequent email on 18th December he adds "nothing you think you may have done or said or intimated justifies my

obsessive behaviour/response/reaction. I can see now that this has been tantamount to harassment" and he refers to his behaviour as "intense, irrational and inappropriate".

• According to the Suzy Lamplugh Trust, which runs the England and Wales National Stalking Hotline, there is no legal definition of stalking, but behaviours that could lead to a conviction for stalking (under Section 2A of the amended Protection from Harassment Act) would include "following, contacting/attempting to contact, publishing statements or material about the victim, monitoring the victim (including online), loitering in a public or private place, interfering with property, watching or spying".

• I think that given Tony has admitted this behaviour, there is evidence he did loiter outside her home on at least two occasions while trying to contact her, and did go to public places to try to see her, and given that he recognises the distress this behaviour caused, ***there is evidence to uphold this allegation.***

Similar behaviour elsewhere

40.77. Ms Wilson found that there, "…**was no evidence to suggest that Mr Reilly had partaken in similar behaviour elsewhere**."

Observations

40.78. Ms Wilson set out a list of twenty observations [585-587] that do not appear to have been contextualized or refer back to her findings. We note that in the third observation, Ms Wilson stated (§ 3 [585]:

"Although both parties participated in the conversations at their height, and both parties shared intimate messages and images, TR's behaviour shows signs of obsessiveness. He recognised this in the apology emails he sent in December. He also recognised it in a card he sent her following an incident on 18th November. Multiple messages would be sent in a short space of time. The content would be highly emotional and intense. I believe [the claimant's] account that this was emotionally draining for her at a time when she was already under stress due to family issues."

Conclusion

40.79. Ms Wilson suggested that there were two options for the SUC to consider:

<u>Option 1</u>

That given that both Tony and [the claimant] note that there was an intimate and confusing period of around six weeks during which their professional relationship – which to that point had been positive – intensified; that there is evidence that while [the claimant] did try to alter the terms of this friendship (given her discomfort at some of Tony's behaviour, and at her own) intimate and flirtatious messaging continued; and what could be construed as mixed messages (particularly by someone also in an emotionally vulnerable state such as Tony,) and that [the claimant] too acknowledges, took place during the period from 31 October to 14 December – the date [the claimant] wrote to Tony to outline why she felt his behaviour to be inappropriate – only actions after 14 December should be considered in scope of the grievance.

This would mean that the allegations above, particularly the two where I have suggested there is evidence to uphold, would need to be discounted. However, I think some of Tony's subsequent behaviour would still fall under the rubric of the harassment policy, insofar as "**unwanted conduct** [my emphasis] which is intended to or has the effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual."

Evidence:

• The fact that Tony continued to engage in messaging **[KJ]** outside of work – even if she also messaged him – was inappropriate.

• The fact that he sent her a lavish Christmas gift (received in January) with a message "Shuuush!! (say nothing, just enjoy) x" was highly inappropriate and I believe [the claimant] when she said it made her feel "sick" and that the message implied that she was "being coy or pretending that I didn't want it and I did".

• Also inappropriate and evidence of harassment are the lengthy and intensely emotional messages sent in January and February via WhatsApp, outside of work hours and often late at night. In these, Tony clearly accepts that he behaved "inappropriately, irrationally, unacceptably". They read as an attempt to make **[KJ]** feel responsible for Tony's emotional welfare. His line manager had already warned him about this behaviour.

Option 2

> That while both parties were participating in mutual flirtation, mainly conducted over WhatsApp, and while Tony was not [the claimant's] line manager, he had a duty of care as country director that should have overridden his feelings towards her, despite any actions he interpreted as her welcoming the behaviour. He was aware that she was emotionally vulnerable, given her family situation, and that she was concerned by some of his (and her own) behaviour and was keen to distance herself.
>
> While the first option seems to be the clearer cut, it is at odds with the multiple acknowledgments made by Tony of his behaviour, however much he has sought to downplay it since. He acknowledges in his apology emails in December 2020 that his behaviour was inappropriate, using words such as "obsessive", "tantamount to harassment" and "intense, irrational and inappropriate". A WhatsApp conversation in February continues:
>
> Claimant: "The difference is I asked you to stop…"
>
> TR: "Agree I should have stopped & didn't."
>
> Whatever role [the claimant] played in encouraging this behaviour, whatever her feelings were or mixed messages she gave, I agree with his own interpretation of it as obsessive and inappropriate and tantamount to harassment. It comes into conflict with both British Council policy on harassment and British Council Code of Conduct Principle 14 (Personal Relationships– Professionalism).

40.80. The investigation report was submitted to the SUC on 26 October 2021 [592]. There was a special SUC meeting on 3 November 2021 to hear Ms Wilson's presentation of her findings and discuss the two options she had set out in her report. The minutes record that the meeting lasted 30 minutes [593-595]. The discussion centred on three matters:

40.80.1. The extent to which culpability or responsibility, if any, may lie with the individual making the allegation.

40.80.2. Clarification of which of the alleged behaviours took place before 14 December 2020 and which took place afterwards.

40.80.3. Additional explanation of the evidence for some of the alleged behaviours, in particular inappropriate touching, and stalking.

40.81. The SUC included a summary of its deliberations in its minute of the meeting [595]:

"4.1. The committee considered:

a) that the two individuals involved are peers in terms of seniority, and that neither should be assumed to have duty of care for the other

b) the difficulty of establishing, based on the evidence, whether the behaviour alleged to have taken place before 14 December 2020 was inappropriate

c) that, due to their own separate personal circumstances, both individuals were in a state of vulnerability, albeit to different degrees

d) that based on the evidence, and without professional advice, the committee is unable to determine whether the individual making the allegation was taken advantage of as a vulnerable adult

e) that the action taken on 14 December 2020 by the individual making the allegation provided an unequivocal message directly to the other individual involved that the alleged behaviour was unwelcome and inappropriate

f) the nature of the behaviours alleged to have taken place after 14 December 2020 (sic).

4.2. Based on these considerations the committee CONCLUDED that the behaviours alleged to have taken place after 14 December 2020 constitute a breach of the Bullying and Harassment policy and that therefore there is a case to answer.

4.3. The committee AGREED that the case should be taken forward as set out in the British Council's Disciplinary Policy and Procedure.

 Action: Head of ER to draft a summary of the evidence supporting the committee's conclusion, in the Chair's name, to the individual making the allegation.

 Action: Head of ER to inform Regional Director MENA and Director Global Network of the committee's conclusion."

40.82. On 15 November 2021, Mr Williams, as Chair of the SUC sent the Committee's Outcome document [604-611] to Mr Reilly at 11:45am [612] and the claimant at 12:45pm [618-619]. The email to Mr Reilly indicated that his line manager, Ms White would contact him regarding the outcome.

40.83. The Outcome document decided the timescale of the matter into four phases:

40.83.1. Phase I – between Summer 2019 and March 2020 – in which the relationship between Mr Reilly and the claimant was described as *"professional"*.

40.83.2. Phase II – between March 2020 and October 2020 – in which the relationship between Mr Reilly and the claimant was described as *"…closer in a friendly way as friendly colleagues…[they] started checking in on each other."*

40.83.3. Phase III – between end of October 2020 and December 2020 – which characterised the relationship during the period as:

> *"…intimate, however only through messaging, specifically WhatsApp messages. Both parties confirm sending the messages. Tony describes this phase as a period of intense turmoil of back and forth; [the claimant] has confirmed she flirted back initially until early November.*
>
> *Messages submitted as evidence by both parties confirm the tone of messages was more than friendly, and some messages from both parties can be described as intimate."*

40.83.4. Phase IV – from December 2020 until the claimant's email on 14 December 2020 – which summarised the events in the time period as follows:

> *"[The claimant] contacted her Line Manager Alison Ball on 6th December 2020 and shared her concerns about Tony's excessive messaging to her. At this point, [the claimant] did not file a formal complaint and wanted an informal resolution as she was empathetic about Tony's wellbeing. It was agreed that [the claimant] discusses her concerns with Elizabeth White, Tony's line manager. Both Elizabeth White and Alison Ball, in their respective interviews, confirmed that* **[KJ]** *did not want to escalate this to a formal complaint at this point. Alison and Elizabeth were not privy to the actual messages exchanged between Tony and [the claimant].*
>
> *After a discussion with Elizabeth,* **[KJ]** *sent an email to Tony Reilly, clearly setting out how she felt. The email specifically describes Tony's behaviour over the few weeks before the email being, at times, totally unacceptable and making* **[KJ]** *feel very uncomfortable and that his behaviour was tantamount to harassment.*

Tony continued to message [the claimant] after this email, the initial few emails apologising for his behaviour. There is evidence of continued messaging from Tony; some messages were reciprocated by [the claimant] between Christmas and New Years' time. In February 2021, [the claimant] blocked Tony on WhatsApp, and Tony also blocked [the claimant] on WhatsApp. Tony continued to send personal messages to [the claimant], a few over email and some using the MS.

Teams messaging. The content of these messages is not particularly sexual in nature; however, they are not work-related."

40.84. The SUC concluded that the allegations of harassment were upheld but the allegations of sexual harassment were not. In respect of the allegations made by the claimant, the SUC made the following findings.

Unwanted sexual advances

40.85. The SUC found that *There are two incidents of unwanted physical touching reported to have happened on 8th and 14th November; apart from these incidents, there is no evidence of unwanted sexual advances."*

Written or verbal comments of a sexual nature

40.86. The SUC found:

"The evidence suggests that while **[KJ]** *had attempted to realign their relationship with Tony away from the intense and intimate – she says this happened in November – both she and Tony were still messaging in an intimate fashion into December. This included both parties sharing messages and photos – intimate and perhaps suggestive, rather than sexually explicit, and the messages are also intimate."*

Sexual remarks or contact on social media

40.87. The SUC found that no evidence was put forward to support this allegation.

Intrusive questions about a person's private or sex life, and discussing your own sex life and/or sexual preferences

40.88. The SUC found:

"In the second interview, [the claimant] recounts that she and Tony went for dinner on 4th December. WhatsApp messages from the time are friendly and outline their plans. Tony's messages incline towards the more flirtatious and he does

mention talking about his wife at this stage, but the messages indicate they enjoyed an evening out as friends. Messages the next morning indicate the same. They both indicate they had been drinking (both refer to being mildly hungover in their messages the next day). **[KJ]** *says she doesn't remember the end of the night; she said something similar in her second interview. She also stated in the interview that Tony had talked about his sex life that night. In a WhatsApp message, he indicates he may have "overshared". This is the only concrete reference in the evidence and interviews in terms of Tony discussing his sex life. Both parties had been at dinner together and had been drinking. There was no evidence presented that he asked* **[KJ]** *about her sex life. The messages indicate the evening ended on a friendly note. Both parties appear to have discussed their relationships and private lives on a few occasions during this period.".*

40.89. The SUC made no mention of Ms Wilson's finding that, *"…the following evening Tony sent [the claimant] a couple of WhatsApp messages that are much more intimate and of a sexual nature (outlined in the allegation above regarding unwanted touching: "me trying to resist finding some soft skin to touch with my wandering hands. You okay? Xx" and "There was just a kiss scene in Wanderlust....teenage son learning to how to kiss softly... made me think <a kiss icon>."*

Stalking

40.90. The SUC found that "The incident of stalking outlined during the interview happened on 13th November, 18th November, 20th November, and 2nd December. It made the following findings:

"13th November where Tony says in a WhatsApp message that he drove to her house and "hovered outside" but "felt like a stalker"

18th November where he expressed anger (over WhatsApp) that she had not chosen to spend time with him on a day off. She went to his house to check he was OK as he had not replied to a message she sent but then decided not to go in. He later drove to her home, sat in his car and phoned three times ([the claimant] did not answer), and then Tony left her some Strepsils inside her front gate.

20th November, driving past a bar where he thought she'd be but didn't see her bike there, so he didn't go in.

2nd December, where he went to her house, knowing she would not be there (although thinking her maid might be), and went on to the property to leave [the claimant], who was returning from her trip to Marrakech, a bunch of flowers.

Tony went without permission by climbing over the gate, entered the garage and left flowers by the door. In her interview, **[KJ]** *stated that this "terrified" her. In a message to Tony on 9 January 2021, it is noted that he never made her feel unsafe. A part of message sent right after the incident of 2nd December, which was submitted as evidence, suggest* **[KJ's]** *reaction immediately after receiving the flowers as "Aw They're lovely. Just when you thought you'd have your fair share of…. <rest of message not available>"*

9th December [the Tribunal believes this is a reference to 11 December 2020] *where he went to a bar knowing she would be (Tony mentions this in a WhatsApp message).*

Tony acknowledges there were occasions where he wanted to see her. He explained one of the incidents that [the claimant] mentioned – when she was out shopping and Tony suddenly appeared there – by saying she messaged him saying she was shopping, and where she was, and because he was nearby and wanted to see her he went to the supermarket where she was. Referring to the agreed notes from our first interview, Tony said he did not think it was fair to characterise this is stalking, but agreed that he was "lonely" and there were times when "he wanted to see her just simply to see and talk to her, nothing more intense than that".

Rabat is a small city and it seems from conversations with both parties that the likelihood of bumping into acquaintances while shopping or socialising is high.

In her email to Tony of 14th December, [the claimant] alludes to the behaviour above, stating that his behaviour made her very uncomfortable, that he has "breached or attempted to breach her personal space, physically and emotionally, and her own home, that he has followed her to tried to find her". She states it is tantamount to harassment.

His reply includes the following: "I am genuinely sorry…I recognise the behavior [sic] you've described and I am really sorry for the distress I have caused you. It is unacceptable and I am not going to attempt to justify it…I have developed strong feelings for you. However, I haven't managed or controlled them appropriately. Feelings are not an excuse for harassing someone or causing them distress." In a subsequent email on 18th December he adds "nothing you think you may have done or said or intimated justifies my obsessive behaviour/response/reaction. I can see now that this has been tantamount to harassment" and he refers to his behaviour as "intense, irrational and inappropriate".

Similar behaviour elsewhere

40.91. The SUC concluded that the investigation brought forward no evidence that Mr Reilly had acted similarly elsewhere.

Physical contact and touching

40.92. The SUC made no findings on the allegations of physical contact and touching despite Ms Wilson finding [581], *"I believe that there is evidence to uphold this allegation."*

Concluding remarks

40.93. The SUC made the following remarks in conclusion:

> "Both parties have admitted that they were either exploring a romantic relationship or were being flirtatious with the other. [The claimant] has indicated that she was flirting back with Tony until early November, and Tony was also exploring the boundaries of their relationship.
>
> It was through the email on December 14th to Tony when [the claimant] very clear set out her feelings. The informal efforts through Alison Ball and Elizabeth White were focused on Tony's mental wellbeing rather than any allegations of harassment.
>
> However, Tony continued to message [the claimant] after this email, initially to apologise and later continued to message about the relationship or change in their relationship. Messages sent by Tony over MS Team in January, March, April, can be described as more than friendly. One message talked about his loneliness, another mentioned "not being able to understand the dramatic shift in their 'relationship' – these messages do not fall into the professional realm. [The claimant] has replied to some messages, her messages after January are professional or courteous."

40.94. The SUC's recommendation was that *"In this context the allegations of harassment are upheld."* [611]

40.95. On 17 November 2021, the claimant raised concerns about the outcome with Mr Williams [617-618]. She spoke to Ms Bewley of the respondent's HR department on 22 November 2021.

40.96. The claimant resigned by an email to Ms Ball on 22 November 2021 [656]. She gave three months' notice to expire on 22 March 2022. Her evidence in chief (para 141) was that receipt of the grievance outcome was the final straw that led to her resignation.

40.97. On 23 November 2021, the claimant appealed the outcome of the grievance [616-617]. The claimant's grounds for appeal were briefly

expressed: she disagreed with the conclusions reached on the allegations of stalking and unwanted sexual advances. She also commented on the disciplinary process that was underway against Mr Reilly: she objected to the identity of the person chosen to hear the disciplinary case, Elizabeth White. Ms White was replaced as disciplinary hearing manager on 25 November 2021 [615-616].

40.98. On 26 November 2021, Mr Reilly raised his own concerns about the outcome of the claimant's grievance [636-637]. This developed into a grievance of his own that was formally submitted by Mr Reilly on 8 December 2021. The disciplinary process against Mr Reilly was halted pending the determination of the claimant's grievance appeal. She was notified of this on 1 December 2021 [614-615].

40.99. Christopher Rawlings, who was Regional Director (MENA) for the respondent and was based in Dubai was asked to be the final decision maker in the claimant's grievance (i.e., the appeals officer) and was also asked to investigate Mr Reilly's grievance. The evidence of Mr Williams (paragraph 40) was that the claimant had not submitted a formal appeal and that Mr Rawlings was instructed to review the claimant's concerns.

40.100. Mr Rawlings's unchallenged evidence was that he was briefed on the claimant's appeal by Nita Bewley (HR Director, Global Employee Relations), Yogita Kaul and Kate Harris on 14 December 2021 and was asked to:

40.100.1. Revisit the initial SUC outcome provided to the parties on 15 November 2021;

40.100.2. Review and investigate the concerns raised by the claimant following her receipt of the SUC outcome; and

40.100.3. Review and investigate the concerns raised by Mr Reilly following his receipt of the initial SUC outcome into the claimant's grievance.

40.101. Mr Rawling's evidence in chief was that it was clear that he wasn't being asked to reopen the initial investigation by Christine Wilson. It was agreed that Mr Rawlings was on leave from 19 December 2021 to 4 January 2022.

40.102. Mr Rawlings reviewed the documents from the claimant's interviewed Ms Wilson on 17 January 2022 [680-681]. He presented an interim report to the SUC on 29 January 2022 [682-684]. In his report, he concluded that the line of evidence showed harassment had occurred, "…from early-mid November." In his report, he found that the harassing behaviors had begun on 9 November 2021. (paragraph 28 of his witness statement). He also noted the Mr Reilly had a duty of care towards the claimant and had acknowledged that his behaviour was inappropriate on several occasions. Mr Rawlings

also expressed concerns about the process, which he felt lacked clarity at times.

40.103. Mr Rawlings interviewed Mr Reilly via Teams on 25 January 2022 [735-740]. Mr Reilly shared his comments on the SUC's findings after the meeting [636-649]. As a result, Mr Rawlings asked Kate Harris to send him more documents, which she did [650-654, 669-671, and 693-694]. Mr Rawlings met Andrew Spells at the request of Mr Reilly on 28 January 2023 [704-706].

40.104. On 28 January 2022, Mr Rawlings also met the claimant on Teams [752-757]. After the meeting, the claimant shared WhatsApp messages she had received from three female colleagues who worked at the British Embassy at Rabat [707-714] concerning the incident on 11 December 2020 when Mr Reilly had turned up at a bar where the claimant was enjoying drinks with her friends.

40.105. On 4 February 2022, Ms Harris emailed Mr Reilly [762] to request a further meeting to discuss the incident on 11 December 2021 referenced in the WhatsApp messages and to discuss the photographs that Mr Reilly said the claimant had sent him.

40.106. The claimant's last day at work was 4 February 2022.

40.107. Mr Reilly emailed Mr Rawlings on 6 February 2002. He wrote that he had been reluctant to disclose some of the more intimate exchanges between himself and the claimant, "…during the 4-5 week period under examination…" and described images sent by the claimant to him on nine dates between 3 November 2021 and 5 December 2021 [763-765]. His argument was that the claimant sent him explicit photographs, gifts and cards and sent him sexualized messages.

40.108. Mr Rawlings interviewed the claimant's three friends about the 11 December 2021 incident on 8 February 2022 [790-792, 776-777, and 780-781], and concluded that Mr Reilly's presence had made the claimant uncomfortable.

40.109. A meeting on Teams took place on 9 February between Mr Rawlings and Mr Reilly [786-789]. Mr Reilly said that the event on 11 December was open. He had apologised to the claimant later that night. After the meeting, Mr Reilly produced transcripts of WhatsApp messages [782] and screenshots when asked for them [784]. Mr Reilly's covering email stated "It's the mixed messages theme illustrated again here. I don't think I am imagining this." [783].

40.110. The claimant's employment ended on 22 February 2022 (the effective date of termination).

40.111. Mr Rawlings produced a report titled "Outcome of investigation into TR's Grievance dated 8 December 2021" on 3 March 2022 [818-827]. It was sent to the SUC on 3 March 2022.

40.112. It was sent to Mr Reilly on 4 March 2022 [816] with a covering letter dated 3 March 2022 [817].

40.113. Mr Rawling's report noted that Mr Reilly had raised four concerns:

40.113.1. "The delay between the period when the alleged behaviours under investigation took place (Nov-mid Dec 2020) and when the concern was raised (23 June) and I was informed (18 August). This is in breach of our Grievance policy."

40.113.2. "The unconscionable delay in the whole process and its impact on my wellbeing. This has been and remains insensitive and unacceptable."

40.113.3. "The inclusion of defamatory and unsubstantiated allegations within the findings report shared with the Speak Up Committee."

40.113.4. "A findings report that I believe misrepresents evidence provided during the investigation in favour of the complainant, and as a result, has led to an unfair outcome, as well as causing personal reputational damage."

40.114. Mr Rawlings' findings were as follows:

40.114.1. "**Overall**. The context of the overriding allegations behind **[the claimant]**'s grievance is important to my overall findings and in particular the misrepresentation of the evidence. I have therefore set out key points below. In doing so I came against two apparent difficulties. (1) If **[the claimant]** was a victim of harassment/sexual harassment and stalking, why did she share such friendly, occasionally intimate, messages with TR, through November and December? And (2) if TR felt that the relationship was two-way why did he acknowledge and apologise for unwanted behaviour in November and December – but then subsequently state that he refuted the allegations?

40.114.2. I interviewed TR on 25 January 2022 and subsequent to that he shared by e-mail on 6 February 2022, but in confidence, more detail about some of the images and messages which **[the claimant]** shared with him. They are available for the record. The messages as described by TR are intimate and sexually suggestive and span a period between 3 November 2020 and 5 December 2020. He

adds: “I found it unfair and unbalanced that in the findings report it talks about me making intrusive remarks about a person’s sex life, discussing my own sex life etc. This ignores the reality that **[the claimant]** and I were close during this period, and discussed many things, on both sides, that were intimate, and at times, sexually explicit.”

40.114.3. I reiterate paragraphs 29 to 31. The original investigation had explored aspects of this with **[the claimant]** during her follow-up interview on 8 September 2021, asking for her response to why she sent messages around 1 December 2020 that “are very friendly, but were also quite intimate”. **[the claimant]**’s response was that “this part is hard for her to look back on, and that she has been honest throughout the process and already shared that she did flirt back with TR, and deeply regrets a lot of how she handled the situation at that time. **[The claimant]** confirmed that she remembers sending the photo around the 1st of December after the spa day, that is true **[the claimant]** confirmed.

40.114.4. She added she didn’t send anything like that after the email [of 14 December 2020] and before the email on 14th of December around 7th or 8th December, just before **[the claimant]** spoke to her line manager, she had a couple of ‘light bulb moments’ during this whole period, but this one was key, she remembers around 5th December going onto the Intranet and reading the Bullying and Harassment Policy, and it suddenly clicked what was happening. At that point, she stopped sending him any photos of her. **[the claimant]** adds she became a lot clearer on the situation, she regrets it and still feels very ashamed of how she handled herself at some points during this situation.”

40.114.5. Despite her comment, in the same 8 September 2021 interview **[the claimant]** had been asked why friendly messages were exchanged around Christmas time 2020 – that is, after 14 December. “**[The claimant]** said it is hard to understand why she did that – there may be several reasons, it took her a really long time, several months to extract and move away from the situation, to get the perspective she talked about earlier, she was emotionally very confused and very emotionally drained by everything that was going on, was also stuck in Morocco alone over Christmas. It was hard for her. TR is someone who had been supporting her in the past. So, **[the claimant]** did occasionally want to reach out, both for herself and also to check in on TR, because he had told her how he really didn’t want to be alone over Christmas. **[The claimant]** added, she sympathises with that, so she would send a few messages now and again just to see that he was OK,

even though she had already flagged her concern to [his line manager].” “**[The claimant]** added another reason they swapped photos was of where they were in Morocco. Which was somewhat with an ulterior motive, because it helped **[the claimant]** to make sur that she was avoiding whatever city TR was in. Because **[the claimant]** was scared that he was going to turn up wherever she was or they would bump into each other. There was already emotional exhaustion, paranoia, guilt, and shame and lots of reasons why it wasn’t easy to completely stop communicating.”

40.114.6. I have found the mismatch of **[the claimant]**’s feelings and communication behaviour to be perplexing but on conclusion of the review on balance I find her explanations around mental state, avoidance of conflict and the entrapment she felt to be credible. She emerges as someone who at the time was mentally vulnerable and who was emotionally manipulated.

40.114.7. Regarding TR’s concern of the Initial Outcome report missing the reciprocity of feelings, I have established that **[the claimant]** clearly set out that his behaviours were unwanted on 9 November 2020 and onwards.TR acknowledged and apologised for this in November and December. To claim after the event that he did not really mean this does not ring true and, as I have suggested earlier, to my mind suggests an attempt, unintentional or otherwise, to re-write the narrative of his own recollection.

40.114.8. **Informal resolution**. Although **[the claimant]** had sought to resolve the issues informally via TR’s and her own line of management, the British Council’s Bullying and Harassment Policy clearly states that whilst informal resolution is preferred (“all employees are responsible for attempting to resolve matters informally wherever possible”) it is not a pre-requisite. There is further evidence that despite the seriousness of the allegations, in her contact with both her own and TR’s line managers, she was wanting to focus on an informal approach to resolution. In the light of the context as well as both parties’ mental well-being at the time, I find this credible. This concern is not upheld.

40.114.9. **Delay to when the concern was raised**. Whilst it must be preferable to raise concerns as close to the alleged events/behaviours as possible (“all employees are responsible for raising concerns as early as possible”), there are no limitations set out in the British Council’s policy. **[The claimant]**’s explanations for the delay are

compelling, credible and I consider to be reasonable. This concern is not upheld.

40.114.10. **Delays in the process and impact on well-being**. The 2-month period between the concern being raised on 23 June 2021 and TR being informed of the same on 18 August 2021 does seem unnecessarily long. It is not clear to me why this was an issue for TR; he knew when he knew and until that point it would not be a negative. It would therefore seem to be more of an issue for **[the claimant]** than for TR. This concern is not upheld.

40.114.11. The evidence demonstrates a drawn-out process with poor communications and lack of clarity on next steps. (Similar concerns were raised by **[the claimant]**.) I consider that the evidence supports that there was a delay which impacted on him. I am satisfied that whilst the Grievance policy has been followed, this concern is upheld.

40.114.12. **Defamation**. The Terms of Reference for the original investigation included establishing "if there is evidence of similar behaviour, or other inappropriate behaviours, towards other female colleagues…This stemmed from **[the claimant]** reporting that in conversation with a third party she came to believe that there had been an accusation of similar behaviour by TR when he was Country Director Sri Lanka." This was raised as a genuine concern and it was incumbent on the investigation to follow up. After that follow up the investigator noted "I do not believe there is evidence here to uphold this allegation".

40.114.13. The review finds this line of enquiry appropriate; a concern had been raised and it needed to be investigated. It is however unfortunate that TR was not made aware of this allegation. Whilst there is no requirement to share the terms of reference for an investigation, on this occasion at least it would have been good practice.

40.114.14. Furthermore, as the Investigation Report was made available to **[the claimant]**, it is suggested that it should also have been shared with TR. These observations notwithstanding, the concern of defamation is not upheld.

40.114.15. **Misrepresentation of evidence**. There is certainly confused messaging throughout November and December 2020 between **[the claimant]** and TR. Yet the review has established that **[the claimant]** had set, or attempted to set, boundaries to the relationship from 9 November 2020. The findings at paragraph 34 are relevant background to this finding. Paragraph 33 also sets out what appears to be the key: "**[The claimant]** acknowledged there was

inconsistency in her behaviour but from early November she did try and stop the behaviours – he should have listened to her and responded." TR has confidentially shared details of exchanges with **[the claimant]** of an intimate and occasionally sexually suggestive nature. But taken all together with where **[the claimant]** was emotionally, combined with additional witness statements, and focusing on the definition of Harassment as described in the Equality Act 2010 and the British Council's Bullying and Harassment Policy, this concern is not upheld."

40.115. Mr Rawling's grievance review outcome was sent to the claimant on 4 March 2022 by email [803] with a covering letter [804] that summarised the outcome as finding that the alleged behaviours from 9 November 2020 should be considered in scope of the grievance and the behaviours from that date should be considered sexual harassment. The email also contained Mr Rawlings' report dated 3 March 2022 and titled "Outcome of investigation into **[the claimant]**'s concerns dated 23 June 2021" [805-815]. His conclusions [814-815] were:

40.115.1. "**Timeline**. Evidence supports that between 9 November 2020 until early December, **[the claimant]** made efforts to clarify her situation that she was not looking for a romantic relationship and to establish boundaries. By the time of a drinks evening on 9 December 2020, there is evidence that **[the claimant]** was well-established in that view and witnesses confirm the negative impact on her at that event and from at least her birthday beforehand at the end of November 2020.

40.115.2. Although he has said he did not accept the allegations when referring to his response to **[the claimant]**'s 14 December 2020 email, TR's own written answer in that response accepts and apologises and this is reflected in several other exchanges through November. In this light, conduct from 9 November 2020, rather than 14 December 2020, should be considered as breaches of British Council policies and/or harassment.

40.115.3. **Sexual harassment**. The Outcome Report did not uphold allegations of sexual harassment. This review however finds that conduct from 9 November onwards is within scope and conduct identified by the Investigation Report from that earlier date are to be considered as breaches of British Council policies and/or sexual harassment.

40.115.4. **Stalking**. The Outcome Report upheld allegations of harassment but not specific allegations of stalking. The Report includes a range of evidence under stalking but does at one point (among several) appear to dwell on the

size of Rabat and the consequent likelihood of bumping into acquaintances.

40.115.5. The review found the fact that **[the claimant]** and TR shared a relatively small social and/or professional circle to be more pertinent. This aside, the Initial Outcomes report presents a range of evidence and this review's further exploration of **[the claimant]**'s reactions around her birthday celebrations at the end of November 2020 and a drinks evening on 9 December 2020 all point to TR appearing and undertaking actions that caused her extreme discomfort.

40.115.6. The Initial Outcomes report also notes apparently friendly and unthreatened messages from **[the claimant]** to TR after alleged stalking incidents. Whilst confusing these are not considered material to the core allegation of stalking behaviour on TR's side. TR had recognised the distress his behaviour had caused. This review concurs with the Investigation Report that there is evidence to uphold this allegation.

40.115.7. **Mental state**. The Outcome Report observes that from October 2020 there was a period where both parties were flirtatious and potentially exploring a romantic relationship. Whilst the Report also notes that an understanding of both parties' mental state was vital in the context, and despite some mixed messaging, "it is evident that between November 9th until early December, **[the claimant]** made efforts to clarify her situation that she was not looking for a romantic relationship."

40.115.8. In her stated concerns **[the claimant]** felt that the Outcome Report overly focused on TR's mental state whereas TR felt it to be biased in the other direction ("the report didn't mention that his parents had recently died and that he'd ended a 10-year relationship"). The Initial Outcome report does appear to have given due consideration to both parties' mental health and wellbeing issues at the time. However, as cited above, the detail obtained through this review is important to fully appreciate the context. The review has revealed evidence of how **[the claimant]** had a feeling of being trapped and how she did not want to be burdened with TR's issues.

40.115.9. Despite the confused messaging, **[the claimant]** remains true to the boundaries which she initially sets out on 9 November 2020. The background and further evidence set out in paras. 25 to 30 are all relevant here and best summarised by her comment (para. 29) that "*she acknowledged there was inconsistency in her behaviour*

but from early November she did try and stop the behaviours – he should have listened to her and responded." This review finds **[the claimant]**'s feeling of entrapment to be credible, and that in the wider context of her mental state, this explains the confusing messaging.

40.115.10. **Weak communications**. The evidence demonstrates a drawn-out process with poor communications and lack of clarity on next steps. (Similar concerns were raised by TR.)

40.115.11. Whilst I am satisfied that the British Council's Grievance and Bullying and Harassment policies were followed, I consider that the evidence supports that there was a delay which impacted on her."

Mr Reilly Disciplinary

40.116. Mr Reilly attended a disciplinary hearing on 29 March 2022 that was Chaired by Any Mackay, Regional Director EU, who set out his decision in an outcome letter dated 12 May 2022.

40.117. The specific allegations were:

40.117.1. Unwanted conduct by physically touching the claimant on 8 and 14 November 2020;

40.117.2. Unwanted conduct in relation to stalking the claimant on a number of occasions including:

40.117.2.1. 'hovering' around her residence in Rabat on 13 November 2020;

40.117.2.2. Entering her residence property on 2 December 2020 and leaving her flowers; and

40.117.2.3. Attending uninvited a bar that he knew the claimant frequented on 11 December 2020 with the intention of seeing her.

40.117.3. After the claimant had made it clear in a mal dated 14 December 2020 how she received and viewed his conduct prier to the date of the email, he continued to send extensive messages in January, March, April, and a gift including a card with a suggestive and inappropriate message on 21 January 2021.

40.117.4. Mr Mackay said he had considered the investigations by Ms Wilson and Mr Rawlings and the related documents and interview notes.

40.117.5. The first allegation of unwanted touching was not found to be proven as sexual harassment.

40.117.6. The first and second parts of the second allegation were found to be proven. The third allegation was found to be an event to which the Mr Reilly did not need an invitation but his conduct was harassing.

40.117.7. The third allegation was found to be proven.

40.117.8. The penalty imposed was summary dismissal.

40.118. On appeal before Adrian Chadwick, Regional Director South Asia on 28 June 2022, Mr Reilly was reinstated with a final written warning. We do not find that the disciplinary process and appeal outcome have any material effect on our decision in this case as both were determined well after the date that the claimant had left the respondent's employment and no evidence was led by the respondents and no documents were produced to corroborate or substantiate the findings made in the disciplinary and appeal that went contrary to the findings in the claimant's grievance and grievance appeal.

Disputed Matters

41. Mr Frew's submissions were primarily legal and focussed on time points. Mr Milsom's submissions were primarily factual but also dealt with legal points. He did not focus on the time points to the same extent as Mr Frew. Both sets of submissions are to be commended on their thoroughness. We make the following findings of fact.

Unfair dismissal

42. The claimant relies upon the implied term of trust and confidence and the duty to provide a safe and suitable working environment under The Health and Safety at Work Act 1974 in respect of the following matters:

42.1. The harassment from Mr Reilly for which the respondent is vicariously liable;

42.2. The failure to proactively or reactively protect the claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it;

42.3. The delay in investigating and responding to the complaints;

42.4. The inadequate support and communication provided to the Claimant during the investigation; and/or

42.5. The perverse and unreasonable findings of the Panel [the Stand Up Committee].

43. We repeat our findings on the agreed facts section above.

Harassment by Mr Reilly

44. As set out elsewhere in these reasons, the fact that Mr Reilly subjected the claimant to harassment related to sex (section 26(1) of the EqA) or of a sexual nature (section 26(2) of the EqA) is not in dispute. Neither is the fact that the respondent was vicariously liable for his actions. We will deal with the factual allegations here and will return to the time points at the end of our reasons, as we must consider the totality of the case when deciding whether to exercise our discretion to extend time on the just and equitable basis under section 123(1)(b) of the EqA.

45. We find the claimant's account of her distress on the death of her father; the impact on her of having to support her mother; and the additional pressure of the pandemic lockdown to be credible because her evidence in chief and in answer to cross examination questions was logically and internally consistent. The respondent did not challenge the claimant on her account of these matters.

46. Neither did the respondent challenge the claimant's account of her dealings with Mr Reilly and Mr Reilly's conduct that is set out in the claimant's witness statement (§§ 6-45 and 69-81). We find that the matters contained in the claimant's evidence in chief is a credible account of her interactions with Mr Reilly because it was not challenged and was internally consistent. We find that the respondent's position is accurately summarised in Mr Rawlings' report (§§ 40.115.1 - 40.115.11) above.

47. We find that the respondent accepted, because Mr Rawlings' report said as much, that the claimant was subjected to sexual harassment from 8 November 2020 until 29 April 2021 [540]. Mr Rawlings found that the harassment included two sexual assaults and five instances of stalking which met the descriptions found in s. 2A Protection from Harassment Act 1997 as detailed by the Suzy Lamplugh Trust (§ 19 [809]).

48. Mr Reilly's harassing behaviours also encompassed long threads of intense messages at erratic hours and excessive unwanted gifting.

49. Much was made by Mr Reilly in the grievance investigations of what he described as "mixed messages" from the claimant. We find Mr Reilly's position to be unsustainable. As Mr Rawlings correctly noted (§ 14 [808]), conduct does not have to be objected to in order to be unwanted. There are numerous instances of the claimant telling Mr Reilly to stop behaving in the way he did. These were usually followed by an apology but then he would commit a further instance of harassing language or actions.

50. We find that any reasonable investigation into the claimant's grievance should have looked at the holistic pattern of behaviour alleged. We find that the respondent's SUC did not take a holistic view. Instead, it appeared to divide the matters that the claimant complained of into four arbitrary and separate time periods and treat each period as if they were unrelated. We find the SUC's report to be deeply flawed. We will return to this later.

51. We find that Mr Rawlings' review started from the correct place by asking himself what harassment and stalking were and then investigating whether the behaviour alleged met the definition. We find he correctly avoided the trap the SUC had fallen into when it effectively said that the claimant had given a green light to Mr

Reilly's behaviours up to 14 December 2020, when she sent him the email, because she had sent him flirtatious messages.

52. We find that the correct approach was to look at the evidence given by the parties involved. Mr Rawlings' notes (§§ 25-30 [809-810]) show that he took account of the claimant's admissions that there were potentially confusing behaviours and actions from her. However, he also noted that the claimant had alleged that the SUC report overlooked the emotional and professional entrapment she felt was being exerted on her by Mr Reilly. We have already noted that it was agreed that Mr Reilly had a duty of care towards the claimant because of his position as Country Director.

53. The effect on the claimant, who was made to feel extreme discomfort on 11 December 2020, was accepted by Mr Rawlings (§23 [809]). Her discomfort was corroborated by three witnesses She was left to feel "guilt and shame" for her conduct (§ 43 [814]). She lost weight. Her work was affected. She altered her social engagements including her birthday plans (§ 30 [810].

54. We agree with Mr Rawlings' finding that when the claimant reciprocated Mr Reilly's unwanted messages, she felt regret and shame (§ 27 [810]) and that she "felt trapped to show warmth and gratitude" (§30 [811]. Mr Rawlings found that the claimant provided, "…credible evidence that her decision making was influenced by her feeling of entrapment." (§ 36 [812]). We find Mr Rawlings' conclusion that, "…on balance I find her explanations around mental state, avoidance of conflict and the entrapment she felt to be credible. She emerges as someone who at the time was mentally vulnerable and who was emotionally manipulated by TR." (§ 44 [814]) to be accurate.

55. We find that the claimant made it sufficiently clear to Mr Reilly during a meeting on 8 November 2020 that she did not want a physical relationship (§ 31 [811] and § 34 [812]). This meeting was the first incident of sexual assault.

56. We find that Mr Rawlings was correct in his conclusion that the claimant, "…clearly set out that (Mr Reilly's) behaviours were unwanted on 9 November and onwards…TR acknowledged and apologised for this in November and December. To claim after the event that he did not really mean this does not ring true and…suggests an attempt, unintentional or otherwise to rewrite the narrative of his own recollection. (§ 45 [814]).

57. An example of Mr Reilly's propensity to seemingly apologise before doubling down on his harassing behaviour is his note to the claimant of 19 November 2020 [251-3] in which he acknowledged that the claimant had, "…tried to get me to ease off and allow you to have space…" but that he had "…encroached on (her) space." [251] Mr Reilly went on to write that he would keep the claimant, "…locked away in a secret part of my heart." [252]. Mr Reilly did not include this note in the first tranche of documents disclosed to Mr Rawlings.

58. We find that the claimant was subjected to harassment of a sexual nature and harassment related to the protected characteristic of sex by Mr Reilly between October 2020 and 4 August 2021 as we have detailed in these reasons.

Failure to proactively or reactively take steps to protect the claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it;

59. The claimant reported concerns about some of Mr Reilly's behaviours to her line manager, Alison Ball by telephone on 6 December 2020. We find this to be the date because it is noted by Ms Ball in her email to Christine Wilson on 1 September 2021 [133].

60. Neither the clamant nor Ms Ball kept any record of the call. The claimant's evidence (§ 55 of her witness statement) was that the conversation took place on 7 December 2020 (which we find to be inaccurate) and that she told Ms Ball that she was being harassed by Mr Reilly and that she gave Ms Ball examples of his behaviour, including stalking and breach of her property. The claimant says she shared concerns about Mr Reilly's wellbeing and asked for advice and support.

61. Ms Ball's evidence in chief (§§ 6 and 7 of her witness statement) was that the claimant spoke in general terms about Mr Reilly's behaviour and described it as overfriendly and inappropriate. Ms Ball recalls the claimant mentioning that Mr Reilly was sending her texts at strange times and mentioned unwanted visits at some point (although Ms Ball could not say if this was during this call).

62. We understand that hindsight is always perfect, but even on Ms Ball's recollection, we are surprised that she did not keep a note of the conversation contemporaneously or after the conversation has ended.

63. We find the claimant's evidence to be more credible than Ms Ball's on the question of what was discussed in the call because:

    63.1. It was more internally consistent with the factual matrix at the time. The call followed a WhatsApp message from Mr Reilly on 29 November 2020 [250] in which he expressed a wish to touch the claimant; Mr Reilly climbing over the wall of the claimant's home to leave her flowers on 2 December 2020 [218]; a platonic dinner on 4 December 2020 at which Mr Reilly discussed his sex life and told the claimant that he hoped their relationship would become romantic; and Mr Reilly sending the claimant a WhatsApp message on 5 December 20202 [236] in which he wrote, 'Sending a really warm, affectionate hug down the road now….me trying to resist some soft skin to touch with my wandering hands.'

    63.2. Ms Ball made no notes.

    63.3. The claimant's account was more internally consistent and consistent with the documentary evidence.

    63.4. The agreed evidence was that Ms Ball advised the claimant to contact Elizabeth White. We find it unlikely that such advice would be given if Ms Ball's recollection of the concerns was correct.

64. Whilst we find that Ms Ball was generally supportive of the claimant, we find that her reaction to what she was told by the claimant was too passive. It is agreed that the claimant was distressed when she spoke to Ms Ball. Ms Ball's evidence in chief (§ 7) was that she was "led by [the claimant] on the way forward as I always would be when faced with a direct report raising a sensitive personal issue of this nature." We find that the claimant had raised matters of harassment and stalking. She was in a vulnerable emotional state and clearly concerned about Mr Reilly's reaction to her reporting his behaviours. We find that as the claimant's manager, Ms Ball should have been more assertive about which options to take.

65. Even if Ms Ball's recollection of the conversation on 6 December had been correct, she should have immediately taken steps to further investigate the allegations and to limit or stop work contact between Mr Reilly and the claimant, who were still meeting professionally every week. Our view is evidenced by Mr Reilly's subsequent actions. Ms Ball's actions do not accord with the respondent's Code of Conduct, values and behaviours, or its stated commitment to equality, diversity, and inclusion.

66. On 7 December 2020, the claimant emailed Elizabeth White [116] asking to discuss some concerns she had about Mr Reilly. Ms White replied on the same day [116] and proposed a meeting the following day, 8 December 2020.

67. The telephone conversation took place on 8 December. Ms White line managed both Ms Ball and Mr Reilly. In her note of the conversation with the claimant [117-118], Ms Ball's handwritten notes record the phrases:

    67.1. I think it's sexual harassment.

    67.2. Staying some of the things is not appropriate.

    67.3. Struggling.

    67.4. Crying myself to sleep.

    67.5. Excessive gifts.

    67.6. Messaging.

    67.7. Turning up at my house.

    67.8. Exhausting for [the claimant].

68. Ms White did not give evidence in this case, but the documents show that she emailed Ms Ball on 9 December 2020 [136], which we find to be a contemporaneous record of her thoughts. In the email to Ms Ball, Ms White said that she was concerned for both the claimant and Mr Reilly for different reasons, but particularly for the claimant.

69. Ms White told Ms Ball that she had advised the claimant to make a definite change in the way she dealt with Mr Reilly. Ms White told Ms Ball that she would engage with Mr Reilly more and try and draw him out and get him to engage with EAP. Ms White wrote that she thought a word from her would make Mr Reilly think and

see how wrong this is and how dangerous. The email notes that the claimant did not wish Ms White to take the matter any further.

70. Ms White emailed the claimant on 9 December and advised her that she would engage with Mr Reilly more. She advised the claimant to, "…be extremely clear and even forbiddingly professional – not in any way to imply that you do not do this, but sometimes you need to signal these things quite sharply." She added that she thought a word from her would be enough to make Mr Reilly realise quite how unacceptable his behaviours were, "…as well as the risk to him, and make him reconsider his position." We find this wording to be unfortunate. Ms Ball and Ms White had accepted what the claimant had told them. Ms White's reaction was not to insist on action to protect the claimant, but to attempt to convince a harasser to reconsider. Ms White's actions do not accord with the respondent's Code of Conduct, values and behaviours, or its stated commitment to equality, diversity, and inclusion.

71. We accept the evidence of the claimant and Ms Ball and the emails of Ms White that the claimant was keen to avoid a formal process, although, on reflection, we are of the view that the claimant should have received greater encouragement to take formal action. This is particularly so when Ms White used words such as "wrong" and "dangerous" in her email to Ms Ball [136]. We note that both Ms Ball and Ms White expressed some remorse themselves during Ms Wilson's investigation [309, 484 and 487]. This prompted a recommendation from Mr Rawlings: (§ 9 [834] (emphasis added):

> "Neither line managers of the parties appreciated the significance/potential severity of the situation and failed to act decisively in the moment. It is suggested that a more robust response from both LMs might well have avoided or mitigated difficulties and *this will be captured in evaluations".*

72. Ms Ball's oral evidence during cross-examination, over a year after Mr Rawlings had completed his report, was that nothing had been captured in her evaluations. Mr Rawlings agreed that this was a cause for concern.

73. For reasons that were not explained to the Tribunal, Ms White did not speak to Mr Reilly immediately. We can see from the email exchanges between the claimant and Ms White (14 December 2020 [267]) that Ms White intended to speak to Mr Reilly on Tuesday 15 December 2020, having spoken to the claimant on Tuesday 8 December 2020. We find this to be an unreasonable delay given the seriousness of the matter.

74. The seriousness of the delay is put into context by the actions of Mr Reilly in the days following the claimant's conversation with Ms White on 8 December. In view of the claimant's discussions with the respondent's managers the events of Friday 11-Saturday 12 December 2020 merit some elaboration:

    74.1. On 11 December 2020, there was the incident when Mr Reilly turned up when the claimant was enjoying drinks with friends.

74.2. Mr Reilly was aware of the discomfort he had caused. This was reflected in his message at 8:00pm on 11 December: “Sorry. I shouldn’t have come. Just wanted to see you” [238].

74.3. Having apologised, Mr Reilly sent five further messages that same evening [240-241]. At 20:26 he promised “nothing more from me tonight.” At 23:03 he broke that promise: “How I wish I could wrap my arms around you now” [240]. He sent three further messages on 12 December starting at 04:56am [241]. The claimant blocked his number and unblocked it for the purposes of sending him the EAP Counselling details [243].

75. On Monday 14 December 2020, the claimant emailed Mr Reilly using their respective personal email accounts [264]. In her email to Mr Reilly, the claimant described his behaviour “…over the last few weeks…” as being “…tantamount to harassment…” She wrote that, “You’ve breached or attempted to breach my personal space, physically and emotionally, as well as my own home. You’ve followed me to places or tried to find me somewhere even if you’re not sure where I am. And even though you know it drains me you continue to send streams of messages that are often inappropriate.”

76. Mr Reilly responded by email on 14 December and agreed that his behaviour had been tantamount to harassment. He also acknowledged that he had made his “…state of mind dependent on receiving your affection…making you responsible for my wellbeing.” [265].

77. The claimant emailed Ms White on 14 December and wrote that she had to send Mr Reilly the email after, “…some more issues over the weekend.” [267].

78. The claimant’s evidence is that she believes Ms Ball and Ms White should have overridden her wish to keep matters informal. We agree with that assessment. The consequences of the failure of Ms White to escalate the behaviours of Mr Reilly to a formal process (grievance or disciplinary) are seen by his continuing harassment of the claimant.

79. We find that Mr Reilly was aware that Ms Ball and Ms White had been notified of his conduct by 14 December 2020 because his email to the claimant of that date [264] says as much. Despite the clear message from the claimant on 14 December, Mr Reilly continued to send emails [265-266] and WhatsApp Messages [244-249] and [503-513] expressing strong feelings for the claimant.

80. The claimant blocked Mr Reilly on WhatsApp on 19 February 2021 [249]. He moved his medium of communication to MS Teams messages between 22 January 2021 and 4 August 2021 [535-541]. We find some of the messages (for example on 3 August 2021 [541]) to be a continuation of his harassing and stalking behaviours:

> *“Are you in Rabat this week? Seems an age since we were in touch. Not sure what your movements are. Do you fancy catching up – F2F or virtuality? Plenty of work stuff to talk through/share. Be quite nice to see you again too.”*

81. Mr Reilly also continued to hold the claimant responsible for his emotional wellbeing, "…loneliness can be crippling." [537]. He also continued to apologise, citing "Obsessive Love Disorder" in his message of 30 March 2021 [538] but then telling the claimant that he still cared about her.

82. We are mindful of the context of these messages. The claimant moved from Rabat to Marrakech in August 2021 to be as far away from Mr Reilly as possible. We also note that Mr Reilly knew that a formal grievance had been raised about his behaviour on 18 August 2021 [214-215]. We find it highly unlikely that he did not think that it was the claimant who made the complaint. We note that there are no allegations of harassing or stalking behaviour by Mr Reilly after he was notified of the formal grievance, which suggests to the Tribunal that a speedier process is likely to have stopped Mr Reilly's behaviours sooner.

83. We find that the respondent failed to proactively or reactively take steps to protect the claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it.

The delay in investigating and responding to the complaints

84. It was the claimant's evidence (§§ 80-82 of her witness statement) that despite feeling uncomfortable at having to work with Mr Reilly, a combination of her mental health; a reduction in the number of messages from Mr Reilly and a cessation of the excessive gifts and turning up to her house uninvited; and the thought of having to discuss matters with an investigator was more than the claimant could cope with. Her unchallenged evidence was that she wanted to put everything behind her. We find the claimant's evidence to be cogent, internally consistent, and consistent with the circumstances of the case.

85. Similarly, we find the claimant's evidence that she was terrified that if she made a formal complaint, Mr Reilly may act on some of his comments when upset was credible. We find that the fear that the claimant expressed about the impact of a complaint on her career was credible.

86. Two incidents in June 2021 changed the claimant's mind about making a formal complaint:

    86.1. A friend from the British Embassy told the claimant that Mr Reilly had been accused of similar conduct whilst in Sri Lanka. We find that the claimant told Ms Ball about what she had been told in a catch up meting on 15 June 2021 [143]; and

    86.2. On 11 June 2021 Mr Reilly sent a LinkedIn message [894] to a younger female employee, HL. The claimant had told Mr Reilly in strictest confidence (and for work purposes only) that HL was due to commence a performance improvement plan. The first message from Mr Reilly asked how HL was doing and continued, "Know you've been having a tough couple of weeks. Enjoy the weekend."

    86.3. After exchanging pleasantries, Mr Reilly ended the conversation with, "Stay strong. Speak when I get back hopefully."

86.4. The claimant's evidence was that HL knew nothing about the claimant's allegations against Mr Reilly but mentioned the WhatsApp to her as she found it "strange." In a follow-up interview with Ms Wilson on 8 September 2021, the claimant said that what HL had told her had set "…some alarms ringing…" because "…that was how messaging began between her and Tony initially" [403-4].

87. We find it highly unlikely that the claimant's account is fabricated because Mr Reilly initiated the WhatsApps with HL. We find the claimant's suspicions to be genuinely held by her in good faith in the light of her own experiences.

88. The claimant presented a formal grievance on 23 June 2021 [147-148]. She stated that she had "reason to believe that others may be at risk of similar treatment."

The respondent's policies

89. We find that from 23 June 2021, the respondent's Bullying and Harassment Policy was engaged. We find that the oral evidence of Ms Ball and Ms Wilson demonstrated that the former was not fully aware of the terms of the Policy and the latter only became aware of its terms once she had stated her investigation into the claimant's grievance. Under the heading "Roles and Responsibilities" in the Policy, managers are responsible for, "regularly reminding their teams of the policy and ensuring all employees are aware of their responsibilities in managing, reporting and preventing bullying and harassment." [850]. In his written submissions, Mr Milsom asserted that the respondent derogated from the Policy in the following examples. We agree with his submissions on the evidence provided to us:

89.1. The Bullying and Harassment Policy extends to "concerns received about behaviours not directly witnessed. Additional fact finding will need to be undertaken before these can be acted upon" (§ 5 [848]);

89.2. "The principles below govern this policy and its application: …clear and transparent processes leading to fair and objective decisions that are informed, reasonable and proportionate…treatment of individuals with fairness, dignity and respect… timeliness of actions" [849];

89.3. "The allegation will be managed impartially and considered by a manager who has not previously been involved" (§ 9 [849]);

89.4. "Employees will be informed of the outcome of their allegation and provided with detailed reasons for the decision in writing" (§ 19 [850];

89.5. "Human Resources are responsible for providing support, advice and guidance in a(n)…unbiased manner" [851];

89.6. A Care Assessment Panel may be appointed in complex or sensitive cases [854];

89.7. "The appointment of an investigator should consider the nature of the complaint. In exceptional circumstances it may be appropriate to appoint an external investigator" [855];

89.8. The investigator "is required to look for evidence that both supports and refutes the allegation and to establish a fair and balanced view" [855];

89.9. "It is…imperative to keep and have available all records and relevant information…must ensure there are note of all meetings" [855];

89.10. The investigation report "Must be factual, balanced, and impartial giving due consideration to the evidence and British Council values, behaviours, and processes. The investigator will complete and send the report to the identified manager and HR or Case Assessment Panel within ten working days of the investigation" [856];

89.11. "The manager asked to decide the complaint and the CAP, if convened, will consider the evidence gathered and decide what further action, if any, is required" p.856. The Speak Up Policy similarly requires an "appropriate senior manager to act as agreed decision maker" [869];

89.12. "The manager making the decision must inform the employee raising the concern of the outcome, in writing, the reasons for the decision and the right to appeal, if applicable" [856].

90. We find that the document "A guide to the Speak Up Policy" dated October 2021 [861-870] states [870] that:

> *"The Speak Up Committee has been set up to make sure the Speak Up policy is upheld. The Committee includes our Chief Operating Officer (Chair), Chief People Officer, an overseas Regional Director and the Director Corporate Affairs.*
>
> *Their responsibilities are to:*
>
> *• Oversee concerns raised which might have financial, reputational, or organisational impact.*
>
> *• Oversee ongoing investigations, outcomes, and follow up actions of such cases.*
>
> *• Ensure there is monitoring and recording of new and existing cases, risks, and trends, making recommendations for mitigation.*
>
> *Concerns against members of the Senior Leadership Team relating to financial, reputational or organisational impact will be deferred to a named member of the Board of Trustees.*

91. We find that the SUC was not devised as a decision-maker because the Policy [971-874] and Guidance [861-870] make no reference to the SUC performing that

function. The Policy and Guide refer to the SUC performing an overseeing function and monitoring of new and existing cases and threats.

92. Andrew Williams, the Chair of the SUC's evidence in chief (para 4 of his witness statement) gave a nuanced version of the SUC's purpose, which he said was to:

> *"…(i) ensure senior and high level oversight and monitoring of concerns raised by employees or external parties; and (ii) ensure that cases flagged to them by local teams are managed and responded to via an appropriate process."*

93. We find that the reference to the SUC ensuring that an appropriate process is used is an attempt to justify derogations from the Policies of the respondent.

94. We find that on receipt of the claimant's formal grievance, there was some concern amongst the respondent's HR function about its ability to find an appropriate investigator (e.g., Ms Kaul's email of 7 July 2021 [161]).

Delay

95. The SUC Policy and Guide contain no instructions on how a disciplinary or grievance procedure should operate. We find that the appropriate Policy for us to reference in connection with the timescales employed by the respondent is the Bullying and Harassment Policy [848-856]. It cannot be disputed that the Policy requires the following timescales:

95.1. "…the complaint will be acknowledged within 2 working days." [854];

95.2. "The investigator will meet with the employee raising the concern within 10 working days of the complaint having been raised. If the CAP has been convened this may be extended to 15 days." (§ 12 [850] and [855]);

95.3. "If follow up investigations are necessary, these will be conducted without unreasonable delay." (§ 18 [850]); and

95.4. "The investigator will complete and send the report to the identified manager and HR or Case Assessment Panel within ten working days of the end of the investigation" [856]. We find that this clause is potentially open-ended. If the clause is given its literal meaning, there is defined end date to the process. That makes the process itself uncertain for any complainant. We find that to be unfair.

96. The Care Assessment Panel is explained in the Bullying and Harassment Policy [854], which states that a CAP may be convened if the issues are, "…complex and/or sensitive…", which we find that they were in the case of the claimant's grievance. To convene a CAP, the HR representative must discuss and get agreement from the respondent's HR Director Global Employee Relations and Reward. In the cast list supplied by the parties, Nita Bewley was described as "HR Director, Global Employee Relations." We heard and saw no discussion about convening a CAP.

97. We find Mr Williams' evidence about the role of the SUC and non-role of the CAP displayed contradictory and confused thinking within the respondent. His evidence in chief (§ 28) referred to notes of the second SUC meting on 3 November 2021 that referred to the SUC as acting as a CAP. He commented:

> *"The usual role of a Case Assessment Panel is to support and guide an investigation, a Case Assessment Panel does not make decisions. The SUC were referred to as a Case Assessment Panel in these minutes (and in other documents) but were not performing this function in this case. In preparing to give evidence on this case, I have come to understand that the references to the SUC acting as "a Case Assessment Panel" were likely the result of a misunderstanding, with colleagues using a familiar term from the Council's policies to describe the SUC's function, without appreciating that it did not accurately reflect the role actually being performed in this process."*

98. As can be seen from our findings above, the SUC is not a decision-making body.

99. It cannot be disputed that the period between the claimant filing her grievance on 23 June 2021 and her receiving the outcome of the SUC in summary format prepared by Ms Bewley [604-611] in an email from Mr Williams dated 15 November 2021 at 12:45pm [618-619] was 145 days, or 20 weeks and 5 days. The period between the claimant presenting her grievance and receiving the outcome of Mr Rawlings' investigation was 254 days, or 36 weeks and 2 days but that delay is not a matter to be considered in relation to the constructive unfair dismissal claim.

100. We find that Mr Reilly was advised of the outcome of the claimant's grievance before she was; at 11:45 on 15 November 2021 [612].

101. Mr Williams apologised to the claimant in his email for the fact that, "…we were not able to conclude the investigation into the allegations you raised against Tony Reilly, Country Director Morocco, earlier. No other explanation for the delay was offered.

102. Insofar as the instances of delay we found are concerned, our findings are:

    102.1. There was no formal acknowledgement until 23 July 2021 [146-7];

    102.2. The terms of reference were not completed until 17 August 2021, nearly two months after the complaint was first presented [207];

    102.3. The claimant first met Ms Wilson on 26 July 2021 [275] but no interview took place until two months after the claimant had presented her grievance the grievance, on 26 August 2021 [284-300];

    102.4. The SUC sought completion by mid-September 2021 but no report was sent to the claimant until 15 November 2020 [636-7]. That report was an 8-page edit created by Ms Bewley;

102.5. The claimant did not receive the full investigation report until 3 December 2020, when Ms Bewley sent it to her [614];

102.6. On 18 January 2022, the claimant asked the respondent to conclude her appeal she left its employment [676]. The claimant did not receive an outcome to her appeal until 3 March 2022 [804].

103. The Tribunal is cognisant of the global pandemic that was still causing massive disruption in June 2021. We are also mindful of the fact that neither Ms Wilson, nor Mr Rawlings were investigators as part of their main role. They had their main jobs to do. The Global Head of HR was involved in this matter from an early stage. The respondent had the opportunity to appoint an external investigator but chose not to do so.

104. We understand that some of those involved in the grievance were in different time zones and based in countries that were separated by thousands of miles but by June 2021 the business world had adapted to the use of digital meeting platforms such as MS Teams. We find the pandemic not to be a reasonable excuse for the delay by the respondent in dealing with the claimant's grievance. If anything, the use of digital meetings should have speeded up the process.

105. We acknowledge that this case was complicated. The investigation was not helped by the piecemeal disclosure of information by the claimant and Mr Reilly. However, we find that the respondent had all it needed to make a decision by 8 September 2021 when the claimant was interviewed for the second time. We find the pace of the investigation to that point was too slow given the obvious distress and harm that the process was causing the claimant, who was still required to work with Mr Reilly and meet him in 1-2-1 meetings (§§ 95-100 and 104-108 of her witness statement).

106. The delays from the second interview with the claimant on 8 September 2021 and the delivery of the outcome on 15 November 2021 were even more unreasonable in our findings. We could not see what value the SUC added to the process that could not have been done by a senior HR officer.

107. The ACAS Code of Practice on disciplinary and grievance procedures at paragraph 40 states that the employee should be notified of the decision, "…without unreasonable delay."

108. We find that the delays were made worse for the claimant by the respondent's inability to keep her advised of what was happening; giving no reasons for the delays; and not answering her many chasing emails with helpful information (e.g., [161, 313, 314, 315, 316-317, and 596].

109. Ms Ball chased matters on the claimant's behalf by email of 10 November 2021 Ms Ball explained that four and a half months was unacceptable compounded by the lack of communication:

> *"Prior to raising the complaint, [the claimant] considered very carefully the impact that this action may have on her mental health and her work but she thought it was the right thing to do. However, the infrequent/unhelpful*

communication together with the length of time that this exercise is taking has really taken its toll and is a contributory factor in her considering to leave the organization. Prior to this [the claimant] was considered to be a talent and someone who would have remained with and added value to the organization for a long time."

110. To his credit, Mr Rawlings noted the communication issues in his decision (§ 5 [833]):

"Communications with both parties have been inadequate throughout. In ER cases this needs to be handled centrally and regularly…the flow and clarity of communications to the two parties was patchy at best and responsibility within HR teams often confused."

111. We find that there was excessive and unreasonable delay in dealing with the claimant's grievance that caused her distress and harm.

The inadequate support and communication provided to the Claimant during the investigation

112. We find that there is a juxtaposition between the seriousness with which the respondent appears to have taken the allegations made by the claimant when taking actions such as reporting the allegations made against Mr Reilly to the Charity Commissioners (SUC meeting 27 July 2021 [179]), and the actions or failures to act taken to support the claimant during the investigation. At the SUC meeting on 27 July 2021, Ms Bewley, as Head of Employee Relations was asked why Mr Reilly was not suspended [179]. Her response was that there was, "…no safeguarding risk." No explanation was given for this opinion. We find the decision and the lack of explanation to be unjustifiable.

113. On 16 July 2021, there was an email exchange between Ms Bewley and Ms Kaur [168-169] that discussed suspension of Mr Reilly and the alternatives available. Ms Bewley thought there was no direct reporting line between the claimant and Mr Reilly, which was correct but ignored their regular 1-2-1 meetings. The solution was to ask Ms Bell to sit in on the meetings. We find the solution to be entirely inadequate. The claimant had made serious allegations of sexual assault, stalking, and harassment and was the one who had to work from home and be chaperoned on 1-2-1 meetings with the person she had accused. Mr Reilly had admitted some of the serious allegations in WhatsApp messages to the claimant that the respondent had seen early on the process.

114. We find that a large part of the reason that the clamant moved 300km away to Marrakech was to avoid Mr Reilly. If the respondent had put proper and effective safeguards in place, she may not have had to take that action.

115. We repeat our finding that communication with the claimant was poor. We cannot put things any better than Mr Rawlings did in his document titled "Observations" [833], sent to Ms Harris on 7 April 2022:

"5. Communications with both parties have been inadequate throughout. In ER cases this needs to be handled centrally and regularly. There were

some circumstances behind delays: events in November/December 2020 becoming a concern in June 2021, an outcome report issuing 22 October 2021, a further review taking us to February 2022. But the flow and clarity of communications to the two parties was patchy at best and responsibilities within HR teams often confused…

9. Neither line managers of the parties appreciated the significance/potential severity of the situation and failed to act decisively in the moment. It is suggested that a more robust response from both (LMFG) LMs might well have avoided or mitigated difficulties and this will be captured in evaluations."

116. We find that the actions (or lack of them) of the respondent from the date that the claimant made her first informal approach to Ms Ball on 6 December 2020 to the date she left the respondent's employment failed to support her wellbeing and safety (both in terms of the risk to her physical and mental health) and prioritised Mr Reilly's welfare over the claimant's.

The Investigation

117. We find that this was not an easy matter to investigate. That is obvious from the detail that these reasons have had to go into to address the claims made and the issues in the case. We find that the respondent struggled to find a manager at the appropriate level to conduct the investigation [162, 152, 154, 164, and 166].

118. Ms Wilson stepped up although she had no experience of sexual harassment allegations and limited experience of conducting grievance investigations at all (§5 of her witness statement). We find that this is a case where the respondent would have been better served by an independent investigator who could devote the whole of their time to the investigation and who had experience of investigating complex allegations of harassment.

119. We agree with Mr Milsom's submission that the approach of Ms Wilson to the investigation was flawed in three central respects:

119.1. Ms Wilson took Mr Reilly's edited messages at "…face value" when we find that a more inquisitorial approach was required. Mr Reilly was facing allegations which, if proven could end his long career with the respondent. The stakes were high. The claimant was quizzed about her allegedly "mixed messages" but Mr Reilly's account was accepted.

119.2. We are critical of the failure to provide the document produced by Mr Reilly to the claimant, contrary to the express assurances of Ms Kaul that any evidence which required her input would be shared [304-305].

119.3. The respondent's HR department provided Ms Wilson with the "very helpful summary" at [274-284], which we find:

119.3.1. Was either deliberately or unfortunately and ineptly partisan and inaccurate in a number of ways that

minimised the claimant's evidence and gave greater weight to Mr Reilly's evidence.

119.3.2. Contained highlighted passages that gave a clear steer to Ms Wilson (who was meant to make an independent decision) about which pieces of evidence should be given more weight.

119.3.3. Contained narrative opinion by way of commentary to the evidence that attempted to imply motive and/or critique the reliability of the evidence (e.g., "*long emotional puzzled* message…**[the claimant]** showed some interest and TR responded but *something changed*" [280]).

119.3.4. Excluded relevant messages that would have undermined the idea that no harassment had occurred before 14 December 2020, for example:

119.3.4.1. "lemon breaking my own rules…not allowed to say how much I'm missing you so won't." 12 November 2020 [234];

119.3.4.2. "Feel very naughty this morning. Would so love to make your first nespresso, bring it up the spiral staircase, with a glass of freshly squeezed orange juice, give you a very soft kiss on the forehead and leave…Last message. Promisexxxx" 13 November 2020 [235];

119.3.4.3. "don't want you to agree under duress and when it isn't really what you want" 13 November 2020 [220];

119.3.4.4. "I can respect boundaries – and apart from succumbing to a need to touch you a couple of times, I have tried really hard not to make you feel uncomfortable physically" 19 November 2020 [250];

119.3.4.5. "I'm probably guilty of hearing only what I want to hear...Part of it is listening to you when you say, with honesty and clarity, that you can't be the one to make you happy right now" 29 November 2020 [250];

119.4. We appreciate that the investigation needed to remain as confidential as possible but find the investigation's approach to obtaining evidence from witnesses other than the two main protagonists was confused, biased, and inconsistent:

119.4.1. Ms Wilson made no efforts to contact HL regarding the LinkedIn message.

119.4.2. Ms Wilson's investigation of Mr Reilly's alleged previous behaviours was inadequate. We find that the investigation report was materially misleading in referring to there being "no evidence" to support the allegation. We make this finding because, two months after her report was disseminated, in an email to Kate Harris dated 28 January 2022 [695] Ms Wilson discussed what the source of the information about Mr Reilly's alleged behaviour in previous postings had said. Ms Wilson reported that S told her:

"S and [the claimant] have a mutual friend at the Embassy, who one evening mentioned Tony's name in conversation to do with issues with [the claimant]. S said she said it wasn't surprising as he had a bit of a reputation. This conversation made its way back to [the claimant]. S was subsequently contacted by [the claimant], asking if she would contact the people involved in Sri Lanka. S felt it was inappropriate and declined. S then recounted a story about Tony's behaviour, about a time he'd said a couple of things at reception in Colombo that had made her feel very uncomfortable. S had told him where to go in no uncertain terms."

119.4.3. We find that Ms Wilson made inaccurate representations to the witness [746]:

"If she wanted to speak on the record but advised if she did and the case went to tribunal she would be called to give evidence. It is therefore on the record that there is no evidence on this point from [the claimant]."

The representations were inaccurate because it is possible to preserve the anonymity of a witness in an investigation in subsequent Employment Tribunal proceedings. If Ms Wilson did not know this, she had an HR department and lawyers available who could have advised her, if asked.

119.4.4. Ms Wilson's approach was not taken by Mr Rawlings when interviewing the claimants' friends about the 11 December 2020 incident. We agree with Mr Milsom's submission that it was logically incoherent, contrary to the spirit of the harassment policy and designed to suppress material information for Ms Wilson to speak to S in the terms she did.

119.4.5. Ms Wilson failed to investigate a complaint filed against Mr Reilly in Kenya because he had said that it was not relevant and the SUC had not asked her to investigate further when she asked it the question [681].

119.4.6. Ms Wilson did not ask Mr Reilly about previous or ongoing incidents of behaviour which might constitute harassment during the first interview. If she had, this may have obviated the need for a second interview and removed one of the instances of delay.

119.5. We find Ms Wilson failed to take all relevant considerations into account and included irrelevant considerations.

The Report

120. Ms Wilson's report upheld two allegations of assault on 8 and 14 November 2020. These were essentially admitted by Mr Reilly in contemporaneous messages on 29 November 2020, "…apart from succumbing to a need to touch you a couple of times, I have tried really hard not to make you feel uncomfortable physically during the times when we've been together." [250]. During his interview, Mr Reilly alleged that the claimant had touched him [464]. Ms Wilson regarded that allegation as so lacking in credibility that she did not even put it to the claimant during the follow-up interview on 8 September 2021.

121. Ms Wilson also upheld the allegations of stalking which we find met the Suzy Lamplaugh Trust and PHA 1997 threshold [583]. Mr Reilly had evidenced an intent to follow the claimant – and an awareness that this was unwanted – as early as 9 November 2020, "…thought about sitting at a safe distance just to see you…I thought you'd think it was a bit weird, intense, obsessive." [232].

122. Whilst Ms Wilson recorded the incidents of 13 November, 18 November, 20 November, 2 December, and 9 December 2020, she omitted the incident on 11 December 2020.

123. Ms Wilson's report [583] included the observation that:

"Rabat is a small city and it seems from conversations with both parties that the likelihood of bumping into acquaintances while shopping or socialising is high."

The observation was made to contextualise her opinion that Mr Reilly could be in the same bar as the claimant simply because Rabat is a small place. This struck the Tribunal as an unusual claim. We searched online in the hearing and found information which we shared with the parties that suggested the population of Rabat is about 575,000. We find the observation to be an unfair attempt to normalise Mr Reilly's stalking behaviours.

124. We find the conclusion that there were no unwanted sexual advances is inexplicable and entirely unsustainable. It is also internally contradictory given that

Ms Wilson found there were "two incidents of unwanted physical touching" [580] which we find are expressed in a way that deliberately downplays the seriousness of what we find could fairly be described as sexual assaults.

125. We agree with Mr Milsom's submission that the conclusion failed to recognise the content, nature and seriousness of messages sent by Mr Reilly, including the following:

125.1. "yearning for a cuddle, caress, contact" 6 November 2020 [230-233];

125.2. "Feel very naughty this morning. Would so love to make your first nespresso, bring it up the spiral staircase, with a glass of freshly squeezed orange juice, give you a very soft kiss on the forehead and leave…Last message. Promisexxxx" 13 November 2020 [235];

125.3. "don't want you to agree under duress and when it isn't really what you want" 13 November 2020 [220];

125.4. "Firstly I am so sorry about the way I acted today. I'm embarrassed, ashamed and disappointed that I let my emotions rule my actions. I shouldn't have said what I said nor should I have encroached on your space. You've been honest with me and have as gently as you can tried to get me to ease off and allow you to have space. I've tried and failed. Don't know why…My behaviour's been erratic, intense and emotional You've touched me **[KJ]** – stirred something inside…I fucked up massively today and feel so stupid about it. I won't let it happen again…We haven't been in a relationship and yet sometimes it feels as if we have. I will keep you locked away in a secret part of my heart. You are a very special person…But hope we can still find a way of enjoying the closeness I think we share" 19 November 2020 [251-253];

125.5. Mr Reilly sent picture of himself half naked on 28 November 2020 [224];

125.6. On 4 December 2020, Mr Reilly initiated conversation over dinner about the claimant's sex life;

125.7. On 5 December 2020, Mr Reilly messaged the claimant [236]:

> *"And on your Dad, it is recent [claimants name] and fucking hard – especially when you're dealing with it all on your own. The one thing we didn't manage last night was a proper hug. Sounds like you've needed one today. Sending a really warm affectionate hug down the road now…your chin on my right shoulder…me trying to resist finding some soft skin to touch with my wandering hands. You ok?"*

126. We find that on any analysis of the evidence at the time, no reasonable employer would have concluded that there was no act of harassment before 14 December 2020. We find the respondent's decision to impose that date as a cut off point is deeply flawed. Ms Wilson's statement (§ 40) goes further and identifies the email

of 14 December as "the first clear and unequivocal expression from **[KJ]** that Tony's behaviour was unwelcome and unwanted". We find that to fly in the face of the evidence, particularly Mr Reilly's own messages (see above), which include apologies for his behaviour.

127. The most troubling aspect of the decision for the Tribunal is that it implies that a woman who engages in flirting at a point in time gives consent to be harassed, stalked, and assaulted until such time as she withdraws her consent in writing.

128. We find that the claimant gave a factually consistent and logically consistent reason for continuing to engage in conversations with Mr Reilly on 1 and 5 December 2020 in her interview on 8 September 2021 [400]. No weight was given to her explanation.

129. The report seemingly ignored the fact that in his reply to the claimant's email of 14 December 2020 [264], which had described his behaviour as breaching her personal space physically and emotionally, stalking and bombarding her with messages, Mr Reilly wrote, "I recognize the behaviour you've described, and I am really sorry for the distress I've caused you. It is unacceptable and I am not going to attempt to justify it."

130. We find that the claimant made multiple efforts to set boundaries before 14 December 2020. We make this finding because of the references to boundaries that he had broken by Mr Reilly in his messages of 9 November [232], 12 November [234], 13 November 2020 [220 and 235], 14 November 2020 [263], 18 November 2020 [221], 19 November 2020 (card) [251-253], 29 November 2020 [250], 9 December 2020, 11 December 2020 [240], and 12 December 2020 [243].

131. We do not find that there was any logical reason why the date that the claimant reported he concerns to Ms Ball and Ms White should have been imposed as an alternative cut off point given our findings above.

132. We find that Mr Rawlings was entirely correct to ignore the arbitrary cut off date of 14 December 2020.

Confused decision making

133. We find that the process used by the respondent was confused and never adequately explained to this Tribunal. If the respondent cannot explain why it did what it did, or which person or body was responsible for making a particular decision, we find that the validity of the decision itself must be questioned.

134. We find that the roles of Ms Wilson and the SUC were never clearly defined.

135. Ms Wilson's paper presents the use of four time periods and a cut off that disallows any complaint of harassment etc. before 14 December 2020 as an option only. We find that it was unclear who assumed responsibility for taking that option.

136. Ms Wilson maintains in her witness statement (§ 41) that it was not her role to decide whether the conduct constituted harassment or sexual harassment. We

find her assertion to be both internally inconsistent (given that she was upholding allegations which fell within the scope of sexual harassment) and an abdication of the responsibility of an investigator. We have drawn an inference that Ms Wilson (and the respondent in general) had a reticence to uphold findings of sexual harassment in the face of compelling evidence.

137. We find that Ms Wilson's oral evidence was untrue when she denied receiving any indication that a conclusion of sexual harassment could be avoided by identifying 14 December 2020 as a cut-off point. We make this finding because of her account given to Mr Rawlings on 17 January [680]:

> *"CW said she has discussed with Nita Bewley (NB) who had indicated that if the view is taken that evidence before the date in Dec is key, then sexual harassment, if it is after this date then harassment only."*

In cross-examination, Ms Wilson sought to deny the conversation took place and raised objections to the language in the note. We do not accept her evidence, as she approved the note of the meeting [678]. We find that the cutoff point was imposed as a conscious decision to avoid upholding allegations of sexual harassment.

138. We reject the suggestion by the respondent that the two protagonists had reframed their respective cases. The suggestion is at odds with Ms Wilson's investigation report which, in the Observations section, finds the claimant's account to be credible: (§§ 1-3 [585]). Ms Wilson describes Mr Reilly's "rowing back" on earlier apologies as, "…a concern." (§ 10 [586]). This caused Ms Wilson to, "…have concerns about TR's interpretation of events." (§ 13 [586]).

139. Ms Wilson accepted that matters were "emotionally draining" for the claimant [585]. During the interviews with the claimant, Ms Wilson asked the claimant on three occasions whether she needed a break. Ms Wilson said that she realised how uncomfortable the claimant must have felt [681]. We find that the claimant's account was never reframed. In contract, we find that Mr Reilly's own interpretation of his conduct went from complete acceptance of what the claimant alleged in her email of 14 December 2020 at the time, and that his behaviour was, "Obsessive and inappropriate and tantamount to harassment" [588] to a complete denial or any culpable wrongdoing by the time of his appeal against dismissal. His acceptance of responsibility for his clearly evidenced actions drained away from 14 December 2020. Ms Wilson made that finding but did not apply it to the outcome of her report.

The perverse and unreasonable findings of the Panel [the Stand Up Committee]

140. Ms Wilson's report upheld allegations of sexual harassment in the form of stalking and assault. She then suggested two options "…for the SUC to consider in coming to a final decision." In a nutshell, Option 1 imposed the cut off date of 14 December 2020 and Option 2 notes Mr Reilly's acceptance of wrongdoing and suggested no cut off.

141. The report and options were discussed at the SUC on 3 November 2021 [593-595]. The meeting incorrectly described itself as a Case Assessment Panel, despite the fact that it accepted that it was not in its evidence to this hearing and the fact that the Global Head of ER and Regional Head of ER were in attendance.

142. Ms Wilson outlined the two options and the SUC discussed three points [594];

    142.1. The extent to which culpability or responsibility, if any, may lie with the individual making the allegation.

    142.2. Clarification of which of the alleged behaviors took place before 14 December 2021 and which took place afterwards; and

    142.3. Additional explanation of the evidence for some of the alleged behaviours, in particular inappropriate touching, and stalking.

143. Ms Wilson and Ms Kaul were then asked to leave the meeting before the remaining attendees deliberated on its decision. We find this to be irrefutable evidence that the decision was made by the SUC and not Ms Wilson.

144. We find it disturbing that the first point of discussion was to decide to what extent the claimant was responsible for Mr Reilly's behaviours. Notwithstanding the queries about some of the matters that remained to be clarified, it was clear in Ms Wilson's report that Mr Reilly had committed several unlawful acts that breached the criminal and civil law and that he accepted responsibility for such at the time. There is no record of the discussion that took place on the first point, which is lamentable.

145. We find that Mr Williams' denial that exploration of messages was "…not with a view to attributing blame or responsibility to [the claimant]." (§ 31 of his witness statement) is not sustainable or credible. We make that finding because the imposition of the December 2020 cutoff can only be logical if the SUC believed that the claimant had been in a consensual relationship with Mr Reilly before that date that was ended on that date. We find such a belief to be one that no reasonable employer would have come to.

146. We take an inference from the fact that the possibility of blaming the claimant for Mr Reilly's action was worded in the way it was and was the first item to be discussed as indicating a desire on the part of the SUC to at least minimise the damage to its own reputation and potential liability in the Employment Tribunal (and, as a consequence, the damage to Mr Reilly's reputation and the severity of any disciplinary penalty that may be imposed on him). The inference that we take is that the SUC's decision was at least partially based on the fact that the claimant had made a grievance and that the decision itself was tainted with discrimination.

147. Mr Williams confirmed that the responsibility for finding facts rests with an investigator not human resources, which is entirely contrary to what happened when Ms Wilson (the purported decision maker) left the meeting and the SUC made the choice of options which we find to be a choice about the facts.

148. Further, we find that after the SUC meeting on 3 November 2021, Ms Bewley prepared a fresh report [604-611] that departed from Ms Wilson's findings with no discernable additional investigation (see below). The Speak Up Committee adopted it without making any changes whatsoever or detecting that it departed in key respects from Ms Wilson's conclusions. We agree with Mr Milson's submission that there is no support for this approach in the policy.

149. We find that this was fundamentally deceptive as the claimant was given no indication as to the author of this report or the fact that there was a distinct report from Ms Bewley. It professed to be "the findings" of the investigation rather than a summary. We find it would be reasonable for the claimant to assume that Ms Bewley's report was penned by Ms Wilson. We find that Ms Wilson did not even see it.

150. We find that Ms Bewley's report departed in the following key respects from Ms Wilson's report:

150.1. Ms Wilson's factual determinations and ultimate decision to uphold allegations of unwanted touching was removed in their entirety ([605] cf. [578 and 580-581];

150.2. It adopted Mr Reilly's account of various phases in the relationship ([606-7] cf. [453-455]. Ms Wilson had rejected Mr Reilly's characterisation of events. Ms Wilson's report described a "phase" in which she had identified seven incidents that could correctly be described as potentially criminal had taken place. Ms Bewley's report described those seven incidents as one in which messages were sent by both parties which "can be described as intimate" [607].

150.3. The report removed Ms Wilson's finding that there had been a duty of care owed by Mr Reilly as Country Director which had been supported by evidence from Ms White (§§ 4 and 5 [585]); This finding was deemed as relevant to the harassment finding and the liability of the respondent when the SUC met on 20 January 2022 (§ 2.2.(a) [683]. We find that Ms Bewley's conclusion at (§ 4.1(a) [595] that, *"…neither should be assumed to have a duty of care for the other*" was perverse on the facts and rightly rejected during Mr Reilly's disciplinary process [841] and, more relevantly, at this hearing.

150.4. The report went further than Ms Wilson's investigation in seeking to excuse Mr Reilly's behaviour as "*exploring the boundaries of their relationship*" [611] and equalising responsibility between the claimant and Mr Reilly as both sending "*equally intimate*" messages [608].

150.5. The report concluded that there had been neither harassment nor sexual harassment until 14 December. Thereafter, despite the clear intentions of Mr Reilly where he continued to express his attraction to the claimant [244], the report concluded that further unwanted contact from him was not sexual harassment [607]. The conclusion is mystifying, and no-one has sought to explain it.

151. We find the findings and outcome of the SUC to be perverse and unreasonable. We find the process was opaque and unfair.

Notification of the Outcome

152. It was agreed that prior notification of the conclusions to the managers of the claimant and Ms Reilly would serve as an appropriate measure of support [601]. This did not happen as regards the claimant despite Ms Ball registering serious concern as to the effect of the process on the claimant [599] and [129]. Mr Reilly became aware of the outcome one hour before the Claimant [612] and [618].

153. The outcome did not notify the claimant of a right of appeal [619]. Given the size and administrative resources of the respondent, we find this omission to be difficult to understand. We make an inference that the reason that the claimant was not notified of her right to appeal was because the respondent did not want her to appeal, as that is the only logical explanation when viewed in the context of the circumstances of the case. We also make the inference because the respondent immediately pressed on with disciplinary action against Mr Reilly, from which we infer that the respondent was hoping or expecting the claimant not to appeal.

154. We find the appointment of Ms White as investigator in Mr Reilly's disciplinary process, when she had been the person to whom the claimant made her telephone informal complaint; and who was a witness in the claimant's grievance; and was Mr Reilly's line manager with a duty to provide pastoral support to him; was unwise.

155. Ms Kaur was appointed as HR support. She had sent an email to Mr Reilly on 24 September 2021 [449] that included the following final paragraph (our emphasis):

> *"I want to thank you for your patience and **I can understand this process can be distressing for everyone involved, especially you**. I hope you are also able to get some support from Andrew in managing your wellbeing through this process."*

156. We find that there can be little doubt that the SUC outcome was the respondent's decision on the claimant's grievance. No other conclusion makes any logical sense, we find, for the reasons outlined in Mr Milsom's submissions:

156.1. Mr Reilly would not have been subject to a disciplinary process on the basis of a "provisional outcome." He would not be subject to a disciplinary process in relation to allegations which had already been rejected;

156.2. Mr Rawlings knew nothing of the process until after the decision had already been made. He rightly regarded himself as an appeal chair [677, 685, 723]. It was for this reason that Mr Rawlings did not give the claimant a further right of appeal.

157. We find that the attempt to retrospectively classify the Speak Up findings as "provisional" is a retrospective tacit admission that the SUC conclusions were

flawed and that Mr Rawlings made the 'real' decision. If that argument succeeds, it would also throw doubt on the strength of the claimant's claim of constructive dismissal.

158. The claimant received the outcome on 15 November 2021 with the summary report. She engaged in several telephone calls and lengthy correspondence with the respondent to try and obtain further details about the reasons for the decision (to which we find she was entitled at the time that the decision was given) and resigned on 23 November 2021 giving 3 months' notice that expired on 22 February 2022 (the EDT).

159. We find that the effect of the findings of the SUC, particularly after the process was delayed, was significant on the claimant. We make that finding because there was no attempt to undermine her evidence on the subject [124 - 127], [132 - 137], [141] and [144].

160. Because of the early conciliation dates, matters prior to 13 November 2021 are ostensibly time barred subject to a continuing act and/or extension of time.

Resignation

161. The claimant received the outcome of her grievance and Ms Bewley's version of the report [604-611] on 15 November 2021 [818-619]. She rang Ms Bewley and then engaged in email conversation with Ms Bewley that began on 17 November 2021 [617] and ended on 9 December 2021 [613].

162. The claimant resigned on 22 November 2021 [665]. The claimant's resignation letter made no reference to the allegations against Mr Reilly, the grievance process, or the grievance outcome.

163. The claimant emailed Ben Maguire Boyle of the respondent on 23 November 2021 [666] in response to his email earlier the same day offering his thanks for the claimant's contributions to the respondent. In her email, the claimant said that "…the handling of the grievance I submitted in June is my key reason for leaving."

164. At paragraph 140 of her witness statement, the claimant wrote that she had resigned because her trust and confidence in the respondent had been extinguished by Mr Reilly's harassment and sexual harassment; the respondent's failure to protect her from Mr Reilly's behaviour before it happened; the respondent's failure to put measures in place to prevent it happening again after it was raised to senior managers in December 2020; the inadequate support and communication that was offered to the claimant during the investigation; and the perverse and unreasonable findings of the SUC.

165. The findings of the panel were stated to be the final straw (§ 141 of the claimant's witness statement).

166. We find the evidence of the claimant to be credible as to the reasons for her resignation because it is internally and logically consistent and consistent with the documents.

167. We find that the claimant was considering a new role at World Learning [666] which was contingent on USAID funding, but her schedule of loss indicates that she took a part-time post at Morocco World News as an Editor between 7 March 2022 and 29 April 2022 before starting work as a Property Consultant in Marrakech on 6 June 2022.

168. We therefore find that it was more likely that the claimant resigned because of the alleged breach of the duty of confidence rather than the opportunity of a job with World Learning that was contingent on funding arrangements and had not been offered to the claimant.

Contributory fault

169. The respondent indicated that it would not seek any reduction in any basic or compensatory award based on the claimant's conduct.

Polkey

170. ~~We find that there is no scope for a **Polkey** reduction because the respondent did not argue that if we found that there had been a dismissal, then the dismissal was fair or would have been fair If a fair procedure had been used.~~

171. **The Tribunal has decided on its own initiative the reconsider its Judgment and Reasons on the issues of Polkey and Chagger. Employment Judge Shore completed the draft of the Judgment and Reasons from his own notes of the deliberations of the Tribunal on 14 March 2023. In completing his draft, the Employment Judge missed a note that recorded the Tribunal's decision to impose a 35% reduction under Polkey and Chagger. The notes of Mrs Legg contained the rationale of the decision on Polkey/Chagger. The Employment Judge did not have those notes at the time he completed the draft.**

The draft Judgment was submitted to the Tribunal and the members on the same day because the Employment Judge was due to go on annual leave and did not want to cause even further delay. Unfortunately, the members did not have chance to review the draft before it was promulgated. The promulgated version contained the error on Polkey and Chagger.

When the members had chance to read the now promulgated version, both contacted the Employment Judge to express concern that the Polkey/Chagger decision did not reflect our decision. We therefore met online on 11 April 2024 and unanimously decided to reconsider the points. We then caused an email to be written to the parties to advise them of the reconsideration so that they would be aware of it at the PH on 15 April 2024.

The reasons that the Tribunal has decided to impose a 35% reduction are:

171.1. We find that the evidence of Ms Wilson and Ms Ball that the claimant's career would have flourished at the respondent to be credible. It was not seriously challenged by the respondent and the claimant had attained a senior position with relatively little

experience, which indicates the Tribunal that she could have been destined for a long and successful career.

171.2. However, we find that the respondent planned and implemented a restructure that was known internally at "the Transformation." The claimant (para 167 w/s), Ms Ball (para 30 w/s) and Mr Williams (para 13 w/s) all made reference to it in their evidence in chief.

171.3. The Transformation meant a significant change in posts and job titles. The claimant's existing post was going to disappear. We find that there must have been a chance that she would not have been successful in applying for a new post.

171.4. On 17 September 2018, signed an amendment to her contract of employment [113-114] that effected her relocation to Rabat, Morocco as Teaching Centre Cluster Lead Maghreb/Teaching Centre Manager Morocco for a fixed term that was to start on 7 October 2018 and end on 6 October 2021. We find that is a relevant factor in determining that there was a possibility that the claimant may have left the respondent's employment at the end of her contract.

171.5. Mr Williams' unchallenged oral evidence was that many staff left before they were made redundant, which we find to have been a possibility in the claimant's case.

171.6. In an email exchange with Mr Reilly on 30 March 2021 [643], the claimant expressed a wish to be able to return to the UK "…without the quarantine and travel stuff…" and added that "and probably doesn't help that my attempts to get back permanently haven't been successful!" We find this to be indicative of the claimant considering returning to the UK well before the SUC made its decision on her grievance.

171.7. In a catch-up meeting with Ms Ball on 14 April 2021 [140], the claimant is recorded as saying that she was "…committed to staying in current role until next summer…" and "Move back to the UK…not until at least next summer…"

171.8. The claimant and Ms Ball exchanged Teams messages on 4 November 2021 that discussed the claimant's application for a job outside the respondent for which she had offered an interview that evening [126]. In the same exchange, Ms Ball asked if the claimant was going to apply for one of the new roles at the respondent. In reply, the claimant wrote on 9 November 2021, "…Honestly at this point even if the [new post] opp doesn't work out I don't think I'm going to apply internally…but I feel really bad about that." [127]

171.9. We find below that the last straw was, effectively, the SUC's report of 15 November 2021, which postdated the claimant's message to

Ms Ball on 4 November 2021 [127]. We draw the conclusion that before the claimant had decided to resign, she was open to leaving the respondent for employment elsewhere and was considering not applying for one of the new internal posts with the respondent.

171.10. The claimant messaged her friend on 15 November 2021 [659] and seemed excited by the potential new role for which she had been interviewed on 4 November and confirmed that the prospective employer had matched her desired salary and had "…thrown in another 10% as incentive to move back to Rabat." We find that this indicates that the claimant's eyes had been opened to other possibilities outside the respondent.

171.11. The claimant emailed Ben Maguire Boyle on 23 November 2021 [666] to discuss her resignation. She said that the grievance was the key reason for leaving but "The comms around mobility was also a factor in decision making." The claimant received a mobility allowance of £16,000 and a location allowance of £5,500,00. Ms Ball gave unchallenged evidence that it was proposed to reduce the mobility allowance to £7,000.00 and remove other benefits.

171.12. The claimant admitted in cross-examination that the Transformation would mean a reduction in the financial package on offer and that this was a factor in her decision to leave.

171.13. The claimant also told Mr Maguire in her email of 23 November 2021 [666] that the job she had been interviewed for earlier in the month may not work out, but it had "…given me a little bit of confidence in taking the leap." We appreciate that the claimant had resigned by 23 November but find that the mail illustrates the claimant's desire to leave the respondent's employment before the SUC report on 15 November 2021.

171.14. The claimant expressed dissatisfaction with the amended terms and conditions that would be on offer for the new roles, which we find casts doubt on the chance that she would have accepted one even if it had been offered.

171.15. Looking at the matter in the round, we find that there was a 35% chance that the claimant's employment would have ended by her resignation or redundancy if the constructive unfair dismissal and/or discrimination had not occurred.

172. ~~We did not hear sufficient evidence about a planned reorganisation of the respondent to make a determination as to whether the claimant was likely to be made redundant at a point in the future.~~

Appeal

173. Whilst of limited direct evidential value, we find that there are matters that were dealt with in the claimant's appeal against her grievance outcome that we ought to consider when making our decision. As can be seen from our findings above, we find that Mr Rawlings made a much better fist of the appeal than the SUC made of the first instance decision. The claimant's unchallenged evidence was that a timely and effective resolution of her complaints may have avoided her resignation (§ 161 of her witness statement.

174. The respondent called Mr Rawlings to give evidence, so we have to conclude that it agreed with his outcomes even if they ran contrary to the SUC's.

The Reilly Disciplinary Matter

175. Mr Williams rightly accepted the disciplinary matters as a relevant part of the "substantive action" by which the respondent should be judged: [35] WS AW.

176. The failure to disclose the material relating to the disciplinary matters is therefore wholly unreasonable and grounds from which the ET should draw inferences. The material should have been provided in ordinary disclosure. It was not. A specific disclosure request was made on 9 January 2023. It was resisted on bogus grounds of relevance. Only when the prospect of an application to the ET was made did the Respondent relent.

177. We find that the following features are relevant to our decision:

177.1. Despite Mr Rawlings' findings, Mr Reilly was not suspended;

177.2. The finding that the claimant had been subject to assault was withdrawn [839];

177.3. The disciplinary chair concluded that he could have no confidence that the behaviour would not recur and there was a "genuine concern" of repetition [841-842];

177.4. Mr Reilly was reinstated on appeal due to "exceptional circumstances" and without regard to other allegations against him [847];

177.5. Mr Reilly benefitted from a redundancy payment reflecting decades of service;

177.6. Mr Rawlings was not consulted as to any of Mr Reilly's disciplinary process. He found the outcome surprising.

178. This concludes our fact finding on the unfair dismissal claim, although the facts that we have found above are relevant to other claims made by the claimant set out below.

Direct discrimination because of the protected characteristic of sex

179. The claimant alleges that she was subjected to the following acts of direct discrimination:

179.1. The perverse and unreasonable findings of the Panel (the SUC) which;

179.1.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's criminal actions by dismissing his behaviour as having been encouraged by her;

179.1.2. Concluded that Mr Reilly's mental health and the confusing nature of the claimant's messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her. The claimant was a man, almost twice the age of the claimant and a person of senior influence in Morocco. She felt responsible for him and felt terrified and isolated by his behaviour;

179.1.3. Failed to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment;

179.1.4. The claimant's constructive dismissal, pursuant to section 39(2)(c) EqA 2010.

180. We rely on our findings of fact above in making our decision on these claims of direct sex discrimination.

Harassment related to the protected characteristic of sex

181. The claimant alleges that the respondent harassed her as follows:

181.1. The behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021 (wrongly recorded as 2020)); and

181.2. The perverse and unreasonable findings of the Panel which;

181.2.1. Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged;

181.2.2. Failed to recognise Mr Reilly's treatment of the Claimant as contributing harassment prior December 2020 and sexual harassment at all; and

181.2.3. Justified and romanticised Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand where things went wrong".

182. We rely on our findings of fact above in making our decision on these claims of harassment related to the protected characteristic of sex. **Claims of harassment related to sex and direct discrimination because of sex are mutually**

exclusive, so we have reconsidered our decision that both claims arising out of the actions of the perverse and unreasonable findings of the SUC succeed and have upheld the harassment claim, which means that the direct discrimination claim has to fail because of the effect of section 212 (1) of the Equality Act 2010 that states that "…detriment does not, subject to subsection (5) include conduct that amounts to harassment..."

Harassment of a sexual nature

183. The claimant alleges that the respondent subjected her to harassment of a sexual nature as follows:

183.1. The unwanted conduct relied upon is the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2020).

184. We rely on our findings of fact above in making our decision on these claims of harassment of a sexual nature.

Victimisation

185. The parties agree that the claimant's grievance of 23 June 2021 was a protected act.

186. The detriments relied upon are;

186.1. The perverse and unreasonable findings of the Panel which;

186.1.1. Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged by her;

186.1.2. Failed to recognise Mr Reilly's treatment of the Claimant as constituting harassment prior to December 2020 and sexual harassment at all;

186.1.3. Concluded that Mr Reilly's mental health and the confusing nature of the Claimant's messages were mitigation or an excuse for his actions, while failing to recognise the relatively vulnerability of the Claimant;

186.1.4. Justified and romanticised Mr Reilly's behaviour by concluding that his messages "has the tone of a spurned lover trying to understand where things went wrong";

186.1.5. Failed to uphold the complaint of sexual harassment by concluding that unwanted, physical touching on two separate occasions did not constitute sexual harassment; and

186.1.6. Her constructive dismissal, pursuant to section 39(2)(c) EqA 2010.

187. We rely on our findings of fact above in making our decision on these claims of victimisation.

Applying the facts to the law and the issues

Unfair Dismissal

Law

188. Messrs Frew and Milsom were not far apart in their respective submissions on the law relating to constructive unfair dismissal, as one would expect. Section 95(1)(c) of the ERA 1996 states:

> ***95 Circumstances in which an employee is dismissed.***
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if… …(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

Implied Duty, fundamental breach, and grievances

189. We find that paragraphs 72 to 80 of Mr Milsom's Submissions set out a correct analysis of the case law around fundamental breaches, the implied duty and the interplay between grievances and constructive dismissal, taking in:

189.1. **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** [1997] ICR 606, namely the duty that neither party will, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

189.2. An EqA 2010 contravention is likely to constitute a breach of the implied term: **Shaw v CCL Ltd** [2008] IRLR 284. Any breach of the implied term is repudiatory in nature: **Lewis v Motorworld Garages Ltd** [1986] ICR 157.

189.3. The unfounded rejection of a grievance is likely to constitute a breach of the implied term. In **Nicholson v Hazel House Nursing Home Ltd** EAT 0241/15 the EAT overturned the ETs decision and substituted it for a judgment that the claimant had been constructively dismissed following the dismissal of a grievance concerning prior discrimination. Per Laing J at paragraphs 37-50.

189.4. A breach of trust and confidence may also arise not so much from the unfair rejection of a grievance as from the way in which the grievance was handled. An employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to their employees to obtain

redress of any grievance they may have: **WA Goold (Pearmak) Ltd v McConnell and anor** [1995] IRLR 516. The implied term is not only breached where there is a wholesale failure to conduct a grievance but also where the procedure once commenced is not conducted in a fair and proper way: **Blackburn v Aldi Stores Ltd** [2013] ICR D37.

189.5. An employer's approach to fact-finding in respect of any grievance is to be informed by Supreme Court guidance in **Braganza v BP Shipping Ltd and anor** [2015] ICR 449. Due to the relational nature of an employment contract, any decision-making function entrusted to the employer must be exercised in accordance with the implied obligation of trust and confidence. This necessitates both limbs of the Wednesbury test of rationality to be satisfied. Per Baroness Hale:

> *"The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it."*

189.6. Even where internal policies governing matters such as disciplinary, grievance and anti-harassment measures are not contractually incorporated, they are illustrative of the implied term. Per Moore-Bick LJ at [17] in **Deadman v Bristol City Council** [2007] IRLR 888:

> *"The recognition of the need to deal with harassment positively, quickly and sensitively provides one example, but rather than constituting a term in its own right it is in my view properly to be understood as illustrating the manner in which the Council expects to conduct its relationship with its employees, both in complying with its contractual obligation not to undermine the mutual relationship of trust and confidence and in observing its duty of care towards them under the contract and at common law. The Procedure for Stopping Harassment in the Workplace is rather different. Although some parts of it also contain little more than statements of policy, other parts, particularly section 7, are of a more detailed and formal nature and are capable of being incorporated into contracts of employment. In my view where an employer has published and implemented with the concurrence of employees' representatives formal procedures providing for the manner in which complaints are to be investigated, it will usually become a term of the contract of employment that those procedures will be followed unless and until withdrawn by agreement."*

189.7. Absent express terms to the contrary, it is an implied term that the determination of any internal disciplinary procedure will be the product of the appointed investigator: **West London Mental Health NHS Trust v Chhabra** [2014] IRLR 227 (SC). The improper influence of third parties, and in particular HR, is likely to be in breach of that term. "An

investigating officer is entitled to call for advice from HR; but HR must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. An employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the dismissing officer that go beyond legal advice, and advice on matter of process and procedure:" per HHJ Serota in **Ramphal v Department For Transport** [2015] IRLR 985. There is no reason in principle why a different approach should apply to grievance procedures.

189.8. The implied term similarly entails a duty to offer such steps as are reasonable to support an employee in her duties without enduring harassment or disruption from colleagues: **Wigan Borough Council v Davies** [1979] ICR 411.

189.9. A repudiatory breach cannot be cured: **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908.

189.10. A repudiatory breach need only be part of the reason for resignation in order to sustain a constructive dismissal claim: **Meikle v Nottinghamshire County Council** [2005] ICR 1; **Wright v North Ayrshire Council** [2014] ICR 77. 'The crucial question is whether the repudiatory breach played a part in the dismissal.' Even if the employee leaves for 'a whole host of reasons,' he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon:' Elias P **in Abbycars (West Hornden) Ltd v Ford** EAT 0472/07.

The Last Straw Doctrine

190. We found Mr Frew's summary of cases was accurate and relevant:

190.1. In **Waltham Forest v Omilaju** *[2004] EWCA Civ 1493*, the Court of Appeal had to decide whether there can be a constructive dismissal where the employer's final act which prompted the resignation is found by the Tribunal to be reasonable conduct. Mr Omilaju brought a number of Tribunal proceedings against the council, which had a rule that employers who took employment proceedings against it had to apply for special unpaid and annual leave to attend the Hearings in their claims. It refused to pay Mr Omilaju's salary when he was attending a Hearing. He resigned, claiming that the refusal to pay his salary had destroyed his trust and confidence in the council and was the last straw in a series of mistreatment over a period of years.

190.2. When the Tribunal dismissed his original claims, he issued further proceedings against the council for constructive dismissal. The claim eventually came before the Court of Appeal and the Court of Appeal ruled that the key question was whether the final straw was the last in a series of acts or incidents that cumulatively amounted to a repudiation of the contract by the employer. It found against Mr Omilaju and gave the following guidance:

190.2.1. The final straw must contribute something to the breach, although ordered acts might be relatively insignificant.

190.2.2. The final straw must not be utterly trivial.

190.2.3. The act does not have to be of the same character as earlier acts complained of.

190.2.4. It is not necessary to characterise the final straw as unreasonable or blameworthy conduct in isolation, although in most cases it is likely to be so.

190.2.5. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

191. Mr Milsom's take on the **Omilaju** case was that individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of breaching the implied term of trust and confidence by way of a final straw. A last straw need not have the same character as the earlier acts in the series, but it must have a material contribution.

192. Mr Milson also submitted that there is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer: **Logan v Commissioners of Customs and Excise** [2004] ICR 1. The victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation: **Kaur**. The effect of the last straw is to revive the employee's right to resign. It follows from **Kaur** that where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.

193. Mr Frew referred us to the following further cases n the last straw doctrine:

193.1. The case of **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** UKEAT/0108/19 found that the Tribunal erred in concluding that, because it had found that the conduct of the respondent which tipped the claimant into resigning could not contribute to a breach of the implied duty of trust and confidence, his

claim that he was constructively dismissed must fail. That would be correct only had it, properly, found that:

193.1.1. There was no prior conduct by the respondent amounting to a fundamental breach; or

193.1.2. There was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed.

193.2. Paragraph 90 of the **Williams** judgment provides the following (Mr Frew's emphasis:

"However, the Tribunal's findings thus far, on such proper pre-resignation, are limited to the following. Firstly, there is a finding that there was discrimination in relation to withholding information about the conduct of which the Claimant was accused. However, the Tribunal did find that the Claimant was at least, prior to his resignation, given the information that he was accused of manhandling a child. Secondly, there was the withholding of the information about the identity of his accuser and thirdly the withholding of access to witnesses and documents. The fourth matter Mr Sugarman seeks to rely on, namely the withholding of the name of the child, is a matter in respect of which I have concluded remission is necessary to determine whether there was an act of discrimination or not. ***I have concluded that it would go beyond what I can do at this point, to make a finding that the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory.*** *That is a finding that it may be open to the Tribunal to make. I do not rule it out, but the Tribunal will have to decide that for itself on remission."*

193.3. In **De Lacey v Wechsein Ltd (t/a The Andrew Hill Salon)** *UKEAT/0038/20* the Employment Appeal Tribunal held that the fact that the last straw was not discriminatory did not automatically mean that a constructive dismissal was not discriminatory. Relying on **Williams** the Employment Appeal Tribunal noted that it will be a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. In **De Lacey** (D) was a Trainee Hair Stylist. In 2015 D commenced a period of maternity leave, returning to work 10 months later. She alleged that her employer engaged in a course of discriminatory conduct by undermining her work and disregarding her. This culminated in what D described as a last straw incident in January 2017. She resigned and brought claims of discrimination but also claimed unfair constructive dismissal.

193.4. An Employment Tribunal dismissed her claims of discrimination but upheld her claim of constructive dismissal. It held that, although D

established a prima facie case of discrimination in 2015, she had failed to establish an ongoing course of discriminatory conduct, so that her discrimination claim was not brought within the three month time limit. However, although the last straw incident was not discriminatory, it was the culmination of treatment by the employer since 2015 that when taken together, amounted to a breach by the employer of the implied term of trust and confidence, which D was entitled to treat as a repudiatory breach of her contract of employment. D appealed arguing that her constructive dismissal and allegations of historic acts of unlawful discrimination were in reality inextricably linked and that her constructive dismissal was therefore discriminatory.

193.5. The Employment Appeal Tribunal remitted the question of whether D's constructive dismissal was discriminatory back to the original Tribunal but rejected all other grounds of appeal. The Tribunal had erred in law by not addressing whether the last straw incident was influenced by the alleged discrimination in 2015, which might have rendered the constructive dismissal discriminatory but also meant that D's discrimination claim was brought in time.

193.6. It is clear that the question is whether the discrimination found had sufficiently influenced the overall repudiatory breach. There could be cases in which the constructive dismissal was discriminatory, even though the last straw was not. The very essence of the last straw doctrine was that it need not be something of major significance or amount to a breach of contract when looked at in isolation.

193.7. A constructive dismissal can be discriminatory if discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach. The question it is repeated, was whether the discrimination found had sufficiently influenced the overall repudiatory breach and, on that basis, it was held within **De Lacey** that **Williams** applied. It was a matter of degree whether discriminatory contributing factors rendered the constructive dismissal discriminatory (§§ 68-92).

Affirmation

194. Mr Milsom submitted that:

194.1. Affirmation requires something more than the passage of time: **Chindove v William Morrison Supermarkets plc** EAT 0201/13. This is particularly so given the serious consequences on the individual of losing their employment and the significant consequences which may follow: Buckland. Consequently, as Jacob LJ observed, he more serious the consequences, the longer the employee may take to make such a decision.

194.2. Invoking an employer's grievance procedure – including by way of an appeal – does not amount to affirmation: **Gordon v J & D Pierce (Contracts) Ltd** [2021] IRLR 266; **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1. As Underhill LJ observed in **Kaur**, there is no

anomaly in holding that a contract has been terminated for some purposes and not for others, and it would be unsatisfactory if an employee were unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.

194.3. For similar reasons, giving contractual notice should not be regarded as affirmation. So much is clear on the face of s95(1)(c) ERA 1996 itself: there may be a constructive dismissal "with or without notice." See also **Quilter Private Client Advisers Ltd v Falconer and anor** [2022] IRLR 227 and **Buckland** in which Jacobs LJ suggested that the employee's long notice period in that case would not have stood in the way of his constructive dismissal claim.

Direct Discrimination

Law

195. Section 13(1) EqA 2010 provides as follows:

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

196. Mr Milsom pointed us to the following matters:

196.1. Whilst "less favourable treatment" imports an objective element this must be considered having regard to the experiences of the particular claimant, 'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person:' [3.5] EHRC Code on Employment.

196.2. Once it has been established that the claimant suffered less favourable treatment, it is not possible to offset the effect of the treatment by offering some benefit to him or her in return: **Ministry of Defence v Jeremiah** *[1980] ICR 13.*

196.3. The laborious search for an actual or hypothetical comparator may be circumvented by addressing the primary question, namely why the complainant was treated as he or she was. If there are discriminatory grounds for that treatment, there will 'usually be no difficulty in deciding whether the treatment… was less favourable than was or would have been afforded to others:" per Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337. See also Mummery LJ in **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278: 'I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he

was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment'.

Harassment

Law

197. Section 26 EqA 2010 provides as follows:

26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

…

sex

...

198. Mr Milsom referred us to the following:

198.1. Pursuant to s212(1) EqA 2010, acts of harassment are excluded from the scope of "detriment" for the purposes of s13 EqA 2010 (direct discrimination). It follows that a finding of harassment precludes the ET from concluding that the same behaviour also constitutes direct discrimination.

198.2. As Underhill J observed in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, it is a "health discipline" to consider the three elements of s26(1)-(2) EqA 2010 separately:

198.2.1. unwanted conduct;

198.2.2. that has the proscribed purpose or effect;

198.2.3. which relates to a relevant protected characteristic.

Unwanted

198.3. Unwanted conduct is to be assessed from the perspective of the employee : **Thomas Sanderson Blinds Ltd v English** EAT 0316/10. The claimant need not be the primary victim: [7.10] EHRC Code of Practice on Employment; **Moonsar v Fiveways Express Transport Ltd** [2005] IRLR 9.

198.4. The scope of unwanted conduct is broad. It has previously been found to encompass an employer's handling of an employee's harassment complaint can itself amount to unwanted conduct that satisfies the statutory definition e.g., **Rose-Brown v Home Office (UKBA)** ET Case No.2313044/10. We are aware that first instance cases are not bunding on this Tribunal.

198.5. Unwanted is to be equated with "unwelcome" or "uninvited." A claimant need not object to such conduct at the time in order for it to be regarded as unwanted: **Reed and anor v Stedman** [1999] IRLR 299; **Moonsar** (in which the EAT overturned the ET's rejection of a harassment complaint due to the absence of a complaint at the time).

Violation of Dignity or Offensive Environment

198.6. A claimant need only show the violation of dignity *or* the creation of an offensive environment. Similarly, a claimant is only required to show that the conduct in issue had the proscribed purpose *or* effect. The

adverse purpose or effect should be assessed cumulatively by reference to all incidents relied upon: see **Reed v Steadman** in which the EAT adopted the approach of the USA Federal Appeal Court in **USA v Gail Knapp***:*

> *'The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."*

198.7. The test for establishing the requisite purpose or effect is subjective but with an objective element. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect. It is principally designed to exclude instances of hypersensitivity. Application of the objective standard must, however, take into account the circumstances of the claimant including previous experiences of harassment: **Punch v Maldon Carers Centre** ET Case No.3202677/06.

Related to Sex

198.8. When adopting the "related to" test, Parliament consciously had in mind a broader test than that found in s13 EqA 2010 in order to effectively transpose the Framework Directive*:* ***R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*** [2007] ICR 1234. The breadth of the test is illustrated in the statutory EHRC Code at [7.10]:

> *"A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex."*

198.9. Where the link between the protected characteristic and impugned conduct is not explicit, the ET is to adopt the approach to the drawing of inferences common to other provisions of EqA 2010.

Section 26(2) EqA 2010

198.10. Section 26(2) proscribes conduct of "a sexual nature" as contrasted to conduct "related to sex." It is to be assessed on a common-sense basis on the facts of any given case: **Driskel v Peninsula Business Services Ltd and ors** [2000] IRLR 151. Examples cited at [7.13] in EHRC Code include unwelcome sexual advances, touching, sexual assault, sexual jokes, displaying pornographic photographs or drawings, or sending emails containing material of a sexual nature.

Section 26(3) EqA 2010

198.11. There is comparatively little authority on the application of s26(3) EqA 2010. This is unsurprising given that conduct within the scope of s26(3) EqA 2010 is also likely to constitute harassment pursuant to s26(1)-(2) in that the conduct will axiomatically be "related to sex." The requirements are clear on the face of the provision: there must have been prior actionable harassment and the claimant must have been treated less favourably because of submitting to or resisting that harassment. The primary harasser need not be the same person as person "A." This is a paradigm instance of where the ET might be expected to adopt a "reason why" approach to the treatment rather than invoke an actual or hypothetical comparator (**Shamoon**).

198.12. Whilst rarely invoked, the availability of s26(3) provides a means of awarding compensation to reflect the indignity of a worker's fate within the workplace being determined by responses to unwanted sexual attention: **AA Solicitors Ltd (t/a AA Solicitors) v Majid** UKEAT/0217/15.

The EHRC Technical Guidance

198.13. In 2020 the EHRC provided Technical Guidance on Sexual Harassment and Harassment at Work pursuant to its powers under s13 Equality Act 2006. Whilst not a statutory code pursuant to s14 EA 2006 which the ET is *required* to consider, the Guidance "may still be used as evidence in legal proceedings." This is particularly so in view of the impending obligations reflected in the Worker Protection (Amendment of Equality Act 2010) Bill, currently at second reading in the HL. Whilst a private members Bill it has received support during its passage through the Commons from the Government. Once in force it will introduce a new s40A to EqA 2010, which imposes a duty on the employer to "take all reasonable steps to prevent sexual harassment" in the course of employment. This will be accompanied by a new s124A EqA 2010 conferring the right on the ET to grant an uplift to compensation where there is a failure to comply with the duty capped at 25%.

198.14. We were referred to paragraphs 5.4; 5.9; 5.16; 5.29; 5.33; 5.41; 5.43; 5:45; 5:49; 5.58-5.60; 5.64-5.65; 5.66; and 5.72 of the Technical Guidance.

199. Mr Frew's submissions on harassment were as follows:

199.1. The EHRC Employment Code adopts a broad interpretation of the term "related to". It gives the following example: a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult but continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is

related to her sex. This could amount to harassment related to sex (Paragraph 7.10).

199.2. A real-life situation similar to the example happened in **Nathwani v University of The Arts London** *ET Case No: 2201741/11*. There, N entered into a sexual relationship with a colleague, S. When this ended the Tribunal found that S unlawfully harassed her by making protestations of his feelings for her at work, telling his colleagues of his feelings for her and then acting coldly towards her. He also sought to change her line management reporting arrangement so that she would report to him. S argued that this conduct was not related to N's sex but to the fact that they had had a sexual relationship. However, the Tribunal reasoned that the feelings S had for N were feelings for her as a woman. He would not have had similar feelings for a man, nor would he have expressed himself in a similar way to a man. His conduct towards N was related to her sex in a similar way to the conduct of a man who wished to instigate a sexual relationship with a woman: "One would not say in such a case that the man's conduct was related only to wish to have a sexual relationship with the woman, and not to her sex".

199.3. ***Zachariadis v CADY Commercial Cleaning Ltd*** *ET Case No. 2400380/15* where two directors were in a personal as well as a business partnership but subsequently separated. Another female employee intended to go on holiday but K objected, went to their home, and told her she would have to leave her employment. She was asked for her phone and when she refused on the basis that the other director had paid for it, K crushed the phone grabbed her by the neck, scratched her, threw her against furniture and accused her of stealing her man. The incident was reported to the police and a claim for discrimination and harassment was made. The Tribunal considered that there were no facts from which it could conclude that the conduct was related to sex. In its view, the dismissal and assault were not inherently related to the fact that Z was a woman. The words used, stealing my man, related to supposed behaviour rather than her sex. As for the motivation the Tribunal concluded that it was not because the employee was a woman but because she thought she was having an affair.

199.4. **Stead v Nosh (Southampton) Ltd** *ET Case No. 3102213/12*: S was the manager of a restaurant that was bought by K and B, who were in a relationship. B accused S of trying to take K away from her and told S to stay away from him. The Tribunal considered that B's unwanted conduct was not related to sex. In its view, the comments made by B were due to her perception that S posed a threat to her relationship with K, a threat heightened by S's close daily working relationship with K. In its view, "The law protects women from harassment as women and not as threats to established relationships."

199.5. In the case of **Land Registry v Grant** [2011] EWCA Civ 769 Elias LJ said "An individual may choose to make generally known in the

workplace certain aspects of his or her private life, such as the fact that he or she has contracted some debilitating illness, or is pregnant, or has become a Christian. In my judgment if that information is discussed in the course of conversation, even in idol gossip, provided at least there was no ill intent, that would not make the disclosure of that information an act of disability, sex, or religious discrimination, as the case may be. This is so even if the victim is upset at the thought that he or she will be the subject of such idle conversation."

199.6. The same passage was relied upon in the case of **Warby v Wunda Group plc** UKEAT/0434/11.

Victimisation

Law

200. The law is contained in section 27(1) EqA 2010, which provides as follows:

> *"A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act."*

201. Mr Frew made the following legal submissions on the question of victimisation:

201.1. In **Chief Constable of Greater Manchester Police v Bailey** [2017] EWCA Civ 425 the Court of Appeal applied **Ahmed v Amnesty International** [2009] IRLR 884 and held that the Tribunal had erred by applying a "but for" approach to causation. In fact, while there would have been no secondment determinative DC Bailey had not brought his earlier claims, that did not mean that the termination was "because of" his earlier claims in the relevant sense. The reason why the secondment was terminated was that the agreed two-year period had expired: it had nothing to do with DC Bailey's race, or the existence of the settled claims.

201.2. The Employment Appeal Tribunal held that a Tribunal also applied the wrong causation test in **Peninsula Business Services Ltd v Baker** UKEAT/0241/16. Baker was a lawyer employed by Peninsula to provide legal advice and representation at tribunal hearings. He advised his manager that he had dyslexia and advised another manager that his disability meant that he took longer to do certain things and that he might not be able to cover a case. Occupational Health advised that Mr Baker was likely disabled and recommended reasonable adjustments. The following month, the Director of Legal Services arranged for covert surveillance of Mr Baker to be carried out. The director believed that Mr Baker intended to build up a private caseload during the time he should be working for Peninsula. The Employment Appeal Tribunal overturned a Tribunals finding that Mr Baker had been victimised. The Tribunal had failed to apply the right test as it had failed to ask itself why Peninsula had subjected to him to surveillance and what, consciously or unconsciously, was the reason for that.

201.3. In **Paige v Lord Chancellor and Another** [2021] EWCA Civ 254, the Court of Appeal upheld a Tribunal decision that a Christian magistrate did not suffer victimisation when he was removed from office after speaking to the press, expressing disapproval of adoption by same sex couples. The courts leading judgment was given by Underhill LJ, who had given judgment in **Martin**. Rejecting Mr Paige's argument that the Tribunal had erred in applying **Martin** in his case, the court considered the observations made by the Employment Appeal Tribunal in **Woodhouse v West North West Homes Leeds Ltd** UKEAT/0007/12.

201.4. While the court agreed it was important not to undermine the protection provided by the anti-victimisation legislation where complainants acted in an irrational way did not consider that it was useful to apply a requirement for circumstances to be exceptional. Tribunals could be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.

201.5. In **Woodhouse**, an employee submitted 10 grievances and lodged 9 claims in the Employment Tribunal based on various allegations including race discrimination and victimisation. The employer rejected his grievances and dismissed the employee on the basis that the relationship had broken down as a result of his incurable disaffection. The Tribunal held that the employee's case was on all fours with **Martin** and upheld his victimisation claim. The Employment Appeal Tribunal overturned the Tribunal's decision noting that while the employee might have been obsessive and fixated, he was not mentally ill like Ms Martin. In practice, said the Employment Appeal Tribunal, it will only be in a few exceptional cases where protected acts will be found not to have caused the dismissal or other detriment. Cases like **Martin** where the reason for dismissal was generally separable from the protected acts, will be very rare.

202. Mr Milsom's submissions on victimisation were as follows:

202.1. Whilst it is open to an ET to conclude that the reason for treatment was something truly separable from a protected act, it should not do so lightly. An ET must also be satisfied that the causative factor is genuinely separable from the protected act itself: **Martin v Devonshires Solicitors** [2011] ICR 352.

"Because of" and "Related to:" Causation and Inferring EqA 2010 Contraventions

202.2. The protected characteristic need not be the sole or principal ground for the treatment in issue: similarly, the "relation to" the protected characteristic need not be the sole cause for the purposes of a harassment complaint. Per Lord Nicholls in **Najaragan v London Regional Transport** [1999] ICR 877:

"…a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases:

discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out' (our stress). The crucial question, in every case, was 'why the complainant received less favourable treatment… Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

202.3. "Significant" requires no more than "an influence which is more than trivial:" per Peter Gibson LJ in **Igen Ltd v Wong** [2005] ICR 931; see also **Pathan v South London Islamic Centre** EAT 0312/13.

202.4. Discriminatory motivations are rarely overt. Discriminatory decision-makers 'do not in general advertise their prejudices: indeed, they may not even be aware of them:' per Lord Browne-Wilkinson in **Glasgow City Council v Zafar** [1998] ICR 120. The reverse burden of proof is the means of remedying the problems which this would otherwise create: once a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate s136 EqA 2010.

202.5. Whilst unreasonable behaviour in and of itself may not give rise to inferences, unexplained unreasonable conduct certainly may and often should do so: **Igen**.

202.6. Inferences of EqA 2010 contraventions frequently been drawn from the following:

202.6.1. A failure to follow internal procedures including disciplinary and grievance procedures: **Governing Body of Tywyn Primary School v Aplin** EAT 0298/17: **Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust** [2019] IRLR 1022;

202.7. Breach of EHRC Code and/or Guidance;

202.7.1. Inconsistent or untruthful evidence: **SRA v Mitchell** EAT 0497/12; **Base Childrenswear Ltd v Otshudi** [2020] IRLR 118 (CA);

202.7.2. Opacity in the provision of information and/or the failure to call relevant witnesses: **D'Silva v NATFHE (now known as University and College Union) and ors** [2008] IRLR 412. As the CJEU observed in **Meister v Speech Design Carrier Systems GmbH** [2012] ICR 1006, ECJ, "it

must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by the [relevant EU Directives]'

The differential treatment of an evidential comparator.

202.8. If an ET makes findings of fact from which an inference of discrimination could properly be drawn, it will be an error of law for it not to do so and thus avoid shifting the onus on an employer to disprove the prima facie case: **Country Style Foods Ltd v Bouzir** [2011] EWCA Civ 1519.

202.9. An ET should not assume that others would be treated similarly poorly absent evidence to that effect: **Anya v University of Oxford and anor** [2001] ICR 847; **Eagle Place Services v Rudd** [2010] IRLR 486.

Limitation

Law

203. Mr Frew made the following legal points in relation to the time limits applicable to the claimant's discrimination claims and the Tribunal's discretion to extend time on a just and equitable basis:

203.1. The time limit for a discrimination claim to be presented to a Tribunal is normally at the end of "the period of three months starting with the date of the act to which the complaint relates," section 123(1) Equality Act 2010. However, acts occurring more than three months before the claim may still form the basis of the claim if they are part of "conduct extended over a period," and the claim is brought within three months of the date of that period, section 123(3) Equality Act 2010.

203.2. In deciding whether it is just and equitable to extend time to permit an out of time discrimination claim to proceed, the Tribunal is entitled to take into account anything that it deems to be relevant. The Court of Appeal confirmed that a Tribunal has a wide discretion when considering whether it is just and equitable to extend time. Time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, Tribunals, should not extend time unless the claimant convinces them that it is just and equitable to do so. The exercise of discretion to extend time should be the exception, not the rule (**Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576).

203.3. It is accepted that this does not mean that a claimant must always put forward a good reason for their delay, or that time cannot be extended in the absence of an explanation for the delay from the Claimant. The case of **Concentrix GVC Intelligent Contact Ltd v Obi** [2022] EAT 149 identifies just such a position where a Tribunal decided to extend time where no evidence was presented as to why the claimant had presented the claim one day late and where the claimant had been aware of the time limit. The Tribunal found that the delay did not cause

any genuine prejudice to the Respondent, whereas if the extension had not been granted, the claimant would not have been able to receive any remedy. The Employment Appeal Tribunal rejected a submission that, in circumstances where no reason was provided by the claimant, it was necessary for the Tribunal to discern one from the available evidence. Applying the Court of Appeal's decision in **Morgan (Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640), it was open to a Tribunal to exercise the discretion even when finding no reason for the delay. However, the Employment Appeal Tribunal held that it would be an error for a Tribunal to fail to consider the potential forensic prejudice arising from historical allegations that would be brought in if an extension of time were allowed. Where the claim involves a series of complaints about incidents occurring over a period, HHJ Auerbach suggested in obiter comments that the Tribunal should first consider whether, taking all of the incidents as one course of conduct, it is just and equitable to extend time, taking into account any issues of forensic prejudice. If the Tribunal concludes that it is not just and equitable to extend time in relation to the whole course of conduct, it may need to consider whether to extend time in relation to the most recent incident in its own right, on the basis that the same forensic prejudice issues might not arise.

203.4. Notwithstanding the above, the Court of Appeal in, **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 identified that when exercising discretion Tribunals should assess all relevant factors in a case, including the length of and the reasons for the delay.

204. Mr Milsom's legal submissions on limitation were as follows:

204.1. Pursuant to s123(1)(a) EqA 2010 a claim must be brought within three months of the last act complained of. Time may be extended pursuant to s123(1)(b) EqA 2010 where a claim is brought within "such other period as the employment tribunal thinks just and equitable."

204.2. Time may be at large where there is an "act extending over a period" or continuing state of affairs. Suspension is regarded as giving rise to a continuing state of affairs: **Tait v Redcar and Cleveland Borough Council**: EAT 2 Apr 2008.

204.3. Whilst it is relevant that all acts complained of are committed by the same or different individuals, it is not decisive: **Aziz v FDA** [2010] EWCA Civ 304.

204.4. Whilst the burden on extending time rests with the claimant, it is an error of law to conclude that an extension requires exceptional circumstances: **Pathan v South London Islamic Centre** EAT 0312/13. As **Pathan** confirms, an ET considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time.

204.5. Instead, the central question is the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

204.6. Resolution of this primary question may be informed by the factors cited in s33 Limitation Act 1980 in particular:

204.6.1. the length of, and reasons for, the delay;

204.6.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

204.6.3. the extent to which the party sued has cooperated with any requests for information;

204.6.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

204.6.5. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

204.7. Given the focus on prejudice there is no "tariff" approach to the length of delay.

204.8. Assessing prejudice should include consideration of the merits of the complaint. Thus, in **Szmidt v AC Produce Imports Ltd** EAT 0291/14 the ETs refusal to extend time was overturned on appeal. Whilst there had been no explanation for the delay by the claimant, the ET concluded that but for the time bar the claim would have succeeded. This was a feature which the ET failed to give adequate weight when refusing to extend time.

204.9. Whilst pursuit of an internal complaint does not automatically licence an extension of time, it is a relevant factor: **Aniagwu v London Borough of Hackney and anor** [1999] IRLR 303. This is particularly so where further delay is attributable to an employer's non-compliance with its policies: **Osajie v London Borough of Camden** EAT 0317/96

Causation, Polkey and Chagger

Law

205. Mr Milsom submitted that the EqA 2010 contraventions are compensated as statutory torts. 'As best as money can do it, the applicant must be put into the position she [or he] would have been in *but for* the unlawful conduct' per **Ministry of Defence v Cannock and ors** [1994] ICR 918. The breadth of compensation is in fact wider since there is no foreseeability requirement: all losses which naturally flow from the underlying contravention are recoverable: **Essa v Laing Ltd** [2004] ICR 746.

206. An ET must consider whether, absent the unfairness or discriminatory nature of the dismissal, the employment would nonetheless come to an end and if so when (**Polkey/Chagger***).* If that which went wrong in a claimant's dismissal was fundamental and seems to have gone 'to the heart of the matter', it may well be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to "embark on a sea of speculation:" **King and ors v Eaton Ltd (No.2)** [1998] IRLR 686.

Summary

Unfair Dismissal

207. We find that the claimant was constructively dismissed by the respondent. We make that finding for the following reasons:

    207.1. Section 2(1) of the Health and Safety at Work Act 1974 imposes a duty on employers to ensure, so far as reasonably practicable, the health, safety, and welfare at work of all its employees.

    207.2. There is an implied duty in all contracts of employment that binds employers and employees not to conduct themselves in a manner likely to destroy or seriously damage their relationship without reasonable cause following **Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation)**.

    207.3. As set out in our findings of fact above, we find that Mr Reilly, for whom the respondent admits vicarious liability, subjected the claimant to harassment related to the protected characteristic of sex under section 26(1) if the EqA 2010 and subjected the claimant to harassment of a sexual nature under section 26(2) of the EqA 2010.

    207.4. As set out in our findings of fact above, we find that the respondent failed to proactively protect the claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it between 6 December 2020 and 4 August 2021. The respondent has conceded that Mr Reilly harassed the claimant between

    207.5. As set out in our findings of fact above, we find that the respondent unreasonably delayed, between 6 December 2020 and 15 November 2021, investigating and responding to the claimant's complaints about Mr Reilly's behaviour.

    207.6. As set out above, we find that the respondent provided inadequate support and communication to the claimant during the investigation between 23 June 2021 and 15 November 2021.

    207.7. As set out in our findings of fact above, we find that the SUC's findings were perverse and unreasonable.

207.8. The claimant's claim is that she resigned following a last straw, which was her receipt of the SUC's report on 15 November 2021 and her subsequent conversation with Nita Bewley on 22 and 23 November 2021. The burden of proof is on the claimant to show on the balance of probabilities that she was dismissed.

207.9. The respondent's position, as expressed in Mr Frew's Submissions (paras 17-37), is that the claimant has not demonstrated that, when viewed objectively, the respondent's conduct over time demonstrated an intention to no longer be bound by the contract of employment.

207.10. The parties agreed that the final straw was, effectively, the SUC's report of 15 November 2021. Applying the tests set out in **Omilaju**, we find that;

207.10.1. The SUC's report contributed something to the breach of the implied duty of trust and confidence. We find that the contribution of the report was substantial.

207.10.2. The final straw was not utterly trivial.

207.10.3. The final straw was, in part, of the same character of the claimant's allegations that she was not protected by the respondent and that the procedure was delayed.

207.10.4. The final straw can be characterised as unreasonable and blameworthy on our findings.

207.10.5. The final straw was not an innocuous act.

207.11. We reject Mr Frew's argument that the claimant's evidence at paragraph 161 of her witness statement that, effectively, if the SUC report had contained the findings in Mr Rawlings' report, she may not have resigned. That is then broken down into the propositions that without Mr Reilly's harassment, there would not have been an investigation; and without the investigation leading to the SUC report, she may not have resigned; so, but for the actions of Mr Reilly between October/November 2020 and February 2021, the situation would not have arisen.

207.12. We find that the analysis is flawed because if separates out the harassment in a way that the claimant did not in her witness statement at paragraph 161. She references the SUC report as the final straw and then goes on to cite the failure of the respondent to handle her complaint in a timely manner, the failure to provide regular updates, and the failure to suspend Mr Reilly to show that the respondent was taking her complaint seriously and create a safer, less hostile work environment. We have made findings of fact that the respondent failed to do all those things.

207.13. We also reject the submission by Mr Frew that the claimant's motivation for filing her grievance was her learning of other potential incidents of harassment by Mr Reilly in other countries. We find that the claimant has shown on the balance of probabilities that the reason she made her grievance was the harassment of her by Mr Reilly. The reason she resigned was the culmination of the five elements that we find the claimant has shown to have happened in the list of issues.

207.14. Despite our criticisms of its report, the SUC did find that Mr Reilly had harassed the claimant. The respondent has conceded that Mr Reilly harassed the claimant.

207.15. We find that a contravention of the EqA 2010 is likely to constitute a breach of the implied term (**Shaw v CCL Ltd**). We find that, in this case, Mr Reilly's conduct, for which the respondent admits vicarious liability, breached the duty of trust and confidence.

207.16. We find that any breach of the implied duty is repudiatory in nature (**Lewis v Motorworld Garages Ltd**). We find that Mr Reilly's conduct was a repudiatory breach.

207.17. We find that the respondent's failure to proactively or reactively protect the claimant from Mr Reilly's behaviour and/or take adequate effective measures to prevent it is a fundamental breach of the duty to provide a safe workplace under section 2 of the Health and Safety at Work Act 1974, and a breach of the implied duty of trust of confidence.

207.18. We find that the delay in investigating and responding to the claimant's complaints is a breach of the implied duty of trust and confidence.

207.19. We find that the inadequate support and communication provided to the claimant during the investigation is a breach of the implied duty of trust and confidence.

207.20. We find that the findings of the SUC, which were perverse and unreasonable is a breach of the implied duty of trust and confidence (see **Nicholson v Hazel House Nursing Home Ltd**).

207.21. We find that the repudiatory breaches played a huge part in the dismissal. A repudiatory breach cannot be cured (**Bournemouth University Higher Education Corporation v Buckland**).

207.22. If the claimant relied solely upon the conduct of Mr Reilly as a repudiatory breach, then affirmation would be a factor in our decision. However, our findings are that there were five elements to the breach of the implied duty of trust and confidence that culminated in a final straw that was a breach of the implied duty itself on 15 November 2021.

207.23. We find that the claimant did not affirm any of the breaches following the decision in **Kaur** that stated that the effect of the last straw is to revive the employee's right to resign.

207.24. We find that there was no potentially fair reason for dismissal proposed by the respondent.

207.25. We find that the claimant was unfairly dismissed.

207.26. We find that the constructive dismissal was discriminatory. We will explain this finding further when we deal with the discrimination claims.

207.27. We find that there is no reason for us to make a reduction in any basic or compensatory award because of the claimant's contributory conduct. No reduction was argued for by Mr Frew.

208. ~~We find that there is no need for us to make a **Polkey** reduction because the respondent did not argue that if we found that there had been a dismissal, then the dismissal was fair or would have been fair If a fair procedure had been used.~~

209. ~~We did not hear sufficient evidence about a planned reorganisation of the respondent to make a determination as to whether the claimant was likely to be made redundant at a point in the future.~~

Overlap of discrimination claims and List of Issues

210. Our deliberations on these claims required consideration of the provisions of section 212(1) of the EqA 2010 that states that harassment cannot be a detriment in a direct discrimination claim.

211. Regrettably, we only noticed on wring these reasons that there was an error in the List of Issues produced in the preliminary hearing on 26 September 2022 [60-69]. Under the heading "Harassment were two sub-headings that were in bold and underlined. The first was "**Harassment related to sex**" [67] and contained two main allegations: Mr Reilly's behaviour from October 2020 until April 2021 that was set out in the substance of the claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021); and the perverse and unreasonable findings of the SUC.

212. The second sub heading [68] was "**Harassment related to the protected characteristic of sex**" which consisted solely of Mr Reilly's behaviour from October 2020 until April 2021 that was set out in the substance of the claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021).

213. No one had noticed the error. It was not raised in counsels' written or oral submissions. We have looked at the Agreed List of Issues that was submitted to the Tribunal by the claimant's solicitor on 5 September 2022 for the preliminary hearing before EJ Shore on 26 September 2022. It stated:

c. **Harassment**

Sex harassment

207.27.1. Did the Respondent engage in unwanted conduct related to sex?

207.27.2. What was the unwanted conduct?

- *The unwanted conduct relied upon is:*
  - *the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2020); and*
  - *The perverse and unreasonable findings of the Panel which;*
    - *Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's actions by dismissing his behaviour as having been encouraged;*
    - *Failed to recognise Mr Reilly's treatment of the Claimant as contributing harassment prior December 2020 and sexual harassment at all; and*
    - *justified and romanticised Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand where things went wrong"…*

…Sexual harassment

i. Did the Respondent engage in unwanted conduct of a sexual nature?

ii. What was the unwanted conduct?

- *The unwanted conduct relied upon is the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2020)"*

214. We find the list of claims set out by Mr Milsom in his Submissions did not reflect the actuality of the List of Issues as he had conflated separate claims of harassment related to the protected characteristic of sex with claims of harassment of a sexual nature on an 'either/or' basis (§ 1(ii)).

215. Mr Frew did not set out a full list of claims but acknowledges in his submissions (§ 73) that the claimant made claims of harassment related to sex (section 26(1)) and harassment of a sexual nature (section 26(2)).

216. We find that the claims under the heading "**Harassment related to sex**" [67] in the List of Issues produced after the preliminary hearing in September 2022 were agreed as and were meant to be claims under section 26(1) of harassment related to the protected characteristic of sex.

217. We find that the claims under the heading "**Harassment related to the protected characteristic of sex**" [68] in the List of Issues produced after the preliminary hearing in September 2022 were agreed as and were meant to be claims under section 26(2) of harassment of a sexual nature.

218. We find that a logical interpretation of the List of Issues in the bundle is that the claims under the heading "**Harassment related to sex**" [67] must be under section 26(1) because they include allegations about the allegedly perverse and unreasonable findings of the SUC.

219. We find that a logical interpretation of the List of Issues in the bundle is that the claims under the heading "**Harassment related to the protected characteristic of sex**" [68] must be under section 26(2) because they only include an allegation about Mr Reilly's behaviours.

220. That left us with a potential problem with Mr Frew's submissions (paragraphs 73-91) if he had been under the wrong impression as to which claims were made under which parts of section 26. We find, however, that his submissions address the legal and factual matters in the harassment related to sex claims in paragraphs 73-75 and 78-91. The factual aspect of the harassment of a sexual nature claim, which is limited to the conduct of Mr Reilly, is addressed in paragraphs 76-77: the respondent concedes Mr Reilly's conduct. The respondent asserts that the claims are out of time and that there are no grounds for the Tribunal to exercise its discretion to extend time in paragraphs 1-15.

Overlap of claims

221. We find that the scope of the claimant's direct discrimination claims as set out in paragraph 2.1.1 of the List of Issues were:

> *"2.1.1 "The perverse and unreasonable findings of the Panel which;*
>
> *2.1.1.1 Erroneously and inappropriately attributed blame and responsibility to the Claimant for Mr Reilly's criminal actions by dismissing his behaviour as having been encouraged by her;*
>
> *2.1.1.2 Concluding that Mr Reilly's mental health and the confusing nature of the Claimant's messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her. The Claimant was a man, almost twice the age of the Claimant and a person of senior influence in Morocco. She felt responsible for him and felt terrified and isolated by his behaviour;*
>
> *2.1.1.3 Failed to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment."*

221.1. The claimant's claims of harassment related to sex at paragraph 3.2.2 of the List of Issues contained exactly the heading as paragraph 2.1.1 of the direct sex discrimination claim. The specific detriment at paragraph 3.2.2.1 in the harassment related to sex claim is exactly the

same as paragraph 2.1.1.1 of the direct discrimination claim: both allege that the respondent erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's actions.

221.2. Paragraph 3.2.2.2 of the harassment of a sexual nature claim was an alleged detriment of:

> *"3.2.2.2 Failed to recognise Mr Reilly's treatment of the Claimant as contributing harassment prior to December 2020 and sexual harassment at all;"*

221.3. Paragraph 3.2.2.3 of the harassment related to sex claim alleged a detriment of:

> *"3.2.2.2 Justified and romanticised Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand where things went wrong".*

221.4. The claimant's alleged detriment in her claim of harassment of a sexual nature was:

> *"The unwanted conduct relied upon is the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021)"*

221.5. After considering the claims carefully and the effect that section 212(1) has on the claims find that the claims of direct discrimination because of sex and harassment related to sex (s.26(1)) are the same and are mutually exclusive.

Discrimination and Victimisation

Direct discrimination because of sex

222. Note – we will deal with any time points after making findings on the facts as to whether the complaints are made out.

223. The claimant relies on either Mr Reilly or a hypothetical comparator. We find that Mr Reilly is not an appropriate comparator for the claimant because his relevant circumstances are not materially the same as those of the claimant. In relation to the first claim, Mr Reilly had not made a complaint of harassment. In the second claim, Mr Reilly was not accused of sending mixed messages. In the third claim, Mr Reilly had not alleged unwanted sexual touching.

224. We find that the correct hypothetical comparator would be a man of materially similar rank and status as the claimant within the respondent who had made allegations of harassment of a sexual nature, including unwanted touching, stalking and excessive gifting and messaging.

225. Mr Frew submits that the claimant has pleaded her case on the basis that the respondent acted in the way it is alleged to have acted to downplay sexual harassment to harassment. It is submitted that the logical conclusion of that argument is that the respondent would have treated a hypothetical male comparator in exactly the same way as the claimant in order to achieve its goal of protecting its reputation.

226. Mr Milsom approaches the question from a different perspective; that of identifying why the claimant was treated as she was. He quoted Lord Nicholls in **Shamoon**, as saying that if there are discriminatory grounds for that treatment, there will "…usually be no difficulty in deciding whether the treatment… was less favourable than was or would have been afforded to others."

227. We have looked at the whole circumstances of the case and the findings of fact that we have made and have taken inferences from them. The relevant findings are:

    227.1. Some of the respondent's managers seemed unfamiliar with its Bullying and Harassment policies;

    227.2. The respondent has now conceded that Mr Reilly harassed the claimant from October 2020 to April 2021;

    227.3. The respondent failed to put effective measures in place to protect the claimant from Mr Reilly's conduct after she made an informal complaint to her line manager on 6 December 2020 and spoke to Mr Reilly's line manager on 8 December 2020;

    227.4. On the respondent's own admission, Mr Reilly continued to harass the claimant after she had made her informal report on 6 December and had written an email to Mr Reilly on 14 December 2020 making it very clear that his conduct was unwanted and that she had reported it to their respective line managers;

    227.5. The investigation of the claimant's grievance was unfair by (amongst other things):

        227.5.1. Its confused remit and procedural anomalies that ignored its own polices;

        227.5.2. HR producing a biased and unfair summary document for the investigator; and

        227.5.3. Taking the investigator's report and rewriting it. In the process, the findings of the investigator were watered down. The investigator was not told what the SUC had done.

    227.6. The respondent's SUC report was perverse and unreasonable by (amongst other things)

227.6.1. Setting an arbitrary and unsustainable cut off of 14 December 2020 and refusing to contemplate any allegation of harassment by Mr Reilly, which it now accepts should have been included;

227.6.2. Removing allegations unreasonably;

227.6.3. Including comments made by Mr Reilly as if they were facts when the investigator had cast doubt on their reliability.

227.7. Mr Reilly's mental health was given more priority and importance than the claimant's.

227.8. Ms Kaur sent Mr Reilly an email on 24 September 2021 sympathising with him and stating, "I can understand this process can be distressing for everyone involved, **especially you**." (our emphasis);

227.9. The respondent failed to communicate effectively with the claimant during the investigation; and

227.10. Mr Reilly was not suspended after the claimant made her grievance on 23 June 2021 or after he had been notified of disciplinary matters for which he was ultimately dismissed.

228. We took all the inferences from the above evidence into account. We find that the claimant has shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the claimant contravened section 13 of the EqA 2010. The Tribunal must hold that the contravention occurred unless the respondent shows that it did not contravene the provision.

229. We reject the suggestion that the respondent acted in the way it did in order to protect its reputation. That was never the respondent's case. We reject the suggestion that the respondent's actions were inept, rather than discriminatory. The two concepts are not mutually exclusive and the respondent's evidence never suggested that its own ineptitude was at the heart of the claimant's experiences.

230. We find that the respondent's SUC report placed blame on the claimant for her "mixed messages" which ignored her attempts to draw boundaries with Mr Reilly that he then ignored. The SUC report implied that a woman could give consent to being harassed, stalked, and assaulted by flirting with a man and that consent was only withdrawn by a notice in writing.

231. We find that the respondent gave greater weight to Mr Reilly's mental health than it did to the claimant's.

232. We find that even if the decision to discount two now-admitted instances of sexual assault was made in part to protect the respondent's reputation, the decision had the effect of treating the claimant less favourably than the respondent would have treated a hypothetical male comparator.

233. We find that the respondent treated the claimant less favourably than it would have treated a hypothetical male comparator in the same circumstances by:

233.1. "The perverse and unreasonable findings of the SUC which;

233.1.1. Erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's criminal actions by dismissing his behaviour as having been encouraged by her;

233.1.2. Concluding that Mr Reilly's mental health and the confusing nature of the Claimant's messages were mitigation or an excuse for his actions, while failing to recognise relative vulnerability to her;

233.1.3. Failed to uphold the complaint of sexual harassment by concluding that unwanted physical touching on two separate occasions did not constitute sexual harassment;

234. We have found above that the claimant was unfairly dismissed. We find that the claimant has shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened section 13 of the EqA 2010. The Tribunal must hold that the contravention occurred unless the respondent shows that it did not contravene the provision. We find that the respondent has not satisfied that test for the reasons set out above.

235. We find that the unfair dismissal was directly discriminatory pursuant to section 39(2)(c) EqA 2010 because, after taking all our findings into account, we find that the most likely scenario is that the respondent would not have treated a hypothetical comparator in the same way as it treated the claimant. The treatment was less favourable and caused the claimant to resign.

Harassment related to the protected characteristic of sex (s.26(1) EqA 2010

236. No comparator is required for a harassment claim. The conduct complained of under section 26(1) must be related to the protected characterise: sex in this case.

237. The respondent concedes that it is vicariously liable for Mr Reilly's actions and it accepts that the claimant has suffered harassment related to sex or of a sexual nature by Mr Reilly. The Respondent submits that these claims are out of time. We will deal with the jurisdiction points below.

238. We therefore find that the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021) was harassment of the claimant related to the protected characteristic of sex.

239. We have found that the finding of the SUC that erroneously and inappropriately attributed blame and responsibility to the claimant for Mr Reilly's criminal actions by dismissing his behaviour as having been encouraged by her was an act of direct discrimination because of sex, so it cannot be a successful claim of harassment related to sex. That claim fails.

240. We have found above that the findings of the SUC failed to recognise Mr Reilly's treatment of the claimant as continuing harassment prior to 14 December 2020 and did not accept that it was harassment of a sexual nature. We repeat our findings as to the perversity and reasonableness of the SUC report. We find that the claimant has shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened section 26(1) of the EqA 2010. We make that finding by using the same rationale we used in finding that the claimant had shown facts from which we could conclude that she had been discriminated against because of her sex under section 13 of the EqA above. We drew inferences from the evidence we heard and found that the claimant satisfied the initial burden of proof on her.

241. We find that the first instance decisions to which we were referred by both counsel are not binding on this Tribunal. We find that the respondent has not satisfied the burden of proof on it to show that the decision was not an act of harassment related to the claimant's sex. We reject the ineptitude argument and find that the evidence provided by the respondent did not meet the evidential burden required to rebut the statutory presumption.

242. We find that the respondent engaged in unwanted conduct towards the claimant that was related to her sex by justifying and romanticising Mr Reilly's behaviour by concluding that his messages had "the tone of a spurned lover trying to understand why things went wrong."

Harassment of a sexual nature (s.26(2) EqA 2010)

243. The respondent concedes that it is vicariously liable for Mr Reilly's actions and it accepts that the claimant has suffered harassment related to sex or of a sexual nature by Mr Reilly. The Respondent submits that these claims are out of time. We will deal with the jurisdiction points below.

244. We therefore find that the behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2021) was harassment of the claimant of a sexual nature.

Harassment under section 26(3)

245. Mr Milsom argued that we ought to make a finding that the claimant had been harassed under the provisions of section 26(3)(c) of the EqA. No application to amend the claim to include a claim under this head was made. We find that we have no jurisdiction to deal with such a claim.

Victimisation

246. It is accepted by the respondent that the claimant's grievance of 23 June 2021 was a protected act.

247. We have already found in this Judgment and Reasons that the respondent did all the six alleged detriments listed by the claimant including that she was dismissed unfairly by the claimant and that the dismissal was discriminatory.

248. Our task in this head of claim was to apply the 'reason why' test established in **Bailey**. We find that the claimant had not shown evidence from which we could conclude in the absence of any explanation that she had been subjected to the detriments alleged because of the protected act. Our findings above show that the claimant was subjected to all the detriments under the heads of direct discrimination or harassment.

249. The claim of victimisation fails.

Jurisdiction

250. We find that it is in furtherance of the overriding objective to deal with the jurisdictional points of time and the extension of time limits on a just and equitable basis after we have made findings on the claims themselves, as the strength or weakness of a claim is a factor that can be taken into account when deciding whether to exercise the Tribunal's discretion under section 123 of the EqA 2010.

251. As the claimant started early conciliation with ACAS on 6 November 2021 (Day A), obtained an early conciliation certificate on 10 January 2022 (Day B), and presented her claim on 17 February 2022, any act complained of before 15 September 2021 is out of time (presentation date less three months plus one day less time between Day A and Day B).

252. In practical terms, that means that any complaint about the SUC report itself is in time, as it was sent to the claimant on 15 November 2021. The dismissal and the discriminatory act of dismissal are in time because the EDT is 22 November 2021. All the acts of direct discrimination are in time because they relate to the findings of the SUC.

253. All the claims of harassment related to the protected characteristic of sex are in time save for the allegations concerning Mr Reilly's conduct towards the claimant.

254. The only claim of harassment of a sexual nature is the allegation about Mr Reilly's conduct towards the claimant.

255. The claims we must adjudicate on, therefore both relate to the same set of facts that the respondent has conceded:

> "The behaviour of Mr Reilly from October 2020 until April 2021, which is set out in the substance of the Claimant's complaints (23 June 2021 and interviews of 26 August and 8 September 2020)."

256. Section 123(1) of the EqA provides that proceedings of the type we are dealing with must be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable.

257. Section 123(3) of the EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided upon it.

258. By any calculation, the conduct of Mr Reilly that we have determined constitutes harassment related to sex and of a sexual nature ended at the end of April 2021, as that is the cut off date in the List of Issues and is the basis upon which the claimant's case is put.

259. The respondent's concession is limited to the acts of Mr Reilly between October 2020 and February 2021. We have found that his harassment continued to at least April 2021.

260. The sole issue, therefore, is whether we find that the acts of Mr Reilly are part of conduct extending over a period and/or whether the Tribunal should exercise its discretion to extend time in favour of the claimant.

261. Looking at our findings of fact in this case, we find that there is conduct extending over the period from October 2020 to 22 November 2021. We find that there was a continuing state of affairs that started with Mr Reilly's harassment of the claimant (which we find went on beyond April 2021 and ended on 4 August 2021) that overlapped the claimant filing a grievance on 23 June 2021. The state of affairs continued with the delays to the investigation and the SUC report that the claimant received on 15 November 2021. She resigned on 23 November 2021.

262. We find that there is a continuing state of discrimination against the claimant that means that her claims in respect of the harassment by My Reilly were presented in time.

263. In the alternative, given the concessions made by the respondent and the seriousness of the acts of Mr Reilly, we find that it would be unjust to deny the claimant the opportunity to present her claim and we would have extended time to allow it in the circumstances of the facts that we have found above.

264. The claimant's claims of harassment relating to sex concerning the actions of Mr Reilly between October 2020 and April 2021 and the claims of harassment of a sexual nature relating to the same facts both succeed.

Employment Judge S Shore
Date: 5 July 2024