# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
|---|---|---|
| JG | **- V -** | (1) DoiT International UK & I Ltd<br>(2) WB |

**Heard at**: London Central (CVP) **On**: 23 April – 2 May 2025

**Before:** Employment Judge Baty

**Representation:**

**For the Claimant:** Mr I Hurst (solicitor)
**For the 1st Respondent:** Ms C McCann (counsel)
**For the 2nd Respondent:** Mr D Brown (counsel)

# RESERVED JUDGMENT

**1. The claimant's complaints of direct sex discrimination and harassment related to sex against the second respondent at paragraphs 1.1(a) and 2.1(a) of the agreed list of issues ("LOI") were presented out of time and it is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear these complaints and they are struck out. If the tribunal had had jurisdiction to hear these complaints, they would have failed.**

**2. The tribunal does not have jurisdiction to hear the claimant's complaints of direct sex discrimination and harassment related to sex (under both sections 26(1) and 26(2) of the Equality Act 2010 ("EQA")) at paragraphs 1.1(b) and 2.1(b) of the LOI against either the first or the second respondent because the act done by the second respondent was not done by him in the course of his employment.**

**3. If the tribunal had had jurisdiction to hear the complaints referred to in the paragraph above, they would have succeeded against the second**

**respondent under sections 26(1) and 26(2) EQA but would have failed against the first respondent because the first respondent took all reasonable steps to prevent the second respondent from doing that thing or from doing anything of that description.**

**4. The claimant's remaining complaints of direct sex discrimination and harassment related to sex and her complaints of victimisation all fail.**

# REASONS

## The complaints

1. By a claim form presented to the employment tribunal on 26 April 2023, the claimant brought complaints of direct sex discrimination, harassment related to sex and victimisation. The respondents each defended the complaints.

2. Certain anonymisation orders were made in relation to the claim, which I shall return to below. In consequence of them, however, in these reasons the claimant is referred to as either "the claimant" or "JG"; the second respondent is referred to as "WB"; and references to "the respondent" are to the first respondent only.

## The issues

3. The issues were agreed between the parties and the tribunal at a preliminary hearing on 2 November 2023 before EJ Clark. At the start of this hearing, I asked the representatives whether those issues remained the issues for me to determine and they all confirmed that they were. A copy of those issues is annexed to these reasons at Annex 1.

4. Mr Brown stated that if, for the purposes of issue 4.1, if it was found that the respondent was not vicariously liable for the actions of WB because the acts alleged to have been done by WB were not done in the course of WB's employment, it followed that WB too was not liable for those acts under the Equality Act 2010 ("EQA"). Mr Brown said that he did not consider that this required a change in the list of issues, but wanted the point to be noted.

5. While we were discussing the list of issues, I addressed the representatives about jurisdictional issues in relation to time limits. I noted that there was no reference to this in the list of issues. I noted that the claim was presented on 26 April 2023. There were separate ACAS early conciliation certificates in relation to the respondent and to WB. For the respondent, early conciliation commenced on 16 February 2023 and ended on 30 March 2023. For WB, early conciliation commenced on 28 February 2023 and ended on 6 April 2023. By my calculation, this meant that, in relation to the respondent, any alleged act said to have taken place prior to 17 November 2022 would be prima facie out of time; and in relation to WB, any alleged act said to have taken place prior to 29 November 2022 would be prima facie out of time. This meant that all

of the alleged acts in the list of issues in relation to the respondent were in time; however, of the two alleged acts in the list of issues which related to WB, whilst the second act was in time, the first act (at 1.1(a) and 2.1(a) of the list of issues concerning an alleged comment about eating) was prima facie out of time because it was said to have taken place on 28 November 2022. If that was the case, the tribunal would need to consider issues of whether there was conduct extending over a period such as to bring that act within time or, if there was not, whether it was just and equitable to extend time.

6. Mr Hurst said that he agreed with my calculations and accepted that the alleged act in relation to the eating comment was prima facie out of time; he said that he would be arguing that it was part of conduct extending over a period such that it was in time and, in the alternative, that it was just and equitable to extend time. I noted this and that I would need to consider these jurisdictional issues in addition to the issues set out in the list of issues in the annex. The parties acknowledged this.

7. On this basis, with the addition of these jurisdictional issues, the list of issues was agreed between the representatives and me.

8. The list of issues references the harassment complaints as being complaints under section 26(1) of the EQA. In her written submissions, Ms McCann referenced the complaint at issue 2.1(b) as being a complaint under section 26(2) EQA. I asked the representatives about this before they made their oral submissions. I noted that the claim form was silent on the matter (in that it simply referred to harassment without confirming which section the allegations of harassment were brought under). Mr Hurst confirmed that it was intended that issue 2.1(b) was brought under both section 26(1) and 26(2) EQA. Ms McCann and Mr Brown confirmed that they did not object to this (although Ms McCann said that she did not think that such a complaint could succeed under both section 26(1) and 26(2) EQA). However, it was agreed that, for the purposes of the list of issues, this allegation was brought under both section 26(1) and 26(2) EQA. For the avoidance of doubt, the allegation of harassment at paragraph 2.1(a) of the list of issues is brought only under section 26(1) EQA.

## This hearing

9. The final hearing in the case had originally been listed by EJ Clark for six days from 16 to 23 July 2024. It was listed before a full tribunal panel and to consider matters of liability only. However, various matters in connection with anonymisation needed to be dealt with at the start of that hearing and the representatives and the tribunal agreed that there was insufficient time remaining for the full hearing to take place within the allocated listing. It was therefore postponed and relisted for eight days from 23 April to 2 May 2025, again before a full tribunal panel.

10. On the afternoon of 22 April 2025, the day before this hearing was due to commence, the tribunal wrote to the parties on the instruction of the Regional Employment Judge to confirm that, due to non-legal member unavailability, the hearing would be conducted by a judge sitting alone without non-legal members.

The letter confirmed that any further change to the composition of the tribunal panel would be a matter for the hearing judge at their absolute discretion.

11. At the start of the hearing, I referenced the letter from the Regional Employment Judge, the new rules on panel composition and the fact that the composition of the tribunal had been changed because of a lack of non-legal members. I explained that, if any of the representatives felt strongly that there should be a full tribunal panel to hear the case, that would inevitably mean that the final hearing would need to be postponed again. None of the representatives raised any objection to the final hearing being conducted by an employment judge sitting alone. I therefore proceeded to hear the case.

12. It had previously been agreed that the final hearing should take place remotely by CVP and it duly did.

## The evidence

Witnesses

13. Witness evidence was heard from the following:

*For the claimant:*

The claimant herself.

*For WB:*

WB himself (two witness statements).

*For the respondent:*

Ms Kristen Tronsky, who has been employed by the respondent, since July 2020, as Chief People Officer (three witness statements); and

Ms Tracie Stamm, who is employed by the respondent as Global Head of Product and Content Marketing (two witness statements).

14. Ms Stamm is located in Ohio in the US, which is five hours behind London time. She gave her evidence remotely from the US. Because of the time difference, it was agreed that she should give her evidence during an afternoon (afternoon in the UK), even though that meant that her evidence was interposed between Ms Tronsky's evidence. There was no objection to this and the hearing proceeded on this basis.

15. The respondent also produced a written witness statement for a Mr Scott White, who had been employed by the respondent as Chief Operating and Revenue Officer. Mr White had been ready to give evidence at the original final hearing which started on 16 July 2024 and his statement had been produced for that hearing. However, he left the respondent's employment on 5 September 2024 to take up another role. He was not prepared to attend this hearing. This

was despite considerable attempts by Ms Tronsky (evidence of which was set out in a further witness statement which Ms Tronsky provided) to try to persuade him to give evidence. Mr Scott is a US citizen and is resident in the United States and, as Ms Tronsky acknowledged in her witness statement, there is no mechanism to compel his attendance at this hearing.

16. Ms McCann nonetheless requested that I read Mr White's witness statement. Mr Hurst indicated that he did not have any objection to my reading the statement but said that I should give no weight to it because Mr White was not attending the hearing. I did read the witness statement. In any aspects which are material to the issues of the case, it essentially corroborates the evidence of Ms Tronsky and Ms Stamm and is consistent with the contemporaneous documents in the bundle. Furthermore, I note that Mr White was fully prepared to give evidence at the previous hearing and only declined to give evidence at this hearing because he was no longer employed by the respondent and could not be compelled to give evidence. Because of the other witness and documentary evidence of the case, Mr White's evidence was not in fact crucial to the key factual findings which I had to make. However, for the reasons above, I nonetheless do not consider that I should give no weight to his evidence, as Mr Hurst submitted (and as Mr Brown later submitted in his submissions). To the limited extent that it is necessary, therefore, I do give weight to the evidence provided in Mr White's statement.

Documents

17. An agreed bundle numbered pages 1-407 was produced to the tribunal. A supplementary bundle numbered pages 1-41 was also produced to the tribunal.

18. In addition, there were produced to the tribunal several short videos of the *"Omnia event"*, of which more below, and a 1½ hour video of the respondent's sexual harassment prevention training. Ms McCann asked that I should view the videos of the Omnia event and approximately 47 minutes of the sexual harassment prevention training video.

19. A further one page document was disclosed by the respondent partway through but at a relatively early stage of the hearing. At the request of Mr Hurst (to which there was no objection), this was added to the supplementary bundle as page 42.

20. On the morning of the sixth day of the hearing, during the evidence of Ms Tronsky (who was the last of the witnesses to give evidence), Mr Hurst informed me that the claimant had disclosed a further document which he wanted to be put before the tribunal. Ms McCann and Mr Brown had been sent a copy of it. Neither of them thought that it was necessary for it to be before the tribunal, particularly as the claimant had long since completed her evidence, and they objected to this. I explained to Mr Hurst that, as he described the document, it did not on the surface seemed to be something that was necessary for me to see to determine the issues before me and I said that, if he wished to pursue his application to have it adduced, I would need to hear submissions from all three representatives, which may be time consuming, but it was his decision as to how to proceed. Mr

Hurst asked if he could briefly take instructions, which I allowed and which he did. When he returned, he said that he was no longer pursuing an application that this document should be adduced as evidence.

21. Later that same morning, the respondent's solicitors disclosed a further document, which was an email chain between the claimant and Ms Tronsky which related to the issue of whether or not the respondent refused to allow the claimant to return to work (issue 3.2(c)). Ms McCann apologised for the late disclosure, although she noted that, to the extent that there was a failure to disclose, that applied equally to the respondent and the claimant as the email chain in question was between the claimant and Ms Tronsky. However, all three representatives said that they wanted the document put before the tribunal so that I could read it and Mr Hurst, who had just finished cross-examining Ms Tronsky, asked if he could ask some further questions of her about it. Therefore, by agreement, the document was adduced to the tribunal and I read it. Mr Hurst then duly asked some further questions of Ms Tronsky relating to it.

22. At the start of the hearing, the respondent also produced a cast list and a chronology. The other representatives agreed that, with the exception of a small number of entries, the chronology was an agreed chronology. Finally, Ms McCann produced an opening note and a "note on housekeeping and suggested timetable".

Pre-reading

23. I read in advance (before oral evidence commenced) the witness statements and any documents in the bundles to which they referred and viewed in advance the videos which I had been requested to view. I also read in advance the two notes provided by Ms McCann as referenced above.

Adjustments

24. For the reasons set out below, the nature of the case is sensitive. This had resulted in the making of an anonymisation order, which related to the claimant and to WB. At the start of the hearing, I asked the representatives if there were any adjustments which I needed to bear in mind to enable in particular both the claimant and WB to be able to participate properly in the hearing and give their evidence to the best of their ability.

25. Initially, Mr Hurst said that, if the public were present at the hearing, he would like the claimant to be able to keep her camera off. The other representatives objected to the claimant keeping her camera off when she was actually giving evidence and stated that, when both the claimant and WB gave their evidence, it was important that they should keep their cameras on. Mr Hurst then, very pragmatically, reconsidered and did not continue pursuing an application that the claimant should be able to keep her camera off at all times. However, he said that, if any members of the public did attend the hearing, he would appreciate it if I could remind them not to record the hearing or take any photos. I said that I would do so. As it turned out, there were no members of the

public present either at the start of the hearing or at any time throughout the hearing.

26. In practice, both the claimant and WB tended to keep their cameras off when they were not themselves giving evidence. At one point during her evidence, the claimant appeared to ask that everyone else should keep their cameras off. On further exploration, it became clear that she thought that WB's camera had come on at one point earlier in her evidence and she wanted to ensure that WB's camera was off whilst she was giving her evidence. At that point, WB's camera was off. However, I said that, whilst I had not myself seen that WB's camera was on at any point during the claimant's evidence, WB should nevertheless keep his camera off whilst the claimant was giving evidence. There were no objections to that from anyone and WB did keep his camera off during the claimant's evidence. Similarly, the claimant kept her camera off when WB gave his evidence.

27. Other than what is set out in the paragraphs above, the representatives indicated that there was no further need for any adjustments in relation to the claimant or WB.

28. Before he gave his evidence, WB indicated that he had a back problem and asked if from time to time he could make an adjustment to his sitting arrangements which would help alleviate this. No one objected to this and I allowed it. WB made such adjustments on no more than a handful of occasions during his evidence and it in no way interrupted or broke up the flow of his evidence. He turned his camera off before making those adjustments.

29. At one point late on in the hearing (at the start of day 6), WB had a problem with his camera and instead used his phone to join the CVP hearing. This was at a stage well after his own evidence had completed and he was of course represented throughout. Nonetheless, I enquired as to whether he was content to proceed that way or whether he would like a break to try to resolve the issue. WB confirmed to me that he was content to proceed that way. The hearing duly proceeded.

Timetable

30. A timetable for cross-examination and submissions was agreed between the parties and me at the start of the hearing. This was largely adhered to.

31. All the representatives produced written submissions, which I read in advance of hearing their oral submissions.

32. The decision was reserved.

## Anonymisation and restricted reporting orders

Orders

33. As noted, the case concerns issues of great sensitivity. Both the claimant and WB attended a conference in Las Vegas in late November 2022. At the centre of the case is an allegation by the claimant that WB sexually assaulted her in a hotel bedroom in Las Vegas; by contrast, WB alleges that it was the claimant who sexually assaulted him.

34. On 1 September 2023, at a relatively early stage of these proceedings, EJ Glennie made a temporary anonymisation order in respect of both the claimant and WB. The order states that *"This temporary order remains in force until the conclusion of the first preliminary hearing of this case, or until further order of the Tribunal."*. Although the first preliminary hearing of the case has long since been and gone, I have seen no further order of the tribunal in relation to the claimant and WB; furthermore, the representatives at this hearing appear to have considered and assumed that that temporary anonymisation order remains in place and/or that, as set out below, further provision for a similar order has been made.

35. On 24 October 2023, EJ Smart made a temporary anonymisation order in respect of the respondent. In an order sent to the parties on 9 September 2024, EJ Glennie revoked this order and refused an application by the respondent for a restricted reporting order in relation to the respondent. This was the matter considered by the tribunal at the start of the originally listed final hearing in July 2024 (which was then duly postponed).

36. The representatives all acknowledged that section 1 of the Sexual Offences (Amendment) Act 1992 meant that the claimant, as a person in relation to whom an allegation has been made that an offence to which that Act applies has been committed, had lifelong anonymity in any event.

37. At paragraph 2 of the reasons for his decisions sent to the parties on 9 September 2024, EJ Glennie stated that *"All parties supported anonymisation of and restricted reporting orders in respect of the claimant and WB"*. Ms McCann said that, from her notes of that hearing, she considered that the tribunal had agreed to make both anonymisation and restricted reporting orders in relation to the claimant and WB which would apply up to the final hearing. The other representatives agreed that that was the case. Furthermore, they all agreed that something would need actively to be put in place on a temporary basis pending judgment on the liability issues in this case.

38. Whilst I appreciate that the views of the parties are not decisive on the matter, Mr Hurst also said that, if the tribunal found that WB had sexually assaulted the claimant, the claimant would seek to have any temporary anonymity or restricted reporting order in relation to WB removed but that, if the tribunal did not make this finding, the claimant would not object to such orders being made permanent.

39. The representatives returned to this topic a number of times during this hearing. It was ultimately agreed that the representatives should liaise with each other about the precise terms of any anonymisation and restricted reporting orders which they wanted me to make at the end of this hearing and which I would consider at the end of this hearing; and that (if I agreed to make such orders) we should set a date for a separate hearing, which would follow the giving of judgment on liability, to consider whether or not any such temporary orders should be made permanent.

40. After the representatives had all completed their oral submissions, we returned to this issue. The representatives agreed what the terms of the anonymisation and restricted reporting orders in relation respectively to the claimant and WB should be. The representatives were also able to agree with me that any hearing to consider whether or not such orders should be made permanent or revoked could take place on 12 June 2025. This was just over a month after the conclusion of this hearing.

41. I considered that the terms of the proposed orders were reasonable, I took the representatives word that they reflected what had been previously discussed with EJ Glennie and I noted that the duration of them (which would be until the next hearing) was very short. Taking this into account and the provisions of rule 49 of the Employment Tribunal Rules 2024, I agreed to make the orders. Four orders were made in total, namely anonymisation orders and restricted reporting orders in respect of the claimant and in respect of WB. These were sent to the parties on 2 May 2025, after this hearing. The hearing on 12 June 2025 was duly listed.

42. It was important that the terms of these orders were agreed precisely and before the publication of my reserved judgment on liability, as the terms of those orders impact upon anonymisation issues in relation to that judgment. In particular, they impact upon anonymisation not only of the claimant and WB but also of members of the team of which the claimant was part when she was employed by the respondent.

Mr X/MsY

43. During the hearing, I heard evidence about a male individual who was dismissed following an incident at the Las Vegas conference. The incident was entirely separate to the events of this claim. However, that individual was dismissed for his behaviour, which included being intoxicated and attempting to kiss a more junior female employee. The representatives referenced this in their submissions as comparative evidence about the respondent's approach both in relation to intoxication and sexual harassment. However, they all agreed that there was no public interest at all in the names of either of these individuals being published in a judgment that would be searchable online. I agreed. The individuals were not witnesses nor, so far as I am aware, were even aware of these proceedings. Anonymising them would have no impact on anyone's ability to understand these reasons and therefore no significant impact on the principle of open justice or the Convention right of freedom of expression; by contrast, the article 8 Convention rights of these individuals were very much engaged.

44. Therefore, to the extent that I need to refer to this evidence in these reasons, I shall refer to the individuals as respectively “Mr X” and “Ms Y”.

Bundle anonymisation

45. The bundles for this hearing had been prepared with anonymisation of the claimant and WB, using the initials “JG” and “WB” respectively in place of their names.

46. Having done my preliminary reading, I noted for the benefit of the respondent (which had prepared the bundles), that I had spotted one occasion where the claimant’s name had not been fully anonymised. This was not of immediate concern because at that point no members of the public were present and everybody who had access to the bundles knew the identities of the claimant and WB in any case. However, I asked the respondent to ensure that, should a member of the public attend the hearing and need to see any part of the bundle, the bundle provided should be properly redacted. As it turned out, at no point during the hearing did any member of the public attend so this issue never arose.

Naming conventions during this hearing

47. At the start of the hearing, I agreed with the representatives that, in line with the previous temporary anonymisation order, the claimant should be referred to at this hearing either as “the claimant” or “JG” and that WB should be referred to at this hearing as either “the second respondent” or “WB”. The parties and the witnesses abided by this for the vast majority of the hearing. There were some rare occasions during the evidence where a witness or a representative forgot and used a real name; however, as no one from the public was present at any stage of the hearing, there was no adverse impact in terms of any breach of the anonymisation order.

## Warning regarding self-incrimination

48. As noted, the claimant alleged in these proceedings that WB sexually assaulted her in a hotel room in Las Vegas. Her evidence was that she had reported the matter to the police in the UK in February 2023; she said that investigation had not concluded and indicated that she did not have any firm decision on whether the police were going to press charges or whether the investigation would be discontinued.

49. As there appeared, therefore, to be an ongoing investigation which might result in criminal charges against WB, I issued a warning regarding self-incrimination to WB before he commenced giving his evidence. I explained to him that he had the right to refuse to answer questions or produce documents if he believed that doing so could incriminate him. I explained that there was such a thing as the privilege against self-incrimination; this is a legal right that protects individuals from having to answer questions or produce documents that could expose them to criminal charges; I explained that self-incrimination occurs when an individual is compelled to provide information or evidence that could be used

to prosecute them for a crime and that an individual's answers or the production of documents could be used against them in a criminal case. I, therefore, reiterated to WB that he had the right to refuse to answer questions or produce documents if he believed that doing so could incriminate him.

50. At no point during his evidence did WB refuse to answer any question put to him.

51. It should be noted that WB's evidence in this case is that it was in fact the claimant who sexually assaulted him rather than the other way round. However, he has not reported the matter to the police and there is no indication that there is any likelihood of criminal charges being brought against the claimant. I did not, therefore, issue a similar warning regarding self-incrimination to the claimant.

## Management of the hearing

### Claimant's evidence

52. The claimant's evidence was given on the afternoon of day 2 and the morning of day 3 of the hearing. Towards the end of day 2, the claimant appeared to indicate that, although she did not initially seek to press charges against WB in the US, she changed her mind and did seek to press charges in the US. Up to that point, I had seen nothing to indicate that that was the case. Furthermore, Ms McCann was also clearly surprised at this assertion. She therefore asked the claimant to clarify this. The claimant did so but also went on to start giving a lengthy account of why she said that she had not originally sought to press charges which, for the first time in her evidence, caused her to become visibly emotional. Ms McCann, who could see that the claimant was becoming emotional, interjected and said that that was not what she was asking and she didn't need to give that answer. Mr Hurst then interjected and said that the claimant ought to be given the opportunity to continue with this answer. Ms McCann explained that she had interjected because the claimant was answering a question which she had not asked and, despite her having taken great care to try and avoid unnecessarily touching on areas which might be emotionally triggering for the claimant, the claimant was nonetheless becoming emotional, but in giving evidence in answer to a question which she had not even been asked.

53. I agreed with Ms McCann; Ms McCann was entitled to interject because the claimant was going into a lengthy explanation about something which she was not asked; it was even more pertinent in this case because it was having a detrimental effect on the claimant as well.

54. The claimant had also asked around this time whether her answers to the questions should be just yes or no. I therefore also explained, in case there was any doubt on the claimant's part, that she was not limited to yes or no answers; because of the nature of cross-examination, it would often be the case that a question could be answered with a simple yes or no; however, if a witness needed to give context to explain an answer or if a witness wanted to give an explanation as to why they disagreed with a proposition put to them, it was

perfectly acceptable to do so, so long as the explanation was in connection with answering the question put.

55. As there was quite a lot of cutting across between various individuals at this point and it was near the end of the day, I also reiterated in more detail these points at the start of the following day before the claimant continued with her evidence.

56. To be clear, many of the claimant's answers on the first afternoon of her evidence were indeed yes and no answers; this reflected the tight nature of the cross-examination questions which she was asked by Ms McCann and in response to which yes and no answers were all that was needed. However, where the claimant did want to expand on an answer, she did so. I do not, therefore, have a concern that the claimant may have chosen not to answer a question fully under any mistaken apprehension that she was only permitted to answer yes or no (nor was it asserted at the hearing that this was the case). Indeed, the pattern of the claimant's answers the following day (in other words after the clear explanations which I gave and which are referenced above) mirrored the pattern of the previous day; in other words, the majority of her answers were yes or no, although on some occasions she gave more lengthy answers with more context.

57. At times towards the end of her cross-examination by Mr Brown, the claimant did become tearful. This is no criticism of Mr Brown; he had to ask questions which covered sensitive matters in order to put his client's case to the claimant; indeed the claimant herself acknowledged that he had to do this. I asked the claimant if she wanted to take a break. However, she said that she wanted to carry on in order to get the cross-examination completed. She duly did so and was able to do so.

58. Mr Hurst had about 20 minutes of re-examination questions for the claimant. I interjected on a few occasions during his re-examination to stop some questions; this was predominantly where either the question was a leading question or where it simply repeated something that had already been asked in cross-examination.

<u>Cross-examination of other witnesses</u>

59. During Mr Hurst's cross-examination of other witnesses, there were a number of interjections from the other representatives, particularly Mr Brown, in response to questions asked by Mr Hurst. Some of these I agreed with; others I did not. Of those that I did agree with, the majority were because Mr Hurst had (albeit almost certainly unintentionally) misrepresented in a particular question to a witness evidence given by witnesses previously or contained in documents, and there was therefore a danger of the witness being inadvertently misled.

60. I also had to interject on a number of occasions to ask Mr Hurst to ensure that the question which he was asking was clear. I explained that it was only fair that the witness knew exactly what they were being asked.

Submissions

61. After the representatives had completed their oral submissions, I noticed that the claimant had written something in the chat box on the CVP room at some point during Mr Hurst's submissions (Mr Hurst was the last of the three representatives to deliver his oral submissions). I said that it was not appropriate to do that and that I would just therefore ignore that message and the three representatives agreed with this approach. I made clear, however, that I did not consider that the claimant was at fault and that she may not have been aware that she should not have been writing submissions about the case in the chat function. The claimant immediately apologised for doing so.

Overall

62. However, despite the very sensitive subject matter of the case, this was not a difficult hearing to manage; that is largely because of the way those participating conducted themselves. I am grateful in particular to all three representatives for the way they conducted themselves and for their efforts to assist me in ensuring that the hearing ran as smoothly as possible.

## Findings of fact

63. I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues. I start with an overview, before going on to make more detailed findings of fact.

Overview

64. The respondent is the UK subsidiary of DoiT International ("DoiT"). DoiT (including its subsidiaries) is a global organisation. It helps technology companies understand and harness the cloud in the most meaningful way possible to drive business growth. It does this by providing technology and tools through its platform and access to Cloud Architect Consultants around the world. DoiT's customers are primarily technology companies. DoiT is a Premier Partner of Amazon Web Services and Google Cloud.

65. During the period relevant to this claim, DoiT had 426 employees worldwide. It's employees are based in roughly 20 countries worldwide. 20-25% of its employees are based in the United States and that makes up the largest section of its workforce. The next largest section of its workforce by country are employees based in Israel. It had 61 employees based in the UK at the time of the events relating to this claim, with similar numbers in each of Germany and France.

66. There are seven members of DoiT's executive team. Six of these are based in the US and one in Israel. Ms Tronsky, as DoiT's Chief People Officer, is a member of that executive team. Her role is a global role and concerns DoiT's employees worldwide. However, given the wide variety of countries and jurisdictions in which employees of DoiT are based, DoiT and Ms Tronsky take

advice from local counsel on matters regarding the local laws of the country/jurisdiction in question.

67. DoiT's workforce is 100% remote; in other words, the entirety of DoiT's workforce globally works from home.

68. WB commenced employment with the respondent in January 2021 and remained employed until he was dismissed with immediate effect on 16 December 2022. He was based in the UK. WB is male.

69. The claimant was employed by the respondent from 11 July 2022 until 2 March 2023, when she was dismissed by the respondent, the respondent says by reason of redundancy. The claimant is female.

70. At all times the claimant was employed as Content Coordinator. She was the only employee holding this role. Her role sat within the Content and Communications Team, which was managed by MN. There were five other members of that team as well as the claimant, all of whom reported to MN. None of the members of the team had the same job title.

71. The claimant's role of Content Coordinator had become vacant when the previous role holder's US work visa expired. As there was no reason for the role to be filled by a US-based individual, MN decided to advertise the role globally. The claimant applied for and was appointed to the role.

72. In November 2022, there were discussions amongst management about making the claimant's role redundant, the details and context of which I shall return to later. The claimant was not aware of these discussions at the time.

73. On 27 November 2022, the claimant flew to Las Vegas to attend the "re:Invent" conference. About 50 of the respondent's employees also attended that conference, including WB. I shall return to the conference in much greater detail later. However, one of the conference events, which was sponsored by DoiT, took place at the Omnia nightclub at Caesar's Palace in Las Vegas on the evening of 29 November 2022, extending into the early hours of 30 November 2022. It is alleged that, after both of them had left that event, WB sexually assaulted the claimant in her hotel room in the early hours of 30 November 2022; as noted, by contrast, WB alleges that it was the claimant who sexually assaulted him. There is no dispute that the sexual activity in question took place.

74. An investigation then took place, conducted by Ms Tronsky. It is Ms Tronsky's notes of that investigation which are one of the most significant documents in the evidence in this case. In summary, the claimant's account of what happened in the hotel room remained consistent; by contrast, WB's account varied and developed and changed over the course of a number of interviews which he had with Ms Tronsky. It is worth saying at this point that Mr Brown has sought to cast doubt on the accuracy of Ms Tronsky's notes. However, whilst they are not verbatim, they are very detailed and were taken contemporaneously; Ms Tronsky typed them as she was speaking to those individuals whom she interviewed as part of the investigation. Mr Brown is right that the notes use a

mixture of first and third person pronouns when describing the individuals involved; however, it is clear when reading the notes to whom the pronouns refer and I do not consider that this style casts any doubt on the accuracy of the content of the notes. I will return to this later on but, for present purposes, I accept that there is a high degree of accuracy in those notes.

75. Subsequent to the investigation, WB was invited to a disciplinary hearing which took place on 15 December 2022 before Mr White. WB was dismissed with immediate effect on 16 December 2022.

76. Mr White dismissed WB because of dishonesty in relation to his answers in the investigation. Mr White decided that he was unable to determine whether or not WB had sexually assaulted the claimant and that that allegation remained unproven; it was not, therefore, the reason for WB's dismissal.

77. After the alleged assault, the claimant was absent from work on sickness absence.

78. The claimant's team manager, MN, had previously been informed that she would be made redundant and her redundancy took effect on 3 January 2023.

79. There were discussions about the claimant returning to work in late January and early February 2023. I shall return to these in more detail later.

80. In February 2023, there were discussions between management and the claimant about her job being made redundant. The respondent told the claimant for the first time that her job was redundant during a protected conversation with her on 8 February 2023.

81. There were then written communications between the respondent and both the claimant and her solicitors, with the claimant's solicitors alleging for the first time in a letter of 15 February 2023 that they considered that she had strong grounds for bringing claims of sexual harassment, sex discrimination and victimisation against the respondent.

82. On 15 February 2023, the claimant contacted the UK police with a view to pressing charges against WB.

83. The claimant began ACAS early conciliation in relation to the respondent on 16 February 2023, and in relation to WB on 28 February 2023.

84. The claimant's employment was terminated by the respondent with effect from 2 March 2023, the respondent says by reason of redundancy.

85. Of the six members of the team which had reported to MN, four of them (including the claimant) were dismissed around this time, the respondent says by reason of redundancy.

Reliability of evidence

86. Before going on to make my more detailed findings of fact, I make some findings about the respective reliability of evidence of the witnesses at this tribunal. This is relevant in the context of certain findings of fact which I have to make, particularly those where there is no or little contemporaneous documentation which assists in determining those facts.

*The claimant*

87. In her closing submissions, Ms McCann described the claimant as having shown herself to be *"an unreliable historian"*. I think that is a good description. I am not concluding that the claimant has deliberately sought to mislead the tribunal throughout. However, in her claim, her witness statement and her oral evidence, she made assertions which were simply not reflected in the other evidence and which she must or ought to have known were simply not correct. She also demonstrated a carelessness in recording what she says was said, where there was a potentially significant difference in terms of the context and implications of what she recorded as having been said compared to what was actually said. I accept that in certain respects this undermines the reliance that can be placed on her evidence.

88. Ms McCann set out a number of relevant examples (at paragraph 68 of her written closing submissions) which illustrate this. I do not repeat all of those here, although some of them are detailed in my findings of fact below. However, suffice it to say, they are collectively evidence that the reliability of the claimant's evidence, in particular her "take" on and perception of what actually happened when she recounted events that happened a while previously, is questionable. Whether for the most part these inaccuracies represented a genuinely but mistakenly held belief on the claimant's part or whether they involved a more deliberate retelling in areas which she (or her legal advisers) perceived were more advantageous to her case, I do not need to determine. However, either way, it gives cause for concern as to the reliability of her evidence more generally.

89. In her oral evidence before the tribunal, the claimant for the most part sought to answer the questions put to her and did not try to avoid answering questions. When the discrepancies referred to above were pointed out to her, the claimant often accepted that what actually happened was indeed at odds with what had been set out in her claim and her witness statement. This was not, however, always the case and on some occasions she stuck to a position which was not tenable in light of the other evidence.

*WB*

90. With the exception of two particular matters which I shall return to, WB appeared to be a reliable witness. His account of the narrative and background details was consistent and he did not diverge from it. He did not seek to avoid any questions and sought to answer the questions put to him. He was very clear

in his answers, and his delivery of them gave the impression of someone who was accurately recounting his memory of what happened.

91. The two exceptions are, however, very significant ones. They are his recollection of part of the interaction on 28 November 2022 in relation to buying desserts (which I shall return to in detail later) and his account of what happened in the hotel room in the early hours of 30 November 2022 and, in particular, the significant discrepancies in the various interchanges he had with Ms Tronsky during her investigation.

*The respondent's witnesses*

92. I had no cause to doubt the reliability of the evidence given by either Ms Tronsky or Ms Stamm. They both sought to answer the questions put to them and their evidence remained in all material respects consistent, both with their witness statements, with each other, with the evidence of Mr White in his witness statement and with the contemporaneous documents.

More detailed findings of fact

*DoiT's employee handbook*

93. As noted, Ms Tronsky has been Chief People Officer at DoiT since July 2020. She subsequently, effective from July 2021, overhauled and updated DoiT's company handbook, including adding to that handbook a "sexual harassment policy". She put in place a requirement for all employees to read and agree to the employee handbook as part of their onboarding. Both WB and the claimant signed to acknowledge that they had done this this when they joined the respondent.

94. The sexual harassment policy in the handbook sets out that sexual harassment is unlawful and will not be permitted, and lists examples of conduct which may constitute sexual harassment. These examples include coerced sexual acts. The policy confirms that where sexual harassment occurs, disciplinary sanctions may be imposed, which may include termination.

95. The handbook also contains a "drug/substance-free workplace policy". This policy confirms that working under the influence of alcohol is prohibited. The policy does not amount to an absolute ban on drinking alcohol; the prohibition is on working while under the influence of alcohol. There have been suggestions by the claimant at this tribunal that this policy was not clear. However, there was no doubt in the minds of Ms Tronsky and of WB as to what this meant; that there was no ban on alcohol, but employees should not be in a position where their ability to work was impaired by having drunk too much alcohol. Ms Tronsky was very clear that everybody's tolerance in this respect was different and that DoiT trusted its employees to make their own decisions about how much if any alcohol they should drink at functions in the work context.

*Diversity, equality and inclusion*

96. In her witness statement, the claimant made various assertions to the effect that the respondent's workplace culture was lacking, from the perspective of diversity, equality and inclusion, and she suggested the respondent merely paid lip service to such issues. In doing so, she made various criticisms of HR.

97. I do not need to go into a great deal of detail about this as it is not of central relevance to the issues of the claim. However, it is an important example of how the claimant's assertions in her witness statement are significantly at odds with what the actual situation was. The claimant's assertions prompted the respondent to submit Ms Tronsky's second witness statement and much of the documentation in the supplemental bundle. It paints a completely different picture to the assertions made by the claimant. I have no reason to doubt the evidence of Ms Tronsky, which is backed up by substantial contemporaneous evidence, and I accept it.

98. In summary, during her time at DoiT, Ms Tronsky has invested a lot of support personally into advancing diversity and inclusion and encouraging employees to get involved. There are a large number of diversity initiatives, promoted and run by HR. In relation to one of these initiatives, HR attempted to open the initiative up and asked employees whether they would like to put themselves forward for the role of co-chairs for the committee in question. The claimant and another employer volunteered. In fact, despite the support HR gave them, virtually nothing was done by the claimant and the other employee and eventually HR took back control of the initiative in question.

99. In stark contrast, therefore, to the claimant's assertions, the respondent took diversity, equality and inclusion matters seriously and its HR department devoted a lot of time to promoting them.

100. Similarly, the claimant has sought at this tribunal to suggest that the respondent's workplace culture was lacking, from the perspective of diversity, equality and inclusion. However, by contrast, she went out of her way to praise the *"incredible work culture"* which she had observed at the respondent in an unsolicited email of 2 August 2022 to Ms Tronsky. The claimant's attempts in cross-examination to draw a distinction between an "incredible work culture" in terms of having great colleagues, which she accepted was the case, and "work culture" in terms of diversity, equality and inclusion, were particularly unconvincing. Furthermore, there are no records of the claimant having made any complaint about diversity, equality or inclusion during her employment nor did she make any such complaints until these proceedings. That is surprising given that the claimant was confident enough to apply for a position as co-chair on one diversity, equality and inclusion initiative and was not therefore likely to be someone who was unable to raise a serious concern about diversity, equality and inclusion if indeed she genuinely had one at the time.

101. Furthermore, the evidence of other witnesses is that the respondent's workplace culture was very good. WB, for example, stated that the respondent had a *"collaborative and helpful culture"*.

102. For all these reasons, I therefore accept that, at the time of her employment, the claimant did not have concerns about the work culture at the respondent.

*Sexual harassment prevention training*

103. DoiT provided sexual harassment prevention training for its employees. It provided this training to its employees globally. Ms Tronsky previewed a number of sexual harassment training programmes and selected the one that would be given to all employees. She was particularly impressed by the particular training which she ultimately chose, in particular because of its interactivity and engaging nature and she therefore rolled the training out globally in August 2022. She completed the sexual harassment training herself on 12 August 2022.

104. As noted, all of the company's employees work from home. The training provided was online training. The training provided information on recognising, preventing and reporting sexual harassment, the employer and employee's obligations, and comprised opportunities to practice and apply this knowledge in scenario-based decision-making, through quizzes and a video role-play scenario.

105. As noted, I viewed 47 minutes of a video of this training which in total lasted 1½ hours. What the employees doing the training saw was not necessarily exactly the video which I saw; the video had been produced so that the tribunal could view it and, whilst it showed the majority of what employees doing the training would have seen, what they actually saw would have depended upon which answers to questions they clicked upon. This is because clicking a correct answer would provide one particular explanation whereas clicking on a wrong answer would provide another explanation as to why the answer was wrong; in other words, it was interactive training designed to educate employees by explaining the reasons why the decisions they made in answer to the questions were either correct or incorrect. Having got an answer wrong and received the explanation, an employee could then nominate a different answer. In order to complete the training, employees ultimately had to answer all of the questions correctly.

106. The training programme was made in the US and based on US law. Indeed, there were some sections of it, not relevant to UK employees, which outlined some of the distinctions between the law in different US states. A lot of criticism has been made at this tribunal of the fact that it was not based on UK law. However, DoiT, with 426 employees globally, whilst not a small organisation, was also not an enormous organisation either. It was not therefore in principle unreasonable to choose one set of sexual harassment prevention training and roll it out for its workforce globally rather than seek different sets of training for each of the 20 or so countries in which it operated. Furthermore, choosing training from the US, which was the country in which the largest number of DoiT employees worked, was similarly not in principle unreasonable. More importantly, however, despite some of the discrepancies, the core training about what sexual harassment is and the type of work situations in which it could arise was applicable not just in the US but also in other jurisdictions such as the UK.

Having viewed the training myself, despite these discrepancies, I agree with Ms Tronsky that it was good and thorough training on sexual harassment prevention.

107. Ms Tronsky received unsolicited and overwhelmingly positive feedback about the training from employees. Having seen the training, that does not surprise me.

108. All of the company's employees completed the sexual harassment prevention training. This included both the claimant and WB, who completed it on 28 and 30 September 2022 respectively.

109. In her claim form, the claimant for the first time described the sexual harassment prevention training as a *"tick box"* exercise. However, she did not make any such suggestion to the respondent at the time. This is despite the fact that, around the time she completed the training (on 30 September 2022), she was in frequent contact with the respondent's HR team about diversity and inclusion initiatives. Again, the claimant is not someone who lacked the confidence to express a concern if she had one, but rather someone who chose to volunteer herself for diversity initiatives. It is, therefore, particularly surprising, if she did have a concern, that she neither said nor wrote anything to the respondent's HR team at the time. In any event, the claimant is simply wrong in describing the training as "tick box". For the reasons set out above, it was thorough, lengthy, educational and appropriate training; it was not a tick box exercise.

*Event at Vagabond, Victoria, London*

110. As noted, all of the respondent's employees work from home. This means that the occasions on which they meet in person are rare.

111. On 21 July 2022, the respondent hosted a meeting in person in London. This was because Mr White, the Chief Revenue Officer, who was based in the US, was in London; those colleagues who were based in London were able to attend. The event took place at the Vagabond, which is a wine bar in Victoria, London. Both the claimant and WB attended this event. Later on, WB's wife joined the event. This is corroborated by the claimant's account in her first investigation interview with Ms Tronsky on 30 November 2022; she references this event, states that she met WB at it and that *"he was nice, we didn't flirt - I think his wife/girlfriend came to the event"*.

112. WB's evidence before the tribunal is that he recalls that the claimant was part of the group of people who attended the event but that he didn't have any conversations with her, as he was occupied with conversations with other people. The claimant gave no evidence of any interactions with WB at this event, although one can perhaps infer from her account to Ms Tronsky that she considered that they must at least have spoken briefly for her to be able to come to the conclusion that *"he was nice"*. In the light of some of my later findings, it may be the case that WB is downplaying even a minimal level of interaction between the claimant and himself at this event. However, in terms of a factual

finding in this respect, I find that, whilst they were both at the event, WB and the claimant had limited interaction with each other.

113. This was the only occasion on which the claimant and WB were at the same venue in person prior to the re:Invent conference in Las Vegas in late November 2022.

114. Throughout her evidence, the claimant has sought to paint a picture of a *"massive drinking culture"* at the respondent and DoiT in general, which was encouraged by management. I do not accept this. It makes sense to address this at this point, because the Vagabond event is the first occasion which the claimant cites as an example of this alleged drinking culture.

115. A huge amount has been made by the claimant in these proceedings (and by both Mr Hurst and Mr Brown in their cross-examination and submissions) of this alleged drinking culture. However, again, the allegation about there being a massive drinking culture was not made by the claimant until the letters from her solicitor of 15 February 2023 in the run up to bringing these proceedings. Again, given that the claimant was confident enough to put herself forward as a co-chair on diversity, equality and inclusion issues and that she had a channel of communication with HR, it is very surprising that she made no mention of this alleged drinking culture if she at the time genuinely thought there was one and had a concern about it, and certainly if her concern was so serious as she has maintained at these proceedings it was.

116. There is no other evidence to corroborate the claimant's assertion that the respondent encouraged a "drinking culture". On the contrary, it is denied by all the other witnesses, including WB. Indeed, WB specifically asserts in his evidence that this was not his experience of the respondent as an organisation. He states that *"staff were not encouraged to drink to excess"* and were expected to *"exhibit self-control and appropriate and responsible behaviour whilst drinking alcohol"*. He states that when the respondent did occasionally have in-person person gatherings, alcohol was usually involved, but it was only a few drinks for each person and to his knowledge nobody ever got drunk at these gatherings. He specifically addressed the claimant's allegation that the organisation encouraged employees to drink to excess by saying that that was not his experience of the organisation. That is consistent with the view of other witnesses and I have no reason to doubt it. I have, as set out above, also expressed my concerns about the claimant's retelling of earlier events and the reliability of her evidence in these respects.

117. In addition, as noted, the respondent had a specific policy which made clear that a violation of the alcohol policy would lead to disciplinary action up to and including dismissal. Furthermore, as we shall come to, at the re:Invent conference, staff were told off for drinking at the conference booth and another employee (Mr X) was dismissed following the Omnia event in part due to violation of the alcohol policy.

118. There is further evidence in relation to later events, which supports this conclusion and which I will come to in due course. However, it is enough for

present purposes to state that I conclude that the respondent did not have a "drinking culture" nor was a "drinking culture" encouraged by management.

119. As to the event at the Vagabond itself, the claimant asserted that there was a free bar and there was no limit on the amount that attendees were allowed to drink and that nobody was warned that they should not drink to excess. That is not disputed and those facts are not uncommon to corporate events involving socialising in general. I do not accept, if that is what is implied, that they are indicative of a drinking culture encouraged by management in general. As Ms Tronsky indicated, the respondent trusts its employees to make their own decisions as to how much they choose to drink, albeit in line with the respondent's alcohol policy.

120. The claimant goes on to assert that *"by the end of the evening those in attendance were intoxicated*". This assertion is not corroborated by WB nor by Mr White, who were present at that event. In cross-examination, WB specifically agreed that there had not been any excessive drinking at that event. For these reasons, and the reasons set out above, I do not accept that, by the end of the evening, those in attendance were intoxicated.

*Discussions about the claimant's team and the claimant's role (August - November 2022)*

121. As early as August 2022, there were discussions at DoiT's executive board level about DoiT's marketing function, part of which was the Content and Communications Team, headed by MN, in which the claimant worked. Concerns were raised that the Content and Communications Team was relying too much on outside contractors to produce content, despite the team having been hired to do this, because of the low level, generic experience that the team had. The executive leadership team therefore had a roundtable discussion about what was working and what was not and what practical steps could be taken to resolve these issues. At this time proposals for a strategic change were made. This discussion resulted in the suggestion that there needed to be a change in strategic direction with fewer, more specialised and experienced employees carrying out the function. That necessitated a reorganisation of the function in question.

122. Between August and November 2022, Mr White and Mr John Purcell, DoiT's Chief Product Officer, began to assess the impact of the function. It is not necessary to go into all the details. However, the outcome was that the marketing function of the respondent would be reorganised, with the Content and Communications Team being absorbed within the Product Marketing Team. As the Content and Communications Team was to be absorbed within the Product Marketing Team, Ms Stamm, as Head of the Product Marketing Team, would take over line management duties from MN, the Head of Content and Communications. Mr White therefore decided that the role of Head of Content and Communications would be made redundant by this reorganisation.

123. It had also become apparent during Mr White and Mr Purcell's review that the role of Content Coordinator (the claimant's role) was redundant. This role

was exclusively focused on creating social media content by taking the content produced by other parts of the company. It was apparent that the individuals actually producing the content could easily upload it to social media themselves most of the time and there was no need for an additional step (i.e. sending it to another person to upload) that added no value. This view was confirmed by MN, who agreed that the role was not necessary, and the responsibilities could easily be distributed elsewhere. (Indeed, Ms Stamm in her evidence, which I accept, described the claimant's role as a *"nice to have"* rather than a *"must have"* and was of the view that it was not therefore the best use of DoiT's limited resources.

124. Ms Tronsky gave evidence, which I accept and which is backed up by the contemporaneous documents, that it was therefore the respondent's intention to make both MN and the claimant redundant at the same time. There was also the potential that other roles within the team would be redundant too, but that was only a possibility at that stage.

125. Mr White informed MN on 22 November 2022 that her role was to be made redundant. This was at a meeting at which Ms Tronsky was also present. MN was to be placed on garden leave following a transitional handover period, with her employment terminating on 3 January 2023. During this period Ms Stamm would take over line management of the remaining five members of the team (as the claimant was to be made redundant shortly after MN) in order to perform a review of the skills the new team members had and to consider how this aligned with the company's new strategy.

126. MN was duly placed on garden leave and her employment terminated on 3 January 2023.

127. As noted, there is a lot of evidence in the bundle which evidences these discussions and what management's thinking was at that time (in other words in November 2022, prior to the re:Invent conference in Las Vegas). There is a spreadsheet setting out a timeline for the redundancy process and the messaging that would be put across in the process. Noted on the spreadsheet is the fact that MN and Ms Tronsky had discussed that the claimant's role should be made redundant, with any residual coordination duties picked up by a team member whilst the review of the wider team took place. The rationale for the elimination of the claimant's role is set out on that spreadsheet.

128. Because it was apparent that the claimant's role was going to be made redundant, Mr White and Mr Tronsky decided that Mr White would have a meeting with the claimant as soon as possible to consult on her potential redundancy and the package that might be available to her if her role was redundant. A timeline in the bundle sets out their intention to speak with the claimant about her redundancy as soon as possible. They were intending to speak to her on 22 November 2022.

129. However, as noted on the spreadsheet and in various Slack messages in the bundle, the claimant would be attending the re:Invent conference in Las Vegas which was due to take place from 28 November to 2 December 2022. Therefore, in order to ensure that the claimant could focus fully on performing her

role at the conference, and enjoy it, and because of a lack of availability on the part of Mr White that week, Mr White decided to wait until the claimant returned from the conference before having this conversation. This is reflected in the contemporaneous messages.

130. Furthermore, in an amended spreadsheet dated 29 November 2022, the expression *"TBD"* has been changed to *"Next Week"* to reflect that Mr White and Ms Tronsky were intending to have the consultation conversation with the claimant during the week commencing 5 December 2022, on her return from the re:Invent conference. However, the process was put on hold as a result of the events which happened at the re:Invent conference.

131. The claimant has suggested at this tribunal that the decision to make her role redundant had not been taken prior to her leaving for the re:Invent conference in Las Vegas. Ms Tronsky's evidence, which is consistent with the contemporaneous documentation, is that the decision that the claimant's role was redundant had been taken by that stage; however there remained to be had a consultation period to discuss such matters as packages and whether there were any alternative employment possibilities. I have no reason to doubt Ms Tronsky's evidence and I accept it. The fact that Ms Stamm was subsequently surprised to see the claimant at the conference in Las Vegas because she thought that the claimant would have been made redundant by then only supports this further.

132. I therefore find that, prior to the claimant leaving for the re:Invent conference in Las Vegas, management had already decided that her role was redundant, in the sense that the decision to remove her role had already been taken. Any references to "potential redundancy" either at the time or during the subsequent redundancy process in February 2023 reflect not that that decision had not been taken; rather they reflect issues about whether alternative employment might be found such that the claimant might not be dismissed and other consultation discussion points such as packages.

*The re:Invent conference in Las Vegas*

133. From 28 November to 2 December 2022, the AWS re:Invent 2022 conference was held in Las Vegas. This is an annual conference held at the Venetian Convention and Expo Centre (except for in 2020 when the conference was held virtually due to Covid). This conference features keynote speeches, an Expo Hall, technical training and certification opportunities, more than 2,000 technical sessions, and a variety of events hosted and sponsored by attending companies.

134. The event was overall hosted by Amazon Web Services to which, as noted, DoiT was a Premier partner. It was the biggest technology event that Amazon Web Services hosted. Attending the event presented a huge opportunity to network with key stakeholders within Amazon Web Services and others. As Ms Stamm put it, the re:Invent conference was DoIT's primary industry tradeshow.

135. DoiT was a Bronze sponsor of the 2022 conference and had a booth in the Expo Hall. It also sponsored the Omnia event. This is an annual event. It was held for DoiT's existing and prospective partners and customers at the Omnia nightclub in Caesar's Palace. Additionally the company hosted experiential events and executive dinners.

136. DoiT attends the re:Invent conference on an annual basis. It had hosted the Omnia event previously in 2021 and subsequently in 2023. Whilst it attended the conference in 2024, it did not choose to sponsor the Omnia event in 2024. Apart from 2022, DoiT has never had any people issues at the conference.

137. Each year, the conference is attended by more than 20,000 people, including approximately 50 of DoIT's employees. The event is very popular among its employees and therefore only those with a strong business need to attend may do so, with senior sign off required.

138. The claimant had been asked by her manager MN to attend the re:Invent conference. I accept Ms Tronsky's evidence that there was no real business reason for the claimant needing to attend the conference and that it was not clear and remains unclear why MN specifically asked her to attend. Indeed, the claimant herself seemed to be unclear about why she had been asked to attend. However, as arrangements had already been made and the claimant had expressed excitement about going to the conference, Ms Tronsky did not stop her from attending. The claimant was asked to capture the event and generate content for DoIT's social media platforms, which would be uploaded throughout the conference to encourage its existing and potential customers to engage with it at the conference and thereafter.

139. In anticipation of the conference, on 18 November 2022 DoiT circulated a *"know before you go"* slide deck to those employees who were due to attend the conference, setting out useful information about the conference and practical arrangements for attendees. The aim of the deck was to ensure that everyone understood what the plan and expectations were for the attendees. Furthermore, there was a training session/briefing for employees at which the deck was presented. Whilst the slides on the deck contain a lot of information, it is common ground that they do not make reference to alcohol consumption.

140. However, the collective evidence of Ms Tronsky, Ms Stamm, Mr White and WB is that at the briefing, it was made clear that the Omnia event was not an internal company party and that employees were expected to behave professionally including in terms of alcohol consumption. The matter was not dwelt on at length, (DoiT, as Ms Tronsky made clear in her evidence, trusted its employees to behave responsibly in this respect). However, those witnesses were all clear from the briefing that the message was that, whilst alcohol was available, DoiT's expectations with the same as at any other event and that nobody should be getting drunk or intoxicated as that was not the purpose of the event, which was to network with customers and partners.

141. On 26 November 2022, WB travelled to and arrived in Las Vegas for the conference. WB worked hard networking with customers at the conference.

142. On 27 November 2022, the claimant travelled to and arrived in Las Vegas for the conference.

143. WB and the claimant were staying in separate hotels in Las Vegas for the duration of the conference. The hotels were paid for by the respondent.

144. On the morning of 28 November 2022, the claimant learned that her boyfriend had cheated on her. The claimant accepted in cross-examination that she felt *"upset"*, *"shocked"* and *"angry"*, although she said she was *"mostly upset"*.

*28 November 2022*

145. On the evening of 28 November 2022, WB met with his team members for dinner to discuss a customer case study that they were going to present two days later. Those present at the dinner included Ms Stamm, ST (a member of the Content and Communications team), in other words the same team as the claimant), and "Matan". WB recalls that the claimant was also there, although he does not recall any conversation with her at dinner. This was the first time that WB and the claimant encountered each other in person in Las Vegas.

146. In her witness statement, the claimant asserted that the dinner, which they had at the Treasure Island hotel, was paid for by Ms Stamm (on expenses), which is correct. However, the claimant went on to assert that, by the end of the evening, she herself was intoxicated as were her colleagues and managers; she added that managers must have seen that they were all getting inebriated but didn't say anything.

147. I do not accept that this was true. The evidence of both Ms Stamm and WB was that people were not inebriated. Furthermore, the receipt and menu from Treasure Island, which were in the bundle, support their evidence that this was a casual dinner involving only a drink or two per person; the spend was approximately $33 per head, which was the price of a main dish and one drink, or of a couple of cocktails per person.

*"Eating" comment*

148. In the claimant's retelling, the timing of what is alleged to have happened next, which is the allegation about the "eating" comment at paragraphs 1.1(a) and 2.1(a) of the list of issues, is very confused. However it appears to be common ground that this alleged comment is said to have taken place just after the dinner at the Treasure Island hotel on 28 November 2022.

149. The claimant's allegation in the list of issues is that WB asked her *"why she was eating so much"*. The list of issues cross-references the relevant paragraph (30) of the claimant's particulars of claim, which states *"The claimant was eating cakes and was asked by WB why she was eating so much. Either [ST] or Matan, the claimant does not remember who, explained to WB that the claimant had just left a long-standing relationship."* In her witness statement, the

claimant stated (at paragraph 35) *"I was eating cakes and the second respondent said "what the fuck" and asked me why I was eating so much. Either [ST] or Matan explained to the second respondent that they knew that I had just left a long-standing relationship."*

150. WB's witness statement evidence did not even reference the alleged comment about eating. He explained that after the dinner at Treasure Island, a number of employees walked towards their hotels and some of them stopped for desserts; that the respondent would reimburse all expenses during the trip so it was normal practice for one person to pay the bill for the group and then the expense receipt would be sent to the company portal; that he purchased desserts with his credit card for the group; that he did not recall if the claimant was part of the group at the time when they purchased the desserts, but that had she been part of the group, the desserts would have been purchased with his credit card as well as the rest of the group's desserts; and that after they purchased the desserts, they all went their separate ways to each of their hotels.

151. The claimant's account on 30 November 2022 in her first investigation interview with Ms Tronsky was as follows: *"Went to the cake shop solo to get cake, and Matan, [ST] and WB caught up with her and asked why she was buying so much cake. She told them that her boyfriend cheated on her after being with her for two years, WB said what the fuck and was upset for her. When she was checking out, he asked the person behind the counter what they would recommend for someone that had been cheated on and she said Chocolate covered strawberries, so he bought them for her."*.

152. This account took place only two days after the events in question. It is therefore more likely to be accurate than the subsequent accounts given by the claimant, particularly in light of my concerns about the reliability of the claimant's evidence where she is describing events which took place a while ago and where she has either reformulated in her own mind what has happened or put a spin on matters which may be of assistance to her case. Furthermore, this account differs from the claimant's pleaded case before this tribunal in many significant respects.

153. First, there is no suggestion by the claimant that it was WB who specifically passed comment about the cake; she actually attributes this to Matan, [ST] and WB collectively, without identifying WB specifically as the person who asked her why she was buying so much cake.

154. Secondly, and importantly, the comment attributed to the group of workers in her account to Ms Tronsky is different to the comment attributed to WB specifically in the claimant's pleaded complaint; in other words asking why she was *"buying so much cake"* as opposed to asking why she was *"eating so much"*. I make no finding as to whether the latter comment could or could not be related to sex for the purposes of a harassment complaint; however, it is hard to see how the former comment, in the context in which it was alleged to have been said, could be said to be because of or related to sex.

155. Furthermore, the *"what the fuck"* comment makes much more sense in the context of the narrative as the claimant told it to Ms Tronsky.

156. For all these reasons, I find that the correct version of events was the one which the claimant told Ms Tronsky on 30 November 2022. It follows, therefore, that WB did not ask the claimant why she was "eating so much".

*Chocolate strawberries*

157. However, I consider it is also important to make some findings about what happened next in relation to the alleged purchase of strawberries, even though that is not an allegation of discrimination/harassment which is before me. This is because it is one of the two specific areas which in particular caused me to have concern about the reliability of WB's evidence.

158. I have already set out above the claimant's contemporaneous account of the buying of strawberries, which is set out in Ms Tronsky's notes of the investigation. Again, it was an account given two days after the event and is therefore likely to be a truer and more accurate account.

159. As part of the investigation, Ms Tronsky interviewed ST on 1 December 2022, three days after these events. ST confirmed that they *"left to get cake - it was WB/JG/ST/not sure who else"*. He goes on to state *"She has said that she has broken up with her boyfriend - she told ST 1:1, isn't sure if she told the group"*. This account further indicates that it was a relatively small group of employees who went to get cake. It also references a significant issue between the claimant and her boyfriend, albeit the reference to the boyfriend cheating on her is not there.

160. I have already set out above WB's account in his witness statement of what happened. His is a general reference to having bought desserts for the group and he states that he cannot even remember whether the claimant was part of that group; there is certainly no reference to chocolate covered strawberries. However, in his first investigation interview with Ms Tronsky, on 1 December 2022, WB states in the midst of his account of the taxi ride from the Omnia to the claimant's hotel: *"We were sitting in the taxi - for context, the day before she told me her boyfriend cheated on her and I bought her strawberries to make her feel better"*.

161. First, that contemporaneous account corroborates the contemporaneous account which the claimant gave to Ms Tronsky in which she said that she told the group of employees, including WB, that her boyfriend had cheated on her and that it was in response to that information that WB was upset for her and ultimately bought the chocolate covered strawberries for her. It therefore further supports the finding I have made about the alleged "eating" comment above.

162. Secondly, in the light of these two corroborative contemporaneous accounts, I find that the claimant was buying a lot of cake; was asked why by the group; did inform the group that her boyfriend had cheated on her; and that WB did say "what the fuck" in the context of being upset for the claimant; and that WB

asked the person behind the counter what they would recommend for someone who had been cheated on, was told chocolate covered strawberries, and therefore bought them for her.

163. Thirdly, whilst I appreciate that there was a long time gap between the events in question and WB writing his witness statement for this tribunal, I do find it surprising if, as he alleges, he has no memory of the claimant being part of a relatively small group going to buy desserts, particularly if (as I have found) the claimant revealed the striking news about her boyfriend cheating on her; if he felt particular indignation about that to the extent that he swore; and if he then went on specifically to ask the person behind the counter what they would recommend and to buy something specific like chocolate covered strawberries as a result. I therefore consider that, on the balance of probabilities, WB probably does recall more of this incident than he admits to in his evidence before the tribunal; and that, out of concern for any inferences which he perceives may be drawn from his actions in this respect in relation to the subsequent allegation of sexually assaulting the claimant, has not given an account of everything which he remembers about this incident.

*Vanderpump event - 29 November 2022*

164. In her witness statement (paragraphs 38-39), the claimant gave evidence of her colleagues and her having been invited to attend Vanderpump Cocktail Garden on 29 November 2022 for pre-drinks prior to the event in the Omnia nightclub. She states that the drinks were paid for by the respondent and that this seemed like a further indication to her that there was a massive drinking culture within the respondent's organisation and that it seemed that every event had alcohol served to members of staff including her. She then stated that after the pre-drinks, she and her colleagues moved on to the Omnia nightclub.

165. However, as she had to admit in cross-examination, the claimant did not even attend the Vanderpump event; she in fact went straight to the Omnia event, arriving at about 11 PM. Indeed, in her investigation interview with Ms Tronsky on 30 November 2022 (less than 24 hours later), she stated that she arrived at the Omnia event alone, late (at 11 PM) and that she was sober. Her late arrival was also noted by ST, as set out in his investigation interview with Ms Tronsky.

166. Once again, however, the claimant has sought to give the impression of a "massive drinking culture" at the respondent, this time by reference to an event which she herself did not even attend.

*The Omnia event*

167. The Omnia event is an annual invitation-only event. It takes place at the Omnia nightclub in Caesar's Palace. It was held by DoiT in 2022 for its existing and prospective partners and customers. As Ms Stamm put it, this event was a flagship event at DoiT's primary industry tradeshow.

168. The event is held on the second floor of the nightclub and DoiT had exclusive use of this floor and its adjoining outside terrace. However, the first

floor, where the dance floor of the club was, and which one could look down onto from the balcony of the second floor, was open to the general public. Employees and guests at the respondent's event could gain access to the first floor if they chose to do so. However, the majority did not do so, as they were concentrating, as they should have done, on networking with prospective partners and customers on the second floor.

169. As already noted, the Omnia event had been discussed in detail by DoiT at the briefing session on 18 November 2022 prior to the re:Invent conference.

170. The event commenced at 9 PM on 29 November 2022 and ended at 2 AM the following morning, 30 November 2022. As set out in the slide deck for the briefing, DoIi's employees were instructed to arrive at 8:45 PM, in order to ensure that they were there to engage with the partners and customers as they arrived. There was no set time until which employees were obliged to stay at the event. Indeed, I have seen evidence that many employees, including for example Ms Stamm, who left at 10:30 PM, left well before the end of the event.

171. There were approximately 1,000 people at the Omnia event, of which only around 50 were employees of DoiT. It was very clearly not an internal company party; rather, it was a business event – a networking event for DoiT's potential partners and customers.

172. Food and drink were available throughout, all paid for by DoiT. This included alcoholic and non-alcoholic drinks. All witnesses acknowledged that there was plenty of water to drink should people want or need it. There was no limit placed on the amount of drinks of any sort which employees (or guests) could order and consume. However, as already indicated, employees were expected to behave professionally and comply with DoiT's alcohol policy, which meant ensuring that they were not under the influence of alcohol such that they could not do their work, and certainly not intoxicated.

173. Some of the respondent's employees who attended the event chose to drink alcohol; others did not.

174. There was no "designated welfare officer" available for employees of DoiT at the Omnia event (as Mr Brown and Mr Hurst both submitted there should have been). However, there were senior employees of DoiT present at the event to whom employees could have gone had there been any issue.

175. There were taxis readily available outside the Omnia. If an employee wanted to leave the venue, that employee could easily get a taxi back to their hotel and would be able to reclaim the cost from DoiT on expenses.

176. WB arrived at the event at about 8:30 PM. It is not in dispute that he spent the majority of the event networking with potential partners and customers and spent the majority of his time on the terrace adjoining the second floor, which was quieter than the interior and from his point of view better for networking.

177. When he joined the event at 8:30 PM, WB had one vodka and Red Bull. Thereafter he was drinking water and Red Bull only. At no stage was WB under the influence of alcohol.

178. WB stayed outside on the terrace the whole evening until the terrace was closed by staff of the venue, which was probably around 1:30 AM. Prior to that he had not seen the claimant.

179. As already noted, notwithstanding the instruction that employees should arrive by around 8:45 PM, the claimant did not arrive at the Omnia event until 11 PM. The claimant told Ms Tronsky at her first investigation interview on 30 November 2022 that when she arrived, she was *"completely sober but hadn't eaten very much that day"*. There is no dispute about this and accept that.

180. In her particulars of claim (paragraph 35), the claimant asserted that Ms Tronsky attended the Omnia event on the evening of 29 November 2022 but that she left early, having told the claimant that *"she did not want to stay because people get "weird" when HR stay [at an event] and they will not have as much fun if she were to remain in attendance"*. However, Ms Tronsky did not even attend the Omnia event and so could not have said this to the claimant. Ms Tronsky did not attend the Omnia event at all as she was unwell. The fact that she was unwell is supported by contemporaneous messages between her and the respondent's CEO (who was checking that his Chief People Officer was okay) and evidence of the electronic "check-ins" for the Omnia event which showed that Ms Tronsky did not check-in to the event, unlike the claimant and WB.

181. At paragraph 41 of her witness statement, and notwithstanding the fact that the documentary evidence referred to in the paragraph above had presumably already been disclosed to the claimant and her solicitors by the time she finalised her witness statement, the claimant continues to assert that Ms Tronsky was in attendance at the Omnia event but left early. Her evidence about the comment morphs into an assertion that Ms Tronsky later made that comment. However, the comment still makes no sense if Ms Tronsky was never at the Omnia event at all, because it refers to her giving a reason for leaving that event early.

182. I therefore accept Ms Tronsky's evidence that this alleged comment simply never happened.

*Drinking at the Omnia event*

183. There is no dispute that, after she arrived at the Omnia event, the claimant drank a number of rum and cokes and that she also had some champagne, and that she became intoxicated.

184. The claimant's evidence (at paragraph 40 onwards of her witness statement) was that a large number of her colleagues were extremely intoxicated; that no one from management attempted to limit the alcohol intake despite most sales managers of the respondent and its chief executive officer being in attendance; that, indeed, they were also, in the main, intoxicated

themselves; that she saw employees dancing on tables, many of whom were clearly intoxicated; and that she saw the chief executive officer of the respondent in a booth with approximately 20 employees most of whom were seriously drunk and dancing on tables. I do not accept any of this, for the reasons below.

185. First, the quality of the claimant's evidence, the reliability of which I have concerns about anyway, was even more questionable because, by her own admission, the claimant was herself intoxicated at the Omnia event. Indeed, as I shall come to, she was so intoxicated by the time she left that she did not even realise at the time that she had in fact been ordered to leave because of her behaviour by the Omnia nightclub's security staff. She only realised this when she was subsequently informed by Ms Tronsky during the investigation that it had happened.

186. Secondly, leaving aside the claimant's evidence, which I do not accept, there is no evidence that any of the employees of DoiT (apart from the claimant and one other employee, Mr X, whom I shall return to in due course) were intoxicated. As noted, I have seen various videos of the event as well as a large number of photographs of the event which were contained in the bundle; whilst individuals are often smiling and appeared to be enjoying the event, there is nothing which indicates that any of DoiT's employees were intoxicated. The photos and the videos appear indicative of the sort of approach which Ms Stamm described as being what was expected from DoiT's employees: that conversation should be *"fun and casual, but still professional"*, as they were representatives of DoiT attending a work event on work time.

187. Thirdly, Ms Stamm's evidence was that the event was a professional event and that no one should have been getting drunk or acting out of hand; she was not aware of anyone having been intoxicated (albeit she left the event at around 10:30 PM, before, for example, the claimant, who was subsequently intoxicated, arrived).

188. Fourthly, WB's evidence in cross-examination was that he did not recall seeing any employee (except the claimant) intoxicated, although he did see some customers intoxicated. He said that some employees were having alcoholic drinks, but they were not intoxicated. He was asked how he would define someone who was intoxicated. He replied that *"They can't walk, they slur"*. WB was, of course, present at the event to its close, so he would have had a fuller opportunity to see if employees of DoiT had been intoxicated. However, he said that he had not seen any DoiT employee who was intoxicated (apart from the claimant).

189. Fifthly, Mr White's evidence was that he was present at the event and that, of the approximately 50 employees at the event, he interacted with around 40, and none of those with whom he had interactions were intoxicated; rather, they were enjoying the event as well as talking business. He confirmed that the majority of DoiT's employees and guests were outside on the terrace, which was much quieter than inside the club, having group discussions. He left the event around midnight. This evidence is not inconsistent with the evidence of other employees (except that of the claimant) and the photographic and video

evidence which I have seen. I have no reason to doubt it, and I therefore accept it.

190. Sixthly, given the clear purpose of the event, the respondent's policy regarding alcohol, the contents of the briefing prior to the event, and the fact that this event was a great opportunity for employees to generate business and cement contacts with potential customers and partners, the claimant's assertion that, on her evidence, the majority of managers and employees of DoiT were intoxicated at that event is highly unlikely to be correct. If they had been, it would have been a complete waste of this great opportunity.

191. Seventh, I have already set out in these findings numerous instances of where the claimant has sought to paint an untrue picture of an alleged "massive drinking culture" at DoiT and in doing so has made assertions which are palpably untrue. That casts considerable doubt about her similar assertions in relation to the Omnia event.

192. Finally, during the investigation conducted by Ms Tronsky, the claimant did not make any of these assertions about either a massive drinking culture or about large numbers of employees being intoxicated at the Omnia event. Given the detailed notes of that investigation, that is surprising if what the claimant has now maintained about intoxication at the Omnia event was true. Indeed, the first time that the claimant raised with the respondent allegations about excessive drinking and the respondent's alleged attitude to drinking, both in relation to the Omnia event and generally, was via her solicitors in their letter of 15 February 2023, which first made allegations against the respondent of sexual harassment, sex discrimination and victimisation. Notably, that letter followed soon after the protected conversation on 8 February 2023, at which the claimant was notified for the first time about her job being redundant.

193. For all these reasons, I do not accept either that employees of DoiT (with the exception of the claimant and Mr X) were intoxicated at the Omnia event or that DoiT has a "drinking culture" generally, let alone the "massive drinking culture" which the claimant maintains.

*Leaving the Omnia event*

194. It is not in dispute that the claimant, who was intoxicated at that stage, had a poor recollection of some of the events towards the end of her attendance at the Omnia event and the journey back to her hotel. I shall return to the detail but, in summary, the following is not in dispute. While she was at the Omnia event, the claimant went down to the first floor of the Omnia nightclub (the public area) and danced. Although she had no recollection of this at the time of her investigation interview with Ms Tronsky later the same day, the claimant was asked to leave the Omnia by security at the Omnia because she was too intoxicated. Security took a picture of her licence. This happened around 2 AM on the morning of 30 November 2022. In doing so, security brought the claimant up to the second floor of the Omnia. The outside terrace adjoining the second floor had been shut by that stage and WB had moved inside on the second floor.

WB then accompanied the claimant in a taxi back to her hotel. WB then accompanied the claimant to her room.

195. I shall return in due course to what allegedly happened, sometime between 2:30 and 2:45 AM, in the hotel room.

196. Shortly after 3 AM, the claimant made a phone call to her boyfriend, who contacted hotel security and paramedics, who took her to hospital.

*Ms Tronsky's support for the claimant*

197. At about 7:15 AM, the claimant telephoned Mr Rob Cummings, a member of DoiT's HR team (who was based on the US East Coast), informing him that she had been assaulted. Mr Cummings immediately informed Ms Tronsky.

198. Ms Tronsky gave evidence that she was deeply concerned for the claimant's well-being first and foremost and wanted to support her and that she was also keen to learn as much as possible about what exactly had happened so that she could ensure that the respondent was doing right by the claimant. In light of the actions she subsequently took, which back this up, and the fact that I have no concerns about the reliability of her evidence, I accept that that was the case.

199. At about 7:30 AM, Ms Tronsky telephoned the claimant, who told her that she was in hospital but did not know which one. Ms Tronsky's evidence is that it was clear from the claimant's voice that she was still very drunk, as she was mumbling and slurring her words and sounded as if she was in a daze. Ms Tronsky was in the best position to make this judgment and I accept her evidence that that was the case. The claimant did not know where she was and Ms Tronsky asked her to find out and text her.

200. At about 8:30 AM, the claimant texted Ms Tronsky to confirm the name of the hospital that she was in. Ms Tronsky quickly got into a taxi and made her way urgently to the hospital. She kept in communication with the claimant by phone/text during this time. She confirmed to the claimant that she was in a taxi on her way to her. The claimant then texted Ms Tronsky to explain that she would not be able to speak to her until after she had spoken to the police. Ms Tronsky explained that she would wait at the hospital until she was able to see her. She also informed the claimant that her boyfriend had reached out to Mr Cummings and that he had been told that she was at the hospital waiting for the claimant.

201. A little while later, Ms Tronsky left the hospital briefly to purchase a coffee and a muffin for the claimant, but she was not allowed to bring it into the hospital.

202. In the meantime, the claimant told the police officers present at the hospital that WB had assaulted her. The officers told Ms Tronsky this when they left the claimant's hospital room, at which point Ms Tronsky gave them her contact information and WB's full name, contact information and the name of the hotel at which he was staying, along with her offer to assist in any way needed.

203. Subsequently, the specialist sexual assault detective then arrived to speak with the claimant. The claimant asked Ms Tronsky to be present for her interview with the specialist sexual assault detective and Ms Tronsky agreed, provided that that was okay with the detective, which it was.

204. As already noted, there was at this hearing some confusion caused in relation to the claimant's evidence about whether she asked the Las Vegas police to press charges. For the first time, the claimant suggested that, whilst she did not ask the original officers who interviewed her to press charges, she did ask the specialist detective at the subsequent interview to press charges. However, there is no record in the police documents that the claimant asked them to press charges; in fact they are clear that she asked them not to. Furthermore, Ms Tronsky's evidence was that in the interview with the specialist sexual assault detective, the claimant confirmed that she did not want to press charges against WB. In light of the documentary evidence and the evidence of Ms Tronsky, who was present at the interview, and my concerns about the reliability of the claimant's evidence particularly in relation to matters further in the past, I find that, on the balance of probabilities, the claimant did not at any stage ask the Las Vegas police to press charges against WB.

205. Ms Tronsky's evidence is that the specialist sexual assault detective told the claimant repeatedly that if she decided not to file charges at that point, it would be unlikely that criminal charges would be able to be brought against WB, and that the claimant repeatedly insisted that she did not want to pursue charges; that Ms Tronsky assured the claimant that the decision as to whether to press charges was absolutely her own to make and that she would do everything she could to support her if she did decide to press charges; but that, ultimately, the claimant decided against taking any kind of criminal action. Again, notwithstanding the uncertainty cast on this by the claimant's evidence in cross-examination at this tribunal, I accept Ms Tronsky's evidence for the reasons set out above.

206. After the interview, Ms Tronsky arranged for a taxi to take the claimant and her back to the claimant's hotel.

207. When they arrived at the hotel, Ms Tronsky used her own money to arrange for a second hotel room with the hotel and ensured that they put a hold on the claimant's original room so that no one would enter or clean the room, in order to preserve any evidence if the claimant changed her mind about pursuing charges.

208. The claimant said that she was exhausted and wanted to shower and go to sleep. Ms Tronsky told her to rest and that she could order anything from room service if you wished to. Ms Tronsky asked the claimant to let her know if she needed anything and said that she would check in with her later in the day, unless she needed her before then.

209. Once Ms Tronsky had settled the claimant into her new hotel room, she went back to her hotel to plan the investigation and to start to make notes of what had happened.

210. Mr Cummings then notified Ms Tronsky that the claimant's boyfriend was intending to fly to Las Vegas to be with her. The claimant's boyfriend was required to give contact details for his visa and Ms Tronsky gave him her contact information to ensure that he was able to enter the country without any issues.

*Ms Tronsky's investigation*

211. Just before 5:30 PM on 30 November 2022, Ms Tronsky went to the claimant's new hotel room to check in on her and see if she was ready to discuss what had happened in detail. The claimant confirmed that she was ready to share what had happened. Ms Tronsky therefore interviewed the claimant about the alleged sexual assault.

212. Ms Tronsky took detailed notes on her laptop to capture the claimant's words as accurately as possible. She typed these as she was interviewing the claimant. She also did this in relation to the subsequent interviews in the investigation, albeit some of those interviews were by phone rather than in person. I reiterate that, for the reasons given earlier, I consider that they are a detailed and in all material respects accurate record of what she was told by the various interviewees.

*Interview with the claimant 30 November 2022*

213. Ms Tronsky asked the claimant to walk through everything that had happened since the claimant had arrived in Las Vegas, as she had previously referenced having a prior interaction with WB in Las Vegas (the interaction regarding the buying of desserts). The claimant had not said that she had been offended by this previous interaction; however Ms Tronsky wanted to ensure the entire situation was captured. The material details of that interaction have been recorded earlier and these findings and are not repeated here.

214. During the course of her account of her time at the Las Vegas conference, the claimant mentioned that she had visited DoiT's Expo stand and that employees had been chastised by the DoIT's management when seen drinking beer at the Expo stand. As the notes recorded, *"Shannon told off people for drinking-no beer at the booth!"*.

215. In relation to the Omnia event, the claimant stated that she had arrived at 11 PM, completely sober, but having not eaten very much that day. She said that she had a number of alcoholic drinks. She began to feel *"wavy"* and so began drinking water. She said that she went downstairs into the public area of the nightclub where she danced with and kissed a stranger, before returning to the second floor. She then explained that she bumped into WB who had told her that she had had a lot to drink and needed to go home, and physically guided her out of the nightclub. Her account of her interaction with WB at this point was as follows:

"Went to go back upstairs and bumped into WB - He said woah you've had a lot to drink. She said she needed to go get water and that she left her jacket upstairs. He told her that she needed to go home and put his hand on her arm, she told him she was just going to have more water. He said no no lets take you home. She told him that she was good, she could stay longer, she wanted to get her jacket, but he kept insisting she go home, steered her outside, told her again and again it was ok, she left her jacket, she was feeling kind of wavy / cloudy / dazed - it was a lot but she wasn't blackout. She was just trying to get more water."

(As already noted, the latter part of this account was incorrect because the claimant was escorted back to the second floor by Omnia security, who were evicting her from the club because she was intoxicated, and it was at that point that she met WB.)

216. The claimant told Ms Tronsky she did recall [ST] messaging her at 1:20 AM to ask where she had gone and that later she responded to explain that she had apparently had too much to drink and that WB was taking her home.

217. She said that she did not recall the taxi journey with WB back to her hotel. She recalled arriving at her hotel and entering her room with WB.

218. In terms of what she said then happened in the hotel room, I set out the account in Ms Tronsky's notes in full:

"Remembers being in the hotel lobby - found her way to the lift to get to the 20th floor, was struggling to found the key in her bag, he took the bag and found her key and got them in the room. She was really apologetic, felt like she had ruined the night. She thought he was being a friend and felt safe with him and he seemed nice.
 She said she was ok now, said she wasn't going to go back out - She wanted to go brush her teeth and was looking at the counter and all her makeup.
 He was talking to her - said you're alright, kept rubbing her arm. Guided her out of the bathroom, she didn't get to brush her teeth, he started talking about her boyfriend, telling her that she was beautiful and that she didn't deserve that. She was a bit taken a back, looking at him talking, he was being really sweet, He said that "we just need to get into bed, lets get you undressed, she felt like she told him she could do it herself but isn't sure, she was really drunk at this point.
 Was wearing a slip dress. He pulled down both the straps of her dress and it was off, she was only wearing panties / no bra.
 He was still talking to her - she was frozen, almost outside of her body, felt like there was no gravity in her body
He was touching the back of her hair, rubbing her shoulders, touching her breasts.
 Then he pushed her down on the floor so she was on her knees looking up at him - felt very confused, he unzipped his trousers and put his penis in her mouth, and put his hand on the back of her head and "fucked her mouth" and he came in her mouth.
 She thinks she was crying but isn't sure - she was very confused. It felt like it wasn't real life. She didn't understand how that happened. She can't remember if he said anything while it was happening.
 Afterwards he was talking to her - still complimenting her and saying that if he wasn't in a relationship "you'd have know idea what else I'd like to do".
 He got her up off the floor - he said that no one needs to know about it. "You can't tell anyone about this this / not doit / you don't need to tell anyone ok?"
 She thinks she was crying when she left. Embarrassed / distraught / wailing after he left.
 She messaged [ST], sent him the voice message. Messaged [MN], messaged Rob
 Her boyfriend messaged her on instagram so she video called him, "She kept repeating "he was just meant to take me home / He was meant to take me home / he came in my mouth"
 She was wailing by the door / the neighbor told her to shut the fuck up / she was feeling."

awful / went to puke but missed a bit / rested her head on the wall in the bathroom and passed out for a bit

 Came to when security knocked at her door but she couldn't respond - they were asking her if she was ok but she couldn't really talk. Was only wearing underwear - got her pooh sweater / was hysterically trying to tell them what happened while having a panic attack while choking and coughing. They called the paramedics / they kept asking questions and she was trying to respond / just grabbed her softee blanket / and they wrapped her up and took her to the hospital."

219. In relation to the alleged sexual assault itself, the claimant's account remained consistent in all material respects. Furthermore, the account which she gave to the Las Vegas police is contained in the tribunal bundle. Whilst it is not as detailed as the account which she gave to Ms Tronsky, the account of the sexual assault which it contains is in all material respects consistent with the account which she gave Ms Tronsky.

220. On the morning of 1 December 2022, Ms Tronsky told WB to remain in his hotel room and not to engage with any further conference or employment activities pending the investigation. She did not officially suspend him, as she was not yet in a position to confirm the correct process to be followed and wanted to speak with the respondent's external legal counsel about this. However, this was a de facto suspension because WB, whilst remaining on full pay, had been told not to engage in any employment activities.

221. Ms Tronsky confirmed to the claimant, with whom she remained in regular contact by text, that WB had not been suspended at this point but that she had asked him not to attend any events; the claimant thanked Ms Tronsky for the transparency.

222. In the course of her investigation, Ms Tronsky spoke with the management of the claimant's hotel to try to get the security footage of the claimant arriving back to her room with WB; however, the hotel refused to provide anything without a warrant.

223. She also spoke with the management of the Omnia nightclub and managed to get them to agree to review the security footage and their notes from the night of the Omnia event (this was something that they told her they only do when the police asked them to). The Omnia, however, confirmed to her that the claimant was in fact asked to leave the Omnia by security because she was too intoxicated; that they took a picture of her licence; and that the claimant did leave with WB.

*Interview with ST 1 December 2022*

224. Ms Tronsky interviewed ST on 1 December 2022 at approximately 1:30 PM.

*First interview with WB 1 December 2022*

225. Ms Tronsky interviewed WB for the first time on 1 December 2022 at approximately 3 PM. There were in fact in total five separate interviews over the course of the days that followed. WB's evidence at the tribunal was that he could

not recall there were as many as that. However, in light of Ms Tronsky's investigation notes, which were taken contemporaneously and make the dates and separateness of the interviews clear, I accept that there were five separate interviews. As already indicated, whilst I have used the expression "interview", some of these took place by phone rather than in person (although it is not clear from the evidence which ones were in person and which took place by phone).

226. Ms Tronsky carefully and specifically framed her questioning of WB to do everything possible to ensure that he shared as much detail as possible with her during the investigation. She did not give full details of the allegations against him from the start, but rather sought to give him the opportunity to give his own account of what happened that evening. I set out WB's account in the paragraphs below.

227. In this first interview, WB explained that at around 2 AM at the Omnia nightclub, he had seen nightclub security escorting the claimant. He had spoken to security and they told him that they needed to escort her out because she was too drunk and that she was a liability to the Omnia. They asked WB if he was from DoiT. They asked if he knew claimant and he said yes and the claimant also said yes. They had escorted her over to get her bag to get her ID in order to get a photo for their records showing that she was escorted out for intoxication. She gave her ID to the security people and WB saw them take a picture and they told her that she was on the banned list and needed to be escorted out. She needed to lean on WB to get down the stairs safely after stumbling a few times.

228. The claimant initially said that she wanted to walk to her hotel but WB insisted that she took a cab. They went to a cab and the cabbie said that the claimant was drunk and insisted that WB should, as a sober person, accompany her. WB agreed to do so. In the investigation notes at this point it states: *''He said #actasoneteam - I'll take her home."* The hashtag reference is to one of DoiT's values in "acting as one team"; in other words, what WB was saying to Ms Tronsky was that he agreed to take claimant home as he was, in line with company values, taking care of a colleague who needed assistance.

229. WB stated that, in the taxi, the claimant told him that she had *"hooked up with a girl the night before in her hotel and that the girl had stolen her Ted Baker jacket. She said that she likes girls but that she needs a penis to be satisfied"*. He stated that the claimant said that she was sad that he had a wife. He said that the claimant said that she wished she could be with him when they got out of the taxi.

230. WB said that, when they arrived at the claimant's hotel, the claimant had trouble finding her room and that she was *"very very very drunk"* and had to lean up against the walls in the elevator. He said that, when they found her room, the claimant told him that he needed to help her get into her room and said that *"you need to come in and make sure that I'm okay"*. WB commented that, if something had happened and she was too drunk to use a phone, he wouldn't have been able to forgive himself but that, looking back at it, he should probably not have helped her.

231. In terms of WB's account of what happened in the room, I set out below Ms Tronsky's notes in full:

"So I open the door, she walks in, I have my back to her - when I turn around and she starts kissing me there. I told her to stop, she says that shes upset that he has a wife but that she still wanted to do it. She kept saying sorry, I told her to stop and brush her teeth.
 She told me I needed to help her get out of her dress because she was too drunk to do that. I help her to slip her dress down on the side and I look aside because I didn't want to see that, and the she started to change. She tried to kiss me again and I said no and I left.
 She had too much to drink to know what she was doing. She is a very nice person. This is a very very uncomfortable situation. I had actually planned on reaching out to you on monday to figure out what to do - if i should file a harassment claim.
 And when you sent me that message, I thought, does she have another account of this,
because when people are drunk they can remember things differently.
 If I was in that situation, I would have wanted someone to help me - but obviously things weren't good.
(KT asked specifically - was there any sexual activity between you and JG) There was no sexual activity between me and JG - I don't find her attractive. I was just trying to be a nice guy and now that there is a case against me, from now on i'm not going to be considerate. I like her as a person, and I like what she has been doing with our social media - I wish that I went to a female employee to have them escort her back.
 I didn't tell anyone anything about what happened the night before. I haven't had any contact with JG since. If i need to speak to her again, I'll need an apology. I won't be able to look her in the eyes. I felt taken advantage of, and now things have been turned around on me. I don't feel comfortable.
 I'm just shocked - I was trying to be a nice person and help another Do'er out. I've been with my wife for 7 years, and even if I wasn't I wouldn't do this. The fact that you have this a conversation with me will color my reputation. I should have just told her to find her own way home, but I decided to take one for the team because I could tell that she needed help.
 My biggest concern is that this situation will have an impact on my future at doit - I love my job. My wife and I just bought a house, I would never do anything to jeopardize my role my job or anything at doit. And i worry that now I'm going to be punished for it.
 I want to makes sure that my name is clean. This is very disturbing."

232. The interview ended at this point.

*Second interview with WB 1 December 2022*

233. At 4:30 PM on 1 December 2022, WB called Ms Tronsky and requested to speak to her again. During this call, the version of events given by WB changed for the first time.

234. WB confirmed that the claimant had kissed him shortly after he entered her room, as he had stated in his initial interview. However, having assisted the claimant in removing her dress and following her attempt to kiss him again, he stated that he had forced her onto the bed, put a blanket on top of her, and that she had asked him to keep it a secret. WB explained that this was why he didn't proactively approach Ms Tronsky to inform her about what had happened.

235. He also stated, apparently voluntarily, *"The fact that you asked me about sexual activity is beyond me."*

236. He went on *"I don't want to put words in her mouth or paint her in a bad light but it's been a while since I've seen someone that drunk. I didn't expect her to remember anything that happened, she couldn't walk and was slurring"*.

237. After this second interview, at 5:28 PM on 1 December 2022, Ms Tronsky messaged WB to ask how long he had been in the claimant's hotel room. WB stated that the taxi had arrived at the hotel at 2:24 AM, they had spent the next 6 to 9 minutes getting to her room, and he had left her room at 2:44 AM. This would have meant that WB had spent between 11 and 14 minutes in the claimant's hotel room.

238. When Ms Tronsky texted the claimant to ask the same question, she could not give a definitive answer.

*Third interview with WB 2 December 2022*

239. WB contacted Ms Tronsky again on 2 December 2022 at around 12 PM. As set out in Ms Tronsky's notes, that interview was as follows:

"There is one quite major thing I forgot to share with you yesterday. The answer is still no, we did not have any sexual contact - BUT - she asked if I could help her get over her boyfriend by letting her give me a blowjob and I said no and I put her into bed. I had a hard time sleeping last night and I don't want to hang anyone out but I don't want to lie to do it.
 She said that she needs someone to "fuck her face."
 I just wanted that on the record - a kiss is bad but asking for a sexual favor goes against everything I stand for. I don't know if anything happened in the room after I left, because she had mentioned having someone there the night before. I'm glad that I have records and time stamps of how long it could have been that I was in the room. I just feel used to be honest. This whole experience makes me think twice about helping in the future. I thought I was doing the right thing but now it turns out I'm being questioned about something that I haven't even done."

240. At the end of the interview, Ms Tronsky told WB that the police were involved, that they had taken swabs from the claimant at the hospital and handed over evidence to the forensics examiner. She then asked if he had anything else to share. WB said no.

241. At this tribunal, WB gave certain explanations as to why his account developed and why he did not tell what he now asserts is the whole truth from the start. I will return to these in due course. However, he accepted in his evidence that the first two paragraphs of the interview notes quoted above did not amount to a development in terms of revealing further details of what actually happened; rather, he accepted that those two paragraphs were simply untrue; in other words, there was never a discussion about oral sex (as set out in the two paragraphs above) but that the oral sex which he later accepted took place happened without any prior discussion about it.

*WB's helpline calls*

242. WB maintains that he then decided to call the national helpline for sexual assault victims in America to talk to somebody about what he maintains had happened; that he explained everything that had happened to him (in other words that he was the one who was assaulted) and was told that his way of reacting was normal in this situation as he was a victim of trauma; that the helpline advised him that, since the police were involved, it was important that he told the full story to the respondent to show that he was truthful; that he then

called Las Vegas police to check if they had an investigation against him and the police advised that an allegation had been made but that, without sufficient evidence, they could not proceed further with the investigation and did not need him to come in for any questioning. In the meantime, WB returned to the UK. WB maintains that the following Monday, 5 December 2022, he had a call with the rape and sexual abuse helpline in the UK to seek advice and support. There are call logs in the bundle indicating that he called the UK helpline twice on Monday, 5 December 2022. I accept, therefore, that WB at the very least called the UK helpline, although I make no finding about the content of any of these calls.

*Fourth interview with WB 5 December 2022*

243. Later on 5 December 2022, WB requested to speak with Ms Tronsky again. This was the fourth time she had interviewed him and again his version of events changed, this time very substantially. The notes of the interview are as follows:

 : "WB: I wanted you to know that i've called and spoke to a sexual harassment hotline in the UK. I needed to share that whenever we were in her room and she came out and brushed her teeth and she pushed me into the hallways between the bathroom and the Door.
 She forcefully pulled down my pants and my underwear and started performing oral sex on me - and I just froze and felt filthy and dirty and kept trying to think why I gave her any indication that what she was doing was ok. I wanted to call and explain everything everything especially if police are involved in this shit. I don't want to be blamed for this if I haven't done anything. I'm so disgusted and ashamed for being in a position where I could be taken advantage of like that. This whole thing is turning into a nightmare for me.
 I don't know what happened - whenever she kissed me she said she needed to kiss me to get over her boyfriend. She turned aggressive and pushed me against the wall and yanked down my pants and underwear before I snapped out of it - I moved her over to the bed.
KT, "WB , the police are involved and have forensics people reviewing swabs that were taken from JG's mouth. Are they going to find evidence of your semen in her mouth?"
 : I don't know. (long pause.) I don't know if they are going to find semen her mouth - I did not ejaculate but maybe there was some transfer or something. My penis was in her mouth for maybe 7 or 8 seconds.
 KT: Is there anything else you remember or would like to share?
 : No.
 KT: Ok I appreciate you telling me, let me know if you remember anything else. At this point, like I said the police are involved, I'm speaking to them and outside counsel later today and will touch base with you tomorrow.
 We asked you - you categorically denied it / we asked you again you said again that you didn't. Trust and confidence issue because he's lied about a very serious issue…"

*Ms Tronsky's check in conversation with the claimant 5 December 2022*

244. Later on 5 December 2022, Ms Tronsky spoke to the claimant to check in on her. She told her at this point that they had talked to the Omnia and that the Omnia had told them that the claimant was in fact asked to leave the Omnia by security because she was too intoxicated, that they took a picture of her licence and that she did leave with WB. The claimant replied *"Wow I don't remember that"*.

245. Ms Tronsky asked the claimant whether, in the light of that, it was possible that she might not remember exactly what happened or might be misremembering certain elements of what happened. The claimant replied that

she knew she was very drunk and that she might not remember everything but that she knew that she was assaulted. She referenced having nightmares. She stated *"I feel very broken - I drank too much and that's on me but I didn't deserve that. I know I was blackout drunk so my version isn't clear but I know what he did"*.

*Fifth interview with WB 7 December 2022*

246. On 7 December 2022, WB requested to speak with Ms Tronsky again, for the fifth time. During this call, his version of events changed again. The investigation notes include the following:

 "WB: I'm just very much out in the weeds at the moment - this is a very traumatic situation for me and I just wanted to ensure I've provided all the right information. I've been speaking with people from sexual harassment hotlines. I had a session with a therapist yesterday that asked me to walk through everything and I realized there was something I hadn't remembered that came up after I spoke to the therapist.
 When JG pushed me against the wall and started to preform oral sex on me. It lasted between 10 and 15 seconds - and I was in a state of shock against the wall. I realized that I had started to ejaculate and I realized what was happening and I pulled out of her mouth and the majority of the semen went into my underwear, but I don't know what might have gotten into her mouth because she also spit some of it out.
 I just want to make sure that it doesn't come across that I've not been truthful. This information came to me after several sessions on monday and tuesday. Because when you asked on monday if the swab that was given to the police would show any semen and I said no because i didn't think there would be - but then through the work I realized that there was. But I wanted to be honest and truthful…

 WB asks if I can tell him what JG is saying happened - Is she saying he raped her?
KT responds that she isn't going to share details from JG's report with him, and would not share details from his report with her. He thanks me for handling this so professionally."

*Ms Tronsky's call to the claimant on 9 December 2022*

247. On 9 December 2022, Ms Tronsky called the claimant to update her. The notes of the conversation are as follows:

 "KT calls to share that the investigation with WB is ongoing, that he has now shared that there was in fact sexual content between the two of them, although his version of how it happened is dramatically different than hers.
 JG say thank you for telling me, I was going crazy - I know what happened, I couldn't believe that he was saying it didn't happen. I know I was drunk but I know what he did.
 KT shares with JG again that WB shared that she did perform oral sex on him but that his account is the exact opposite as hers, with her as the aggressor.
JG says that's just not true and my story has never changed.
JG shared that she is going to be going out on medical leave to work with a therapist, KT asks her to share the documentation when she has it. (She later shared a doctors note approving her leave until December 27th.)"

*Conclusion of investigation, WB's suspension and disciplinary hearing*

248. This concluded Ms Tronsky's investigation. All of the interviews notes were included in one investigation report.

249. On 9 December 2022, Ms Tronsky sent WB a suspension letter. The suspension letter is dated 1 December 2022, but it is accepted that it was not sent until 9 December 2022. As already noted, in practice WB had been asked not to attend work from 1 December 2022 onwards.

250. WB was also invited to a disciplinary hearing. This took place on 15 December 2022. It was chaired by Mr White and attended by Ms Tronsky, WB and a note taker. There were two allegations: first, that WB was dishonest in his explanations to the respondent regarding the incident on 30 November 2022, leading to a loss of loss of trust and confidence in him; and, secondly, that WB had committed sexual assault on 30 November 2022 towards a female colleague.

251. In his outcome letter of 16 December 2022, Mr White noted that the claimant had been very intoxicated and that, in his view, that meant she was very unlikely to have been able to give consent to any sexual contact. However, he concluded that ultimately he could not determine the allegation of sexual assault on the balance of probabilities and that it therefore *"remains unproven based on the evidence that was presented to me at the hearing"*.

252. However, he upheld the first allegation regarding dishonesty and dismissed WB with immediate effect by reason of gross misconduct.

253. WB appealed. Amongst other things, he submitted, as he did at the disciplinary hearing, that, in summary, it was he who had been sexually assaulted and that he had not been dishonest in his answers in the investigation but had acted out of being in a state of shock. Mr Purcell, who heard the appeal, did not accept this. He did not uphold the appeal.

*Findings in relation to leaving the Omnia and arriving at the claimant's hotel*

254. Having set out above much of the often conflicting evidence in relation to the alleged assault, I now go on to make my findings of fact in this respect. I start with some of the background findings in the run-up to the incident in the hotel room.

255. I accept that WB first encountered the claimant in the early hours of 30 November 2022 at around 2 AM. This was on the second floor of the Omnia nightclub. The claimant had been escorted there by Omnia security who were in the process of evicting her from the club. I have no reason to doubt that, as is his evidence, WB saw this and approached Omnia security, who asked both WB and the claimant whether they knew each other and that they each confirmed that they did. The claimant cannot recall the security incident and is not in a position to give any evidence in this respect. By contrast, I have no reason to doubt WB's evidence, which is supported by his first interview with Ms Tronsky and is consistent with the evidence given to Ms Tronsky by the Omnia itself about the claimant being removed from the Omnia due to intoxication.

256. Similarly, I accept WB's evidence that Omnia security told him that the claimant needed to be escorted out of the Omnia and that he agreed to do this.

Whilst the claimant's original account to Ms Tronsky of how she left the Omnia is in many respects at variance with not only WB's evidence but what must be the factual reality (as confirmed by the Omnia itself to Ms Tronsky), WB does accept that he insisted that she took a cab to get back to her hotel and that he escorted her outside the Omnia for this purpose. I therefore find as a fact that that happened.

257. I also accept the respondent's evidence that at this time, around 2 AM, which was the time that the DoiT event was scheduled to end, the DoiT signage and branding had been removed. Whilst some DoiT employs remained at the Omnia, the event itself was over.

258. I accept WB's evidence that the taxi driver would not take the claimant back to her hotel unless someone sober, in other words WB, accompanied her. The claimant herself is not in a position to confirm or dispute this as she cannot recall these details. However, I do not consider that it is uncommon for a taxi driver to make such a request rather than take an intoxicated individual on their own with the potential risks that that entails. I therefore accept, on the balance of probabilities, that the taxi driver asked WB to accompany the claimant on the taxi ride and that he agreed to and did do so. I make no finding, however, that there was any reluctance on WB's part to accompany the claimant.

259. There are disputes about what was said between the claimant and WB during the taxi ride. The claimant had little recollection of the taxi ride at the time, including what if anything was said. WB's evidence was that during the taxi ride, which lasted around 15 minutes, the claimant did most of the talking and it was more like a *"monologue"*. As the claimant was intoxicated, that is quite possible and I do not have any reason to doubt WB's evidence in this respect. I therefore find the claimant did do most of the talking in the taxi.

260. During the claimant's evidence at this tribunal, several of the comments which WB in his first investigation interview alleged that she had made in the taxi were put to her. She denied that she had made the comment about having hooked up with a girl the night before in her hotel and that the girl had stolen her Ted Baker jacket. Similarly she denied having said that she likes girls but that she needed a penis to be satisfied, or that said that she was sad that WB had a wife.

261. In the course of answering these questions, however, the claimant candidly confirmed that she is bisexual. There is no evidence that WB, who was not a friend of the claimant's and had met her on only very limited occasions with minimal interaction, had learned that very personal fact at any other stage previously and I therefore find that he had not. WB was sober during the taxi ride and there is no reason why he should not have been able accurately to recall anything he heard during the conversation. It is unlikely that WB, in his first interview during the investigation, would have made a potentially relatively easily disprovable assertion unless he thought that it was correct. It is, therefore, likely that, at some point during that taxi drive, the claimant revealed to him details about her sexuality or that she like girls and I therefore find, on the balance of probabilities, that she did so. Therefore, during the taxi ride, and whether

because she was intoxicated or otherwise, the claimant did make at least some statements which related to sex and/or sexuality.

262. Similarly, there would be little for WB to gain in making up the alleged comment about hooking up with a girl the night before who stole the claimant's Ted Baker jacket; and it would be a similarly risky thing to do, as it too may have been potentially relatively easy to disprove. It is also a particularly specific and detailed comment. Notwithstanding the claimant's denial in her oral evidence of having made the comment, she was not asked whether this actually happened (as opposed to being asked whether in the taxi she had said that it happened). Furthermore, as noted, the claimant could not remember many details at all about the taxi ride in any case, including the contents of any conversation. For these reasons, I therefore find, on the balance of probabilities, that the claimant did make a comment to this effect in the taxi.

263. In the context of a conversation in which the claimant was prepared to discuss sex and sexuality, it is certainly not impossible that the claimant would have made the comment about needing a penis to be satisfied. Furthermore, notwithstanding her denial in cross-examination of having made this comment, the claimant had no contemporary recollection of the conversation in the taxi. However, in light of the specific concerns which I will come to in relation to WB's evidence regarding what happened in the hotel room and the attempts which I consider that he has made to downplay both the level of contact which he had with the claimant at the Vagabond Wine Bar event and his knowledge of the level of interaction which he had with the claimant regarding the chocolate strawberries incident, I do not consider, on the balance of probabilities, that WB has established that either the comment about needing a penis to be satisfied or the comment about the claimant being sad that WB had a wife and wishing that she could be with him when they got out of the taxi were made.

264. Those comments, if made, would play directly into a narrative that the claimant wanted a sexual liaison with WB when they got back to the hotel. Neither of them are assertions which could be denied by reference to other evidence (unlike the comment about the claimant's sexuality or the Ted Baker jacket comment which I have referred to above). WB knew that the claimant had met his wife at the event in London at the Vagabond; indeed, without needing to do so, he specifically tells Ms Tronsky that in his first investigation interview, a fact that would give added plausibility to his assertion that the claimant made a comment in the taxi referencing his wife.

265. In his evidence before this tribunal (at paragraph 17 of his witness statement), WB stated that, after they had arrived at the claimant's hotel, he wanted to drop her off and continue in the taxi back to the Omnia; but that the cab driver told the concierge of the hotel that the claimant had been escorted out of the club by security and barred; that the concierge then told WB that he must ensure that the claimant got safely back to her room as they could not allow her to enter the lobby of the hotel if there was a risk that her behaviour would be inappropriate. He stated that he did not want to exit the taxi but felt he had no choice. Again, the claimant is not in a position either to confirm or deny this evidence, as she was intoxicated at the time.

266. This evidence is very detailed. Clearly, accepting the truth of this evidence would be persuasive that, at least at that point, WB did not want to go to the claimant's hotel room with her but that he felt he had no choice. However, this evidence is not referred to by WB at any stage during the investigation interviews. That is surprising, given the level of detail which WB goes into, particularly in the narrative which he gives in his first investigation interview, which took place only a day after the events in question. For this reason, and because of the concerns which I have about the specific parts of WB's evidence which I referenced above, I do not find that WB has established on the balance of probabilities that this happened. I find that it is more likely that, having arrived at the claimant's hotel by taxi, WB escorted the claimant straight to her room.

267. Similarly, in the same paragraph of his witness statement, WB stated that, as they walked through the lobby and to the other elevator, although the claimant seemed drunk, she also seemed to know exactly what she was doing and where she was going; she found the elevator, knew which floor to get off at and which hotel room she needed to get to; and when she got to the room, she insisted that he needed to ensure that she was okay and did not hurt herself and insisted that he go into her room. In his oral evidence before the tribunal he suggested that the claimant was sobering up at this point.

268. This evidence, if accepted, would be significant. It is evidence that, by the time the claimant got to her hotel room, she had sobered up enough so that she knew what she was doing; in other words, that she had sobered up enough to be able to give consent to the sexual act which followed and which, on WB's case, was initiated by her.

269. This evidence contrasts with the claimant's own evidence that she was really drunk at this point and her inability to remember details of the taxi ride and anything more than the barest of details of getting to her room. It contrasts with Ms Tronsky's evidence that, even several hours later at 7:30 AM the next morning, the claimant was still drunk. Most particularly, it contrasts with WB's own evidence in his first investigation interview where he states not only that the claimant couldn't find her room and had to lean up against the walls of the elevator and that he had to help her walk so she did not fall, but that she was at this point *"very very very drunk"*.

270. For these reasons, and the reasons referred to above about my concerns about specific elements of WB's evidence, I do not accept that at the point when the claimant entered her hotel room she was sobering up or that she knew what she was doing; by contrast, I find that she was still, in WB's own words, *"very very very drunk"*, and that, on the balance of probabilities, because of this level of intoxication, she was not in a position to be able legally to give consent to the sexual act which followed.

*Findings in relation to the alleged sexual assault*

271. I am very conscious of the significance of the finding which I am about to make, in relation to the alleged sexual assault, in particular both for the claimant

and for WB. As the parties are well aware, however, I need to make this finding in order to determine one of the issues of the claim. The finding concerns a matter which, if it happened as alleged, amounts to a criminal offence. However, the standard of proof is not the criminal standard of beyond reasonable doubt; rather this is a finding on the balance of probabilities.

272. Mr Brown reminds me, quite rightly, that the burden of proof is upon the person seeking to assert the fact; in other words, the burden of proof is on the claimant to show on the balance of probabilities that WB orally raped her. Unsurprisingly, he cites the claimant's intoxication as one reason why I should not prefer her evidence. However, and in fairness to Mr Brown he has not suggested otherwise, there is no reason why I should not also take into account evidence originating from WB, and in particular the accounts he gave during the investigation, in determining whether or not the claimant has discharged that burden.

273. In terms of the claimant's evidence of what happened, she was intoxicated at the time and this clearly had a significant impact on her ability to remember the detail of what happened, either at the Omnia or on the journey back to hotel. Furthermore, as I have found, there are many elements of the claimant's evidence in general which are unreliable. These particularly relate to her evidence before the tribunal about matters that happened a while ago during her employment, for example her evidence about diversity and equality, the training she was given and the alleged "massive drinking culture", which I have found not to have existed. In addition, her recollection of details on the evening of 29/30 November 2022 was completely flawed in one significant respect, namely that she did not even remember being evicted from the Omnia at the behest of Omnia security.

274. However, her account of the alleged rape in her hotel room remained consistent, both in her accounts during the investigation, in what she said to the Las Vegas police and in her oral evidence before this tribunal. Furthermore, notwithstanding her intoxication, it is unsurprising that particularly shocking occurrences, such as undergoing a sexual assault, would remain firm and vivid in the claimant's mind, even if ancillary details were far more vague or even completely forgotten. Therefore, whatever my concerns about the reliability of the claimant's evidence in general, I do not hold those concerns to anything like the same degree in relation to her evidence of the alleged assault itself.

275. Furthermore, it is noteworthy that the claimant contacted her boyfriend almost immediately after WB left her room, and then contacted various people at the respondent soon afterwards, reporting that she had been sexually assaulted. Whilst a delay in reporting a sexual assault would not normally count against an alleged victim in terms of the believability of her evidence, the fact that, as in this case, the claimant immediately reported it, without any reflection or thinking time, is indicative of an increased likelihood of it having happened.

276. WB's case is that the claimant assaulted him in an attempt to somehow get back at her boyfriend because he had recently cheated on her; however, if that had been the case, it is extremely odd that the claimant would immediately

report to so many people what happened as being an assault on her by WB. If it was an act of revenge on her boyfriend, it is far more likely that she would be presenting it to her boyfriend as something she did voluntarily to get back at him.

277. However, the most significant evidence in relation to this finding is the interview notes of the five separate interviews which WB had with Ms Tronsky, and in particular the fact that his evidence changed so dramatically over the course of those interviews. It is also significant that it was not Ms Tronsky who was asking for repeated interviews; rather, it was WB who kept returning to Ms Tronsky to give additional details or changed details of his story. At this tribunal, WB was able to and did give his evidence very clearly and in a measured and ordered way; furthermore, he was sober on the evening of 29/30 November 2022; it is, therefore, surprising in itself that WB should not be able to give a full, clear and consistent account of his version of what happened from the start, rather than having to come back to Ms Tronsky over five separate occasions.

278. There are a number of discrepancies, as is evident from the notes of those interviews which I have set out in my findings above. However, the most significant of these are set out below.

279. In his first interview, WB was specifically asked whether there was any sexual activity between him and the claimant and he said that there wasn't. In his second interview, he added that he had forced the claimant onto the bed, put a blanket on top of her and that she had asked him to keep this a secret. Omitting from the first interview the physical act of forcing the claimant onto the bed is a major omission, given that the physical act of forcing someone onto a bed is something that one would be likely to remember. Similarly, if the claimant had told him that she wanted him to keep things secret, it is surprising that he did not mention that at the first interview, at which point, even though WB did not know the details of the allegation made, he must have realised that a serious allegation of some sort relating to the claimant must have been made by dint of the fact that Ms Tronsky was conducting an investigation interview with him. He said this to give an explanation as to why he didn't proactively approach Ms Tronsky himself; however, it is surprising that he did not say this at the first interview.

280. In his third interview, WB continued to maintain that there had been no sexual activity between him and the claimant. However, he added that, whilst they were in the hotel room, she had offered to perform oral sex on him and that he had said no and put her to bed. This, if true, would have been a highly significant event and a hugely surprising omission from WB's original interview account to Ms Tronsky. However, as he confirmed in cross-examination, it was not in fact true; there was no conversation about oral sex and (whoever initiated it) the oral sex happened without a prior conversation about it. The contents of this third interview, therefore, significantly impact on the credibility of WB's account.

281. It was at the end of the third interview that Ms Tronsky told the claimant that the police were involved and that they had taken swabs from the claimant at the hospital and handed over the evidence to the forensic examiner. She asked WB if he had anything else to share and he said no.

282. It was in the fourth interview that WB's account most radically changed. In this interview he admitted that the oral sex took place, albeit maintained that it was the claimant who assaulted him. I will come to WB's explanation for his changing evidence (which I do not accept) in due course. However, leaving that aside, what WB said in the fourth interview was a radical change in his evidence and it is that which most significantly impacts on the credibility of his account. Furthermore, it is particularly noticeable that he only admitted that the oral sex took place once he had been told by Ms Tronsky that there was likely to be forensic evidence (which would prove that a sexual act had taken place). Up until then, he was likely to have been hoping that the claimant in her state of intoxication had not recalled the full details, as indicated in his own words in his second interview (*"I didn't expect her to remember anything that happened, she couldn't walk and was slurring"*).

283. Finally, when Ms Tronsky asked WB in the fourth interview if they would find evidence of his semen in the claimant's mouth, WB said that he didn't know; he then paused for a long time; he then said that he didn't know if they would and declared that he *"did not ejaculate but maybe there was some transfer or something"*. However, when he reverted to Ms Tronsky for the fifth interview, he admitted that he had ejaculated. Again, given that WB was sober at the time, it is surprising that, when asked directly by Ms Tronsky in the fourth interview, he was not able to confirm that he had ejaculated. This again casts significant doubt on the credibility of WB's account.

284. The explanation which WB gave for these significant changes in his evidence over the course of the investigation was that it was in fact he who was assaulted by the claimant; that he withheld details of the assault on him in the early stages of the investigation because he was still trying to process the incident and that, as a man, he felt ashamed and embarrassed; he maintained that it is not common for a man to admit to having been assaulted by a woman, so he felt ashamed and embarrassed and this was the reason why he did not reveal what happened at that point; he also added that he did not want to get the claimant into any trouble and felt incredibly conflicted about what to do; he also asserted that it was the trauma associated with the assault on him which caused him not to reveal the full account straightaway.

285. There are elements of this explanation in the notes of the fourth and fifth investigation interviews, where WB refers to the situation having been traumatic for him and to having spoken to people from sexual harassment hotlines (which I accept he did) and having had a session with a therapist. However, it is noticeable that he gives these explanations after he has been told by Ms Tronsky about the possibility of there being forensic evidence and has contacted Ms Tronsky to admit that oral sex took place.

286. First, I do not accept the explanation about not wanting to get the claimant into trouble; it was clear from the first interview that, even though WB did not know the full details of the claimant's allegation, a serious allegation must have been made, otherwise the interview would not be taking place. He of course knew that he had been in a hotel room alone with the claimant with no other

witnesses present and that, whatever the allegations were, they were likely to be serious. He would have been aware that, had he not been truthful himself, he could have himself been in serious trouble. It is not, therefore, credible that, at the point of the first interview, WB would not have told the full truth because of not wanting to get the claimant into trouble.

287. Secondly, I accept that it is possible that, if he had been assaulted, dealing with any associated trauma might impact upon the evidence and explanations given. However, I do not consider that it is likely that that would have given rise to such radical changes in evidence. Furthermore, it is noticeable that this was not a question of more details being added to a picture over time; the evidence changed radically and included WB having given evidence that was simply not true, such as the accounts in the third interview of the claimant asking to perform oral sex on him and his saying no, let alone the complete denial of any sexual activity having taken place when something as significant as oral sex had in fact taken place. I consider that it is far more likely that the reason for the changing evidence was not because of any trauma or shame that WB maintains he was suffering from but because, once he realised that there may be forensic evidence which proved that oral sex had taken place, he felt that he had to admit that it had.

288. For all these reasons, I prefer the claimant's evidence in relation to the sexual assault over WB's. Accordingly, I find that the claimant has discharged the burden of proof and shown on the balance of probabilities that WB orally raped her.

289. To be clear, where in some of my findings in relation to disputed facts in the run-up to the incident in the hotel room (for example, details of what was said during the taxi ride) I have preferred the claimant's evidence and made reference to my concerns about the reliability of WB's evidence in specific areas, it is to the concerns referenced in this section in relation to his evidence in the investigation to which I am referring.

290. Finally, for completeness, I deal with some of the points made particularly by Mr Brown in submissions in relation to the finding of fact regarding the sexual assault which I have just made.

291. Mr Brown noted that the claimant's witness statement for this hearing did not contain a description of the alleged rape and that the claimant had not provided her own written account. However, I do not consider that this has any impact on the finding I had to make. The claimant's account is clearly set out in Ms Tronsky's notes and, as I have already found, I consider that that is an accurate account of what the claimant told Ms Tronsky.

292. It was suggested by Mr Hurst in his cross-examination of WB that the fact that WB ejaculated in a short time demonstrated that WB was sexually aroused before any physical contact was made and that it was therefore likely that it was he who initiated the sexual activity. In response, WB said that, in relation to trauma, just because you ejaculate, which is a physical response, doesn't mean that you enjoyed, instigated or wanted the activity and it could be

because of being scared. There is no expert evidence on this issue before me. There may be any number of reasons why an individual might ejaculate quickly, whether previously aroused or otherwise. I therefore accept that the fact that WB ejaculated quickly is not probative evidence either way in terms of deciding who instigated sexual contact.

293. Mr Brown suggested that WB was comparatively slight in build and that, in terms of comparative physical size, that meant that it was less likely that he had assaulted the claimant rather than the other way round. First, as this was a CVP video hearing during which, at the points where they had their cameras on, both the claimant and WB were sitting down, I am not in a position to draw any firm conclusions about their comparative height or size. Secondly, even if I could, such conclusions would not assist. The claimant was intoxicated at the time of the alleged assault, so the impact of any physical advantage to her would be significantly minimised. Furthermore, on his evidence, WB froze when, as he alleges, the claimant assaulted him; if he froze, whatever his physical stature was would be unlikely to be a factor in his ability or otherwise to defend himself. The allegations about size are not, therefore, of any probative value in terms of deciding who instigated sexual contact.

294. Mr Brown noted that WB had been married for nine years prior to the events of 30 November 2022; he had recently bought a house with his wife and had been discussing starting a family; he had a clean disciplinary record; and he had never been accused of any inappropriate behaviour; and that there was no suggestion that WB had shown any sexual interest in the claimant before the Las Vegas conference. All of that is correct. However, I do not consider that it impacts upon the analysis of the evidence set out above. It is quite possible for all of those things to be true and nonetheless for an individual to commit a sexual assault.

295. Mr Brown noted that the claimant had recently been cheated on by her boyfriend. He suggested that these feelings undoubtedly contributed to the claimant's kissing someone random in the Omnia (although I do not accept that as there is no compelling evidence that that was why she did this); indeed, the claimant accepted in cross-examination simply that her behaviour was out of character, drunken and impulsive and, when asked, she denied that she was looking for someone to sleep with to get revenge on her boyfriend. However, if Mr Brown is suggesting that these factors made it more likely that it is she who assaulted WB later in the whole hotel room, I disagree. I have already noted that the theory that the claimant was initiating a sexual liaison with WB to get back at her boyfriend because he cheated on her is not plausible and set out my reasons why. Similarly, there is a great deal of difference between randomly kissing someone in a nightclub when drunk and sexually assaulting someone in one's hotel room. I do not consider that the fact that the claimant randomly kissed someone in the Omnia has any probative value in evaluating what happened in the hotel room.

296. Similarly, I do not accept, that the fact that the claimant said that she did not want to press criminal charges in the US is indicative that the alleged rape by WB did not take place. There are many reasons why individuals choose not to

press criminal charges. I do not consider that the fact the claimant chose not to do so has any probative value in relation to what happened in the hotel room.

297. Similarly, I do not consider that the fact that the claimant did not report matters to the police in the UK until 15 February 2023 has any probative value on the issue of what happened in the hotel room. I accept that there is likely to be a connection in terms of timing between her deciding to do so at that point and the fact that she had just been told on 8 February 2023 that her job was redundant; indeed she got solicitors involved, commenced ACAS early conciliation and informed the UK police all within the space of a few days of being told that her job was redundant. However, I do not consider that that fact has any probative value in relation to what actually happened in hotel room.

*Mr X*

298. On 29 November 2022, another of DoiT's employees, Mr X, had acted inappropriately towards another employee, Ms Y, by making unwanted advances towards her. This incident was entirely unrelated to the incident which is the subject of this claim.

299. Mr X was an employee who was based in California. He arrived at the Omnia event already intoxicated and had vomited whilst at the event. He had grabbed Ms Y and attempted to kiss her, in front of other appalled employees. When Ms Y resisted his attempt to kiss her, he desisted from doing so. Ms Y was a more junior employee than Mr X. There were witnesses present and Mr X admitted his conduct. Ms Y said that she did not want Mr X to lose his job as a result of the incident. There is no indication that Mr X had done anything of this nature previously and he had attended many such events before.

300. Following discussions between Mr White, Ms Tronsky and DoiT's CEO, Mr White decided to terminate Mr X's employment with immediate effect on 1 December 2022.

301. There are in the bundle Slack messages between Ms Tronsky and Mr White from 1 December 2022 which relate to this. It is clear from them that the CEO wanted to dismiss Mr X. Mr White states *"Personally I think if you are a leader and you make an unwanted advance/kiss/try to kiss someone who is at a lower level you should be fired"*.

302. At one point in the messages, Ms Tronsky states that the incident regarding Ms Y alone is *"probably not termination worthy"*. There has been a lot of focus at this tribunal by Mr Hurst and Mr Brown on this, suggesting that the respondent, or at least Ms Tronsky, did not therefore take sexual harassment seriously enough. However, Mr X was employed in California and, without going into the details, there are differences between California law and UK law which mean that a first offence of the nature of what Mr X did in relation to Ms Y may not have been "termination worthy". Ms Tronsky was the individual who liaised with legal counsel from the various jurisdictions to understand what the correct legal requirements were. I accept that she was in this Slack message simply setting out her understanding of the position under California law. I do not accept

that there is anything in her Slack message which indicates that she did not take sexual harassment seriously. By contrast, given the evidence of her involvement in the preparation of the company handbook and the sourcing of sexual harassment prevention training, and her exemplary conduct of the very difficult investigation in relation to the incident between the claimant and WB, I consider that she did take sexual harassment extremely seriously.

*Claimant's return to work*

303. The claimant returned to the UK from Las Vegas. However, she remained off sick for a substantial period of time. She was signed off sick by her doctor until 24 January 2024. She did not make any requests to return to work in that period nor was there any refusal by the respondent to allow her to return to work.

304. The respondent sought to support the claimant's return to work. There was correspondence between the claimant and Ms Tronsky in this respect. The claimant specifically thanked Ms Tronsky for her support in an email of 16 January 2023. In an email of 18 January 2023, the claimant stated *"I've been back working/catching up since Monday"*. This was despite the fact that she was signed off sick. However, the respondent made no objection to her choosing to do so.

305. Ms Tronsky was, however, concerned for the claimant's welfare. This was particularly in light of the alleged sexual assault in Las Vegas. Ms Tronsky knew the claimant had been getting therapy and that there had previously been a reference to contemplating suicide by the claimant. Ms Tronsky also knew that, as soon as the claimant was back, the respondent would need to address the issue of the redundancy of the claimant's role with her and she was concerned about the impact that that might have on the claimant.

306. It was agreed that an occupational health report should be obtained. The claimant met the occupational health advisor on 24 January 2023, although the report produced, which required the claimant's permission to be passed on to the respondent, was not received by Ms Tronsky until 30 January 2023. The occupational health advisor recommended a phased return to work, with a *"reduced workload"* for 4 to 6 weeks. In addition, Ms Tronsky wanted to speak with the occupational health advisor personally, particularly because of her specific concern about how informing the claimant about the redundancy of her job might impact upon her. She duly spoke with the occupational health advisor about this.

307. The claimant accepted that, during this period, she was doing ad hoc tasks and light work and there are messages between her and Mr Cummings in the bundle and references to her attendance at team meetings on 30 January 2023 and 6 February 2023 which demonstrate that she was working. The respondent did not prevent her from doing so.

308. The claimant felt supported in her return to work and did return to light duties consistent with occupational health advice.

*Redundancy*

309. In the meantime, Ms Stamm had conducted her review of the claimant's team. This resulted in three other members of the team, in addition to the claimant, being made redundant. The decision in relation to the claimant's job role had, as already noted, been made in November 2022, prior to the Las Vegas conference.

310. On 8 February 2023, Ms Tronsky and Ms Stamm had a "protected conversation" with the claimant. During the course of this, she was informed that the respondent intended to make her redundant. Attempts were made to negotiate a settlement agreement.

311. As already noted, the claimant approached the UK police on 15 February 2023, instructed solicitors who wrote letters to the respondent on both an open and without prejudice basis dated 15 and 16 February 2023 respectively, and commenced ACAS early conciliation against the first respondent on 16 February 2023. Although the claimant denies it, in light of the timing, I find that it was the knowledge that her job was redundant which triggered all three of these actions.

*Ms Tronsky's letter of 23 February 2023*

312. The letters from the claimant's solicitors dated 15 and 16 February 2023 make allegations against the respondent of sexual harassment, sex discrimination and victimisation and seek to settle the matter without needing to issue employment tribunal proceedings. Those letters include, as has been the case at this proceedings, suggestions that the respondent was irresponsible in allowing staff to drink without limit at the Omnia party and allegations that members of staff were extremely drunk at the event without anything being done about it by the respondent.

313. Ms Tronsky wrote a without prejudice letter to the claimant dated 23 February 2023. The letter was in response to communications between the respondent and the claimant from the date of the protected conversation on 8 February 2023 onwards, with a view to the claimant leaving her employment under a settlement agreement.

314. On 15 February 2023, the claimant had added Mr Hurst, her solicitor, to the email thread and Ms Tronsky responded directly to the claimant that afternoon. Neither the claimant nor Mr Hurst asked Ms Tronsky to correspond only or directly with Mr Hurst.

315. Ms Tronsky's letter of 23 February 2023 was seeking to advance the settlement agreement negotiations; indeed, in it she refers to a revised settlement agreement and to having inserted the details of the claimant's solicitors.

316. In order to negotiate the respondent's settlement position further, Ms Tronsky emphasised various points that could be made to rebut the complaints that the claimant was advancing through her solicitors' letters, including in relation to vicarious liability and the allegations about drinking. In the course of this, Ms Tronsky referenced various policies which the respondent had, including their discrimination and sexual harassment policies and the policy prohibiting working under the influence of alcohol.

317. Contrary to the claimant's assertion in her claim, Ms Tronsky's letter does not assert or imply in any way that the claimant was at fault for being raped, nor that she was guilty of discrimination or harassment. I make no finding as to how the claimant perceived the letter; however, if she did somehow perceive it to be an example of victim blaming, such a perception was not reasonable on the terms of the letter alone, let alone in the context of why it was written and the matters it was addressing. The reference to the claimant being intoxicated in Ms Tronsky's letter was to note that the claimant had herself admitted that she could not fully recall the events of 30 November 2022 because she was intoxicated.

318. Indeed, in cross-examination, the claimant agreed that the content of the letter had nothing to do with her sex or the fact that she had complained about being raped but was because the respondent was engaging in without prejudice negotiations for a settlement agreement.

*The claimant's redundancy*

319. The negotiations did not result in a settlement.

320. On 27 February 2023, Ms Tronsky therefore wrote to the claimant commencing a period of redundancy consultation. Her letter is headed *"potential redundancy situation"*. As already indicated, Mr Hurst has dwelt on this language to suggest that a decision that the claimant's role was redundant had not been made by this stage. However, as I have already found, that decision had been made in November 2022. The language used is typical of a consultation letter, indicating that dismissal itself is not a foregone conclusion, and indeed it was not inevitable that the claimant would be dismissed because of the possibility of discussing issues such as suitable alternative employment; however, this does not detract from the fact that the decision to remove the claimant's role (in other words that the role was redundant) had already been made in November 2022.

321. There was then a consultation meeting between the claimant and the respondent, attended by Ms Stamm and Ms Tronsky, on 28 February 2023. It is not necessary to go into the details as these have not been dwelt on to any great extent at this hearing. However, there was discussion of alternative roles and indeed the claimant suggested certain roles she might do. These were considered by Ms Stamm but, as the claimant admitted in cross-examination, she did not have the experience for the roles in question. A further role, which the claimant suggested, amounted to recreating the role that was being made redundant anyway. It was not, therefore, suitable. There were, therefore, no alternative roles which were suitable for the claimant.

322. As there was no suitable alternative employment, the respondent terminated the claimant's employment, by reason of redundancy, on 2 March 2023.

## The law

Direct sex discrimination, harassment related to sex, harassment of a sexual nature and victimisation

323. Under section 13(1) EQA, a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination). Sex is a protected characteristic for the purposes of direct discrimination.

324. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

325. Under section 26(1) EQA, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Sex is a protected characteristic for the purposes of harassment.

326. Under section 26(2) EQA, a person (A) harasses another person (B) if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

327. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

328. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT Mr Justice Underhill, then President of the EAT, said: 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'. The EAT affirmed this view in Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13. The EAT observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'. Indeed, the Court of Appeal in HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390 further stated in this context that 'tribunals must not cheapen the significance of these words since they are an important control to

prevent trivial acts causing minor upsets being caught by the concept of harassment'.

329. Section 27 EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. Protected acts include the bringing of proceedings under the EQA or making an allegation, whether express or not, that A or another person has contravened the EQA.

330. Under sections 39(2) EQA, an employer must not discriminate against an employee of his on various grounds, including dismissing him or subjecting him to any other detriment. Under section 40(1) EQA, an employer must not harass an employee of his. Where conduct constitutes harassment, it cannot also constitute a detriment as defined in the Act and therefore cannot be direct discrimination as well as harassment. Under section 39(4) of the Act, an employer must not victimise an employee of his by dismissing that employee or subjecting that employee to a detriment.

331. Ms McCann suggested that a proven act could not amount to harassment under both section 26(1) and 26(2). I am not aware of any authority for this. In the absence of that, I see no reason why a proven act could not amount to harassment under both sections.

332. In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied; there must be "something more" to indicate a connection between the two (Madarassy v Nomura International plc [2007] IRLR 246). If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, I must hold that the provision was contravened.

333. However, if the tribunal can make clear positive findings as to an employer's motivation, then it need not revert to the burden of proof (Martin v Devonshires Solicitors [2001] ICR 352 (EAT)).

Liability for acts of employees

334. Under section 109(1) EQA, anything done by a person in the course of their employment must be treated as also done by the employer.

335. Section 110(1) EQA provides that an employee is also liable for an act done by that employee where, by virtue of section 109(1), the employer would be liable. In other words, if the employer was not liable under section 109(1) EQA, for example because the act in question was not done in the course of the employee's employment, the employee would not be liable for that act either. As

noted, Mr Brown made this point very clear at the start of the proceedings and the other two representatives did not disagree.

336. Under section 109(4) EQA, in proceedings against an employer in respect of anything alleged to have been done by an employee in the course of the employee's employment, it is a defence for the employer to show that it took all reasonable steps to prevent the employee from doing that thing or from doing anything of that description. If an employer establishes this defence, that does not stop the employee from being liable for that act (section 110(2) EQA).

337. I specifically asked the representatives to address me in their submissions on the wording *"doing that thing or from doing anything of that description"*. Ms McCann submitted that the correct approach is to rely on the wording of the statute and, in the context of this case, it means *"oral rape or anything of that description"*; she submitted that *"anything of that description"* would therefore cover any form of sexual assault; however, the wording would not cover acts, for example, of harassment which, whilst illegal, were of a lesser degree of seriousness. Mr Brown submitted that the scope of the wording went wider than that but, as he conceded, he could find no authority on the point. I consider, therefore, that I should rely on the plain wording of the statute and that the submissions made by Ms McCann in this respect are correct.

*In the course of employment*

338. Both Ms McCann and Mr Brown made extensive submissions on this issue and on the legal approach in relation to this issue. It should be noted that, notwithstanding that finding that the alleged sexual assault was outside the course of WB's employment would mean not only that the tribunal had no jurisdiction to hear that complaint against the respondent but also that it had no jurisdiction to hear that complaint against WB, Mr Brown nonetheless submitted that the act (if it was deemed to have taken place) was done in the course of WB's employment. (Similarly, he argued that the respondent had not established the statutory defence under section 109(4)).

339. In her opening note, Ms McCann set out the legal principles in relation to both of these areas in some considerable detail, including by analysis of previous case law. In his closing submissions, Mr Brown submitted that the correct approach to the issue of whether the act took place in the course of WB's employment was not to compare or contrast this case with the facts of previously decided cases; he submitted that I should decide whether WB was acting in the course of his employment by analysing the particular facts and circumstances of this case. I accept that I should decide these issue by analysing the particular facts and circumstances of this case. However, the previous cases are instructive of the sort of issues which may be relevant to a determination of the issue in this case. I therefore include and set out below much of the summary provided by Ms McCann.

340. The Court of Appeal held (in Jones v Tower Boot Co Ltd [1997] IRLR 168 (CA)) that the words "*in the course of employment*" (in what is now s.109(1)

EQA) were not to be restricted to the narrow meaning at that time used to establish vicarious liability in tort, but should be given their ordinary meaning.

341. The CA was clearly influenced by the fact that the common law test, as it stood at that time, was very restricted (in particular, that the more heinous the act, the less likely it would be that vicarious liability would apply) (at 263F to H, per Waite LJ). The common law test required that the act was only deemed to be done by the employer if it was a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer (see Jones, at 263C).

342. However, the common law test for vicarious liability has since emphatically shifted, in particular see Lister v Hesley Hall Ltd [2001] ICR 665 (HL), as considered and applied by the Supreme Court in Mohamud v Wm Morrison Supermarkets plc [2016] ICR 485 (SC), at [39] and at [44] to [46]. The modern common law test for vicarious liability now requires determination of the following:

1. The nature of the employee's job; and

2. Whether there is sufficient connection between that job and the employee's wrongful conduct to make it right, as a matter of social justice, for the employer to be held liable, which requires an evaluative judgment in each case having regard to all the circumstances.

343. The test for liability for statutory discrimination under s.109(1) EQA ("in the course of employment") is to be regarded as at least as wide as, if not broader, than the Lister test (see Livesey v Parker Merchanting Ltd [2004] UKEAT/0755/03); however, decisions on common law vicarious liability, from Lister onwards, can provide a useful sense check when applying the statutory test. This is because both the statutory and the common law tests necessarily entail consideration of the extent of the connection with employment of the alleged act of discrimination/harassment etc.

344. The dividing line between what is and what is not 'in the course of employment' can become blurred in relation to conduct away from work and outside normal working hours, particularly at (or, as here, after) work events. Here, the factors to be taken into account might include:

1. Whether the incident took place on the employer's premises (or premises used by the employer);

2. Whether the complainant and/or perpetrator were still on duty;

3. Whether the incident took place at the work event, or after work, or at an after work gathering;

4. If the latter, whether the gathering took place immediately after work and/or whether it included other employees, customers or unrelated third parties.

See, for example, Chief Constable of Lincolnshire v Stubbs [1999] IRLR 81 (EAT), at 558B to D.

345. The need to assess the closeness of connection with employment when applying the statutory test of 'in the course of employment' can be seen in two cases relating to off-duty conduct:

1. In Waters v Metropolitan Police [1997] ICR 1073, a policewoman had been sexually assaulted by a fellow police officer whilst they were off duty. The alleged assault occurred at a police section house where she had a room and was required to live. The assailant ("T") lived elsewhere and was a visitor to her room in circumstances "*which placed him and her in no different position from that which would have applied if they had been social acquaintances only, with no working connection at all*" (at 1095H). Per Waite LJ, "*it is inconceivable….that any tribunal applying the test in the Tower Boot case…could find that the alleged assault was committed in the course of T's employment*."

2. In HM Prison Service v Davis [2000] UKEAT/1294/98, the tribunal found that alleged sexual harassment took place at a pub and on returning to the claimant's home whilst she and the perpetrator (both prison officers) were off duty. The tribunal's finding that this was "in the course of employment" was overturned by the EAT, which observed that the only connection with work is that they met through work, noting, "*it is not as if he was held to have, so to speak, pulled rank on her or given orders to her or threatened that he would cause difficulties for her at work unless she let him have his way or anything of that nature*" (at paragraph 19).

346. Albeit a case on the application of the common law test of vicarious liability and "in the course of employment", in Mohamud (cited above), the Supreme Court found the supermarket to be liable for the actions of the defendant employee who had committed a violent assault on a customer in the forecourt of the supermarket premises. The Court held that the defendant employee's job was to attend customers and respond to their inquiries and there had been an "*unbroken sequence of events*" between his response to the claimant's initial inquiry and then following him onto the forecourt, ordering him never to return, which he then reinforced with a violent assault. Although such conduct was a gross abuse of the employee's position, it had been in connection with the job which he carried out for the supermarket so there was a sufficient connection to hold it should be vicariously liable for his assault.

347. The decision in Bellman v Northampton Recruitment Ltd [2019] ICR 459 (CA) is also instructive (albeit, again, on the application of the common law test for vicarious liability). Here, the defendant company organised a Christmas party

for its 11 staff members, their partners and a few guests. When the party ended, just over half of those present took taxis to a local hotel and sat talking, drinking alcohol paid for by the defendant. In the early hours, the conversation turned to work matters and the Managing Director (who was the directing mind and in overall charge of the small company), became annoyed and assaulted the claimant employee, causing serious injury. The CA held that, as the directing mind of the small company, the Director's remit and authority were very wide and, despite the time and place at which the assault occurred, he was still purporting to act as the company's managing director and to exercise his authority over his subordinates. Given his position of seniority, his dominant and supervisory role, which enabled him to exercise authority over the staff who were present, there was sufficient connection to his employment to render it just to hold the company vicariously liable for his actions.

*Statutory defence (section 109(4) EQA*

348. The burden of proof is on the respondent to establish this defence.

349. To succeed with the defence, the respondent must have taken such steps before the act of discrimination or harassment occurred.

350. Ms McCann and Mr Brown agreed that the leading authority is the EAT's decision in Canniffe v East Riding of Yorkshire Council [2000] IRLR 555. This sets out a two-stage test, looking first at what steps the employer took and then considering whether there were other reasonable steps it could have taken.

351. I set out here the whole of the extract from paragraph 14 of Canniffe which Mr Brown set out in his closing submissions, which includes the two-stage test but also the passage which follows this.

"[The test] involves the questions:
(1) what steps were taken?
(2) were there any further steps that were reasonably practicable that should have been taken and could have been taken by the respondent?

in that context and that context alone, it would be relevant to ask whether any such further steps would have been of any consequence or have had any realistic chance of success. But even if they had not had any realistic chance of success, if in fact it was reasonably practicable for them to be done, they should have been done. That is the purpose of this legislation, and that is the difficult eye of the needle through which a respondent employer who seeks to avoid a vicarious liability must travel in order to avoid that liability.

352. Mr Brown submitted that this passage means that, in determining whether or not a proposed step was reasonable, no account can be taken of whether or not taking such a step would have been effective in preventing the discriminatory act in question.

353. However, I was also referred to paragraph 63 of the Court of Appeal decision in Croft v Royal Mail Group plc [2003] IRLR 592. At paragraph 63, Pill LJ specifically references paragraph 14 of Canniffe and states:

"If Burton J was adopting a different approach in the Canniffe case [2000] IRLR 555, I respectfully disagree. In the concluding part of paragraph 14 of his judgment, however, the part relied on by the applicant, Burton J does twice refer to "reasonable steps". In considering what steps are reasonable in the circumstances, it is legitimate to consider the effect they are likely to have. Steps which require time, trouble and expense, and which may be counter-productive given an agreed low-key approach, may not be reasonable steps if, on an assessment, they are likely to achieve little or nothing.".

354. Furthermore, the EAT in Allay (UK) Ltd v Gehlen [2021] ICR 645 cited this passage in Croft.

355. I accept, therefore, that the likely effectiveness of alleged reasonable steps is a factor that may legitimately be taken into account in assessing whether those steps are indeed reasonable steps.

356. The statutory defence must be considered having regard to its purpose within equality legislation. As noted by HHJ James Tayler in Gehlen, *"It is designed to encourage employers to take significant and effective action to combat discrimination"*. As that is its purpose, it would be strange if steps which could never be effective in preventing discrimination were nonetheless considered to be reasonable steps the absence of which precluded the establishment of the statutory defence.

357. In Caspersz v Ministry of Defence UKEAT/0599/05, the EAT held that the existence of a 'dignity at work' policy that complied with the Commission Recommendation on the Protection of the Dignity of Women and Men at work (92/131/EEC), together with evidence that the MoD had followed the procedures outlined in the policy, was sufficient to establish it had taken all reasonably practicable steps – the mere existence of a policy is not sufficient; the employer must show that it took steps to implement it.

358. Where equality training is up-to-date, the employer is much more likely to successfully rely on it to discharge the s.109(4) defence (as demonstrated in the very recent Judgment of the EAT in Campbell v Sheffield Teaching Hospitals NHS Foundation Trust and Another [2025] EAT 42). In this case, the claimant pursued a claim of race-related harassment. He was employed by the Trust as a full-time trade union official. He complained that another Trust employee ("H"), during a dispute about the continued deduction of union membership subscription fees from H's wages, made a racist comment. The Tribunal concluded that the comment was not made by H in the course of his employment; and that, even if it had been, the Trust had taken all reasonable steps to prevent such a comment from being made because:

1. The Trust's annual training covered its 'Proud' core values, which were also displayed on posters in areas that H worked;

2. H had taken part in mandatory equality and diversity training every three years, with the training (in a small group, viewing a powerpoint presentation) having recently been completed (two weeks prior to the comment having been made).

359. Both Ms McCann and Mr Brown also referred me to the EHRC Code of Practice on Employment (2011), Ms McCann to paragraph 10.50 and Mr Brown to paragraph 10.51. I set out both below:

"10.50

An employer will not be liable for unlawful acts committed by their employees where the employer has taken 'all reasonable steps' to prevent such acts.

Example:

An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In those circumstances, the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act.

10.51

An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable."

360. In assessing what steps could reasonably have been taken, an important issue is whether any other employee had any knowledge of any particular risk that an employee would act in the way that the perpetrator had done (see Canniffe, at [22]). If the act was a one-off act (such as a serious sexual assault), and if there was nothing to alert anyone to the particular risk, then it might well be sufficient for there to be an adequately promulgated sexual harassment policy making clear that the conduct in question would not be condoned or encouraged by the employer.

Time limits

361. The EQA provides that a complaint under the EQA may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. The primary time-limit is extended by reference to periods of time spent in ACAS early conciliation.

362. The EQA further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

363. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the

complaints that the employer was responsible for an ongoing situation or a continuing state of affairs.

364. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

**Conclusions on the issues**

365. I make the following conclusions, applying the law to the facts found in relation to the agreed issues. I set out my conclusions first on the substantive merits of the allegations, then on whether any proven conduct was in the course of employment, then on the statutory defence and finally on time limits.

Substantive merits

*Protected act*

366. It is accepted that the claimant's informing the respondent on 30 November 2022 that she had been sexually assaulted was a protected act for the purposes of the various victimisation complaints referred to below.

*"WB asking the claimant where she was eating so much" (s.13, s.26(1))*

367. As set out in my findings of fact above, I found that this comment was not made. The complaint therefore fails at the first stage, both as an allegation of direct sex discrimination and of harassment related to sex.

368. What I found was said was that one of the three individuals who were with the claimant asked her why she was "buying so much cake". As that is not the allegation in the claim, it cannot without an amendment to the claim stand as a substitute allegation at this late stage (and there is no amendment application in this respect before me). However, even if it did, any complaints of direct sex discrimination or harassment related to sex based on it would, for the reasons below, still fail.

369. First, I have made no finding that it was actually WB who said it; it could have been any one of the three. As there is no finding that WB said it, a complaint that WB said it cannot be established on the facts.

370. Secondly, for the purposes of a harassment complaint, I have made no finding that the claimant considered that what was said was unwanted. Furthermore, as it was a perfectly polite and logical enquiry by a colleague as to why the claimant was buying so much cake, there is no basis for a finding that it was unwanted. In addition, it was not related to sex. Furthermore, it did not have the purpose or effect of violating her dignity or creating an offensive etc environment for her. For all these reasons, it would fail as a complaint of harassment related to sex.

371. Furthermore, for the purposes of a direct sex discrimination complaint, the comment was, for the reasons given above, not a detriment. Nor was it because of the claimant's sex; it was made in response to the fact that she was buying a lot of cake. For all these reasons, this complaint would also fail as a complaint of direct sex discrimination.

372. Very briefly, I turn to the finding that WB bought the claimant chocolate covered strawberries. To reiterate, this is not an allegation that is before me. Without an amendment to the claim, it would not be permissible for me to consider this as an allegation, and there is no such amendment application before me.

373. However, even if it was an allegation before me, it would, for the following reasons, fail both as an allegation of harassment related to sex and direct sex discrimination.

374. In terms of the former, it was not unwanted. Although the claimant has in her claim before the tribunal sought to describe WB's buying the strawberries as *"strange"*, she did not say that the time. In the notes of her investigation interview with Ms Tronsky, she said that WB *"was upset for her"* and there is no reference to her suggesting that his behaviour was *"strange"*. I therefore find that the claimant at the time did not find WB's actions strange and thought that he was doing something nice because he was upset for her as she had been cheated on by her boyfriend; in short, the action was not "unwanted" for the purposes of a harassment complaint. I consider that the claimant's subsequent assessment in these proceedings that the action was *"strange"* is another example of the claimant's revisionist history (whether conscious or unconscious), to go with the many other examples of the same set out in my findings of fact above. Furthermore, the action of buying strawberries was not related to sex; rather it was done because WB was upset for the claimant because she had been cheated on. Finally, this action did not have either the purpose or effect of violating the claimant's dignity or creating an offensive etc environment for her. It would, therefore, fail as an allegation of harassment related to sex.

375. In terms of direct sex discrimination, the act of buying strawberries was not a detriment, for the same reasons as set out in the paragraph above. Furthermore, it was not done because of sex; rather it was done out of sympathy to the claimant because she had been cheated on by her boyfriend. It would, therefore, also fail as an allegation of direct sex discrimination.

376. As part of my findings of fact, I found that WB downplayed his recollection of the details of the strawberry buying incident at this tribunal. I consider that he did so because he perceived that any impression of a higher level of contact with the claimant in this incident might count adversely against him in determining the allegation about what happened in the hotel room. However, I want to be clear about two things. Firstly, I do not consider that the fact that he did so has any implications about what actually happened at the strawberry buying incident or the preceding "cake" comment; my findings in relation to this are based largely on the contemporaneous investigation interview

notes of Ms Tronsky. Secondly, I do not consider that the fact that WB subsequently downplayed this is indicative that he in fact showed any particular interest in the claimant at the time of the strawberry incident beyond doing something nice because he was upset for her.

*WB orally raping the claimant ((s.13, s.26(1), s.26(2))*

377. As set out in my findings of fact above, I found that, on the balance of probabilities, WB did orally rape the claimant. The factual allegation in relation to these complaints is therefore established.

378. All the representatives acknowledge that, if actually proven, this conduct amounts to unwanted conduct of a sexual nature. Therefore, subject to my findings below regarding acts in the course of employment and the statutory defence, the complaint under section 26(2) EQA would succeed.

379. Again, subject to my findings below regarding acts in the course of employment and the statutory defence, this allegation would also succeed as a complaint under section 26(1) EQA. The conduct was clearly unwanted. It was clearly related to sex. Furthermore, whether or not it was WB's purpose (and I do not need to make a finding to that effect), the conduct clearly had the effect of both violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for her.

380. Finally, the allegation would not succeed as an allegation of direct sex discrimination. This is simply because of the structure of the EQA, in which an act of harassment cannot amount to a detriment for the purposes of a direct discrimination complaint.

*The respondent "did not suspend WB" (s.13, s.27)*

381. The respondent did suspend WB. Ms Tronsky sent WB a letter on 9 December 2022 (albeit dated 1 December 2022) confirming his suspension. The allegation as pleaded therefore fails.

382. Realising this, in his submissions Mr Hurst sought to change the allegation to one that the respondent did not suspend the claimant immediately. In doing so he suggested that an allegation of a failure to suspend immediately was contained at paragraph 48 of the particulars of claim, to which the list of issues cross-referenced. However, paragraph 48 of the particulars of claim states:

"Despite the very serious allegation that the claimant had made against WB he was allowed to continue working. The claimant believes that had such a serious allegation [been] made against herself or any other female member of staff that they would have been immediately suspended pending investigation rather than awaiting an outcome. The claimant believes that the refusal to suspend WB amounts to sex discrimination."

383. In the light of my findings of fact, not a lot turns on this. However, what is stated at paragraph 48 is a belief that, had the allegation of sexual assault been made against the claimant, she would have immediately been suspended; it does

not make an allegation that the respondent failed to suspend WB "immediately"; rather, the factual context in paragraph 48 sets out a belief that WB was allowed to continue working, in other words that he wasn't suspended at all. I do not, therefore, accept that the claim already contains an allegation, as Mr Hurst submitted, of a failure to suspend WB immediately.

384. Ms McCann submitted that the claim did not contain this allegation and that, therefore, in order to bring such an allegation, there would need to be an amendment. I accept that that is the case. Even Mr Hurst, towards the end, seemed to indicate that he thought an amendment was required, but said that one should be granted. I asked the parties, in particular Mr Hurst, if at this late stage they wanted me to consider an amendment application, which may take some time. Both Mr Hurst and Mr McCann said no and asked me to simply decide the matter on my own.

385. To be clear, an amendment is required. However, had there been an amendment application before me, I would have refused it, taking into account the principles in Selkent Bus Co Ltd v Moore [1996] ICR 836. Such an application would have been at the latest of late stages, after all of the evidence had been heard and virtually all of the submissions had been made; it was considerably out of time in terms of tribunal time limits; and whilst it was not a substantial amendment, it would involve the respondent having to readjust its case. Furthermore, in the light of my findings below, there would be no prejudice to the claimant in refusing the amendment, because granting it would simply have allowed an additional allegation that was doomed to fail; by contrast, there would have been greater prejudice to the respondent in allowing the amendment, because it would not have had the chance to prepare for it in advance of the case. I would, therefore, have refused any application to amend.

386. However, even if I had allowed the amendment, this complaint would have failed. As noted, the respondent did formally suspend WB on 9 December 2022. However, far from allowing WB to continue working after the incident (as the claim form alleges), Ms Tronsky instructed him on 1 December 2022, immediately after the day of the incident, to remain in his room and not engage with colleagues, customers or clients or attend any conference events. As WB was excluded from working, he was, although not formally suspended, de facto suspended. Even if he was not immediately suspended in the formal sense, Ms Tronsky's decision was not either because of the claimant's sex or because of her protected act of making her complaint of sexual assault on 30 November 2022. She did not formally suspend him because she needed to confirm with DoiT's external legal counsel that she could do so, as she wanted to ensure that she acted in accordance with WB's employment rights under UK law. Therefore, both a direct sex discrimination and a victimisation complaint based on such an amended allegation would have failed.

*The respondent writing directly to the claimant (s.13, s.27)*

387. This allegation is a reference to Ms Tronsky's without prejudice letter to the claimant of 23 February 2023. She wrote that letter directly to the claimant.

388. In his written closing submissions, however, Mr Hurst simply stated in addressing this allegation *"Not pursued"*. I take that as a withdrawal of the allegation and the complaints of direct sex discrimination and victimisation based on this allegation are therefore dismissed.

389. However, these complaints would nonetheless fail on their merits. I refer back to my findings of fact in relation to this letter in full. Ms Tronsky's writing of this letter directly to the claimant came in the context of the ongoing settlement discussions which had begun directly with the claimant in the protected conversation meeting of 8 February 2023. The claimant accepted in cross-examination that that was the reason why Ms Tronsky had written the letter to her. Furthermore, Mr Hurst did not even suggest in cross-examination of Ms Tronsky that the reason why she wrote the letter directly to the claimant was because of the claimant's sex or because she had raised her complaint of sexual assault.

390. I therefore find that the reason why Ms Tronsky wrote directly to the claimant was indeed because of ongoing settlement negotiations which had begun with the claimant and that no part of her reasoning whatsoever was because of the claimant's sex or her protected act. Therefore, both the direct sex discrimination complaint and the victimisation complaint based on this allegation would fail.

*The respondent suggesting that the claimant was at fault for being raped (s.13)/the contents of Ms Tronsky's 23 February 2023 letter to the claimant (s.27)/the respondent implying that the claimant was at fault for working under the influence of alcohol (s.27)*

391. These various complaints, spread over allegations of direct sex discrimination and victimisation, are all in fact about the contents of Ms Tronsky's letter of 23 February 2023 to the claimant.

392. I refer to my findings of fact about that letter in full. However, as I have found, there is nothing in that letter which suggests the claimant was at fault for being raped or implies that she was at fault for working under the influence of alcohol. Whatever the claimant's own perception may have been, it is not, on a fair reading of both the terms of the letter and the context within which it was written, in any way reasonable to assume that the respondent implied or suggested these things. The factual allegations on which these complaints are based are not therefore established and they all fail.

393. Furthermore, in general terms, there is nothing in the contents of the letter to indicate that it was written in any way because of the claimant's sex or because she raised her complaint of sexual assault; rather, the contents of the letter are as they are because they defend some of the allegations made by the claimant's solicitor against the respondent and for the purposes of furthering the ongoing settlement negotiations.

394. All of these complaints of direct sex discrimination and victimisation therefore fail.

*The respondent's failure to provide support (s.27)*

395. I have detailed in my findings of fact above the considerable support which the respondent, and Ms Tronsky in particular, gave to the claimant in the aftermath of her reporting the sexual assault. I cross-refer to them in full.

396. However, in summary: the numerous messages between the claimant and Ms Tronsky demonstrate the significant support provided, within minutes of hearing about the allegation of sexual assault; Ms Tronsky, although she was unwell herself to the extent that she had not been able to attend the Omnia event, made very prompt contact with the claimant; jumped in a cab to attend the hospital; thought to offer to get the claimant a coffee and a muffin; assisted with the visa arrangements for the claimant's boyfriend; accompanied the claimant back to the hotel; secured alternative accommodation for the claimant, whilst putting a "hold" on the claimant's original room to preserve any evidence; embarked on a detailed and thorough investigation straightaway; contacted the Omnia as part of that investigation; maintained contact with the claimant by message and phone; and checked in with the claimant and updated her on the investigation. Indeed, the claimant conveyed her gratitude for the respondent's support at the time, both to Mr Cummings and to Ms Tronsky, specifically stating *"I truly appreciate all your support so far"*.

397. In short, the levels of support given by the respondent to the claimant were considerable. The allegation that the respondent failed to provide support is not, therefore, made out on the facts and this complaint of victimisation therefore fails.

*The respondent's refusal to allow the claimant to return to work (s.27)*

398. Again, this allegation is simply not made out on the facts and therefore fails.

399. I again refer to my findings of fact in this respect in totality. However, in summary, the respondent did allow the claimant to return to work and, as she accepted in cross-examination, she did do some work, albeit she did more limited duties in accordance with occupational health advice.

400. Furthermore, any interactions which Ms Tronsky had with the claimant in relation to her returning to work, including obtaining the occupational health report, were done out of concern for the claimant's welfare, particularly in view of what Ms Tronsky knew about the claimant's state of health and the fact that the respondent would shortly need to address with the claimant the issue of her redundancy. Those interactions were not in any way because the claimant made her complaint of being sexually assaulted. This victimisation complaint therefore also fails for this reason.

*The respondent emailing the claimant threatening redundancy (s.27)/the respondent terminating the claimant's employment (s.27)*

401. I deal with these last two allegations together. The allegation in the list of issues about emailing the claimant threatening redundancy cross-references paragraph 63 of the particulars of claim. That paragraph refers to an email of 7 February 2023. I have not seen any such email in the bundle nor have I seen reference to it in the witness statements. I therefore, find that the claimant does not establish that there was such an email and the factual basis of this allegation is not therefore made out. That complaint therefore fails for that reason.

402. However, it is accepted that the following day, 8 February 2023, there was a protected conversation at which the claimant was told about the redundancy. Furthermore, the claimant was dismissed on 2 March 2023.

403. However, as I have found in my findings of fact above, the decision that the claimant's role was redundant was made in November 2022, before the claimant's protected act of 30 November 2022. Therefore, that decision could not have been and was not made because of the protected act.

404. The reality is that the claimant's employment would have been terminated by reason of redundancy by early December 2022 if it were not for the intervening events at the Las Vegas conference. Notwithstanding that, the reason for the claimant's dismissal remained the same. She was dismissed by reason of redundancy; her role was redundant and no suitable alternative roles were identified and the respondent therefore dismissed her, by reason of redundancy.

405. The fact that the claimant did a protected act was no part whatsoever of the reason why the respondent terminated the claimant's employment. Furthermore it was no part of the reason for any of the communications which the respondent had with the claimant, both in writing and orally in meetings, regarding the termination of the claimant's employment.

406. Both of these allegations of victimisation therefore fail.

*Summary on substantive merits*

407. In summary, therefore, all of the claimant's complaints, with the exception of the two harassment complaints in relation to the sexual assault, fail on their substantive merits. Those two complaints are, however, subject to my findings on whether that act was done in the course of WB's employment and whether the respondent has established the statutory defence.

<u>Course of employment</u>

408. Ms McCann submits that WB's sexual assault of the claimant was not done in the course of WB's employment; Mr Brown and Mr Hurst submit that it was.

409. It is not in dispute that both the claimant and WB were attending events at the conference in Las Vegas, including the Omnia event, in the course of their employment. They were staying in separate hotels in Las Vegas. The hotel accommodation was paid for by the respondent. Furthermore, although nobody actually did so, both the claimant and WB would have been entitled to reclaim from the respondent the cost of the taxi from the Omnia to the claimant's hotel.

410. In the context of this issue, Mr Brown made various submissions about WB's motives in accompanying the claimant back to her hotel. He notes that, in response to a question of his about whether the respondent's duty to the claimant ended at the Omnia nightclub, Ms Tronsky said that *"if someone had observed an employee in distress of course they would have intervened"*. He then went on to note that the claimant and WB were not friends and submitted that WB was not acting in a personal capacity when he took the claimant from the Omnia back to her hotel room; he referred to WB referring in his oral evidence to approaching security because he *"saw a potential college in need"* and his reference in his first investigation interview with Ms Tronsky to *"#actsasoneteam"* in relation to the respondent's core values. He also notes that in cross-examination, Ms Tronsky agreed that in his first investigation interview WB told her that *"when he made the decision to take JG back in the taxi, he thought he was acting in accordance with the company's core values"*. He submitted that WB was working at the point he left the Omnia and took the claimant back to her hotel room. He submitted that the Omnia event was scheduled to go on until 2 AM and that the incident in the hotel room took place not long after that, between 2:30 AM and 2:45 AM a.m. He submitted that, in light of the fact that the claimant and WB were on an overseas business trip, it would be wholly artificial and wrong to conclude that, in such a short space of time, WB had ceased acting in the course of his employment.

411. However I do not accept much of this analysis, and particularly the section regarding WB's motivation. Whatever Ms Tronsky reported about what WB said to her at the time and whatever, in general terms, an employee of the respondent might do in terms of intervening if they saw an employee in distress, the question is what WB in these circumstances was doing. I accept that he was acting in the course of his employment at least until he left the Omnia, carrying out his networking as part of his work duties. However, in the light of what he ultimately did in the hotel room, I do not accept his evidence that he was acting throughout in order to assist an employee in distress. It is uncertain as to precisely at what point WB's motivation stopped being to assist the claimant (if it indeed ever was) and at what point his motivation became that of taking advantage of her sexually because of her inebriated state. However, at some point prior to the assault, the latter was or became his motivation. I have accepted the claimant's account of what happened in the hotel room; in other words, the oral rape did not just suddenly happen, but there was a buildup to it during which WB variously kept rubbing the claimant's arm; made complimentary remarks about her looks; removed her dress; and touched her, on her hair, shoulders and breasts. It is highly unlikely that his motivation to do so only arose at the point that he did it; it is far more likely that, at some point previously, that became his motivation, opportunity permitting. I consider that this is significant because, whereas taking a distressed colleague back to her hotel after a work

event in order to ensure that she is okay may well be an act in the course of employment, it is far less likely that taking a colleague back to her hotel, albeit after a work event, for the purposes of taking advantage of her sexually is an act done in the course of employment.

412. The submissions Mr Brown makes about timing have little bearing on this; it is the nature of what WB was doing rather than the fact that it was only half an hour to 45 minutes after the point when he was working which is more relevant.

413. I make no finding as to whether WB's motives originally when he met the claimant at the Omnia were purely to assist her or whether even at this point his motivation was to take advantage of her. Furthermore, whether he was happy to do so or not, there was certainly pressure on him to accompany the claimant both from the Omnia security in terms of accompanying her out of the Omnia, and to accompany her in the taxi, because of the taxi driver's insistence that she be accompanied by someone sober.

414. However, I have not accepted WB's evidence at this tribunal that the concierge at the claimant's hotel insisted that he accompany the claimant to her room and I find that, as that did not happen, WB at that point was under no obligation to assist the claimant further by accompanying her into and through her hotel and, in due course, into her room. By that stage, he was acting in a personal capacity; he was motivated by that stage by a desire to take advantage of her sexually and not by a desire to assist her. By that stage, he was not acting in course of his employment.

415. I would add the following points, which further point against the assault having been done in the course of WB's employment.

416. The incident did not happen at a work event or at an after work gathering. It happened in the claimant's hotel room and after the event at the Omnia had concluded. The incident did not take place on the respondent's premises or in premises used by the respondent; it happened at the claimant's hotel, in her own accommodation, over which neither the respondent nor WB had any right of access or control (its only connection being that it was paid for by the respondent, a fact which I do not consider to be of significant weight in determining the question of whether the act which took place in that room was done in the course of WB's employment; similarly, I do not consider that the fact that either WB or the claimant could, had they chosen to do so, have reclaimed the cost of the taxi fare from the respondent is of significant weight either). WB was not even staying at the same hotel as the claimant. The respondent would have no reason to suppose that WB would have any reason to be at the claimant's hotel or in her hotel room.

417. At the time of the assault, neither the claimant nor WB were on duty. By the time the claimant was being evicted from the Omnia by Omnia security, the respondent's event on the second floor had concluded and the DoiT signage and banners had been removed.

418. I do not accept Ms McCann's submission that thet interventions of Omnia security and the taxi driver in themselves took matters further away from the course of employment. If WB was genuinely in the process of trying to help a distressed colleague by taking her back to her hotel, the fact that these interventions would have provided further incentive to do so does not take what WB was doing at the time further away from the course of his employment. Rather, as I have already found, it is the fact that that was not what WB was doing which is far more significant in evidencing that his actions, at least from the point when the taxi arrived at the claimant's hotel, and including his actions in the hotel room, were outside the course of his employment.

419. There was no sexual harassment by WB at the Omnia event. Therefore, what happened afterwards could not be said to be an extension of any conduct which had started at the Omnia event.

420. Furthermore, WB was not in a position of authority over the claimant (he was neither a manager nor her supervisor) and they did not even work on the same team, unlike the situation in Bellman.

421. I therefore accept Ms McCann's submission that the circumstances show that there was a complete disconnection between WB's job, including his work duties at the Omnia event, and the sexual assault which he committed in the claimant's hotel room. The fact that the evening started off at a work event is part of the background narrative but was not part of an *"unbroken sequence of events"* unlike, for example, in the case of Mohamud. The sexual assault was perpetrated off-site, off duty and within the private sphere of the claimant's hotel room. I accept that this case is, therefore, more similar to the cases of Waters and Davis referred to in the law summary.

422. Therefore, by the time WB and the claimant were in the claimant's hotel room, where the act was done, there was no longer any sufficient connection to employment. The sexual assault was not done in the course of WB's employment.

423. It follows that the tribunal does not therefore have jurisdiction to hear the complaints of direct sex discrimination, harassment related to sex and sexual harassment at paragraphs 1.1(b) and 2.1(b) of the list of issues. Those complaints are therefore struck out, as against both the respondent and WB.

424. I appreciate that the claimant will be unhappy that this conclusion means that she has no remedy in the employment tribunal in relation to the proven act, all the more so because that act was a sexual assault of such a serious nature. However, the level of seriousness of the action in question plays no part in the determination of the question of whether it was done in the course of WB's employment.

Statutory defence

425. I turn then to the question of whether the respondent has shown that the statutory defence applies and to the two-stage test outlined in Canniffe.

*Steps the respondent took*

426. I set out first the steps which the respondent took.

427. The respondent had a clear code of conduct and anti-discrimination and harassment policy and a specific sexual harassment policy in place. Both the claimant and WB had signed to acknowledge that they had read and would adhere to these policies.

428. The respondent's handbook/policies are revised and updated (in other words they are not left to go stale). They were last updated, not long before the material events in this claim, by Ms Tronsky in July 2021.

429. The respondent had rolled out relevant training on the prevention of sexual harassment, which both WB and the claimant had completed just two months prior to the assault in Las Vegas. The unsolicited feedback about that training was universally positive. Having myself viewed a video showing much of that training, I agree that the training is very good and covers the core concepts of sexual harassment within it.

430. The respondent's sexual harassment prevention training was fit for purpose. It was engaging and informative, with key learning points being explored along the way, with scenarios and situational quizzes which bring the learning to life and embed the key points. This was accepted by WB during cross-examination. (I address below some of the attempted criticisms of the training made by Mr Brown and Mr Hurst.)

431. The sexual harassment policy and the respondent's UK employment contract made clear that disciplinary action would be taken if an employee was found to have committed an act of harassment or indecent behaviour. The respondent's UK employment contract makes clear that this conduct constitutes gross misconduct, in respect of which the respondent would likely terminate the employee's employment without notice.

432. WB accepted in his evidence that he fully understood the prohibition against sexual harassment; and did not need training to know that he should not sexually assault anyone (colleague or otherwise).

433. The respondent had a specific alcohol and drug policy which all employees were required to read and to adhere to. This made clear that, whilst consuming alcohol was permitted, this was only where the employer was not impaired in the performance of their duties; employees were not permitted to be "under the influence" of alcohol. Again, both WB and the claimant had signed to acknowledge that they had read and would adhere to this policy.

434. WB accepted in cross-examination that he fully understood his responsibilities as an employee to act in accordance with the respondent's policies and understood the importance of the alcohol and drug policy (and, indeed, he hardly drank at all during the evening at the Omnia).

435. At the briefing the week or so before the Las Vegas conference, employees were reminded of the alcohol policy and the need to maintain professional behaviour at the conference.

436. The respondent had a work culture that was supportive, collaborative and helpful. That was the evidence of all of the witnesses including WB (with the exception of the claimant, whose evidence in this respect I have not accepted).

437. DoiT takes seriously breaches of its code of conduct, sexual harassment and alcohol policies generally. That is apparent from the fact that Mr X was immediately dismissed for drinking too much and trying to kiss a female colleague. I appreciate that this dismissal took place after the sexual assault on the claimant and that what one must take into account is actions by the respondent prior to the sexual assault on the claimant; however, the fact that the respondent took this prompt action against Mr X is indicative that, both before and after the sexual assault, the respondent took such breaches seriously.

438. This was the first occasion that any untoward conduct had happened at the Las Vegas conference and the first occasion of any inappropriate conduct by Mr X (who had attended many such events during his time with DoiT). There was, therefore, nothing to alert DoiT to any potential issues, either with the Omnia event or with Mr X.

439. The same applies to WB. WB had a clean disciplinary record and there was nothing to alert the respondent to any potential issues that there might be with WB of any nature, let alone that he might commit an act of serious sexual assault.

*Alleged reasonable steps which could have been taken*

440. Mr Hurst and, in particular, Mr Brown have submitted that there were a number of steps which were not taken but which could have been taken and were reasonably practicable. I go through these below.

441. However, before doing so, it is worth noting that the majority of these were not contained in either the pleadings or the witness statements but were for the first time put to Ms Tronsky towards the end of her cross-examination (and Ms Tronsky was the last witness to give evidence). Indeed, although Ms Tronsky denied that they were reasonable steps, she was not pushed on why she did not consider that to be the case and was only asked to set out why she did not consider them to be reasonable in re-examination questions. The result was a very last minute ambush in an area which is an important issue of this case. Whilst I have seen exactly this approach taken in other cases involving the reasonable steps defence, I do consider that there is an unfairness to it in that the case which the claimant (and in this case WB too) is making is not in fact revealed until the very end of the witness evidence.

442. I turn then to the alleged reasonable steps in question.

443. First, it is alleged that the respondent had a "massive drinking culture" and that management encouraged this. I have categorically rejected that in my findings of fact above. However, as is the case with a lot of the allegations relating to drinking, I accept that it is a red herring. WB was entirely sober both at the Omnia event and at the time of the sexual assault; any form of restriction on drinking by the respondent would not have prevented him from carrying out the assault. If, by contrast, Mr Hurst and Mr Brown are suggesting that some sort of drinking restriction by the respondent would have prevented the claimant from being intoxicated and therefore reduced the chances of a sexual assault occurring, I do not accept that. The claimant and her colleagues were well remunerated (her salary was £53,000) so, had she been intent on drinking, she would simply have purchased alcohol for herself, either before the event (as Mr X obviously did), at the event itself or at the public bar on the first floor of the Omnia. However, in any event, as I address some of the more specific alleged reasonable steps in relation to alcohol, I set out my reasons as to why I do not consider them to be reasonable.

444. Mr Brown has suggested that holding an event at a Las Vegas nightclub with an open bar between 9 PM and 2 AM was irresponsible; that due to what he described as the "obvious risks" associated with alcohol consumption, the Omnia event created a significant risk of employees becoming intoxicated and/or vulnerable to harassment/discrimination. However, I disagree. In all of the years at which DoIT it attended the conference in Las Vegas, there were only two incidents, one which forms the basis of this claim and the other being that regarding Mr X. Furthermore, there was nothing stopping employees from either turning up to the invent intoxicated (which is what Mr X did) or simply buying their own alcohol. That would be the case if the respondent had held a networking event somewhere other than Las Vegas or in a venue other than a nightclub or earlier in the evening. The suggested measure would not therefore even be effective.

445. However, not holding an event in Las Vegas or at the Omnia would not be a reasonable step in itself, even if it was effective. The event is DoiT's flagship event, to signal its intent and offering to the market, at one of the largest conferences in the industry, surrounded by its competitors, who would otherwise muscle in on the action. The event takes place anyway (in 2024, it was sponsored by one of DoiT's competitors). The whole reason for holding the event at the Omnia was to draw attention to DoiT and to provide an iconic, fun opportunity for networking. It would have undermined its business goal not to hold the event at the Omnia (or a similar venue). I accept that there is no proper basis for concluding that holding this type of customer facing event elsewhere would have been more (or less) likely to prevent WB from committing the act of oral rape or anything of that description.

446. Mr Brown submitted that, at the Omnia party, music containing the "N word" could be heard from the dancefloor and this highlighted that the venue was wholly inappropriate for a professional event. He said this with reference to one of the videos of the Omnia event which I viewed as part of the evidence at this hearing. Both Mr Hurst and Ms McCann said that they could not hear the "N word" on the video in question; I viewed (and listened to) the video again and I

could not hear it either. I do not therefore accept that it is been proven that the word was in fact used. In any event, the music came from the public dancefloor downstairs which was entirely outside DoiT's its control. There is nothing, therefore, in this submission which is indicative that the Omnia was an unsuitable venue to hold the networking event.

447. Returning to the issue of alcohol, Mr Brown submitted that the respondent failed to provide written guidance about alcohol consumption and a written reminder about expectations in relation to alcohol at the Omnia event. However, the respondent had given guidance at the briefing session before the Las Vegas conference that their employees should act professionally in relation to alcohol and it had a policy which employees had signed to confirm they were aware of. The respondent is entitled to treat its professional employees like adults. I do not consider that setting out in writing specific guidelines on alcohol in relation to the Omnia event would have been a reasonable step to prevent WB from committing a sexual assault.

448. Similarly, both Mr Hurst and Mr Brown submitted that the respondent should have limited the number of alcoholic drinks available to employees by the use of drinks tokens/vouchers or other means and limiting the period of operation of the open bar. However, this was a flagship industry event which had passed off without incident in previous years, when the arrangements were identical, so there was nothing to suggest that there were any problems "waiting to happen". It was a key networking event, for DoiT to establish contacts and to develop client relationships and, hopefully, make sales. As Ms Tronsky indicated in her oral evidence when this was put to her, these steps would be embarrassing and uncomfortable for all concerned; with a message being conveyed to customers and partners that DoiT's staff needed nannying and had to be treated like children. DoiT's competitors were not putting on events in this way and the distinction would be obvious for all to see. I accept Ms McCann's submission that arrangements such as these proposed would be reminiscent of a school prom and would undermine DoiT's commercial goals. They are not reasonable steps to prevent WB from committing a sexual assault.

449. Mr Brown submitted that there should have been a designated welfare officer at the event. However, although there was not a designated welfare officer, there were senior members of staff there to whom an employee in distress could go. That was enough. If the claimant was so intoxicated that she was not able to approach a senior member of staff, she would similarly be unable to approach a designated welfare officer. This is not, therefore, a reasonable step to prevent WB from committing a sexual assault.

450. Mr Brown submitted that the respondent should have made transport provision for employees to return to their hotel room safely. However, there were taxis outside the building which employees could at DoiT's cost use and, in the case of the claimant and WB, did use. Transport provision was, therefore, in place.

451. The remaining allegations of a failure to take reasonable steps relate to the respondent's policies and sexual harassment prevention training. They

amount to a nitpicking analysis which focused on details rather than looking at the substance of both the policies and the training, and I do not accept any of them amount to a failure to take reasonable steps.

452. It is not necessary to go through each of these criticisms in detail. However, in summary, although specific provisions of the EQA were not specified in the training, which was produced in the US, and although elements of the training made some references to laws of particular US states, I accept Ms McCann's submission that that is not to the point. References to specific provisions are unhelpful and put form over substance.

453. Furthermore, more importantly, the training and the respondent's policy clearly convey the important concepts which are covered by the EQA, namely: what constitutes sexual harassment (verbal, physical, visual or written conduct); how employers and employees might be liable for sexual harassment, including the reasonable steps defence; how sexual harassment can occur during a business trip (at a hotel bar for example) and whether conduct relates to the employment relationship; how to speak up, report and complain and the protection against retaliation (which is a more understandable term than "victimisation"). Whilst the EQA and English case law does not use the terms "severe and pervasive" (expressions used in US law), it has similar concepts of conduct needing to be substantial (that is, more than trivial) and creating an "environment" (so that, whilst a one-off incident might create such an environment, that will likely depend on its severity) in order to constitute harassment within the meaning of section 26(1) EQA.

454. Mr Brown's point about different rules being applicable to supervisors as compared with employees who do not have a supervisory role is a factor in cases decided in English courts and tribunals (that is apparent from the Bellman case where the fact that the company's managing director had a dominant and supervisory role which enabled him to exercise authority over his subordinates was highly relevant in the Court of Appeal deciding that the defendant company should be vicariously liable for his assault of the claimant after a Christmas party).

455. In summary, therefore, any differences between the training/policy and UK law are minor and do not impact upon the substance of what was a good policy and very good prevention from harassment training.

456. As I have set out in my findings of fact earlier, given that the respondent had only 426 employees globally at that time but spread over roughly 20 jurisdictions, I do not consider it was unreasonable to roll out one set of global training (of this quality) rather than try and source 20 different sets of training (and possibly more if you break down the US into its various state jurisdictions); it would not, therefore, have been a reasonable step for Ms Tronsky to source specific training that precisely mirrored UK law for its UK employees, when what was offered was perfectly reasonable.

457. Furthermore, it is self-evident that, had WB two months prior to the assault carried out UK prevention from harassment training tailored precisely to

UK law as opposed to the training which he did undertake, it would have made absolutely no difference whatsoever to the fact that he sexually assaulted the claimant. I do not, therefore, consider that what Mr Brown and Mr Hurst propose is a reasonable step to prevent WB from committing oral rape or anything of that description.

458. In summary, therefore, I find that the respondent has shown that it took all reasonable steps to prevent WB from doing the act in question or from doing anything of that description.

459. Therefore, even if that act had happened in the course of WB's employment (which I have found that it did not), the respondent would not in any event be liable for it because it has established the statutory defence in section 109(4) EQA.

Time limits

460. As noted at the beginning of these reasons, all of the complaints brought against the respondent were brought within the tribunal time limit. Furthermore, the complaints against WB were brought within the tribunal time limit, except for the complaints at 1.1(a) and 2.1(a) of the list of issues (which are the complaints about WB allegedly having asked the claimant why she was eating so much). These were presented out of time.

461. There are no successful in time complaints against WB such that the out of time complaints can be deemed to be in time as being conduct extending over a period.

462. I therefore need to consider whether it would be just and equitable to extend time in relation to these complaints.

463. Despite making clear at the start of the hearing that there was a jurisdictional issue and reminding the parties that they should make submissions on the issue, Mr Hurst did not make any submissions on this issue. I have, therefore, heard no submissions as to why it might be just and equitable to extend time. Furthermore, the claimant has presented no evidence and given no reasons why time should be extended. Furthermore, I have seen nothing in the evidence before me throughout the course of this hearing which would provide any reason as to why it might be just and equitable to extend time. The burden of proof is on the claimant to show that it would be just and equitable to extend time. She has not, therefore, discharged it. I therefore find that it is not just and equitable to extend time.

464. The tribunal does not therefore have jurisdiction to hear these complaints and they are therefore struck out.

465. As I have already found, even if they had not been struck out for want of jurisdiction, they would have failed on their substantive merits.

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Employment Judge Baty

Dated: 9 May 2025

Judgment and Reasons sent to the parties on:

14 May 2025
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…….....
For the Tribunal Office

## ANNEX

## AGREED LIST OF ISSUES

### 1 Direct sex discrimination (s13 Equality Act 2010)

1.1 The Claimant alleges that the following acts or omissions took place and amounted to less favourable treatment, and that such treatment was because of sex:

(a) The Second Respondent asking the Claimant why she was eating so much (paragraph 30);

(b) The Second Respondent orally raping the Claimant (paragraph 41);

(c) That the First Respondent did not suspend WB (paragraph 48);

(d) The First Respondent writing directly to the Claimant (paragraph 67);

(e) The First Respondent suggesting that the Claimant was at fault for being raped (paragraph 70).

1.2 Did the Respondents discriminate against the Claimant because of sex contrary to section 13 of the Equality Act 2010? In particular:

1.2.1 With reference to the alleged acts or omissions listed to at 1.1, did the Respondents carry out such acts or omissions?

1.2.2 If the answer to 1.2.1 is yes, did the Respondents in so doing treat the Claimant less favourably than others?

If the answer to 1.2.2 is yes:

1.2.3 Was the treatment because of sex?

1.2.4 The Claimant relies on the following real or hypothetical comparator whose circumstances are not materially different to the Claimant's own:

(a) The Claimant will rely on a hypothetical comparator

1.2.5 Is that real or hypothetical comparator the appropriate comparator? If not, who is the appropriate real or hypothetical comparator?

### 2 Harassment relating to sex(s26(1) of the Equality Act 2010)

2.1 The Claimant alleges the Respondents subjected her to the following conduct:

(a) WB asking the Claimant why she was eating so much (paragraph 30);

(b) WB orally raping the Claimant (paragraph 41).

2.2 Did the Second Respondents subject the Claimant to the conduct set out above?

2.2.1 Was the conduct unwanted?

2.2.2 Was the conduct related to sex?

2.2.3 Did the conduct have the purpose or effect of violating the Claimant's dignity?

2.2.4 Did the conduct create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.2.5 Did the Claimant consider the behaviour to have the impact outlined at 3 or 4?

2.2.6 In all the circumstances of the case, was it reasonable for the conduct to have that effect?

**3 Victimisation (s 27 Equality Act 2010)**

3.1 The Claimant alleges that she did the following protected act:

(a) The Claimant's complaint of sexual assault to the First Respondent on 30 November 2022.

3.2 The Claimant relies on the following acts/omissions as being detriments to which the Respondents subjected the Claimant by reason of doing a protected act:

(a) The First Respondent's failure to provide support (paragraph 53);

(b) The First Respondent's failure to suspend WB (paragraph 48);

(c) The First Respondent's refusal to allow the Claimant to return to work (paragraphs 60 and 62);

(d) The First Respondent emailing the Claimant threatening redundancy (Paragraph 63);

(e) The First Respondent sending an undated letter directly to the claimant and the contents of that email (paragraphs 65, 66 and 67);

(f) The First Respondent implying that the Claimant was at fault for working under the influence of alcohol (paragraph 70);

(g) The First Respondent terminating the Claimant's employment (paragraph 74)

3.3 With reference to the alleged acts of victimisation listed at 3.2 did the First Respondent do those acts or omissions?

3.4 If so, did the First Respondent subject the Claimant to a detriment because she had done, or because the First Respondents believed that she had done (or may do), the protected act alleged above?

**4 Liability**

4.1 Is the First Respondent vicariously liable for the conduct in terms of section 109(1) of the Equality Act 2010?

4.2 Did the First Respondent take all reasonable steps to prevent the harassment in terms of section 109(4) of the Equality Act 2010?