# EMPLOYMENT TRIBUNALS

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| **Claimants:** | Miss Stephanie Davies<br>Miss Jennifer Thomas |
| **Respondent:** | Bridgend County Borough Council |
| **Heard at:** | Cardiff **On:** 3, 4, 5, 6, 7 and 10 November 2025 |
| **Before:** | Employment Judge S Jenkins<br>Ms M Farley<br>Mr M Lewis |

**Representation:**
Claimants: In person
Respondent: Mr J Lewis-Bale (Counsel)

**JUDGMENT** having been sent to the parties on 25 November 2025, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

# REASONS

## Background

1. The hearing was to consider the Claimants' complaints, brought by way of a Claim Form dated 26 June 2024, following early conciliation between 21 April and 2 June 2024. Two earlier preliminary hearings had taken place in this case, one on 28 January 2025 before the Judge presiding in this hearing, at which it was confirmed that the Claimants were advancing complaints of sexual harassment, involving one act said to be unwanted conduct, and a

direct sex discrimination involving eight acts, said to be less favourable treatment because of sex. The other took place on 13 May 2025 before Employment Judge Moore, and led to confirmation that, in addition to the one act alleged to amount to sexual harassment, there were thirteen acts said to be less favourable treatment because of sex, and that those acts were also contended to be acts of harassment related to sex.

2. During the course of the hearing we heard evidence from both Claimants, by way of written statements and answers to questions, and from four witnesses, again by way of written statements and answers to questions, on behalf of the Respondent; Laura Griffiths, Group Manager of Legal and Democratic Services; Annette Parkes, formerly Business Change Programme Manager; Claire Marchant, Corporate Director of Social Services and Wellbeing; and Helen Selway, Business Partner Manager.

3. We were presented with a bundle of documents spanning 578 pages and we considered those to which our attention was drawn. We took into account three additional pages adduced by the Claimants during the course of the hearing, and to unredacted versions of three pages within the bundle on which redactions had originally been made. We also took into account the parties' closing submissions.

## Preliminary issue

4. Shortly prior to this hearing, the Claimants made an application for an anonymity order pursuant to Rule 49 of the Employment Tribunal Procedure Rules 2024. That was considered on the first day of the hearing by the Judge alone, and was refused for reasons given orally at the time. The hearing then proceeded before the full Tribunal to consider the substantive complaints.

## Issues

5. The issues to be determined at this hearing had been set out by Employment Judge Moore in her Record of Preliminary Hearing following the preliminary hearing on 13 May 2025, and were as follows:

***Sexual harassment (Equality Act 2010 section 26)***

*1.1 Did an employee of the Respondent expose himself to the Claimants whilst they were in a vehicle parked outside the Second Claimant's home on 12 June 2023?*

*1.2 If so, was that unwanted conduct of a sexual nature?*

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

*1.4 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

*1.5 Can the Respondent be vicariously liable for that act?*

***2. Harassment related to sex (Equality Act 2010 section 26)***

*2.1 Did the Respondent fail to handle the Claimant's complaint about the incident on 12 June 2023 appropriately, in particular:*

*2.1.1 On or around 15 June 2023 decide a managerial meeting was an appropriate sanction for the employee who had committed the acts on 12 June 2023 ("the employee");*

*2.1.2 From 15 June 2023 fail to provide the Claimants with a safe working environment or expose them to an environment of the proscribed nature under s26 by requiring them to work in the same building as the employee;*

*2.1.3 Between June – October 2023 refuse to interview the Claimants as part of the employee's disciplinary process on basis their testimony was irrelevant;*

*2.1.4 In October 2023 fail to apply the code of conduct that provides criminal behaviour outside the workplace will not be tolerated and permitting the employee to return to work;*

*2.1.5 From the employee's return to work on or around October 2023 fail to conduct appropriate risk assessments as to the safety and exposure of the claimants working in the same building as the employee;*

*2.1.6 From October 2023 to date requiring the Claimants to adjust their working patterns to go into work when the other employee was not there;*

*2.1.7 From October 2023 requiring the Claimants to email several different employees in the Respondent's HR department to make those working arrangements;*

*2.1.8 From October 2023 tell the Claimants to avoid using stairs and lifts as a way of limiting contact with the other employee whereas the employee was not provided with any such instruction;*

*2.1.9 By treating meetings with the Claimants at the end of October 2023 as a "tick box exercise", with the HR adviser not being aware of the full details of the incident on 12 June 2023;*

*2.1.10 In October 2023 by Helen Little advising the claimants they should "simply bump into the employee and get it over with";*

*2.1.11 By the investigating officer Laura Griffiths appointed in relation to a grievance brought by the Claimants, in November 2023, likening the 12 June 2023 incident to an employee receiving a speeding ticket outside work;*

*2.1.12 By initially appointing the Respondent's Head of HR's line manager as Chair of the Grievance Panel;*

*2.1.13 By reaching a decision, on 12 June 2024, that the Respondent's HR Team had properly followed the relevant policies, despite the evidence being presented by the Claimants.*

*2.2 If so, was that unwanted conduct?*

*2.3 Did it relate to sex? alternatively was it of a sexual nature?*

*2.4 Did the conduct have the purpose of violating the Claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimants?*

*2.5 If not, did it have that effect? The Tribunal will take into account the Claimants' perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

***3. Direct sex discrimination (s13 EQA 2010)***

*3.1 Did the Respondent do the following things? The Claimants rely on the same acts and set out above 2.1.1 – 2.1.13.*

*3.2 Was that less favourable treatment?*

*The Tribunal will decide whether the Claimants were treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimants'.*

*If there was nobody in the same circumstances as the Claimants, the Tribunal will decide whether they were treated worse than someone else would have been treated.*

*The Claimants rely on a hypothetical comparator save the claimants rely on the employee in regards to 2.1.8.*

*3.3 If so, was it because of sex?*

***4. Remedy for discrimination***

*4.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimants? What should it recommend?*

*4.2 What injury to feelings has the discrimination caused the Claimants and how much compensation should be awarded for that?*

*4.3 Should interest be awarded? How much?*

**Law**

6. The applicable law and legal principles were as follows;

Sexual harassment

7. Section 26 of the Equality Act 2010 ("EqA") provides as follows:

*(2) A … harasses B if—*

*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

Subsection (1)(b) provides as follows:

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

8. The Employment Appeal Tribunal ("EAT") noted, in ***Driskel v Peninsula Business Services Ltd and ors*** **[2000] IRLR 151**, that sexual harassment

should be defined on a common-sense basis by reference to the facts of each particular case.

9. The Equality and Human Rights Commission Employment Code contains examples of sexual harassment as follows: unwelcome sexual advances, touching, sexual assault, sexual jokes, displaying pornographic photographs or drawings, or sending emails containing material of a sexual nature (para 7.13). The EHRC Technical Guidance expands on this list by including; suggestive looks or leering, making promises in return for sexual favours, sexual gestures, intrusive questions about a person's private or sex life or a person discussing their own sex life, sexual posts or contact on social media, or spreading sexual rumours about a person (para 1.20).

Vicarious liability

10. In this case, a particular strand of the Respondent's defence to the sexual harassment complaint was that it was not responsible for its employee's actions, i.e. it was not vicariously liable. Section 109 EqA deals with vicarious liability and provides as follows:

*109 Liability of employers and principals*

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

*(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

*(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

11. In ***Jones v Tower Boot Co Ltd*** **[1997] 2 All ER 406**, the Court of Appeal held that the test for vicarious liability under the equality legislation is broader than the common law test, allowing for a more liberal interpretation of what constitutes conduct in the course of employment. It must be noted however that the test of vicarious liability in civil claims is now rather more broad than it was then.

12. In ***Jones***, the Court concluded that the words '*in the course of… employment*' are to be construed in the sense in which every layperson would understand them. The question of whether an employee's discriminatory acts were done in the course of his or her employment, thereby rendering the employer liable for them, should be treated as a question of fact, which, the Court stated, an employment tribunal is well suited to resolve.

13. However, the courts have consistently made clear that off-duty conduct may not be sufficiently connected to the employment to lead to the employer becoming vicariously liable. In ***Waters v Commissioner of Police of the Metropolis*** **[1997] ICR 1073**, a police constable claimed that she had been victimised by her employer after complaining of a sexual assault by a male colleague. The parties were off duty at the time of the alleged assault, which occurred in the early hours, and the male officer was a visitor to the woman's room in the police section house. The parties were in the same position as would have applied if they had been social acquaintances with no working connection. The Court held that in those circumstances it was inconceivable that any tribunal applying the correct test could have found that the alleged assault was committed in the course of the male officer's employment.

14. Similarly, in ***HM Prison Service and ors v Davis*** **(UKEAT/1294/98)** a prison officer alleged that she had received an unexpected visit at home one evening from a colleague, who then made wholly unwanted sexual advances towards her. She brought a claim of sex discrimination against the employer and an employment tribunal found the employer vicariously liable because the sexual harassment was '*in relation to employment*'. One of the reasons the tribunal gave for this decision was that the employer's disciplinary code stated that the conduct of employees 'on and off duty' must not bring discredit on the Prison Service. The code also provided for disciplinary action to be taken when an alleged criminal offence was committed 'away from the workplace'. Since the employees were subject to a contract of employment that governed their behaviour 24 hours a day, it followed, according to the tribunal, that the off-duty conduct occurred in the course of employment.

15. The EAT disagreed with the tribunal's assessment. In its view, the fact that an employer can legitimately complain about an employee's activities outside employment does not bring that activity within the course of employment. The incident of harassment had only the '*most slender of connections*' with work and had not occurred in the course of employment. The EAT expressed the view that the case was virtually indistinguishable from that of the ***Waters*** case. Indeed, the only real difference was that the incident in the ***Waters*** case occurred at accommodation owned by the employer. The absence of such a factor in the instant case meant that there was even less reason for holding that the harassment took place in the course of employment.

<u>Harassment related to sex</u>

16. Section 26 EqA notes that:

"*(1) A person (A) harasses another person (B) if –*

*(a) A engages in "unwanted conduct related to a relevant protected characteristic, and*

*(b) The conduct has the purpose or effect of –*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

17. In assessing whether that had taken place in this case, we would first have to assess whether the matters asserted had taken place, and whether they amounted to "unwanted conduct".

18. If we were satisfied that there had been unwanted conduct, we would then need to consider whether it had related to the Claimants' sex, "related to" having a broad meaning, wider than "because of" or "on the ground of", as noted by the EAT in ***Blanc de Provence v Ha*** **[2023] EAT 160**.

19. The EAT confirmed, in ***Warby v Wunda Group Plc*** **[2012] All ER (D) 203 (Jun)**, that the context of the conduct is crucial in determining whether it is related to a protected characteristic. In that case, it was held that a manager's accusation that an employee had lied about a miscarriage did not amount to harassment related to sex, as the context showed the complaint was about lying rather than the employee's sex or pregnancy.

20. Similarly, in ***UNITE the Union v Nailard*** **[2018] EWCA Civ 1203**, the Court of Appeal held that the conclusion that a failure to address a sexual harassment complaint, made against elected officials of the union, could amount to harassment related to sex 'because of the background of harassment related to sex' as going too far. The act required the Tribunal to focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic – for example, sex.

21. The EAT, in ***Carozzi v University of Hertfordshire*** **2024 EAT 169**, emphasised that there is no requirement for a mental element equivalent to that in a claim for direct discrimination when considering whether conduct is 'related to' a protected characteristic.

22. If we were satisfied that there had been unwanted conduct which related to the Claimants' sex, we would need to consider whether it had had the purpose or effect of violating the Claimants' dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

23. In deciding whether the Respondent's conduct, if it took place, had the effect of violating the Claimants' dignity or of creating an intimidating etc. environment for them, section 26(4) EqA notes that three matters are to be taken into account; the Claimants' perceptions, the other circumstances of the case, and whether it was reasonable for the conduct to have had that effect, a test which therefore has both subjective and objective elements.

Direct Discrimination

24. Section 13(1) Equality Act 2010 provides that:

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

25. Section 23(1) then notes that there must be "*no material difference between the circumstances relating to each case*" when undertaking the comparison.

26. The EHRC Employment Code makes it clear, at para 3.23, that the circumstances of the claimant and the comparator need not be identical in every way. Rather, '*what matters is that the circumstances which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator*'.

27. The House of Lords, in ***Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School*** **[2003] ICR 937**, held that, with the exception of the prohibited factor (be it sex, race or otherwise), '*all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator*'. The Court of Appeal confirmed, in ***Shomer v B and R Residential Lettings Ltd*** **[1992] IRLR 317**, that that applies regardless of whether the comparator that is used is actual or hypothetical.

28. The Court of Appeal summarised the approach to be taken in relation to section 13, and in particular the required degree of causation arising from the words, "because of", in ***Chief Constable of Greater Manchester v Bailey*** **[2017] EWCA Civ 425**, and stated, at paragraph 12:

"*Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the*

*same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B*."

29. The House of Lords also noted, in ***Chief Constable of West Yorkshire Police v Khan*** **[2001] ICR 1065** that, in relation to causation, the Tribunal must identify *"the real reason, the core reason, the causa causans, the motive*".

Burden of proof

30. Section 136 Equality Act 2010 deals with the burden of proof and provides as follows:

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

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

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

31. A two stage test was therefore involved. First, the Claimant had to prove facts from which we could decide that discrimination had taken place, and secondly, if so, the burden of proof would then shift to the Respondent which would have to prove, on the balance of probability, a non-discriminatory reason for the treatment in question.

32. However, the appellate courts have noted that there can be occasions, particularly where a claimant is relying on a hypothetical comparator, where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the respondent treated the claimant in the way that it did. The utility of that approach was first pointed out by the House of Lords, in ***Shamoon v Chief Constable of the Ulster Royal Constabulary*** **[2003] UKHL 11**, which in fact pre-dated the statutory burden of proof rules, where Lord Nicholls noted that, "*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was*".

33. That approach was endorsed by Elias J, as he then was, in ***Laing -v- Manchester City Council*** **[2006] ICR 1519***,* where he noted that, "*it might be sensible for a Tribunal to go straight to the second stage…where the employee is seeking to compare his treatment with a hypothetical employee.*

*In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment*". The Judge had made the same point in ***Brown -v- London Borough of Croydon*** **(UKEAT/0672/05)** which was subsequently endorsed by the Court of Appeal in that case.

34. The Court of Appeal made clear however, in **Madarassy v Nomura International PLC [2007] ICR 867**, that something more than less favourable treatment compared with someone not possessing the Claimant's protected characteristic is required. In that case, Mummery LJ noted, at paragraph 56, in relation to the burden of proof:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination*."

Remedy

35. The Claimants remain employed by the Respondent and no financial losses are being pursued by them. If the complaints were successful, our focus then in terms of remedy would be on injury to feelings.

36. In that regard, we noted the direction provided by the EAT in ***Prison Service and others -v- Johnson*** **[1997] ICR 275** that:

    (i) Awards for injury to feelings are designed to compensate the injured party fully, but not to punish the guilty party.

    (ii) Awards should not be so low as to diminish respect for the policy of the discrimination legislation, but, on the other hand, should not be so excessive that they may be regarded as untaxed riches.

    (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases.

    (iv) In exercising their discretion, Tribunals should remind themselves of the value in everyday life of the sum they have in mind.

    (v) Tribunals should bear in mind the need for public respect for the level of awards made.

37. We also bore in mind the seminal Court of Appeal decision of ***Vento -v- Chief Constable of West Yorkshire Police (No. 2)*** **[2003] IRLR 102**, in which it set out the three "bands" in which awards should be assessed; the top band (£35,200 to £58,700 in the period relevant for this case) for the "*most serious*

*cases, such as where there has been a lengthy campaign of discriminatory harassment*", the middle band (£11,700 to £35,200) for "*serious cases which do not merit an award in the highest band*", and the lower band (£1,200 to £11,700) for "*less serious cases, such as where the act of discrimination is an isolated or one-off occurrence*".

## Findings

38. Our findings of fact relevant to the issues we had to determine were as follows. There was ultimately little dispute over the events giving rise to the claims, but where there was we resolved it on the balance of probability.

39. The Respondent is the local authority covering the Bridgend area. It employs approximately 6,000 employees.

40. The Claimants have been employed by the Respondent for several years. They both have an office based in the Respondent's Civic Centre, the First Claimant on the third floor, and the Second Claimant on the fourth floor, albeit both have undertaken a large proportion of their work from home in recent years, we presumed since the Covid lockdowns which commenced in 2020.

41. The Claimants do not work for the same directorate, with the First Claimant working in the Communities Directorate, and the Second Claimant in the Chief Executive's Directorate, but both are friends inside and outside work.

42. The other directorate relevant to this case is the "Corporate Landlord". We understood this to be the directorate dealing with the Respondent's premises and facilities management, although a precise description was not provided to us.

43. The first factual event we needed to record, and the event which formed the backdrop to the Claimants' claims, took place on the night of Monday 12 June 2023. We only heard evidence from the Claimants about the incident, but it was not challenged, and was consistent with the record of the events they provided, at the time and subsequently.

44. On that night, the two Claimants had been out, not in connection with their work, and the First Claimant had driven the Second Claimant home to her parents' house, where she was living at the time. On approaching the house, the Claimants noticed a man standing next to the Second Claimant's parents' car. On reaching the house they could see that the man was, in fact, urinating against the car.

45. The Second Claimant recognised the man as someone who also worked for the Respondent. Indirectly, we heard a great deal about the male employee without direct evidence being put before us. He was referred to throughout this hearing as the "the male employee" or "the other employee" and references to his identity were redacted in the hearing bundle.

46. What we took from the indirect evidence we read and heard is that the male employee was aged approximately 40, and had a disability in the form of a learning difficulty, possibly quite a severe learning difficulty, although the precise condition was not provided to us.

47. He was employed via a form of assisted employment programme, we presumed designed to assist disabled employees in their attempts to gain employment. We understood that he had worked for the Respondent for some time, on a part-time basis, at that stage, for six hours on Thursdays and Fridays, and for four hours on Tuesdays. It appeared that the male employee was employed in a, fairly menial, manual role, in which he works across all floors in the Civic Centre, using a trolley to assist him with his duties.

48. Returning to the events of 12 June 2023, after urinating on the car, the male employee walked towards the First Claimant's car with his penis exposed, with his hands in the air, and talking in an aggressive manner. He then stood facing the car, still exposed, with the Claimants obviously approximately at his waist level. They did their best not to make eye contact with him.

49. The male employee then sat on the pavement in front of the car, still with his penis exposed. The Claimants then called 101 to report the behaviour and seek advice. Whilst they were waiting to speak to someone, the male employee stopped exposing himself, and then approached the car again, shouting and swearing. He looked into the car, banged on the roof and window, and attempted to open the car door. He then crossed the road and walked away.

50. The Claimants' call to 101 was put through, and the call handler informed them that the CCTV pictures showed the male employee defecating in the street nearby, where he was then arrested.

51. Both the Claimants, the Second Claimant in person and the First Claimant via a video call, reported the incident to their managers the following day, and both managers informed the Respondent's HR Department about it. The Second Claimant's manager, who it appeared to us, due to his greater seniority and experience, then took more of a lead role in liaising with HR about the incident. He informed the Second Claimant that HR were already aware of the incident as the police had been in contact with them directly.

52. The police attended upon both Claimants, whilst they were both at the First Claimant's house on the evening of 13 June 2023, to take statements. At that point the male employee was in custody. There were indications within the bundle the male employee was not due to be in work that week in any event due to annual leave.

53. The male employee then attended Magistrates' Court the following day, 14 June 2023, and pleaded guilty to two charges. He was then released on conditional bail pending a sentencing hearing on 24 July 2023.

54. Precisely what the male employee had pleaded guilty to was a source of confusion between the parties. On the Claimants' side the Police's Witness Care Unit wrote to the Second Claimant on 15 June 2023, informing her that the male employee had pleaded guilty on 14 June 2023 to two charges: "1. Act of outraging public decency – common law, 2. Public Nuisance – indecent exposure".

55. The Claimants understandably took that to mean that the two charges and guilty pleas both related to the incident on 12 June 2023. However, in an email sent to the Respondent on 19 June 2023, following a request for more detail of the charges, the Police's Public Protection Unit noted that the charges had been: "1. Act of outraging public decency 12.6.23. Behaved in an indecent manner, namely urinated and defecated in the road", and "2. Indecent exposure 29.04.23 – indecently exposed buttocks and testicles in the view of members of the public".

56. The Claimants' perception that the charges and guilty pleas both related to the incident involving them continued, again understandably, following the police's communication to them about sentencing in July 2023, when they were told that the defendant had been sentenced for "*both charges*" on 24 July 2023, and had been given various non-custodial punishments.

57. It remained the understanding of the Claimants, until the Respondent disclosed its documents during the course of this litigation, that the charges of outraging public decency and indecent exposure both related to the incident on 12 June 2023. It was only when they saw the police communications with the Respondent, and the Respondent's letter to the employee suspending him from work on 23 June 2023, which repeated the information provided to the Respondent by the police on 19 June 2023, that they could see that two separate incidents, one not involving them, had occurred. They could also see that the only aspect of the incident of 12 June 2023 taken forward as a criminal prosecution was the act of public urination.

58. For the avoidance of doubt however, regardless of the matters taken forward by way of criminal prosecution, we observed that the Claimants had brought to their employer's attention both the matter of public urination and also that the male employee had indecently exposed himself to them.

59. The focus of the criminal prosecution appeared however to infect the Respondent's approach to the disciplinary allegations against the male employee. The initial view expressed to the Second Claimant's line manager by the HR Business Partner responsible for the Corporate Landlord Directorate in which the male employee worked, in an email of 15 June 2023,

was that his working hours would be shared with the Claimants so that they could look to work around his hours to diminish contact. It was also noted that, in terms of further action, the male employee would be spoken to via a "management discussion".

60. We noted that the Respondent's Disciplinary Policy and Procedure makes no reference to "management discussions", but we presumed that such a discussion would be a form of action short of formal disciplinary action.

61. Matters moved on from that position quite quickly, initially it seems at the instigation of the Second Claimant's Line Manager, who replied, promptly and forcefully, noting that it was unacceptable that the victims were having to alter their work patterns and behaviour because of the male employee's actions. He also noted that the Second Claimant was devastated by the fact that the male employee would be returning to work, and felt totally let down. He observed that he had to concur with that, given that the Respondent was not even undertaking a disciplinary investigation, and that he was not sure how a management discussion fitted the circumstances.

62. Whether due to the Line Manager's prompting or further information from the police, the initial stance regarding only having a management discussion changed, as on 16 June 2023 the Respondent was looking to implement an investigation under its Disciplinary Policy. As we have noted, the male employee was then suspended on 23 June 2023 pending that investigation.

63. No direct evidence of that investigation or its outcome was before us, although notes of interviews with both the Investigating Officer and the HR Business Partner involved in it were taken by Ms Parkes as part of her subsequent Resolution, or grievance, investigation, and they were in the bundle.

64. Other than information provided to them by their line managers, the Claimants had no information regarding the disciplinary investigation. Emails between the Corporate Landlord HR Business Partner and Ms Selway, who we understood to be the, or at least a, Senior HR Business Partner, on 21 June 2023 however, indicated that the Respondent's view then, and from that point on, was that the Claimants had no role to play in the investigation. The Corporate Landlord HR Business Partner had emailed Ms Selway, noting that as the male employee had pleaded guilty it was unlikely that the Claimants would be called to give evidence, and she sought Ms Selway's views on whether they would need to be part of the investigative process, her view being that they would not.

65. Ms Selway replied, noting that she did not believe that there was a need to interview the Claimants, and that the Respondent was only concerned with the fact that the male employee had a criminal conviction which was believed to impact on his role. She concluded the email by saying that the investigation

was seeking to address the impact, if any, of the convictions on the male employee's ability to continue working for the Respondent, and whether there were any adjustments or safeguards that could be put in place to support his continued employment. As we have noted, that appeared to be the approach the Respondent adopted consistently thereafter.

66. The approach regarding the decision not to interview the Claimants was drawn from the interpretation by those involved in the disciplinary process of paragraph 3.4.7 of the Respondents Disciplinary Policy. That states as follows:

*"Any witnesses to the alleged misconduct will be interviewed and asked to provide a written statement."*

67. It appeared that the view taken by those involved was that, as the male employee had pleaded guilty to the criminal charges, there was no "alleged" misconduct, there was admitted misconduct. However, that view overlooked the fact that the alleged misconduct in this case i.e. including that the male employee had indecently exposed himself to the Claimants on 12 June 2023, had not been established. In any event, an investigation into disciplinary allegations will not necessarily be confined to whether the allegations occurred in fact. The ramifications of the acts may also be relevant, particularly where, as here, other employees are involved, essentially as the victims of the acts.

68. We also noted at paragraph 3.4.1. of the Respondent's Disciplinary Policy states that the investigation will, "*Gather all the relevant facts in relation to the allegations*", and, again, that would not necessarily be confined to whether or not the alleged acts occurred. The impact of the acts on others could still be a "relevant fact".

69. No clear information was put before us as to the outcome of the disciplinary process in relation to the male employee. It was clear however that he was not dismissed. That was despite the Respondent's Disciplinary Policy noting, at paragraph 9.2.2, that actions regarded as gross misconduct, "*will lead to summary dismissal (without notice) for a first offence unless there are clear and mitigating circumstances*", and also including, as an example of gross misconduct, "*Criminal conduct outside the workplace, which reflects adversely upon the Council, or on the employee's suitability for the job*".

70. No evidence was put before us as to any clear and mitigating circumstances which might have led to the male employee not being dismissed for criminal conduct outside work, which in our view clearly reflected adversely on the Council, or on the male employee's suitability for the job, although we appreciated that that was not a matter that was directly before us.

71. It was also not entirely clear when the disciplinary process relating to the employee was completed, and when he returned to work, although that appears to have been around the start of October 2023, as the Claimants' complaints regarding risk assessments and having to adjust their working patterns referred to concerns arising from October 2023, and they referred, in their statements, to having been told that the male employee would be returning at around that point.

72. Within the bundle, although it was not dated, was a "Return to Work - Risk Assessment Discussion Form", which recorded a discussion between the male employee and his manager. The initial comment in that document was that, following the disciplinary investigation, a risk assessment had been completed to reduce any risks, and to support the male employee in the workplace. We were not referred to any other risk assessment documents, and therefore presumed that the reference to the fact that a risk assessment had been completed related to a risk assessment at that meeting. No specific reference to any identified risk was however included.

73. The mitigating support measures, in addition to reminding the employee of the seriousness of his offence, that he needed to ensure he displayed good behaviour and acceptable conduct, that any bad behaviour or conduct would risk him losing his job, and that he needed to ensure that his behaviour towards females was appropriate, included that he would work five hours on Mondays and Tuesdays, and six hours on Thursdays. The document was updated in April 2024 to note that the male employee no longer supported Level 4 (i.e. the fourth floor) at the Second Claimant's manager's request.

74. Risk assessments for the Claimants were not completed straight away following the male employee's return to work. Indeed, it appeared that they and their managers had to push for risk assessments to be carried out.

75. Following the raising of concerns about the impact of the male employee's return on the Claimants, meetings took place with each of them, together with their managers and a representative of HR, Helen Little, the Interim Principal HR Business Partner, who had also been involved in the disciplinary hearing in relation to the male employee. Each of the Claimants in fact had two meetings with Ms Little, the First Claimant on 17 and 31 October 2023, and the Second Claimant on 13 and 27 October 2023.

76. Ms Little was not called to give evidence before us, and no notes of the meetings were taken, but we did have recourse to references Ms Little made about the meetings in her interview with Ms Parker as part of the Claimants' grievance, as well as the Claimants own evidence. Bearing in mind that some of the Claimants' complaints related to specific comments and actions of Ms Little, it would have been preferable to have heard direct evidence from her.

77. The First Claimant asked for an agenda for her meeting with Ms Little, but was told by her that it was just a meeting to listen to the Claimants' concerns.

78. No substantive progress was made during or as a result of those meetings, other than that risk assessments would be undertaken for them, and that counselling would be made available to them. However, it appeared to us that there was little other than that that could have been achieved. The Claimants were frustrated that the disciplinary process relating to the male employee had been completed without their involvement, whilst Ms Little, as the Respondent's representative, was dealing with a concluded situation as far as the male employee was concerned, where the decision had been taken that he should not be dismissed and could return to his duties.

79. Bearing in mind that it had been established that the male employee could not undertake other duties or work at another location, Ms Little, and the Respondent generally, was faced with managing the situation from there. We noted that Ms Little in her interview with Ms Parkes said, "*It seemed as if they [the Claimants] just wanted the employee removed from the building, and I did not have the power to influence that.*".

80. In relation to managing things moving forward, as we have noted, the employee's days in work were changed to Mondays, Tuesdays and Thursdays, leaving the Claimants free to attend on Wednesdays and Fridays. It was also noted that both Claimants may be required to attend the office on other days, and, if so, they should contact Ms Little, or in her absence another senior HR employee, so that they could look to change the male employee's working days.

81. Separately in the meetings with each of the Claimants, Ms Little made a comment along the lines of "*Maybe you should just bump into him [the male employee] and get it over with*". Ms Little, in her interview with Ms Parkes, did not deny making such a comment, but stated that it had been intended as a suggestion of a controlled sighting of the male employee, which might reduce the Claimants' anxiety about meeting him, as it was inevitable that they would see him at some stage.

82. The Second Claimant's line manager, in his interview with Ms Parkes, suggested that he understood that Ms Little was trying to be positive with her suggestion, whereas the First Claimant's line manager noted, in her interview with Ms Parkes, that she did not think it was an appropriate thing to say. Both Claimants, in their evidence, were clear that the comment was an unwelcome one, and did not recognise the impact the incident on 12 June 2023 had had on them.

83. The Second Claimant also noted, in her evidence, that Ms Little had said to her that she should try to avoid the lifts and stairwells and the basement. That was not put to Ms Little during her interview with Ms Parkes, but we saw no

reason to doubt the Second Claimant's evidence, and therefore concluded that such a comment had been made. We noted however that that would have been in the context of Ms Little's role of trying to deal with the situation that was not going to change in the way the Claimants wanted it to, as the decision that the male employee should return had been taken, and in his role he was required to move between floors, using the lift to do so.

84. With regard to risk assessments, Ms Little was initially unclear as to what was being asked for, and suggested a workplace risk assessment i.e. one focussed on desk ergonomics, but then stress risk assessments were completed for both Claimants, the one for the Second Claimant was completed on 8 November 2023, and the one for the First Claimant was completed on 8 January 2024.

85. Both assessments made some suggestions around managing work patterns, but it was recognised that completely managing the risk of coming into contact with the male employee was difficult. Indeed, the First Claimant noted, in her assessment, that she was unsure on what a solution could be.

86. The risk assessment for the Second Claimant raised the prospect of the installation of a magnetic lock or "maglock", i.e. one involving the use of a card, for access to the area in which she worked on Level 4. That was pursued, and was initially rejected, we understood on the ground of cost, but was later approved, some time in 2024, following the presentation of a business case.

87. Not being satisfied with the outcomes of their meetings with Ms Little, the Claimants raised concerns under the Respondent's Resolution Policy, effectively its grievance policy. The Policy provides first for an informal stage, which, after catering for discussing the matter with the person about whom the concern is being raised, and for a facilitated discussion, neither of which were appropriate in this case, involves an informal resolution meeting. If not resolved at that informal stage one, the Policy moves to Stage 2, a formal resolution investigation involving the appointment of an Investigating Officer, the holding of a resolution hearing, and the reaching of a decision by a responsible officer. There is then scope for a further appeal.

88. The Claimants raised their concerns by way of resolution statements dated 15 and 14 November 2023 respectively. The concerns raised were about the Respondent's HR Department generally but Paul Miles, the Head of HR, was named as the person against whom the concerns were to be raised.

89. In their statements, after outlining the incident on 12 June 2023 and the way it was subsequently handled, both Claimants outlined their proposed solutions in two parts. The first was for the Respondent to change its policy so that, should a situation like theirs ever occur again, the victims of any incident or crime are considered and heard. The second noted that HR had

repeatedly said that, "*lessons need to be learned*" from the situation, but no actual apology had ever been offered. They noted that they needed to see HR taking responsibility for their errors by way of a formal apology.

90. Laura Griffiths was appointed to consider the Claimants' concerns at Stage 1, and she met the Claimants together. Ms Griffiths referred only to one meeting on 14 December 2023 in her witness statement, but the Claimants both referred to two meetings with her, on 8 and 14 December 2023, and we concluded that two meetings had taken place. Notes of the meetings were not before us, but Ms Griffiths' "Informal Resolution Record" was in the hearing bundle.

91. The discussion appeared to have added a third proposed solution, as the Record recorded the proposed solution of the employee's (we presumed that to be the male employee's) work schedule being moved, and of the Claimants being provided with sufficient notice until they remained comfortable and safe in the workplace.

92. Following the meetings, during which the Claimants amplified their concerns, Ms Griffiths sought clarification from HR on the concerns raised, and received an email with that clarification on 14 December 2023. That email was not before us, but Ms Griffiths included eleven bullet points, outlining the core elements of the HR response, in her Record.

93. In her findings and recommendations, Ms Griffiths noted that she accepted the reason provided by HR for not interviewing the Claimants, that it was not necessary due to the police investigation and the confirmation of the convictions, although she acknowledged the Claimants' frustration about the lack of interviews. Ms Griffiths also noted that the lack of records of discussions that had taken place between the Claimants and HR made it difficult to verify what had been discussed, and what lessons needed to be learned. She also noted that the Claimants had been offered support via the Respondent's Health and Wellbeing Protocol, and that counselling had been made available.

94. In terms of the outcomes sought by the Claimants, Ms Griffiths concluded, first, that she recommended that any lessons learned from this issue should inform the next iteration of the Respondent's Health and Wellbeing Protocol, although we observed that that rather missed the Claimants' point, as the Claimants were looking to a change in, or in the application of, the Disciplinary Policy.

95. Secondly, Ms Griffiths concluded that she did not consider that there had been any fault on the part of HR, but recommended that any shortcomings identified in the process, although she did not specify what they were or might have been, should be addressed appropriately by HR.

96. Finally, Ms Griffiths recommended that management, in consultation with the Respondent's Health and Safety Unit, should make a sufficient assessment of the risks to the health and safety of the Claimants whilst working in the office.

97. One particular issue arising from Ms Griffiths' meetings with the Claimants' which gave rise to one of their allegations' was a comment made by Ms Griffiths' which the Claimants considered likened the incident of 12 June 2023 to an employee receiving a speeding ticket outside work.

98. Both the Claimants confirmed that that arose in the context of them pointing out that, if they had conducted themselves in the same way as the male employee, they would have expected to have been dismissed. Ms Griffiths indicated that it arose following the Claimants raising a concern that the male employee had been convicted and yet remained in work.

99. Ms Griffiths confirmed that she did make reference to the situation of someone receiving a speeding ticket, but only as an example of a criminal offence which might not lead to disciplinary action being taken against any employee. We were satisfied that that was the context in which the comment was made.

100. Ms Griffiths completed her Record on 15 December 2023, and sent it to the Claimants on that day. The Claimants then requested the Resolution Policy be progressed to Stage 2, the formal stage.

101. Annette Parkes, a manager from a different directorate, was appointed as the Investigating Officer. She met the Claimants separately on 1 December 2023, and then conducted further interviews with several managers and HR Business Partners. That included the Claimants' line managers, the line manager of the male employee, the HR manager and the Investigating Officer involved in the disciplinary case against the male employee, and other HR managers involved in the subsequent handling of the issues. In total, 13 people were interviewed in addition to the two Claimants. Those interviews were mainly undertaken in February 2024, with three being undertaken in March, and the final one on 16 April 2024.

102. Ms Parkes then produced an investigation report spanning 42 pages, some 280 pages in total including appendices. It was not clear when the report was produced as it was not dated, and Ms Parkes did not recall the date in her witness statement, but we presumed that it was completed in early May 2024.

103. Within her report Ms Parkes noted the three main issues the Claimants wished to be addressed as follows:

    "1. A change in policy or "ensuring all elements of the Disciplinary Policy are always followed".

The potential addition to the Policy of a Wellbeing addendum which prescribes support for victims of incidents.

2. A formal apology from the Head of HR which acknowledges errors made in the process.

3. Review dates to be set for the risk assessment and management plan of the employees (again we presumed that to be the male employee's) work schedule.

   For the review to consider the impact on the complainants."

104. Having outlined her findings, Ms Parkes noted six recommendations as follows:

- "*Risk assessment and management plan needs to be reviewed at agreed regular intervals, with an agreed end date for the plan where it becomes business as usual.*

- *The managers of all three members of staff need to be involved in the risk assessment and review. Managers need to agree to share and feed into the review so that all are clear on the arrangements for the working pattern so that it is workable and practical and takes into account business needs and working arrangements of all service areas and the staff involved.*

- *Arrangements for changes to the risk assessment management plan at short notice need to be mutually agreed and shared.*

- *Remind managers in this case of the need to maintain confidentiality and how the GDPR relates to their role as managers.*

- *Consider specific mandatory management training or mentoring for all new managers above a certain grade in the authority. This will need to include the corporate expectation of the role of managers, decision making responsibility, disciplinary/resolution, available wellbeing supports and processes, stress risk assessment, environmental risk assessment etc.*

- *Further clarity is needed for all managers on the role of HR Business Partners.*"

105. The Stage 2 hearing was initially provisionally scheduled on 9 April 2024, to take place on 4 June 2024.

106. On 15 May 2024, the HR Business Partner supporting Ms Parkes in relation to her investigation wrote to the Claimants, noting that she was waiting to receive the hearing pack of documents from Ms Parkes so that they could be

collated, and that she hoped to get the pack to them by 20 May 2024. In that email it was noted that Kelly Watson, the Respondent's Head of Service for the areas which included HR, would chair the hearing.

107. The Second Claimant queried that later that day, noting that Ms Watson was responsible for the HR Service and was Paul Miles' line manager, and questioning whether that created a conflict of interest. The HR Business Partner replied that it would be usual practice for the Head of Service to be the Responsible Officer, but that she would raise the Second Claimant's concerns with Ms Watson and get back to her.

108. The HR Business Partner further replied on 16 May 2024, noting that she had spoken to Ms Watson, who did not feel that there was a conflict of interest, but was happy to take on board the Second Claimant's concerns. It was noted that if an alternative Responsible Officer was sought, it was likely that the 4 June 2024 hearing would have to be postponed.

109. The Second Claimant replied again on 16 May 2024, noting that if appointing someone other than Ms Watson would lead to a postponement, they would go ahead with her. On 20 May 2024 however, the HR Business Partner replied, noting that an alternative Responsible Officer had been secured, with the hearing then taking place on 12 June 2024. The Second Claimant confirmed that she and the First Claimant would like to go ahead on 12 June 2024, notwithstanding that it was the anniversary of the incident.

110. The alternative Responsible Officer was Claire Marchant, and the hearing went ahead as planned on 12 June 2024.

111. Ms Marchant then provided her decision to the Claimants by way of separate, but identical, letters dated 14 June 2024. In those, Ms Marchant set out the three issues identified by Ms Parkes in her investigation report, and noted her conclusions in respect of each of them.

112. In relation to issue 1, the change in the Disciplinary Policy and the addition of an addendum to the Wellbeing Policy, Ms Marchant addressed the two elements separately. With regard to the former, she referred to paragraph 3.4.7 of the Disciplinary Policy, and commented that it was considered that the Policy had been followed, as the disciplinary investigation had been to consider the suitability of continued employment and not to determine whether an incident had or had not occurred.

113. We pause there to observe that Ms Marchant appears to have failed, as did everyone else considering the Claimants' concerns, to appreciate that there were indeed facts that required to be determined in relation to the indecent exposure element of the incident on 12 June 2023. Regardless of that, Ms Marchant, again like all others, appears to have concluded that there could

then be no role for others as witnesses when the issue was the suitability of the continued employment of the employee under investigation.

114. We did not think that that, as a statement of principle, is accurate. There may be cases, and this would appear to be one, where the views of others, the "recipients", for lack of a better term, of the employee's conduct, may legitimately, indeed properly, be taken into account in that decision.

115. With regard to the Wellbeing Addendum, Ms Marchant concluded that the Claimants had been referred to wellbeing resources, including counselling, and that a specific addendum was therefore not required. She did however identify that the chair of the disciplinary panel should have considered the impact of their decision on connected employees, i.e. the Claimants.

116. We pause there to observe that that would appear almost tantamount to acceptance of the Claimants' main point, that they should have been spoken to as part of the disciplinary process, although it may be that Ms Marchant had in mind a requirement for the panel chair to address the impact subsequent to the decision.

117. With regard to issue 2, the request for a formal apology for errors, Ms Marchant again addressed two elements separately; issues relating to a lack of contact and support from HR, and issues relating to a lack of communication in relation to the disciplinary matter.

118. In relation to the former, Ms Marchant concluded that HR had acted in a timely manner, had liaised principally with the Second Claimant's line manager in respect of both Claimants, and that sources of support had been signposted.

119. With regard to the latter, Ms Marchant noted that it would not have been appropriate for HR to share information about the disciplinary process relating to another employee with the Claimants. Indeed, she seemed critical of the amount of information that was shared, although as we noted it did not appear, even now, that the Claimants are aware of the disciplinary sanction imposed on the male employee. Their fundamental concern was that he had not been dismissed, which was always going to be self-evident once he had returned to work.

120. With regard to issue 3, the setting of review dates for the risk assessment and the male employee's management plan, and for the review to consider the impact on the Claimants, Ms Marchant noted that there had been inconsistencies in the way that risk assessments had been carried out, and that a collaborative approach was required to ensure their alignment. She concluded that the assessment had not been done as effectively as was necessary, and therefore upheld this element of the Claimants concerns.

121. In her letters, Ms Marchant reminded the Claimants of their ability to appeal the decision to the Group Manager, Human Resources and Organisational Development, who was in fact Paul Miles, the person who was named as the subject of the Claimants' original concern. The Second Claimant confirmed that that, in the Claimants view, was a further example of a conflict of interest, although, as was pointed out by Ms Marchant in her oral evidence, the appeal stage under the Resolution Policy is to a panel of councillors, and Mr Miles would only have had an administrative role in relation to any appeal. Ultimately the Claimants did not appeal the issue any further, they had already commenced the process of early conciliation with ACAS, and submitted their Tribunal claim on 26 June 2024.

## Conclusions

122. Taking into account our findings of fact and the applicable legal principles, our conclusions in relation to the matters we had to determine were as follows:

123. Before looking at each of the complaints in turn, and the specific allegations in relation to each of them, we make an overarching comment that, as may be clear from our findings, whilst there are aspect of the way the Respondents handled the concerns raised by the Claimants which are worthy of criticism, our focus had to be on whether any such issues were because of, or were related to, sex. In most cases we concluded that they were not. That should not be taken to indicate that the Respondent acted appropriately in relation to them, only that we did not consider that there had been the required connection of the Respondent's acts or omissions to sex.

124. We dealt with each complaint in turn.

Sexual harassment

125. As with any harassment complaint, our focus was, first, on whether the alleged acts happened and, if so, whether they were unwanted. We then moved to consider whether, in the context of this complaint, it was conduct of a sexual nature, and then whether it had the purpose or effect of violating the Claimants' dignity or of creating the required intimidating etc. environment.

126. In the context of this complaint we also had to consider the specific issue of whether the Respondent was vicariously liable for the actions of the male employee on 12 June 2023, i.e. of whether, pursuant to section 109 of the Equality Act 2010, the act was done in the course of the male employee's employment.

127. Taking those points in turn, we were satisfied that the act complained of happened in fact, i.e. that the male employee did expose himself to the Claimants whilst they were in a vehicle parked outside the Second Claimant's home on 12 June 2023.

128. Mr Lewis-Bale, in his closing submissions on behalf of the Respondent, focussed on the fact that the criminal prosecution in relation to the incident was for the public indecency element of the male employee's urination in public, but the fact that the Police and/or the Crown Prosecution Service did not, as it appears, seek to prosecute the male employee for indecent exposure on 12 June 2023 does not mean that that did not happen.

129. Whatever the thought processes of the Police and/or the CPS, and we find it difficult to understand why the indecent exposure charge was not pursued, bearing in mind that there were two witnesses ready and willing to attest to what happened, the Claimants were both clear about the events of 12 June 2023, both in their statements to the Police the next day, and in the information provided to the Respondent.

130. That was that, whilst they had originally observed the male employee in the act of urination, at which point any exposure might have been viewed as incidental, the exposure continued to the point where, on any reasonable view, it became indecent. We were satisfied therefore that the Claimants description of events was accurate.

131. It was then a straightforward task to conclude that the conduct was unwanted. The Claimants made that clear by reporting it to the Police and their employer, and they have continued to make that very clear at all times up to and including this hearing.

132. It was also clear to us that the conduct was of a sexual nature. As we have noted, it went beyond urination to the point where it clearly, in our view, became indecent exposure, and indecent exposure is included at Section 66 as an offence under the Sexual Offences Act 2003.

133. With regard to the purpose or effect of the conduct, it seemed to us likely that the male employee had intended to cause offence to the Claimants as he walked towards the car with his penis exposed, although we did note that he was intoxicated at the time, which may have had a bearing on that.

134. Regardless of that, it was very clear that the conduct had the effect of violating the Claimants' dignity. They clearly perceived that it had that effect, and, as has been clear during the course of this hearing, they still perceive it. We were also satisfied that, objectively, it was reasonable for the conduct to have had that effect.

135. To this point therefore, infringement of Section 26(2) of the Equality Act had been made out, A, the male employee, engaged in unwanted conduct of a sexual nature which had, at least, the effect of violating B's (in this case the two Claimants') dignity.

136. However, the Claimants did not bring a complaint against the male employee, their complaint was only against the Respondent, and the Respondent would

only be liable if, pursuant to Section 109 of the Equality Act, the male employee's act was done in the course of his employment. If it was, it would then have to be treated as also done by the Respondent as his employer, and, as noted by Section 109(3), it does not matter then whether it was done with the Respondent's knowledge or approval. In this case however it was clear that the male employee's actions were not done with the Respondent's knowledge or approval, so our focus was on whether they had been done in the course of his employment.

137. We took into account the guidance of the Appellate Courts in the ***Jones***, ***Waters*** and ***Davies*** cases, and concluded that the male employee's acts had not taken place during the course of his employment.

138. The acts occurred late at night, long after the duties of the male employee and the Claimants had ended. It happened away from the workplace, and the male employee was not wearing any form of uniform or insignia which might have indicated that he was employed by the Respondent.

139. The Claimants accepted that the employee's presence at the Second Claimant's parents house was a matter of coincidence. He did not know either of them, nor did he know where either of them lived or were staying. Indeed, it appeared that of the two Claimants, only the Second Claimant knew that the male employee was employed by the Respondent.

140. Bearing in mind that the Appeal Courts in ***Waters*** and ***Davies*** concluded that acts occurring away from the workplace, in terms of both location and time, could not be said to have been in the course of employment, even where the two parties were known to each other, it appeared to us that this case was even further removed from the course of employment.

141. Ultimately therefore, whilst the required elements of Section 26(2) of the Equality Act were very clearly made out as far as the male employee's acts were concerned, we did not consider that they had been done in the course of employment such that the Respondent could be liable for them. The Claimants' complaint of sexual harassment therefore failed.

<u>Harassment related to sex</u>

142. Similar to our consideration of the sexual harassment complaint, our focus again was, first, on whether the thirteen alleged acts had taken place in fact, and then, if so, whether they amounted to unwanted conduct. We then focussed on whether any acts which we considered amounted to unwanted conduct were related to sex.

143. In that regard, we noted that paragraph 2.3 of the List of Issues indicated that we should consider in the alternative whether the acts were of a sexual nature. However, we noted that none of the acts complained of included anything which might fall within the scope of acts of a sexual nature as

outlined in the EHRC Code and Technical Guidance. Our focus was therefore on whether any acts of unwanted conduct related to sex.

144. In relation to any acts that we concluded were so related, we then moved to consider whether they had the purpose or effect of violating the Claimants' dignity or of creating the prohibited environment. We considered each allegation in turn.

*Issue 2.1.1*

*On or around 15 June 2023 decide a managerial meeting was an appropriate sanction for the employee who had committed the acts on 12 June 2023 ("the employee");*

145. We were satisfied that there had, at least initially, been a decision that a managerial meeting or discussion was an appropriate sanction for the male employee. The email of 15 June 2023 said in relation to further action "*the [ male employee] will be spoken to via a "Management Discussion"*", and those words are not capable of being interpreted as anything other than the indication of a decision that that course of action was to be followed.

146. We were also satisfied that the decision amounted to unwanted conduct. From the Claimants' perspective, they had raised concerns about serious misconduct, which included that a sexual offence had been committed, and they, throughout that process, wanted that dealt with by way of formal disciplinary action.

147. Even though the decision changed the following day, when it was decided that a disciplinary investigation would be undertaken, at the time it was unwanted.

148. We were not however satisfied that the conduct related to sex. We were conscious that the Respondent's mistaken perception, which they appeared to be under throughout the process, was that they were only dealing with an act of public urination in relation to the events of 12 June 2023. We were further conscious that the male employee was a disabled person with a learning difficulty, and we considered that the Respondent's decision at that stage to proceed by way of a management discussion arose from those factors and not from the Claimants' sex. Whilst motive, whether conscious or sub-conscious, is not relevant to a harassment complaint, we nevertheless, taking account of the EAT's guidance in ***Warby***, considered that those aspects provided important context to the allegation and we concluded that the decision was not related to sex.

*Issue 2.1.2*

*From 15 June 2023 fail to provide the Claimants with a safe working environment or expose them to an environment of the proscribed nature under s26 by requiring them to work in the same building as the employee;*

149. We noted that, certainly from October 2023, the Claimants were required to work in the same building as the male employee, and that, although steps were in place to minimise the prospect of the Claimants and the male employee encountering each other, it seemed to have been accepted by all concerned that that prospect could not be totally extinguished. Potentially therefore, the Respondent did fail to provide the Claimants with a safe working environment, or certainly with an environment that they themselves considered sufficiently safe, which it appeared would only ever have arisen when the male employee was excluded from the work location.

150. We were also satisfied that that conduct was unwanted. The Claimants were always clear that had they felt their work environment was unsafe for as long as there was potential for them to encounter the male employee, and therefore anything short of the removal of that potential was unwanted by them. Again however, we were not satisfied that that conduct related to sex

151. In relation to this allegation, we noted that the male employee could only work in the Civic Centre, and, by the nature of his work, would travel between floors and departments. Once the Respondent had taken the decision not to dismiss the male employee, any steps it took in relation to the Claimants' working environment were bound to be impacted by those requirements, and it was that which led to any failures in the provision of a safe working environment, not sex.

*Issue 2.1.3*

*Between June – October 2023 refuse to interview the Claimants as part of the employee's disciplinary process on basis their testimony was irrelevant;*

152. Again, as a matter of fact, the Respondent did refuse to interview the Claimants as part of the male employee's disciplinary process between June and October 2023, when that process was concluded.

153. As we have already indicated, we considered that that approach was a mistaken one, as the issues raised by the Claimants were broader than those taken forward by the Respondent. Had the disciplinary allegations included the full extent of the concerns raised by the Claimants, i.e. extending beyond those dealt with as criminal charges, then there would have been "alleged misconduct" which would have led, under the Respondent's Disciplinary Policy, to the Claimants being relevant witnesses.

154. Beyond that, the Claimants also, in our view, appeared to be relevant witnesses with regard to the suitability of the male employee remaining in employment, as, as they have always steadfastly maintained, they were impacted by that. The decision not to interview the Claimants was therefore clearly unwanted by them.

155. Again however, we did not consider that the decision was related to sex. Whilst a sexual offence formed the backdrop to the decision, it was not the cause or focus of it. The actual focus of it was the Respondent's view that they should deal with the allegations as the police had dealt with them, which, in the context of the incident of 12 June 2023, was only an allegation of urination in public. The Claimants accepted that had that been the only issue arising from 12 June 2023 then, following the male employee's guilty plea, there would have been no need for their involvement.

156. The fact that that approach was a mistaken one, for the reasons we have outlined, does not alter the fact that that was what led to the decision. Again it was not related to sex.

*Issue 2.1.4*

*In October 2023 fail to apply the code of conduct that provides criminal behaviour outside the workplace will not be tolerated and permitting the employee to return to work;*

157. It was not entirely clear to us what the actual Code of Conduct referred to here was. No specific Policy or section of a Policy was brought to our attention, and whilst we noted that there was a Code of Conduct Policy in the hearing bundle, it did not include anything which stated that criminal behaviour outside the workplace would not be tolerated. We thought it more likely that the Claimants had in mind here the inclusion of criminal conduct outside work as an example of gross misconduct within the Respondent's Disciplinary Policy. We were not however satisfied that the Respondent had failed to apply anything which might be considered to be a Code of Conduct which provided that criminal behaviour outside the workplace would not be tolerated.

158. The Disciplinary Policy noted that acts of gross misconduct would lead to summary dismissal unless there were clear and mitigating circumstances. As we have noted, we were not provided with any information as to what clear and mitigating circumstances were considered to have applied so as to lead to the male employee not being summarily dismissed. We surmised that it was likely the male employee's learning difficulties may have been a factor, as may have been the fact of his intoxication.

159. The Policy does however cater for the sanction of summary dismissal to be mitigated, and there was no indication of any failure by the Respondent to

apply any element of anything that might be considered to be a Code of Conduct. We were not therefore satisfied that this allegation had been made out in fact.

*Issue 2.1.5*

*From the employee's return to work on or around October 2023 fail to conduct appropriate risk assessments as to the safety and exposure of the claimants working in the same building as the employee;*

160. We were satisfied that the Respondent had failed to conduct appropriate risk assessments on the male employee's return to work in October 2023. To start with, the risk assessment for the male employee focussed on what were referred to as "*support measures*" for him. The risks of him committing further sexual offences, and the impact of that on the Claimants, or indeed other female employees, were not addressed, other than by advising him that his behaviour towards females needed to be appropriate.

161. No assessment of the exposure to risk of the Claimants was originally planned at all, and it was only when pushed for by the Claimants and the Claimants managers, during the meetings with Helen Little in October 2023, that any steps were taken. Then, whilst the Second Claimant's assessment was undertaken in November 2023, the First Claimant's was not undertaken until January 2024, after the First Claimant and her managers experienced difficulties in getting hold of the appropriate form. There were then further difficulties for the Second Claimant in getting a maglock installed on Level 4, which was only installed after significant pressure from the Second Claimant's manager.

162. We were therefore satisfied that this allegation had arisen in fact, and again we were satisfied that it was clearly unwanted by the Claimants. They wanted that exposure to the risk of harm to be managed, and a full assessment of risk, both of the male employee committing further misconduct, and to the Claimants as recipients of such conduct, would have helped.

163. We turned then to the question of whether that unwanted conduct related to sex, and this time concluded that it was. We were conscious that the Claimant's position was that of the recipients, indeed the victims, of a sexual offence, and whilst we considered, in relation to the first four allegations, that that amounted only to the backdrop to the alleged acts, in this case it was more central.

164. In that regard, we noted that female employees are inherently more vulnerable in relation to the commission, or simply the prospect of the commission, of sexual offences, and we considered that the failure to adequately address risk in that area did relate to sex.

165. We moved then to consider whether that conduct had the purpose or effect of violating the Claimants' dignity, or of creating the prescribed environment. We saw nothing to suggest that there had been any purpose. In other respects, the Respondent was quick to signpost support services and to provide counselling, and we did not consider that there had been any intention to create the proscribed environment.

166. However, we were satisfied that the conduct had the effect of creating the proscribed environment. The Claimants clearly perceived that it did, and we were satisfied that, in all the circumstances, it was reasonable to conclude that the conduct had had that effect. The Claimants' potential vulnerabilities were left unaddressed for quite some time, and were only addressed at their, and their managers', instigation, and, even, then it took a long time for them to be addressed. This allegation was therefore made out as an act of harassment related to sex.

*Issues 2.1.6, 2.1.7 and 2.1.8*

*From October 2023 to date requiring the Claimants to adjust their working patterns to go into work when the other employee was not there;*

*From October 2023 requiring the Claimants to email several different employees in the Respondent's HR department to make those working arrangements;*

*From October 2023 tell the Claimants to avoid using stairs and lifts as a way of limiting contact with the other employee whereas the employee was not provided with any such instruction;*

167. Our conclusions in relation to these three allegations were very similar and we therefore dealt with them together.

168. We were satisfied that the Respondent did, to a degree, require the Claimants to adjust their working patterns to go into work when the male employee was not there, although his working pattern was also adjusted.

169. We were also satisfied that the Respondent required the Claimants potentially to email several employees in the Respondent's HR Department to make alternative working arrangements, i.e. when they wanted to attend the office on days when the male employee usually worked. We noted however, that that contact would be sequential, and that the Claimants would only need to contact a second or third member of the HR Department if the first or second were not available.

170. We were also satisfied that Helen Little had told the Claimants, certainly the Second Claimant, to avoid lifts and stairwells as a way of limiting contact with

the male employee. We did not however consider that the direction had been to avoid using stairs, only stairwells, i.e. the landings on each floor, which we presumed would be near the lifts as the male employee used a trolley which, in our view, would generally have led to him using lifts rather than stairs.

171. We were further satisfied that the directions were unwanted as far as the Claimants were concerned. They wished to undertake their duties freely, without restrictions and without any requirement to make advance arrangements. However, in relation to all three of these allegations, we noted that the direction or advice was simply a consequence of the decision that the male employee should not be dismissed, and then of the work he was to carry out and the way in which he was to carry it out.

172. The Claimants were both located, when in the office, in one location, and whilst they would no doubt move around the building from time to time, would generally be limited to that location. By contrast, the male employee had a job which did not just involve him moving around the building, it required him to move around the building with a trolley, which necessitated the use of the lifts. In the circumstances, we considered that the direction or advice given in relation to all three allegations derived from the specific work circumstances and were not related to sex.

*Issue 2.1.9*

*By treating meetings with the Claimants at the end of October 2023 as a "tick box exercise", with the HR adviser not being aware of the full details of the incident on 12 June 2023;*

173. As noted by Helen Little in her interview with Ms Parkes during her investigation, the question of whether the meetings she held with the Claimants in October 2023 were a "tick box exercise" or not ultimately boils down to an individual point of view. The Claimants very much perceived them as such, whereas Ms Little, as she noted to Ms Parkes, wanted to speak to the Claimants as she was aware they were unhappy and she wanted to understand their feelings.

174. Ultimately, in view of the position of the respective parties, i.e. the Claimants on the one hand, and the Respondent corporately and Ms Little specifically on the other, the meetings were never likely to lead to a satisfactory resolution.

175. The Claimants were concerned that they had not been interviewed and that the male employee had not been dismissed, whereas Ms Little, and by extension the Respondent, was satisfied that interviewing the Claimants had not been required, and that the decision not to dismiss the male employee had been an appropriate one.

176. Ultimately, regardless of the question of whether or not the meetings had been a "tick box exercise", and even if it was accepted that they had been, and that amounted to unwanted conduct, we did not consider that any such conduct could be said to have been related to sex. As we noted in relation to issue 2.1.3, the Respondent's, in the form of Helen Little's, approach to the meeting was informed by its overall view of the disciplinary process and decision, and not by issues of sex.

*Issue 2.1.10*

*In October 2023 by Helen Little advising the claimants they should "simply bump into the employee and get it over with";*

177. We were again satisfied that this allegation happened in fact, as Helen Little herself confirmed to Ms Parkes that she had said something along those lines.

178. We were also again satisfied that the comment involved unwanted conduct. The Claimants essentially wanted not to have to encounter the male employee at all, so to be told that they should "bump into him and get it over with" was bound to be unwelcome to them.

179. With regard to the question of whether that conduct was related to sex, we considered that there were parallels to our conclusion in relation to issue 2.1.5. We noted again that the Claimants had been the victims of a sexual offence, and we again noted the particular position, in general, of women in such circumstances. We considered that the instruction, however well intentioned, failed to take account of the Claimants' position as victims of a sexual offence, and of the particular sensitivities that they faced, which women in general would be more likely to face, in their circumstances. In our view therefore, this allegation was also related to sex.

180. Whilst again, we saw nothing to indicate that there had been any purpose behind the comment in terms of creating the prescribed environment. To the contrary, as we have noted, it appeared to have been a well-intentioned, albeit misguided and inappropriate comment.

181. We were however, satisfied that it had the effect of creating the prescribed environment. The Claimants clearly perceived it as such, and we were satisfied that, in all the circumstances, which put the onus on the Claimants, as women, to resolve matters, it was reasonable to conclude that it had that effect.

*Issue 2.1.11*

*By the investigating officer Laura Griffiths appointed in relation to a grievance brought by the Claimants, in November 2023, likening the 12 June 2023 incident to an employee receiving a speeding ticket outside work;*

182. Whilst we were satisfied that Ms Griffiths had referred to a speeding ticket offence in her discussion with the Claimants, we did not consider that, in doing so, she had likened such an offence to the incident on 12 June 2023. As we noted in our findings, we considered that Ms Griffiths had simply used a speeding ticket offence, as an example of a criminal offence which would not be likely to lead to disciplinary action, as a response to the Claimants' contention that the male employee should have been dismissed. We did not therefore consider that this allegation had been made out in fact.

*Issue 2.1.12*

*By initially appointing the Respondent's Head of HR's line manager as Chair of the Grievance Panel;*

183. The Respondent did, as a matter of fact, initially appoint the person who was the Head of HR's line manager as the Responsible Officer in relation to their grievance. Such a step would however not be at all unusual. Indeed, very often, the decision makers in disciplinary and grievance processes will be directly higher up in the line management structure from the persons under scrutiny.

184. Regardless of that, the Claimants did consider that that involved a potential conflict of interest so therefore considered it to be unwanted, although we did note that they were prepared for the particular manager to act as the Responsible Officer if the grievance hearing would otherwise have been delayed.

185. We did not see however, that the act had any relation to sex. It was simply a standard step taken by the Respondent, which in the eyes of many would not have been controversial. We also noted that the Respondent, whilst maintaining that there was no conflict of interest, did not insist on the particular manager dealing with the hearing, and did instead source another manager.

*Issue 2.1.13*

*By reaching a decision, on 12 June 2024, that the Respondent's HR Team had properly followed the relevant policies, despite the evidence being presented by the Claimants.*

186. Ms Marchant, the person sourced to act as the Responsible Officer, did reach a decision that the Respondent's HR team had promptly followed relevant policies and, as we have noted, we were of the view that that was an inappropriate conclusion in the circumstances. To that extent therefore, this allegation did happen in fact.

187. It was clear that that was unwanted by the Claimants, as they were expressly looking for a conclusion that the policies had not been applied correctly, and for an apology for that, which they did not get.

188. However, as with the majority of the issues, we did not see that that conduct was related to sex. As we have noted in relation to issues 2.1.3 and 2.1.9, Ms Marchant's approach was informed by her view of the disciplinary process that was applied in relation to the male employee, and not by issues of sex.

189. In conclusion, in relation to the complaint of harassment related to sex, we were satisfied that issues 2.1.5 and 2.1.10 amounted to unlawful acts of harassment, but that the other allegations did not.

Direct sex discrimination

190. Our initial focus here was again on whether the alleged acts happened in fact. Our conclusions on the factual matters pursued as part of the harassment complaints apply equally here, and we do not need to repeat them. We found that the majority of the alleged acts did happen in fact.

191. Our focus then moved to whether any of the alleged acts we found happened involved less favourable treatment, that occurred, or would have occurred, in relation to appropriate comparators because of sex.

192. With regard to the comparison, section 23(1) of the Equality Act provides that there must be no material difference other than, of course, the difference in protected characteristic of sex between the Claimants and any comparator. In this case the Claimants relied on the male employee as a comparator in relation to the eighth issue, and a hypothetical comparator in relation to all the other issues.

193. With regard to the eighth issue and the male employee, we did not consider that he could be considered to be an appropriate comparator for the purposes of Section 23(1). There were a number of reasons for that. He had a job which required him to be in the Respondent's premises at all times, whereas the Claimants could, and largely did, work from home on a hybrid basis. His role required him to be peripatetic within the Respondent's Civic Centre, as he had to travel around all floors, whereas the Claimants predominantly worked in one area, and he generally used a trolley for work, which necessitated his use of the lift, whereas the Claimants did have the option of using the stairs.

194. Consequently, in terms of the eighth issue, the male employee's circumstances were materially different to those of the Claimants.

195. Turning to the question of a hypothetical comparator, we found the task of constructing a hypothetical comparator difficult. There were a range of possible options.

196. One would be to look at male employees experiencing an act of indecent exposure by a female person, but we considered that a man's experience in such circumstances would have been likelier to have been qualitatively different to a woman experiencing indecent exposure by a man.

197. We then looked at male employees experiencing an act of indecent exposure by a male person, but, again, we considered it likely that a man's experience in such circumstances would have been qualitatively different to a woman's.

198. We looked at a possible comparator of a man being subjected to a sexual offence generally, by a woman, or indeed a man, but still felt that the experience of a man compared to a woman would have been likely to have been materially different.

199. Finally, we looked at the possible comparator of a man who experienced another criminal offence, such as a common assault, i.e. an act which caused them to fear that they were about to be subjected to unlawful physical harm. We were conscious that, as well as being subjected to indecent exposure on 12 June 2023, it could also have been said that the Claimants had been subjected to common assault when the male employee banged on the door and window of the car and tried to open it.

200. We felt that this option perhaps came closest to the construction of a valid comparator for the purposes of Section 23, but we were still conscious that the crux of the Claimants' concerns, arising from the events of the night of 12 June 2023, was that they had been subjected to a sexual offence, so we still considered that such a comparator would not fall within the terms of Section 23(1).

201. Ultimately, we considered that the better approach would be, as suggested by the House of Lords in ***Shamoon*** and the Employment Appeal Tribunal in ***Laing***, to focus on the second stage of the test, i.e. the reason why the Claimants were treated as they were.

202. In that regard, as we noted in relation to the harassment complaint, except for the fifth and tenth issues, we did not consider, if made out in fact, that any allegation was related to sex. In respect of those issues, i.e. all bar the fifth and tenth, and for the same reasons, we also did not consider that any act or omission was because of sex.

203. We were also conscious of the guidance from ***Bailey*** and ***Khan*** that our focus in relation to direct discrimination complaints also needed to include an assessment of the mental processes or motivation of the alleged discriminator.

204. We did not consider that the Respondent generally, or any of the individuals involved in relation to the specific allegations such as Ms Little or Ms Griffiths, were in any way motivated by the Claimants' sex in relation to the decisions

they took. They were instead motivated by the mistaken beliefs that they were only dealing with an allegation of public indecency from the events on 12 June 2023, and that they were then restricted under the Disciplinary Policy from interviewing the Claimants. They were also, we thought, motivated by the circumstances of the male employee as someone with a learning difficulty, i.e. by his position as a disabled employee, and not his position as a male employee.

205. We then looked specifically at the two issues of harassment related to sex that we had considered were well-founded; the fifth issue of failing to conduct appropriate risk assessments, and the tenth issue of suggesting that the Claimant should simply bump into the male employee and get it over with.

206. We concluded in relation to those two issues that they were related to sex, due to the connection of them to the Claimants' position as victims of a sexual offence, a position which we felt more clearly impacted on the Claimants as women than did any of the other allegations.

207. In relation to the direct sex discrimination complaint however, we had to be satisfied that the acts were because of sex, which included, as we have already noted, consideration of the reason, as noted in ***Khan*** the "real reason" or the "core reason" for the acts concerned.

208. In that regard, as we noted in relation to the harassment complaint, we concluded that whilst the two acts had the effect of violating the Claimants' dignity or of creating the proscribed environment, we did not consider that there was anything which indicated that there had been any purpose of doing so.

209. In our view, that conclusion fed into our assessment of the direct discrimination complaint. As we have already noted, we felt that the Respondent was motivated to act in the way that it did due to the mistaken assessment of the nature of the offence of 12 June 2023, and the mistaken interpretation of the Disciplinary Policy, together with taking into account (possibly to an excessive degree) of the circumstances of the male employee as someone with a learning disability.

210. Ultimately therefore, we did not consider that any of the allegations amounted to acts of direct sex discrimination, and that complaint therefore fell to be dismissed.

## Remedy

211. With regard to remedy, we noted that, as the Claimants had remained in employment, and had not suffered any losses of salary or other benefits, our focus was purely on injury to feelings, and any interest that would arise from any injury to feelings award.

212. We noted the guidance provided by the Court of Appeal in ***Vento***, and took into account the evidence provided by the Claimants about the impact on them of the treatment we had concluded had been discriminatory.

213. Whilst the claimants had clearly been upset by their experiences, and remained upset by them, the thrust of that upset related to their experiences on the night of 12 June 2023, and the Respondent's failure to involve them in disciplinary proceedings arising from that night. As we have noted, we did not consider that any of the Claimants' specific complaints relating to those matters involved discrimination.

214. We also took on board the EAT's guidance in ***Johnson*** that; awards should not be so low as to diminish respect for the policy of the discrimination legislation, but, on the other hand, should not be so excessive that they may be regarded as untaxed riches; and that awards should bear some broad general similarity to the range of awards in personal injury cases.

215. In that regard, we noted that the level of award arising in respect of psychiatric damage in less severe cases should be between £1,880 and £7,150. We further noted that the lower ***Vento*** band, in relation to the dates of acts arising in this case, was £1,200 to £11,700.

216. Ultimately, and assessing matters as best we could, we considered it appropriate to order the Respondent to pay each Claimant the sum of £5,000 in respect of injury to feelings. Interest then felt to be added to that sum, which was calculated as £801.90 in each case, which led to an order that the Respondent be ordered to pay each of the Claimants the total sum of £5,801.90.

Authorised for issue by
Employment Judge S Jenkins
26 January 2026

Sent to the parties on:

5 February 2026
For the Tribunal Office:

Miriam Drake