

Neutral Citation Number: [2026] EAT 115

Case No: EA-2024-001064-TH

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 30 July 2026

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS
MISS GLORIA MILLS CBE
MRS GEMMA TODD

Between:

MISS AB

Appellant

- and -

GH LIMITED

Respondent

Jack Stuart (instructed by **NLS Legal**) for the **Appellant**
Graeme Lomas (representative from **Citation Limited**) for the **Respondent**

Hearing date: 7 July 2026

JUDGMENT

SUMMARY

Unfair Dismissal, Victimisation, Harassment.

When dismissing claims of harassment related to sex or of a sexual nature, the ET had not erred in its treatment of consent and capacity to consent. When finding that it would not be just and equitable to extend time, the ET had not failed to consider any significant factor.

Section 26 of the Equality Act 2010 does not use the word “consent” in the definition of harassment or of sexual harassment. However, consent is relevant to the question of whether conduct of a sexual nature is “unwanted” within the meaning of the Act and it is also relevant to the factors which by sub-section (4) must be taken into account. If there is an imbalance of power, sexual conduct may be “unwanted” even though consent has been given. (Paras 11-12 of the judgment.)

There may be cases in which a person is so drunk that they lack the capacity to consent, but if a person is drunk, even very drunk, and gives consent, the consent is valid even though it is “a drunk consent”: *R v Bree* [2008] QB 131, [2007] EWCA Crim 804. The fact that a different judgment would have been made if the person had not been drunk does not mean that the consent is not valid. These are ultimately questions of fact. (Paras 30 and 33 of the judgment.)

The word “unwanted” in section 26 is a plain, English word easily understood by everyone. It does not need a gloss. There is a risk that substituting words for the statutory words (such as “unwelcome” or “uninvited”) will change the meaning, at least for some readers, and that would be wrong. Para 7.8 of the Equality and Human Rights Commission’s Equality Act 2010 Code of Practice on Employment (2011) considered. (Paras 13-15 of the judgment.)

THE HONOURABLE MR JUSTICE GRIFFITHS

Anonymisation and reporting restrictions

1. An order has been made under Rule 23 of the Employment Appeal Tribunal Rules 1993 (as amended) that AB, YZ and GH Ltd be not identified in the course of or by reference to these proceedings save by those acronyms.

The appeal

2. This is an appeal against a decision of the Employment Tribunal dated 2 July 2024 dismissing the appellant's claims of harassment related to sex or of a sexual nature in relation to her dismissal, and her complaint of unfair (constructive) dismissal, and her complaints of harassment related to sex or of a sexual nature and of victimisation prior to her alleged constructive dismissal.

3. The decision followed a five-day full merits hearing before an Employment Judge sitting with members ("the ET"). The decision was reserved and a day was set aside for deliberations. The written decision, including reasons, ("the Reasons") is 38 pages long. The decision considered eight allegations of sexual harassment contrary to section 26 of the Equality Act 2010 on dates between 17 December 2021 and 17 November 2022, one allegation of victimisation on 21 November 2022, and a claim that the appellant had been unfairly constructively dismissed because of the previous matters. She resigned on 23 March 2023, giving two months' notice, and her employment ended on 18 May 2023.

4. The ET dismissed all the complaints. It found that the first allegation of harassment (which is the sole subject matter of the appeal) was not proved. It found as a fact that the conduct complained of did not take place in the way the appellant alleged, and, further, that the conduct which did take place was not "unwanted" as required by section 26. It also dismissed all the other allegations of harassment and of victimisation (and there is no appeal in respect of those matters). It also found that the appellant had not, in fact, been constructively dismissed and that, even if she had been, she had affirmed the contract by continuing to work and accepting promotion in the course of a long period after the original incident complained of. It found that, in any event, all the claims arising before her resignation were out of time and it would not be just and equitable to extend time in respect of those claims. Therefore, only the claims of unfair dismissal and constructive dismissal were brought in time, and they were dismissed on their merits. All the claims of harassment related to sex and the claim of victimisation were brought out of time but the ET also found that they failed on their merits.

5. Ground 1 of the appeal is that the ET should have considered consent when determining whether YZ's conduct on 17 November 2021 was unwanted (this was the first allegation of sexual harassment) and that it failed to do so and thereby misdirected itself and misapplied the law relevant to section 26 of the Equality Act 2010.

6. Ground 2 of the appeal is that the ET failed to consider a significant factor when assessing whether it would be just and equitable to extend the time limits for the appellant to bring those claims which were out of time.

The law

7. Section 26 of the Equality Act 2010 provides:

“26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (...)
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

8. “Unwanted” must mean unwanted by the person who suffers the conduct in question. Per Lady Haldane in *Greasley-Adams v Royal Mail Group Ltd* [2023] ICR 1031, [2023] EAT 86 at para 20:

“Giving the language of s.26 its plain meaning makes it clear that the test is a cumulative one. By that I mean that it is stated that A harasses B if, firstly, they engage in unwanted conduct, secondly that the conduct has the effect of violating B's dignity (for present purposes) and that in deciding whether the conduct has that effect, ‘each of the following *must* (my emphasis) be taken into account...a. the perception of B, b. the other circumstances of the case, and c. whether it is reasonable for the conduct to have that effect.’ In other words, the perception of the person claiming harassment is a key and indeed mandatory component in determining whether or not harassment has occurred.”

9. The subjective element imported by the word “unwanted” was helpfully made salient by the judgment of Underhill LJ in *Pemberton v Inwood* [2018] ICR 1291, [2018] EWCA Civ 564 which also demonstrated that, in addition to a subjective test, there is a subsequent objective test, as a result of the wording of section 26. He said, at para 88 (with his own emphasis):

“In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider *both* (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.”

(In a footnote, Underhill LJ described his phrase “adverse environment”, as “shorthand (...) for the cornucopia of epithets deployed in the statute. Although it is a convenient shorthand, it is important not to lose sight of the force of the particular adjectives used: see *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390, per Elias LJ at para. 47”.)

10. The statutory definition of harassment is taken from the Equal Treatment Directive (Directive 2002/73/EC, amending Council Directive 76/207/EEC) which amended Article 2 in the following terms:

“Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. For the purposes of this Directive, the following definitions shall apply:

(...)

- harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,

- sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.”

11. The word “consent” is not used in the statutory definition of harassment or of sexual harassment. However, consent is relevant to the question of whether conduct of a sexual nature is “unwanted” within the meaning of the Act and it is also relevant to the factors which by sub-section (4) must be taken into account. Conduct, including sexual conduct, for which consent has been given will often not be conduct which in the subjective judgment of an employee is “unwanted”. However, it is possible that consent is given to sexual conduct which is nevertheless “unwanted”, for example in the context of an employment relationship in which there is an imbalance of power. In that case, consideration will also have to be given to whether the conduct, which is “unwanted” but to which consent has been given, satisfies the objective test of whether it was reasonable for the conduct to be regarded as violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. The giving of consent may be relevant to that too.
12. To say that consent is relevant to these questions is not to say that consent will be determinative of them in every case. The giving of consent makes it much less likely that the conduct was “unwanted” and, if it was not unwanted, there is no claim under section 26. But the conduct may be “unwanted” even if consent is given, and then the objective question has to be considered. The giving of consent makes it less likely that it is reasonable for conduct to be regarded as violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. But a lot will depend on what the statute itself refers to as “the other circumstances of the case”. A free and enthusiastic consent is almost certain to fail both the subjective and objective requirements of section 26. But an obviously reluctant consent, especially from a junior employee to one in a position of power, might not.
13. In the present, case, the ET Reasons (at paras 7 and 9) referred to the Equality and Human Rights Commission’s Equality Act 2010 Code of Practice on *Employment* (2011). At para 7.8, the Code of Practice says:

“The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’.”
14. The Code of Practice was issued under section 14(1) of the Equality Act 2006 (as amended by the Equality Act 2010) and was brought into force by the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment and Equal Pay) Order 2011 (SI 2011/857). By section 15(4)(b) of the Equality Act 2006, the Code of Practice “shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.”
15. Although unwelcome or uninvited conduct may well be “unwanted” conduct, however, it may be confusing to say it is “essentially the same”. Uninvited conduct might, in fact, be welcome: that would be a question of fact and would depend on the evidence. It will usually be best to focus on the words of the statute, and not to substitute the words “unwelcome” or “uninvited” for the statutory word “unwanted” which is a plain, English word easily understood by everyone. It does not need a gloss. There is a risk that substituting words for the statutory words will change the meaning, at least for some readers, and that would be wrong.

The findings of the ET

16. Important context for this appeal is that the ET's factual findings are not challenged by the appellant. The principal ground of appeal (which is that the ET erred in law in its handling of issues about the claimant's capacity to consent when intoxicated) is argued within the context of the ET's factual findings and not by way of challenge to any finding of primary fact. This was a realistic concession on behalf of the Appellant, in circumstances where the appeal is against a reserved decision which made detailed findings of fact, carefully setting out the evidence upon which they were based, and explaining, on matters in dispute, why the ET reached the conclusions that it did.
17. The Appellant's case in relation to the first allegation of harassment, which is the subject matter of the appeal, is that, after the Respondent's Christmas party on 16 December 2021, YZ sexually assaulted her at the hotel in which they were both staying.
18. The ET's findings of fact on this incident included the following:
 - i) The Appellant's evidence was sometimes demonstrably inaccurate or unreliable and, whilst the ET stressed that it did not find her to be deliberately dishonest or lying, it approached her evidence with caution and could not simply accept what she said as an accurate account. Instead, it looked carefully at all the evidence and bore in mind that "What was said and written at the time may well provide more accurate evidence of what took place" (Reasons para 22). It noted specific inconsistencies in her account over time, and explicitly rejected her account of the hotel incident (Reasons paras 40.4 – 40.6). It is not correct, therefore, to take evidence given by the appellant, including evidence recorded in the Reasons, as accepted fact. The ET made it clear in the Reasons what it found as fact, and this cannot be supplemented by evidence from the appellant which was not accepted by the ET.
 - ii) The ET decided that YZ's evidence "could not be accepted at face value either" (Reasons para 39).
 - iii) YZ was a colleague doing the same role as the Appellant (Reasons para 25). There was, therefore, no difference in seniority between them. This is not a case in which there is any evidence of imbalance of power.
 - iv) The ET made a finding that both YZ and the Appellant were drunk following the Christmas party (Reasons paras 40.1 and 40.2).
 - v) After the Christmas party, YZ helped the Claimant to her hotel room and helped her into the room with her bags.
 - vi) The incident was initiated in the way YZ described in evidence. They were talking and the Claimant was upset about having to move flat and being unsuccessful in a job application.
 - vii) YZ hugged her. At the Claimant's instigation, this progressed beyond a platonic hug. The Claimant both initiated physical contact and suggested that it would not be such a bad idea if something happened between them.
 - viii) Matters progressed as far as YZ unzipping the Claimant's dress and pushing her bra strap down. This was, on the balance of probabilities, at her instigation. It was the Claimant who initiated the removal of her clothing. Each time she referred to being in

a state of undress, she said that YZ “helped her out” of her dress and bra. That language was, the ET found, striking. It was not the language of being forcibly undressed, nor of somebody else taking it upon themselves to do so. It was explicitly language about being assisted to do something. Given the Appellant’s consistent description of being “helped out of” her dress, the ET found that this is what happened – YZ helped her to unzip her dress. It seemed to the ET that this was, most likely, how what the Reasons refer to as “the intimate situation” arose.

- ix) So far as the intimate situation itself is concerned, the ET referred to a concession by YZ that he touched AB’s breast with her consent (Reasons para 26). The ET rejected his evidence that this was a fleeting touch to the breast, fully clothed (Reasons para 40.6) and accepted the Appellant’s evidence that her dress was unzipped and her bra straps pushed down (para 40.6). “However, the Tribunal concluded that it was the Claimant who initiated the removal of her clothing” (Reasons para 40.7). This should be read with the ET’s finding that, immediately before this, the Appellant “suggested that it would not be such a bad idea of something happened between them” (para 40.3). Therefore, the sexual touching was also consensual.
 - x) After the unzipping of the dress, and pushing down of the bra strap, which, as we have said, was found to be at the Appellant’s instigation, and the consensual touching of the appellant’s breast, YZ then realised that this was not what he wanted and left” (Reasons para 40.3). YZ had referred in his evidence to having a partner (Reasons para 25).
19. After making these findings of primary fact, the ET referred (correctly) to the burden of proof being on the Appellant and said this (Reasons para 41):
- “In those circumstances, on the evidence before the Tribunal the Claimant did not prove, on the balance of probabilities, that YZ’s conduct was unwanted by her, i.e. unwelcome or uninvited. For the reasons we have explained, we concluded that both were drunk, the Claimant initiated some sexual contact, most likely by asking YZ to help her out of her dress, and this progressed as described above until YZ brought it to an end and left.”
20. The EAT then added this:
- “On her own account the Claimant said more than once at the time, “Don’t worry we were both drunk.” She repeatedly said subsequently that when she thought YZ was also drunk she did not have an issue, it was only when she came to believe that he had been sober that things changed. This is consistent with what happened not being unwanted at the time. The Tribunal has found that YZ was drunk. The Claimant has not proved that what took place was unwanted by her.”
21. It followed that the ET found as a fact that YZ’s conduct was not unwanted, the contrary not having been proved in circumstances where the burden of proving it was on AB, who had not satisfied that burden. There was no imbalance of power. There were findings relevant to consent, which we have quoted, although the word “consent” is not used, the ET preferring to concentrate on the statutory language “unwanted”. There was no evidence that any consent given by the Appellant was given reluctantly and no finding to that effect. It is explicit in the

ET's findings of fact that the Appellant initiated and consented to the undressing and the touching of her breast before YZ decided of his own accord to stop (because it was not what he wanted), and left.

22. There is then the discussion of consent and intoxication which we have quoted in full in paras 19 and 20 above. Relevant there is the Appellant repeatedly saying "that when she thought YZ was also drunk she did not have an issue", coupled with her own account that she said more than once at the time "Don't worry we were both drunk." Earlier in the Reasons, at para 29, the ET referred to evidence that the Claimant told Ms LR on 7 February 2022 "it was fine and a drunken thing. When he said he was not drunk things changed entirely. If he was not sober, she would not have given it a second thought." The ET finding was that he was, in fact, drunk.

Discussion and decision on Ground 1 of the appeal

23. The basis of the appeal is para 42 of the Reasons, which, after the passage in para 41 which we have quoted in para 19 above, says (with our emphasis):

"The Tribunal has not dealt with the question of consent, including capacity to consent, **for the purposes of criminal law**. That is not the issue we have to decide."

24. It is submitted that this was an error of law, because the question of consent did fall to be decided, because of its relevance to the statutory concept of "unwanted conduct of a sexual nature" in section 26.
25. However, it is clear to us that the ET did consider the question of consent and of capacity, in the passages we have quoted, and by making the findings that we have highlighted. It was not an error of law to decline to be drawn into questions of criminal law and practice in cases involving sexual assault under section 3 of the Sexual Offences Act 2003.
26. The Appellant represented herself at the ET hearing but she had the benefit of some advice, and she supported her case with a written skeleton argument which was shown to us. Under the heading "Substantive issues – Harassment – Legal considerations for sexual harassment" this skeleton argument began by looking at the criminal law (paras 21-23). That is the context in which the Reasons said it would not deal with the question of consent, including capacity to consent "for the purposes of the criminal law". The Appellant's Counsel accepted that the emphasis in that sentence is on the last phrase, "for the purposes of the criminal law".
27. The Appellant refers us to the "*Sexual harassment and harassment at work: technical guidance* issued by the Equality and Human Rights Commission ("the Technical Guidance"). Unlike the Code of Practice, this has not been approved by parliament and does not fall to be taken into account under section 15(4)(b) of the Equality Act 2006. It is, however, a document of the sort the Commission is empowered to issue by section 13. Para 1.14 of the Technical Guidance says:

"There may be circumstances in which a course of conduct is not unwanted in the earlier stages, but at some point 'oversteps the mark' and becomes unwanted."

28. That is, no doubt, correct. However, it was not a point that arose on the facts of this case. It was not the Appellant's case that she gave a consent which was subsequently withdrawn by her, or that she gave a consent which was subsequently exceeded. Her case (which was rejected) was that she was immediately and without preliminary chat of any sort sexually assaulted, without her giving any consent or encouragement at all. It was also not a point which arose on the findings of fact made by the ET, which was that there was (a) preliminary consent (in the form of instigation by the Appellant herself, rather than a situation in which YZ made a proposition to her which she accepted) followed by (b) a short incident within the bounds of the consent, followed by (c) a voluntary withdrawal by YZ. The Technical Guidance was not raised by the Appellant in her skeleton argument to the ET.
29. The Appellant referred us to the case of *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) on the basis that it showed some similarities of fact, albeit that it was a regulatory appeal and not a case brought under section 26 of the Equality Act 2010. We did not find the factual similarities very striking. On the contrary, *Beckwith* was a case in which there was no allegation that the encounter in question took place without consent. It was also a case in which the accused person was in a position of seniority or authority over the complainant. We were not referred to any statement of principle in *Beckwith* that might usefully contribute to the consideration of the present appeal.
30. We were also referred to section 74 of the Sexual Offences Act 2003 ("For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.") and the judgment of Lord Judge LCJ in *Regina v Bree* [2008] QB 131, [2007] EWCA Crim 804 (a criminal appeal about a rape conviction under section 1 of the Sexual Offences Act 2003). At the beginning of his trial, the prosecution alleged that Bree had raped the complainant when her level of intoxication was so great that she was effectively unconscious and incapable of consenting within the meaning of section 74 of the 2003 Act. However, by the end of the evidence, the prosecution case was that although the complainant had been conscious and capable of consenting, she had not in fact consented. The defence case was that notwithstanding, and possibly because of, drink the complainant had consented and the defendant had reasonably believed that she was consenting. Allowing an appeal on the basis that the judge's directions to the jury on the issues of consent and voluntary intoxication had been inadequate, Lord Judge LCJ said (with our emphasis added):

"32. (...) one of the most familiar directions of law provided to juries who are being asked to conclude that the voluntary consumption of alcohol by a defendant should lead to the conclusion that he was too drunk to form the intention required for proof of the crime alleged against him, is that **a drunken intent is still an intent**: *R v Sheehan* [1975] 1 WLR 739. So it is, and that we suspect is the source of the phrase that a "drunken consent is still consent". In the context of consent to intercourse, the phrase lacks delicacy, but, properly understood, it provides a useful shorthand accurately encapsulating the legal position. (...)

33. (...) All that was being said in *R v Dougal* was that when someone who has had a lot to drink is in fact consenting to intercourse, then that is what she is doing, consenting: equally, if after taking drink, she is not consenting, then by definition intercourse is taking place without her consent. This is unexceptionable.

34. In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. **If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting,** and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. **However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.** We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact-specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion."

31. The first point to be made about this is that the word "consent" does not appear in section 26 of the Equality Act 2010, although it does appear, and is defined in, the Sexual Offences Act 2003. It is therefore not necessary to attempt a statutory or exact definition of consent for present purposes; nor was the ET required to formulate such a definition. Consent fell to be considered to the extent that it had a bearing on the decision to be made on the issue of "unwanted sexual conduct", which is the issue the ET, correctly, addressed in its reasons.
32. The Reasons did consider consent in that context. They found that she instigated what happened, which implied that she consented to it, and that she did so when drunk. It is the substance of their findings which matters, not the vocabulary they employed. They focussed on the word "unwanted" and they were right to do so, because that is the word in section 26. But they did not neglect the issue of consent; on the contrary, they examined the evidence on both sides, accepted neither the account of AB or of YZ wholesale, and made careful findings, which they fully explained, based on the weight of the evidence, from which they were able to draw conclusions about consent and whether the sexual conduct was "unwanted" applying the correct burden and standard and proof. Although, as we have acknowledged, the word "consent" was not used, the words employed by the ET in their findings of fact were "initiated" (by the Appellant), "instigation" (by the Appellant) and "suggested" (by the Appellant), all of which did entail her consent. They found that the conduct was not "unwanted by her, i.e. unwelcome or uninvited". They found that she repeatedly said afterwards that "she did not have an issue" (which changed only when she later formed the mistaken belief that he had been sober and she was the only one who was drunk).
33. The second point to be made about *Bree* is that the passages we have emphasised in para 30 above demonstrate that there may be cases in which a person is so drunk that they lack the capacity to consent, but if a person is drunk, even very drunk, and gives consent, the consent is valid even though it is "a drunk consent". The fact that a different judgment would have been made if the person had not been drunk does not mean that the consent is not valid. These are ultimately questions of fact.
34. Reliance was placed before us on the Appellant's case that she was in no fit state to consent because she was drunk, which was said to raise an issue of consent/capacity which was not addressed by the ET in its reasons.

35. This case was made in her skeleton argument to the ET which said, at para 37, that the Appellant “asserts that she was in no fit condition to consent”. This built on para 32 of her skeleton argument, which referred to “YZ assistance to checking the [appellant] into the hotel and getting her to her room, because she was not in a fit state to do so on her own”. Similarly, para 33 referred to YZ giving “significant assistance when the [Appellant] was in no fit state”.
36. Contrary to the Appellant’s submissions, these points were considered by the ET. It said, when summarising the Appellant’s evidence in para 23 of the Reasons:
- “The Claimant’s account in her witness statement is that she was very drunk. She has little memory of getting back to the hotel afterwards. She had to ask for the car to be stopped multiple times for her to be sick. Her next memory is of being at the hotel reception. She had not checked in and she was somewhat aware of not being capable of doing so. She did not remember asking for help from YZ but she may have done so. She did remember that YZ carried her bags for her and found her room. She has recently had EMDR and can now remember more details than she could before. She now remembers that YZ immediately got onto the bed and pulled her to him. She got up and sat on the end of the bed to move away. YZ moved to her, undressed her top half and groped her left breast. She did not encourage him. She did not tell him to stop but she was in no state to consent. She remembers YZ trying to get them to lie down together and still touching her. She must have passed out because she does not remember him leaving.”
37. The ET therefore acknowledged her case that she “did not tell him to stop but she was in no state to consent”.
38. However, the ET rejected this case. It rejected her evidence that she had to ask for the car to be stopped for her to be sick. It rejected her evidence that YZ immediately pulled her onto the bed and pulled her to him. It rejected her case that she did not encourage him.
39. The ET accepted that she was drunk, but did not find that she was “very drunk”. It found that she had in fact been able to engage in conversation before the physical contact. It found that this contact was instigated by her, and that she was not only able to say what she wanted but did say it. It therefore rejected her case that she was in no state to consent. It found that she did consent, in that she herself instigated the conduct in question. None of it, on the findings of the ET, including the sexual touching, went beyond what she had invited YZ to do. Those findings embodied consent and capacity. None of the conduct was unwanted; all of it was at her instigation. A drunk consent is still a consent.
40. On the findings of the ET, this was not a case of unwanted sexual conduct by YZ which she did not ask him to stop because she was in no fit state because of drink. It was a case of sexual conduct which she had instigated and agreed to and which she had no issue with until she afterwards formed a mistaken view about whether YZ was drunk as well as her. The ET did not accept her case that she was in no fit state to consent. Rather, it found that, although drunk, she was able to and did know what she would like to happen, she suggested it to YZ, and what he then did was at her instigation and was not unwanted.
41. The Appellant lost because she failed to prove her case on the evidence and on the facts; not because of any error or omission in the consideration of the case by the ET.

42. The Reasons said (with our emphasis added):

“40.1. Both the Claimant and YZ were drunk following the Christmas party.

40.2 (...) Mr CW did not recall that either the Claimant or YZ was particularly drunk but his evidence was that he did see both of them drinking at the party. (...)

40.3 (...) YZ helped the Claimant to her hotel room and helped her into the room with her bags. On the balance of probabilities, the incident was initiated in the way YZ describes. They were talking and the Claimant was upset about having to move flat and being unsuccessful in a job application. YZ hugged her. **At the Claimant’s instigation, this progressed beyond a platonic hug. She both initiated physical contact and suggested that it would not be such a bad idea if something happened between them.** Matters progressed as far as YZ unzipping the Claimant’s dress and pushing her bra strap down. **This was, on the balance of probabilities, at her instigation. YZ then realised that this was not what he wanted and left.**

40.4. In reaching that view, the Tribunal rejected the Claimant’s description, given for the first time in her witness statement, of YZ going into the room, immediately getting onto the bed and pulling her onto him. (...)

40.5 (...) The Tribunal did not find the Claimant’s oral evidence that she and YZ did not chat and that she did not become physically and verbally amorous towards him convincing.”

43. The ET’s findings demonstrate that they considered the case that the Appellant did not consent or lacked capacity to consent and rejected it. We think that is clear enough.

44. We therefore reject Ground 1 of the appeal.

Discussion and decision on Ground 2 of the appeal

45. Ground 2 of the appeal challenges para 117 of the Reasons which found that it was not just and equitable to extend the statutory time limit for presenting the Appellant’s out of time complaints. There is no dispute about them being out of time and therefore requiring an extension of time, based on what the ET thought “just and equitable”, in accordance with section 123 of the Equality Act 2010.

46. Three points were made to us in argument:

- i) The ET failed to consider that the Respondent had significantly contributed to the delay between the original incident (on 17 December 2021) and the presentation of the ET Claim Form (on 22 June 2023).
- ii) The ET was wrong to find that the Respondent was prejudiced by lack of a contemporaneous record from YZ (as a result of the delay), when (it is argued) there was such an account, and any delay in obtaining one was the fault of the Respondent.

- iii) The ET's error of law in its handling of the issue of consent (as argued under Ground 1) was relevant to its assessment of whether it was just and equitable to extend time and therefore that assessment is vitiated.
47. We will consider these points in turn.
- (i)
48. As to the first point, we asked what contribution to delay was relied upon. We were directed to the following passages in the Appellant's Form ET1:
- “Between the meeting in February and the time I left site at the end of April, [Ms LR] came to site either three or four times ... Each time we discussed my concerns, and when I asked about making a formal grievance about [YZ] [Ms LR] strongly dissuaded me, stating that even if it went my way nothing could be put in place to protect or warn anyone else within the company (...)”
- “I had several conversations with my new line manager (...) that normally ended up with me in tears after talking about how I felt unsafe and (...) agreed to escalate to get something formal arranged to ensure we never had to work together. (...) and I called [Mr WT] (COO/Finance Director) on speaker phone together and this suggestion was met with opposition”
49. This does not however explain the Appellant's delay in bringing ET proceedings. Even if she was dissuaded from making a formal grievance, this should not have dissuaded her from escalating her complaint to a fair and independent Employment Tribunal; quite the contrary.
50. These allegations were, moreover, taken from the ET1. They did not feature in the Appellant's skeleton argument on the subject of an extension of time. Nor did they feature in the Appellant's evidence in support of an extension of time (Reasons para 109). The Appellant's evidence was that it was she who “did not want to go down the formal route and put in a complaint about YZ” (Reasons para 29 and para 44). The ET made a finding of fact (which is not challenged) that the Claimant had, in fact, been encouraged to make a formal complaint, but did not wish to do so (Reasons para 65).
51. The ET cannot be criticised for not addressing an argument which was not put to them, based on evidence which was not given to them.
52. The point is also hopeless because the evidence was that the Appellant did lodge a formal grievance, in an email on 24 October 2022, and yet she still did not bring ET proceedings in respect of what happened on 17 December 2021 until eighteen months later, on 22 June 2023. In the meantime, she had been able to make reports to the police in May and December 2022, and was aware of the time limits because she had a friend who works at ACAS who told her about it (Reasons para 114).
- (ii)
53. As to the second point, reference is made to para 49 of the Reasons, where the ET said:

“There is clearly prejudice in not allowing the Claimant to bring this complaint, raising a serious allegation about YZ. On the other hand, there is clear prejudice in allowing her to do so, and requiring YZ (and the Respondent) to defend an allegation of this nature brought two and a half years after the event. There was no formal internal process until almost a year after the event, so there is not a clear, contemporaneous account from YZ. The Tribunal’s findings above show that memories have faded over time – for example there were clearly matters that YZ could recall in 2022 that he cannot now recall. Recollections or accounts have also changed over time. That presents a very real risk of prejudice. The Tribunal’s conclusions on this issue turned on whether the Claimant had met the initial burden of proof that rests on her. It was not possible for the Tribunal to reach a definitive determination. The Tribunal found that the Claimant was well enough to complain to the Tribunal about this in the first half of 2022 if she had chosen to. She could have sought advice, from her friend or by researching on the internet, about bringing Tribunal claims and the time limit for doing so. Although there is significant prejudice in not allowing her to advance this complaint now, the Tribunal found that that prejudice was outweighed by the prejudice in allowing her to do so, both to YZ personally in being required to defend this serious allegation so long after the event given the impact of that delay on the evidence; and to the Respondent in being potentially held liable in the same circumstances. Therefore, we found that it was not just and equitable to extend the time limit in respect of this allegation.”

54. The appeal objects to the sentence, within this paragraph, which says “There was no formal internal process until almost a year after the event, so there is not a clear, contemporaneous account from YZ.”
55. It is argued that this was contradicted by an earlier finding (Reasons para 30) that Ms LT spoke to YZ shortly after a meeting with the Appellant on 7 February 2022 and took notes of what he said about what happened on 17 December 2022.
56. However, in the next paragraph (para 31), the ET said there was no note, on this occasion, of YZ being asked whether or not he was drunk, and no note of him being asked how the incident started, or about the Appellant’s state of undress. It was not, therefore, contradictory to say, in para 49, that there was no “clear, contemporaneous” account from YZ. The account he gave was incomplete. The ET found as a fact that it was clear from the proceedings before them that memories suffered in the time after that, and that prejudice was caused.
57. We therefore do not find that the ET made any error in its consideration of what was just and equitable, or that they reached a conclusion which was not open to them on that point.

(iii)

58. The third point falls away because the Appellant has not succeeded on Ground 1.

Conclusion

59. For these reasons, the appeal will be dismissed.