



EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: B, C, D and E

Heard at: East London Hearing Centre [by Cloud Video Platform]

On: 19 – 23 October 2020

Before: Employment Judge Lewis

Members: Ms Harwood
Mr Quinlan

Representation

Claimant: Mr S Margo - Counsel
Respondent: Mr I Wheaton - Counsel

RESTRICTED REPORTING AND ANONYMISATION

These proceedings are the subject of a Restricted Reporting Order and an Anonymisation order made on 3 March 2020 by Regional Employment Judge Taylor.

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claim for sexual harassment in respect of the incident 20 June 2019 succeeds.
2. The Claimant's complaints of sexual harassment in respect of the incidents in or around August 2019 and 23rd of September 2019 also succeed.
3. The Claimant's claims of victimisation succeed in respect of the matters set out at paragraph 8 a) i, iv and viii of the list of issues and b) (i) dismissing the Claimant on 3 October 2019 with immediate effect.
4. The claim for breach of contract /constructive dismissal succeeds, the Claimant was wrongfully dismissed in breach of

contract by the Respondent failing to give her notice.

5. Remedy is to be determined at a separate hearing

REASONS

1. THE ISSUES

The position as between the Respondents

1. The First Respondent has accepted vicarious liability [liability under s109 EqA 2010] for any unlawful conduct by the Second to Fourth Respondents. The First Respondent does not seek to rely on the statutory defence under s 109(4) Equality Act 2010.

Sexual harassment

2. Did the Second Respondent at approximately 22:30 on 20 June 2019 in the back of a taxi, place his hand on the Claimant's leg and then move his hand under her dress and touch her vagina?
3. Was this unwanted conduct of a sexual nature (section 26(2)(a) Equality Act 2010)?
4. Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (s26(1) (b) EqA 2010)?
 - a. When considering whether the conduct had the required effect, did it have this effect taking into account the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have this effect (s26(4) EqA 2010)?

Sex harassment

5. Did the Second Respondent do the following:
 - a. In or around August 2019, calling the Claimant a "cunt"?
 - b. On 23rd of September 2019, calling the Claimant a "spotty adolescent"?
6. In relation to these allegations
 - a. Was this unwanted conduct related to the Claimant sex,?
 - b. Did this conduct have the required purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Victimisation

6. The protected acts:
- a. The Respondents admit that on 24 September 2019 the Claimant did the following, each of which amounted to an allegation that the Second Respondent had contravened the Equality Act 2010:
 - (i) Telling the Fourth Respondent about the Second Respondent's conduct towards her in the back of the taxi on 20 June 2019;
 - (ii) telling the Third Respondent about the Second Respondent's conduct towards her in the back of the taxi 20th of June.
 - b. the Respondents aver these allegations were false allegations made in bad faith:
 - (i) were the allegations false;
 - (ii) If so, were the allegations made in bad faith?
- 8 The detriments: did the Respondents subject the Claimant to any or all of the following detriments because she did the protected act/s set out above?
- a) By subjecting the Claimant to less favourable treatment through the grievance procedure:
 - (i) Through insisting that the Claimant respond to an unreasonable and/ or unrealistic timeframe;
 - (ii) was withdrawn
 - (iii) was withdrawn
 - (iv) Continually harassing the Claimant with correspondence, through post and email, while she was signed off sick in full knowledge that the Claimant was distressed, tearful and stressed;
 - (v) was withdrawn
 - (vi) Holding the grievance meeting in the Claimant's absence and reaching a decision based on the Second Respondent's version of events without providing the Claimant the opportunity to comment or make representations;
 - (vii) withdrawn
 - (viii) Failing to follow the ACAS Code in relation to the Claimant's grievance and /or [failing to] treat the allegations seriously, respectfully and reasonably.
 - b) By dismissing the Claimant on 24 September 2019 with immediate effect.
 - i. The Respondents deny the Claimant was dismissed; their case is she resigned.

Jurisdiction - discrimination claims

9. Does the Claimant's claim of sexual harassment at para 2 above [the incident on 20 June 2019] form part of conduct extending over a period with the later acts of sex harassment and victimisation such that the Tribunal has jurisdiction to consider it?
10. If not, is it just and equitable for the Tribunal to extend the time for bringing the sexual harassment claim?

Breach of contract

11. Was the Claimant summarily dismissed in breach of her contract of employment and, if so, what sum is she entitled to be paid for notice pay?

Remedy

12. The hearing was listed for liability only.

2. The hearing and procedural matters

2.1 The hearing had been listed to start on 22nd of September 2020 before Employment Judge Tobin and the same members however at the start of that hearing the Claimant sought permission to admit to documents that were disclosed late they were the Claimant's diary and email from Andrew Greenley to the Claimant dated 11th of August 2018 these been disclosed to the Respondents 7 PM on the Friday, 18 September the last working day prior to start of the hearing and the second item be provided by the first Respondent as part a response to a subject access request.

2.2 The diary was described as the typed version of the diary of the Claimant's thoughts and feelings which she started to keep from 5 November 2019 and included her reflections on the aftermath of the alleged assault from the period of 21 June 2019 to 4 November 2019. Entries from the 5 November 2019 were said to be a contemporaneous record. The diary was originally written in manuscript form in note books and typed up in late February or early March; large parts of the manuscript diary were thrown away after they were typed up, the Claimant retained the majority of the entries for June and July as well as November's. It was made clear by the Claimant that the entries from June to November were not written contemporaneously.

2.3 The Tribunal decided to allow the documents to be submitted and the hearing was adjourned for four weeks and directions were given in respect of supplemental witness statements from the Respondent and for the Claimant to deal with the disclosure of the diary in supplemental evidence, an indicative timetable was agreed with the parties and it was indicated that final submissions should be made in writing and exchanged between the parties' representatives prior to sending them to the Tribunal. Employment Judge Tobin recorded that he referred Mr Wheaton, Counsel for the Respondent to the Advocates' Gateway Toolkits as a helpful reference. Mr Wheaton acknowledged that the Claimant would need to be questioned sensitively. Directions were also given by employment Judge Tobin in respect of the arrangements for the remote hearing, specifically that a separate room with

Internet connection would be required for the Respondents' witnesses. Directions were made in respect of specific paragraphs in two of the Respondents' witness statements which it was agreed would be deleted and a new statement served.

2.4 It became apparent at this hearing that the copies of the witness statements had not had the paragraphs removed and the arrangements for the hearing were such that Mr Wheaton was in the same room as a number of the Respondents and his instructing solicitor, however a separate room had been arranged from which the Respondents were to give their evidence as and when they were called. For the purposes of this hearing it was agreed that the Second Respondent would remain in the separate room with the camera switched off for the duration of the Claimant's evidence so that he could see and hear the Claimant but she did not have to see him throughout her evidence; in the event the Fourth Respondent also sat with the Second Respondent for the Claimant's evidence.

2.5 Notwithstanding the assurances as to the sensitivity required and having been referred to the Advocates Gateway the Employment Judge had to intervene on a number of occasions in the course of Mr Wheaton's questioning of the Claimant, at one point it was necessary to adjourn to give the Claimant a break after questions were put in a way which did not show the required sensitivity in light of the nature of the allegations, Counsel was asked to rephrase his questions and to put his client's case in a more appropriate way; the Judge also intervened when the questions appeared to be straying into matters that were not relevant to either the Claimant's or the Respondents' case as identified in the List of Issues.

2.6 There were various disruptions to the hearing through technological difficulties, which of themselves did not amount lengthy delays, however there was a fire alarm at the tribunal during the Claimant's evidence which unfortunately meant that her evidence was not completed in one day and she concluded her evidence on the morning of the third day (the first day having been spent reading). The Tribunal also heard evidence from the Claimant's boyfriend as well as having a written statement from her friend, Izzy, who did not attend to give evidence. The Tribunal heard from the Second, third and Fourth Respondent and Mr Smith and Mr Greenway on behalf of the Respondents and had a statement from Mr Ser'jeanton of NatWest Mentor Services.

3. FINDINGS OF FACT

3.1 The Claimant was employed by the First Respondent, B, from 16 April 2018 as a Business Development Co-Ordinator. Prior to being employed by B she had worked in a call centre and in a pub, which is where she met C. C was looking to hire a Business Development Co-ordinator and wanted someone new to the industry that he could train up. The Claimant had just finished Sixth Form and wanted a career and was excited to be considered for the opportunity. She applied for the role and following an interview with C and D was offered the position.

3.2 The primary function of her role started off as organising client functions, booking meetings with clients and trying to generate new tendering and business opportunities. C gave evidence that within a short period of time the Claimant also got involved in a number of other functions within the office, such as

covering the switchboard, undertaking new starter inductions, resource allocation charts, projects defects trackers, organising the staff Christmas function and general office management duties.

3.3 The Claimant loved her job from the outset. She was aware that it would entail late nights and client events and was happy to take this on. She loved learning and developing, meeting new people and contributing to the Company's success. She received positive feedback from the Directors and shortly before Christmas 2018 was given a positive appraisal and a £6000 pay rise and £2000 bonus.

3.4 C was the Claimant's manager and a Director of the Company but she also saw him as a friend. They would text each other regularly about work and non-work related matters, including about their holidays. They spent a lot of time together, including attending client events and the Claimant considered that they had a really good relationship. C and the Claimant lived not far from each other and would often travel to work on the same train. C described how the Claimant would also join him and his friends at social functions outside of work, sometime attending with her then boyfriend. C had the impression at times that the Claimant saw him as a father figure who she could confide in. He described their relationship as a normal working relationship, and considered that they treated each other with mutual respect and that he treated the Claimant no differently to other employees. C told the Tribunal that as far as he was aware his working relationship with the Claimant was okay up until the day she left. The only thing that he believed had changed was that the Claimant did not like the fact that in June to August 2019 she was being made more accountable for her role within the business, in respect of booking more client meetings, securing additional tendering opportunities and some outstanding tasks.

3.5 It was accepted by the Respondents' witnesses that B was a company where people liked to drink and be sociable and that there was an expectation that people would enjoy a drink with clients as well as at internal facing functions.

20 June 2019

3.6 On 20 June 2019 the First Respondent held a client event at Ascot to thank some of its clients for their custom. 9 people attended on behalf of the company, including the Claimant, C and D. The Claimant and C were staying at the same hotel outside Ascot and C had given the Claimant a lift to the hotel. They arrived at the race course at approximately 11.30 am and hospitality with food and drinks was available throughout the day. The Claimant told us that she was conscious she was representing the company in front of clients and limited her alcohol intake, drinking mainly tonic or lime and soda. She chose to drink tonic so that it would look as though she was drinking gin and tonic and clients would not notice that she was not matching them or joining them in their drinking.

3.7 There was a dispute as to how much the Claimant may have drunk, with the Respondents suggesting that she had had a lot to drink. D remembers buying her cocktails at the pub and believed that she was drunk while Mr Smith who also gave evidence on behalf of the Respondents did not consider the Claimant to be excessively drunk.

3.8 At numerous points in cross-examination and in their witness statements

the respondents sought to introduce evidence as to how much the Claimant had been drinking on the 20 June and at other events on other occasions; they also sought to introduce photographs of what the Claimant was wearing to the event, (a smart outfit appropriate to the formality of the occasion) although accepting that had no relevance at all as to whether the alleged assault had happened as she described. We accept the Claimant's evidence that she was conscious of not wanting to get drunk in front of clients and also find that is consistent with Mr Smith's evidence that he did not consider her to be excessively drunk.

3.9 Given the defence to the allegation it was not explained to the Tribunal what relevance there was to the Respondents' case how much, if anything, the Claimant had had to drink. The Respondents' case is simply that the alleged assault did not take place.

3.10 C told the Tribunal that he made sure he had something to eat before getting to the event in order to line this stomach, he accepted that he drank throughout the day and then moved on to a pub where he continued to drink into the evening.

3.11 C gave a detailed account of ordering an Uber and leaving the pub at around 10.12 pm with the Claimant, walking up the hill to meet the Uber; his detailed account continued to the point immediately after getting into the car, including the make and class of the car and on which side of the car he and the Claimant were sitting. He told us that he fell asleep as soon as he got into the car and remained asleep until the driver woke him up when they got to the hotel. He denied that anything happened in the taxi at all.

3.12 The Claimant was cross-examined on her account of what took place in the taxi 20 June. In cross examination it was suggested that there was some physical impossibility in relation to her description of the incident. The tribunal considered this suggestion to be misplaced. Mr Wheaton revisited this in closing submission suggesting that it was impossible for the Claimant's account to be correct and therefore the assault could not have taken place as described; we have carefully considered that submission but have rejected it.

3.13 We find that it would be odd for the Claimant to include in her description of the event the detail that she rested her head on C's leg if she was fabricating an assault. We accept the Claimant's evidence that she loved the job and thought she would build her career with the company. No explanation has been suggested as to why she would choose to throw away the career that she loved, and the first proper job she had had and make this very serious allegation against the managing director (and one of the majority shareholders) and someone who had been a friend.

3.14 It was not disputed that the Claimant and C had been friendly and up until the event in question and for all intents and purposes appeared to be friendly thereafter, indeed that was part of the respondent's defence. We accept the Claimant's explanation for remaining friendly in her text messages, namely that she wanted to pretend it had never happened and wanted things to go back to normal and to keep her job. We do not find it to be inconsistent with her description in her diary entries.

3.15 We find that it would be unlikely that the Claimant would have fabricated exchange with her friend by text message [page 159-161] in respect of how she was feeling or [165] informing her boyfriend about what had happened. It was not suggested to her boyfriend that he had been a party to some elaborate sting or set up. He gave clear evidence about the change he had noticed in the Claimant and how upset the Claimant was when she told him about what had happened.

3.16 We find there was no credible reason for the Claimant to have fabricated her account, that no motive was put to the Claimant, other than that the honeymoon period with her job was over, to explain a desire to tarnish or destroy her working relationships and the Respondents reputation.

The Claimant's diaries

3.17 The Claimant was asked a number of questions about the contents and purpose of her diaries. She explained that when she had first met with her solicitor he had suggested to her that she keep a diary of how she felt and the impact of the events on her; she had not understood from what he said that the diary would form any part of the evidence in the proposed proceedings. She started to keep a diary in November 2019 and found it very helpful. She decided to treat it as a form of immersion therapy where she went back over the events and set down how she felt at the time. She had not cross checked all the dates in her diaries with social media entries or texts. The diaries had not been disclosed in these proceedings as she had not considered they would be relevant evidence, she thought of them as an entirely private matter and had not intended them to be seen or read by anyone else. It was only when her barrister asked her in their conference on the Friday before the hearing in September that she mentioned she had diaries and was told that she would have to disclose them. She was embarrassed to know they would be read by others and stopped writing them at that point as they were not meant to be read, what she put them was private, she viewed it as a form of self-therapy. She described how she had used writing them as a form of coping with, and understanding, how she felt at the time. She had initially thought she would be up to cope with what had happened to her on her own, without the need for professional therapy but she subsequently realised she needed professional help and has gone to a professional therapist through CARA (Centre for Action on Rape and Abuse, which works with victims and survivors of sexual violence).

3.18 The Claimant was subject to some rigorous cross-examination about the purpose of her diaries, the timing of their writing, the contents and apparent inconsistencies. We are satisfied that she answered truthfully.

3.19 We have carefully considered the respective submissions and specifically we accept the submissions set out at paragraph 15 of the Claimant's closing skeleton argument. We find on the balance of probabilities, having taken into account and giving due weight to the seriousness of the allegation, that the sexual assault occurred as described by the Claimant.

3.20 The Tribunal found the Claimant to be a credible witness, we are satisfied that she was doing her best to tell the truth. There were times when she became upset during the course of the evidence but we do not think that she was exaggerating her responses, we find that she was clearly doing her best to try to hold herself together throughout.

3.21 We have accepted the Claimant's account of events and find that the incident in the taxi took place as she described and as set out in issue 2 of the List of Issues above.

Text messages and continuing friendly behaviour

3.22 We find that immediately after the incident the Claimant had wanted to try to pretend the assault had not happened, she had made no reference to it and did everything she could to try to get things to go back to the way they had been before; she loved her job and did not want to lose her job and leave the company. We find that the Claimant believed that if she disclosed what had happened that would be the end of her time with the company. We accept that was the reason why she continued with the familiar text exchanges between herself and C. We find this evidence to be consistent with the Claimant's explanation that she tried to carry on as normal put on a brave face and act as if nothing had happened in the hope that that would allow her to continue to carry on with her job. The Claimant told us she did not want people to know about the assault and she certainly did not want to be defined by it. We also accept that she did not want people to know what had happened to her.

In or around August 2019, calling the Claimant a "cunt"

3.23 The Claimant does not recall the specific date on which this incident took place, she remembered that it was sometime in August and it was said in a meeting which Mr Greenway was present, as well as others from the accounts department. The Claimant felt humiliated and went back to her desk and cried. She then became angry and went to speak to Lucy who worked on reception and told her what C had said and how upset she was.

3.24 Mr Greenway was adamant that he did not hear the word used and if it had been used by C he would have noticed as it was not a word that C ever used or indeed approved of. C denied absolutely that he used that word or would use it. We accept that Mr Greenway did not hear it being said and that it would be out of character for C to use that word.

3.25 We accept the Claimant's evidence. We have already found that C acted towards the Claimant in a way that was out of his usual character. We find that this incident was a lapse into hostility towards her in the aftermath of what had happened in June. We do not find that the Claimant has made up this allegation and prefer the Claimant's evidence.

On 23rd of September 2019, calling the Claimant a "spotty adolescent"

3.26 We find that on 23 September the Claimant was in the directors' office talking to C, she was not wearing any make up that day. C told her that she needed to wear makeup and called her as "spotty adolescent". The Claimant was upset and hurt by the comment. She believed the comment was made with the intention to degrade and humiliate her and that C was now being spiteful towards her. We accept that this incident was what made her realise she was not strong enough to hide what had happened in June and pretend it had not happened and she made the decision to tell E about what had happened when she was in the next day.

3.27 We have found the Claimant to be telling the truth in respect of this incident. We do not find that she fabricated this allegation and the incident in August in order to create an argument that there were ongoing or continuing acts of harassment as was suggested by the Respondents' Counsel.

3.28 We find in the context which includes the reference to needing to wear makeup, that the comment was related to the Claimant's sex. We were referred in evidence to previous discussions as to the Claimant's attractiveness being an asset to the business in the context of dealing with clients. We are satisfied that the Claimant has established facts from which we could conclude that the comment was related to the Claimant's sex and that the Respondent has not established that it was not.

3.29 We also find on the balance of probabilities that the comment would not have been made had the incident in June not taken place. We find it was part of a course of conduct following on from the sexual assault in June after which C's attitude towards the Claimant changed and, whether consciously or subconsciously, he lapsed into hostility towards her and sought to put her down. We find the comment had the purpose as well as the effect of humiliating and degrading the Claimant.

24 September 2019

3.30 On 24 September 2019 the Claimant went into the office feeling, tired and deflated, she had started to hate going into work. E came over to speak to her and the Claimant was crying because she was upset and angry. E suggested that the Claimant meet her outside for a cigarette. When they got outside the Claimant broke down in tears and told E how she was feeling and that C had called her a spotty adolescent. E did not seem surprised and asked "didn't he call you a cunt a couple of weeks ago". The Claimant was shocked the E knew about this. E told the Claimant that Lucy had told her about it. The Claimant and E went for a walk and the Claimant talked about how she was feeling, that she felt like she was being harassed and that C was humiliating her. E told the Claimant that she could see she was not enjoying work at the moment and she didn't understand why C was treating her in this way. The Claimant asked E to promise not to tell anyone what she was going to tell her, E agreed, and the Claimant told her about the assault after the event at Ascot. She did not give an exact description but gestured to where he had touched her as she could not bring herself to say it.

3.31 The Claimant believed that E looked disgusted. E told her that if it was true she would not want to work for someone who did this. The Claimant told E she was trying to find excuses to get out of a forthcoming three-day trip with C because she was scared of how he would behave; that she had not said anything for fear of losing her job, her clients and everything she had worked so hard for. E told the Claimant to move her laptop to her block of desks, away from the directors' office, and to send herself the CRM system so she would have her clients' details.

3.32 The Claimant and E agreed to go to the pub at lunchtime so they could talk away from work and discuss what they would do next. The Claimant texted her best friend Izzy so she could be there for support.

3.33 E denied that the Claimant told her about the assault when they went for a walk outside the office building and before they returned to the office. She maintained that the Claimant only told her about the sexual assault when they met at the pub. We do not find this to be a truthful account of what happened. We find it is inconsistent with the text message sent at 12:08pm, at page 166A of the bundle, in which the Claimant tells E that,

“Izzy is the only one that knows, I told her 3 weeks ago ...
By crying in exchange square”.

We are satisfied that was a reference to Izzy being the only person that knows about the sexual assault. We found E’s evidence in respect of this text to be unsatisfactory. We find that it is likely that E wanted to distance herself from having knowledge of the assault before the meeting at lunchtime in order to also distance herself from the Claimant’s actions on their return to the office in transferring the CRM data to her laptop.

3.34 When they went to the pub at lunchtime the Claimant told E in more detail what had happened at Ascot. During this conversation the Claimant was crying and clearly distressed. E encouraged her to tell D, the other co-Director what had happened so that something could be done about it and the Claimant was reassured that E would support her.

3.35 E told the Tribunal that she advised the Claimant to report the matter to the Police but that the Claimant told her she did not want to go to the Police. We find this indicates that E was clearly aware of how serious the allegation was. We do not however, accept E’s suggestion that the fact that C did not want to go to the Police undermined the credibility of her allegation. There are many reasons why a victim of a sexual assault might not want to go to the Police and the Claimant explained in evidence her reasons for not wanting to do so.

3.36 On returning to the office the Claimant immediately asked D for a meeting. They went into the meeting room. The Claimant started to tell D what had happened. D asked her to wait while he went to ask E to join them as E was the HR manager. E then joined them in the meeting room. It is accepted that neither E nor D took any notes of what was said. It was also accepted that during the meeting C was sobbing and distraught and at times could barely speak.

Did the Claimant resign or was she dismissed

3.37 There was a dispute as to whether the Claimant began the meeting on 24 September 2019 by telling D that she was leaving the company. D’s evidence was that this was the first thing the Claimant said, before E joined them, that she said was leaving because she could no longer work with C and that there had been an incident with him. E’s evidence was that immediately after she joined them the Claimant said that she was resigning as she was “unable to work with C due to his moods” and that she wanted to see D before she leaves to explain there was another reason that she was leaving.

3.38 The Claimant accepted that at the start of the meeting she had believed the only possible outcome was that she would have to leave the company as she

was making a very serious allegation against one of the founders and co-Directors, however as a result of what D during the meeting she was reassured that she would not necessarily have to leave, she was told that they would find a way to make it work and her complaint would be investigated. It was accepted that at the end of the meeting D told the Claimant to take a few days to collect her thoughts, the Claimant's account was that he said he would speak to C and give her a call when she could come back into work.

3.39 It was not disputed that this was a highly charged meeting. The Respondents accepted that the Claimant was genuinely and visibly upset and was crying. Both D and E were consistent in respect of the Claimant beginning the meeting by saying she was leaving because of what had happened with C and that at the end of the meeting D suggested that she take a few days to compose herself. Both D and E stated that at the end of the meeting the Claimant was adamant she was resigning.

3.40 We find that the Claimant began the meeting very apprehensive about what she was about to disclose, she was conscious that she was going to be 'dropping a bomb' on the company and on D who was a co-director and shareholder with C. D appeared kind and supportive and listened to her and she felt reassured from what he said that it might be possible to find a way through that meant she would not have to leave. At the end of the meeting D suggested she take a few days off and that is what she agreed to do. She was asked if she wanted any of her personal things from the desk and she replied that she did she would like shoes and she handed back the company credit card because she did not want to be her at risk of being accused of misusing it in any way. She agreed to keep the company mobile phone so that she could be contacted. We accept the Claimant's evidence that she was reassured by what D said and that she did not leave the meeting saying that she was 'definitely resigning'.

3.41 We do not find that when D suggested the Claimant take a few days to compose herself the Claimant responded by saying, "I will take those days but I'm definitely resigning." We do not find that it would make sense for her to do so. We are satisfied that even if she had said that, it would not have been reasonable for the Respondent to rely on those words given the circumstances and the distraught state that they accepted that she was in.

3.42 We were taken to the subsequent correspondence [pages 75 to 80] in which the Respondents sought clarification of the Claimant's position as to her resignation We do not find the subsequent correspondence to be consistent with the Respondents having understood the Claimant to have been unequivocally resigning at the meeting on 24 September. If the Claimant's resignation had been unequivocal it is not clear why the Respondents would need to seek clarification. E told the Tribunal that the clarification sought was limited to the Claimant's intentions in respect of giving notice and carrying out a handover, but that is not consistent with the correspondence. For instance, in the email sent at 3:30 in 2 October [page 80] the Respondent asked for clarification and stated,

"... if it is not your decision to resign and you are not fit to return to work, any further periods of absences following Friday 4th October will be paid as SSP..." .

We do not find this is consistent with the suggestion that the Respondent was only seeking clarification in respect of any notice period and handover. The Claimant responded on 2 October stating she had not intended to resign. The response was contained in a without prejudice letter written on her behalf by Mr Engwell who was a solicitor and family friend.

3.43 D told the Tribunal that it was as a result of receiving this letter on 2 October that he decided he had to draw things to a close and he used the words termination in relation to the Claimant's employment. The letter written and signed by D on 3 October 2019 informed the Claimant [somewhat bafflingly given Mr Engwell's letter] that she had failed to clarify her intentions and that her resignation on 24 September stood and her employment terminated on that date [p82-83].

3.44 We find that the employment relationship was terminated by D's letter on 3 October which brought the Claimant's employment to an end without notice.

The grievance

Timescales

3.45 The context for the Claimant's absence from work was that she was extremely distressed after disclosing an allegation of sexual assault and had been told to take some time off to compose herself.

3.46 We were taken to the correspondence about the grievance [pages 74-158], which to a large extent speaks for itself. For instance, on 1 October the Respondent asked the Claimant for confirmation of how she wished to proceed with her grievance by close of business the same day, although they were aware of how upset the Claimant was. The Claimant had telephoned and spoken to E explaining she needed time to respond was struggling with her mental health [although E only accepted she was told she was feeling unwell with a cold]. The Claimant was sent a further email on 3 October at 17:18 [page 81] at the end of the working day attaching D's letter requiring a response setting out the details the grievance by the close of business on 7 October, the following Monday, and also informing the Claimant that she had resigned and her employment had been terminated as from on 24 September. That letter was sent not only by email but also by first class post and signed for delivery.

3.47 The Claimant described feeling bombarded by the correspondence and the deadlines that she was given. She described having to go to the Post Office to sign for a letter only to discover it was the same letter she had already received by email and First class post. We are satisfied that the Claimant's description of feeling bombarded was a fair description and that the Respondents' actions were unreasonable in the circumstances.

3.48 We accept paragraphs 34 to 43 Mr Saul's written submissions. We find that the timescales were not mandated by B's grievance policy and that the reasons for the deadlines being imposed and why D and E were so persistent was due to the nature of the allegation that the Claimant had made against C, that is because she had made an allegation of sexual harassment.

Holding the grievance meeting in the Claimant's absence

3.49 The First Respondent appointed Mr Ser'Jeanton of NatWest Mentor Services to conduct the grievance, he was provided with a copy of the Claimant's written grievance document. A meeting with the Claimant was arranged for 11 October 2019. E was dealing with the administration and correspondence with the Claimant. We were taken to the correspondence in relation to the conduct of the grievance meeting, which was in the bundle.

3.50 The Claimant objected to the appointment of Mr Ser'Jeanton on the basis that NatWest was the First Respondent's bank and so he was not truly independent. She provided the details of an alternative HR adviser whom she considered to be independent. She also informed E that she was not well enough to attend the meeting on 11 October. E rearranged the meeting for 16th October and reiterated the Respondents' position that the Claimant had resigned on 24 September. The Claimant was distressed and felt bullied; she did not attend the meeting because she believed it would be biased against her; she did not respond to E's letter informing her of the rearranged meeting because she was too upset.

3.51 Mr Ser'jeanton attended B's offices on 16 October for the meeting scheduled with the Claimant. E accompanied him as a note taker. They waited 30 minutes for the Claimant, she did not attend and they had not heard from her. Mr Ser'jeanton then met with C [the notes of that meeting are at p127-129]. Following the meeting C was provided with a copy of the notes from his meeting which he approved subject to some amendments. Mr Ser'jeanton went ahead and considered the grievance on the basis of the information before him, which included the Claimant 's written complaint and C's interview. He did not uphold the grievance.

3.52 We have found that the reason the grievance was dealt with in the Claimant's absence was because she did not attend the meetings arranged and did not respond to the letter [signed by D, p 115-116]. We are satisfied that the decision to go ahead without the Claimant was not connected to the fact that the allegations involved complaints of sexual harassment or discrimination.

Failing to deal with the grievance reasonably

3.53 We have found the overriding desire was to deal with the Claimant's grievance speedily and this was due to the allegation being of a sexual assault. We have found that there was a failure to deal with the matter reasonably at the first stage, during which unreasonable pressure was put on the Claimant in respect of timescales for confirming and setting out her grievance. We have found that had the grievance not related to an allegation of sexual harassment against C the same pressure would not have been placed on the Claimant to respond to unreasonable deadlines [as per paragraph 3.48 above].

Failing to follow the ACAS Code

3.54 We reminded ourselves of the contents of the ACAS Code of Practice which refers to obligations on both employee and employer to deal with grievances without unreasonable delay. There is reference in the ACAS Guide to Discipline and Grievances at work to employers having to deal with complaints of

harassment and discrimination carefully, and to consider how they can provide support to minimise the risk of the process causing distress and having an impact on a person's mental health. No specific breach of the Code (as opposed to the Guidance) was pointed to or relied upon before us. The Respondents were criticised for failing to provide support and for pushing on to a resolution as quickly as possible.

4. THE LAW

4.1 The Equality Act 2010

Section 26 Harassment

(1) A person (A) harasses another (B) if—

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

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

(i) violating B's dignity, or

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

(2) A also harasses B if—

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

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

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Section 27 Victimisation

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

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

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

Section 39 Employees and applicants

...

(2) An employer (A) must not discriminate against an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

...

(4) An employer (A) must not victimise an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

Section 136 Burden of proof

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

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

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

...

4.2 Submissions on the law

4.2.1 Counsel set their respective submissions on the law and relevant authorities in their written submissions [Closing Submissions on behalf of the Claimant paragraphs 2-14; Final Submission on Behalf of the Respondent, paragraphs 30 – 42]. We were provided with copies of *Tom Cobleigh PLC v Young EAT /292/97* and *Saad v Southampton University Hospitals Trust [2018] IRLR 1007, EAT*

4.2.2 There was no dispute as to the applicable law and the principals to be derived from the authorities to which we were referred. It was not disputed that detriment simply means that the complainant has been put at a disadvantage in some way: [see *Kirby v Manpower Services Commission [1980] IRLR 229, [1980] ICR 420, EAT*; *BL Cars Ltd v Brown [1983] IRLR 193, [1983] ICR 143, EAT*; *Garry v Ealing London Borough Council [2001] IRLR 681, CA.*]

5. CONCLUSIONS

Sexual harassment

5.1 We have found that on 20 June 2019 C sexually assault the Claimant in the back of a taxi, following a work event at Ascot. We find this was unwanted conduct of a sexual nature contrary to section 26(2)(a) Equality Act 2010.

5.2 We have found that this had the effect of violating the Claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her (s26(1) (b) EqA 2010)

5.3 When considering whether the conduct had the required effect, we took into account the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have this effect (s26(4) EqA 2010).

Sex harassment

5.4. We have found that the Second Respondent did the following:

- a. In or around August 2019, calling the Claimant a "cunt"
- b. On 23rd of September 2019, calling the Claimant a "spotty adolescent"

5.5 We have found that this was unwanted conduct related to the Claimant sex. We find that this conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Victimisation

Protected acts 24 September 2019

5.6 The Respondents admit that on 24 September 2019 the Claimant did the following, each of which amounted to an allegation that the Second Respondent had contravened the Equality Act 2010:

(i) Telling the Fourth Respondent about the Second Respondent's conduct towards her in the back of the taxi on 20 June 2019;

(ii) telling the Third Respondent about the Second Respondent's conduct towards her in the back of the taxi 20th of June.

5.7 The Respondents case is that these allegations were false and as such were made in bad faith.

Were the allegations false and made in bad faith

5.8 We have found the allegations to be true for the reasons set out above.

5.9 Other than denying the allegations, the Respondents did not suggest any reason as to why the Claimant would wish to make up such an allegation, either in their response to the claim or in cross-examination of the Claimant. It was not until closing submissions, in response to a question from the Employment Judge, that the Respondents' Counsel suggested for the first time that it was in order to obtain payment of monies from the Respondents.

Detriments

5.10 Did the Respondents subject the Claimant to any or all of the following detriments because she did the protected act/s set out above?

(a) By subjecting the Claimant to less favourable treatment through the grievance procedure

(i) Through insisting that the Claimant respond to an unreasonable and/or unrealistic timeframe;

5.11 We have found this allegation made out for the reasons set out above. We are satisfied that the timescale imposed on the Claimant were unreasonable in the circumstances, the Respondents were well aware of her distress, and she contacted them to let them know she was unwell. We find that their insistence on pressing the Claimant to respond left the Claimant feeling bullied and unsupported and amounted to a detriment in the circumstances.

5.12 We have found that the reason for insisting the Claimant meet the unreasonable timescale and deadlines in respect of her grievance was in large part because of the fact she had made an allegation that the Second Respondent had sexually harassed her.

(iv) Continually harassing the Claimant with correspondence, through post and email, while she was signed off sick in full knowledge that the Claimant was distressed, tearful and stressed;

5.13 We have found this allegation made out for the reasons set out above. We find that the Respondents' actions left the Claimant feeling bombarded and increased her distress at what was an already distressing and stressful time. We find that in so doing they subjected her to a detriment.

(vi) Holding the grievance meeting in the Claimant's absence and reaching a

decision based on the Second Respondent's version of events without providing the Claimant the opportunity to comment or make representations;

5.14 We do not find there to be a causal link to the protected act and holding the grievance in the Claimant's absence and not asking for her comments on C's response. We do not find this allegation to have been made out.

(viii) Failing to follow the ACAS Code in relation to the Claimant's grievance and /or [failing to] treat the allegations seriously, respectfully and reasonably.

5.15 We have not found there was a failure to follow the ACAS Code. We have not found that the Respondents failed to treat the allegations seriously, however we have found that they failed to treat the Claimant respectfully and reasonably as set out above.

b) By dismissing the Claimant on 24 September 2019 with immediate effect.

5.16 We are satisfied that the sexual assault allegation was a significant factor in the decision to draw a line under the employment relationship and terminate it for the reasons set out above, which includes D's evidence to that effect.

5.17 We find that the decision to bring relationship to an end was an act of victimisation.

Jurisdiction - discrimination claims

5.18 We have found that C's remark on 23 September 2019 when he called the Claimant a "spotty adolescent" was a continuation of his conduct towards her and were part of an ongoing state of affairs, which was his lapses into harassing behaviour towards her following the assault on 20 June.

5.19 Had we not found the conduct to be have been extending over the period we would have been satisfied that it was just and equitable to extend time. The only prejudice it was suggested the Respondents had suffered was the inability to rely on the Uber driver's recollection of the taxi journey on 20 June 2019. There was no evidence to suggest that the Respondents had sought to identify or contact the driver to establish whether he had any recollection of the incident or that they would have done so had the incident been disclosed closer to the time. We have accepted the Claimant's reasons for not disclosing the sexual assault, and bringing the complaint, sooner and are satisfied that the balance of prejudice falls in favour time being extended.

Breach of contract

Was the Claimant summarily dismissed in breach of her contract of employment

5.20 We have found that the Claimant was summarily dismissed on 3 October 2019 in breach of her contract of employment.

Remedy

5.21 A remedy hearing has been listed for 1 day on **4 May 2021** by CVP.

Employment Judge Lewis
Date 26 January 2021