EMPLOYMENT TRIBUNALS

Claimant: **Ms Mia Travers**

Respondents: **(1) Places for People Leisure Limited**
(2) Mark Taylor
(3) Shelley Abbot-Jones

Heard at: **East London Hearing Centre (by Cloud Video Platform on 28 and 29 April 2021)**

On: **28 and 29 November 2019 (in person) and 28 April and in Chambers 29 April 2021 (CVP)**

Before: **Employment Judge Hallen**
Members: **Ms. G. Everett**
Ms. E. Ojiako

Representation

Claimant: Ms. C. Mayes (18 and 29 November 2019) Ms. J. Beal (Solicitor 28 April 2021)
Respondent: Ms S. Palmer (Counsel)

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The unanimous judgment of the Tribunal is that: -

1. **The Claimants claims under the Equality Act were out of time by 5 weeks but the Tribunal considered it just and equitable to hear them out of time.**

2. **The Claimant's claim in relation to constructive dismissal contrary to section 95 Employment Rights Act (ERA) 1996 fails and is dismissed**

3. **The Claimant's claim for age discrimination contrary to section 13 of the Equality Act 2010 (EqA) fails and is dismissed.**

4. **The Claimant's claim for harassment pursuant to section 26 of the EqA succeeds and is listed for a remedy hearing on 27 November 2021 and directions for the hearing are set out in Employment Judge Jones case management note and in this judgment.**

5. **The Claimant's claim in respect of unlawful deductions contrary to section 13 ERA 1996 is not made out and is dismissed.**

REASONS

Background

1. The Claimant was employed as a receptionist at the first respondents Blackwater Leisure Centre from 18 May 2015 until 5 May 2019 working for the Respondent in one of its national leisure centres. At the relevant time the Claimant was aged 20. The Claimant asserted that she was constructively unfairly dismissed, the subject of sex harassment, age discrimination and had an unlawful deduction made from her wages in her Claim Form submitted on 23 May 2019.

2. The claim form and response form were considered at a preliminary hearing on 9 September 2019 before Employment Judge Jones at which directions were given for the substantive hearing and the issues were agreed between the parties. This substantive hearing was listed for two days on 28 and 29 November 2019 and went ahead with a personal hearing before this full Tribunal. It could not be completed in two days and was re-scheduled for 17 and 18 March 2020 but could not proceed due to the covid pandemic. It eventually went ahead by way of a hybrid CVP hearing on 28 April 2021 with 29 April being heard in Chambers before the same Tribunal.

3. The first set of issues for the Tribunal to determine were jurisdictional issues namely were the Claimant's complaints of discrimination and harassment presented in time? Do any of the complaints constitute conduct extending over a period, i.e. part of a continuing act? If so, was the claim presented within three months from the end of that period? If not, was the claim submitted within such other period as the Tribunal thinks just and equitable?

4. With regard to the substantive claim of constructive dismissal, did the First Respondent fundamentally breach the Claimants contract of employment entitling her to resign? The Claimant's case is, that the way in which the Respondent responded to her initial complaint of assault from the individual concerned was inappropriate, unhelpful and unsupportive. Furthermore, she was told to forget about it and was treated as though she was a little girl, and it was not until, an older woman became involved that the Respondent took it seriously and started investigating the matter.

5. The Claimant's second point is that the final straw was the contents of Mr Churchman's grievance appeal outcome letter partially upholding her grievance but not upholding her complaint in relation Ms. Abbot-Jones. It is the Claimant's case that Ms Abbot-Jones actions were fundamental to her feeling, that, she had been harassed and less favourably treated according to her sex. The fact that Mr. Churchman did not uphold that part of the grievance was the final straw leading her to submit her resignation for the Respondents employment.

6. It is the Claimant's case that there were three incidents during which she was sexually assaulted by the individual concerned, hereafter referred to as G who she now understands was an employee of the Respondent but at the time she was not aware of his status. The duty manager witnessed the first incident and laughed. Another member of staff saw the second incident. When the third incident occurred in December 2018, the Claimant decided to make a complaint and spoke to Ms. Abbot-Jones who told her that she should accept the situation, treated her as though she was a silly little girl and made excuses for the individual involved.

7. The Claimant alleges that the Respondent breached her employment contract from the moment Ms Abbot-Jones responded in that way. Also, in the way that it conducted the investigation, the Respondent's failure to uphold her complaint and deal with the individual concerned and lastly, the final straw being Mr Churchman's response in his letter and his findings against the Claimant's appeal against the grievance outcome.

8. With regard to the second claim of age discrimination, it is the Claimant's case that if she had been older, the First Respondent would have taken her complaints seriously. It is her case that when she spoke to Mr. Taylor he did not treat her complaint as seriously as he did when he was subsequently spoken to by Ms Lesley Davies who was an older woman employed by the First Respondent. It was only then that he began an investigation. The Claimant makes an allegation of age discrimination against Mr Taylor.

9. The Claimant alleges that when she spoke to Ms Abbott-Jones about being sexually assaulted, she treated the Claimant as though she were a silly girl and made comments to try to make the situation acceptable. She stated that the man was "touchy feely" and asked whether the Claimant knew who he was in the sense that he was the father of another manager employed by the Respondent at another leisure centre. She did not treat the Claimant's complaint seriously. On that occasion the Claimant told her about two earlier incidents in which the individual concerned had sexually assaulted her but it was still not taken seriously. It is the Claimant's case that had she been older Ms Abbott-Jones would have taken her complaints seriously and started an investigation.

10. It is the Claimant's complaint that had she been an older woman the First Respondent would, have treated her complaint of sex assault differently and would have investigated it and take decisive action against him much sooner than it did.

11. In relation to the third claim of sex harassment, the Tribunal has to ascertain if any of the Respondents and or the alleged perpetrator engaged in unwanted conduct related to the Claimant's sex which had the purpose or effect of violating her dignity. She alleges that it became evident to other members of staff what was happening as they would have seen and would have, known what was happening and that she was having to deal with the unacceptable behaviour of the individual concerned. The Claimant had subsequently found out through the police investigation that there were two other female members of staff who had made similar complaints about G and if Respondent had taken decisive action on those complaints then it is the Claimant's case that she would not have been subjected to the sexual assaults that she was. The Claimant is unsure of the dates of the earlier incidents when she was assaulted by the same individual. Those are referred to as background in that they show a pattern of behaviour. However, the Claimant alleges that the last incident took place on 18 December 2018 and that further information is contained in the grievance investigation and in the statement that she gave as part of the police investigation.

12. It is also the Claimant's case that the Respondents created an intimidating, hostile, degrading, humiliating or offensive environment for her. The Respondent failed to apply its policy relating to employees conduct between each other whether on harassment, assault or otherwise and if the First Respondent had done so, the individual concerned behaviour would not have continued and she would not have been sexually assaulted at work on three occasions. The Respondents had information from other victims, the Claimant and other documentary information that it had about the individual concerned that should have made them protect her from him and it failed to do so. Instead, Ms Abbott-Jones said to the Claimant when she complained: "You do know who he is' which led the Claimant to believe that he was being protected-and/or that there was a reluctance to deal with him because of his status. It is only much later that the Claimant was told that he was an employee.

13. The Respondent treatment of the matter indicated to the Claimant that she had, to work and be in an intimidating environment. Although the First Respondent arranged the rotas that the Claimant and the individual concerned did not work the same shifts, this was a leisure centre which the Claimant could use as part of her employment contract. She was not able to so following the reporting of the incident and she did not know if he would be on the premises or would approach her. The Claimant's case is that the Respondents created hostile environment for her at work and there was no outlet for her and no support.

14. If the Claimant proved the above having regard to all the circumstances of the case and the Claimant's perception, was it reasonable for the conduct to have that effect? The Claimant confirmed that she is not bringing a complaint of victimization under me Equality Act 2010. It was the Respondent's case that if the Claimant did suffer any acts of discrimination or harassment that it took reasonable steps to prevent its employees from doing that or anything of that description.

15. The Claimant complains that the Respondent deducted an overpayment of sick pay in the sum of £105.19 from her wages which she challenges. It is the First Respondent's case the Claimant had exhausted her sick pay entitlement while she was off sick following the last incident and it therefore reduced her pay to half pay or SSP levels. It is the Claimant's case that if the Respondents had dealt with this matter upon her complaint and dealt with it decisively and fairly, she would not have been off sick and would have been earning her full pay. It is therefore the Claimant's case that she has been subjected to unlawful deduction of wages by the First Respondent.

16. If her complaint is successful in addition to seeking compensation, the Claimant seeks recommendations from the Tribunal that the First Respondents managers should be given training on safeguarding of staff and of patrons, some of whom would be vulnerable adults and children and that the First Respondent's handbook, and any supporting policies should be available for all members of staff to have access to.

17. At the hearing, the Tribunal had before it an agreed bundle of documents and heard first from the Claimant who had prepared a written witness statement. The Respondent attended with three witnesses namely Shelley Abbott-Jones, the Operations Manager at Blackwater Leisure Centre; Mark Taylor, the Contract Manager for the Centre and the first stage grievance manager; Simon Churchman, Contract Manager and the second stage grievance appeal officer. All of these witnesses prepared witness statements and were subject to cross examination and questions from the Tribunal.

Facts

18. At the outset of this part of the judgment, it should be stated that the Tribunal on balance preferred the evidence of the Respondent's witnesses and resolved most of the conflicts of evidence in the Respondent's favour as shown in this section of the judgment.

19. The Respondent is a company operating leisure centre facilities on behalf of local authorities throughout the country and employs 9,000 people nationwide. There were approximately 97 employees that work on the site at which the Claimant worked. It was a at Blackwater Leisure Centre, Maldon, Essex.

20. The Claimant commenced her service with the Respondent on 18 May 2015 initially as a full-time lifeguard. She commenced employment at roughly the same time as Shelley Abbot-Jones, the first Respondents Operations Manager and second in command at the site who reported to Mr. Mark Taylor, the Contracts Manager. The Claimant and Ms Abbot-Jones have known each other since 2015 and she has reported to Ms Abbot-Jones on and off since then. The pair had regular interactions with each other, and the Claimant never hesitated to come to Ms Abbot-Jones if she had any problems or concerns. The Tribunal accepted Ms Abbot-Jones evidence that the two had a good working relationship. The alleged perpetrator, G was already working at the leisure centre when Ms Abbot-Jones joined as he was transferred in from the previous operators, Leisure Connection. The alleged perpetrator did not report to directly Ms Abbot-Jones but to the Duty Manager who in turn reports to Ms Abbot-Jones.

21. When the Claimant started working for the first Respondent, she was a full-time lifeguard. When the Claimant was working as a lifeguard, she began having blackouts outside of work and was under medical observation. She was supported through this period that ultimately led to her redeployment to part time Receptionist and Recreational Assistant. It was agreed after the sickness leave that it was better for her to redeploy to alternative duties. As such her contract was changed to part time and her role was split between Reception and Recreation Assistant. The Claimant had several other bouts of sickness throughout the period of working for the first Respondent and as before was supported through these in line with the company sickness procedures.

22. The company introduced an E-learning platform in June 2017, initially this contained a few training modules including safeguarding that both existing and new staff were/are required to complete. Since this introduction more training modules have been introduced, relevant ones for the purpose of this statement include place-making, which sets out the company's expectations about behaviour and customer service and spirit, which is about the company— values and the fundamental beliefs for behaviours of all employees, which was introduced to the platform in May 2018. Prior to that, this type of training would have been covered in the company's induction processes, which is still completed for new employees supporting the E-Learning programmes.

23. The Respondent produced a record of the training carried out by Ms Abbot-Jones, and Mr Churchman on pages 84 A-B. This also included the training records for the duty managers at Blackwater as well as for the alleged perpetrator, G. These records were taken from the e-learning platform and the Human Resource's database. This was the only evidence produced of training and guidance provided to staff on the first Respondents policies on sexual harassment. There was no evidence produced that showed that the

alleged perpetrator, G had undertaken any training in this area prior to the sexual assault of the Claimant or any other evidence of training or guidance given to him in respect of the Respondents equality procedures.

24. The alleged perpetrator only worked two days a week throughout the time Ms Abbot-Jones worked with him. He was employed as a Maintenance Engineer.

25. On 18 December, Ms Abbot-Jones was sitting at her desk in the back office at about around 10.30am. Val Ottaway and Sabrina Johnson were present, and Mark Taylor was in his office. Sam Conway, the admin manager returned to the office. Sam said "I think you need to talk to Mia there has been an altercation between her and G in the café'. Ms Abbot-Jones told her she should talk to the Claimant directly. Ms Abbot-Jones thought it was a bit strange that Sam had come to see her and told her about this rather than the Claimant, as Claimant had always been quite happy to speak to Ms Abbot-Jones about things that she was worried about or had concerns about. Ms Abbot-Jones recollected that it was around mid-morning as she had a meeting shortly afterwards which she believed was at 11 am. Ms Abbot-Jones very briefly made Mark Taylor aware that a potential allegation had been made by the Claimant about G. This occurred in Mark's Taylor's office with the door closed and only Mark Taylor and Ms Abbot-Jones were present. It was fair to say it was brief and Ms Abbot-Jones simply made Mr Taylor aware that she had been told by Sam that the Claimant had an issue with G. At this stage Ms Abbot-Jones was not aware of the detail but was about to get a written statement. Mr. Taylor confirmed that the company would need a detailed written statement from the Claimant and anyone else who had witnessed the incident or subsequent conversation as this was standard procedure.

26. Ms Abbot-Jones went out to the reception area where the Claimant was working. She was talking to two or three other staff lifeguards. Ms Abbot-Jones said to her that she understood that something had happened between her and G and, if so, she would like a written statement of what had occurred. She said okay. Ms Abbot-Jones returned to her desk and printed the form. Ms Abbot-Jones then explained to the Claimant that she had a meeting coming up but she could then discuss the matter once she had completed the statement. Ms Abbot-Jones then went to the meeting room and attended the group fitness meeting with Paul Mahoney and Sabrina Johnson. The meeting lasted approximately one hour.

27. Once Ms Abbot-Jones had finished she came back out and asked the Claimant if she had had a chance to write her statement. She said that she had not. Ms Abbot-Jones then went to ask the Duty Manager, Ben Thornett, if someone could cover the reception desk. Daniel, one of the lifeguards, said that he could so. Ms Abbot-Jones asked Ben if he could sit with the Claimant in the Duty Managers' office and help her complete the form.

28. Ms Abbot-Jones returned to her desk. She recalled that 10 or 15mins had passed but she had still not received the statement from the Claimant. She went to the toilet and on the way back she saw the Claimant sitting at reception. She asked her if she had completed the form and the Claimant handed it to her. Ms Abbot-Jones recalls standing in the doorway between the back office and reception and had a quick skim through what she had written (page 85) and she then had a brief conversation with her. It was a very short conversation, probably no longer than 60 seconds and was the only time Ms Abbot-Jones ever spoke to her specifically about the incident. She was conscious that this was a sensitive issue having

read her summary and therefore did not want to discuss it in public but as there was no one there at the time she thought it was okay to raise it with the Claimant.

29. Ms Abbot-Jones asked her if she had said anything directly to G at the time and she said she had not. She did not mention any other incidents and whilst Ms Abbot-Jones did not remember the exact words she used, she did remember that she was trying to play devil's advocate to some extent and she did say words along the lines of "G is of a different generation and he sometimes puts a hand on the shoulder when in conversation, like my Grandad, so is a little more touchy feely perhaps than others". The Claimant said this was not like that. Ms Abbot-Jones was not trying to make excuses for what G did or make the Claimant feel silly. Ms Abbot-Jones did not fully understand what had happened at that point. She gave evidence to the Tribunal which we accepted that at this stage she was trying to explore whether G's actions could have been misinterpreted. Ms Abbot-Jones said that G was of a generation where gestures and being a bit more touchy in conversation was common. The Claimant did not ask Ms Abbot-Jones if she wanted her to explain in detail precisely what had happened, and this was a very short conversation. Ms Abbot-Jones gave evidence to the Tribunal which was accepted that she did not say anything along the lines of 'You do know who he is don't you". Ms Abbot-Jones gave evidence to the Tribunal which was accepted that G was not a special case and would be treated preferentially.

30. Ms Abbot-Jones gave evidence to the Tribunal which was accepted that she did not tell the Claimant that she should just accept it or to forget about it. The Tribunal found that Ms Abbot-Jones and the Claimant had known each other for at least four years, had a good working relationship and were on reasonable talking terms. It was unlikely in the Tribunals view that Ms Abbot-Jones would have taken the dismissive attitude that the Claimant attributed to her. In fact, at the end this brief conversation, Ms Abbot-Jones told her that the employer would carry out an investigation, which Ms Abbot-Jones had already agreed with Mr. Taylor before she had spoken to the Claimant. At this stage the Claimant had not mentioned the two other earlier incidents involving G.

31. Following this discussion Ms Abbot-Jones went to see Mr Taylor again to explain what the Claimant had told her and handed him the statement. Mr Taylor briefly read the statement and handed it back. He instructed Ms Abbot-Jones to carry out a full investigation. He asked her to download the CCTV footage from the areas within the statement and gain written statements from the people that were in the CCTV and anyone that the Claimant had contact with. Essentially, he asked Ms Abbot-Jones to carry out an information gathering exercise. This was particularly important as the CCTV footage was only saved for a period of two weeks. By this time, it was 1 pm and Ms Abbot-Jones had finished her shift. She told Mr. Taylor this and that she would gather the evidence the following day. She locked the Claimant's statement in her desk drawer then went to the gym to train.

32. Around 30 minutes later, Lesley Davies came in to see Mr. Taylor and said that she thought he needed to speak to the Claimant who had an issue with G. Lesley was a customer adviser at the centre and as a more mature staff member often supported the younger staff with work and personal issues, given the nature of the industry a high volume of the staff under 25 years of age.

33. Mr Taylor followed Lesley out to reception where the Claimant was sitting. He requested that they both follow him to the meeting room, which they did. This was the first time Mr. Taylor had spoken to the Claimant about this incident. The fact that Lesley was

there with the Claimant had absolutely no bearing on how Mr Taylor reacted or dealt with the allegations. He spent around 15 to 20 minutes with them, but he did not take any notes as he felt that this was an informal welfare meeting rather than part of a formal process at this stage. Mr. Taylor asked the Claimant to explain what had happened and she described it as inappropriate touching but did not give any further details. Mr. Taylor explained the company procedure. He concluded, based on what she told him, that he would treat this as a formal grievance, so he talked her through how the process worked stage by stage. Mr Taylor realised that this complaint could not be dealt with on an informal basis and so he said that we would gather evidence (which he had already asked to Ms Abbot-Jones do) and we would then have a grievance meeting to get some precise details so we could understand the matter better.

34. Alan Dawson, Contract Sales Manager, was the Claimant’s line manager at that time but given the serious nature of her complaint Mr. Taylor felt that it was appropriate for him to hear the grievance. The Claimant did say to Mr Taylor in that meeting that she thought Ms Abbot-Jones had not taken this seriously, but Mr Taylor reiterated to her that the company was taking it very seriously. At that stage, Mr Taylor did not think there was a complaint against Ms Abbot-Jones. The focus was much more about G's behaviour, and it was for that reason that Mr Taylor continued to keep Ms Abbot-Jones involved, as he thought it would be a useful experience for her and he really did not think that she would be personally involved in the process. At the end of the meeting, Mr. Taylor told the Claimant that this was a sensitive allegation and he strongly suggested that she limited the number of people that she told about it. Mr. Taylor’s only intention about this was to avoid her telling everyone and potentially compromising people's views. The Tribunal accepted Mr. Taylor’s explanation and did not accept the interpretation that the Claimant was putting on the instruction given by Mr Taylor. It was entirely appropriate in the Tribunal’s view that these sensitive matters be kept confidential.

35. On finishing her gym session Ms Abbot-Jones came back to collect her belongings from her desk when she was called into Mr. Taylor's office. He said that Lesley Davies had come to speak to him, and he had subsequently spoken to both Lesley Davies and the Claimant together whilst Ms Abbot-Jones was in the gym. Mr. Taylor told Ms Abbot-Jones that Lesley felt that the matter had not been dealt with appropriately. He did not go into any further detail at that stage and Ms Abbot-Jones certainly did not get the impression that there was any criticism about the way that she had dealt with the Claimant a couple of hours previously. She had done as she usually would in any situation like this which was to inform Mr Taylor and collect a written statement. Mr. Taylor reiterated that Ms Abbot-Jones should get the information together the following day. Ms Abbot-Jones decided at that point to write a statement of her own in case she needed to recall any information later of her involvement so far. She had not been instructed to do this but was aware it is good practise to do so. She returned to her desk, wrote her statement, scanned and saved it to her secured documents, destroyed the original and left site at approximately 2.30pm (pages 86 & 87)

36. Ms Abbot-Jones came into work the following day 19 December. G was not in work on that day as it was a Wednesday and he only worked on a Monday and Tuesday. The Claimant had been due on shift, but her mother called in sick on her behalf. The Claimant did not come back into work after 19 December at all tendering her resignation on 1 May with effect from 5 May 2019. The Claimant was signed off work sick for anxiety disorder due to the actions of G. This was for a period of four months. The Tribunal accepted that in part the actions of G had contributed to this sickness absence.

37. Ms Abbot-Jones extracted the CCTV and secured it on a USB stick and began collecting statements from people she knew had been involved or who were on the CCTV. Everyone was very cooperative and provided statements which were at pages 85 to 91, 130 to 133, 170 and 173. Not all statements were collected on the same day as not all staff were on shift, but all of the handwritten statements were obtained by Ms Abbot-Jones over the course of the following few days. Some of the statements have later dates on them but that was where they had subsequently been signed to confirm they were a true record.

38. On 20 December, Ms Abbot-Jones arranged the date for the grievance hearing and sent out the letter which Mr Taylor approved and signed. A copy of the grievance policy was also sent to the Claimant. Mr. Taylor also asked Ms Abbot-Jones to carry out a risk assessment about G's possible suspension which she wrote and which he approved (page 92), The Claimant and G were both on leave by that point and not due back until after Christmas on 14 January. Mr. Taylor considered whether he could allow them both back to work and ensure that they did not cross paths. Given that G only worked two days a week and only 8 hours in total, he thought the company could manage them working alternative shifts and there was only one possible change necessary to accommodate that. Mr Taylor also considered that as he was going to have the grievance hearing before they were both back from leave, he thought that suspension was not necessary at that stage.

39. It was only as a result of the Claimant's allegations that the company learnt about incidents involving G and RP and AL. References to these incidents were included in the initial statements gathered by Ms. Abbot-Jones and Mr. Taylor subsequently also asked them about these incidents in the formal interviews. The incident when G stroked RP's hair had taken place on 17 December 2018, but she had not reported it as she saw it as harmless. AL also later told Mr. Taylor in her interview that G had touched her knee when she was supervising bouncy tots, but it had not bothered her, so she also did not report it. Mr Taylor was unable to deal with these incidents when they arose (or indeed the earlier incidents involving the Claimant) as the individuals did not report them to management.

40. Mr. Taylor gave evidence to the Tribunal which was accepted that the company would expect where a Duty Manager was made aware of or witnessed an event that raised concern that this would be reported upwards through the management structure and recorded through the relevant reporting system. This was part of their job description and in the induction training for managers. As part of the investigation, it became clear that two duty managers (Adam Ratchford and Ben Thornett) and one lifeguard (Dan Henderson) who was only 17 witnessed or been told of previous incidents. Dan described it as jovial and non-harmful (page 105), Adam had not witnessed anything but had been told about previous incidents when G had stroked a female member of staff's hair or shoulder. He said that no-one wanted to take it any further when prompted (page 133). Finally, Ben said that the Claimant had said at the time that it was a "bit weird" but it was not deemed offensive (page 123). From those accounts it became clear to Mr. Taylor that as no-one took any offence or considered the previous incidents to be very serious (including the people who had been touched by G) the incidents were not reported to management. Mr Taylor realised that was not the case for the Claimant. Mr Taylor gave evidence to the Tribunal which was accepted that if a member of staff did not report the incidents that made them feel uncomfortable, there was little that an employer could do apart from putting in to place appropriate policies and training staff in respect of those policies. When such incidents were reported as was the case here with the Claimant, Mr. Taylor confirmed that immediate action was taken.

41. There were no developments over the Christmas period until the grievance meeting on 8 January. A copy of the notes were on pages 94 to 96. The Claimant also signed to confirm that she agreed with them. There was a bit of confusion at the start of the meeting about whose responsibility it was to ensure that the Claimant's companion Lesley Davies was available. Having looked at the invitation letter (page 93), Mr. Taylor accepted that this could be a bit misleading, but the grievance policy (pages 80 to 84) made it clear that it was the employees' responsibility to secure the attendance of their companion (page 82). Ms Abbot-Jones was present to take notes and not say anything. Mr Taylor was present to lead the meeting. Mr Taylor looked at the letter and agreed that it was potentially misleading. He made arrangements for Sam Conway to be present to which the Claimant agreed.

42. The Claimant did not at any stage object to Ms. Abbot-Jones presence in the meeting. However, she made it clear that she also had a complaint about the way Ms. Abbot-Jones had originally communicated to her the first (and only) time they spoke about it. Until that point, Mr. Taylor had not appreciated that it formed part of her formal complaint. After the meeting, Mr Taylor decided to remove Ms. Abbot-Jones from any further involvement with the Claimants grievance. That was his decision and not at the Claimants request. The Claimant did make it clear that there were other historic complaints that she also wanted taken into account. She had not mentioned this to Mr. Taylor or Ms Abbot-Jones before and Mr. Taylor was completely unaware of them until she raised for the first time at the grievance meeting. Mr Taylor asked her to write to him after the meeting in as much detail as possible setting out the precise details of her complaints as he was still not completely clear about them. Mr. Taylor wanted to make sure that he understood exactly what he needed to investigate. At the end of the meeting the Claimant confirmed to Mr. Taylor what her desired outcomes were. She did not want to work with G or see him. Mr. Taylor said that he would discuss shift scheduling with Alan Dawson, and she told him what her shift pattern was. Mr. Taylor reiterated that the content of the Claimant's grievance must remain confidential. This was the same message he had given her when they first spoke and that he gave to all other witnesses that were interviewed. He also had Ms Abbot-Jones write up the notes and had a conversation with her confirming that it would not be appropriate for Ms Abbot-Jones to continue to carry out any further investigations or have any further involvement in the grievance process. Ms Abbot-Jones did not see or have any further dealings with the Claimant after this.

43. Mr Taylor understood from Alan Dawson that he subsequently spoke to the Claimant about the shift. He had asked Mr. Dawson to speak to her about her revised shift patterns on her return to work after sick leave as the company was making one small change to ensure that she did not come into any contact with G. Consideration was given to changing both G and the Claimants shift pattern, however in the first instance it appeared easier to adjust the Claimant's. Before this was finalised the Claimant had reported her sickness absence and therefore this was not concluded as the Claimant did not return to work.

44. As Mr. Taylor had requested in the meeting on 15 January the Claimant had sent him an email with more detail of the allegations relating to earlier inappropriate conduct towards her by G (page 97). Following receipt of this email, Mr. Taylor decided that he needed to meet her again as he had some further questions to get more detail from her and Mr. Taylor replied on 19 January at 12.19pm (page 100 to 101). This also included a formal invitation to the meeting, and Mr. Taylor explained that she should make arrangements for her companion to be available (page 102). On the same day at 1.55pm, Mr. Taylor also sent

her a copy of the meeting minutes for 8 January, which she later signed as a true record (page 103 to 104).

45. As the Claimant was signed off sick, Mr. Taylor followed up on 22 January to confirm her attendance on 24 in an email sent at 5:49pm (page 106).

46. It was around this time that Mr. Taylor also began his formal investigation, and the company was also first contacted by Essex Police. Ms Abbot-Jones had already collected short statements from relevant individuals before Christmas which Mr. Taylor had seen (pages 85-91, 130-133, 170, 173). The Respondent received a request for disclosure from the Police on the 22 January, which he responded to the following day (107 to 108).

47. On 24 January, Mr. Taylor had a follow up grievance meeting with the Claimant. Notes of this meeting were at pages 109 to 111. The meeting lasted just under an hour and a half. Mr. Taylor started off the meeting by explaining why Ms Abbot-Jones was not there, that James Eley would be the note taker, and this would be consistent personnel going forward. Mr. Taylor also reiterated that these matters should be kept confidential. The Claimant gave some more information about the historic allegations and confirmed that there were three main points to her grievance which were: the incident on 18 December with G; the two earlier incidents involving G; and the way that Ms Abbot-Jones had handled the initial conversation on 18 December.

48. The Claimant told Mr. Taylor that her preferred outcomes would be for G to be suspended and then dismissed following the investigation. Mr. Taylor explained to her that there was a process to follow and that will determine the outcome. She made no requests about what should happen to Ms Abbot-Jones. Mr. Taylor confirmed to her that he had completed a risk assessment and had decided not to suspend G. He would ensure that she and G would not be in the building at the same time and G was not permitted to enter the building outside of work hours unless he was attending a meeting at Mr. Taylor's specific request. Mr. Taylor explained to the Claimant that he would inform her if this was to happen. The Claimant said she was happy with this arrangement.

49. Mr. Taylor was conscious at this stage that some significant time had already passed since the initial incident on 18 December and the Claimant's complaint, but that delay had been due to lack of clarity initially as well as sickness absence and the Christmas period. It had taken all of this time for Mr. Taylor to completely understand what the allegations were and what the scope of his investigation should be.

50. On 26 January, Mr. Taylor wrote to the Claimant setting out clearly the arrangements he had made about shift patterns to ensure that the Claimant did not encounter G (page 113). Mr. Taylor sent this to her at 10:39am on 27 January (page 114) which was during his normal working hours. This letter explained that in practice the Claimant was free to attend the centre at any time and would not encounter G provided she did not come between 8 am and 1 pm on Monday or Tuesday when G was working. Mr. Taylor also sent the meeting notes at approximately the same time (page 115).

51. Around this time Mr. Taylor held a whole series of interviews with other potential witnesses including Dan Henderson who was present at one of the historic incidents (Page 105); G (page 117 to 119); Jessica Kerridge who was with the Claimant on 18 December

(page 120 to 121); Ben Thornett who was present during the other historic incident (page 122-123); Shelley Abbott-Jones (page 124 to 125); AL (page 126 to 127) and Lesley Davies (page 128 to 129). He also interviewed RP a little later (page 171-172).

52. On 30 January, which was when Mr. Taylor carried out a large number of interviews, he had a further request for disclosure from the police and he complied with this the following day (page 134 to 135).

53. On 1 February 2019, Mr. Taylor received a site visit from someone called LB who was a member of the public. She had been at the centre watching her granddaughter doing swimming lessons. She was eventually put in touch with Mr. Taylor, and she told him that she knew or recognised G of old, she did not want to make a statement but said that she understood his real name was GS as he lived close by in a small village and she told Mr. Taylor that he had been involved in a police investigation involving an issue with a young girl about 26 years ago. At that stage, Mr. Taylor had no further corroborating information and it had been totally out of the blue, so he took no further action apart from recording the visit.

54. However, shortly after this another member of the public, JL, contacted the company using generic contact details and was put through to one of the directors, Richard Millard. Mr Millard has now retired from the business. JL told Mr Millard that he knew G and Mr Millard passed this information to Mr. Taylor. Mr. Taylor called JL and met him outside the centre on 11 February. He said that he lived near G and that he was known as GS. He told Mr. Taylor that G was a convicted sex offender. He said that he had seen him on site and just wanted to make the company aware. Again, he said he did not want to do anything or be involved but simply wanted to make the company aware about this information.

55. Mr. Taylor considered this information and was concerned by it as it corroborated the information that Mr. Taylor had been given the previous week. Mr. Taylor conducted an updated risk assessment on the same day (page 138) in which he concluded that he should be suspending G with immediate effect. There was some internal communication between Jeremy Boreham, who was Mr. Taylor's area manager, and some of the directors and Mr. Taylor about this incident (page 141) and he made the police aware the following day (page 145).

56. At some point either before or after this email, Mr. Taylor spoke to the police who asked him to name the individuals that had come to him although Mr. Taylor said they had asked to remain anonymous, as they did not want to take it any further. The police told Mr. Taylor that G had no criminal convictions.

57. On the same day that Mr. Taylor had a meeting with G, explained to him about the claims, and suspended him. Mr. Taylor had to assess the risk to the safety of G, staff and the public and therefore Mr. Taylor felt that it was appropriate to suspend him due to the nature of the allegations and the new information.

58. As normal, Mr. Taylor did not advertise the fact that we had suspended G and he did not inform the Claimant. Also on the same day, Mr. Taylor provided a witness statement to the police (page 142-144).

59. On 19 February, the Claimant's mother rang reception asking for a number of policies. This call was passed to Mr. Taylor. He told her that the Claimant had access to policies via the intranet from home but asked for clarification if there were any other additional policies that she wanted him to send. The Claimant' later emailed Mr. Taylor on 27 February with a list of the policies that she wanted to see, and Mr. Taylor made arrangements for these to be sent to her by the People Team on 1 March (page 179).

60. On 20 February, Mr. Taylor emailed the Claimant at 12.38pm regarding her ongoing sickness absence. Mr. Taylor sent the Claimant information about support which was available and a guide to occupational health so that she could understand the support the company could provide and help her get back to work. Mr. Taylor also updated her on the progress of the grievance and explained that he was in the process of completing the outcome report (page 148).

61. Normally it would be a line manager who would be in touch with employees who were off sick, however due to the nature of the absence and for consistency (as Mr. Taylor had been in regular contact with the Claimant from early January), Mr. Taylor conducted welfare contacts throughout the process as these related specifically to investigations that he was carrying out.

62. On 21 February, Mr. Taylor emailed the Claimant at 5:26pm as her last sick note had run out over a week ago (page 161). He asked her to confirm when he would receive this as if he did not then her absence would need to be recorded as unauthorised absence. The Claimant provided an updated Fit Note shortly afterwards.

63. Mr. Taylor then had an exchange of emails with the Claimant in late February when she was asking him to confirm his findings. Mr. Taylor explained that he would be able to give her an update during the scheduled welfare call on 26 February but would not be in a position to confirm the final outcome. He explained that typical arrangements would be a face-to-face meeting to run through the outcome when the final report was available, and he was clear about the outcome and next steps and that there was really nothing for her to prepare in advance of the welfare call (see pages 162-163).

64. Mr. Taylor then spoke to the Claimant on a welfare call on 27 February (page 166 to 167). Mr Taylor wanted her to understand how the company could help move forward so he ran through the employee care pack and the support which the company would provide and also ran through the occupational health information. Mr. Taylor confirmed that he needed her consent to this and asked her to confirm her agreement. There was a follow up meeting scheduled for 6 March and Mr. Taylor reminded her that she had access to all of the policies on the intranet but if she wanted anything else then she should simply let him know and he would provide these.

65. Mr. Taylor provided her with an update on the grievance and explained that he had interviewed a number of people and he had also been dealing with the police, which had regrettably delayed matters. Mr. Taylor reiterated his plan to notify her shortly when the outcome meeting would be. He later emailed her a copy of the minutes on 1 March at 5:53pm (page 169).

66. On 4 March, Mr. Taylor carried out his final interview which was with RP. It was on the same date that he completed his draft report confirming the scope of his investigation and his findings. It took a little bit of time to finalise this as he wanted the People Team to review it although the findings were all his own. A copy of the report was on pages 174 to 177 of the bundle.

67. Mr. Taylor had a further welfare call with the Claimant on 6 March who was still signed off work sick at that time. He asked her to complete the consent form for occupational health and he noted that the company policies she had requested had been sent over on 1 March. Mr. Taylor sent her a copy of the notes later the same day at 10:58am. (page 179 to 180).

68. It came to Mr. Taylor's attention that the Claimant had been overpaid for March as she had been paid full pay for the whole month. The Claimant was entitled to 13 weeks' full pay under her contract of employment (page 63). However due to her previous absences in the prior 12 months, she had reached that point on 14 February. Therefore, from 15 February onwards she was only contractually entitled to receive SSP. Mr. Taylor wrote to her on 7 March explaining this and that she had therefore been overpaid by £105.19 (page 181). He never received a reply to this letter from the Claimant. Mr. Taylor gave evidence that it is not normally the company practice to write to employees when company sick pay was due to run out but in this case for some reason no-one had noticed that the pay rate should be changing. It was accepted by the Tribunal that the first Respondent's sickness absence policy was set out in the Claimants contract of employment. When the relevant period of sickness absence was triggered in any rolling 12-month period, the entitlement to sick pay at full rate came to an end and was replaced by Statutory Sick Pay entitlement. It was accepted by the Tribunal that the Respondent's position was simple and was clearly set out by the first Respondent in correspondence at page 181 to the Claimant. One of her sick certificates was received late from the Claimant. This resulted in sickness absence in February 2019 initially not being recorded as such. This meant that the Claimant continued to be paid full pay beyond the point when she should have gone onto SSP. Once the sick certificate was received and it was realised that she had inadvertently been overpaid by some £105.19 during February 2019. An adjustment was applied to the following pay run. When the Claimant was taken to the correspondence which set out clearly that this was recovery of an overpayment, she said that she accepted that that was the reason, but that at the time she had not accepted it. She then said that she still thought it was "coincidental" and did not really accept that the reason was valid. The Tribunal accepted the evidence of the Respondent that this was recovery of an overpayment of wages which the Claimant was not entitled to.

69. Mr. Taylor confirmed that there was a further disclosure request from the police on 8 March for all of the contents of the investigation and report outcome, which he provided on 10 March (page 182 to 184).

70. On 13 March, the Claimant then emailed Mr. Taylor asking for a copy of her contract. He replied the following day at 4:51pm confirming that this would be dealt with by the People Team, and he also asked her to confirm her consent for an occupational health referral and noted the date for their next welfare call on 20 March (page 185-186). As the Claimant's original contract could not be located a backdated copy of the contract was sent along with an amendment of terms in January 2017 on 20 March (page 188)

71. Mr. Taylor could not contact the Claimant for their welfare call on 20 March, but he sent her an email the following day at 9:16pm. He tried to rearrange that meeting and also to schedule a grievance outcome meeting. The Claimant did not reply and therefore he wrote to her on 26 March confirming his decision on her grievance (page 190-192)

72. Mr Taylors preference in any grievance outcome was always to try and arrange a meeting so the complainant could be clear about what the outcome was. Obviously in this case it was not possible, but Mr. Taylor sent a comprehensive grievance outcome letter.

73. In the letter, he confirmed that he had viewed the CCTV footage which was inconclusive. It showed that there was a movement by G which appeared to be him pretending to push the tray out of the Claimant's hand which supported her version of events. It was impossible to see what happened to that hand afterwards as it was below counter level so whilst he could see that G had placed his hand on her left shoulder, the CCTV footage was not helpful in showing whether or not G did touch her inappropriately. Also, there was nobody that witnessed it; The Claimant did tell Jessica immediately afterward what had happened. Taking into account what she had told others, the CCTV footage and statements Mr. Taylor had taken from other staff members he felt that he was unable to conclude definitively what had happened, but he thought that it was possible that it could have occurred as the Claimant alleged. Since Mr. Taylor did not think it was possible to say conclusively, he did not feel entirely comfortable upholding the first allegation entirely as he could not prove that it had happened. All of her complaints before and after did happen and so Mr. Taylor partially upheld the first complaint about G touching her inappropriately.

74. In relation to the second allegation that G had touched her in the abdomen area on two previous occasions, Mr Taylor had corroborating evidence from Ben Thornett and Daniel Henderson. They had both witnessed separate incidents when this had happened, albeit no formal complaints were raised by the Claimant or anyone else at the time. On that basis, Mr. Taylor upheld that allegation.

75. Finally, Mr. Taylor dealt with the complaint about Shelley Abbot-Jones. He knew that Ms. Abbot-Jones had immediately escalated the matter to him, and he had subsequently explained to the Claimant and Lesley Davies that he would be following the grievance policy and precisely what steps would be taken. The Claimant was then invited to a grievance meeting on 20 December. Mr Taylor also dealt with the issue of the confusion over her companion in the first grievance meeting. The Claimant was given the opportunity to reschedule that meeting, however, she said that she was happy to continue. He therefore concluded that the grievance procedure had been followed appropriately and that company policy had been followed. However, Mr Taylor did conclude that Ms. Abbot-Jones could have been more sensitive in her initial brief discussion with the Claimant although he acknowledged Ms. Abbot-Jones mitigation for this was that she did not fully understand the severity of the allegation, in particular because the Claimant had not reported it to her directly. Whilst Ms. Abbot-Jones could have been a little more understanding in her choice of words, she did escalate appropriately to Mr Taylor and thereafter this was dealt with appropriately. Mr Taylor acknowledged that it had taken somewhat longer than usual to conclude the investigation due to the number of witnesses and complicating factors, such as police involvement and annual leave. Mr Taylor therefore partially upheld the third ground in respect of the allegations against Ms. Abbot-Jones but not in relation to non-compliance with company policy.

76. Mr Taylor also outlined the seps which he would be taking to resolve this. Firstly, the company would be taking relevant action in relation to G and he would ensure that the Claimant would not work with him in future. Secondly, Ms. Abbot-Jones would be undertaking grievance refresher training as he felt that Ms Abbot-Jones could have dealt with the matter more sensitively. At the hearing before the Tribunal, Ms Abbot-Jones agreed that she could have approached the subject in a different way with the Claimant. At the time Ms Abbot-Jones did not have a full understanding of what had happened but if she knew then what she subsequently learned, she would certainly have dealt with it more sensitively. The training took place on 7 November. Finally, Mr. Taylor advised her of her right to appeal.

77. Also on 26 March, Mr Taylor emailed the Claimant at 6:33pm (while he was at work) to confirm that Jeremy Boreham would be taking over her welfare calls. He gave evidence that the reason for this was because the Claimant subsequently made complaints about Mr. Taylor in her appeal against his grievance outcome, so he was sure this decision would have been taken anyway.

78. Following the conclusion of Mr Taylors investigation and the grievance outcome, the decision was taken to take disciplinary action against G, which was one of his recommendations. This was referred to Phil Wright, Contract Manager in Norwich, although he has now left the company. A copy of the disciplinary invitation letter to G was on page 194-195. Mr. Taylor did not have any direct input into this process apart from giving an account of his grievance outcome to Mr. Wright at the outset of G’s disciplinary hearing following which he withdrew. Mr. Wrights findings were reached independently.

79. On 15 April, G's disciplinary outcome was confirmed as a final written warning (pages 225-228). It was entirely Mr. Wright's decision. However, G did not come back to site. In or around September/October 2018, G’s role was identified as potentially at risk of redundancy due to cost savings. The first Respondent had delayed that process due to the ongoing investigation and the uncertainty of what might happen to G. As soon as the disciplinary hearing concluded and G was not dismissed, he was placed at risk of redundancy. This happened on 23 April and he asked for voluntary redundancy which was granted.

80. On 1 May, the Claimant emailed Mr Taylor and Simon Churchman with her resignation (page 231). Mr Taylor passed this to Jeremy Boreham to deal with and he replied on 3 May, saying that the Company had accepted her resignation with regret and set out the arrangements for the end of her employment a couple of days later as of 5 May 2019 (232-233).

81. Following the original grievance outcome decision by Mark Taylor, Simon Churchman received two emails on 31 March appealing against the outcome. The first was from the Claimant confirming that Ms. Carlie Mayes would speak on her behalf (page 200) and then an email from Ms. Mayes shortly afterwards confirming the Claimant 's wish to appeal (page 197).

82. On 2 April, Mr. Churchman replied to the Claimant and Ms. Mayes (page 198). The Claimant had the right to be accompanied at the appeal, so in Mr. Churchman’s email he asked for clarification of Ms. Mayes 's relationship to the Claimant to check if she satisfied the criteria to be the Claimant 's companion. In her previous email to Mr. Churchman, Ms. Mayes complained about the tone of the right of appeal wording in Mr Taylor’s outcome

letter and Mr. Churchman confirmed this was simply standard wording. Mr. Churchman also asked for clarification of the grounds of appeal.

83. On the same day, Mr. Churchman sent an invitation to the appeal hearing (pages 201-202). The appeal was to be a full re-hearing. Mr. Tom Reed was due to hear it with Mr. Churchman initially but was unavailable, so Mr. Churchman asked Laura Hitchman-Banks, who is the safeguarding lead for the Wellingborough Contract, to hear it with him instead (page 199). The Claimant was offered the chance to submit new evidence and call witnesses.

84. Ms. Maye's provided the detailed grounds of appeal the following day (page 206 and 207). She also asked to reschedule the meeting to allow her companion to attend. Even though Ms. Mayes was not a work colleague, Mr. Churchman agreed to this request and rescheduled the hearing at Moulden Council Offices on 8 April (see page 209) as she requested. In light of her complaints about Mr Taylor, Mr. Churchman also arranged for Mr. Taylor not to attend the meeting to present the original findings to the panel as had been envisaged but rather Mr Taylor briefed Mr. Churchman in advance. The meeting with Mr Taylor took place on the same date as the appeal hearing but just beforehand. This was all done to support he Claimant as it appeared to Mr. Churchman from Ms. Maye's emails that the Claimant had found the original incidents and the grievance process itself very upsetting.

85. The appeal hearing did go ahead on 8 April. In preparation Mr. Churchman watched the CCTV footage from 18 December before he read anything. Mr. Churchman did not want to be swayed by what he had read before viewing it. Mr. Churchman was comfortable that the CCTV did not show that there was any touching below the waist but that was simply due to the location of the CCTV cameras and it was impossible to see whether it had taken place or not. However, Mr. Churchman did think that there was a look of shock on the Claimant's face after the incident and it looked like she was thinking or saying to her colleague "did you just see that?".

86. Mr. Churchman also looked at the statements which had been taken as part of the grievance investigation (pages 105, 117-129, 166-167), and noticed that was in fact almost precisely what she had said to Jessica, which made Mr. Churchman think that something untoward had happened.

87. Finally, Mr. Churchman also read the grievance report and the outcome letter and copies of the statements, reports and minutes from the original grievance process.

88. The minutes of the appeal hearing were taken by James Eley and were at pages 215-218. At the appeal hearing on 8 April before Mr Churchman, the Claimant was quiet and did not seem uncomfortable, but Ms. Mayes certainly did most of the talking and was leading matters. Mr. Churchman thought the Claimant was sincere and did not appear to be exaggerating.

89. The Claimant did become quite upset at one point and Mr. Churchman had a short adjournment just before the end. The parties talked through the different aspects of the appeal. Mr. Churchman gave evidence to the Tribunal which was accepted that at no stage in the meeting did the Claimant suggest or mention that she was treated the way she was

because of her age. She also did not make any reference to the fact that G was not suspended until February.

90. Around two days after the appeal hearing, Mr. Churchman as part of his further investigations spoke to Lesley Davies in relation to the allegation that Mr. Taylor had told the Claimant to keep her mouth shut at the meeting attended by Lesley on 18 December. Ms. Davies told Mr. Churchman that was not correct, and that Mr. Taylor had in fact simply asked her to keep it between themselves at that time due to confidentiality reasons. Mr. Churchman also spoke to Mr. Taylor about that separately. Mr. Taylor recalled that he asked her not to discuss it as it was private and confidential. Mr. Churchman therefore concluded the Claimant must have misinterpreted this instruction.

91. After the appeal meeting Ms. Hitchman-Banks and Mr. Churchman as joint decision makers reviewed all the information they had received and what had been said at the appeal hearing. Drawing on their own knowledge and experience, they sat down together to go through all the material and agreed the decision. Mr. Churchman then wrote it up and Ms. Hitchman-Banks agreed it. Mr. Churchman emailed it to the Claimant and Ms. Mayes on 12 April (page 219).

92. The first ground of appeal was the ~~company's failure to con~~sider the Claimant's welfare or follow company policy. In fact, the Claimant acknowledged at the appeal hearing that Mr. Taylor had contacted her to arrange a welfare call and she had been given details of the employee assistance programme and been asked to approve her referral to the occupational health team. Mr Churchman thought this appeared to satisfy the company's obligations. However, due to unforeseen delays this was not issued as soon as the company would normally have wished to happen. Her complaint about failure to follow company policy was, as far as Mr. Churchman understood, a complaint about the confusion over her companion in the first grievance meeting. However, whilst Mr. Churchman thought that wording of the invitation letter was potentially confusing, the policy was very clear that it was the Claimant's responsibility to ensure that her representative attended the hearing. Mr. Churchman suggested that he would make sure he addressed this wording going forward. The key thing for Mr. Churchman was that that the Claimant was accompanied at that meeting and she was happy to go forward. He therefore did not find that there was any breach of policy and did not uphold that allegation.

93. There were a number of complaints about the way Ms. Abbot-Jones and Mr. Taylor had handled the grievance initially and Mr. Churchman dealt with these together. The original grievance had made it clear that Ms. Abbot-Jones should have dealt with the matter in a more sensitive manner when she first discussed it with the Claimant and had upheld that aspect of her complaint. Mr. Churchman agreed with that assessment. Mr. Churchman accepted that the Claimant was reluctant to complain due to others interpreting the previous incidents as a jovial interaction, however from what he could see, as soon as Ms. Abbot-Jones became aware of it she escalated it to Mr Taylor straight away who in turn almost immediately commenced an investigation. Mr. Churchman thought that the original decision was therefore correct to partially uphold the complaint against Ms. Abbot-Jones. On that basis Mr. Churchman did not uphold that aspect of the appeal as the original complaint against Ms Abbot-Jones had already been partially upheld and Mr. Churchman agreed with that decision.

94. Mr. Churchman could not find any evidence that Mr Taylor had dealt with the complaint in any other manner than completely professionally and there were no texts sent by him whatsoever despite a complaint that he had continually called and texted late at night. A few of his emails were sent outside of working hours but Mr. Churchman thought this was completely normal in the leisure industry where people do not work normal office hours. In any case, Mr. Churchman did not feel there was any obligation on the Claimant to reply or pressure placed on her so Mr. Churchman did not uphold the complaint about Mr. Taylor.

95. There were also a number of complaints about G, his position and whether he had any kind of control over the process. Mr. Churchman could find no evidence of this whatsoever. G was an employee in the same way as the Claimant was however due to their shift patterns Mr. Churchman thought they simply did not come into contact with one another very often. Lesley Davies did not support the Claimant's allegations about being told by Mr. Taylor to "keep her mouth shut" on 18 December and Mr. Churchman's conclusion was that Mr. Taylor had simply told her to keep matters confidential as he had done with all the other witnesses. This was entirely appropriate. Mr. Churchman therefore did not uphold this aspect of the appeal either.

96. Finally, there was the allegation that Mr. Taylor and Ms. Abbot-Jones had both treated this matter as jovial. That was in fact the word used by the witnesses to the earlier incidents (Daniel and Ben on pages 105 and 123 respectively) rather than Mr. Taylor or Ms Abbot-Jones. Mr. Churchman did not find any evidence that Mr. Taylor had treated the incident with anything other than with the utmost seriousness although acknowledged that Ms. Abbot-Jones could have dealt with it more sensitively and empathetically as Mr. Taylor himself had acknowledged (and upheld) in the grievance outcome. Mr. Churchman therefore did not uphold that aspect of the appeal either.

97. Mr. Churchman confirmed that in the panel's view although there was no direct evidence of the inappropriate touching having taken place on 18 December other than the Claimants own evidence, they concluded that it did occur and confirmed that they accepted this aspect of her complaint as valid. They confirmed that action would be taken accordingly and apologised for any distress of this process had caused as they were aware that it had been a difficult process.

98. Overall, Mr. Churchman thought that Mr. Taylor and Ms Abbot-Jones did the best in what was a very difficult and sensitive situation. There were a lot of external factors such as holiday, sickness absence, Christmas and the police investigation and therefore the process was unavoidably delayed. Under normal circumstances the progress would have not been so delayed. Mr. Churchman thought it was quite telling that the first time it was brought to the company's attention (and this was not even by the Claimant directly) it was dealt with in what Mr. Churchman considered to be an appropriate and robust way. Mr. Churchman was then copied in on the Claimant's resignation on 1 May (page 231). The Claimant gave four days notice of her resignation with effect from 5 May 2019. The Claimant remained sick due to stress/anxiety but did manage to lodge her claim in the East London Tribunal on 23 May 2019 which was well within three months of her resignation but not within three months of the assault on her by G which was on 18 December 2018. She gave evidence to the Tribunal which was accepted that she was waiting for the outcome of the grievance process before she felt it appropriate to make a claim to the Tribunal. It was her position that if the grievance process was dealt with to her advantage, she would not have commenced proceedings.

Because she felt that Mr. Churchman had not dealt with her grievance appeal properly especially in not taking more robust action against Ms. Abbot-Jones for the manner that she first dealt with the complaint and the way that she had trivialised it she felt that she had no option to commence these legal proceedings in the Employment Tribunal.

Law

Time Limits

99. Section 123 of the EQA, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:"(1) … proceedings on a complaint … may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or(b) such other period as the employment tribunal thinks just and equitable." The language used ("such other period as the employment tribunal thinks just and equitable") gives the employment tribunal wide discretion.

100. Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay;(c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

101. In British Coal Corporation v Keeble [1997] IRLR 336, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'(Southwark London Borough v Afolabi [2003] IRLR 220).

102. The Court of Appeal in Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.

103. In Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 the Court of Appeal however stated that the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b)whether the delay has prejudiced the respondent". There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

Age Discrimination

104. Section 13 of the Equality Act 2010 is worded as follows: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Section 136(2) of the Equality Act 2010 is worded as follows: (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.

105. The Claimant seeks to compare herself to an older woman in the same circumstances facing sexual harassment stating that such a hypothetical comparator would not have been treated in the same way as she was when she made her complaint of sexual harassment in respect of the length of time her grievance was dealt with and the dismissive comments made about her and/or her grievance by the Respondents. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from her age. The focus is on the mental processes of the person that took the actions at the relevant time. The Tribunal should consider whether respondents 2 and 3 were consciously or unconsciously influenced to a significant (i.e. a non-trivial) extent by the Claimant's age. Their motives are irrelevant.

106. The burden of proof in discrimination cases, dealt with in section 136 of the EA, is a two-stage process. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. If the Tribunal could not reach such a conclusion on the facts found the claim must fail. Where the Tribunal could conclude that the Respondent had committed an unlawful act of discrimination against the Claimant, it is then for the Respondent to prove that it did not commit, or as the case may be, it is not to be treated as having committed that act. The Tribunal makes further observations on the burden of proof below.

107. Section 13 of the EA provides that it is direct discrimination for an employer to treat an employee less favourably because of a protected characteristic than it treats or would treat others. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

108. The court of appeal in Igen Ltd v Wong (2005) EWCA Civ142 made the following points in relation to the application of the burden of proof and claims of direct discrimination: –

> 'It is important to bear in mind in deciding whether the Claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of… discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination may not be an intention but merely based on the assumption that "he or she would not have fitted in'.

109. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal therefore usually depends on

what inferences it is proper to draw from the primary facts found by the Tribunal. It is important to note the word “could” in the legislation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal was looking at the primary facts before it to see what inferences of secondary fact could be drawn from them. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

110. According to the Court of Appeal in the case of Madarassy v Nomura International Plc (2007) IRLR 246, a difference of status and a difference of treatment will not usually be sufficient to reverse the burden of proof automatically. Nor will simply showing that the conduct is unreasonable or unfair usually, by itself, be enough to trigger the transfer of the burden of proof: Bahl-v- The Law Society (2003) IRLR 640, EAT approved by the Court of Appeal at (2004) IRLR 799. In Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that a unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of age and the detrimental treatment, in the absence of a non-discriminatory explanation.

111. Where the Claimant has proved facts from which the Tribunal could conclude that the Respondent had treated the Claimant less favourably because of age, it is then for the Respondent to prove that it did not commit that act, or as the case may be, is not to be treated as having committed that act. As Igen made clear, to discharge that burden in the case of alleged direct discrimination it is necessary for the Respondent to prove on the balance of probabilities the treatment was in no sense whatsoever on the grounds of the protected characteristic. Where there is more than one reason for an employer’s act, the question is whether the protected characteristic was an effective cause.

Constructive Dismissal

112. Section 95 Employment Right Act 1996 (ERA).

> (1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

113. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment (*Western Excavation Limited v Sharp)*.

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

114. Whether or not the employer intended to break the contract is irrelevant (Bliss v South East 713 [1987] ICR 700 (CA)).

115. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (Malik v Bank of Credit and Commerce International [1998] AC20 34h -35d and 45c-46e).

116. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Limited [1981] ICR 666 at 672, Morrow v Safeway Stores [2002] IRLR 9.

117. The test of whether there has been a breach of the implied term of trust and confidence is objective (Lord Nicolls, Malik page 35c) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer.

118. A breach occurs when the proscribed conduct takes place: See Malik.

119. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach, but it is not a legal requirement: See *Bournemouth University v Buckland [2010] ICR 908 at para 28.*

120. The Claimant must not affirm the breach: Lord Denning said in Western Excavating v Sharp (referring to an employee who had been the subject of a repudiatory breach):

> "the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.":

121. Court of Appeal's decision in *Marriott v Oxford Co-operative Society [1970] 1 QB 186* is an authority for the proposition that, provided the employee makes clear their objection to what is being done, they are not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time after the breach, even if their purpose is to enable them to find alternative work.

122. The Claimant must show that s/he resigned in response to this breach, not for some other reason. However, the breach does not need to be the sole or primary cause of the resignation; only an effective cause (Nottinghamshire County Council v Meikle [2004] IRLR 703).

123. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16).Those authorities give the following guidance on the "last straw" doctrine:-

> The repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorword Garages Ltd [1986] IRLR 157, per Neil LJ (p167C).

In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied term?

Although the final straw may be relatively insignificant it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

The “final straw need not be characterised as ‘unreasonable’ or ‘blameworthy’ conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

The last straw must contribute, however, slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract s/he cannot subsequently rely on these acts to justify a constructive dismissal unless s/he can point to a later act which enables her to do so. If the later act on which s/he seeks to rely is entirely innocuous, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer’s conduct will have cross the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but “soldiers on” they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

Even when correctly used in the context of a cumulative breach, there are two distinct legal effects to which the "last straw" label can be applied. The first is the legal significance of the final act in the series that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered no until the later act which triggers her/his resignation: in this case by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

The affirmation point discussed in Omilaju will not arise in every cumulative breach case:

"*There will be such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).*

Harassment due to sex

124. s26 Eq A provides " (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'.

125. 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."

126. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, a case dealing with racial harassment, the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the Claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the Claimant's race.

127. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences. This guidance is instructive in respect of harassment claims under s26 EA, albeit under the EA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or sex. There is no requirement that harassment be "on the grounds of" the protected characteristic – R(EOC) v Secretary of State for Trade and Industry [2007] ICR 1234. The shifting burden of proof applies to claims under the Eq A.

Statutory Defence

128. Section 109(4) EqA provides employers with a defence to a claim under S.109. It states that: 'In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A… (a) from doing that thing, or (b) from doing anything of that description.' Thus, it is a defence for the employer to show that it took all reasonable steps to prevent employees from either committing a particular discriminatory act or committing such acts in general. The EHRC Employment Code provides the following example: 'An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy.

129. The onus rests firmly on the employer to establish the defence. An employer can do so by showing either that it attempted to prevent the particular act of discrimination or that it attempted to prevent that kind of act in general. The defence is limited to steps taken before the discriminatory act occurred; this much is apparent from the use of the word 'took' in the past tense, which 'requires the employer to prove what it had done in the past' — Mahood v Irish Centre Housing Ltd EAT 0228/10. It is not sufficient for an employer to show that the discrimination was promptly remedied — see, for example, Fox v Ocean City Recruitment Ltd EAT 0035/11. What amounts to 'all reasonable steps will depend on the circumstances, but examples might include providing supervision or training and/or implementing an equal opportunities policy. The EHRC Employment Code suggests the following: implementing an equality policy; ensuring workers are aware of the policy; providing equal opportunities training; reviewing the policy as appropriate and dealing effectively with employee complaints.

130. The EAT has issued guidance as to the approach tribunals should adopt when determining whether an employer has satisfied the 'reasonable steps' defence. In Canniffe v East Riding of Yorkshire Council 2000 IRLR 555, EAT, it held that the proper test of whether the employer has established the defence is to identify: first, whether there were any preventative steps taken by the employer, and secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

Unlawful Deductions from Wages

131. Under Section 13 of the Employment Rights Act 1996, "(1) An employer shall not make a deduction from wages of a worker employed by him unless –(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

Tribunals Conclusions

Time Limits

132. The Claimant's early conciliation notifications were presented on 8 and 14 March 2019 (within 3 months of the incident on 18 December 2019) and her claim was presented to the Tribunal on 23 May 2019. The claim presented by the Claimant was within 3 months

of the date of resignation on 5 May but not within 3 months of the date of the assault by B on 18 December 2018. For this to be in time it should have been submitted on 17 April and not 23 May 2019. It was submitted by the Respondent that any act prior to 24 January 2019 is therefore on the face of it out of time. This incorporates the act(s) of G which were the subject of the grievance, and also the alleged lack of support/insensitive remarks of Ms. Abbot-Jones on 18 December 2018, as well as the early stages of the grievance process.

133. There are two possible exceptions to the time limit outlined above: The tribunal has the discretion to allow acclaim to be brought within such other period as the employment tribunal thinks just and equitable (s123(1)(b) EqA); In circumstances of a "continuing act": where conduct extending over a period is treated as done at the end of that period, as set out in s123(3)(a EqA).

134. In the present case the Tribunal found that there was no factual basis for asserting a continuing act. A succession of different individuals were involved in the matters of which the Claimant complains, each taking different decisions or carrying out different acts or functions. There were the original allegations concerning G, which took place on 18 December 2018 and two unknown earlier dates around 6 months earlier, and about 2 months apart from each other (the evidence of a witness to one of these puts it as early as April 2018).There appeared to be allegations that various colleagues witnessing or discussing one or more of these incidents failed to offer support, although this was never raised by the Claimant as part of her formal internal grievance, and appeared to be at odds with the evidence from various of those individuals that they encouraged the Claimant on 18 December 2018 to report the issue to Mr. Taylor if she had concerns. There was the allegation that, when the Claimant discussed the 18 December incident with Ms. Abbot Jones on the same date, she failed to take it seriously and made insensitive remarks during the conversation. There was also the allegation (despite the Claimant having confirmed in her 2nd grievance meeting on 24 January 2019 that it no longer formed part of her grievance) that Ms. Abbot-Jones in some way breached the Respondents grievance policy in relation to the arrangements for representation at the first grievance meeting, and by being present as note-taker at that meeting. However, it was clear to the Tribunal that, following the first grievance meeting on 8 January 2019, Ms. Abbot-Jones played no further part in the process because she was now being treated as part of the substance of the grievance. From that time onwards, the investigation and grievance process were carried out by Mr. Taylor, and the appeal stage by Mr. Churchman. There was a parallel, but independent, disciplinary process in relation to G, carried out by an entirely different management team following Mr. Taylor's findings. It was also clear to the Tribunal that Mr. Taylor carried out a comprehensive investigation of his own, and of note that both he and Mr. Churchman upheld the Claimant's grievances in whole or in substantial part. Mr. Taylor was also responsible for the welfare contact and contact with the police which took place between January and April 2019. Ms. Abbot-Jones played no part in those. The mere fact that, having investigated the matter and considered it independently, both Mr. Taylor and Mr. Churchman formed the view that although Ms. Abbot-Jones could have acted with greater sensitivity, the remainder of the grievance against her was not substantiated, did not make it part of a continuing act as against Claimant.

135. Turning to the issue of whether it was just and equitable to extend time, the Tribunal was of the view that it was just and equitable to extend time to include the incident on 18 December and the incidents by G relating to the Claimant prior to 18 December 2018. The tribunal reminded itself that the burden was on the Claimant to satisfy the tribunal of such cogent grounds for extension. We found it helpful to consider the factors set out in s33 of

the Limitation Act 1980. This included the prejudice that either party would suffer as a result of the decision reached, all the circumstances of the case, and in particular the length of and reasons for delay, the extent to which the cogency of evidence was likely to be affected, the extent to which the Respondent had co-operated with any requests for information, the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action, and the steps taken by the Claimant to seek appropriate advice once aware of the possibility of taking action. The Tribunal accepted that it was reasonable in this case for the Claimant to wait for the outcome of the grievance appeal conducted by Mr. Churchman to see if her concerns relating to the assault by G could be resolved satisfactorily. Given the nature and seriousness of G's actions it was only natural and normal for the Claimant to give the Respondent a full opportunity to resolve her concerns. When she found that her concerns were not dealt with to her satisfaction she did not delay in resigning from her employment and claiming constructive dismissal. The Tribunal also noted the fact that the Claimant was signed off sick from 19 December the day after the sexual assault by G which had an impact on her mental faculties and her ability to think clearly. In addition, the Tribunal noted the fact that both of the first Respondents grievance outcomes concluded that the assault by G did occur on 18 December 2018 and the two earlier assaults also occurred. In such circumstances, it would not be just for the Tribunal to prevent the Claimant from pursuing her claims of discrimination against the Respondents. The tribunal found that the limited delay of 6 weeks did not prejudice the Respondent in any material way in defending this claim as it was able to prepare and present it evidence despite such delay. Therefore, the Tribunal found that it was just and equitable to consider the Claimant's complaints of discrimination.

Constructive Dismissal

136. The Tribunal reminded itself that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. This requires consideration of four questions, in respect of each of which the burden of proof is on the employee: Was the Respondent in breach of the Claimant's contract of employment? If there was a breach of contract, was it fundamental? Did the Claimant resign in response to such fundamental breach of contract? Did the Claimant delay too long before resigning or otherwise waive the breach? In addition, the Tribunal reminded itself that a constructive dismissal is not necessarily an unfair one.

137. In this case, the Tribunal also reminded itself of a number of matters as set out as follows. if there was a dismissal, this therefore required consideration of the following issues: what was the reason for the dismissal, was it potentially fair, and was it procedurally and substantively fair or unfair having regard to all the relevant circumstances. In terms of whether there was a breach and whether it was fundamental: Failure to follow a policy (particularly a non-contractual one as was the case with the first Respondent's grievance policy) will not necessarily amount to breach of contract; Not every breach of contract will be fundamental or repudiatory (in other words, of a nature that entitles the wronged party to treat the contract as being at an end): it is a question of fact and degree. Thus, even if the Tribunal found that an employee who resigns in response to an incident of discrimination has suffered discrimination, it is not an inevitable consequence that dismissal will occur as a result; The mere fact that an employer has acted unreasonably does not of itself mean that the employee is justified in leaving employment and claiming unfair constructive dismissal. The fundamental breach must be an effective cause of the resignation, and delay in resigning following a repudiatory breach may indicate that the employee has affirmed the contract, or that the repudiatory breach is not an effective cause of the resignation. A course

of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident, even if that last straw by itself would not amount to a breach of contract. However, the "last straw" must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act by the employer cannot be a final straw, even if the employee genuinely (but mistakenly) interprets that act as hurtful and destructive of his or her trust and confidence. The test of whether the employee's trust and confidence has been broken is objective. And whilst it is not a prerequisite that the "last straw" act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable will satisfy the "last straw" doctrine.

138. The Claimants case on constructive dismissal was set above in the issues section of the judgment. Her case was that the third Respondent's (Ms. Abbot-Jones) initial response to her complaint of assault was inappropriate, unhelpful and unsupportive; The Claimant was told "to forget about it", was treated as a "little girl", and the complaint was only taken seriously, and an investigation commenced, when "an older woman became involved" namely Ms. Lesley Davies; The first Respondent failed to uphold her complaint and deal with the individual concerned; The "last straw" was Mr. Churchman’s failure to uphold the Claimant's complaint in relation to Ms. Abbot-Jones initial response to her complaint of harassment.

139. The Tribunal did not find that any of the factual assertions made by the Claimant upon which the above argument was based to be well founded. The Tribunal found that the Claimants recollection and/or understanding of what occurred was inaccurate, incomplete, flawed and unreliable: Contemporaneous or near-contemporaneous documentary evidence showed that the Claimant’s immediate work colleagues (to whom she reported the incident) all supported and encouraged her to make a formal complaint to Ms. Abbot-Jones. Despite this, it was clear that the Claimant did not do so until Ms. Abbot-Jones approached her. The Tribunal did not find that these actions could be characterised as a failure (by Ms. Abbot-Jones or other colleagues) to offer support, take appropriate action or take the allegations seriously. The Tribunal noted that when taken to the individual witness statements of these colleagues in which they said that they had advised her to make a complaint, and/or told her that they would support her, the Claimant said that she did not recall whether they had said that but maintained even in the face of these contemporaneous documents that she had not been offered support.

140. The Tribunal found that there was no evidence to support the Claimant's assertion that she was told to forget about the incident or treated as a "little girl" [explicitly or impliedly]. The Tribunal noted that these allegations formed no part of her internal grievance, either to Mr. Taylor or at the appeal stage, or indeed her ETI. They were not corroborated by the text messages she sent her boyfriend that day. On the contrary, those messages and the contemporaneous documentation adduced by the first Respondent show that the Claimant was asked to put her complaint in writing and was told that it would be investigated; The highest that matters could be put was that Ms. Abbot-Jones, when speaking briefly to the Claimant to collect her statement, asked an insensitive question about whether it was possible that the Claimant had misinterpreted actions which were simply a product of a generational difference in interpersonal style, resulting in G being more "touchy-feely". However the Tribunal found that this was not sufficient to amount to a breach of contract (still less a fundamental one), especially in the context of Ms. Abbot-Jones, at the same time, encouraging the Claimant to make a formal complaint, asking her repeatedly to complete a witness statement, and telling her the matter would be investigated; The clear

evidence of Mr. Taylor and Ms. Abbot-Jones, corroborated by contemporaneous documentation, was that before Ms. Abbot-Jones even spoke to the Claimant (having been made aware of the allegation by a third party colleague), she had escalated the matter to Mr. Taylor and a decision had been taken that it should be investigated, with Ms. Abbot-Jones being instructed to perform this task. This had occurred before the Claimant and her "older colleague" Ms. Davies came to talk to Mr. Taylor. Ms. Davie's evidence, gathered during the investigation process, was that the Claimant had approached her for advice and reassurance, and that she had asked Mr. Taylor to talk to her about the grievance process, which he had willingly agreed to do; It seemed to the Tribunal to be implicit from the way in which the Claimant's allegations were expressed that she accepted (at least from after the conversation between Mr. Taylor, Ms. Davies and herself) that the grievance was then taken seriously and investigated. The Tribunal found that this was clearly the case, and that the documentary evidence showed a careful, fair and thorough investigation being carried out into the complaints raised by the Claimant.

141. The Claimant alleged that her grievance was not upheld. However, it was clear to the Tribunal that, for the most part (by Mr. Taylor) and in its entirety (by Mr. Churchman), her original complaint about the perpetrator, G, was upheld at the grievance and at the appeal stages. Her additional complaint about Ms. Abbot-Jone's initial response to the incident was upheld in part, at both stages. The Tribunal also noted that there was also evidence that appropriate action was taken: during the investigation, steps were made to avoid the Claimant and G working together. Following the investigation, formal disciplinary action was taken against G resulting in a final written warning. Ms. Abbot-Jones was required to undertake refresher training on handling grievances; The Claimant's complaint can therefore only be that, having carried out a full and thorough investigation, Mr. Taylor and Mr. Churchman did not agree with her on every single concern she had raised about Ms. Abbot-Jones (who was not the perpetrator of the original assault); The Tribunal found that this was not capable of being characterised as a breach of contract, still less a fundamental one. The Tribunal found that any implied term of the contract of employment can only extend to an obligation on the Respondent's part to take the Claimant's grievance seriously, investigate it properly, and take appropriate action in response to any findings. It cannot extend to a requirement that they uphold every aspect of that grievance; The Tribunal found that in any event, the so-called "last straw" can only be characterised as an entirely innocuous act by Mr. Churchman, who had re-considered the grievance fully and seriously and formed his own view. No suggestion has ever been made by the Claimant that he did not take the matter seriously and investigate it properly. Indeed, at the appeal hearing, the Claimant's representative, Ms. Mayes commented positively that Mr. Churchman had been "brilliant and very open and frank and you've wanted to hear what she wanted to say, this actually goes a long way to helping both individuals to move forward".

142. The Tribunal found that the evidence did not corroborate a causal connection between any alleged repudiatory breach and the Claimant's resignation and the Claimant's oral evidence in this regard was vague and unsatisfactory. In the circumstances, the Tribunal found that the Claimant did not show that she resigned in response to any fundamental breach, rather than for some other reason, such as an unwillingness or inability to contemplate a return to work on grounds of her health, or a reluctance to accept the outcome of the grievance process. In the circumstances, the Claimant failed to establish any of the four elements required to give rise to a claim of constructive dismissal and that this claim was dismissed.

Age Discrimination

143. The Tribunal reminded itself that the Claimant is required to show potentially less favourable treatment from which an inference of discrimination could properly be drawn. This involved identifying an actual or hypothetical comparator, treated more favourably, whose circumstances were not materially different. There should be more than just a difference in treatment and a difference in protected characteristics: there should be "something more" to suggest a prima facie case that the difference in treatment was related to the protected characteristic. It was of course right that an employer can be vicariously liable for the discriminatory acts of its employees, unless it can establish that it took all reasonable steps in an attempt to prevent the particular act of discrimination, or that kind of act in general.

144. It is also right to say that an employer who fails to deal adequately with an employee's complaints or formal grievances about discrimination, or fails to treat a grievance seriously, may be liable for a further act of discrimination if it can be shown that the failure came about because of a protected characteristic. However, a failure to deal adequately with complaints does not constitute discrimination merely because the initial complaint concerned discrimination (or harassment). The failure will only give rise to a further claim of discrimination/harassment if the employer would have behaved differently in response to a similar complaint from an appropriate comparator.

145. Having reminded itself of the above points the Tribunal noted that the Claimant's case on age discrimination was that had she been older, the Respondents would have taken her complaints seriously; Mr. Taylor did not treat her complaint as seriously, when she spoke to him, as he did when he was subsequently spoken to by Lesley Davies. Only after that did he begin an investigation; Had she been an older woman, the first Respondent would have investigated her complaint of sexual assault and taken decisive action against G much sooner than it did; Ms. Abbot-Jones, when she spoke to the Claimant on 18 December 2019, treated her "as though she was a silly girl" and made comments to try to make the situation acceptable. She was told about two previous occasions but still did not take the matter seriously and would have done had the Claimant been older.

146. As with the Claimant's case in relation to constructive dismissal, the Tribunal found that the Claimant's case was not borne out by the contemporaneous evidence and that her recollection and/or understanding of what occurred was inaccurate, incomplete, flawed and unreliable. The Tribunal found no evidence to support her assertion that her complaint was not taken seriously. She made a complaint (once prompted to do so more than once by Ms. Abbot-Jones) and was told that it would be investigated. Ms. Abbot-Jones commenced that investigation, taking some initial statements, but following the first grievance meeting on 8 January 2019 she dropped out of the picture and the investigation was taken over by Mr. Taylor. It was clear that before she and the Claimant had spoken about the incident, Ms. Abbot-Jones had already escalated it to Mr. Taylor and it had been agreed that an investigation should be carried out. There was no evidence that this would have been any different with an actual or hypothetical comparator of a different age group whose circumstances were not materially different; However, it was clear that during the conversation with Ms. Davies and Mr. Taylor with the Claimant (and this was supported by Ms. Davie's statement in the internal process), Mr. Taylor was at pains to explain the process and reassure the Claimant that the incident would be investigated. This was an

informal conversation about a grievance which Mr. Taylor had already instructed Ms. Abbot-Jones to start to investigate. Again, there was no evidence to support the assertion that there would have been any difference in treatment had the Claimant been older, or that Ms. Davies's age played any material part on that day; The grievance was investigated. Statements were taken, and the Claimant's complaints about G's treatment of her were for the most part upheld. There was no evidence to support the assertion that the process would have happened faster, differently, or with a different outcome had the Claimant been of a different age group; There was no evidence to support the Claimant's assertion that she was treated as a "little girl" [explicitly or impliedly]. The Tribunal noted that these allegations formed no part of her internal grievance, either to Mr. Taylor or at the appeal stage, or indeed her ETI. They were not corroborated by the text messages she sent her boyfriend that day. On the contrary, those messages and the contemporaneous documentation adduced by the first Respondent showed that the Claimant was asked to put her complaint in writing and was told that it would be investigated; The highest that matters could be put was that Ms. Abbot-Jones when speaking briefly to the Claimant to collect her statement, asked an insensitive question about whether it was possible that the Claimant had misinterpreted actions which were simply a product of a generational difference in interpersonal style, resulting in G being more "touchy-feely". However, that was not the same as saying that she did not take the allegation seriously or fail to investigate it: The Tribunal found that Ms. Abbot-Jones clearly told the Claimant, that day, that the matter would be investigated, and the contemporaneous evidence showed that she started to gather evidence.

147. Further the Tribunal found that this did not come near suggesting facts from which it could be concluded that Ms. Abbot-Jones would have taken the allegation more seriously, or acted any differently, had the Claimant been older; It was not factually accurate that the Claimant told Ms. Abbot-Jones about the two earlier incidents. It was right that in the written statement the Claimant handed to Ms. Abbot-Jones, there was passing reference to earlier incidents where G had touched her stomach. Those incidents were discussed at the first grievance meeting, at which the Claimant was asked to provide further information about them so that they could be investigated. However, the Tribunal found that the details of those two incidents were not provided by the Claimant before that point. It may be that the Claimant's perception was that she found it harder to raise the complaints or challenge G's behaviour because of her age. However, the Tribunal found that this perception had nothing to do with any view taken or expressed by any of the Respondents and that there was no evidence capable of establishing a prima facie case of difference of treatment because of age. Therefore, the Tribunal dismissed the Claimant's claim of age discrimination.

Sexual Harassment

148. In so far as sexual harassment was concerned, the Tribunal reminded itself that in deciding whether conduct has the effect of creating an intimidating environment, it was necessary to take into account (a) the perception of the victim; (b) the other circumstances of the case; and (c) whether it was reasonable for the conduct to have that effect. The third of these (reasonableness) is an objective test. It was accepted by the first Respondent that the original act by G on 18 December 2018, and the two earlier incidents which were upheld in the grievance process, involved inappropriate physical touching and were capable of being regarded as unwanted conduct with the effect of violating the Claimant's dignity and related to the protected characteristic of sex.

149. In respect of that conduct, the Tribunal noted that the first Respondent accepted that it took place within the workplace and that G was its employee. The first Respondent accepted that it was vicariously liable for his actions unless it could be established that the statutory defence applied. However, in so far as the statutory defence was concerned, it was common ground throughout the grievance that at the time of the earlier incidents, the Claimant had not made any report or formal complaint to management about those two earlier incidents. On her own account, although she felt embarrassed by the incidents, she did not say so to anyone at the time. It appeared to the Tribunal that she may have described at least one of them as "a bit weird" but not said anything to indicate that she was uncomfortable or distressed by them. However, she did make a complaint about the third incident on 18 December 2018 which was upheld. It was also common ground throughout the grievance that other employees who had received similar treatment from G had not considered it worthy of mention or complaint at the time and had not raised any complaints or concerns. It was apparent to the Tribunal that nobody within the first Respondent’s senior management had therefore been put on notice that G was an employee with any propensity to act in this way. It was also apparent to the Tribunal from the evidence of the first Respondent’s witnesses and the documentation in the bundle that it had a comprehensive written policy on Equality and Dignity at Work, which formed part of induction training for some of its staff although there was no evidence of any such training, induction or supervision given to G, the perpetrator of the assaults on the Claimant. A training sheet was produced in evidence by the Respondent, but this did not show that G had been given any training, instruction or guidance in relation the Respondent comprehensive equality and harassment procedures.

150. The Tribunal would have expected that any "reasonable steps" argument needed to be taken in advance of the act complained of in order to be relevant for the statutory defence to apply. That was not the case in respect of G who the first Respondent accepted was guilty of sexual harassment that the Claimant complained about specifically on 18 December referencing two earlier incidents that she did not complain about but which the first Respondent accepted did take place. Therefore, the Tribunal did not accept that the written policies which were in place had any teeth in this particular workplace and certainly did not stop G assaulting the Claimant. Therefore, the Tribunal did not accept that the first Respondent demonstrated that it took such steps as were reasonable in the circumstances to prevent G's actions occurring, and the statutory defence was not made out in this case. As a consequence, the Tribunal found that G harassed the Claimant in that he engaged in unwanted conduct related to the Claimant’s sex and this conduct had the purpose or effect of— (i) violating the Claimants dignity, and/or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Indeed, the Tribunal’s finding is essentially based on the first Respondent’s own grievance outcome both at the initial stage by Mr. Taylor and then at appeal by Mr. Churchman. Therefore, the first Respondent is vicariously liable for G’s actions and this complaint succeeds.

Unlawful Deductions from Wages

151. It was submitted to the Tribunal and accepted by it that the first Respondent’s sickness absence policy was set out in the Claimants contract of employment. When the relevant period of sickness absence was triggered in any rolling 12-month period, the entitlement to sick pay at full rate came to an end and was replaced by Statutory Sick Pay entitlement. It was submitted and accepted by the Tribunal that the Respondent's position was simple and was clearly set out by the first Respondent in correspondence to the

Claimant. One of her sick certificates was received late from the Claimant. This resulted in sickness absence in February 2019 initially not being recorded as such. This meant that the Claimant continued to be paid full pay beyond the point when she should have gone onto SSP. Once the sick certificate was received and it was realised that she had inadvertently been overpaid by some £105.19 during February 2019. An adjustment was applied to the following pay run. When the Claimant was taken to the correspondence which set out clearly that this was recovery of an overpayment, she said that she accepted that that was the reason, but that at the time she had not accepted it. She then said that she still thought it was "coincidental" and did not really accept that the reason was valid. The Tribunal accepted the evidence of the Respondent that the deduction was made in respect of an overpayment and that this was justified and not an unlawful deduction of wages contrary to section 13 ERA.

152. As the Tribunal upheld part of the Claimants claims a remedy hearing is listed for 26 November 2021 to determine the amount of compensation to be awarded to the Claimant for sexual harassment. This will be limited to injury to feelings and personal injury. The Tribunal had sight of the Claimants schedule of loss and counter schedule prepared by the Respondent and noted that the parties should attempt to settle this aspect of the case as the parties do not appear to be too far apart on the figures. The Claimant should be aware that as the claim for constructive dismissal was not upheld, she would not be awarded a compensatory award.

153. The parties should bear in mind that if the outstanding remedy issues cannot be resolved prior to the remedies hearing on 26 November, Employment Judge Jones has already given directions to the parties in respect of the remedy issues. The party's attention is drawn to paragraphs 9 to 10 of the case management order and orders 3 to 5 of the same document. The Respondent is to be responsible for preparation of the bundle of documents for the remedy hearing. The Claimant is to send all relevant documents including an update schedule of loss to the Respondent by no later than 23 July 2021 and a witness statement relevant to the remedy issue no later than 27 August 2021. The Respondent is at liberty to prepare a counter schedule of loss by no later than 24 September 2021 and to provide a copy to the Claimant along with any witness statements it wishes to rely upon. The Respondent is also to prepare a bundle of documents for the remedy hearing by no later than 24 September and provide a copy to the Claimant.

154. Finally, the Claimant requested that the Tribunal make recommendations if she succeeded in her EqA claims which she has done. The Claimant sought recommendations from the Tribunal that the First Respondents managers should be given training on safeguarding of staff and of patrons, some of whom would be vulnerable adults and children and that the First Respondent's handbook, and any supporting policies should be available for all members of staff to have access to. It was clear to the Tribunal that the Respondent being a large employer has detailed policies in place to prevent harassment of its employee's contrary to the law. In this case, although the first Respondent relied upon the statutory defence, it was clear that it did not take reasonable efforts to ensure that its staff are trained in respect of such policies. Accordingly, the Tribunal would recommend that such training is offered to all of the first Respondent's staff at their initial employment inductions and on a regular and monitorable basis thereafter to ensure that the law is complied with. In addition, the Tribunal recommends that the first Respondent's handbook

and any supporting policies should be available for all members of staff to have access to either in hard copy or in the first Respondents intranet system.

Employment Judge Hallen
Date: 20 May 2021