EMPLOYMENT TRIBUNALS

Claimant: Ms C

Respondent: R Ltd

Heard at: London South Employment Tribunal (in person)

On: 9, 10, 11, 12 and 15 May 2023

Before: Employment Judge Abbott, Ms L Gledhill and Ms E Thompson

Representation
Claimant: Mr A Shepherd, lay representative
Respondent: Mr N Bidnell-Edwards, barrister, instructed by Thackray Williams LLP

JUDGMENT

1. The claim for unfair dismissal is not well-founded and is dismissed.

2. The claim for sexual harassment is dismissed as the Tribunal does not have jurisdiction to hear it.

3. The claim for victimisation is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, 'Ms C', was employed by the Respondent, 'R Ltd', as a Nursery Nurse at a nursery operated by the Respondent as franchisee of 'N Ltd', a national provider of day nurseries. Her employment with the Respondent began on 9 January 2017 and ended with her being summarily dismissed with effect from 6 November 2020.

2. The Claimant brought claims of:

   (1) Unfair dismissal contrary to the Employment Rights Act 1996 ('**ERA**');

   (2) Sexual harassment contrary to s.26 Equality Act 2010 ('**EqA**'); and

   (3) Victimisation contrary to s.27 EqA.

3. The Respondent resisted all of the Claimant's claims on their merits, and

also raised jurisdictional issues (time limits) in relation to aspects of the EqA claims.

Conduct of the hearing

4. The case came before the Tribunal for Final Hearing over 5 days, commencing on 9 May 2023. The hearing was held in person at London South Employment Tribunal in Croydon. The Final Hearing was originally due to commence on 8 May 2023 with a 6-day listing but this could not happen due to the Bank Holiday for the King's Coronation. However, it proved possible to complete the evidence, submissions, deliberations and delivery of an oral judgment within the shortened timeframe.

Rule 50 Orders

5. At the beginning of the hearing, the Respondent applied for orders under Rule 50 that the Final Hearing be conducted in private and that there be an anonymity order in respect of the parties, certain witnesses and certain individuals who are not parties to or witnesses in the proceedings. The Claimant did not resist such orders being made. The Tribunal weighed up the principle of open justice and right of freedom of expression against the rights of two children (who, as the Respondent identified in its application, were likely to be mentioned as part of the factual matrix of the case) under Article 8 of the European Convention on Human Rights, and concluded it was appropriate to order that:

   (1) The Final Hearing be conducted in private; and
   (2) An Anonymisation Order be put in place, covering the parties and certain other individuals (to guard against the risk of jigsaw identification), up until delivery of an oral judgment – as at that point the degree to which the children featured in the relevant factual matrix would be much clearer.

6. After delivery of the oral judgment on 15 May 2023, the Claimant requested written reasons. The Respondent sought to persuade the Tribunal to make the Anonymisation Order permanent so that the written reasons would be permanently anonymised. This was resisted by the Claimant.

7. In order to allow proper consideration of the issue, with both parties having sight of the Tribunal's full written reasons, we decided it was appropriate to extend the Anonymisation Order, on its existing terms, until 14 days after delivery of the written reasons. This will allow the Respondent to make an application for a permanent anonymisation order (if so desired) before that period ends. These written reasons have been prepared in anonymised form pending consideration of such an application but can be converted depending on the outcome.

The evidence

8. Ms C provided a witness statement and gave oral evidence. She also called two other witnesses, 'Miss D' and 'Miss E', who also worked at the Respondent's nursery at relevant times, each of whom provided a witness

statement and gave oral evidence. She also relied on a witness statement from another former colleague, 'Miss F', but Miss F did not attend to be cross-examined and, having considered the statement, the Tribunal decided it could not give any weight to it.

9. On the afternoon of the first day of the hearing, on the resumption of the hearing after the first break during Ms C's evidence, Mr Bidnell-Edwards raised a concern that Mr Shepherd had been coaching Ms C during the break, having overheard a discussion between them. As is usual, the Judge had warned Ms C before the break that she was under oath and should not speak to anyone, including her representative, about her evidence. Mr Shepherd explained that he was giving Ms C a "pep talk", not discussing the substance of the evidence. We were satisfied that this was a misunderstanding of the limits on the part of Mr Shepherd and Ms C, and that nothing had happened which would affect the evidence Ms C was giving. The Judge gave a further warning to Ms C and Mr Shepherd about the limits on what they could speak about during breaks whilst Ms C was giving evidence, repeating the warning before each break. Thereafter, Ms C remained separate from others during breaks in her evidence until after it was complete, thereby avoiding any risk.

10. Giving evidence was plainly a stressful experience for Ms C. There were times she became upset, necessitating short breaks for her to compose herself. At the end of the first day, whilst Ms C was still giving her evidence, Mr Bidnell-Edwards raised a concern that she may be suffering an underlying mental health condition and that consideration might need to be given to reasonable adjustments. It was proper for him to do so, consistent with his professional duties. We invited Ms C to consider the possibility of adjustments overnight. As it was, no adjustments were required. Ms C confirmed that, though she had historically suffered from anxiety and depression, she was not under any current treatment or therapy, and did not require any adjustments. We remained alert to the need to take breaks if and when Ms C became upset and conscious of the fact that English is not Ms C's mother tongue, so questions sometimes needed to be repeated or clarified, but otherwise felt it was appropriate and fair to both parties to continue.

11. On a few occasions during Ms C's evidence, Mr Bidnell-Edwards believed that she was looking to Mr Shepherd for guidance when answering questions. We saw nothing untoward. If she was looking toward Mr Shepherd, it was for the reassurance of a familiar face, and we saw no sign of Mr Shepherd seeking to influence Ms C's answers.

12. In his closing submissions, Mr Bidnell-Edwards addressed the credibility of each of the Claimant's witnesses. We address points around witness credibility when explaining why we made particular factual findings.

13. The Respondent called evidence from four witnesses, each of whom provided a witness statement and gave oral evidence:

    (1) 'Mr G', the owner and sole director of the Respondent;

(2) 'Mr H', a manager at N Limited who served as disciplinary officer in investigations into the conduct of Ms C and of Miss D;

(3) 'Miss I', the Respondent's nursery manager; and

(4) 'Mr J', the Respondent's operations manager.

14. Mr H and Miss I gave their evidence via video link; this was not objected to by the Claimant, and the Tribunal was content that this was consistent with the overriding objective of dealing with the case fairly and justly.

15. The Tribunal was also provided with an 880-page Bundle of Documents, an agreed cast list, and a chronology prepared by the Respondent.

Issues for determination

16. A List of Issues was included in the Order of Employment Judge Dyal made following a Case Management Hearing on 29 September 2021. The Tribunal was content that the List was appropriate. The issues to be determined, therefore, were:

1. Time limits

1.1. Were the harassment and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2. If not, was there conduct extending over a period?

1.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1. Why were the complaints not made to the Tribunal in time?

1.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct or some other substantial reason. The Claimant says this was a concoction and that the true reason was that she rejected Mr G's advances and reported the same.

2.2. If the reason was misconduct/SOSR, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1. there were reasonable grounds for that belief;

2.2.2. at the time the belief was formed the Respondent had carried out a

reasonable investigation;

2.2.3. the Respondent otherwise acted in a procedurally fair manner;

2.2.4. dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1. Does the Claimant wish to be reinstated to their previous employment?

3.2. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.5. What should the terms of the re-engagement order be?

3.6. If there is a compensatory award, how much should it be?

3.7. What basic award is payable to the Claimant, if any?

3.8. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Sexual Harassment (Equality Act 2010 section 26)

4.1. Did the Respondent do the following things:

4.1.1. On 30 November 2019 at the work Christmas party: Mr G tried to dance with the Claimant, grabbed her rear, tried to kiss her, tried to pour alcohol on her chest and told the Claimant she was very attractive and kept doing so after she told him to stop. The Claimant rejected his advances.

4.1.2. After the party, outside, Mr G was drunk and fighting with security people. The Claimant was asked by colleagues to go over and tell him to go home. He grabbed the Claimant on her left arm and squeezed it and said this is because you didn't give me any attention tonight.

4.1.3. Furloughed the Claimant (whilst recruiting new staff).

4.1.4. Persuaded Miss Z to make a false allegation that the Claimant had breached the confidentiality of a disciplinary hearing she attended as companion for Miss D.

4.1.5. Dismissed the Claimant.

4.2. If so, was that unwanted conduct?

4.3. Was the unwanted conduct of a sexual nature? (allegation 4.1.1)

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

4.5. Did the Respondent treat the Claimant less favourably because the Claimant rejected the conduct? (allegations 4.1.2 – 4.1.5)

5. Victimisation (Equality Act 2010 section 27)

5.1. Did the Claimant do a protected act as follows:

5.1.1. Reporting Mr G's conduct to Miss I on 2 December 2019;

5.1.2. Reporting Mr G's conduct to Mr G himself on 2 December 2019.

5.2. Did the Respondent do the following things:

5.2.1. 4.1.3 – 4.1.5 are repeated.

5.3. By doing so, did it subject the Claimant to detriment?

5.4. If so, was it because the Claimant did a protected act?

5.5. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

6. Remedy for harassment or victimisation

6.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2. What financial losses has the discrimination caused the Claimant?

6.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4. If not, for what period of loss should the Claimant be compensated?

6.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.7. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

6.10. By what proportion, up to 25%?

6.11. Should interest be awarded? How much?

Relevant law

Unfair dismissal

10. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that Ms C was a qualifying employee and was dismissed by the Respondent.

11. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.

    11.1 First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b)). Conduct is one of the potentially fair reasons.

    11.2 Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fair or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case. The burden of proof at this stage is neutral.

12. In cases relating to conduct (as this case is), the Tribunal should apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In summary, the employer must demonstrate that:

    12.1 it genuinely believed that the employee was guilty of misconduct;

    12.2 it had reasonable grounds for that belief; and

    12.3 it had carried out an investigation into the matter that was reasonable in the circumstances of the case.

13. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*J Sainsbury plc v Hitt* [2003] IRLR 23; *Whitbread plc v Hall* [2001] ICR 699).

14. The size and administrative resources of the employer's undertaking are relevant, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code"). The ACAS Code recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct.

15. The approach to be taken to procedural fairness is a wide one, viewing it if

appropriate as part of the overall picture, not as a separate aspect of fairness. Any procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness (*Taylor v OCS Group Ltd* [2006] IRLR 613).

Sexual harassment

16. Section 26(2) EqA, read in conjunction with section 26(1), provides that:

> "[A person (A) harasses another (B)] if —
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect [of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B]."

17. Section 26(3) EqA, read in conjunction with section 26(1), provides insofar as is relevant that:

> "[A person (A) harasses another (B)] if —
>
> (a) A or another person engages in unwanted conduct of a sexual nature […],
>
> (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], and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct."

18. Section 26(4) EqA provides that, in deciding whether conduct has the effect described in the sections quoted above, 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."

19. The EHRC Employment Code provides guidance on these provisions. It explains that the word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment (para 7.8).

20. Whether conduct can be categorised as sexual in nature is a question of fact. Unwelcome sexual advances, touching and sexual assault are among

the examples given in the EHRC Employment Code (para 7.13).

21. Similarly, whether conduct is sufficiently serious to 'violate' a claimant's dignity is also a question of fact. Certain one-off acts might violate an employee's dignity but would not be sufficient by themselves to create a degrading environment for the employee (see e.g., *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, EAT).

Victimisation

22. Section 27(1) EqA provides that:

> "A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act."

23. Section 27(2) EqA defines 'protected act':

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

24. Section 27(3) EqA excludes from the scope of 'protected act' false evidence or information, or false allegations, made in bad faith.

25. The EHRC Employment Code summarises what might amount to a detriment (paras 9.8 and 9.9):

> "'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards.
>
> A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment."

26. 'Because of' can fairly be equated to 'by reason that' or 'on grounds of' (*Amnesty International v Ahmed* [2009] ICR 1450, EAT). The essential question in determining the reason for a claimant's treatment is: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? The protected act must be one of the reasons

but need not be the only reason.

Time limits (EqA claims)

27. Section 123(1) EqA provides, insofar as relevant, that a complaint under the Act 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."

28. Under section 123(3), conduct extending over a period is treated as done at the end of the period, and a failure to do something is to be treated as occurring when the person in question decided on it.

29. In considering whether to allow an extension of time under the 'just and equitable' test, the Tribunal has a wide discretion but there is no presumption that the discretion should be exercised. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule (*Bexley Community Centre v Robertson* [2003] EWCA Civ 576). In other words, the burden of persuasion is on a claimant.

30. The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, explained that the best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay. The judgment also quoted from an earlier Court of Appeal judgment, *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, which emphasised at paragraph 19 that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

<u>Findings of fact</u>

31. The relevant facts are, we find, as follows. Where it has been necessary for the Tribunal to resolve any conflict of evidence, we indicate how we have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for us to determine, have been referred to in this judgment. We have not referred to every document that the Tribunal read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

32. On 9 January 2017, Ms C commenced her employment with the Respondent [97]. At the relevant times for this claim, she was employed as a Nursery Nurse at a nursery operated by the Respondent as franchisee of

N Ltd.

33. On 1 December 2018, Ms C won the Respondent's Employee of the Year Award for 2018 [664].

34. On 6 December 2018 a meeting took place involving Ms C, Miss I, and two managers from N Ltd to discuss, informally, the Claimant's conduct. The notes of that meeting were signed by Ms C [665]. The notes record Ms C being congratulated on her recent Award, but also make reference to an incident the previous week in which Ms C had got things "*off her chest*". The notes also record Ms C being told "*that if this happens again then there is obviously a problem with [her] and not the other people so to please be more aware and speak up as soon as anything happens or when she is not happy with anything and we can deal with it*".

35. Ms C did not accept this meeting ever happened, and denied signing the notes, but we preferred Miss I's evidence on this point and find the notes are an accurate record of a meeting that actually took place. We did not consider it likely that the Respondent would have gone to the trouble of fabricating this document, which has little if any direct relevance to the issues in this case, and there is no reliable evidence to indicate it was fabricated. We were taken to a transcript of a call between Ms C and Miss I on 24 April 2019 (covertly recorded by Ms C) which Ms C relied upon as evidence that Miss I couldn't have been at the meeting on this date as she was on annual leave. However, on fully considering that transcript [320-329], it was evident to the Tribunal that there was some confusion in the conversation regarding two different meetings, and ultimately Miss I is clear that she was not on annual leave on 6 December 2018. In the Tribunal's judgement, the most likely explanation is that Ms C had simply forgotten this informal meeting happened and that she had signed the notes.

36. On 6 March 2019 Ms C raised in a room meeting concerns over another, more junior, staff member not doing her share of work. The staff member was upset by this and made a complaint. There followed a disciplinary investigation into this incident, which commenced on 12 March 2019 and involved the Respondent's solicitors, the ultimate result of which was that no formal action was taken against Ms C, but a letter was sent to her on 18 April 2019 setting out the Respondent's expectations in respect of her conduct going forward. That letter [241-242] included the following statements:

    36.1 "*It is evident from the documentation enclosed* [which comprised interview notes and emails from various members of staff] *that your colleagues have raised concerns about the manner in which you speak to them and your attitude in the room however, we can see that there has been a marked improvement in your conduct over the last two weeks. We have therefore taken the decision not to pursue this matter via a formal disciplinary process however, do feel it appropriate to provide you with this formal letter setting out our expectations moving forward.*"

    36.2 "*The nursery code of conduct must be adhered to at all times*

including that "you must cooperate fully with your colleagues and with management and to ensure the maintenance of acceptable standards of politeness" and we therefore expect the improvement in your conduct to continue."

36.3 "*Please note that failure to maintain the improvement in your conduct and attitude could result in formal disciplinary action being taken, at a later date.*"

37. Notably Ms C had accepted in the course of the investigation that she can come across to colleagues as rude at time, stating in interview that "*I try not be rude but if I'm rude I rude* [sic]" [161]. The effect of this process on Ms C was two-fold:

37.1 At the beginning of the process, she immediately went off work sick with stress and anxiety [168, 671-676], returning on 1 April 2019; and

37.2 By the end of the process, she had lost faith in the Respondent and felt that management no longer wanted her working there. Thereafter, Ms C began to regularly covertly record meetings she had with management.

38. On 31 May 2019 there was an incident in which a confidential email relating to Ms C was left open on an unlocked computer terminal in the nursery. No further action was taken by the Respondent in relation to this incident.

39. On 17 September and 11 December 2019, following appraisal reviews of Ms C's performance and conduct, she received salary increases, with the effect that her salary increased from £17,500 to £21,000 in the space of 4 months [864-865]. We rejected Miss I's evidence that Ms C's conduct had deteriorated and that she had become "difficult to manage" by late 2019, which is inconsistent with these appraisal outcomes.

40. 30 November 2019 was the date on which the nursery's Christmas party took place. The party began at a restaurant, where drinks were available to the attendees with their food. From around 10.30pm the party then transferred, by taxis, to a cocktail bar, where further drinks were available at a table reserved for the party and from the bar. Having carefully considered the various different accounts of what happened that night from the witnesses, we made the following findings.

40.1 Mr G was drunk, to the extent that he displayed significantly disinhibited behaviour. He spent much of the evening dancing in an openly sexual manner with a younger member of staff, Miss Y, with whom he was (unbeknownst to the majority of the staff, including Ms C) already having an extramarital affair. The activities of Mr G and Miss Y that evening subsequently became the subject of much gossip in the nursery. We did not accept Mr G's evidence that "the occasion got to him" but that he was not drunk, which was not consistent with the other evidence, including that of the Respondent's own witness Miss I. On balance, we consider it was the alcohol that got to him.

40.2 Mr G tried to pour alcohol into the mouths of members of staff,

including Ms C and another male staff member. Whilst this was inappropriate behaviour from a manager to his staff, we found that there was no sexual element to this act. It was not specifically directed to Ms C or even only to female staff – Mr G was indiscriminate in this regard.

40.3 On balance, we found that, in his drunken state, Mr G did try to dance with Ms C and, in doing so, touched her bottom inappropriately and made inappropriate comments as to her attractiveness. This conduct was not welcomed or wanted by Ms C and was, we found, of a sexual nature. Ms C rejected Mr G's advances. We found Ms C's account of this in paragraphs 45 and 46 of her witness statement to be credible, and it was supported, at least in part, by evidence from Miss D and Miss E. Because of his inebriated state, we did not consider Mr G to be a reliable witness as to his actions that evening. The Respondent submitted that we should not believe Ms C's account because it was not one that she raised contemporaneously in any recorded meetings (where she was instead fixated on the interactions of Mr G and Miss Y, as is evident from reading the covertly-recorded transcripts in the bundle, e.g. that of Ms C's disciplinary meeting at [381-442]), and only first came to be described at the hearing before EJ Dyal in September 2021. The Respondent also sought to paint the allegations as part of a revenge campaign against Mr G orchestrated by Ms C with Miss D and Miss E. We did not accept those submissions – in our judgement, it is unlikely that Miss D and Miss E would have agreed to give false evidence, under oath, in a Tribunal hearing purely for the benefit of Ms C, notwithstanding any bad feeling they have for Mr G as a result of the ways in which their employment with the Respondent ended (Miss D resigned whilst under disciplinary investigation and Miss E was dismissed for misconduct). Their accounts of the evening in question were also credible on their face: they did not claim they saw and heard everything that happened. We also considered that the lack of evidence of the allegations being raised by Ms C earlier does not undermine a finding that the events happened. This was a small employer, and Ms C was, as recognised in her appraisals, doing a good job. There is every reason to think that she preferred not to rock the boat.

40.4 Mr G did not try to kiss Ms C. Although this was included in the List of Issues, it was not supported in any of the Claimant's evidence.

41. On leaving the club at around 02.00am, there was an incident between Mr G and the bouncers which ended with Mr G being on the floor. How he came to be there is irrelevant to the issues in this claim. After this, as she tried to help Mr G, Ms C's arm was roughly grabbed by Mr G in an aggressive manner. We found Ms C's account of the grabbing (which was supported by the evidence of Miss E) to be credible and likely, and, because of his inebriated state, we did not consider Mr G to be a reliable witness as to his actions. However, in our judgement, inappropriately aggressive as it was, this was not conduct of a sexual nature. Further, in her oral evidence, Ms C disavowed that this incident was motivated by her having rejected Mr G's advances earlier in the evening, and we accepted that to be correct.

42. On 2 December 2019, conversations took place between, first, Ms C and

Miss I and, second, Ms C and Mr G.

42.1 We found that, as part of an account of Mr G's drunken behaviour at the party given in the round, including Mr G's conduct with Miss Y, Ms C did mention to Miss I that he had been sexually inappropriate and aggressive towards her. To that extent, we preferred Ms C's evidence over Miss I's. However, Miss I did not appreciate the seriousness of what she was being told about Mr G's conduct towards Ms C amidst the wider picture of Mr G's conduct at the party, and therefore advised Ms C that she should raise her issues directly with Mr G and considered no further action was necessary on her part. This, we consider, is why Miss I does not recall Mr G's conduct specifically towards Ms C being part of the conversation.

42.2 When Ms C spoke to Mr G, she focused on his inappropriate behaviour with Miss Y. We find she did not allege, in terms, that Mr G has sexually harassed / assaulted her (consistent with Mr G's evidence), but it is more likely than not that she did mention his inappropriate behaviour towards her as part of her wider criticism of Mr G's conduct at the party. Like Miss I, Mr G did not appreciate the seriousness of what he was being told about his conduct towards Ms C amidst the wider picture of his conduct at the party but was plainly embarrassed by his overall behaviour. He therefore went along with Ms C's proposal that she go round the nursery apologising on Mr G's behalf for his behaviour at the party. Ms C conceded in oral evidence that this was her idea rather than Mr G's, contrary to her written evidence. Like Miss I, Mr G considered there was no need to take any further steps in respect of what Ms C had reported to him.

42.3 We find Ms C did not have any reasonable belief that either Miss I or Mr G would further pursue what she had reported. Ms C's own written evidence was to the effect that she understood Miss I to be "*avoiding any responsibility and duty of care as my manager*" (paragraph 59 of her witness statement), and it was inherently unlikely that Mr G would investigate himself. Further, neither Miss I nor Mr G gave any sign in the period that followed that they were investigating what Ms C had told them, either at a general level or specifically as regards Mr G's conduct towards Ms C. As far as they were concerned, the matter was closed.

43. On 11 December 2019, Ms C had an appraisal. We have already mentioned at paragraph 39 above the pay rise that followed the appraisal meeting. The meeting was relied upon by the Respondent as undermining her account of being sexually harassed, because the notes record her wellbeing as "*happy, fine*" [701] and records Ms C offering thanks to, among others, Mr G for "*support and patience with me*" [703]. We rejected that argument. The oral evidence from both Ms C and Miss I was that an appraisal was a meeting to focus on the Claimant's work performance and not a forum to discuss other concerns, so it is not inconsistent with our findings as to what happened on 30 November 2019 that Ms C made these comments in an appraisal focusing on her work.

44. In January 2020, Ms C returned from holiday in her home country with gifts

for the nursery. We found that Ms C did not buy gifts specifically for Mr G, as was suggested in the Respondent's evidence, but rather for the broader staff. Further, we did not consider that this gesture undermines our findings as to what happened at the Christmas party.

45. On 16 January 2020 there was an incident in which a confidential document relating to Ms C's previous complaint regarding breach of confidentiality was left hanging out of a shelf behind Miss I's desk in the nursery office. Ms C made a complaint regarding this [711]. Some remedial steps were taken by the Respondent, but no disciplinary further action was taken by the Respondent against Miss I [714].

46. On 27 January 2020, Ms C agreed to babysit for Mr G. His child was a "key child" of Ms C at the nursery and they had a strong bond. It was not unusual (but by no means an obligation) for nursery staff to agree to babysit for their "key children" outside of the scope of their work for the Respondent. Such arrangements were typically made directly between the member of staff and the parents of the child; however, this particular arrangement was facilitated by Miss I rather than directly between Ms C and Mr G. It was submitted by the Respondent that this agreement to babysit undermined Ms C's case as to what happened at the Christmas party. We rejected that submission. The babysitting engagement did not require any direct interaction between Ms C and Mr G as regards arrangements, which were all done through Miss I as an intermediary. There was no objective reason for Ms C to fear going to Mr G's home to babysit, not least as there were expected to be other adults present as is clear from the WhatsApp messages between Mr G and Miss I and between Miss I and Ms C from that day [715-717]. Ms C agreed to babysit because of her close relationship with the child – this does not undermine our findings as to what happened at the Christmas party.

47. At the end of March 2020, Ms C was furloughed [722]. We found that this decision to furlough (and to keep Ms C on furlough up until her dismissal) was in no way influenced by anything that had happened at the Christmas party or because she had reported Mr G's conduct at the party to Miss I or to Mr G, but was a decision made based on business need. We had no reason to doubt the evidence of Mr G, Miss I and Mr J in this respect, which was essentially unchallenged in cross-examination. Ms C seemed to suggest in her oral evidence that she should have been brought back from furlough earlier, but that is inconsistent with an email she sent on 27 May 2020 [723] in which she specifically asks to stay furloughed until October 2020 and a further email she sent on 1 July 2020 [725] indicating she would have childcare issues if required to return to work. We therefore rejected that point.

48. In September 2020, Ms C agreed to accompany a colleague, Miss D, at a disciplinary hearing. Prior to doing so, she agreed the terms of a confidentiality agreement and recorded in emails to Miss I on 22 and 23 September 2020 that she understood she was not allowed to discuss the meeting with anyone else [344-346]. The agreement records that:

    48.1 "*any information regarding the meeting taking place is not permitted to be discussed in any form with any other employee, relative or person*

known to you"; and

48.2 "*If this agreement is breached, then disciplinary action will be taken against you which could result in your dismissal from the company*".

49. The agreement also makes reference to the need to "*fully respect the confidentiality policy that we have in place*". The policy that was in place at the relevant time is at [119-120]. There was a dispute as to whether Ms C was aware of this policy at the time, but since it is concerned primarily with protecting information relating to the children and their families, it is of no direct relevance to the case. However, Ms C can reasonably be expected to be aware of the confidentiality provision in her contract of employment [104], which provides as follows: "*You will not at any time either during your employment or afterwards, to the detriment or prejudice of the Company or the Company's customers, use or divulge to any person, firm or company, except in the proper course of your duties during your employment by the Company, any confidential information identifying or relating to the Company, details of which are not in the public domain, or such confidential information or trade secrets relating to the business of any customer of the Company which have come to your knowledge during your employment.*"

50. The meeting took place on 28 September 2020. Present were Miss D, Ms C, Mr H (from N Ltd as investigating officer) and Mr J as note taker. Ms C covertly recorded this meeting. The purpose of the meeting was to discuss a breach of confidentiality by Miss D, in respect of certain Facebook posts and comments made by Miss D with another staff member (at the time of the posts) Miss E and Miss E's daughter, who was a former parent of the nursery [827-834]. It is not necessary for the purposes of determining the issues in this case to examine the details of the posts and their content, save to say that it was the suspicion of the Respondent that these posts were a reference to Mr G and Miss Y's relationship and that, accordingly, because the posts involved an ex-parent, this amounted to a breach of confidentiality on Miss D's part. Miss D denied that the posts were a reference to Mr G and Miss Y, but this was a topic discussed at the meeting. We rejected Ms C's evidence that this topic was not raised in the meeting, which is contrary to the written record and to the very nature of the allegations against Miss D. Ms C cannot have failed to appreciate the subject matter of this meeting, and her evidence was coloured by a refusal to accept this basic point simply because Miss D had presented a different explanation for the Facebook posts. This was not credible.

51. On Sunday 4 October 2020, there was a telephone call between Ms C and a colleague, Miss Z. Miss Z subsequently reported to the Respondent that, in this call, Ms C had referred to the meeting with Miss D that she had attended and mentioned that it had been about Mr G and Miss Y. It was alleged on the part of Ms C that Miss Z's account must have been fabricated because the meeting with Miss D was not about Mr G and Miss Y, and that therefore she must have been pressurised into making this statement as a pretext for the Respondent to take action against Ms C. We have already rejected the premise of this allegation – the meeting with Miss D was concerned with Mr G and Miss Y as the suspected subjects of the Facebook posts. Further, there is no evidence whatsoever to support a finding that

Miss Z was pressurised into making this statement by anyone. We found it was not procured in that way.

52. The Respondent considered that the allegation made by Miss Z was sufficient to merit a disciplinary investigation into breach of confidentiality by Ms C. On 12 October 2020, Ms C was invited to a disciplinary meeting. The invite letter [357] identified the subject as "*alleged breach of the confidentiality agreement which was sent to you via email on 22/09/2020*", a copy of which was attached [364-366], so it was objectively clear that it concerned Ms C's role as a companion for Miss D. The letter also attached handwritten notes of Miss Z's account as provided to Mr H with the notes taken by Mr J [358-363]. Ms C was subsequently provided, at her request, with a typed version of these notes [369-371] so it was objectively clear what was being alleged against Ms C. The letter also gave Ms C notice of her right to be accompanied at the hearing, and that formal action may follow, which (as she confirmed in oral evidence) Ms C understood could mean dismissal.

53. The disciplinary meeting took place on 20 October 2020. Ms C was accompanied by a colleague, Miss X. Ms C covertly recorded this meeting. The meeting lasted for more than 2 hours. Mr H set out the allegations and Ms C was given a fair opportunity to address them. However, she was fixated on communicating her view that the meeting with Miss D was not concerned with Mr G and Miss Y and therefore that Miss Z's account must be false. However, as we have found, Mr G and Miss Y's relationship was indeed a topic of that meeting, as the Claimant cannot have failed to appreciate. It is not necessary for the purposes of determining the issues in this case to examine further what Ms C said about Mr G and Miss Y's relationship during the disciplinary meeting. The key point is that Ms C advanced a position that Miss Z's account was false and, in fact, it was Miss Z who had raised the topic of Mr G and Miss Y in the telephone call on 4 October 2020, and that Ms C had not told Miss Z anything about the meeting with Miss D.

54. Presented with these two competing accounts, Mr H considered the evidence and concluded that Miss Z's account was to be preferred. He therefore found that the allegation of breach of confidentiality by Ms C was made out. He presented these findings to the Respondent's management (i.e., Mr G, Miss I and Mr J), who collectively decided that the breach was sufficiently serious to merit summary dismissal. The Respondent's policies class a serious breach of confidentiality as an act of gross misconduct [149], and the confidentiality agreement Ms C agreed to in respect of the meeting with Miss D specifically refers to the possibility of dismissal if the agreement is breached [346]. We find that the dismissal was not in any sense influenced by anything that had happened at the Christmas party or because she had reported Mr G's conduct at the party to Miss I or Mr G. Anything that had happened between Mr G and Ms C at the party was long forgotten as far as the Respondent's management were concerned and was out of mind by this time.

55. Ms C was dismissed with effect from 6 November 2020. The dismissal letter [518] recorded this and offered a right of appeal to Ms W (Early Years

Quality Manager at N Ltd).

56. Ms C did avail herself of her right to appeal, which she did so in writing as she claimed to have been advised by her doctor not to attend any face-to-face meetings with representatives of Monkey Puzzle [536-537]. She alleged as follows:

"Your reasons for dismissing me are vague at best. You say I have breached your confidentiality policy/agreement, terms you throw around constantly at any vulnerable employees you want to harass in order to cover up flouting Ofsted rules and indiscretions by members of the management.

The meeting held by [Mr H] on the 22nd October 2020 was a farce. [He] failed to produce any evidence proving I had breached confidentiality policy/agreement. He simply insinuated that because another member of staff told me [certain things about Mr G and Miss Y's relationship], that I was in some way breaking confidentiality by simply being told this (now proven to be true) information.

It was made very clear to me that [Mr H] had no basis for the alleged breach. Later he presented me with his hastily typed out version of the minutes of the meeting which omitted every critical point of consequence made by me and included only the lies he wanted to include in order to further his and [Mr G]'s agenda (my dismissal). [Mr H]'s minutes therefore bore little if any resemblance to what actually transpired in the meeting, the notes for which I have recorded in detail. [Mr H] offered me a 'without prejudice' settlement in the hope that I would just 'shut up and go away'. I can assure you this will not happen.

As furlough was scheduled to be discontinued at the beginning of November, I find the timing of this meeting highly suspect. It is clear to me that [Mr G] and [N Ltd] were engineering my dismissal to coincide with the end of the furlough scheme as they knew perfectly well that I had been told about [Mr G]'s inability to control his sexual desires towards young vulnerable members of staff, and were systematically firing any practitioners that knew about his indiscretions which I have personally experienced, as witnessed.

I am basing my appeal on information you have failed to disclose. You have yet to reveal how I have breached [N Ltd]'s confidentiality rules. The 'evidence' you have provided for the basis for my dismissal is so non-specific and vague, it borders on non-existent. Please stipulate exactly how I have breached your confidentiality policy and prove to me that my dismissal was fair."

57. However, despite having a covert recording of the meeting, Ms C did not raise any specific criticisms of the accuracy of the formal notes. She also did not raise an allegation that she had herself been a victim of sexual harassment by Mr G.

58. Without the benefit of being able to discuss with Ms C, Ms W did what she could do with the appeal, which was to re-examine the materials before her. She also interviewed Mr J and Miss X (as the only other attendees of the disciplinary meeting other than Ms C and Mr H) to get their views as to the conduct of the disciplinary meeting. Neither raised any material criticisms [584-587]. Ms W decided to uphold the decision to dismiss, confirmation of which was sent to Ms C on 18 November 2020 [591-592]. There was no evidence to suggest that Ms W was in any way influenced by Mr G or other members on the Respondent's management in coming to her decision on

the appeal, and we found she was not so influenced.

59. Ms C engaged in ACAS Early Conciliation between 19 and 26 November 2020, and presented her claim to the Tribunal on 26 November 2020.

Conclusions

Unfair dismissal

Issue 2.1: What was the reason or principal reason for dismissal?

60. The burden falls on the Respondent to show a potentially fair reason for dismissal. We were satisfied that the Respondent has discharged its burden of showing that the reason for dismissal was a breach of confidentiality by Ms C, i.e., she was dismissed for misconduct. No credible alternative reason was advanced, and we rejected on the facts the suggestion that the reason for dismissal was anything to do with events at the Xmas party or Ms C's reports to Miss I and Mr G thereafter.

61. Accordingly, the Tribunal found that the Respondent dismissed Ms C for a potentially fair reason falling within section 98(2) ERA.

Issue 2.2: Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

62. We first applied the three-step test in *Burchell* as explained above (which covers sub-issues 2.2.1 and 2.2.2).

63. We were satisfied that the Respondent had a genuine belief that the Claimant had committed misconduct and had reasonable grounds for that belief. Mr H had the account of Miss Z which was, on its face, credible. He found that account to be more believable than Ms C's, which was a conclusion reasonably open to him.

64. We were also satisfied that there had been a reasonable investigation. Mr H had spoken to both people involved in the conversation in which the alleged breach had taken place (i.e., Miss Z and Ms C) and weighed up their evidence. He had himself been present at the meeting with Miss D so was already aware of the subject matter of that meeting and, in any event, the formal notes of that meeting were available.

65. Stepping back, we were satisfied that the Respondent otherwise acted in a procedurally fair manner, looking at the overall process (sub-issue 2.2.3). The Respondent could have been a little more specific in the disciplinary invite letter as to the alleged breach (tying the strands together rather than just identifying that it concerned the meeting with Miss D and providing Ms C with Miss Z's account) but, as is evident in the transcript of the meeting recording, the allegation was made clear to Ms C in the disciplinary meeting itself and she had ample opportunity to address it. Moreover, the Respondent appointed an objectively independent person (Mr H, from N Ltd, rather than a member of the Respondent's management) to investigate and make findings, which was appropriate to do given the size and resources of the Respondent. Other procedural safeguards such as the right

of accompaniment and right to appeal were available to Ms C, and she availed herself of those.

66. We were satisfied that dismissal was within the range of reasonable responses for the Respondent (sub-issue 2.2.4). This is because the confidentiality agreement alleged to have been breached by Ms C specifically mentioned dismissal as a possibility for breach. This was an agreement considered by Ms C a very short time before the alleged breach. Whilst other employers may have been more lenient in the circumstances, we cannot conclude that no employer could reasonably have dismissed in these circumstances.

67. Overall, applying the test in section 98(4) ERA, in our judgement the Respondent did act reasonably in all the circumstances in treating Ms C's conduct as a sufficient reason to dismiss her.

Conclusion on unfair dismissal

68. In view of the above findings, the Tribunal concluded that the claim for unfair dismissal was not well-founded and shall be dismissed. Issue 3 (remedy) therefore did not arise to be determined.

Sexual harassment (s.26 EqA)

Issue 4.1: Did the Respondent do the following things:

> *4.1.1. On 30 November 2019 at the work Christmas party: Mr G tried to dance with the Claimant, grabbed her rear, tried to kiss her, tried to pour alcohol on her chest and told the Claimant she was very attractive and kept doing so after she told him to stop. The Claimant rejected his advances.*

Issue 4.2: If so, was that unwanted conduct?

Issue 4.3: Was the unwanted conduct of a sexual nature?

69. We found on the facts that, on 30 November 2019 at the work Christmas party:

69.1 Mr G did, in an inebriated state, try to dance with Ms C, touched her rear and told her she was attractive. All of this was unwanted conduct of a sexual nature. Ms C rejected his advances. See paragraph 40.3 above.

69.2 Mr G did attempt to pour alcohol into the Claimant's mouth, but that was not unwanted conduct of a sexual nature. See paragraph 40.2 above.

69.3 Mr G did not try to kiss Ms C. See paragraph 40.4 above.

Issue 4.4: Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

70. The conduct to be considered here is that identified in paragraph 69.1

above, i.e., that conduct we have found, in fact, happened and was unwanted conduct of a sexual nature.

71. Considering all of the evidence, we found that Mr G did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Ms C, in his inebriated state. However, on balance, we were satisfied that the conduct had the effect of violating the claimant's dignity. Ms C certainly perceived herself as having had her dignity violated, as evidenced by the conversations she had with Miss I and Mr G on 2 December 2019. It is reasonable for Mr G's conduct to have had that effect: this is in particular because of the nature of the imbalanced power relationship between Mr G, as owner of the Respondent, and Ms C as an employee, but also the circumstances of the conduct happening at what was meant to be a celebratory work event.

72. That is not the end of the matter, as we must come back to consider time limits (issue 1), which we shall do after addressing the other allegations.

Issue 4.1: Did the Respondent do the following things:

4.1.2. After the party, outside, Mr G was drunk and fighting with security people. The Claimant was asked by colleagues to go over and tell him to go home. He grabbed the Claimant on her left arm and squeezed it and said this is because you didn't give me any attention tonight.

4.1.3. Furloughed the Claimant (whilst recruiting new staff).

4.1.4. Persuaded Miss Z to make a false allegation that the Claimant had breached the confidentiality of a disciplinary hearing she attended as companion for Miss D.

4.1.5 Dismissed the Claimant.

Issue 4.5.: Did the Respondent treat the Claimant less favourably because the Claimant rejected the conduct [under allegation 4.1.1]?

73. We found on the facts that:

73.1 After the Christmas party, Mr G did grab Ms C's arm, but this was not because Ms C had rejected his earlier conduct and nor was it conduct of a sexual nature. See paragraph 41 above.

73.2 Ms C was furloughed and kept on furlough up to her dismissal. However, this was in no way influenced by anything that had happened at the Christmas party but rather was a decision made based on business need. See paragraph 47 above.

73.3 Miss Z was not persuaded to make a false allegation by the Respondent. See paragraph 51 above.

73.4 Ms C was dismissed. However, this was in no way influenced by anything that had happened at the Christmas party but rather was because of Ms C's conduct. See paragraph 54 above.

74. Accordingly, none of these allegations amount to unfavourable treatments because Ms C rejected Mr G's conduct on 30 November 2019. All fail on the facts.

Issue 1: Time limits

75. We now return to the question of time limits.

76. None of the acts that we have found fall under section 26 EqA occurred within 3 months prior to the claim being made (even taking account of extension for early conciliation). They all occurred on 30 November 2019 and the claim was not brought until 26 November 2020, nearly 9 months after the primary time limit. There were no continuing acts running into the primary period either, on our findings.

77. The question therefore is whether it is just and equitable in all the circumstances to extend time. If not, the Tribunal does not have jurisdiction to determine Ms C's claim under section 26 EqA.

78. As noted earlier, the burden of persuasion in this respect is on the Claimant. The exercise of the discretion is the exception rather than the rule. As explained in *Morgan*, there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: (1) the length of, and reasons for, the delay; and (2) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). *Adedeji* confirms that the Tribunal can assess all the factors in the case that it considers relevant, including these.

79. We were not satisfied that the burden of persuasion has been discharged by Ms C in this case. Ms C gave no real explanation for why the allegations were not pursued earlier. We have accepted that they were mentioned, as part of a wider account of Mr G's behaviour, to Miss I and to Mr G on 2 December 2019. However, nothing that Miss I or Mr G said or did that day could have led Ms C to reasonably believe that they were going to do anything about it, and nor did they understand they needed to do anything about it. They regarded the matter as closed. We did not accept Ms C's evidence that she believed that the matters were being investigated, which was inconsistent with her own account of Miss I and Mr G's reactions.

80. Nevertheless, Ms C stayed silent on these matters over the course of many months, not raising them during her disciplinary process, nor even (at least as regards herself as a victim) in her appeal. The allegations first surfaced in the ET1 in non-specific terms and were only specified at the case management hearing in September 2021. By that time, the balance of prejudice was firmly against Ms C, as the Respondent had been denied the opportunity to gather evidence to rebut the allegations closer in time to when the alleged events occurred, when recollections may have been clearer. In other words, the Respondent was put at a disadvantage at the Final Hearing in terms of the evidence it could make available to the Tribunal.

81. We take account of the fact that victims of such conduct do not always find it easy to raise and pursue their allegations promptly, and that the COVID

pandemic took Ms C out of the work environment a few months after the incident in question. However, the delay in this case is very considerable, is inadequately explained and, as explained above, causes real prejudice to the Respondent. Ms C did not give us any proper basis to be persuaded that it is just and equitable to extend time in all the circumstances of this case. We were not so persuaded.

Conclusion on sexual harassment

82. In view of the above findings, the Tribunal concluded that it does not have jurisdiction to determine the claim for sexual harassment, which shall therefore be dismissed on that basis.

Victimisation (s.27 EqA)

83. We can deal with this claim relatively shortly in view of the conclusions above.

84. Allegations 4.1.3 to 4.1.5 are relied upon as the things done to Ms C under this head of claim (sub-issue 5.2). We found on the facts that:

84.1 Ms C was furloughed and kept on furlough up to her dismissal. However, this was in no way influenced by anything that had happened at the Christmas party or because she had reported Mr G's conduct at the party to Miss I or Mr G but rather was a decision made based on business need. See paragraph 47 above.

84.2 Miss Z was not persuaded to make a false allegation by the Respondent. See paragraph 51 above.

84.3 Ms C was dismissed. However, this was in no way influenced by anything that had happened at the Christmas party because she had reported Mr G's conduct at the party to Miss I or Mr G but rather was because of Ms C's conduct. See paragraph 54 above.

85. It is therefore not necessary to decide whether these things were 'detriments' or whether either or both of Ms C's reports to Miss I and to Mr G on 2 December 2019 meet the definition of a 'protected act'. There is simply no causal link, on the facts, between the things done and the reports made. Nor was there any suggestion that the things were done because the Respondent feared Ms C might do a 'protected act' - anything that had happened between Mr G and Ms C at the party was long forgotten as far as the Respondent's management were concerned and was out of their mind by this time of these things happening.

Conclusion on victimisation

86. In view of the above findings, the Tribunal concluded that the claim for victimisation was not well-founded and shall be dismissed.

87. In view of the dismissal of both EqA claims, issue 6 (remedy) therefore did not arise to be determined.

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Employment Judge Abbott
Date: 29 May 2023