



EMPLOYMENT TRIBUNALS

Claimant: Miss S Stretch

Respondent: Ballymore Construction Services Ltd

Heard at: East London Hearing Centre

On: 16-18 December 2020
7 January 2021 (decision meeting)

Before: Employment Judge R Barrowclough

Members: Ms Jane Houzer
Mr John Quinlan

Representation

Claimant: In Person

Respondent: Mr R Cater (Consultant)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's complaints of (a) unfair constructive dismissal, in breach of ss.94 & 98 Employment Rights Act 1996, and (b) sexual harassment, in breach of s.26 Equality Act 2010, both succeed, and that she is entitled to compensation. The Claimant's claim will be listed for a Remedy Hearing before the Tribunal.

REASONS

1. By her claim submitted to the Tribunal on 20 September 2019, the Claimant raises allegations of sexual harassment and constructive unfair dismissal against the Respondent, her former employer. There is no dispute that the Claimant was employed by the Respondent, initially as an Administrator and subsequently as a Commercial Co-ordinator, from 2 January 2017 until her resignation, which took effect on 30 August 2019. The Respondent denies the Claimant's allegation of sexual harassment, and

also that it fundamentally breached the terms of her contract of employment, thereby entitling her to leave. We heard this case over the course of a three day hearing when the Claimant gave evidence in support of her claim and Mr Cater, the Respondent's representative, called as witnesses Mr Mark Gordon, the Respondent's Health & Safety Director; Mr Padraic Regan, their Commercial Director; Mr Jamal Fareed, a Project Manager employed by the Respondent; and finally Mr Denis Hevey, a Performance Psychologist who provided consultancy advice and assistance to the Respondent via the Investors in People programme. Messrs Fareed & Hevey participated in the hearing remotely via the CVP platform, all other witnesses and the parties attending and giving their evidence in person. The Tribunal met virtually on 7 January 2021, the fourth of the five days allocated for the full hearing, in the absence of the parties to review the evidence and submissions we heard and to reach this judgment and reasons.

2. The factual background to the Claimant's complaints can be summarised as follows, and was not to any great extent in dispute. The Respondent is a substantial property and development company, with a number of sites and projects under construction or in development both in London and elsewhere in the UK. Its Head Office is in Canary Wharf and at the times with which we are concerned it had at least two major construction projects nearby in East London, known as "Wardian" and "Goodluck Hope". The Claimant was initially employed at the Wardian site, certainly up until April 2018. One of her colleagues on the Wardian project was Mr Fareed, who the Claimant already knew from having previously worked together for a different employer. At any rate during 2017, the Claimant and Mr Fareed both lived in the Tottenham area of London and the Claimant says that from time to time Mr Fareed would give her a lift to or from work in his car. Mr Fareed disputes that and said that did not happen at all. We prefer the Claimant's account, and we find that such lifts were occasionally offered and accepted on a perfectly straightforward informal basis and when it suited both individuals.

3. The events with which we are concerned commenced when the Claimant organised a work's night out, which took place on 7 September 2017. As appears from the list at page 39 in the agreed trial bundle, about 35 members of staff were invited to the Bengal Quay Restaurant in Docklands that night, and approximately a dozen people actually attended, including the Claimant and Mr Fareed, as well as the project manager called Joseph Cullen. It turned out that it was also Mr Fareed's birthday, or close to, so that was a cause for celebration as well. At the end of the evening, which was not protracted, it is accepted and agreed that Mr Fareed offered the Claimant a lift home, which offer she accepted.

4. The Claimant's account is that on the journey home, Mr Fareed made a stream of unwelcome, inappropriate and obvious sexual advances and comments to her, saying in explicit terms that he had always wanted to have sex with her and that he wished to leave his wife and family for her, that he touched himself whilst doing so, and that at one point he put a hand on her leg (or at least attempted to do so). The Claimant's account is that she initially tried to treat this behaviour as a joke in bad taste, before using her phone as a form of self-protection in calling her boyfriend and her line manager, Mr Sam Gregory, to whom she spoke at length and for the remainder of the journey, asking to be dropped off some distance from her home, with which request Mr Fareed complied.

5. Mr Fareed was not asked about this alleged incident, and indeed it was not brought to his attention, until approximately two years later. When the allegations were put to him, he denied them and said that nothing like the behaviour alleged had taken place.

6. The Claimant said that she had kept talking to Mr Gregory on the phone having got out of Mr Fareed's car, and at that point she had told him for the first time what she says had happened in the car and how Mr Fareed had behaved, and that she was shaking and upset. She says that Mr Gregory had consoled her and said that the matter would be addressed at work on the following morning. When Mr Gregory was subsequently interviewed by Mr Martin, once again about two years thereafter, he supported the Claimant's account about their lengthy phone call, and said that on the following day (8 September) both he and the Claimant had gone to see Mr Cullen, the project manager at Wardian who had been at the restaurant the previous evening, when the Claimant had told them both in detail what she said had happened on her journey home.

7. In broad terms, the Claimant says that once she had explained to Messrs Cullen & Gregory what had happened, there was a discussion as to her possible options. One was to contact HR and indeed a call was put through to Karen Gorman, the Respondent's HR manager, by Mr Cullen. Another was to make a formal complaint and/or to bring criminal charges; and Mr Cullen assisted by phoning a friend of his who is a WPC and explaining to her what had apparently happened.

8. The Claimant was not a party to the telephone call with Ms Gorman, but says that she could hear more or less everything said by both her and Mr Cullen, and that the impression she received, rightly or wrongly, was that HR were primarily interested in the identity of the complainant (which had not been disclosed to Ms Gorman, who the Claimant believed was on good terms with Mr Fareed). The conversation with the WPC was on speaker phone, and the Claimant's account is that the advice then given was that if she wished to pursue the matter via the police, she would have to attend at a police station and make a formal complaint, and that effectively it would be a case of her word against Mr Fareed's should the matter proceed to court.

9. The Claimant decided not to pursue either course of action, nor to make a formal complaint (which, she received the clear impression, might well not help her career progression within the Respondent), but was content to rely on the protection and assistance that was offered by Messrs Cullen & Gregory in terms of looking out for her, '*having her back*', and trying to ensure so far as possible that no such incident happened again.

10. We only heard the Claimant's account of that important meeting/conversation. Whilst we were told that Mr Cullen left the Respondent's employment at the end of 2019, Mr Gregory remains one of the Respondent's employees, and no reason was put forward by the Respondent as to why he was not called as a witness. Mr Gregory would of course have been able to confirm or deny the Claimant's account not only of the meeting on 8 September, but also of his alleged phone call with her on the previous meeting. The only written evidence concerning this issue in the bundle is what we were told is a transcript of the notes made by Mr Cullen either at or shortly after the meeting on 8 September, which are at page 37 in the bundle. Those notes essentially confirm the Claimant's account of the meeting and what was then said. It is also right to note

that when both Mr Cullen and Mr Gregory were separately interviewed about the matter by Mr Martin in 2019, they corroborated the Claimant's account.

11. In any event, it is accepted that no formal action was taken by the Claimant and nothing was said by anyone to Mr Fareed about the alleged incident. The Claimant and Mr Fareed thereafter continued to work in or from the same large open plan office, which has about 50 workstations for employees. Whilst they were stationed in different rows, their desks were effectively back to back, and that remained the position until the Claimant was moved from the Wardian to the Goodluck Hope project at some point between four and six months later. The Claimant's account is that over that period of time she was increasingly working away from the Wardian project office, and that at some point in early 2018 she effectively ceased working at the Wardian site altogether.

12. The Claimant says that whilst there was no repetition of Mr Fareed's overt sexual advances thereafter, there were occasional and unavoidable work conversations between them, and that Mr Fareed would sometimes ask whether he made the Claimant feel uncomfortable or make stupid comments, and that she would then tell him to 'fuck off'. Mr Fareed when spoken to in 2019 said that his relationship with the Claimant continued as before on a purely professional 'at work' basis.

13. One of the difficulties in this case is that so little (if anything) was written down contemporaneously by any of the parties or those involved. There was no evidence that the Respondent had any form of personnel file for the Claimant (or any other employees), in which important documents (such as offer and acceptance letters, terms and conditions of employment, changes to such terms, and specific HR documents) were placed, and certainly no such documentation relating to the Claimant was produced by the Respondent and included in the trial bundle. Another example of this absence of any record is the issue of when the Claimant mentioned the alleged incident with Mr Fareed to Mr Hevey, the Performance Psychologist who had been appointed by the Respondent under the Investors in People Scheme, and whether it was before or after her move in the first half of 2018 from the Wardian to the Goodluck Hope project. No evidence was provided by the Respondent to confirm when that move actually happened.

14. The Claimant says that she spoke to Mr Hevey within a month or so of the incident in September 2017, and in any event before the end of that year, and that she then told Mr Hevey not only of her desire to move and to progress her career, but also of the incident involving Mr Fareed. Mr Hevey on the other hand, whilst accepting that he spoke to the Claimant (and no doubt others) about career progression, says that in the Claimant's case that conversation took place in February 2018, before she moved to the Goodluck Hope project; and that when he spoke to the Claimant in April that year following her move (when she said that she was happy in her new surroundings and work), the Claimant had then told him for the first time about the incident involving Mr Fareed. There is a clear conflict of evidence here and as already noted, no contemporaneous documentation to support either party.

15. It seems to us that the Claimant is probably mistaken in saying, as she does clearly, that she spoke to Mr Hevey about both progressing her career and the alleged incident with Mr Fareed shortly after it happened, and in any event during 2017. On balance, and not without some doubt, we prefer Mr Hevey's account, and we accept that, whilst the Claimant probably did speak to Mr Hevey in February 2018 about

moving away from the Wardian project and progressing her career, with which Mr Hevey duly assisted, it was only after the Claimant's move to Goodluck Hope in the first half of 2018 that she mentioned the incident involving Mr Fareed to him, rather than before. The Claimant remained assigned to the Goodluck Hope project thereafter and was happy there, certainly until shortly before she resigned. Indeed, it was a repeated theme of her evidence which we accept that she enjoyed working for the Respondent, and that there seemed to be a career path and opportunities for progression open to her there.

16. Then, at some point during 2019, the Claimant became aware that there was a possibility, or at least a rumour, that Mr Fareed might be moving to the Goodluck Hope project in the near future. This we accept caused her considerable concern. She wrote to Mr Hevey, as can be seen at page 34, on 21 June asking him to phone her as soon as possible and stating that she had just been informed that Mr Fareed would be starting at her site on the following Monday, and that that was unacceptable and went against everything that she had been told by Mr Hevey only a few weeks earlier. That is consistent with Mr Hevey's own account, which is in summary that he had indeed spoken to the Claimant at some point before then when he, having himself spoken to Mr Cullen who was Mr Fareed's line manager, had confirmed that there were no plans to transfer Mr Fareed to Goodluck Hope. Accordingly, having received the Claimant's email of 21 June and discovering for the first time that such plans did in fact exist, Mr Hevey then made a number of enquiries and spoke to senior managers within the Respondent about the projected move for Mr Fareed.

17. This all resulted in a meeting, which we think took place on 1 July, between the Claimant and Mr Tony Martin, who was a senior manager if not a director on the construction side of the Respondent. It was then that the Claimant explained her concern to Mr Martin about Mr Fareed's forthcoming arrival, and the reasons why. It is not disputed that this was the first time Mr Martin had been made aware of the alleged incident involving Mr Fareed and the Claimant. As a result, it is clear that he took steps to try to find out what had happened, including interviewing Mr Cullen, Mr Fareed and Mr Gregory, as the interview notes we have referred to establish.

18. At his meeting with the Claimant on 1 July Mr Martin had suggested that the Claimant take the matter up with HR. The Claimant, perhaps understandably, felt that this was another attempt by the Respondent to *'kick the can down the road'*, since she had already raised the issue with senior personnel, including Mr Martin and Mr Hevey, who, although not an employee, was apparently close to the Respondent's owners; although in fairness to Mr Martin, it is clear that he did in fact action the matter himself. In any event, following her meeting with Mr Martin, the Claimant was absent on pre-booked holiday for a couple of weeks. When she returned, she discovered that she had been invited to contact Ms Rachael Hawley, who was the Respondent's head of recruitment.

19. The Claimant duly contacted Ms Hawley on 17 July, and the two of them met on the following day. A short note of the matters then discussed (which we believe was prepared by Ms Hawley) is at page 44. The Claimant was asked why she hadn't submitted a grievance at the time of the incident and said that she hadn't known how to do so. Ms Hawley told the Claimant that the ensuing delay would make it difficult to investigate the incident; that the Respondent had a duty of care not only to her but also to Mr Fareed; and that it was proposed that the Claimant and Mr Fareed would be

stationed on different floors at the Goodluck Hope project. The Claimant responded that such an arrangement remained unacceptable, since it would not be possible for her to avoid occasional or chance encounters with Mr Fareed there. Ms Hawley said that there were no other projects then being undertaken by the Respondent, whereby the Claimant and Mr Fareed could be separated; and the Claimant asked why a move to the Respondent's head office, in which she had already expressed an interest to Mr Hevey and others, could not be accelerated or brought forward. Ms Hawley was apparently unaware of any such possibility, which the Claimant said that, whilst not formalized, she had discussed with Mr Regan; but indicated that, unless there was a formal plan to transfer the Claimant to head office, she could say with '99%' certainty that there weren't any other options to the Claimant and Mr Fareed both working at the Goodluck Hope project. The Claimant said that she had been promised by Mr Hevey that she would not have to work with Mr Fareed again, and that in that event, she would not be able to stay but would have to leave; and repeated that she would have to leave if not moved. Ms Hawley suggested that the Claimant think things over, said that she would speak to the Claimant's line manager Andrew Hillman, and there the meeting ended.

20. On the next day, 19 July, the Claimant wrote to Ms Hawley and Mr McCall, one of the Respondent's construction directors, and her email is at page 46. In that email, the Claimant reiterated her concerns, and in particular that the prospect of re-encountering Mr Fareed at the Goodluck Hope project from the following Monday (22 July) onwards, when his transfer was due to come into effect, was causing her severe stress and anxiety, and asked the Respondent to reconsider transferring either herself or Mr Fareed to another location. The Claimant concluded by stating that she did not consider that the Respondent understood how badly her current situation was affecting her, that her concerns were not being treated sufficiently seriously, and that through no fault of her own she was being made to feel guilty and uncomfortable in a work environment which she had previously enjoyed and where she wished to remain and progress for the foreseeable future.

21. The Respondent treated the Claimant's email of 19 July as amounting to a formal grievance, and wrote to her by email later that same day (page 49) inviting her to attend a grievance meeting on 25 July to be chaired by Mr Gordon, the Respondent's health and safety director. The Claimant was told of her right to be accompanied at that meeting, but chose to attend on her own; and present with Mr Gordon was Ms Sherina Anderson of HR as notetaker, who apparently recorded what was said. Notes of the grievance meeting (which lasted almost exactly half an hour and the notes of which, it is accepted, are accurate although incorrectly dated 31 July) are at pages 51 to 56.

22. Very much in summary, the Claimant was asked once again to repeat the details of the incident involving Mr Fareed and what had happened thereafter, including her subsequent dealings and conversations with Messrs Gregory, Cullen and Hevey, and told Mr Gordon essentially what she had previously told the three of them, as well as Mr Martin on 1 July. The Claimant was again asked why she had not submitted a grievance two years earlier, and repeated that she did not know how to do so, not having received either a 'starter pack' or a copy of the company handbook from the Respondent; and as already noted, the Respondent was unable to provide any evidence to the Tribunal that the Claimant had in fact been provided with either document.

23. Whilst Ms Anderson's role at the meeting is described as being a 'note taker', it is clear from the notes that she played a full part in the discussion, in fact asking significantly more questions of the Claimant than Mr Gordon raised. When the Claimant asked why she needed to repeat the specific and sexually explicit remarks made by Mr Fareed, which she had only recently recounted to Mr Martin, Ms Anderson told her that this time it was for the purposes of the formal grievance investigation. The Claimant was asked what she wanted from the grievance process, and responded that she did not wish to work with or on the same site as Mr Fareed; that although they were not in the same teams, she had already seen him five times that week; and that whilst it was not up to her whether any formal action was taken against Mr Fareed, he needed to understand that he could not behave in such a manner. She also repeated that it was difficult and uncomfortable for her not being able to tell colleagues why she was not her normal self, since she had herself been told not to discuss the matter with others, including her line manager, and had not done so; that she was constantly looking over her shoulder at work to check whether Mr Fareed was there; and that she felt unable to go to work social events, even the one she herself had organised.

24. Mr Gordon told us that during the meeting the Claimant became visibly upset, and that she was in tears, but that she didn't request a break or adjournment. At the conclusion of the meeting, the Claimant was informed that both Mr Hevey and Mr Fareed would be interviewed, that Mr Fareed would be written to concerning the Claimant's grievance, and that Mr Gordon would review the evidence and reach conclusions once that had been done. In the meantime, the Claimant would have to continue working at the Goodluck Hope project, as would Mr Fareed. There was no discussion of any possible relocation of either of them pending the conclusion of the grievance process.

25. Following that meeting, Mr Gordon did indeed conduct meetings with a number of the Claimant's colleagues, including Ms Ryan and Mr Mannerson, as well as arranging to see Mr Fareed, Mr Gregory and Mr Cullen, albeit his meetings with those individuals did not take place until after the Claimant's employment had terminated at the end of August. Mr Gordon also wrote to the Claimant on 31 July (page 66), six days after their meeting. He then said that his grievance investigation was continuing, repeated the earlier injunction that the Claimant was to keep the matter confidential and was not to be discussed with colleagues, and said that the minutes of their meeting would be sent to her in due course.

26. On that same day, 31 July, the Claimant wrote to Mr Hillman, her line manager, and that email is at page 65. In her letter, the Claimant tendered her resignation, giving no reason why she was leaving, indicated that she would work out her four week contractual notice, stated that she had enjoyed working for the Respondent and was grateful for the opportunities that had been provided for her, and that she would undertake whatever duties were deemed appropriate in her remaining time with the Respondent.

27. Ms Anderson of HR acknowledged receipt of the Claimant's letter on behalf of the Respondent in her letter of 6 August (page 80). In her letter, Ms Anderson offered the Claimant a period of seven days in which to reflect and change her mind, if she wished (which offer was not taken up). There was further correspondence between the Claimant and Ms Anderson from 5 August onwards concerning the promised disclosure of the notes of the Claimant's grievance meeting, which were finally provided under

cover of the Respondent's letter of 20 August, and during which the Claimant stated that it was due to the stress and anxiety caused by her current situation that she had resigned from the Respondent (see her email of 5 August at page 68).

28. The Claimant's last day of employment at the conclusion of her four week notice period was 30 August. As noted, Mr Gordon continued to interview individuals in relation to the Claimant's grievance thereafter; but no grievance outcome or conclusion was ever reached or produced, because, Mr Gordon said, the Claimant had by then left.

29. Once the news of the Claimant's forthcoming departure became known to her colleagues at the Respondent, a number of them wrote to her expressing their shock and sadness at her leaving, and some of those emails and the Claimant's replies are at pages 82 to 84 in the bundle. In one such exchange, the Claimant told Kelly McCarthy, a site secretary at the Respondent's Embassy Gardens site, on 14 August that she *'just wasn't progressing and wanted to do something new, so I'm going to work for a small developer in Soho'*. The Claimant agrees that she also told Mr Regan that that was what she was going to do on leaving the Respondent, their conversation probably taking place during the last week in August. The Respondent suggests that this was in fact the Claimant's real reason for resigning; the Claimant disputes that, and says that she was simply following the Respondent's repeated instruction that she was not to discuss her complaint about Mr Fareed and his being moved to work in the same office as her with unconnected members of staff who were not aware of her complaint/grievance.

30. On 1 August, shortly after submitting her resignation to him, the Claimant also asked Mr Hillman, her line manager who was one of those in ignorance of her complaint/grievance, whether he would be willing to provide a work reference for her if contacted (page 74). The Claimant's evidence was that having submitted her resignation she had contacted an employment agency in order to try to obtain alternative employment once her time at the Respondent came to an end, and that was why she approached Mr Hillman to act as a potential referee; and that she started work elsewhere in September. We have no difficulty in accepting that evidence.

31. Finally, the Claimant having left the Respondent's employment on 30 August, she presented her claim to the Tribunal on 20 September 2019.

32. We now turn to the list of issues, as set out in the Case Management Summary. In relation to the complaint of sexual harassment, the Respondent contends that in any event it is out of time, and that the Tribunal has no jurisdiction to hear and determine it. Section 123(1) Equality Act 2010 provides that any discrimination complaint may not be brought after the end of the period of three months starting with the date of the act to which the proceedings relate, or such other period as the tribunal thinks just and equitable. In this case, the *'act complained of'* occurred on 7 September 2017, and plainly the Claimant's claim was not presented within three months thereafter. It is well established that in relation to extending time for presentation of a complaint under the 'just and equitable' principle, the burden of proof is on a claimant; that extensions of time under this principle are the exception, rather than the rule; and that the Tribunal will require evidence as to why it would be appropriate to exercise its discretion in favour of a claimant.

33. On behalf of the Respondent, Mr Cater submits that it would not be just and equitable to permit the Claimant's sexual harassment complaint to proceed. He contends that, even if the Claimant was unaware that she could bring such a claim until after she spoke to someone at ACAS in July 2019, as she contends, it is clear and not in issue that she was advised on the day after the alleged incident that she could (a) raise a formal internal complaint via HR, and/or (b) pursue the matter externally via the police by means of a criminal complaint. The Claimant chose to do neither, instead relying on the support of her managers, in particular Mr Cullen and Mr Gregory. Because she did so, and given the considerable subsequent delay before proceedings were issued and this full merits hearing, Mr Cater suggests that allowing the complaint to proceed would be unduly prejudicial to the Respondent, and/or that a fair trial is no longer possible. Inevitably, people's memories of events fade and dim over time, which would not be the case had a complaint been raised in a timely manner; some potential witnesses have moved on (e.g. Mr Cullen); the delay arose through no fault of the Respondent; and the complaint revolves around one person's word against another, with no supporting evidence on either side.

34. The Claimant disagrees. Her case is that she was unaware of the possibility of bringing a Tribunal claim in September 2017, that she discussed the available options with her line manager and another senior manager at the time (and was not then told of the possibility of a Tribunal claim), and that she not unreasonably chose to rely on the support offered by those managers whilst she remained working on the same project as Mr Fareed, prior to being moved to a different project a few months later. Thereafter she was promised by Mr Hevey, a senior consultant advising the Respondent who she knew was close to the Respondent's owners, that she would not have to work alongside Mr Fareed; and that it was only when it became clear that the Respondent would not honour that promise that she resigned and was made aware of her rights of action, which she exercised promptly in bringing her claim within a month.

35. We accept the Claimant's account, and we also find that it would be just and equitable to extend time for presentation of her sexual harassment complaint. We bear in mind that at the time of the alleged incident, the Claimant had just turned twenty three, that she enjoyed working at the Respondent, and that she wished to remain in their employment and progress her career with them. In our judgment, it would not be surprising or unusual for the Claimant to then be unaware that she could bring a claim to the Tribunal, nor for her to opt to rely on the assistance that was then being offered by her managers, rather than face the rigours of either a formal internal or, worse still, a criminal complaint. That that was a reasonable course of action could be said to be established by the fact that it worked: the Claimant was able to remain working at the same project with Mr Fareed for between four and six months after the alleged incident and prior to the Claimant being transferred without any serious repetition of Mr Fareed's behaviour. It was only after it became clear that the Respondent would not take any action to prevent or avoid the Claimant having once more to work in the same building as Mr Fareed, where they would encounter each other on an apparently regular if not daily basis, that the Claimant resigned, before presenting her claim to the Tribunal shortly afterwards.

36. Nor do we accept the suggestion that the Respondent has been unfairly prejudiced by the delay in this issue being examined and dealt with, or that a fair trial is no longer possible. None of the Respondent's witnesses complained that they could no longer remember the details of their particular involvement in the issue, or that those

details had become hazy or uncertain. Mr Fareed's evidence in particular was clear and unequivocal; and the internal interviews conducted first by Mr Martin and subsequently by Mr Gordon also reveal a reasonably clear recollection of events by all who were spoken to. Whilst it is correct that Mr Cullen is no longer an employee of the Respondent, we were not told that unsuccessful attempts had been made to locate him, or that he was unwilling to participate; and, since the Respondent chose not to call Mr Gregory, who could presumably have given important evidence of his phone call with the Claimant on the evening in question, of the joint conversation with her and Mr Cullen on the following day, and of the sequence of events prior to the Claimant's transfer to the Goodluck Hope project, there must be considerable doubt whether Mr Cullen would have been called as a witness in any event. Finally, and with due respect to Mr Cater, it is simply not correct to say that there is no supporting evidence concerning the Claimant and Mr Fareed's conflicting accounts: we examine this issue in greater depth hereafter, but, quite apart from Mr Gregory's involvement, there were Mr Cullen's contemporaneous notes (which we did not see but were told are reflected or contained in his statement dated 2 July 2019 at pages 37/38), and also what the Claimant told Mr Hevey.

37. For these reasons, we are satisfied that it would be just and equitable to extend time for presentation of the Claimant's sexual harassment complaint until 20 September 2019, and that that complaint was presented in time, in accordance with s.123(1) Equality Act 2010.

38. Since we have commenced by considering whether or not the Claimant's sexual harassment complaint was presented in time, it seems appropriate to go on to consider that substantive complaint next, albeit out of order in the original list of issues. Secondly, the individual issues as listed in relation to that complaint can we think be elided into one comprehensive question: did Mr Fareed make unwanted sexual advances to the Claimant, including potentially touching her leg, whilst driving her home on the evening of 7 September 2017, which had the purpose or effect of violating her dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for her?

39. Mr Cater submits that there are inconsistencies in the Claimant's account, which is further undermined by the fact that she did not take action in September 2017 in relation to the alleged assault, whereas Mr Fareed's account, once the matter was raised with him in 2019, has been a consistent denial of any such behaviour, both to Mr Martin and Mr Gordon, and in his evidence to the Tribunal. Secondly, the Claimant continued to work at the same project with Mr Fareed following the alleged incident for a number of months, and failed to report or take action in relation to his subsequent remarks, other than telling him to *'fuck off'*. Finally, the Claimant did not challenge Mr Fareed's account in his evidence to the Tribunal. Overall, the Tribunal is asked to prefer Mr Fareed's account. The Claimant relies on her account and her evidence.

40. We have little hesitation in answering the question posed in paragraph 38 above in the affirmative, or in accepting the Claimant's evidence and preferring it to that of Mr Fareed. The insuperable problem that Mr Cater and the Respondent face is that all the evidence confirms that the Claimant did in fact phone Mr Gregory on the evening of 7 September 2017 whilst in Mr Fareed's car, that she did in fact then tell him of Mr Fareed's behaviour after she had got out of that car, and that she did in fact recount and repeat the details of the incident on the following day with Mr Gregory and

Mr Cullen, when the options open to her were also discussed. Mr Gregory confirmed that in his meeting with Mr Martin on 4 July 2019 (page 40), Mr Cullen had already done the same on 2 July (pages 35/36), and his statement or note at pages 37 and 38, apparently repeating or including his contemporaneous note, is once again consistent with their collective accounts. The fact that the Respondent chose, for no given reason, not to call Mr Gregory as a witness, despite his still being in their employment and the obvious relevance of his evidence, speaks volumes, and we draw the appropriate inferences from that failure.

41. Given the fundamentals of the Claimant's account – that Mr Fareed made repeated, explicit and unwelcome sexual advances and comments to her during their journey between Docklands and Tottenham – the possibility that there may have been some mistake or innocent misunderstanding between them as to what was being said or done by Mr Fareed simply does not exist. Logically there are only two possible conclusions we can reach: either that the incident occurred as the Claimant has consistently stated and as she told her managers at the time, or alternatively that the Claimant made the whole thing up. But there was simply no evidence or explanation before the Tribunal as to why the Claimant should have done so, and such a suggestion - that the Claimant was lying and had invented her whole story - was not put to her, nor that she had simply misinterpreted anything that was then said. There was nothing to suggest that there had been any bad feeling or unpleasant history between the Claimant and Mr Fareed prior to September 2017 – in fact the contrary is true, since both said that they were on good terms; and even if there had been, then it is difficult to see why the Claimant would have accepted a lift home from Mr Fareed on the evening in question.

42. We don't accept Mr Cater's submission that the Claimant's account has been inconsistent: we find that it has remained substantially the same throughout, certainly so far as the core of it is concerned. Nor does the fact that the Claimant remained working at the same project as Mr Fareed for a number of months following the incident undermine her evidence. The Claimant had told her managers what had happened with Mr Fareed, tried to avoid any situation where she and Mr Fareed were alone together, rejected in forceful terms any attempt at non-work related conversation, and had the prospect of moving shortly to the Goodluck Hope project, which, she told us in unchallenged evidence, she had discussed and agreed with Brad Musto, a commercial director, as well as with Mr Hevey. Finally, '*putting her case*' to Mr Fareed when he gave his evidence (when he had rejected the Claimant's account of what happened on the journey in his car from Docklands to Tottenham in any event) would have achieved nothing, and the Tribunal did not direct the Claimant to do so.

43. For these reasons, we unanimously find that the Claimant has succeeded in establishing that Mr Fareed did make unwanted and unwelcome sexual advances and comments to her in his car on 7 September 2017, that self-evidently they related to the protected characteristic of sex, and that they had the effect of violating the Claimant's dignity and creating an offensive, intimidating, and degrading environment for her. As the Claimant told us in her evidence and as we accept, following the incident she felt uncomfortable in Mr Fareed's presence, avoided being alone with him, and their formally friendly relationship ceased and was restricted to essential work issues only. Additionally, after Mr Fareed was moved to the Goodluck Hope project in 2019, the Claimant was unable to tell her colleagues why she wasn't '*her normal self*', and did not go to work social events which she would otherwise have attended.

44. Did Mr Fareed's sexual harassment of the Claimant occur 'in the course of his employment'; and had the Respondent taken 'all reasonable steps to prevent him doing that or anything of that description'? Whilst these matters were not specifically flagged up in the list of issues set out at the preliminary hearing on 3 February 2020, they are essential components for any finding of vicarious liability against an employer or principal for an employee's acts, as set out in s.109 Equality Act 2010, and as a matter of law we must consider and determine them, since both are or were potential defences available to the Respondent.

45. The first point to be made is that neither issue is pleaded or relied upon in the Respondent's ET3, nor were they raised by Mr Cater or by any witness on the Respondent's behalf, either in the course of the evidence or in submissions. In relation to the question of whether the incident occurred in the course of Mr Fareed's employment, we bear in mind that, as the Court of Appeal held in **Jones v Tower Boot Co Ltd [1997] IRLR 168**, a broad interpretation is to be given to that concept. On the one hand, the incident did not take place on the Respondent's premises, nor during working hours; on the other hand, it happened following a works social event (the Wardian project 'team dinner'), to which only those who were employees of the Respondent were invited or indeed attended; that it was only by virtue of their employment by the Respondent that both the Claimant and Mr Fareed were present; and that, as the note prepared by Mr Cullen at page 37 makes clear, he as a senior manager present at the dinner had checked at the end of the evening that all female employees present had plans for getting home safely, at which point Mr Fareed's offer of a lift to the Claimant was made and accepted. In our judgment, Mr Fareed's conduct and behaviour towards the Claimant on 7 September 2017 occurred in the course of his employment.

46. There was simply no evidence before the Tribunal of any steps at all being taken by the Respondent to ensure that their employees behaved at all times in an appropriate manner towards their colleagues. Indeed, the clear impression we formed was that, for such a large undertaking as the Respondent's, there was very little in the way of human resources support or personnel, which perhaps may be gauged by the Respondent's inability to produce any contractual documentation or personnel file in relation to the Claimant. We find that the Respondent cannot show that it took any reasonable steps to prevent employees behaving in the manner that Mr Fareed did towards the Claimant on the evening of 7 September 2017.

47. For these reasons, the Claimant's complaint of sexual harassment is successful.

48. We turn to consider the complaint of unfair constructive dismissal. In order to succeed in such a claim, a claimant must prove that the employer fundamentally breached their contract of employment, that he or she resigned as a result of that breach, and did not waive the breach through affirmation or delay. The breach asserted in this case is of the implied term of trust and confidence, a breach of which, it is well established, goes to the root of the working relationship and is indicative of an intention no longer to be bound by the terms of the parties' agreement. The implied term provides that the parties will not without reasonable cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which must exist between employer and employee.

49. The Claimant's case is straightforward, namely that having been given assurances by Mr Hevey (who was by then aware of the reasons for her concern) that she would not have to work on the same site as Mr Fareed, she discovered that he would shortly be joining her at the Goodluck Hope project. She then complained to Mr Hevey, subsequently to Mr Martin (who had not been told of the relevant background), and then to Ms Hawley, who in effect told her that nothing could be done, despite the Claimant repeatedly stating that she would leave if she had to work at the same project as Mr Fareed. She then wrote to the Respondent, once again requesting an alternative solution and highlighting the seriousness of her concerns. The Respondent chose to treat that as a grievance, held a meeting on 25 July, but did not produce notes of that meeting until 20 August 2019, three weeks after the Claimant's resignation, and did not even interview the individuals at the heart of the matter (Messrs Fareed, Cullen and Gregory) until September that year.

50. The Respondent does not accept that there was any breach of the implied term. Whilst Mr Hevey may have told the Claimant that there were no plans to move Mr Fareed to the Goodluck Hope project when she raised the matter with him, that did not amount to a promise, and Mr Hevey was in any event not an employee of the Respondent. Secondly, it was appropriate for Mr Martin to suggest a meeting between the Claimant and HR to discuss her concerns, and he personally took steps by way of interviewing Messrs Cullen, Gregory and Fareed. A meeting did then take place between the Claimant and Ms Hawley, the Respondent's head of recruitment; and when the Claimant followed that up by her letter dated 19 July, the Respondent treated that as a grievance. Following the grievance meeting on 25 July, Mr Gordon wrote to her on 31 July, stating that he would progress a grievance investigation and that she should continue to treat the matters discussed as confidential, and that she would be sent a copy of the grievance meeting minutes; but on that same day, the Claimant had submitted her resignation letter to her line manager. None of that sequence of events amounts to a breach of contract, whether individually or collectively, it is submitted.

51. In our judgment, it is the steps which the Respondent did not take, rather than what they actually did, which are most significant. As already set out, the Claimant's managers were fully aware of the Claimant's serious allegations against Mr Fareed immediately after the incident on 7 September 2017. The Claimant sought a move to a different project, and that was arranged and duly happened in the early part of 2018. Approximately one year later, the Claimant heard a rumour that Mr Fareed would be joining her at Goodluck Hope and approached Mr Hevey. We find that, whether by way of promise or assurance, he told her that that wasn't going to happen. In reaching that finding, we rely on the contemporaneous documentation, and in particular the Claimant's email to Mr Hevey of 21 June 2019, when she said that such a development *'goes against everything you told me a few weeks ago'*; the Claimant's meeting with Ms Hawley on 18 July, when she said *'Denis promised me that I wouldn't have to work with him, he made that promise'*; and the Claimant's letter on the next day, repeating that Mr Hevey had made *'false promises'*. Whether or not Mr Hevey was an employee of the Respondent is immaterial, since he held himself out, and indeed was held out by the Respondent, on this and other occasions (for example in meeting with and addressing employees including the Claimant about potential career progression), as speaking and acting for the Respondent.

52. It is not denied that the Respondent's intention was in fact for Mr Fareed to move to the Goodluck Hope project, and that duly happened on 22 July 2019. Four days

before that, and following her earlier meeting with Mr Martin, the Claimant had met Ms Hawley, a senior HR manager. At that meeting, the Claimant repeatedly told Ms Hawley that if she had to work with Mr Fareed again, she would have to leave; and Ms Hawley said that unless it had already been formally agreed that the Claimant move to another project, such a move wouldn't happen, and that there was no option but for the Claimant to remain at the Goodluck Hope project.

53. It is in our view striking that, despite the Claimant's managers being aware contemporaneously of the Claimant's serious allegations against Mr Fareed and her subsequent move to a different project, no attempt was made to warn or prepare her for his subsequently joining her at the Goodluck Hope project. Secondly, and despite the Claimant having been given (as it turned out, false) assurances to the contrary, it is clear that the Respondent was not prepared to take any steps, whether temporary or permanent, to try to avoid the Claimant having to work once more with Mr Fareed. Ms Hawley's approach was that unless a formal move elsewhere had already been arranged (which itself would have been difficult for the Claimant, since she had not been informed of Mr Fareed's forthcoming arrival), nothing could be done. We were not told and there was no evidence of any attempt being made by the Respondent to investigate potential moves to another location, despite the Claimant's obvious unhappiness and threats to leave, even after the Claimant wrote to Ms Hawley the following day emphasising the seriousness of the situation. We are satisfied that it would have been possible for an undertaking of the Respondent's size to find an alternative solution, even if only temporary, had they tried to do so. A potential move for the Claimant at some stage to the Respondent's head office had already been discussed with her, and whilst the Wardian project was coming to an end, the Respondent had at least one other ongoing project in London at Embassy Gardens. Additionally, there must at some stage have been some alternative outcome for Mr Fareed at the conclusion of the Wardian project to enable Mr Hevey to provide the Claimant with the assurances we find that he gave her.

54. Instead, the Respondent chose to set up a grievance meeting, at which the Claimant had once again to go through the distressing experience of repeating in explicit detail what Mr Fareed had said and done, which she had already told not only Messrs Cullen, Gregory and Hevey some time earlier, but also Mr Martin and Ms Hawley within the preceding month. At the conclusion of that meeting, the Respondent put forward no proposals whereby the Claimant could avoid coming across Mr Fareed at work, which she had already done repeatedly, other than to suggest that she find a 'middleman'; whilst informing her that Mr Fareed would be written to with details of her complaint, which was likely to make the Claimant's situation even more difficult. The Claimant heard nothing further until six days later, the date on which she resigned, when she was simply told that the grievance investigation was continuing.

55. In our judgment, the Respondent's unwillingness to even investigate and/or to find another location or solution whereby the Claimant would not have to work at the same site as someone against whom she had raised apparently credible allegations of sexual harassment, despite having been told that situation would not arise, amounts to conduct which would inevitably undermine or destroy an employee's trust and confidence in any continuing working relationship, and did so in this case. That the Respondent acted without reasonable cause is in our view self-evident, since we find that it had both the opportunity and the resources to avoid that state of affairs.

56. The Respondent asserts that the Claimant affirmed her contract, and in effect waived any breach by working out what the parties agree was her contractual period of four weeks' notice. With respect, that submission is misconceived. Affirmation has been judicially defined as essentially the legal embodiment of the everyday concept of *'letting bygones be bygones'*; or, in other words, that the parties relationship continues on the same basis, uninterrupted by the breach of contract. That cannot be the case here, since the Claimant had already tendered her resignation from the Respondent's employment for the notice period to even come into being; so plainly the Claimant had decided (promptly, we would add, for the avoidance of doubt) that her relationship with the Respondent had come to an end. Additionally, we do not consider that the Claimant simply working her notice in the circumstances of this case, where her evidence was that she needed employment in order to support herself, could amount to affirmation of the contract.

57. What was the Claimant's reason for resigning? The Respondent disputes that it was because of having to work once again at the same site as Mr Fareed, and suggests that it was because she was leaving for what she regarded as a better job – working for a small developer in Soho, as she told her colleague Kelly McCarthy, as well as Mr Regan during her last week with the Respondent. Mr Cater submits that it is inconceivable that she would not have told her line manager Mr Hillman her real reason for leaving, even if only generically along the lines of *'you know I am unhappy and the reasons why, therefore I am resigning'*, rather than, as the Claimant did, giving him no reason at all. As already noted, the Claimant's evidence was that she had been told not to disclose her complaint/grievance to other members of staff, that Messrs Hillman and Regan as well as Ms McCarthy were unaware of it, and that she had asked Mr Hillman whether he would be willing to give her a reference for future potential employers on 1 August, having resigned the day before and signed on with an employment agency.

58. We accept the Claimant's evidence, and we find that the effective cause of her resignation was the fact that she would have to work at the Goodluck Hope project with Mr Fareed. As the Claimant said both in evidence and at the time, she had enjoyed working for the Respondent and believed that she could further her career with them over time, so there was no obvious reason why she would be looking for employment elsewhere. It is an unusual state of affairs when a claimant is criticised by her former employer for following their instructions and keeping matters confidential; and in the Claimant's case, we bear in mind that she would no doubt have liked to be able to produce a good reference for prospective employers, which might have been imperilled had she breached that duty of confidentiality. Furthermore, it is clear that she made no secret of the real reason for her resignation to those who were aware of the background, for example to Ms Anderson and Mr Gordon. They had conducted the grievance meeting, and when chasing them for the outstanding grievance minutes on 5 August, the Claimant wrote *'As you know, I have resigned due to the stress and anxiety caused by (the) situation'*. That is consistent with what the Claimant had told Ms Hawley at their meeting on 18 July, which was that unless she were moved away from where Mr Fareed was to be stationed, she would have to leave. Overall, we accept that the Claimant has established that it was because of the Respondent's breach of contract that she resigned.

59. Finally, whilst it did not form part of the written submissions advanced by Mr Cater on the Respondent's behalf, we note that at the preliminary hearing on 3 February 2020 the Respondent contended that any constructive dismissal would not

necessarily be unfair, and that it simply arose from a reorganisation of the Respondent's workforce. In the light of our findings, both in relation to the sexual harassment complaint and the events giving rise to the Claimant's resignation, such a contention is unsustainable, and we dismiss it.

60. For these reasons, the Claimant's complaint of unfair constructive dismissal also succeeds.

61. Accordingly, there will have to be a remedy hearing, unless the parties can agree compensation, and we note that the Claimant is not seeking reinstatement or re-engagement. Due to the current pandemic, there may well be a significant delay before it is possible to hold a further 'face to face' Tribunal hearing, and there are presently technological issues which render a remote hearing by CVP programme problematic; so we would urge the parties to try to reach a sensible agreement. We note that a Schedule of Loss has been prepared by the Claimant and is included in the trial bundle at pages 106/107. Since the Claimant is acting in person, and has no previous experience of the Tribunal, it may help if we point out that successful claimants are under a duty to take reasonable steps to mitigate their loss of earnings by obtaining alternative employment, if possible; and that the Tribunal will normally wish to see written evidence of all steps and attempts made to obtain such employment if, as appears to be the case here, a claimant has not been working for at least some of the period since dismissal. In the circumstances, the Tribunal staff will approach the parties after 28 days following the promulgation of this judgment and reasons, with a view to fixing a remedy hearing before the Tribunal if necessary on the first available date with a half day time estimate and adopting the then most appropriate method of hearing.

Employment Judge R Barrowclough
Date: 25 January 2021