



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Stanemir

**Respondent:** Sloane Square Hotel Ltd

**Heard at:** London Central Employment Tribunal

**On:** 26, 27, 28 February 2020

**Before:** Employment Judge Quill, Ms J Griffiths and Mr D Ross

**Appearances**  
For the claimant: Mr P Yadam, director  
For the respondent: Mr R Adewale, counsel

## JUDGMENT

- (1) In summary, all of the complaints were dismissed.
- (2) In particular, the Respondent did not breach section 39(2) of the Equality Act 2010 or section 40 of the Equality Act 2010 as alleged by the Claimant.

Judgment was given orally, and written reasons were requested by both parties.

## REASONS

### Introduction

1. This is a claim brought by an employee against her former employer.

### The Claims

2. The claims were of direct discrimination because of sex, harassment related to sex, and of sexual harassment

### The Issues

3. The factual issues which we had to determine - and which were each said to be acts of (i) direct sex discrimination and (ii) harassment related to sex and (iii) harassment of a sexual nature - were the claimant's allegations relating to the alleged conduct of Mr Fernando Morales. These were:

- 3.1 In August 2018, he punched the claimant aggressively.
  - 3.2 He stood too close to her almost daily the last day being around 27 September 2018 starting from around January or February 2018.
  - 3.3 Almost daily, within the same period, he touched or groped her leg as he was placing things into the bin which was underneath the desk at which she was working.
  - 3.4 Almost daily within the same period he was pressing his body against her, including pressing his genitalia into her.
  - 3.5 He said several times that he was doing her a favour by giving her shifts.
4. The Claimant also alleged that this conduct by Mr Morales meant that she was constructively dismissed, and that this alleged constructive dismissal amounted to a breach of section 39(2)(c) of the Equality Act. It was common ground that she did not have the necessary length of service to bring an unfair dismissal claim.
  5. In his closing submissions, the Claimant's representative used the word "victimisation". The Claimant's representative confirmed that no application was being made to amend the claim. He said that he was simply saying that if the Claimant's existing claims succeeded then the manner in which the Respondent dealt with her complaints could be relevant to remedy.
  6. The respondent did not rely on the defence that if Mr Morales had breached the Equality Act, then the respondent ought not to be liable for that.

### **The Hearing and the Evidence**

7. We had a bundle of documents that was agreed, and which ran to 201 pages. An extra 2 pages were added by agreement.
8. We had 3 witness statements for the claimant and 8 for the respondent.
9. On the claimant side, all 3 witnesses attended and gave evidence. In addition to the claimant, there was Mr David Bejarano and Mrs Laura Kreksina.
10. On the respondent side, there were 4 witnesses who attended and gave evidence in person. These were Mr Fernando Morales, Mr Puji Yadam, Ms Emma Davidson and Ms Loreta Grudzinskaite.
11. There were also 4 further witness statements for the Respondent. These were from:
  - 11.1 Mr John Tham (non-executive chairman and majority shareholder) and Ms Sorcha Doyle (current employee) who each could not attend the hearing due to personal circumstances;

- 11.2 Ms Monica Morgan and Ms Silvia Largo who were former employees of the respondent and who were abroad and who could not attend the hearing.
12. For these witnesses, we read the statements, but gave them such weight as we saw fit, bearing in mind that they had not attended and been cross-examined.

**The findings of fact**

13. The respondent operates a hotel.
14. The claimant commenced employment with the respondent in August 2017. Her job was as receptionist. The claimant is female.
15. The claimant was given a statement of terms and conditions which she signed in August 2017.
16. The respondent has an employee handbook. Amongst other things, the document includes the disciplinary procedure, the grievance procedure, and the equal opportunities/dignity at work sections. It also contains the code of conduct.
- 16.1 The list of examples of gross misconduct included, amongst other things, "unlawful discrimination, harassment and bullying"; "indecent or lewd behaviour of a serious nature"; "serious cases of bullying, offensive, aggressive, threatening or intimidating behaviour or excessive bad language".
- 16.2 The grievance procedure gives employees the right to be accompanied by a work colleague or trade union official at formal meetings. The first step in the process for raising grievances is to informally discuss with supervisor or line manager or - if that is not appropriate - to approach human resources. If the grievance is not resolved by the informal process, then the next step is to submit a written grievance. If dissatisfied with the outcome of the written grievance then employees have the right to appeal.
- 16.3 The harassment section defines harassment and says that if an employee is found guilty of harassment, they will be held personally liable for such conduct. There is a list - which is said not to be exhaustive – which includes “unwanted physical contact”.
- 16.4 In the section bullying, “bullying” is defined as misconduct. Types of inappropriate and unacceptable bullying at work include shouting at a colleague, humiliating public attacks on a colleague's performance and abusive, threatening or insulting words or behaviour.
- 16.5 The handbook explains procedure for employees to report alleged harassment or bullying. The process which is to be followed is similar to the grievance process.
17. From around January 2018 onwards, the claimant's line manager was Fernando Morales. He is male. He started working for the respondent in January 2018 and

worked for them for approximately 20 months. His job title was Front of House Manager.

18. In the relevant period, there were between 7 and 9 female receptionists and female reception supervisors reporting to Mr Morales. There were also some males in those roles reporting to Mr Morales.
19. Each time she worked, the claimant worked one of two shifts as a receptionist: either the early shift which was 7am to 3:30pm or else the late shift which was 3pm until 11pm. Mr Morales tended to work earlier in the day rather than later.
20. At the respondent's premises, there are 3 workstations for the receptionists. There are usually 2 receptionists and a supervisor on duty, meaning that each of the 3 workstations is occupied most of the time.
21. The receptionists sometimes did duties away from reception such as checking the lobbies on the other floors or taking a room service tray to a room.
22. Each of the workstations is a desktop with a computer on it and under each desk there is a cabinet which contains a bin. Some of the time, the person working at the workstation might be standing or some of the time, they might be sitting on a stool. In either case, their legs are close to the bin.
23. Mr Morales had his own office, which was near to the reception area. However, his duties required that he would spend a lot of time away from his office and actually in the reception area itself.
24. Mr Morales would occasionally carry out the duties of a receptionist such as checking in or checking out guests. He also saw it as part of his general responsibilities to clear away unnecessary paperwork from the reception area and throw it into the bin.
25. Loreta Grudzinskaite has worked for the Respondent since 2010. She has been Back of House Manager since 2017. She also spends some time each day in reception, liaising with guests and with the Front of House Manager, amongst other things. Her estimate was that she spent about 3 hours per day on average in reception. Ms Grudzinskaite did not see Mr Morales harassing the Claimant or any other member of staff, and no member of staff complained to her about Mr Morales.
26. Apart from the Claimant, the other receptionists included the following.
  - 26.1 Sorcha Doyle became receptionist in January 2018, and reception supervisor in September 2018.
  - 26.2 Silvia Lago commenced employment as a Reception Supervisor in June 2018 and was still employed as of the Claimant's termination date.
  - 26.3 David Bejarano commenced employment in November 2017 and left in late 2018.
  - 26.4 Ms Laura Kreksina commenced employment in November 2017 and left in late 2018.

27. Ms Doyle's written statement reported that she never saw Mr Morales inappropriately touch the Claimant or any other member of staff, and that she had no concerns about his conduct. She stated that he had granted her requests in relation to the rota without imposing conditions.
28. Ms Lago's written statement was worded very similarly to Ms Doyle's. In addition, she stated that Mr Morales sometimes stood quite close when talking to her, but that this had not bothered her.
29. David Bejarano did not witness Mr Morales touch the Claimant inappropriately, or any of the alleged incidents in the list of issues. The Claimant told him that she felt uncomfortable when Mr Morales stood close to her, and also that he touched her legs with his hands when throwing items into the bin.
30. Laura Kreksina did not witness Mr Morales touch the Claimant inappropriately, or any of the alleged incidents in the list of issues. There was an occasion when she believed that Mr Morales was standing too close to her. She had to ask him more than once to stand further away before he moved. Mr Bejarano witnessed this. Ms Kreksina saw Mr Morales standing extremely close to some of the other receptionists.
31. The claimant began doing a university course in January 2018. She attends university 3 times a week Monday, Wednesday, Saturday. The hours are 6pm to 9pm.
32. On 3 February 2018, the claimant did not attend work. She had been put on the rota for that day by Mr Morales before he knew that the claimant was due to be attending university. When she told him, he informed her that she could arrange a swap of her shift with her colleagues. The claimant was unable to find somebody to swap with her and did not attend work. Because of this, the Claimant received a disciplinary warning dated 6 February 2018, in a letter signed by Monika Morgan, Finance and HR manager.
33. In October 2018, Mr Morales went on leave with his last shift being 26 October 2018. He was due back on 13 November 2018.
34. On 29 October 2018, the claimant sent a letter to the respondent stating that she was resigning. The letter said that, in accordance with the terms of her contract, her employment would end on 30 November 2018. The letter continued:

*I have enjoyed being a part of the team and am thankful for the opportunities you have given me during my time here. If there are any areas you would like me to focus on during my notice period, please let me know.*

*I hope that I can rely on you for a positive reference in the future.*
35. Within the letter she did not make any allegation that she had been treated badly, either by Mr Morales, or by the respondent. Up to 29 October 2018, the claimant

had not submitted any complaints to the respondent about the treatment she had received from Mr Morales or from any other employee.

36. As a result of the resignation letter, on 29 October 2018, the claimant had a meeting with Monika Morgan. This meeting took place at the instigation of Ms Morgan. The claimant had been aware that by submitting her resignation letter, she would be invited to such an interview.
37. In the meeting, the claimant said that her reason for leaving was difficulty working with Mr Morales. During the meeting, Ms Morgan asked the claimant if she would be interested in working in a different post within the respondent's organisation. The claimant said that she was not interested.
38. No contemporaneous written record was made of this meeting. On 6 November 2018, Ms Morgan wrote to the claimant stating that she had given the claimant the opportunity to reconsider and that, since the claimant had not come to her to say that she had reconsidered, Ms Morgan noted that the resignation would take effect on 30 November 2018. The letter went on to discuss the leaving arrangements.
39. On 9 November 2018, the claimant submitted a letter of grievance addressed to Mr Puji Yadam, Hotel Director. In the letter, the Claimant said:
  - 39.1 that Mr Morales had a very inappropriate way of touching her every time he wanted to communicate something.
  - 39.2 that he lent into her, encroaching her personal space and using his entire body, to touch her, including his genitals.
  - 39.3 that he touched her inappropriately on the legs on the pretext of throwing an item in the bin situated under her workstation.
  - 39.4 that this type of behaviour was almost daily for the last few months and made her feel very uncomfortable.
  - 39.5 that *"I never talked about it just because I have been so embarrassed and degraded about it and so scared that I will lose my job"*.
  - 39.6 that he referred to his kindness in agreeing her shift pattern so that she could go to university.
  - 39.7 that Mr Morales hit the claimant 3 times on the arm in an aggressive manner, and then pushed her away from the computer in August 2018. This was said to be because the claimant had allocated a room incorrectly. It said to have been in front of two colleagues who were willing to give evidence. The names were not stated.
  - 39.8 that on 4 October, Mr Morales had said that the Claimant was absent a lot and referred to a colleague who had been dismissed and implied the same thing might happen to the Claimant.

- 39.9 that the claimant had resigned because of the behaviour of Mr Morales and said that Ms Morgan had offered the claimant the opportunity to move departments if she had difficulties working with Mr Morales. The letter said that the claimant was concerned that Mr Morales had not yet been questioned.
40. Mr Yadam received the grievance letter on Friday 9 November 2018. On Monday 12 November, he phoned John Tham, the respondent's chairman and majority shareholder. Mr Tham came to the premises and Mr Tham and Mr Yadam met Mr Morales and read out the grievance letter to him. Mr Morales denied the allegations.
41. Mr Tham instructed Mr Yadam to investigate. Mr Yadam commenced the investigation with effect from 13 November 2018, which was the date of Mr Morales' official return from holiday. Mr Morales was asked not to come into work on 14 November so that he would not encounter the Claimant that day.
42. On 14 November 2018, the claimant attended a meeting with Ms Morgan and Mr Yadam. She was told the meeting was to discuss the grievance letter.
43. At the meeting:
- 43.1 The Claimant said that Mr Morales had been sexually harassing her since March or April 2018 and that he had continued to do so up until the start of his holiday.
- 43.2 In relation to allegation of him touching her leg she said it had happened a few times. She said she could not remember the last time it had happened.
- 43.3 In relation to the August incident, the claimant confirmed that she had continued to work after the incident and she did not report the matter to anybody. She was asked for the names of 2 colleagues who had witnessed the incident and she said that she did not want to supply the names as their identity should remain secret.
- 43.4 Mr Yadam repeated the request for the names, stating that the grievance letter said that they were willing to give evidence. The claimant repeated that she was not willing to give their names.
- 43.5 She confirmed Mr Morales had always allowed her to have shift patterns which matched her university attendance.
44. During the meeting, the Claimant was asked 10 different questions in total, one of which was repeated.
45. At the end of this meeting claimant was told that, given the nature and seriousness of her allegations it would not be appropriate for her to continue working with Mr Morales and therefore she was placed on leave on full pay until 21 November pending an investigation.

46. A written note of the meeting was produced and signed by Ms Morgan, and by the claimant on 14 November 2018. It was a short meeting, and the typed note was about 1.5 pages of A4.
47. On 14 November 2018, at the request of Mr Yadam, Ms Morgan produced and signed a statement relating to her recollection of what had happened on 29 October 2018. According to this 14 November document, Ms Morgan recalled the claimant giving several examples to her of why the Claimant was not happy working with Mr Morales. These included that:
  - 47.1 she did not want to continue working as just the receptionist;
  - 47.2 Mr Morales did not give her money on her birthday like he did with the others;
  - 47.3 Mr Morales had not initiated or conducted an appraisal meeting with her;
  - 47.4 there had been a miscommunication between Mr Morales and the claimant in relation to a telephone call;
  - 47.5 Mr Morales touched her on her shoulder when explaining something to her;
  - 47.6 Mr Morales had allegedly referred to another employee (somebody who had been dismissed) when conducting a back to work interview after sickness absence and said that the claimant did not want to end up like her;
  - 47.7 Mr Morales stood close to the claimant when speaking to her;
  - 47.8 the previous February, when the Claimant received a warning for missing her shift to attend her university course, Mr Morales had said that but for Mr Yadam's and Ms Morgan's "kindness of heart", the claimant would not have remained in employment.
48. Ms Morgan's 14 November document went on to say that the claimant had not wanted an immediate change of job because the post that was immediately available was not of interest to her and that the other potential vacancy would not be open for a few more months. The document recorded Ms Morgan as stating that the claimant had never used the expression sexual harassment in speaking about Mr Morales or his alleged behaviour.
49. On 16 November, Mr Yadam and Ms Morgan and Ms Davidson met Mr Morales. Ms Davidson works as PA to Mr Tham. Her workplace (and that of Mr Tham) is not at the hotel, but is approximately a quarter of a mile away.
50. The notes of the meeting were produced and signed on 16 November 2018 by Ms Davidson and Mr Morales. According to the notes:
  - 50.1 Mr Morales denied touching the claimant in a way that could be misconstrued as inappropriate.



- 50.2 He denied sexually harassing the Claimant in any way.
- 50.3 He denied encroaching on the claimant's personal space and denied putting his genitals against her.
- 50.4 He denied that he deliberately touched the claimant's leg when throwing rubbish into the bins at reception. He said that it was possible that he could have accidentally brushed the claimant's leg with the back of his hand as he was putting something into the bin.
- 50.5 He was not asked how many times he might have brushed the Claimant's leg, or how frequently he placed things into the bin near to where she was standing.
- 50.6 He said that he always announced to staff if they were in front of a bin which he wished to use.
- 50.7 He denied ever hitting or slapping the claimant. He also denied ever pushing her.
- 50.8 He confirmed that he had not had an appraisal meeting with the claimant and said the reason for this was shortage of staff.
- 50.9 He denied that in the claimant's back to work meeting on 4 October he had referred to the dismissed employee at all. He said that he had told the Claimant that she had called in sick 4 or 5 times and that next time she might have to see a doctor nominated by the Respondent.
- 50.10 He said that the dismissed employee named by the Claimant was not sacked due to sickness absence.
51. Between 14 and 19 November 2018, Mr Yadam examined about 19 hours of CCTV footage. He was only able to look back to the last 30 days (so not earlier than mid-October 2018), as that was the length of time for which the recordings were retained. He selected 16, 19, 21 and 23 October. These were dates for which the recordings still existed and on which the Claimant and Mr Morales had both been on duty at same time. Mr Yadam saw nothing on the CCTV recordings that - in his opinion - demonstrated sexual harassment or any other harassment as alleged by the Claimant.
52. On 19 November, by email, Mr Yadam invited the Claimant to a meeting at 3pm on 21 November. He said she could be accompanied. His email said that if her allegations were judged to be false, the Claimant could be dismissed with immediate effect. The email used the word "suspension" when referring to the period of absence on full pay from 14 November onwards.
53. Mr Yadam concluded his investigation. Prior to meeting the Claimant, he met Mr Tham to report his findings, and also produced a memo to Mr Tham dated 21 November. Mr Tham did not disagree with Mr Yadam's findings and recommendations.

54. Mr Yadam's memo to Mr Tham referred to the claimant's grievance letter dated 9 November, the interview notes with the claimant and with Mr Morales, and the statements from Ms Morgan and Ms Davidson.
- 54.1 Having listed the allegations, the memo noted that Mr Morales denied all of the allegations.
- 54.2 At paragraph 9 of his memo, Mr Yadam said that his understanding had been that the claimant's allegations were that the relevant period was from April until around 27 October when Mr Morales went on holiday. He mentioned checking the available CCTV.
- 54.3 In the memo, he said that the claimant had not provided any witnesses to support what she had said, and that she had not given any reason for originally saying that 2 witnesses were available but then declining to supply the names.
- 54.4 In relation to the touching of the leg, Mr Yadam's memo asserted that Mr Morales was confident that if it did happen at all, it was only once. [We observe that the alleged assertion by Mr Morales that it happened no more than once, is not contained in the written notes of the meeting with Mr Morales].
- 54.5 Mr Yadam recommended that the grievance not be upheld on the basis that there was no evidence to support the allegations. Mr Yadam concluded that the allegations were either gross exaggerations or else were entirely false.
- 54.6 Mr Yadam recommended that the claimant not return to work, but should remain away until the end of her employment.
55. On 21 November, Mr Yadam and Ms Morgan met the Claimant. Mr Yadam informed the Claimant of his findings. He told her that she would not be returning to work before the end of her employment (on 30 November 2018), but would be paid for that period. Mr Yadam regarded this as a disciplinary measure, taken because of his opinion that the allegations were false or exaggerated.
56. In the meeting, the Claimant supplied the names of 3 individuals to Mr Yadam. The names had not been supplied earlier. The Claimant suggested that those 3 individuals might also have been touched by Mr Morales inappropriately. Mr Yadam confirmed that he had not spoken to any of those 3 during his investigation and stated that he did not think it would be appropriate to do so now.
57. After the meeting, Mr Yadam posted a letter to the claimant which included the comment, "*you will remain on suspension*". The letter informed the claimant:
- 57.1 that she was not to contact either the hotel or any member of staff at the hotel during their working day for any reason whatsoever.
- 57.2 that any arrangements for her to either collect her own belongings from the hotel or return any company property to the hotel should be arranged with Ms Morgan only by email only.

- 57.3 that the respondent regarded her as having made false allegations with intention to damage Mr Morales' reputation and this could potentially have led to dismissal.
58. The Claimant does not recall receiving the letter. The letter did not state that the Claimant had a right to appeal against the findings.
59. The Claimant was not offered an appeal at the meeting or in the letter because Mr Yadam had taken advice from an external HR advice provider and he had been told that it was not necessary to offer an appeal.
60. The Claimant did not contact the Respondent after 21 November 2018 seeking to appeal. The Claimant remained on full pay until the end of her employment on 30 November 2018.
61. During Mr Morales' employment with Respondent, there were no other complaints about his conduct made by employees either working in reception or elsewhere.
62. There was CCTV of the reception area which covered both the guest side and the staff side. The Claimant was aware of this, as was Mr Morales.
63. We now discuss our findings in relation to the factual issues as per the list of issues, in relation to which there was a significant dispute between the parties' evidence and submissions.

### **Alleged Punching in August 2018**

64. There is a disputed incident which the claimant alleges happened in August 2018. According to the claimant, she got a room booking wrong and Mr Morales physically slapped her hand several times when telling her off for this incident
65. The first time this allegation was recorded in writing was the Claimant's grievance letter of 9 November.
66. We are not satisfied that this was raised with Ms Morgan on 29 October 2018. It is not an allegation recorded by Ms Morgan in either the 6 November letter, or the 14 November statement or in her written statement to the tribunal. During Mr Yadam's investigation, the Claimant did not assert that she had raised the hitting allegation with Ms Morgan on 29 October.
67. The Claimant has been consistent about the date being early August and therefore her 9 November letter was approximately 3 months after the date of the alleged incident.
68. In the letter, the Claimant says she was hit 3 times on arm and pushed away from computer. This is similar to the description which she gave to the tribunal (which was that he hit her left hand and then pushed her away). It is also similar to what she said on 14 November 2018 (which was that Mr Morales started hitting her and then pushed her out of the way to use the computer). However, in the claim form

submitted in December 2018, the allegation is “punched aggressively in front of staff”.

69. The claimant did not name the witnesses to this alleged incident, either in her 9 November letter or in either of her two meetings with Mr Yadam.
70. The first time that the Claimant supplied the names of these alleged witnesses was at the preliminary hearing in this litigation. We will refer to them as CM and RH. The Claimant told us that she believed one of the witnesses was now out of the country, having left the country later than July 2019 (which was the period in which the final hearing had been due to take place, before it was cancelled due to lack of tribunal resources). The Claimant said that she had not been able to contact the other alleged witness. The Claimant confirmed that she had not obtained the agreement of either of them to attend either the tribunal hearing, either on the original dates, or for these rearranged dates.
71. Mr Bejarano does not state that he saw Mr Morales hit the Claimant. Mr Bejarano was in the office one day with Mr Morales. He believes that Morales became angry and left the office. Mr Bejarano spoke to the Claimant later in the day and she told him that Mr Morales had hit her and pushed her out of the way.
72. Mr Morales completely denied ever hitting or pushing the Claimant. He denied being able to recall any incident in which the Claimant had allocated a room incorrectly.
73. We are not satisfied that the Claimant was slapped or hit or punched on the arm or hand, either 3 times or at all.
74. We are satisfied that Mr Morales was annoyed about an error which the Claimant had made (or which he believed that she had made) and that he wanted to access the computer quickly. We are satisfied that there was some physical contact as he hastily took control of the keyboard.
75. He was not intending to violate the Claimant’s dignity, but was intending to try to rectify the situation as quickly as possible.
76. The Claimant was upset by this incident. She was close to tears when she told Mr Bejarano about it.

**That he stood too close to her almost daily basis the last day being around 27 September 2018, having starting several months earlier.**

77. Based on the evidence, we are satisfied that Mr Morales stood close to colleagues in reception. Ms Kreksina had asked him to move further away on one occasion, and Mr Bejarano witnessed that incident. Ms Morgan had also witnessed him standing close to members of staff when speaking to them.
78. The Claimant did not inform Mr Morales that she believed that he was standing too close to her.

79. The area behind the reception desk was limited, although we were given no floorplan.
80. The Claimant named Sorcha Doyle and another employee, MF, as well as Ms Kreksina, as people who had believed Mr Morales encroached on their space.
81. In her signed statement to tribunal, Ms Doyle said that she had no concerns about Mr Morales' conduct. MF was not called as a witness by either side.
82. Our finding is that Mr Morales was not deliberately seeking to make others uncomfortable. Other than by Ms Kreksina, he was not told by any other employees (including the Claimant, Ms Morgan and Mr Bejarano) that he might be standing too close to colleagues.
83. Our finding is that we are not satisfied on the evidence that Mr Morales stood closer to females than to males.
84. The Claimant would have preferred that Mr Morales had given her more room, but was not of the opinion that by standing close he was violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

**Almost daily within the same period he touched or groped her leg as he was placing things into the bin which was underneath the desk at which she was working.**

85. There is a dispute between the parties about whether Mr Morales' hand had made contact with the claimant when he was throwing items into the bin and, if so, why and how often.
86. Mr Morales' evidence was that he would tell staff members if he was about to throw something into the bin so that they could move slightly out of the way. Some of the time, he might need to go close to the bin to drop something into the bin or some of the time, he might throw the item (eg by rolling paper into a ball) from approximately 50 cm away. Mr Morales believed he threw something into the bin perhaps once a shift on average. He denied touching the Claimant's leg deliberately.
87. On the claimant's evidence, Mr Morales would frequently brush his hand against her leg as he was placing things into the bin and that he would do this without asking her or giving her the opportunity to move her legs out of the way.
88. In her grievance letter, this was described as "puts hands on legs". In the claim form, as groping. In the witness statement, the Claimant said that he forced his entire body between Claimant and the bin (and she also alleged that Ms Morgan agreed that she had seen this). On 14 November 2018, the Claimant said it had happened a few times. In the list of issues, it was described as almost daily.

89. The other witnesses do not say that they have seen Mr Morales put his hands on the legs of the Claimant. Mr Bejarano believes that the Claimant had mentioned it to him.
90. Mr Morales accepted on 16 November 2018, that he might have accidentally touched the Claimant's leg. In his evidence to tribunal, he said that he could not remember it ever happening, but it must have been an accident if it ever happened.
91. We are satisfied that any contact between Mr Morales hand and the claimant's leg, did not fit the description of groping. On the balance of probabilities, we are satisfied that on one or more occasions, Mr Morales hand did make contact with the claimant's leg as he was putting something into the bin.
92. This was not something which the Claimant wanted to happen. It was something which annoyed the Claimant when it did happen. She did not regard Mr Morales' conduct as being something which created a hostile or intimidating etc environment. She did not complain about the events until she was leaving, and she did not seek to change shift patterns (or duties within her shifts) to avoid Mr Morales. We have also found that the incidents were not as the Claimant has described them in the claim form.
93. Mr Morales only intention was to put something into the bin. It did not matter whether the receptionist near the bin was male or female. He did not intentionally touch the claimant's leg.

**Almost daily within the same period he was pressing his body against her, including pressing his genitalia into her.**

94. There is a dispute between the parties about whether Mr Morales pressed his body and in particular his genitalia into the claimant. He denies doing this at all. He suggests the only physical contact was that occasionally he might touch the claimant or another employee on the shoulder to attract their attention. He says that the area behind the reception desk is quite small.
95. Mr Yadam looked at the CCTV for the days mentioned above. If, on any of those days, there had been conduct of the type described by the Claimant, then we are satisfied that Mr Yadam would have seen this on the CCTV. He did not see any such conduct on any of those dates.
96. We take into account that the Claimant said in the meeting on 14 November that the harassment had continued up to Mr Morales going on holiday (and that his holiday commenced 27 October.)
97. In these proceedings, the Claimant has said that the behaviour ceased from around 27 September. The claim form states (following on from the allegations of rubbing his genitalia against the Claimant "whenever she was at her desk" and groping the leg by rubbing) that "The last time this happened was the 27<sup>th</sup> September 2018".

98. In her evidence, the Claimant was not able to suggest anything that happened around that date that would have caused Mr Morales to change his behaviour, and she was not able to suggest anything that made the date particularly memorable for her. She stated that – in fact – she was not seeking to assert that there was definitely something which happened on 27 September, or that 27 September was definitely the last occasion of alleged harassment; she said that 27 September was an approximation.
99. If 27 September was the last date on which there was a relevant incident of (alleged) harassment, then that would mean that the last incident occurred earlier than the period for which CCTV recording might have been available.
100. The change in the Claimant's account (from an assertion that it happened all the way up to Mr Morales holiday, to an assertion that it ceased around a month earlier, around 27 September) occurred after the Claimant had been told by Mr Yadam that he had examined video footage for certain shifts in October. Of course, the timing of the change in the account does not necessarily imply that the reason for the change in account was what Mr Yadam told her about the CCTV.
101. The Claimant says that she told Ms Morgan about the pressing of genitalia on 29 October 2018. We are satisfied that she did not do so, and that the first complaint about this was in the 9 November 2018 letter.
102. We are not satisfied on the balance of probabilities that Mr Morales pressed his entire body, and/or his genitals into the Claimant's body.
103. We do accept that from time to time Mr Morales did touch the Claimant physically, by tapping her on the shoulder to attract her attention, as he demonstrated in the tribunal.
104. The Claimant was not happy about being touched on the shoulder by Mr Morales finger and she informed Ms Morgan of that fact on 29 October 2018. It did not have the effect on her that she believed that her dignity was violated or that it had the effects as listed in Section 26(1)(b) of EA.

**He said several times that he was doing her a favour by giving her shifts which fitted in with her university timetable**

105. Mr Morales did have control over the Claimant's shifts. He had the opportunity to make things difficult (or threaten to make things difficult) for the Claimant. He was not difficult over this issue and did not threaten that he would be. There was one occasion, in February 2018, when he told the Claimant that she would have to swap her shift if she wanted to attend university, because he had already drawn up the rota before she told him about it. She did not attend work and was disciplined.
106. After that, Mr Morales always arranged the rota so that Claimant was free to go her studies, and there was no on-going discussion about the issue.

## The Law

### Time Limits

107. Section 123 of EA 2010 states (in part)

- (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
  - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
  - (a) conduct extending over a period is to be treated as done at the end of the period;
  - (b) failure to do something is to be treated as occurring when the person in question decided on it.

108. The Claim was issued on 12 December 2018. Early conciliation started on 3 December 2018 and finished on 5 December 2018. Because the claim was issued less than one month after the end of early conciliation, claims relating to any acts or omissions alleged to have occurred on or after 4 September 2018 are in time.

109. Subject to Section 123(3)(a) of EA 2010, allegations relating to incidents on or before 3 September 2018 are out of time, subject to the tribunal's ability to extend time in accordance with Section 123(1)(b).

110. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period (up until 4 September 2018 or later) or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

111. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing:

112. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list



of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

### Burden of Proof

113. Section 136 of the Equality Act deals with burden of proof and is applicable to all the claims in this action. Namely direct discrimination, harassment related to sex and sexual harassment.

114. Section 136 of EA 2010 states (in part)

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

Equality Act 2010

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

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

115. Section 136 requires a two stage approach:

115.1 At the first stage the tribunal considers whether the claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

115.2 If the claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic.

116. Where the Claimant fails to prove, on the balance of probabilities, that a particular alleged incident did happen, then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

### Direct Discrimination

117. Section 13 of EA 2010 states (in part) that a “person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.

118. Section 39 EA 2010 provides that an employer must not discriminate against an employee. The characteristics which are protected by the legislation include sex.

119. When applying the definition of discrimination in accordance with section 13(1) EA 2010, it is necessary to consider how the respondent has treated the claimant and to consider whether it has done so less favourably than it has treated a comparator.

The comparator can either be an actual person or a hypothetical person. Either way, the comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

120. If we are satisfied that the claimant has been treated less favourably than the comparator, then we must consider the reason for that difference in treatment. In particular, we must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions.

### Harassment

121. Section 26 of EA 2010 states (in part)

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

122. For the purposes of subsection (1), sex is a relevant characteristic. Furthermore, for the purposes of subsection (1), the claimant will need to establish on the balance of probabilities that he or she has been subjected to “unwanted conduct” which has the “purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment” for her.

123. In relation to harassment related to sex, it is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) EA 2010. The conduct also has to be related to the particular protected characteristic. Because of section 136, the Claimant does not need to prove - on the balance of probabilities - that the conduct was related to sex. However, in order to shift the burden of proof, she would need to prove facts from which we might infer that the conduct could be so related.

124. In most cases, whether or not the conduct in question can be categorised as “of a sexual nature” will be self-evident. This is something which should be decided on a common-sense basis by reference to the facts of each particular case.
125. The following examples of sexual harassment are given in the EHRC’s Employment Code: unwelcome sexual advances, touching, sexual assault. Other conduct could amount to conduct of a sexual nature, depending on the circumstances.
126. Not all physical contact between two individuals amounts to sexual harassment (even where that contact is unwanted). Whether it amounts to conduct of a sexual nature so will depend on a number of factors. These include:
- 126.1 the nature of the physical contact and the part of the anatomy that is touched;
  - 126.2 the circumstances or the context in which the contact takes place;
  - 126.3 the relationship between the two individuals;
  - 126.4 whether (the conduct is unwanted and) the recipient has made clear that it is unwanted;
  - 126.5 the intentions of the person making the contact;
  - 126.6 the perception of the recipient of the conduct;
  - 126.7 how a reasonable person would view or perceive the conduct
127. The fact that alleged harasser did not regard it as sexual harassment does not mean that it cannot be harassment contrary to section 26(2) and/or section 26(1).

### Dismissal

128. Section 39(2)(c) of Equality Act 2010 makes it a contravention of that Act for an employer to discriminate against an employee by dismissing the employee. Section 39(7)(b) makes clear that dismissal includes so-called “constructive dismissal” ie a resignation by the employee in circumstances such that the Claimant is entitled, because of the Respondent’s conduct, to terminate the employment without notice.
129. In order to prove that there was a constructive dismissal, the Claimant must show that each of four conditions has been met:
- 129.1 There must be a breach of contract by the employer.
  - 129.2 That breach must be sufficiently serious to justify the employee resigning, ie it must be a so-called “repudiatory breach” of contract.
  - 129.3 The employee must, in part at least, resign in response to the breach and not (just) for some other, unconnected reason(s).
  - 129.4 The employee must not delay too long in terminating the contract in response to the employer’s breach.

130. It is an implied term of an employment contract that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ("the trust and confidence term"). A breach of this term by the employer can potentially be a repudiatory breach.
131. Not every breach of contract amounts to a repudiatory breach and not all unreasonable conduct amounts to a breach of contract. That being said, the more unreasonable the Respondent's conduct, the more likely it is to amount to a repudiatory breach.
132. A claimant may succeed in proving that they were dismissed if they resigned in response to a series of actions by the employer which cumulatively justify the employee leaving, often referred to as "last straw" cases.

### **Analysis and Conclusions**

#### **Punching Allegation - August 2018**

##### *Direct discrimination*

133. The Claimant has not proven facts that might lead us to infer that this incident was because of sex.
134. We are satisfied that the reason for his conduct as we found it to be (which did not involve hitting or punching) was because Mr Morales wanted to take charge of the keyboard quickly in order to (as he saw it) rectify the Claimant's error and not because of Claimant's sex.

##### *Harassment of a sexual nature*

135. Our conclusion is that the conduct was not of a sexual nature.

##### *Harassment related to sex*

136. The effect of Mr Morales' conduct was to create a humiliating environment for the Claimant in that she was criticised in front of guests and colleagues, and Mr Morales took control of the computer from her.
137. We do not find that there are any facts from which we could reasonably infer that the conduct was related to the Claimant's sex. Our inference is that he was annoyed by what he perceived as an error, but that there was no evidence that he was more annoyed that a female employee had made the error than he would have been if a male employee had made the same (or a similar) error.

##### *Time*

138. We do not find this to be a continuing act with the other allegations. It was a one-off incident. It occurred in early August.

That he stood too close to her almost daily basis the last day being around 27 September 2018, having started several months earlier

*Direct discrimination*

139. The Claimant has not proven facts that might lead us to infer it was because of sex.
140. We are satisfied that the reason for his conduct as we found it to be was because Mr Morales had a tendency to stand close to all employees (male or female) when speaking to them, and because space was limited behind the reception desk.

*Harassment of a sexual nature*

141. Our conclusion was that the conduct was not of a sexual nature.

*Harassment related to sex*

142. The Claimant has not satisfied us that the conduct had the forbidden effects (as per section 26(1)(b) of the Equality Act) on her.
143. Furthermore, we are satisfied that he did not stand close to the Claimant for a reason related to her sex.

Almost daily within the same period he touched or groped her leg as he was placing things into the bin which was underneath the desk at which she was working

*Direct discrimination*

144. The Claimant has not proven facts that might lead us to infer that Mr Morales' conduct was because of sex. We are satisfied that the reason for his conduct - as we found it to be - was because he sought to place items into the bin.
145. Any contact with the Claimant was unintentional and was not because of sex.

*Harassment of a sexual nature*

146. Our conclusion was that the conduct – as we found it to be - was not of a sexual nature.

*Harassment related to sex*

147. The Claimant has not satisfied us that the conduct had the forbidden effect on her. She was annoyed, but we are not satisfied that the effect on the Claimant was that an intimidating etc environment was created.
148. Furthermore, we are satisfied that Mr Morales – when accidentally touching an employee's legs when placing items in the bin – was not acting in that way for any reason related to the Claimant's sex (or the sex of any other employee).

Almost daily within the same period he was pressing his body against her, including pressing his genitalia into her

149. We found that Mr Morales was not pressing his genitalia into the Claimant.

150. We found that the extent of the touching was touching her shoulder with his hand.

*Direct discrimination*

151. The Claimant has not proven facts that might lead us to infer it was because of sex. We are satisfied that the reason for his conduct - as we found it to be - was because he sought to attract the Claimant's attention.

152. Such behaviour was exhibited by Mr Morales to employees of both sexes.

*Harassment of a sexual nature*

153. The conduct was not of a sexual nature.

*Harassment related to sex*

154. The Claimant has not satisfied us that the conduct had the forbidden effect on her.

155. Furthermore, we are satisfied that Mr Morales – when touching the Claimant on the shoulder - was not acting in that way for any reason related to the Claimant's sex (or the sex of any other employee)

He said several times that he was doing her a favour by giving her shifts which fitted in with her university timetable

156. We found as a fact that this did not occur.

Dismissal

157. The matters relied on by the Claimant as a repudiatory breach of contract by the Respondent were the alleged conduct of Mr Morales as described above in the list of issues, and our findings in relation to his conduct are as set out above.

158. We have found that there were no breaches of the Equality Act as alleged. Furthermore, the conduct – as we have found it to be – did not amount to a breach of contract by the Respondent, either individually or cumulatively.

159. The Claimant did not prove that there was a breach of the trust and confidence term or of any other term of her contract, prior to her resignation.

160. After she submitted her resignation, the Claimant was offered the opportunity to retract it, and (if she wanted to do so) to move to another job. It was after she declined that opportunity that she submitted a list of allegations in relation to Mr Morales.

- 161. In due course, following on from the grievance, the Respondent informed her that it did not believe her, and that the fact that she had made these allegations could potentially amount to grounds for disciplinary action against her; however, those actions were after the resignation and were not the cause of the resignation.
- 162. The Claimant has not proven to us that her resignation was because of any breach of contract by the Respondent, or because of any breach of the Equality Act by the respondent.
- 163. The Claimant was not (constructively) dismissed.

Time Limits

- 164. For the incident in August, this was out of time. It was not part of a continuing act.
- 165. We do not find that it would be just and equitable to extend time. The Respondent has been prejudiced from not knowing the identities of alleged witnesses to the event nearer the time, and from not being able to view CCTV footage of the alleged incident (although we accept that the latter would only have been possible had the matter been reported within 30 days).
- 166. The Claimant is not prejudiced by our decision not to extend time, because we have found against her on the merits.
- 167. For the other allegations, our decision is that they were all in time, on the basis that the Claimant alleges that they continued until close to 27 September 2018.

Finally

- 168. There was criticism of the Claimant by the Respondent for having raised the allegations in the first place. In particular, the Respondent found that a disciplinary sanction should be applied.
- 169. For avoidance of doubt, our findings as made above should not be treated as a finding on our part that the Respondent's investigation was adequate or that it could have been a proper basis for a disciplinary sanction.

**Employment Judge Quill**

26 May 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/5/2020.....

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FOR EMPLOYMENT TRIBUNALS