Case Number: 2207611/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS D OLULODE**
MS L JONES

BETWEEN:

Ms S Khan

Claimant

AND

SN Estates Property Services Limited (1)
Mr M Miah (2)

Respondents

ON: **29, 30 and 31 October 2018 and 1 and 2 November 2018**

Appearances:

For the Claimant: **In person on day 1 and by Mr S Khwaja, her partner, thereafter**
For the Respondents: **Mr R Aireton, solicitor**

JUDGMENT

1. By consent the respondents shall pay to the claimant one week's notice pay in the agreed sum of **£374.15**.
2. The unanimous Judgment of the Tribunal is that the claim succeeds on on issues 1, 2, 3, 5, 6, 10 and 14 on race related harassment and on issues 4 and 10 on gender related harassment and proceed to a remedy hearing.
3. The claims on issues 7, 8, 9, 11, 12 and 13 fail and are dismissed.
4. The claim for holiday pay succeeds for the statutory entitlement under the Working Time Regulations 1998. By consent the respondents shall pay to the claimant the sum of **£771.71.**

REASONS

1. This decision was delivered orally on 2 November 2018. The claimant requested written reasons.

2. By a claim form presented on 4 November 2017 the claimant Ms Subeena Khan claims race discrimination put as either harassment or in the alternative direct discrimination, sexual harassment and constructive unfair dismissal.

3. The claimant worked for the first respondent in administration and accounts from 6 March 2017 to 7 August 2017. She does not have the right to claim ordinary unfair dismissal because her period of service was for less than two years.

4. The first respondent is an estate agency managing real estate and property. The office is in Camden, London NW1.

5. The claimant had raised at her second preliminary hearing on 29 August 2018 that she wished to have a screen to separate her from the second respondent. This was afforded to the claimant when she raised it with the tribunal on day 1. From day 2 when the claimant was represented by her partner Mr Khwaja, she no longer required the screen.

The issues

6. The issues were identified at a preliminary hearing before Employment Judge Snelson on 29 January 2018. The issues were further considered and amended at a preliminary hearing before Employment Judge Norris on 29 August 2018. The issues were confirmed with the parties that start of this hearing as follows:

7. There are 14 allegations put primarily as racial harassment and in the alternative is direct discrimination. They are:

    1) April 2017: Paki comments
    2) April 2017: Paki comments about the claimant's fiancé
    3) May 2017: comments about "stingy Paki's"
    4) May 2017: Kamini comments – also relied upon as harassment related to sex
    5) June 2017: threats etc – "when will you Paki's learn"
    6) June 2017: small box of sweets episode
    7) June 2017: aggression over hospital appointment
    8) June 2017: humiliating treatment over future plans
    9) June 2017: comments about the claimant's mother's prescription
    10) 5 August 2017: instruction to sack staff member, "Paki bitch" remark - also relied upon as harassment related to sex
    11) 6 August 2017: "not good enough" comment
    12) August 2017: generally not allowing the claimant to take holiday
    13) August 2017: requiring the claimant to run petty errands
    14) 7 August 2017: constructive dismissal

8. At the preliminary hearing on 29 January 2018 Judge Snelson discussed with the claimant that the alleged constructive dismissal could not of itself

stand as an act of harassment but he accepted that the acts that provoked the resignation certainly could.

9. It appeared that there was an issue as to whether the claimant resigned or was dismissed. On the afternoon of day 1 just before the commencement of the evidence, the respondent accepted that it dismissed the claimant in an email on 7 August 2017 at 15:41 (bundle page 46). This preceded the resignation email six hours later on the same day (page 55). We informed the claimant that she had an admission from the respondent of dismissal.

10. There are claims for notice pay and holiday pay. The notice pay claim is for one week's pay and the holiday pay was originally calculated in the sum of £579.02. Judge Snelson gave leave for the sums to be properly calculated.

11. At the hearing before Judge Norris on 29 August 2018 the second respondent was added as a party to the proceedings. The claimant was given leave to amend to add to allegations 4 and 10 above, as harassment related to sex.

12. On the Order of Judge Norris the hearing was split between liability and remedy to allow the claimant to produce a further witness statement. This hearing was therefore not to deal with remedy (see paragraph 16 of the Case Management Summary of 29 August 2018). The respondents' solicitor raised with the tribunal that remedy matters had been covered in the claimant's witness statement. We said that for the purposes of section 26 it was necessary for us to have some evidence from the claimant of the effect she said the alleged discrimination had on her but that we would not deal with remedy matters at this hearing and the respondents need not cross-examine on matters which went to remedy alone.

13. The claimant told us that she had 270 cross-examination questions for the second respondent which were to be put by her partner Mr Khwaja. We asked the claimant to make sure that cross-examination was confined to the matters upon which we had to make a decision which were those matters set out in the case management orders. It was not necessary for there to be cross-examination on anything else.

The claimant's application to introduce an audio recording

14. There was an agreed transcript of the claimant's audio recording at pages 49-53 of the bundle. The respondents' position was that as the transcript was agreed, it was not necessary for us to hear the recording. The claimant said that without hearing the recording we would not hear the tone of the conversation. We therefore gave the claimant leave to play us an extract from the recording and she could choose that extract. We gave her leave to play three minutes to demonstrate to us the tone.

15. The three minute recording was played to us on day 2 at the start of the second respondent's evidence.

Witnesses and documents

16. The tribunal heard from the claimant and two further witnesses her partner Mr Shakil Khwaja and a former colleague Ms Amina El-Imam El-Alaoui.

17. For the respondents the tribunal heard from five witnesses: (i) the second respondent, (ii) Mr Irfan Mirza a contractor who works for the respondents, (iii) Mr Elod Zsigmond and (iv) Mr Faizal Ahmed who are both senior negotiators and (v) Ms Adamma Jade Nwamma who worked as a trainee property consultant.

18. There was a bundle of documents of about 120 pages. Additional documents were introduced as set out below.

19. We had a written submission from the respondent. Both parties gave oral submissions. All submissions and authorities referred to were fully considered, whether or not expressly referred to below.

Additional witness for the respondent

20. The respondent sought leave to include witness, Ms Adamma Jade Nwamma at short notice. Ms Nwamma worked for the respondent from June to October 2017. Her statement was served on the claimant on Friday afternoon 26 October 2018. Statements had otherwise been exchanged on 10 October 2018.

21. The respondents gave the reason for the delay as the claimant having been given leave to add a claim for harassment related to sex and difficulties encountered by the second respondent in giving instructions. The second respondent travelled overseas from 20 to 28 September 2018.

22. Whilst we considered that the respondents could have served this statement earlier than the afternoon of the last working day before the hearing, we also took account of the brevity of the statement, eleven paragraphs, many paragraphs only 1 sentence in length and that this witness would not be called until later in the week which would give the claimant time to consider and prepare any cross-examination. We gave leave for the respondents to call Ms Nwamma.

Additional documents

23. On day 1 both sides wished to add additional documents. We urged them to seek to reach agreement on those documents during our reading time in the morning of day 1 and to consider the relevance of the documents to the issues we had to determine. They were not able to reach agreement on all but one of the documents.

24. The claimant wished to include the first respondent's Staff Handbook. The respondents agreed to its inclusion.

25. Both sides had documents that they said had only just occurred to them to include. As this was the reason on both sides, we admitted the documents where that explanation was given. We admitted pages 121-125. For the respondents these were documents R1-R4. For the claimant it was an exchange of messages with Ms Nwamma. The claimant wished to include photographs of employees who joined after she left. We did not give leave to admit these as we took the view they did not assist us with any of the issues we had to determine. There were also some further print outs from the first respondent's website and the claimant agreed that she could deal with the matter in cross examination so we did not give leave to admit the pages. There was a document printed from the internet showing that a vaping shop over the road from the first respondent's office was "permanently closed". The respondents' solicitor said that this did not help us with anything as it did not show the date on which the premises closed. As the respondents' view was that it did not help with anything we saw no prejudice to the respondents in agreeing to admit it.

Findings of fact

26. The claimant started work at the first respondent property company on 6 March 2017 working in administration and accounts. She describes herself as from a Pakistani ethnic background (statement paragraph 1). The first respondent is a small business employing about 8 or 9 people.

27. The second respondent is a director and owner of the first respondent. He describes his ethnic origin as from East Pakistan, which became Bangladesh some decades ago. He was born in the UK (statement paragraph 3).

28. The second respondent said in evidence (statement paragraph 11) that the claimant was the only person from a Pakistani origin in the office team. It is not in dispute that Mr Mirzah is also of Pakistani origin (his statement paragraph 3). He is a contractor and not part of the office team. Mr Mirzah agreed that the term "*Paki"* was offensive, although acceptable in some communities. He personally finds it an offensive term and said he does not use it.

29. We find, based on the agreed transcript referred to in more detail below, that the second respondent uses the term "*Paki"*. It is clearly shown in the transcript as a term he used. We find based on his witness evidence that he is fully aware that it is offensive terminology.

30. The claimant found that in addition to her role in administration and accounts she took on other duties such as interviewing, office management, shortlisting candidates and training new staff. The claimant did not feel ready to take on these job roles but she found the second respondent unapproachable and angry.

31. The claimant describes the second respondent as being from a Bangladeshi ethnic background. The claimant played to the tribunal a 3

minute extract from the audio recording of the phone call on 5 August 2017 in which the second respondent was shouting and sounded very angry and aggressive. We accept the claimant's evidence and find that the second respondent was unapproachable and angry. As we heard on the recording and read in the transcript, the second respondent considers that even if he is wrong, he is still right.

Issues 1 and 2

32. The claimant's case is that in April 2017 the second respondent called her into the office and began talking about personal matters. He showed her photographs of his daughter and spoke of his disappointment that his daughter had married a "*Paki guy*".

33. In April 2017 the claimant mentioned to the second respondent that her fiance was meeting her after work. Her case is that 10 minutes before she was about to finish work the second respondent sent her to run a personal errand for him which involved going to Camden Town Market to pick up some vaping liquid. The claimant's case is when she was on her way back to the office she received a phone call from the second respondent saying "*is that the guy you're going to marry, the small little dude. He is an idiot, is he a Paki too?"* The claimant asked him not to talk about her fiance like that and felt offended by the racist term he used. We find that the second respondent used the term "*Paki*" and was offensive about the claimant's fiancé and this was upsetting and offensive to her.

34. The claimant's fiancé is Mr Khwaja who was both a witness and other than on day 1, acted as her representative. Mr Khwaja arrived at the respondents' office towards the end of the day to meet the claimant who had gone to run the errand for vaping liquid for the second respondent. It was closing time at the office and as the claimant was not there, he wanted to know where she was. The second respondent's evidence was that Mr Khwaja was shouting in the office wanting to know where the claimant was.

35. The second respondent made it clear that he did not like the claimant carrying out personal errands during work time and we make further findings on this below in relation to issue 9 below. We find on a balance of probabilities that the second respondent had sent the claimant to pick up the vaping liquid for himself. He had asked her late in the day, so it meant there was no easy explanation for Mr Khwaja as to where she was. We find on a balance of probabilities that Mr Khwaja arrived at approximately closing time. Although there was some conflicting evidence on this, we find that whatever the closing time was in April 2017, Mr Khwaja arrived shortly before closing.

36. Mr Elod Zsigmond is a Senior Negotiator with the first respondent and he was present when Mr Khwaja arrived. Although Mr Zsigmond's witness statement (paragraph 4) said that Mr Khwaja was shouting, in cross examination Mr Zsigmond said that Mr Khwaja was not shouting. Mr Ahmed also confirmed that Mr Khwaja was not shouting. This is consistent

with Mr Khwaja's own evidence. We find that Mr Khwaja did not shout in the office.

37. The claimant's case was that when she sat in her car during her lunch break the second respondent would join her asking her to take him to different places such as to Camden Town Market to get vaping equipment for his personal use. The second respondent denies this saying that the claimant parked her car about half a mile away from the office whereas his car was parked directly outside the office. His case is that he only ever used his own car and any assertion to the contrary was "*absurd*".

38. The second respondent admitted that if the claimant was going to get some vaping equipment for herself then he "*may have*" asked her to pick some up for him as well (his statement paragraph 32). He said that he never insisted. Mr Zsigmond was aware that the claimant went to pick up vaping liquid for the second respondent but did not know whether the second respondent had asked her to do this. Mr Zsigmond did not hear any conversation during which requests to pick up vaping liquid were made. As above, we find that given the second respondent did not approve of personal errands being run in work time, he asked her to run the errand for him of picking up vaping liquid. The claimant had no need to pick up vaping liquid for herself as she used to sell it herself and had a supplier.

39. On issues 1 and 2 we find that the "*Paki*" comments were made.

Issue 3

40. The claimant's case is that the second respondent would often come over to her desk to eat food. It was the practice in the office that everyone would bring in sweets and snacks for others to eat. The claimant's case is that the second respondent said: "*Subeena you are so stingy, I think all Pakistanis are like that*".

41. We find that the second respondent uses the term "*Paki*" and that it is part of his vocabulary. We find on a balance of probabilities that the second respondent said that he said: "*all Pakistanis are like that".*

Issue 4 – "Kamini"

42. The claimant's case is that throughout her employment the second respondent would call her "Kamini" which she told the tribunal meant "bitch" in Urdu and was also used an adjective to describe women as voluptuous. The claimant said that Kamini in Hindi means "dog" and Kamini in Urdu means a girl who is a bitch, two-faced or inhumane. The claimant asked the second respondent to stop using this term as she found it insulting and told him it was bullying and harassment. She says that he responded: "*oh shut up it suits you*". She says he made her the butt of his jokes.

43. The claimant's evidence was that Mr Ahmed called her this as well, because the second respondent had asked him to. The claimant and Mr Ahmed

generally got on well at work. She said that she responded to both the second respondent and Mr Ahmed by saying: "*I don't call you names*" to make it clear to them that she did not appreciate it. Mr Zsigmond heard Mr Ahmed but not the second respondent use the term "Kamini". Mr Zsigmond does not speak Urdu, Hindi or Bengali. He did not know what the term Kamini meant until the day he gave his evidence to the tribunal.

44. The respondents case was that calling the claimant Kamini was not offensive but a reference to a Hindi actress named Kamini Kaushal, popular in the 1940s and 1950s (bundle page 110). The second respondent agreed that one meaning of the word Kamini, in Bengali, was "sly" and in Hindi it meant "dog". He told the tribunal that in Bengali the words for "dog" and "bitch" are the same. He speaks Bengali.

45. The second respondent admitted that the word Kamini had a negative connotation in a language he speaks, as it means sly and could also mean dog or bitch. Mr Mirza is a contractor for the respondents. He does not speak Bengali but knew that Kamini was a "*bad word*" (statement paragraph 4). Mr Ahmed's evidence on the point was inconsistent. In his witness statement he admitted to calling the claimant Kamini (paragraph 7) and said he used the term after the actress Kamini Kaushal and compared the claimant to the actress in terms of personality. In cross-examination he denied using the term Kamini. Mr Zsigmond heard Mr Ahmed use the term towards the claimant. We find that Mr Ahmed used the term towards the claimant.

46. It was put to Mr Ahmed that he did not know of the actress Kamini Kaushal who is now aged about 92 and before his time. He said he was a Bollywood fan and knew of a lot of actresses who were before his time and gave some names. He was asked if he could name a film that Kumini Kaushal had been in. He could not.

47. We find that Mr Ahmed and the second respondent called the claimant Kamini as a derogatory term meaning bitch. The second respondent did not shirk from calling the claimant a "*Paki bitch*" on 5 August 2017 as we read in the transcript. We find that this is what he meant when he called her Kamini. Both Mr Mirza and the second respondent are aware that it is a derogatory term and we find that Mr Ahmed knows this as well because he speaks Bengali. It is a term that was offensive to the claimant and we find on the balance of probabilities that she asked Mr Ahmed to stop calling her Kamini because she did not call him names. We find that the reference to the actress was an attempt to avoid the negative connotations of the name calling and we did not accept that explanation. It was related to the claimant's gender and she was offended by it.

48. This comment was also heard by Ms Amina El-Imam El-Alaoui who carried out some work experience for the respondents and also some part time work. She worked there for about a month and a half in total. She heard the second respondent, but not Mr Ahmed, call the claimant Kamini. The languages she speaks are English and Arabic. She had not heard the word

Kamini before so she asked the claimant what it meant. She said that the claimant told her that it meant "bitch".

49. On issue 4 our finding is that both Mr Ahmed and the second respondent called the claimant Kamini as a derogatory term related to gender.

50. It is not in dispute that at no time did the claimant raise a written grievance. As we find below, her partner sought a grievance meeting on her behalf.

51. The claimant's case is that on several occasions throughout her employment she requested holidays that that the second respondent would not allow but did so for other members of staff who were negotiators. He expected her to cover for the negotiators when they were absent. There was no evidence that she requested holiday. The claimant did not put forward any dates that were requested and refused.

52. The effect of the second respondent's comments began to affect the claimant and she was signed off work from 9 to 16 May 2017 for dizziness, tiredness and a fainting episode (sick note page 83). We noted that the claimant had written "stress" on the sicknote in handwriting but this was not the diagnosis of the doctor. Neither was it due to her hands going numb as also written on the sickness certificate.

Issue 5 - threats

53. In June 2017 the claimant said the second respondent became aggressive about work not being done properly and made threats about her job security. Her case is that he said: "*why aren't you all doing your jobs properly, do you want me to come and chop all your heads off, when will you Paki's learn*". The claimant believed this was directed at her as she was the only Pakistani person in the office. The second respondent denied saying this and said it made no sense to him.

54. As we have found above and below, this is terminology used by the second respondent and consistent with the aggressive style of language he uses. There was some inconsistency as to whether this was said in a phone call or in the office and/or whether it would have been overheard by others. The claimant's evidence at paragraph 11 of her statement was that this happened on "*many occasions*" and therefore we find that on at least 1 occasion, whether on the phone or in person, the second respondent said "*When will you Paki's learn"* and made aggressive comments about the consequences of not getting work done. We find on a balance of probabilities that the second respondent made this threatening comment and it was directed at the claimant being the one Pakistani person in the office.

55. The witnesses (including the respondents' witnesses) all gave us the impression that the second respondent could be volatile. Ms Nwamma described him as someone who would "*rant*", Mr Zsigmond described him as someone who could "*get a bit upset if things go wrong*" and Mr Ahmed

said (statement paragraph 16) that "*Overall Mr Miah treats all of us equally".* We found the use of the word "*overall*" a qualifying statement which suggested to us that there were occasions when he did not. We are supported in this view by our findings on the audio recording and the agreed transcripts (pages 49-53 and 114).

56. We find issue 5 proven, that the second respondent made threatening comments and on at least one occasion this was directed at the claimant and her race.

Issue 6 – box of sweets

57. In June 2017 the claimant brought some Indian sweets for everyone to share in the office because of a celebration in her family. Her case is that the respondent ate the whole lot saying: "*why did you bring such a small box, tell your parents they're stingy, you stingy Paki's*".

58. The second respondent agrees that the claimant brought in the sweets and offered some to him and he congratulated her on her family event. The claimant accepted that she offered sweets to other members of staff before the second respondent arrived in the office, so he could not have eaten all the sweets. We find that he did not eat all the sweets.

59. We have found above that the second respondent uses the terminology "*Pakis*" in an offensive way and we found on issue 3 that he said "*Subeena you are so stingy, I think all Pakistanis are like that*". The comment "*why did you bring such a small box, tell your parents they're stingy, you stingy Paki's*" is consistent with this and we find issue 6 proven on a balance of probabilities.

Issue 7 – regarding hospital appointment

60. In June 2017 the claimant had a hospital appointment and asked for time off so that she could attend. She was asked to show some confirmation of her appointment. The second respondent said it was his practice to ask for confirmation of hospital appointments and we accept this evidence and find that this was the practice. As this was a highly personal matter she did not wish to disclose the medical reason but was happy to show her appointment date. Her case is that the second respondent snatched the letter from her and read what was written and she says she was left in tears by his aggressive prying into this private information.

61. The second respondent denied snatching the letter but admitted that he took the letter from the claimant. In cross-examination he admitted that he was busy doing different things in the open plan office, he wanted to see the letter and said that in amongst doing a number of things he "*grabbed it*" and the claimant "*received it back*". He said that he did not understand medical terms and did not know what the appointment was for. We find that grabbing is more or less the same as snatching and we find that the second respondent did snatch the letter from the claimant.

62. We do not condone the second respondent's actions in grabbing the letter. This could have been handled more respectfully. Nevertheless, we find that this was not related to or because of the claimant's race. We find that he would have behaved the same way in the same circumstances with another employee of a different race, seeking time off for a hospital appointment.

Issue 8 – treatment over future plans

63. Also in June 2017 the claimant's case is that the second respondent began discussing with a colleague a different job role for herself and the discussion was carried out in Bengali so that she could not understand what was being said. The respondents' case is that the claimant was not good at her job and this was discussed with her. She was offered a new role as a negotiator and office manager with a new contract.

64. The second respondent was not happy with the claimant's performance in her role and they had a discussion in the open plan office together with Mr Ahmed about whether the claimant could do a negotiator's role. The claimant was interested in the role provided that she was not paid less than her existing administrator's role.

65. There was a dispute over whether the second respondent gave the claimant a new contract of employment for the proposed new role. The second respondent's evidence was that he gave the claimant a new contract, but she did not return it to him. He said he did not keep a copy. The tribunal asked the second respondent how contracts were handled in the company. The respondents use an HR service which handles the contracts.

66. We find that the second respondent did not give the claimant a new contract. We find it implausible that in handing over a new contract, no copy was kept. This is particularly so when the respondents use an HR service for this purpose and no copy contract was disclosed as produced by the HR service. We find that no contract was given to the claimant and the reason for this was because the terms as to pay had not been finalised and agreed.

67. It was suggested by the respondents that the claimant had received some commission in connection with the negotiator role and in support of this relied upon a document at page 111. This showed two payments to the claimant one on 4 August 2017 in the sum of £70 marked EXP and the second on 3 August 2017 in the sum of £160 marked WAGE. We accept the claimant's evidence and find that these payments were for expenses and underpaid wages respectively because the letters against the payments support this. We find that these were not payments of commission as no binding contract was entered into for the claimant to perform a negotiator's role. Terms had not been agreed as to pay.

68. On 2 August 2017 the claimant emailed the second respondent stating that her July pay appeared lower than usual and she asked for an opportunity to discuss why deductions were made (page 47). The second respondent

replied that she was not able to do the job they hired her to do, everything was a mess and not a single thing had been organised within 3 to 4 months, she simply could not do it. He said that they had discussed her going forward as a negotiator and it was commission based. He replied discourteously saying: "*we will talk tomorrow but if you don't have the patience to wait then nothing I can do,".*

69. The claimant's own evidence (statement paragraph 14) was that she did not understand what was being said about her because it was in Bengali, a language she does not speak. We find that she could not find the discussion humiliating because she did not understand what was being said.

70. We find that the second respondent and Mr Ahmed had a conversation in the office in Bengali and the claimant jumped to the conclusion that it was a humiliating discussion about herself. We cannot reach that finding and we can find no more than that the second respondent and Mr Ahmed had a discussion in the office in their common language. This was not because of the claimant's race or related to her race.

Issue 9 – mother's prescription

71. In July 2017 the claimant's mother was unwell and asked the claimant to pick up some medication for her and for this reason the claimant ran late for work. The claimant's case is that she called the second respondent to inform him and his response was "*am I paying for your mum's prescriptions, hurry up and get to work*".

72. The second respondent said that she called him at about 9am saying that she was running a personal errand before work and would arrive late which the second respondent considered unacceptable. The second respondent's case is that personal errands should be performed outside business hours and he would have treated any other employee running personal errands in work time in the same way. The second respondent accepted that the claimant mentioned a prescription and he said he told her that she could pick this up from the chemist opposite the office if it was urgent.

73. The claimant's start time was 9am. She accepted that she normally arrived in the office between 9am and 9:20. The second respondent usually arrived late morning.

74. We find that the second respondent said "*am I paying for your mum's prescriptions, hurry up and get to work*" because the claimant was running a personal errand in work time. As an employer he did not sanction this. We find that this was not related to or because of the claimant's race. We find that he would have behaved the same way in the same circumstances with another employee of a different race, running late for work because he or she wanted to pick up a prescription for a relative.

Issue 10 – the phone conversation of 5 August 2017

75. On 5 August 2017 the claimant's case is that the second respondent complained about not receiving bank account information for a colleague Ronita, who joined the first respondent's employment on 26 June 2017 as an office administrator. The claimant said she sent the details and the second respondent said he did not receive them. This meant that Ronita's wages were not paid on time. He laid the blame for this squarely at the claimant's door.

76. Later in the day on 5 August 2017 the claimant received a very angry phone call from the second respondent who told her to go out of the building and phone him so that no one in the office could hear the conversation. He was angry about the wages situation for Ronita and began shouting down the phone to her. The claimant was standing in the rain during the call.

77. The second respondent initially instructed the claimant to "sack" Ronita and this was moderated to asking the claimant to ask Ronita if she "*wanted the job or not".* He became abusive towards the claimant calling her a "*F***ing Paki bitch*". He said: "*you can't even do your jobs properly you retards from all corners of the world*".

78. We saw the agreed transcript of the recorded telephone conversation on 5 August 2017. In that transcript (bundle page 52) we saw that the second respondent called the claimant "*you f***ing Paki bitch".* We find that he said this*.* The claimant immediately said: "*don't call me a bitch*". He also said "*you are f***ing with me bitch".* She said he should call her when he had calmed down.

79. We heard 3 minutes of audio from the 12 minute call. We found the second respondent to be loud, angry, aggressive, unpleasant, offensive and intimidating in tone. The claimant on the other hand was calm. The second respondent's evidence was that he was upset over family matters and has never used such words before. Even if he was upset by family matters, this is not an excuse for verbal abuse related to race or gender.

80. It is suggested on the respondents' side that there was a particular relationship between the claimant and second respondent. It was put to her that that she fancied him and wanted to build a relationship outside work. The claimant often called him after office hours but we find that this was always on work related matters.

81. The respondents relied upon text in the transcript (page 50) where the claimant said: "*me and you, our ermm relationship/friendship or whatever it is or our relationship within the work environment….".* We find that the claimant said this in response to the preceding comment from the second respondent where he referred to "*you people get close and friendly with me and become cocky on business related or ermm work related matters".* We find that the claimant and the second respondent were not personal friends and that the claimant's comment was in response to his. The claimant was clear that she was talking about their relationship in the work environment.

82. The second respondent said that the claimant contacted him to discuss her wedding arrangements, the music and what she should wear. The claimant denied this and said that she had plenty of friends and family with whom to discuss her wedding. We find on a balance of probabilities that the claimant did not discuss her wedding arrangements with the second respondent. He was her employer and someone who had been racially offensive towards her. We accepted her evidence that she has plenty of friends and family with whom to discuss her wedding.

83. The second respondent's evidence was that the claimant harassed him and that on one occasion she rang him at 12 midnight when he was in bed with his wife. He said "*I honestly think the claimant may have liked me in the wrong way. I don't know what it was, whether it was the money that she was attracted to, but she wouldn't stop calling me. I felt harassed day and night."* He said it got so bad he had to block her on WhatsApp. There was some confusion as to whether he had blocked her or not.

84. There was no evidence from the second respondent to support the contention that the claimant was calling and WhatsApp-ing at all hours or that he had blocked her. If there were messages from the claimant showing a particularly close relationship or friendship or a high number of calls, for example at midnight, these were disclosable. We did not have such messages or call records and this supports our finding.

85. The claimant reported to the police at Wembley Police Station the offensive call she had received from the second respondent on 5 August. Her police witness statement was at page 64 given to the police on 10 August 2017.

86. The second respondent was convicted of one offence of malicious communication under section 127(1) of the Communications Act 2003. He was fined £350 and ordered to pay compensation of £100 to the claimant. The Highbury Corner Magistrates Court found the offence racially aggravated (bundle page 68(a) email from Holborn Police Station Witness Care Unit dated 4 April 2018). The second respondent admits to pleading guilty at the Magistrates Court (statement paragraph 37).

87. The second respondent agreed the content of the transcript. It is therefore not in dispute that he called the claimant a *"f***ing Paki bitch"* and that he said *"you are f***ing with me bitch".*

88. The second respondent's case in the ET3 was that this argument did not take place because of the claimant's race but because of a "*difference of opinion*" concerning Ronita (bundle page 28 paragraph 17).

89. In witness evidence, (statement paragraph 26) the second respondent, in admitting the language he used in the telephone conversation, said he was completely furious and in his statement he apologised for the language he used. We find that there was no apology at the time and the apology has been given in witness evidence for the purposes of these proceedings. He now admits he lost his temper and agrees that it was not acceptable.

90. On 6 August 2017 at about 9pm the claimant emailed the second respondent saying that she would not be able to come to work the following day because she was stressed and suffering from really bad migraines (page 54). We find that this was directly linked to the phone call on 5 August. The claimant made the decision to prepare her resignation letter and seek some clarity on her situation. At page 84 of the bundle we saw a medical certificate for the claimant signing her as unfit from 7 to 20 August 2017 for a "stress-related problem". We find that the stress of dealing with the second respondent's abusive rant on 5 August 2017 made her unwell.

91. The claimant did not attend work on 7 August 2017. She said that the harassment continued throughout the morning as she received a number of phone calls and voicemails from the second respondent. One of these was a voicemail message from the second respondent at 10:28 hours in which the second respondent complained about the claimant not coming to work, accusing her of being unprofessional and creating a lot of havoc and the fact that she did not "c*are to share"* the information that her colleague Ms Nwamma was also off sick. We saw transcript of that message at page 114, it was also agreed by the second respondent. This was not acceptable towards an employee who was off sick and we agree that it was of a harassing nature.

92. The claimant asked her partner Mr Khwaja to speak to the second respondent on her behalf because she was feeling unwell. Mr Khwaja asked for a formal grievance meeting to discuss the second respondent's behaviour towards the claimant. The second respondent refused this saying that he did not wish to discuss anything and told the claimant to stay clear of the office. He said he did not require her to work a weeks notice. The second respondent was rude, abusive and angry towards Mr Khwaja. The claimant heard this as she was with Mr Khwaja and the call was on speaker phone.

93. On 7 August at 15:41 hours the first respondent dismissed the claimant by email. This is admitted. Later that day at 21:40 hours the claimant resigned by email to the second respondent (page 55). As she had already been dismissed, her employment was terminated by the dismissal and not by her resignation. On issue 14 we therefore find that there was an actual and not a constructive dismissal. On day 2 of the hearing the second respondent also admitted liability for one week's notice pay.

Issue 14 - dismissal

94. The dismissal email of 7 August 2017 at 15:41 said as follows:

> *Dear Subeena*
> *As discussed we agreed the salary of 17K basic and 10% commission on your new negotiator position effective first July, sadly after the call I received today on your behalf we have no choice but to issue you with one week's notice from today, I kindly ask for the return of all company devices and papers.*

95. The reason given for dismissal was not the claimant's performance, it was

very squarely put as the phone call on her behalf. We find that the respondents were not just about to dismiss the claimant for poor performance because they wished to offer her a new role as a negotiator. The reason for dismissal is very clearly given in the 7 August 2017 email at 15:41 hours as the phone call received on her behalf. This was the phone call from Mr Khwaja asking for a formal grievance meeting because of the second respondent's unacceptable behaviour. We find that the second respondent was angry that the claimant had dared to complain about his race and sex-related harassment and because of this, he dismissed her.

96. In the phone call of 5 August 2017, Mr Khwaja complained about the second respondent's behaviour. It was the complaint about the second respondent's harassing behaviour that caused the dismissal. It made the second respondent extremely angry saying to Mr Khwaja "*you c***, I'll come and break your face*". We find that in his anger at a complaint being made about his harassing behaviour, he committed a further act of harassment by dismissing the claimant. We find that it was because of the claimant's race and gender, about which he had ranted in the 5 August 2017 call.

Issue 11 – "not good enough" comment

97. The claimant's case is that on 6 August 2017 the claimant was told that she was "*not good enough*". The claimant gave no evidence as to this. We therefore find that even if it was said, we have no evidence to support a finding that it was said in a manner that was related to her race or that it was said because of her race.

Issue 12 - holidays

98. The claimant's evidence (statement paragraph 9) was that she would request holidays but that the second respondent would not approve them, yet approved holiday for other members of staff. The claimant was not challenged on this evidence. The claimant gave no evidence as to what holiday dates had been requested and refused. The second respondent's evidence was that no requests for holiday were made.

99. It was her unchallenged evidence that she took no holiday during her 5 month period of employment, other than taking the statutory Bank Holidays of which we find there were four: two at Easter and two in May 2017.

100. Due to the absence of evidence as to holiday requests, the burden of proof did not pass to the respondents and we find that issue 12 is not proven as to direct race discrimination or harassment related to race. We make further findings below as to entitlement to holiday pay under the Working Time Regulations.

Issue 13 - errands

101. Based on our findings above we find that the second respondent sent the claimant on errands, but this was not because of or related to her race.

Findings in relation to the reliability of witness evidence

102. It was put to the claimant that because the second respondent's daughter was married to a Pakistani man it was unlikely that he would be against those of Pakistani heritage. We do not accept that proposition. We saw from the documents that there were marital problems between the second respondent's daughter and her husband and that there were criminal proceedings against the husband. The second respondent relied on this as one of the reasons why he was *"wound up"* and spoke to the claimant in the way that he did. The daughter had been a victim of domestic violence from her partner (document R1). We find that the second respondent's daughter's marriage to a Pakistani man does not support the case that he has a favourable view of those from Pakistan. It is the opposite.

103. The claimant admitted that she sent messages to the second respondent after normal working hours. She said that the latest was probably at about 9pm to 10pm. She said that if contractors were asking her questions, she had to get the information from the second respondent. She did not know the answers herself. As we have found above, no phone records or copy messages were produced by the respondents to show the times and frequency of the contact from the claimant.

104. It was also put to the claimant that she harassed the second respondent because she fancied him. The second respondent said in his witness statement that he did not know whether it was the money that she was attracted to (statement paragraph 7). This did not sit well with the fact that in the criminal proceedings he was ordered to pay her £100 and requested that this be done by instalments.

105. We take into account in our findings the fact that the second respondent was convicted of a racially aggravated offence against the claimant in relation to the conversation that took place on 5 August 2017 (in these proceedings issue 10).

106. We also reject the submission that if words were said they would have been overheard by others and thus were not said. We reject this for the following reasons. Just because the office is open plan does not mean that everyone is continually listening in to others' conversations. The second respondent had his own office. Each person in the office had a job to do and would have been doing their job which means that the focus of their attention could not be on everyone else's conversations.

107. Mr Ahmed and Mr Zsigmond remain in the first respondent's employment and this is their means of income. It is difficult for them to contradict the second respondent whom we have heard can behave in a very angry, intimidating and offensive manner sufficient to lead to a criminal conviction. He regards himself as right even when he is wrong. Mr Mirzah agreed that he has been a friend of the second respondent for over 20 years which gives him a sense of loyalty to the second respondent. He is a contractor who also

earns an income from the respondents and he was not present in the office a great deal. Ms El Alaoui who is no longer in the first respondent's employment and had no need to be loyal to them agrees that she heard the Kamini comment.

Time limitation

108. The claimant gave no evidence as to why she did not present her claim earlier than 4 November 2017. In submissions the claimant relied upon a continuing act.

Holiday pay

109. Our finding above is that the claimant took no holiday during her 5 month period of employment, other than taking the statutory Bank Holidays of which we find there were four: two at Easter and two in May 2017. Under the Working Time Regulations she is entitled to be paid on termination for her untaken annual leave.

The law

110. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides 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.

111. Very little direct discrimination today is overt or even deliberate. The guidance from the case law tells tribunals to look for indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias – ***Anya v University of Oxford 2001 IRLR 377 CA.***

112. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

113. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

(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.

(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.

114. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

115. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

116. In ***Grant v HM Land Registry 2011 IRLR 748*** the Court of Appeal said that when assessing the effect of a remark, the context in which it is given is highly material.

117. In ***Bakkali v Greater Manchester Buses (South) Ltd EAT/0176/17*** the EAT (Slade J) said that where the same facts were relied upon for a claim of direct discrimination on grounds of race and a claim of harassment for conduct related to the same protected characteristic, an Employment Tribunal does not err in determining the harassment claim if they rely on their findings of fact on the direct discrimination claim provided they apply the correct "related to" test required by section 26 Equality Act 2010.

118. Section 136 provides that 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.

119. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

120. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

121. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285***

said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

122. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

123. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

124. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

125. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** recently confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

126. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..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.*

127. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that

discretion in favour of the claimant.

128. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

129. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

130. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

> *It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had cooperated with any requests for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

131. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

132. Under Regulation 13A of the Working Time Regulations 1998 a worker is entitled to a maximum of 28 days annual leave in each leave year. Under Regulation 13(9) it may not be paid in lieu except on termination of employment. Regulation 14 sets out the basis of calculation when employment is terminated during the course of the leave year.

Conclusions

133. The respondent admits dismissing the claimant on 7 August 2017 and admitted liability for one week's notice pay which is awarded in the agreed sum of £374.15.

134. The agreed transcript of the phone conversation on 5 August 2017 together

with the recording was more than enough for us to find that the burden of proof passed to the respondent. Not only have we made our own findings on that phone call, it was also the subject of a conviction of the second respondent for a racially aggravated criminal offence.

Issues that fail on the facts

135. As we have found above, the following issues fail on their facts: Issues 7, 8, 9, 11, 12 and 13.

136. The claimant succeeds on the facts on issues 1-6 inclusive, 10 and 14. They each succeed on harassment and not direct discrimination. Issue 4 succeeds on harassment related to sex alone, with the Kamini comment. We have found that it was an offensive term related to gender as it meant "bitch" and we find that it falls within the definition of harassment in section 26 Equality Act and it was reasonable for it to have that harassing effect on the claimant.

137. We have found on issues 1, 2, 3, 5, 6 and 10 that they all involved comments about "*Pakis"* or made derogatory and offensive comments about those of Pakistani heritage. We have also found that the dismissal was an act of harassment directly related to the complaint about the second respondent's harassing conduct in using the offensive terms and it was an act of racial harassment in itself.

138. We find that the derogatory reference to "*Paki's"* is harassment related to race and that the second respondent knew this when he made the comments. It met the definition of harassment in section 26 and it was reasonable for it to have that harassing effect on the claimant. We find the same for reasons related to gender, on issues 4 and 10, in calling the claimant a "*bitch*". Her reaction as shown in the transcript, when she immediately told the second respondent not to call her a bitch, supports this.

139. The claim therefore succeeds on race related harassment on issues 1, 2, 3, 5, 6 and 10 and on harassment related to gender on issues 4 and 10.

Time limits

140. The claimant is a litigant in person. She was assisted most capably by her partner Mr Khwaja but he has no legal training.

141. The claimant relied upon the acts relied upon forming a continuing act of discrimination.

142. The respondent accepts that issues 10 to 14 are within time and submits that issues 1 to 9 are out of time. The dates of Early Conciliation are from 18 August 2017 to 18 September 2017. This means that issues taking place in June 2017 which at their latest would end on 30 June 2017 are prima facie out of time.

143. We have therefore considered whether any of the matters relied upon form a continuing act of discrimination. We have considered under ***Hendricks*** whether there was an ongoing situation or continuing state of affairs in which the claimant was treated less favourably and/or harassed.

144. The consistent thread through the entirety of these matters is the second respondent who is the director and owner of the first respondent. He held discriminatory views about Pakistanis which he expressed most forcefully to the claimant. He was also disparaging about women as we found with the Kamini and bitch comments on issues 4 and 10.

145. The acts of harassment upon which we have found in the claimant's favour, all took place in a relatively short period of time and throughout her employment. They are consistent in theme on the part of the second respondent. We find that there was a continuing act of harassment which brings the issues upon which we have found in the claimant's favour within time.

Holiday pay

146. As a matter of law under the Working Time Regulations the claimant is entitled to be paid on termination for her untaken annual leave. We found she took no holiday during her 5 month period of employment, other than taking the statutory Bank Holidays of which we find there were four: two at Easter and two in May 2017.

147. So far as calculating the amount of holiday pay is concerned, our finding above is that there was no binding contract for the claimant to work in a negotiator's role so her pay remained at £24,000 per annum. As it is pay, it is awarded gross.

148. There was a calculation in the claimant's schedule of loss and we asked the respondent if, in the light of our findings, that figure was agreed and we checked with the claimant that it was the figure sought. The sum sought was **£771.31** (bundle page 105) and was agreed by the respondents.

_____

Employment Judge Elliott
Date: 2 November 2018

Judgment sent to the parties and entered in the Register on: 12 Nov. 18.
_____ for the Tribunals