



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110541/19**

**Held on 7, 8 and 18 June and 3 August 2021**

**(By Video Conference, CVP)**

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**Employment Judge: R Gall**

**Tribunal Members: Ms K Ramsay**

**Mr R Henderson**

**Ms L Milroy**

**Claimant  
Represented by  
Ms S Mechan –  
Solicitor**

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**Damall Ltd**

**First Respondent  
Now dissolved**

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**Mr R Best**

**Represented by  
Mr S Connolly –  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The Unanimous Judgment of the Tribunal is that the claims of discrimination brought in terms of Sections 18, 26 and 27 of The Equality Act 2010 are unsuccessful.

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**REASONS**

1. This Case was heard on 7 and 8 June 2021. The case did not conclude that day. A further diet was arranged for 18 June and the evidence in the case concluded that day. It was agreed that written submissions would be sent in  
5 by each of the parties, with each party having the opportunity to comment on the submissions of the other. Submissions were received. A members' meeting took place on 3 August. The decision set out in this Judgment was reached at that point.
  
- 10 2. At the hearing, Ms Mechan represented the claimant. Mr Connolly represented the second respondent. The first respondents were a limited company. They are no longer in existence, having been dissolved.
  
3. The Employment Tribunal heard evidence from
  - a. The claimant, Ms Milroy
  
  - 15 b. Debbie Kennedy, former work colleague of the claimant and
  
  - c. Robin Best, the second respondent, referred to in this judgment as the respondent, given the demise of the first respondent, Damall Limited.
  
4. The following parties are mentioned at the moment for identification purposes.
  - 20 a. Christine Davidson, cleaner with first respondents
  
  - b. Ms Grant, started working for the Damall Limited as maternity cover for the claimant when the claimant commenced her maternity leave.
  
5. A file of documents or bundle was produced for use by the Employment Tribunal. On the morning of the first day Ms Mechan sought to have 2  
25 additional files before the Tribunal for the hearing. Mr Connolly did not object and the Tribunal therefore permitted that those files to be spoken to in evidence. Where a document referred to is one in the main file or bundle, the page number alone is given in this Judgment. If a document is one which

appeared in the claimant's supplementary file or bundle, the page number is preceded by the letter "C".

6. The case is one in which many facts were not in dispute. The claimant had worked for the respondents and had been on maternity leave for a period from 15 February 2019. She alleged that there had been discriminatory actings by Mr Best. Her position was that she was treated unfavourably because she was on maternity leave. She brought a complaint of harassment. She also brought a claim of victimisation. The respondent said that there was no unfavourable treatment in some instances. Either an event did not occur, or the claimant had been treated in the same way as Ms Kennedy and the employee, Ms Davidson. He also said that where there had been any unfavourable treatment in the view of the Employment Tribunal, this was for reasons other than the claimant being on maternity leave. It was submitted that there was no direct discrimination, no harassment related to a protected characteristic, no protected act founding a Section 27 claim under the Equality Act 2010 ("the 2010 Act") and no detriment because of any protected act established.
7. It was confirmed at the outset of the hearing that there were 4 allegations of discriminatory treatment made by the claimant. Those were specifically confirmed as constituting her case at the outset of the hearing. They were:-
- a. That the respondent had informed her that there were no wages when she visited the bar operated by Damall Limited on 20 February 2019. This was a claim made in terms of Sections 18 and 26 of the 2010 Act.
  - b. That the day of the week on which she was due to be paid had been moved from Wednesday of each week to Friday of each week. This was also a claim made in terms of Sections 18 and 26 of the 2010 Act.
  - c. That she had been paid late on various occasions. She referred, in support of her position, to the timing of payments to her colleague Ms Kennedy who was not on maternity leave. This was also a claim made in terms of Sections 18 and 26 of the 2010 Act.

5 d. That she had been banned from entering the work premises as a result of raising the late payment issue with the respondent by saying that she was singled out and would be going back to ACAS to complain about being paid later than colleagues. She had also complained about the respondent not communicating with her. Raising of those matters was, she said, a protected act in terms of the 2010 Act. This claim was advanced in terms of Sections 18, 26 and 27 of the 2010 Act

10 8. The following were found to be the relevant and essential facts as admitted or proved.

### **Facts**

#### *Background*

15 9. The claimant worked 16 hours per week as a barmaid in the Crown Bar in Paisley. She had worked there, with some breaks, over a 6 year period. There had been various entities which had traded from the bar. They had leased the bar and operated it. Damall Limited, the first respondents in this case, took over the lease and operation of the bar around October 2016.

10. The respondent, Mr Best, was the only shareholder and director of Damall Limited. He also had an interest in licensed premises in Hamilton.

20 11. The premises from which the Crown Bar operated were owned by Rosemount Inns Limited. In the period prior to October 2016, that company approached the respondent about his company, Damall Limited, taking the Crown bar over as tenants and operating it for a period of 6 months. Rosemount believed they could find a longer term tenant within that time. They proposed a financial arrangement which involved there being no rental payments for the  
25 6 month period. Rosemount Taverns Limited were keen to ensure that the public house remained open. They were of the view that if it closed and customers moved elsewhere it would be a struggle to regain that custom.

*Trading and Staff arrangements*

12. The respondent, through Damall Limited, took on the lease of the Crown Bar for the 6 month period around October 2016. At the end of that time, however, no potential new tenant had been found. In those circumstances, Damall Limited continued as tenants and remained tenants until October 2019. Rental payments however commenced after the initial 6 month period.
13. In 2019 the claimant and Ms Kennedy each worked 16 hours in the week. Ms Kennedy would generally work on Saturday and Sunday evenings and also Monday mornings. The claimant worked Wednesday, Thursday and Friday nights one week, working Wednesday, Saturday and Sunday the following week. The claimant and Ms Kennedy would hand over one to the other generally. They only infrequently worked together. This was as the bar could be staffed by one person as it was not often busy. The respondent worked behind the bar in the day time on Monday, Tuesday, Wednesday and Thursdays, ceasing at 5pm. He also worked there on Friday mornings. He took no wage for his work in the Crown Bar. On Fridays he would travel to the premises in Hamilton in which he had an interest and would work there.
14. The Crown Bar was not a busy bar. It had a core of regulars, however the clientele was older and decreasing through the reality of occasional deaths. Events were run to try to boost trade. On Sundays there was a bingo session. That attracted some regular female customers. On Tuesday nights, particularly in the winter, there would often be meetings of a dominos league which involved players from other areas coming to the Crown Bar to play in a dominos competition. Sometimes however the team who played at the Crown Bar would travel elsewhere for such a competition, meaning there were few customers that Tuesday. Sunday evenings were Karaoke nights, again with a view to boosting turnover.
15. There were three bar staff employees. Those were the claimant, Ms Kennedy and Ms Davidson. When the claimant was about to go on maternity leave the respondent engaged Ms Grant as a member of the bar staff. She was recruited on the basis that her role was temporary during maternity leave of

the claimant. Her wage was an extra cost, although the business could ultimately obtain repayment from the government of SMP paid to the claimant. Mr Best managed to secure the services of Ms Grant readily and exhibited no issue or resentment in relation to taking on a temporary replacement for the claimant.

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16. The income of the Crown Bar increased when Damall Limited initially started operating it. It was, however, adversely affected when a nearby pub, the Copper Coin, reopened after being refurbished. That was around February 2018. A further nearby pub, Buddies Bar, also improved its offering to customers by putting on some events. The competition from the Copper Coin and Buddies impacted negatively on the income for the pub run by Damall Limited and the respondent. Takings in the Crown Bar which had been around £3,000, sometimes as much as £3,500, each week fell away. The figure mentioned is inclusive of VAT. From that sum rent had to be paid, as well as staff costs, stock purchases, and other services for the premises.

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17. By the end of 2018, weekly takings in the Crown Bar were down to around £2,000 each week. On some weeks takings were around £1,600 or £1,800. Overheads had remained.

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18. At the end of 2018 and into 2019, the respondent started working full time in the business. He took no payment. His hours of work were around 54/56 per week. Damall Limited had no cash reserves.

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19. There was a robbery in April 2019 as detailed below. In the period after that the respondent sought to surrender the lease to the premises as no money was being made from trading. Rosemount Inns Limited said that rent would remain payable even if trading ceased. Given that, the respondent decided to continue trading. An incoming tenant was ultimately found. There was a TUPE transfer. The claimant's employment with Damall Limited ended on 10 October 2019 when the incoming tenant assumed responsibility for the business. The respondent no longer had anything to do with the Crown Bar thereafter.

20. Around late January 2019 the respondent heard a rumour that the claimant was pregnant. The claimant informed the respondent of her pregnancy shortly after that. She stopped work commencing maternity leave on 15 February 2019. Her intention was that her maternity leave lasted 9 months, with her return to occur in November 2019. The claimant had 2 children and was at this point pregnant with her third child. She is a single parent.
21. During their time working together the claimant and the respondent had always got along well. The claimant had left employment with Damall Limited to take up alternative employment. After a period, she asked Mr Best if she could return to work in the Crown Bar. Mr Best agreed and she resumed as an employee of Damall Limited.
22. There was no issue between the claimant and respondent when the claimant informed the respondent of her pregnancy. Due to the timing of the information on her pregnancy being given to the respondent, he was unable to complete the submission of information to the relevant body in time to obtain payment to Damall Limited in advance of statutory maternity pay ("SMP") being payable to the claimant. He was aware however that he would be able to recover SMP paid to the claimant.
23. Mr Best was aware of the claimant's pregnancy by the time the payment of wages for the week ending 13 February became due. Damall Limited had insufficient funds to enable payment of that wage to be paid to the claimant. Mr Best paid this wage himself. The transfer from his account to that of the claimant is confirmed by the entry in the claimant's bank account for that day showing him as the source of payment. That entry appears in the bank statement of the claimant at page 70 of the file.
24. Payment of staff by Damall Limited and their predecessors was made to staff in cash. This ceased, except for a few occasions, in May 2017. Payment was then made by bank transfer. To make payment Mr Best went onto online banking and transferred money to the recipient. He did this for employees one at a time, the employees paid by bank transfer being the claimant and Ms Kennedy.

25. The claimant and Ms Kennedy both bank with the same bank, Santander. Damall Limited banked with Bank of Scotland. Records of payments from Damall Limited to both the claimant and Ms Kennedy were part of the joint file. Those for the claimant covered the period 20 February 2019 to 7 October 2019. They were at pages 48 to 52 of the file. Those for Ms Kennedy covered the same period and were at pages 53 to 56 of the file.
26. The claimant's own bank statements for the period 18 January 2019 to 17 October 2019 were at pages 68 to 98 of the file.
27. The entries in all those bank statements were accepted by the parties in evidence as being accurate or, at the very least, not something they were able to dispute.

*Financial position of Damall Limited.*

28. In 2019 the financial position of Damall Limited was not a healthy one. Mr Best in operating the Crown Bar through Damall Limited was paying bills and staff as and when he could. He was "robbing Peter to pay Paul". There were insufficient funds to meet all liabilities as those arose.

*Robbery*

29. On the overnight of Sunday 14/Monday 15 April 2019 there was a robbery within the Crown Bar. The takings from the week were stolen. The float of cash kept was also stolen. Between £2,400 and £2,500 was stolen.
30. At this time the respondent was already trying to end the lease of the Crown Bar in which Damall Limited was tenant. This was due to there being no financial return from trading. Trading only continued due to rent being payable even if trading was to cease.
31. In relation to the robbery, the insurance company explained that if a claim was made an excess of £800 applied. The money which had been held in the pub, and which was stolen in the robbery, included VAT which was payable by Damall Limited. If VAT was excluded from the claim, there would have been around £500/600 recovered through insurance.



32. Damall Limited was unable to pay any bills, including staff wages, for that week when the robbery occurred. At this time and for a time thereafter, beer was ordered one or two kegs at a time, due to Damall Limited being unable to pay the supplier for larger quantities which would normally have been delivered to the bar. Whisky and vodka being sold in the bar were purchased by staff from local supermarkets as required. That continued to be the position for some weeks.

33. Staff wages were paid to both the claimant and Ms Kennedy on 23 April, although due 19 April. They were therefore paid late. Payment for the week which was due on 19 April 2019 was made, however it was late.

34. The respondent sent a text to the claimant to explain the position. He spoke to Ms Kennedy in similar terms to the text, conveying the same message to her. The text appeared at C3. It read:-

*"Due to the robbery on Monday morning all the money held on the premises was stolen.*

*The result is that I cannot pay the wages this week.*

*However I expect that the weekends (sic) sales will cover this cost by Monday next week.*

*It will take several weeks to get back on track so you must expect this situation to continue for some time.*

*FYI The people who stole from us had keys!!!*

*RB"*

### **Allegations**

*Allegation one, 20 February 2019.*

35. By 20 February 2019 staff were being paid their wages by means of bank transfer. The claimant was at this point not working in the Crown Bar, having just started maternity leave. At this point the staff in the Crown Bar were due to be paid on Wednesdays of each week. 20 February 2019 was a Wednesday.

36. The claimant noticed that she had not received payment of SMP into her bank account in the morning of 20 February. From time to time the staff were paid in cash, even after the standard arrangement for payment became via bank transfer. She attended the Crown Bar intending to speak with Mr Best to see when she was to be paid. She arrived at the Crown Bar. This was around 11am or 11.30am. Ms Kennedy was in the bar. Mr Best was also there. The claimant asked Mr Best about her wages. Mr Best said that there were no wages. It is unclear whether he meant that he did not have cash in the bar or whether he meant that payment was not to be made. The claimant was very worried by the comment that there were no wages. She said to Mr Best that she had direct debits due to be paid from her bank account. He suggested that she contact the bank to rearrange the date of payment of those direct debits.
37. Mr Best completed transfer of wages to both the claimant and Ms Kennedy later on 20 February. Payment to the claimant was made at 14.18 (page 48 of the bundle). Payment to Ms Kennedy was made slightly later, at 14.51 (page 53).
38. The conduct involved, namely payment later in the day of 20 February and also the comment by Mr Best as to there being no wages, were not because of the claimant being on maternity leave. They did not comprise conduct related to a protected characteristic as detailed in Section 26 of the 2010 Act.

*Allegation 2, change of payment date.*

39. As mentioned above, the standard date of payment for staff was Wednesday of each week.
40. By text dated 3 April 2019, a Wednesday, Mr Best sent a text to the claimant. He spoke to Ms Kennedy and Ms Davidson, saying the same to them as he wrote in the text to the claimant. A copy of the text appeared at C2. The text said:-

*“Due to insufficient funds the wages will be paid on Friday.*

*Friday will now become the normal payday.*

*All staff members whether working or not are being treated the same. If anyone wants to discuss this with me or the Citizens advice please contact the appropriate person.*

*Damall Limited.”*

5 41. That day the claimant replied:-

“Ok will do”

42. The claimant spoke to Citizens’ Advice about the information in the text. She did not intimate objection to the change to the respondent or Damall Limited. She did not speak to the respondent or write to Damall Limited or the  
10 respondent in relation to the change. Ms Kennedy did not object to the change or speak to Damall Limited or the respondent about the change. No grievance was presented by any employee in relation to this change. It was accepted by them by their conduct.

43. The due payment date for wages became Friday of the week for the claimant,  
15 Ms Davidson and Ms Kennedy following the issuing of the text and the employees being spoken to in the same terms as communicated via text.

44. The change introduced was not because of the claimant being on maternity leave. It was not conduct related to a protected characteristic as detailed in Section 26 of the 2010 Act.

20 *Allegation 3, late payment of wages*

45. Whilst the claimant was on maternity leave there were occasions when she was paid after Ms Kennedy had been paid. There were also occasions when she was paid in advance of Ms Kennedy. Who was paid first depended on who the respondent decided to pay first. He selected either the claimant or  
25 Ms Kennedy for the first payment on no particular basis. The selection was not related to or because of the claimant being on maternity leave. Late payments which occurred, whether in relation to Ms Kennedy or the claimant, arose due to there being insufficient takings to enable payment to be made on time. Ms Davidson was paid in cash for personal reasons. She was paid

on Fridays. There was no evidence as to whether payments to her were ever made late or not.

46. If payment to the claimant was not received in her bank account on the Friday on which it was due, she would generally text Ms Kennedy. When she did that, she would ask if Ms Kennedy had been paid. She did not enquire beyond that. Other than on those occasions, the claimant did not know whether or when Ms Kennedy had been paid. She did not know the week to which any payment to Ms Kennedy related. There was no discussion between the claimant and Ms Kennedy as to why it might be that the claimant had not received payment when Ms Kennedy had, if that was the situation which pertained.

47. Payments were made by Damall Limited to the claimant and Ms Kennedy as follows:-

Due date	Date of payment to Ms Kennedy	Date of payment to the claimant
20 February	20 February	20 February
27 February	27 February	27 February
6 March	6 March	7 March
13 March	13 March	14 March
20 March	20 March	21 March
27 March	28 March	29 March
5 April	5 April	5 April
12 April	12 April	12 April
19 April	23 April	23 April

Due Date	Date of payment to Ms Kennedy	Date of payment to the claimant
26 April	29 April	1 May
3 May	9 May	9 May
10 May	16 May	Not paid until 9 July, following upon COT3.
17 May	23 May	17 May
24 May	28 May	24 May
31 May	6 June	31 May
7 June	12 June	7 June
14 June	18 June	14 June
21 June	26 June	21 June
28 June	28 June	28 June
5 July	3 July	5 July, received 6 July
12 July	11 July	12 July
19 July	22 July	19 July
26 July		26 July
2 August	1 <sup>st</sup> August (reduced amount)	5 August
9 August	12 August	10 August

Due Date	Date of payment to Ms Kennedy	Date of payment to the claimant
16 August	16 August,	16 August, received by claimant 17 August
23 August	23 August	23 August
30 August	30 August	30 August
6 September	4 September	4 September
13 September	13 September	13 September
20 September	No pay due	20 September
27 September	30 September	28 September
4 October	3 October	3 October received by claimant 4 October
11 October	7 October	7 October

48. Both Ms Kennedy and the claimant were paid late in respect of the week of the robbery. Payment for that week was made to them on 23 April rather than the due date of 19 April.

49. The next payment of wages was due on 26 April. No payment was made either to Ms Kennedy or the claimant that day. Ms Kennedy received her wages payment for that week on 29 April.

50. That day, 29 April, the claimant sent a text to Mr Best. It appeared at C4 and  
5 read:-

*"I'm sorry robin but I'm gonna have to go to citizens advice about the wages there's absolutely no communication from you if they are going to be later than the day you've said if you can't afford to pay your (sic) staff I think you should think about throwing the towel in".*

10 51. Mr Best did not reply. Payment of wages due to the claimant was made to her on 1 May.

52. It was not this delay or that at the time of robbery which led the claimant to speak to ACAS, resulting in the COT3 and payment in July to her. That contact with ACAS, COT3 and payment in July occurred in relation to  
15 payment in respect of the week ending 10 May.

53. The claimant initially received no payment for week ended 10 May 2019. She took this matter up with ACAS. She did this in June or July 2019. Agreement was reached between her and Damall Limited. That was documented in a COT3 agreement, a copy of which appeared at pages 43 and 44 of the file.  
20 Payment of the wage due to the claimant for the week ending 10 May was made to her on 9 July 2019.

54. The claimant was paid on time in the period commencing 17 May 2019 until 5 July 2019. The schedule she produced at page 112 of the file, prepared by her or her solicitor and confirmed by her in evidence as being accurate  
25 reflected this. No claim was made that late payment to the claimant had occurred between those 2 dates.

55. During the time of the claimant's maternity leave, payment of wages to her was sometimes made on time, sometimes made late and on rare occasions paid early to her. Payment to Ms Kennedy during time of the claimant's  
30 maternity was also sometimes made on time, sometimes late and on very

rare occasions, early. Sometimes the claimant was paid in advance of Ms Kennedy. Sometimes Ms Kennedy was paid in advance of the claimant.

56. The table detailed above reflects the dates of payment of wages to both the claimant and Ms Kennedy.

5 57. The claimant was paid at least a day in advance of Ms Kennedy 10 times in the period of her maternity leave. She was paid at least a day after payment was made to Ms Kennedy on 9 occasions. They were paid on the same day on 14 occasions.

10 58. On 14 March the claimant sent a text to Mr Best saying "*Hi Robin is there any wages?*" There was no reply from Mr Best. Payment of wages to the claimant was made by transfer within minutes of that text. The text appeared at C1.

15 59. On 28 March the claimant sent the respondent a text at 14.01. It read "*Hi Robin is there any wages today?*" The respondent replied at 16.12 saying "*Will deposit today's takings in bank and pay SMP immediately after that.*" The claimant sent a response saying "*OK thanks do you know you can claim my smp back from the government?*" This text exchange appears at C1. Payment of SMP was made to the claimant the following morning.

20 60. Although the claimant was paid on the due date on 21 and 28 June 2019, she was concerned that payment had not been received during the earlier part of the day on each of those dates. She sent a text to the respondent on both those dates asking about payment of her wages. A copy of those texts appeared at C4.

61. On Friday 21 June at 17.49, the claimant sent a text asking "*Is there wages going in today?*"

25 62. There was no reply to this text. Payment was made to the claimant that day by bank transfer timed at 18.16. This is confirmed by the entry for 21 June on page 49 of the file.

63. On Friday 28 June at 15.49 the claimant sent a text to the respondent. It read:-



*“Robin can I ask why everyone else is getting paid before me and your (sic) leaving me til (sic) last minute on a Friday night this is terrible what your (sic) doing to me I have 3 kids to think about”.*

5 64. There was no reply to this text. The claimant was paid at 15.49 by transfer. A copy of the relevant entry in the bank statement for Damall Limited appeared at page 49 of the file.

65. On Friday 5 July the claimant sent 4 texts to the respondent. The respondent replied after the 3<sup>rd</sup> of those texts. A copy of the texts appeared at C5 and C6. The texts read, LM being the claimant and RB being the respondent:-

10 LM at 17.53 *“Am I getting paid today? This is clearly personal now”*

LM within the same minute *“For the last 3/4 weeks other members of staff have been getting paid on a Thursday what’s the difference with me considering you can claim it from the government 15 weeks before my son was born not fair at all.”*

15 LM at 20.12 *“I’m obviously not getting paid I will need to go back to Acas about this as your (sic) singling me out as the other staff were paid yesterday and your (sic) not replying or giving me an explanation.”*

20 RB, it appears within the same minute, *“ Please DO NOT contact me again. This is harassment. Please only communicate through ACAS Also Do Not enter the Crown Bar Paisley for any reason. If you do so without my authority I will take matters further.*

*Thank you for your co-operation.”*

LM at, it appears, the same time *“Omg you for real no problem”.*

25 66. The claimant was paid by transfer on 5 July from the bank account of Damall Limited timed at 20.59, page 50 of the file confirming that. The money appeared in her bank account on 6 July, page 86 of the file confirming that. Ms Kennedy had been paid on Wednesday 3 July. For the weeks between 17 May and 28 June, the claimant had, however, been paid in advance of Ms Kennedy. On 28 June Ms Kennedy and the claimant were both paid on the  
30 due date for payment.

67. Any late payment of wages to the claimant during her maternity leave, whether late as against the due payment date or in relation to the time when

Ms Kennedy was paid, did not occur because of maternity leave on the part of the claimant. It was due to cash flow issues within Damall Limited and inability to pay the sum due at the appropriate date. It was not related to a protected characteristic in terms of Section 26 of the 2010 Act. Whether it was the claimant or Ms Kennedy who was paid ahead of the other depended on a decision made at the time by Mr Best. It could be one employee or the other who was paid first. The respondent had no set way of proceeding. His decision either way was not because of the claimant's maternity leave. It was not related to a protected characteristic in terms of Section 26 of the 2010 Act.

*Allegation 4, barring from pub*

68. As reflected in the text from the respondent on 5 July 2019 set out above, the claimant was told that day that she was not to enter the Crown Bar in Paisley for any reason without authority from the respondent. The respondent took the decision to ban the claimant from the bar due to the claimant having contacted him 3 times by text about what she regarded as being late payment to her of SMP.

69. The communications by the claimant to the respondent in relation to pay outstanding, although comprising SMP, did not constitute a protected act in terms of Section 27 of the 2010 Act. No communication had referred to discrimination or had given an indication that the claimant was of the view that her maternity leave was in some way influential in any late payment, change of payment date by the Damall Limited or behaviour of the respondent on 20 February 2019. There was no evidence that she raised those matters as the basis of her issue with Damall Limited or the respondent when speaking with ACAS. There was nothing specifically said by the claimant in her communications with Damall Limited or with the respondent which gave any indication that she was raising a matter to which the 2010 Act applied or was alleging that the respondent or any other person had breached the 2010 Act..

70. If there is no protected act, victimisation in terms of Section 27 cannot be found to have occurred.

71. The banning of the claimant from entering the Crown Bar was not a decision taken because of maternity leave on the part of the claimant. It was a reaction by the respondent to being pressed as to payment of SMP due to the claimant. The decision was not related to a protected characteristic in terms of Section 26 of the 2010 Act.

### *Loss*

72. The claimant was upset due to late payment to her by Damall Limited. She worried as to when she was going to be paid, whether payment would be late and if so, how late. She had bills to pay with her young baby requiring nappies and baby milk and her other children requiring to be fed and clothed. Her enjoyment of her time with her young baby was affected. She did not however consult with her GP or require to take any medication as a result of this. It was, however, a further pressure in managing money.

73. When told by text not to enter the pub, the claimant was upset. She did not consult her GP or take any medication due to this.

### **The Issues**

74. The issues as set out for the Tribunal to determine were:-

Had there been discrimination of the claimant by the respondent in terms of the 2010 Act? Specifically:-

(a) On 20 February 2019 did the respondent harass the claimant by replying "There are no wages" when the claimant attended the Crown Bar Paisley that day to enquire as to payment to her of SMP that day? Did that interaction that day constitute discrimination in terms of Section 18 of the 2010 Act?

(b) when the respondent altered the claimant's weekly "pay day" from Wednesday to Friday on 3 April 2019 was this discrimination in terms of Sections 18 or 26 of the 2010 Act?

- (c) On the occasions that the Respondent paid the claimant following her commencing a period of statutory maternity leave on 15th February 2019 SMP later than the due date or any later than Ms Kennedy received her weekly pay, was this discrimination in terms of Section 18 of the 2010 Act?
- 5 (d) Did the respondent harass the claimant in terms of Section 26 of the 2010 Act by engaging in unwanted conduct related to her relevant protected characteristic of pregnancy or maternity when Damall Limited did not make payment to her of SMP on the dates when that fell due?
- 10 (e) When the respondent informed the claimant on 5 July 2019 that she was not to enter the Crown Bar Paisley, was that harassment in terms of Section 26 of the 2010 Act? Was it discrimination in terms of Section 18 of the 2010 Act?
- (f) Was there a protected act and, if so, was the communication by the respondent to the claimant on 5 July 2019 an act of victimisation in terms
- 15 of Section 27 of the 2010 Act?
- (g) If any of the above acts are considered to be have been discriminatory, what compensation was to be awarded to the claimant?

### Applicable Law

75. The relevant parts of Sections 18, 26, 27 and 136 of the 2010 Act are in the
- 20 following terms:-

*“Section 18 Pregnancy and maternity discrimination: work cases*

*(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*

*(a )because of the pregnancy,*

- 25 *(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*

*(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—*

- 30 *(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;*

*(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.*

#### *Section 26 Harassment*

*“(1 ) A person (A) harasses another (B) if—*

5 *(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*

10 *(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;*

15 *(c) whether it is reasonable for the conduct to have that effect.*

*(5)The relevant protected characteristics are—*

*age;*

*disability;*

*gender reassignment;*

20 *race;*

*religion or belief;*

*sex;*

*sexual orientation.*

#### *Section 27 Victimisation*

25 *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act,*

*(2) Each of the following is a protected act—*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

76. The protected act or acts in this case were said to be the terms of the texts sent by the claimant on 5 July 2019. There were not said to have been any events which might have fallen within sub sections (a) or (b) of Section 27 (2) of the 2010 Act.
77. Section 18 is the applicable Section of the 2010 Act, rather than Section 13, if direct discrimination is said to have occurred because of pregnancy or exercise of the right to maternity leave.
78. Section 136 of the 2010 Act states, insofar as relevant for this case:-
- “(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”.*
79. This means that, when there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof ‘shifts’ to the respondent to prove a non-discriminatory explanation.
80. *Ayodele v CityLink Ltd and anor* 2018 ICR 748, (“*Ayodele*”) is a recent case in which it is confirmed that it is for the claimant to establish a *prima facie* case of discrimination as the first step in the application of the burden of proof provisions in S.136 of the 2010 Act.
81. Relevant cases which are of assistance in this area are *Madarassy v Nomura International plc* (“*Madarassy*”) 2007 ICR 867, *Igen v Wong* 2005 IRLR258 (“*Igen*”), *Nagarajan v London Regional Transport* 1999UKHL 36 (“*Nagarajan*”) and *Laing v Manchester City Council* 2006 UKEAT 0128 (“*Laing*”).

82. *Igen* confirmed that the guidance given in *Barton v Investec Henderson Crosthwaite Securities Ltd* (“*Barton*”) 2003 IRLR 332 remained applicable. That guidance is summarised as follows:

- 5 1. it is for the claimant to prove, on the balance of probabilities, facts from which the Employment Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- 10 2. in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that ‘he or she would not have fitted in’.
- 15 3. the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
4. the Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn.
- 20 5. in considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
6. these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information.
- 25 7. inferences may also be drawn from any failure to comply with a relevant Code of Practice.
8. when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.
- 30 9. it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

10. to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

5 11. not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.

10 12. since the respondent would generally be in possession of the facts necessary to provide an explanation, the Tribunal would normally expect cogent evidence to discharge that burden — in particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

15 83. *Madarassy* confirmed that a there is no error in law merely because an Employment Tribunal fails to recite the *Igen* guidance in its decision or fails to work through the guidance paragraph by paragraph.

20 84. *Madarassy* also saw the Court state “*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*”.

25 85. Looking at this situation, this means that a claimant cannot succeed simply by showing that she was on maternity leave and was put at a disadvantage. Maternity leave may be the context for any unfavourable treatment, but that did not mean that the unfavourable treatment was because of the maternity leave. This is confirmed by the Employment Appeal Tribunal (“EAT”) in *Sefton Borough Council v Wainwright* 2015 ICR 652

30 86. Two other important cases in this area are *Hewage v Grampian Health Board* 2012 ICR 1054 and *Martin v Devonshires Solicitors* 2011 ICR 352, In *Hewage*, Lord Hope, in the Supreme Court, endorsed the view of Mr Justice



Underhill (then President of the EAT) in *Martin* that it is important not to make too much of the burden of proof provisions.

87. In *Hewage*, it was emphasised by Lord Hope that the statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. If, however a Tribunal is able to make positive findings on the evidence whether the claimant was discriminated against on the alleged protected ground or not, then the burden of proof provisions have no relevance.
88. In *Laing*, Mr Justice Elias, then President of the EAT said, in similar vein, ‘*if [the Tribunal] is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, “there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race”.*’
89. *Laing* also confirms that the focus of the Tribunal ‘*must at all times be the question whether or not they can properly and fairly infer... discrimination.*’
90. If a claim made in terms of Section 18 of the 2010 Act is to be successful, the unfavourable treatment must be “*because of*” the claimant’s maternity leave (in this case). *Indigo Design Build and Management Ltd and anor v Martinez* EAT 0020/14 is a relevant case in this regard. If there is no clear link between the unfavourable treatment and maternity leave, a Tribunal requires to consider whether the fact of the claimant exercising her right to maternity leave played a significant part in the conscious or subconscious mind of the alleged discriminator. The mental process of Mr Best and the view of the Tribunal, on the evidence it heard, upon that point was the critical element in this area. Significant has been interpreted as meaning more than trivial.
91. A claim made in terms of Section 26 of the 2010 Act requires to be based on conduct related to a protected characteristic as set out in that Section. The

specified protected characteristics do not include pregnancy and maternity. They do include sex.

- 5 92. For a claim of harassment made in terms of Section 26 to be successful, the unwanted conduct in question requires to be “*related to*” the protected characteristic.
- 10 93. Whether conduct is related to a protected characteristic is something to be determined by the Tribunal having heard the evidence and having decided the facts as it sees them. That is confirmed in the case of *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor* EAT 0039/19. The opinion of a claimant or a decision as to the motivation of the alleged discriminator are not the deciding elements.
94. Whether unwanted conduct related to a protected characteristic is seen as harassing depends on an objective and subjective assessment of its impact.
- 15 95. A claim under Section 27 of the 2010 Act requires there to have been a protected act. The case of *Fullah v Medical Research Council and another* UKEAT/0586/12 (“*Fullah*”) confirms that for there to be a protected act there has to be some act where the context indicates that a relevant complaint has been made. Specific Sections of the 2010 Act do not require to be set out, and particular words do not require to be used. It is however the case that  
20 what is said or done and is contended to be the protected act must be expressed in a way which could amount to an allegation that there has been a breach of the 2010 Act.
- 25 96. *Beneviste v Kingston University* EAT 0393/05 underlined this, saying that a claim does not identify a protected act “*merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation.*”
- 30 97. It is an important principle of litigation, including of practice and principles applied in the Employment tribunal that fair notice of the case of a party is given.

98. In the case of *Chandhok v Tirkey* 2015 ICR 527 (“*Chandhok*”) Mr Justice Langstaff (the then President of the EAT) put it this way:

5                    *[A] system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.’*

10

15

99. In this case the elements of discrimination upon which the claimant founded were clarified at the outset and were confirmed as being the four aspects mentioned above. Those were, put briefly, the interaction on 20 February, the change in date of payment from Wednesday to Friday each week, the late payment of SMP to the claimant and the decision of the respondent to ban the claimant from entering the bar, communicated by text of 5 July 2019.

20

100. The following cases were cited by the parties:-

- *Essex County Council v Jarrett* UKEAT/0045/15
- 25                    • *Barton*
- *Ayodele*
- *Igen*
- *Nagarajan*:
- *R (on the application of E) v Governing Body of JFS and another* [2009] UKSC 15 (“*JFS*”)
- 30                    • *Fullah* (paras 21- 23)
- *Laing*
- *Vento v The Chief Constable of West Yorkshire Police* 2002 EWCA Civ 1871

**Submissions**

101. Both parties tendered written submissions.. Those are now summarised.

*Submissions for the claimant*

5 102. The Tribunal was surprised and also concerned when the submissions from the claimant had attached to them documents which were not before the Tribunal in evidence. Those were a payslip and also a record of contact with ACAS. There was no application that evidence be reopened in order to have those documents spoken to.

10 103. The Tribunal has had no regard to those documents in its deliberations. It has also had no regard to passages from the notes of questions to the claimant which the claimant's solicitor said she had prepared and had asked the claimant in the hearing. Those were sent on to the Tribunal, however are not regarded as of relevance in its deliberations.

15 104. There were also passages in the submissions presented on behalf of the claimant which simply did not reflect the evidence.

105. These matters are mentioned as the submissions made on the part of the claimant must be seen in that light. The claimant's solicitor is an experienced solicitor. That is one of the reasons the Tribunal found this course of action on her part concerning.

20 106. Ms Mechan set out facts which she said should be found and should lead the Tribunal to infer that discrimination had occurred.

25 107. The claimant's evidence in relation to what had happened on 20 February 2019 should be preferred to that of the respondent. His behaviour subsequent to that day in paying the claimant late, and specifically in paying her after her colleague Ms Kennedy was paid, supported there being an issue on his part with the claimant being on maternity leave, it was said.

108. The respondent had not replied to some texts from the claimant chasing payment of the element of SMP due at that point. He had not given any

convincing reason for the claimant being paid after Ms Kennedy on occasion saying that was down to "*happenstance*".

- 5 109. The Tribunal should find that the pay day was changed from Wednesday to Friday only for the claimant. Ms Kennedy had said she did not receive a text informing her of the change. The claimant had not agreed to her pay day being changed and did not want that to happen.
- 10 110. A submission was made that the payment due to the claimant and Ms Kennedy on 19 April was not paid late on 23 April. It was missed. Payment of that amount was made in July 2019 after a COT3 had been entered into with the claimant in June 2019. There was no missing payment on 10 May. The payment for 10 May was not the one addressed by the COT3. The claimant had taken issue with Mr Connolly when he was cross examining her, Ms Mechan said, by saying the dates to which he referred were "a week out". On this footing, the payments made to the claimant from 17 May to 5 July were not on time. The payments to Ms Kennedy continued to be paid ahead of those made to the claimant.
- 15 111. It was in this area in particular that the submissions for the claimant did not reflect the evidence from the claimant both in chief and in cross. Any concession made by the claimant, or answer given by her in cross-examination accepting facts, could not be weighed against any correction of that or variation from it in re-examination as there was no such re-examination.
- 20 112. As to the change in payment date from Wednesdays to Fridays, Ms Mechan submitted that the Tribunal should accept the evidence from Ms Kennedy that she did not receive the same text as the claimant had. The change had been applied only to the claimant.
- 25 113. The claimant had had to chase payments due to her. Some of those, such as that of 21 June had then been followed within minutes by payment being made. Often there was no reply to her texts.

114. These late payments, the unpredictability of payment and the absence of reply to her caused upset and uncertainty for the claimant. It came at a time when she particularly needed money for nappies and baby milk, for example. Her enjoyment of time with her young baby was spoiled.
- 5 115. The claimant was banned from entering the premises of the Crown Bar. This was on 5 July. The Tribunal had the texts of that evening. It should conclude that the reason the claimant was banned was that she had said she was going to go back to ACAS. Ms Mechan said that the protected act was the text from the claimant stating her intention to go back to ACAS *“to complain about the*  
10 *respondent singling her out, late wage payments, being paid later than colleagues and not communicating with her or explaining what was going on”*. The Tribunal should reject the alternative reason for banning the claimant which had been advanced by Mr Best.
116. Various events were set out by Ms Mechan as having created a hostile,  
15 degrading, humiliating or offensive environment for the claimant. It had however been confirmed that the only actings founded upon as the basis of the claim under Section 26 were those detailed above. They were the allegations of discrimination agreed at the outset of the hearing as being those relied upon by the claimant. Any allegations beyond those were not therefore  
20 allegations considered by the Tribunal.
117. In her submissions, Ms Mechan did not highlight which protected characteristic was relied upon and how it was that the actings were said to be related to that protected characteristic. It is assumed that the protected characteristic was sex. The case advanced however was that the harassment  
25 was due to maternity and maternity leave of the claimant. That is not a protected characteristic in terms of Section 26 of the 2010 Act.
118. The impact on the claimant of the alleged discrimination was highlighted to the Tribunal by Ms Mechan. The claimant had felt stressed and worried. There was a lack of communication from the respondent which caused her  
30 upset. She had felt as though she had to beg for wages. She was left short

of money when payment was made on the due date. She regarded herself as being victimised as compared to her colleagues.

119. The Tribunal should accept the evidence of the claimant and Ms Kennedy. The claimant had been straightforward, direct and honest, said Ms Mechan. Similarly Ms Kennedy had been direct and straightforward. She had confirmed she was aware of payment being made to her. The claimant had contacted her when the claimant had not been paid. Ms Kennedy was unaware of customers discussing the claimant or any problems in the claimant may have had in obtaining payment of SMP.
120. The respondent was, Ms Mechan submitted, contradictory at times. He had produced no evidence to back up his position that the business was having financial issues. His evidence as to banning the claimant from the bar due to the claimant's family having spoken to him about the SMP payments to the claimant was unsupported. He had in fact banned her as she had threatened to go to ACAS. She had not been going to the bar in any event, only going in twice during her maternity leave. Upset, humiliation and injury had been caused to her by this action.
121. In short, said Ms Mechan, facts had been proved from which the Tribunal could infer discrimination.
122. The respondent had been annoyed, she said, by the claimant going off on maternity leave. His attitude towards her had changed. He had paid her SMP late. He had not communicated with her timeously and courteously. He had treated her unfavourably because she was on maternity leave.
123. Compensation should be awarded to the claimant, being £5,000 for discrimination, £5,000 for harassment and £5,000 for victimisation.

*Submissions for the respondents*

124. Mr Connolly set out the facts he urged that the Tribunal find based on the evidence it had heard.

125. Mr Best had spoken to the financial position of Damall Limited. That evidence should be accepted by the Tribunal. The claimant and Mr Best had had a good relationship. He had personally paid her wages just before her maternity pay started. That illustrated both the good relationship and the financial difficulties of Damall Limited.
126. The date of payment of wages had been changed for all staff from Wednesday to Friday. That had become the payment date each week, although it was not always possible to make the payment on Fridays. No objection to the change of payment day had been taken by any employee, including the claimant. There was no discriminatory conduct in this movement of payment day.
127. Mr Connolly detailed the payment dates in relation to the claimant and Ms Kennedy. He confirmed that Mr Best accepted that the late payment had been made to both on various occasions. Mr Best appreciated that this would not have been a welcome occurrence. It was however something caused by financial difficulties of Damall Limited. On some occasions the claimant had been paid after Ms Kennedy. On other occasions Ms Kennedy had been paid after the claimant. Sometimes they had both been paid on the same day. Bank statements backed up the payment dates, both to the claimant and Ms Kennedy. Both those witnesses had not disputed that payment was made to them on the dates shown in the bank statements when those were put to them. The claimant did not dispute, although could not comment upon, the dates shown in the bank statements as being the dates on which payment was made to Ms Kennedy.
128. The robbery on Monday 15 April had led to payment for that week being later than it ought to have been. Payment was made not on 19 April, but on 23 April. There had been a text sent explaining that the weekend sales proceeds would be needed before payment of the week's wages could be made.
129. The claimant had accepted that the payment to her on 23 April related to the preceding week. She had accepted that there was a missed week in that the payment on 10 May had not been made. That missing week was dealt with



when the payment in July, pursuant to the COT3, was made to the claimant. She had accepted that. She had also confirmed in evidence that she had been paid on time between 10 May and 5 July. This period saw Ms Kennedy being paid ahead of the claimant.

5 130. Whilst no comparator was necessary for the claimant's case, looking at the timing of payment of wages for Ms Kennedy and the claimant reinforced the fact that financial issues lay behind late payment and also confirmed that who was paid first between them varied in the period, with payment on the same day occurring where funds permitted that.

10 131. The Tribunal should accept the evidence from Mr Best as to why it was that he had banned the claimant from entering the bar.

132. That decision was not an act of victimisation in terms of the 2010 Act. There was, in any event, no protected act as was required under the 2010 Act. There had been no grievance and no indication that there had been any conduct of  
15 a discriminatory nature. The contact from the claimant was about late payment of wages.

133. Mr Connolly acknowledged the provisions in relation to the burden of proof. The Tribunal had to look at facts found in relation to each allegation rather than looking at the allegations in an across the board fashion. There were,  
20 he submitted, no facts from which discrimination could be inferred. If there were, the respondents had discharged the onus and had shown that no discriminatory conduct had taken place.

134. In considering the evidence given, Mr Connolly submitted that the Tribunal should regard Mr Best as being credible. The claimant was also credible, he  
25 said. What the claimant did not have, however, was the information as to the financial position of Damall Limited and also as to the reasoning of Mr Best. There was suspicion on the part of the claimant as to why it was that she had been paid late and as to the other actions upon which she founded. There was, however, no evidence to support those suspicions as being well-  
30 founded.

135. Ms Kennedy had been vague in her responses and her evidence was not reliable. Where her evidence was at odds with the evidence of a different witness, the evidence from that other witness should be preferred.
136. Mr Connolly reminded the Tribunal of *Nagarajan and JFS*. Those cases underlined that in relation to direct discrimination a Tribunal should ask itself what the conscious or subconscious reason for treating someone less favourably was. It should keep in mind the possibility of there being inherently discriminatory grounds and of there being subjectively discriminatory grounds. In this case, the latter category was potentially involved.
137. There had been a conversation between the claimant and Mr Best as to wages on 20 February. Mr Best had transferred payment of wages to the claimant later that day. Mr Connolly said that the Tribunal should accept Mr Best's evidence rather than the claimant's. If it accepted the claimant's evidence as to the exchange, there was no basis to conclude that what had happened was because of the claimant being on maternity leave. The claimant had described Mr Best as supportive when she had told him she was pregnant. He had personally paid her wages for the preceding week. There were no facts which would lead to the burden of proof shifting.
138. As to the day of payment changing, this had happened in relation to all employees. The evidence supported the text which the claimant received as having been sent to Ms Kennedy. There was no evidence to support this change having happened because the claimant was on maternity leave. The claimant had not objected to this change. In addition, when she confirmed in evidence that she had been paid on time between 17 May and 5 July, she was referring to payment being made to her on Fridays of each of those weeks. The change would have occurred whether or not the claimant was on maternity leave. There were no facts which would lead to the burden of proof shifting. If it had shifted, there was a valid non-discriminatory reason for the decision made. That was the financial situation of Damall Limited and the need to build in some additional breathing space for trading to generate funds to pay wages.

139. Similarly, Mr Connolly submitted, the irregular and late payment to the claimant of wages was not because of her being on maternity leave. It was, rather, a consequence of the poor financial health of Damall Limited.
140. It was accepted that the claimant was paid late sometimes. It was recognised that was not ideal and would have caused difficulties. Looking however at the payment pattern and the payment of wages paid to Ms Kennedy during the claimant's maternity leave demonstrated that the reason for late payment and order of payment being made as between the employees was unrelated to the claimant being on maternity leave. She had been paid earlier than Ms Kennedy, at the same time as Ms Kennedy, after Ms Kennedy and also in advance of the payment date during the period. This illustrated and was as a result of the financial problems and cash flow issues which Damall Limited had.
141. The evidence confirmed that the "missing week" of payment for the claimant was that ending 10 May 2019. The claimant accepted that. She had gone to ACAS about that missing week. She also accepted in evidence that the payment in July made under the COT3 was to cover the missing week related to the week ending 10 May. The claimant agreed that she had been paid on time between 17 May and 5 July. Mr Connolly rehearsed the payment sequence and the evidence in this area. The evidence did not support the submission made on behalf of the claimant that there was a missing week in April with the payment on 23 April being other than late payment for the week before, the week of the robbery. That had not been the claimant's position. It was not her position as set out in her claim. It was not Ms Kennedy' evidence. It did not reflect the claimant's position in her own document at page 112 of the file.
142. Mr Connolly set out the claimant's position in relation to the timing of wage payments made to Ms Kennedy. Essentially she did not know, but accepted that the bank statements showed entries confirming payment to her by the respondents on the dates put to the claimant.

143. The Tribunal should, Mr Connolly submitted, accept the evidence just mentioned. It should also accept Mr Best's evidence as to payments made and the missing week being 10 May, addressed by payment being made following the COT3. It should also accept the reasons for late payment as explained by Mr Best, together with his evidence that there was no particular reason why the claimant was sometimes paid ahead of Ms Kennedy and why Ms Kennedy was sometimes paid ahead of the claimant. Paying the claimant in advance of paying Ms Kennedy illustrated that when that situation was reversed, it was not because the claimant was on maternity leave.
144. The claimant was paid in advance of Ms Kennedy 10 times. Ms Kennedy was paid in advance of the claimant 9 times. They were paid at the same time on 14 occasions.
145. The evidence from Mr Best as to why the claimant was banned from entering the bar should be accepted, Mr Connolly said. He had, in the past, encouraged the claimant to go to speak with ACAS. He had welcomed their involvement. Her text saying she would go to ACAS was unlikely to trouble him. It was an assumption by the claimant that her text talking of going back to ACAS about not getting paid had led to the decision by Mr Best. The decision of Mr Best was not because of the claimant being on maternity leave.
146. Again, there were no facts which should lead to the burden of proof shifting. The decision was not taken because the claimant was on maternity leave.
147. In relation to harassment, Mr Connolly highlighted that maternity and pregnancy were not protected characteristics founding a Section 26 claim. Only maternity discrimination had been alleged. This ground of claim could not therefore be successful.
148. There were also now new allegations being made of harassment. There were, it was agreed at the outset of the case, 4 allegations of discrimination. The claim was limited to those matters.
149. Turning to the claim of victimisation, Section 27 required that there be a protected act. There was no protected act on the evidence which the Tribunal

heard, Mr Connolly submitted. This ground of claim could not therefore succeed.

- 5 150. The claimant gave no evidence of having said during her employment that the reason for any alleged discriminatory treatment was that she was absent on maternity leave. She produced no document in which she made any such allegation. She had certainly complained about late payment to her. She had gone to ACAS about that. There was no evidence however that she had said to ACAS that she believed the late payment was due to her being absent on maternity leave. It was only in the claim form presented to the Employment Tribunal that this allegation was made. There was suggestion in the claim form that she had asserted to ACAS that she had a claim for maternity discrimination.
- 10
151. As to what was required for there to be a protected act, Mr Connolly referred to *Fullah*. He set out passages from that Judgment. Those, he said, confirmed that whilst no specific or precise words required, an allegation made had to assert facts which were capable of amounting in law to an act of discrimination. There had to be something about the complaint to show that it was a complaint to which, at least potentially, the Act applied.
- 15
152. At the time the claimant was banned from entering the bar, there had been no indication from the claimant of any allegation that she was being discriminated against because she was on maternity leave. There was no protected act prior to that decision being taken by Mr Best. The claim under Section 27 could not succeed.
- 20
153. Mr Connolly submitted that the initial burden of proof had not been met by the claimant. The sole complaint made by the claimant was as to late payment or non-payment of wages. That was not a complaint under the 2010 Act.
- 25
154. If the Tribunal was of the view that the burden of proof had shifted, the respondent had, Mr Connolly submitted, provided an explanation of the decision he had taken which established that the claimant being absent on

maternity leave was not the reason for her being banned from entering the bar.

155. In relation to remedy, Mr Connolly said that the evidence was short in this area. The claimant referred to the uncertainty. She had had to alter the dates  
5 on which debits were made from her bank account. She said she felt unable to enjoy her maternity leave and time with her new baby and other children.

156. The claimant had not been singled out, however. She had not been unable to pay any direct debit, looking at her bank statements. She had not so  
10 alleged in evidence. She had not required to attend her GP. There was no evidence as to there being any impact on her day-to-day activities. There was no malice by the respondent towards her.

157. Any injury to feelings award, only one award being appropriate should be at the bottom end of the lower *Vento* band.

### Discussion and Decision

15 158. This claim was on based on Sections 18, 26 and 27 of the 2010 Act. The claim form and further particulars set out the claim. Time was taken at the outset of the hearing to obtain clarity as to the allegations of discrimination which were being advanced by the claimant. Ms Mechan participated fully in that discussion.

20 159. It was confirmed that there 4 allegations of discrimination said to have occurred. Those were, stated briefly, the interaction on 20 February 2019, the change of day of payment to the claimant from Wednesday to Friday each week, the late payment of SMP to the claimant which also saw the claimant being paid after her colleague Ms Kennedy, and the banning of the claimant  
25 from entering the bar, that happening on 5 July 2019.

160. It is a principle of any litigation, including Employment Tribunal litigation, that there requires to be fair notice by each party to the other of the case which a party advances, whether as their claim or as their answer to that. *Chandhok* emphasises this fundamental point.

161. The Tribunal was conscious of the applicable principles, the case as specified in the claim form and further particulars, the time taken at commencement of the hearing to confirm the alleged acts of discrimination being relied upon and the clarity obtained through that exploration. It was disappointing, therefore,  
5 to find that other allegations of alleged discrimination were being referred to in submissions for the claimant. They had not been put in that fashion to witnesses. The respondents had not prepared for those matters to be regarded as potentially discriminatory acts. They had not therefore addressed any evidence touching upon those elements in that light.
- 10 162. The Tribunal did not regard any matters, other than the 4 agreed before evidence commenced as being those about which the hearing was concerned, as being allegations of discrimination competently before it.
- 15 163. The claim of harassment was based on the claimant being absent on maternity leave. That is not a protected characteristic listed in Section 26. It can often be the case that a claim in this area can be argued as being an instance of discrimination where the protected characteristic is that of sex. There was never any attempt so to argue in the case as set out, in evidence or in the submissions for the claimant. Questions were never put to the claimant or to the respondent on that proposition or premise. It is not for the  
20 Tribunal to “move” the claimant’s case into a particular category or to relabel it on its own initiative, particularly when professional representation is involved.
- 25 164. For these reasons the Tribunal did not regard there as being a competent Section 26 claim before it. The Tribunal did reflect upon the position if a competent claim of harassment had been made. For the reasons identified below, if treated as claim based on the protected characteristic of sex, the Tribunal would have found that claim to have been unsuccessful.
- 30 165. The Tribunal also found it very troubling that the submissions made on behalf of the claimant in one particular key area not only did not have a basis in evidence but actually were contradictory to the evidence in the case. The claimant’s own evidence was contrary to the position adopted in submission

on her behalf. The submissions did not reflect the case as advanced in the claim form and further particulars.

- 5 166. The main aspect referred to is that of the payment made on 23 April and whether that related to the preceding week. This passage of evidence also dealt with the elements of whether payment for the week of 10 May had been made to the claimant, which payment was covered when the payment in July was made following the COT3 and whether the claimant had been paid on time during the period 17 May to 5 July.
- 10 167. Ms Mechan argued in submission that the payment on 23 April could not relate to the preceding week. This had been foreshadowed only in a line of questioning put to Mr Best in cross examination. It was refuted by him. The claimant had, however, not so stated in evidence in chief. She had been cross examined and taken through the payments of wages she had received or not received. That cross examination had been conducted in a thorough, calm manner by Mr Connolly. It had not involved any hint of aggression. Time had been given to the claimant to consider and to answer the questions she was asked.
- 15 168. Ms Milroy accepted in cross examination that the payment on 23 April related to the preceding week. That preceding week had been the week of the robbery and subsequent text explaining that payment required to be deferred, the expectation being that weekend sales would enable payment of wages to be made.
- 20 169. Ms Mechan argued that the payment made in July following upon the COT3 was in respect of week ending 19 April 2019. That again was contradicted by the claimant's clear acceptance that there was a missing payment of week ending 10 May and that the payment made in July under reference to the COT3 was in respect of that week ending 10 May.
- 25 170. Ms Milroy also accepted that she was paid on time from 17 May until 5 July. That in itself was confirmed by the schedule she produced on her behalf at page 112 of the file.
- 30



171. There was no re-examination of the claimant in these areas.
172. There was also an argument advanced by Ms Mechan in submission that the claimant had spoken with ACAS about the missing week of at the end of April 2019. That had led to the COT3 and subsequent payment. This had therefore  
5 been before the week ending 10 May, so the COT3 and subsequent payment could not relate to week ending 10 May, she argued.
173. This was however not the case as pled, which referred to the claimant having sought assistance from ACAS in July (the claim form) or in June/July (the further and better particulars) regarding outstanding SMP/outstanding wages.  
10 This line of argument in submission also did not accord with the evidence given by the claimant herself which was that the payment in July was in relation to a missing week's payment, that week being week ending 10 May.
174. It is appropriate to record that Ms Mechan referred during the case to the claimant having said when being cross-examined that the payments being  
15 put to her by Mr Connolly were "a week out". She said that Ms Milroy had said this 3 times. When this was raised, 2 of the Employment Tribunal, the Employment Judge and one of the members, said that they had no note or recollection of the claimant so stating. The other member said that he had recall of some such comment being made. This comment said to have been  
20 made by the claimant was said to support a line of questioning to the respondent that there was only 1 occasion when Ms Kennedy was paid ahead of the claimant. That had not in fact been the claimant's evidence.
175. The Tribunal has considered very carefully the statement made by Ms Mechan that the claimant had said the figures being put to her by Mr Connolly  
25 were "a week out". All three of the Tribunal have had the benefit of listening to the recording of the relevant passage of evidence and of discussing that in coming to its decision.
176. The Tribunal is clear that no such comment was made by the claimant during cross-examination. The claimant does say that she thinks Debbie (Ms  
30 Kennedy) had not missed a complete week in her wages being paid. That

5 may be the comment Ms Mechan recalled. The claimant did not take issue when payment of her wages was being explored with her by Mr Connolly by saying he was “a week out”, She did not say that on one occasion, far less 2 or 3 occasions. The evidence the claimant gave in relation to these matters was not something asked about in re-examination.

177. Dealing with the issues before the Tribunal, the deliberations of the Tribunal which led it to the decision on those points as will now be detailed.

*Allegation 1 – interaction between Ms Milroy and Mr Best on 20 February 2019.*

178. The question posed in the issues was:

10 *“On 20 February 2019 did the respondent harass the claimant by replying “There are no wages” when the claimant attended the Crown Bar Paisley that day to enquire as to payment to her of SMP that day? Did that interaction that day constitute discrimination in terms of Section 18 of the 2010 Act?”*

15 179. There were no facts found by the Tribunal from which discrimination because of maternity leave could be inferred. The exchange was no doubt upsetting for the claimant. The respondent could have been more understanding. He could have explained more as to the situation. He could have made contact with the claimant to reassure her later in the day when payment of SMP was  
20 transferred to her account. To quote *Madarassy*, “*without more*” however, the treatment involved was not regarded as being because of the claimant exercising her right to maternity leave or because of her pregnancy.

25 180. If a Section 26 claim was involved in this ground of claim, for the reasons identified above, any such ground of claim was regarded a ill-founded. If it had been brought as a claim based on the protected characteristic of sex, the Tribunal would have been of the view that it would not have been successful. There were no facts on which the Tribunal could have inferred that the statement (assuming for the moment that it constituted harassment) was related to the claimant’s sex. There was no evidence to that effect. The  
30 comment itself was “sex neutral”.

*Allegation 2 – changing the payment day from Wednesday to Friday.*

181. The question in the issues was:

*when the respondent altered the claimant's weekly "pay day" from Wednesday to Friday on 3 April 2019 was this discrimination in terms of Sections 18 or 26 of the 2010 Act?*

182. Again, the claim, if advanced in terms of Section 26 and if based upon any alleged acts of harassment being related to the claimant's absence on maternity leave as it bore to be, led to an unsuccessful outcome. If brought on the basis of the protected characteristic being sex, there was no evidence from which the Tribunal could find any facts which supported an inference that the change in payment day was related to the claimant's sex.

183. Similarly, there were no facts from which the Tribunal could infer that the change in day of payment was because of the claimant exercising her right to maternity leave or because of her pregnancy. There was nothing to link the two or from which a link could be inferred. The change happened for all staff.

184. Further, the facts as found by the Tribunal were that this change arose from the financial difficulties of Damall Limited. It accepted Mr Best's evidence on those matters.

185. The Tribunal were alert to the fact that Mr Best produced no documentation to establish the financial position. He did however given convincing evidence as to the difficulties the business faced. He spoke about reduction in turnover, competition, purchase of alcohol for sale being from local shops rather than wholesale suppliers due to lack of funds and in addition there was the robbery in which takings were stolen. There were also the texts he sent explaining the situation. Mr Best was also working many hours in the bar himself taking no wage for that. The claimant herself referred in a text in reply to the respondent potentially "throwing the towel in" if he couldn't afford to pay staff. Neither the claimant or Ms Kennedy offered counter evidence about, for example, the level of takings or the bar being very busy with customers. The evidence that only one person worked behind the bar, with handovers operating, was also

consistent with a quietish bar. Mr Best had also personally paid the claimant's wages for the week prior to commencement of her maternity leave. That was consistent both with Mr Best seeking to help the claimant and with Damall Limited having no funds.

5 186. Payment was made on Fridays, or was scheduled to be made on Fridays after the change was announced. Ms Milroy may not have been keen on the change. She did not however make any specific objection to it, although she might not specifically have agreed to it in terms. She was pointed to the citizens' advice bureau by Mr Best to take this up with that body if she wished  
10 to do so. Alternatively she was offered the possibility of discussing it with Mr Best. She followed neither of these routes to the knowledge of the respondents.

187. In her schedule at page 112 of the file, when Ms Milroy refers to payment being late or being on time, she refers from later April onwards, to a payment  
15 as on time or late by reference to the Friday in the week of payment.

*Allegation 3 – Late payment of SMP, payment of SMP later than payment of pay was made to Ms Kennedy*

188. The question passed in the issues was:-

20 *On the occasions that the Respondent paid the claimant following her commencing a period of statutory maternity leave on 15th February 2019 SMP later than the due date or any later than Ms Kennedy received her weekly pay was this discrimination in terms of Section 18 of the 2010 Act?*

25 189. This proved to be the area of most contention during the hearing. The Tribunal was clear as to its findings in fact on the evidence it heard.

190. The claimant was paid ahead of Ms Kennedy being paid essentially the same number of times that Ms Kennedy was paid ahead of the claimant being paid. Payment to one of those employees ahead of the other was determined on an inconsistent and somewhat haphazard basis. It was consistent with

payment happening when financial circumstances permitted that. Neither Ms Kennedy or the claimant was consistently favoured one over the other.

191. The claimant's evidence was credible, as was that of Mr Best. Ms Kennedy's evidence was given in a way which did not suggest any issue with credibility. She had however little recollection of many matters about which she was asked. She was unable to counter the payment records of the respondents as put to her showing the dates on which payment was made to her. Her evidence was not considered reliable by the Tribunal, given that her memory of events and detail was not great. The claimant derived little or no support, therefore, from Ms Kennedy on matters dealt with in the Judgment.

192. The Tribunal did wonder whether the reason for payment of Ms Kennedy ahead of the claimant, when that occurred, might have been due to the fact that Ms Kennedy was present on the premises whereas the claimant was not, due to her maternity leave. There was, however, no evidence to support as being the position. It was not a line of questioning pursued when Mr Best was giving evidence. The claimant did not state that as being something previously raised with Mr Best or as being her own view of why she had been paid later than Ms Kennedy. In any event, however, and as found in fact, the claimant was paid in advance of Ms Kennedy as often as she paid after Ms Kennedy had been paid. That fact in itself was extremely problematic for, if not fatal to, the claimant's position that payment to her later than payment to Ms Kennedy was because of her exercising her right to maternity leave or because of her pregnancy, given the absence of any other supporting material for the claimant's view.

193. It is true that the claimant was paid SMP late. Again the Tribunal's view of the facts was that this was due to the financial situation of Damall Limited. Ms Kennedy was also paid late on various occasions. There were no facts found which provided a proper basis for the inference that any late payment to the claimant was because of her exercising her right to maternity leave.

194. In relation to this being a basis for a claim of harassment, the Tribunal concluded as set out in paragraph 180 above.

195. A further question for determination, essentially part of Allegation 3 is now set out:-

5 *Did the respondent harass the claimant in terms of Section 26 of the 2010 Act by engaging in unwanted conduct related to her relevant protected characteristic of pregnancy or maternity when Damall Limited did not make payment to her of SMP on the dates when that fell due?*

196. This is answered above.

*Allegation 4 – Discrimination by banning the claimant from entering the bar*

10 *When the respondent informed that claimant on 5 July 2019 that she was not to enter the Crown Bar Paisley, was that harassment in terms of Section 26 of the 2010 Act? Was it discrimination in terms of Section 18 of the 2010 Act? Was there a protected act and, if so, was the communication by the respondent to the claimant on 5 July 2019 an*  
15 *act of victimisation in terms of Section 27 of the 2010 Act?*

197. The Tribunal rejected Mr Best's evidence that his decision to ban the claimant arose from the claimant's mother and others raising with Mr Best the position in which it was alleged that there were issues as between Damall Limited and the claimant as to payment to her of SMP. Ms Kennedy, whilst struggling with  
20 recollection of some matters was clear that she had never heard any discussion amongst customers as to the claimant and payment to her. It was accepted that Mr Best would be behind the bar on his own when, therefore, customers might have challenged him as to issues of payment to the claimant. Mr Best made no reference, however, to that situation in any  
25 communication with the claimant. The claimant had not been coming into the bar. It did not seem to the Tribunal that banning her from coming into the bar would therefore solve the problem which Mr Best said existed. If customers were giving him "a hard time" as he said, banning the claimant from the bar would almost inevitably have irritated and upset those customers even more.  
30 That in turn would have been likely to lead to more conversations with him

around this matter, rather than halting those. His course of action in banning Ms Milroy from coming into the bar did not seem a logical reaction to the problem he described and which, in his evidence, had led him to take this decision.

5 198. Further, at the very least, the Tribunal would have anticipated that Mr Best would have said something about the reason for his decision, if it was as he said, at the time when he communicated it to the claimant. The timing of his message was also worthy of note. It was sent instantaneously, it appeared, in reply to the claimant's text timed at 20.12, C5.

10 199. The view to which the Tribunal came was, however that this decision was not prompted by a concern that the claimant would contact ACAS. The reply from Mr Best invites communication through ACAS.

15 200. It was the conclusion of the Tribunal that it was likely that Mr Best had become irritated by the reminder text, particularly given the earlier text. He made the transfer to the claimant's bank account at 20.59 that evening. Whether that was in fact the reason is not of significance. The Tribunal was satisfied it was not because of the claimant exercising her right to maternity leave or because of her pregnancy.

20 201. For the reasons given above, the Tribunal did not view this, as advanced, to be a competent claim in terms of Section 26 in that it was not founded upon conduct said to be related to a protected characteristic as defined in the Section.

25 202. If the protected characteristic was said to have been sex and that claim was competently before the Tribunal, its conclusion was that there no basis for a finding that the conduct of banning the claimant from entering the bar was related to her sex. The reasons for that view are the same as those set out above in explaining why any Section 26 claim based on the protected characteristic of sex which might have been before the Tribunal would have been unsuccessful.

203. The other basis of claim advanced in relation to this allegation was that it was victimisation, being a detriment to which the claimant was subjected because she had done a protected act.
204. The Tribunal considered very carefully whether the claimant had done a protected act at any point. It could see that she had complained about late payment. Various texts had been sent. It was not said that any verbal communication by the claimant amounting to a protected act had occurred.
205. The Tribunal did not regard any of the written communications from the claimant to Mr Best as comprising a protected act. It bore in mind the decision *Fullah*. It was clear in its mind that there is no requirement to refer to there having been discrimination quoting any specific statute or section of an Act. There is no set formula of words which must be followed. Nevertheless, it is the case that there must be something which is capable of being read as an allegation of discrimination.
206. In this case, the claimant had been complaining, understandably, about late payment to her. She had also complained of the lack of reply to her. She did not however send any communication which could be construed, in the assessment and decision of the Tribunal, as doing something in connection with the 2010 Act or making an allegation that Mr Best/Damall Limited had contravened the 2010 Act.
207. The high point in this regard was when the claimant referred to being “singled out”, when she said Damall Limited could claim the SMP back from the government and when she said this was “getting personal” now. At no time however did she say, or write, anything such as “I believe you are not paying me on time as you have a problem with me being on maternity leave or being pregnant” or something similar. There was nothing which the Tribunal regarded as being capable of being read as an allegation of discrimination.
208. It is true that the wages were SMP. There was however never any suggestion that it had been said to the respondents whether directly by the claimant or through ACAS at the time the negotiations as to the missing payment in



respect of 10 May were taking place, that there was thought to be a breach of the 2010 Act or that the claimant believed she might have a claim falling under its provisions. The issue was late payment of wages. Until the Employment Tribunal claim was presented, it was not alleged that the late payment was because the claimant was pregnant or was exercising her right to maternity leave. Even at that point and in this hearing, there was no close cross-examination of the respondent on the basis that he had an issue with the claimant being on maternity leave and that this had led to him paying her late or banning her from the bar.

5  
10 209. The statement by the claimant in her text of 5 July when she said "*I'm obviously not getting paid I will need to go back to ACAS...*" was also not an allegation that there had been a contravention of the 2010 Act in the clear view of the Tribunal. Similarly, it was not regarded as doing anything for the purposes of or in connection with the 2010 Act.

15 210. The events had happened during the claimant's maternity leave. That fact, taken with there being an event regarded as a detriment, unwanted conduct or unfavourable treatment does no more than raise the possibility of discrimination. Without more it is insufficient. The respondents also had genuine and accepted alternative explanations in relation to the Section 18 and Section 26 claim (if the latter was properly before the Tribunal).

20  
25 211. In its deliberations the Tribunal considered the allegations individually. It also "stood back" and looked at the situation overall. Occasionally when the complete picture is seen the nature of particular acts becomes clearer. In this case, when looked at as individual instances and also when considered in the round, the Tribunal found no facts on which discrimination could be inferred. Had they done so, there were relevant non-discriminatory reasons for the events complained about.

30 212. The Tribunal had a large measure of sympathy for the claimant. There is no doubt that Mr Best could have communicated better with her. It must have been very difficult for her when payment was delayed in circumstances where there was little communication or explanation and when her wage was

required to sustain her, her baby and her other 2 children. That cannot have been easy. The Tribunal accepted It created stress and anxiety for her. It is a pity that this special time for her and her new baby was marred in this way.

5 213. That said, the Tribunal was clear in its unanimous view, for the reasons detailed, that the claims of discrimination were unsuccessful.

214. The Tribunal understood that Mr Best was under pressure financially and was “firefighting” in the business due to those pressures. A far greater appreciation of Ms Milroy’s situation and the impact of not receiving her wage on time would have been appropriate, as would a far better level of communication with Ms Milroy about the situation.

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215. It is hoped that Mr Best keeps this in mind in the future.

15 Employment Judge: Robert Gall  
Date of Judgment: 17 August 2021  
Entered in register: 24 August 2021  
and copied to parties

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