EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104091/2020

Held in Glasgow on 15, 16 and 17 August 2022;

Members' meeting held on 15 September 2022

Employment Judge: Russell Bradley
Tribunal Member: Ms G Eckersley
Tribunal Member: S Singh

Ms Aishah Zaman	**Claimant** **Represented by:** **Ms C Greig - Solicitor**
Knightsbridge Furnishing Ltd	**First Respondent** **Not present and** **Not represented**
Shahzad Younas	**Second Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that: -

1. The claim of harassment under section 26 of the Equality Act 2010 against both respondents succeeds;

2. The claim of victimisation under section 27 of the Equality Act 2010 against both respondents succeeds;

3. The claim that the claimant's dismissal was an act of direct discrimination under section 13 of the Equality Act 2010 does not succeed and is dismissed;

4. The respondents are order to pay to the claimant, jointly and severally, the sum of EIGHTEEN THOUSAND NINE HUNDRED AND EIGHTY FOUR

POUNDS (£18,984.00) as compensation in respect of Parts 1 and 2 of this judgment.

REASONS

Introduction

1. On 27 July 2020 the claimant presented an ET1 form. She named two respondents. The first was her former employer. The second was at the time of her employment a director of the first. In the form and its paper apart (**pages 15-20**) she made claims of discrimination. The protected characteristic is sex. The claims were of victimisation, harassment and direct discrimination. All followed the termination of the claimant's contract of employment. The claimant's case was that she had been summarily dismissed on 16 April 2020.

2. On 26 August 2020 both respondents, separately, lodged ET3s. On 24 February 2021 both respondents (again separately) lodged Particulars of their responses. On 17 March 2021 the first respondent lodged amended Particulars. The respondents denied that the claimant had been dismissed on 16 April.

3. On 19 March 2021 a telephone conference preliminary hearing took place. Certain issues were identified. The Note contains discussion as to the format of the hearing, use of witness statements, documents for a final hearing and the production of a schedule of loss.

4. A hearing fixed for 17 to 21 and 24 January 2022 did not take place.

5. At a telephone conference preliminary hearing on 6 May 2022 the second respondent's representative advised that he had had a serious accident in Pakistan and was not fit to return to the UK. The Note recorded that the final hearing should be in person. On 10 May Notice of this hearing was issued.

6. On 11 July the first respondent's representatives (Peninsula Business Services Ltd) withdrew from acting for it. At the same time, it provided an email address for the first respondent. They also clarified that they no longer represented

either respondent. From 4 May 2022 the sole director (and person with significant control) of the first respondent was Sameer Khan.

7. On 14 July Mr Khan said that the second respondent had no visa to enter and no ties with the UK and could not attend the final hearing. He also said that the first respondent was in the process of "*filing for bankruptcy*".

8. On 21 July the claimant made an application to strike out the respondents' responses and repeated an email address for the second respondent previously provided by his representative. By email of 3 August, the tribunal advised that the strike out application was refused. It noted from recent correspondence that neither respondent intended to participate in the final hearing. Given the information about the intentions of both respondents, we considered that we should proceed with the hearing in terms of Rule 47 in their absence.

9. A joint indexed bundle was lodged. It contained 323 pages. For this hearing the claimant prepared a separate bundle. For ease we added it so that the joint bundle included it as pages 324 to 330. On the second day of the hearing, Ms Greig then added pages 331 and 332 being an extract from entries at Companies House concerning the first respondent.

10. In the course of the hearing we viewed three video recordings, each of a different short period of time on 16 April 2020. They were then available for us after the conclusion of the hearing.

11. After the hearing and on 18 August 2022, the claimant lodged an updated schedule of loss. Its primary purpose was to show; an increase in the claimant's earnings since her dismissal; a decrease in her claim for past loss of earnings; no future loss; and thus a net reduction in the total claim.

12. In the course of the claimant's evidence, it became clear that the pay recorded for payroll purposes was substantially less than that paid by the first respondent for her work. The point is perhaps most obvious from a comparison of (i) a P60 within the bundle (**pages 297-298**) for the tax year to 5 April 2020 which discloses pay of £4334.88 and no deductions for tax; and (ii) the claimant's

schedule of loss which says that by 16 April 2020 her net monthly pay was £1700.00. In the course of the hearing, we raised with Ms Greig the possibility that the claimant had been employed under an illegal contract, which position could mean that she could not insist on her claims. It appeared clear from those discussions that she had anticipated, prior to 15 August, the possibility of the point arising. The issues for us thus came to include whether the claimant was entitled to a remedy where she may have been engaged by the first respondent under an illegal contract.

The issues

13. At the preliminary hearing on 19 March 2021 and in light of what had been said by the claimant in her ET1 and agenda, it was noted that the issues for determination were:-

    1. Whether by reference to the details set out in paragraphs 4 to 24 of the ET1 paper apart:

        i. The claimant was less favourably treated because of sex (section 13)

        ii. The claimant was subjected to unwanted conduct related to sex which had the purpose or the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (in terms of section 26(1))

        iii. The claimant was subjected to unwanted conduct of a sexual nature which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (in terms of section 26(2))

    2. If so, whether, because of the claimant's rejection or submission to the conduct, the claimant was less favourably treated than had she not rejected or submitted to the conduct (in terms of section 26(3))

    3. Whether the claimant did (or was believed to have done) a protected act (namely making an allegation that the second respondent had

contravened the Equality Act and/or the claimant brought proceedings under the Act)

4. If so, whether the respondents subjected the claimant to a detriment because of that protected act.

14. The Note from the preliminary hearing on 19 March recorded the tribunal's view that various time bar arguments should be reserved for the final hearing. Given the parties' pleadings and arguments, the time bar issues were:-

i. Does the conduct relied upon by the claimant extend over a period such that it is to be treated as done at the end of the period?

ii. If so over what period does it extend?

iii. If so is the claim in time?

iv. If not in time, is it just and equitable to extend time?

15. Taking account of the question of illegality in the performance of the contract, additional issues arose being:

i. Was there illegal performance of the contract of employment in that the parties knew that no income tax or national insurance contributions were being paid to HMRC during it, or during part of it?

ii. If so, does that illegality result in the claimant being unable to enforce the rights she seeks to enforce in these proceedings?

Findings in Fact

16. From the evidence and the Tribunal forms, we found the following facts admitted or proved.

17. The Claimant is Aishah Zaman. She is 35 years of age. She is single.

18. The first respondent is Knightsbridge Furnishing Limited. It is a company incorporated under the Companies Acts. It trades from premises at Unit E, 1 Glenburn Road, East Kilbride. The premises consist of an office, a packing area and a warehouse (see **page 136**).The first respondent sells household

goods, textiles, bedding, and soft furnishings direct to the public via online websites such as Amazon.

19. The second respondent is Shahzad Younas. He was a director of the first respondent. He first held office as director between 7 May 2019 and 20 January 2020. He again held that office between 1 February 2020 and 20 December 2021. He lastly and briefly held office between 3 and 4 May 2022. Between 18 June 2019 and 20 December 2021 he owned 75% or more of the shares of the first respondent. The second respondent is known in the community in the area of the south of Glasgow. Some of his connections are with certain Cash & Carry businesses. He is married. His wife's normal residence is in Pakistan. The claimant was aware while she was employed that he is married.

20. Since 4 May 2022 the sole director (and person with significant control) of the first respondent has been Sameer Khan (**page 331**).

21. On 10 July 2018 the claimant signed a written statement of main terms of employment (**pages 84-86**). As per that statement she; was employed by the respondent from 1 July 2018; was employed as office assistant; was due to work 11 hours per week; and was due to be paid at £7.83 per hour. The statement refers to an Employee Handbook for matters including discipline and grievance.

22. The claimant has worked as a local DJ. That work is in the main at weddings and birthday parties. She has worked as a DJ at Awaz FM. It is a local radio station which brands itself as being at the heart of Glasgow's Asian community. She worked as a DJ during the time of her employment with the first respondent. The claimant and the second respondent have a number of common contacts within that community. They communicated both orally and in writing in English and in Punjabi.

23. Shortly after starting, the claimant was appointed to office manager albeit there was no increase in her pay at that time. She worked full time in that role until her summary dismissal on 16 April 2020. In her role as office manager the claimant was responsible for the first respondent's East Kilbride premises. That responsibility included; processing and packing of orders; liaising with couriers

and suppliers; ensuring that orders were despatched on time; and assisting with interviewing for staff. In the time of her employment, the number of permanent staff varied. The first respondent also engaged individuals on an *ad hoc* basis.

24. In the time of her employment the claimant reported to the second respondent. In the period between July 2018 and about the middle of 2020 the second respondent spent the majority of every year in Pakistan. He supervised the first respondent's business and the claimant from there on a daily basis by use of; Skype and telephone calls; WhatsApp messaging; and CCTV cameras installed at the premises. He visited the UK and the first respondent on a visa basis. Those visits were for about 2 weeks at a time. In about late 2019 the second respondent obtained a visa that allowed him to visit the UK for longer "*stays*". The visa also allowed him to visit the first respondent's business in Budapest, Hungary.

25. On 23 August 2018 there was an exchange of WhatsApp messages between the second respondent and the claimant (**page 239**). The partially obscured first messages from the claimant appear to refer to the East Kilbride warehouse requiring to be cleaned. The second respondent replied, saying, "*Need to clean my flat one day*" followed by the 😂 emoji and "*You r gud cleaner*" followed by 😜. The claimant took this to mean that the second respondent wanted her to clean his flat for him. On many occasions when he was in Scotland, the second respondent asked (only) female employee colleagues of the claimant "*where is my lunch?*" or "*where is my dinner?*", using an expression in Punjabi the meaning of which suggested that he saw them as liable to be asked to do anything for him because he paid their wages. He asked the claimant several times to do work such as this. She did so only once or twice.

26. On 2 September 2018 the second respondent sent a WhatsApp message (**page 240**) to the claimant saying, "*I increased ur salary to 1500 GBP now*." The claimant understood this to be £1500 per month. That increase was not reflected in what was shown by the first respondent in pay slips issued by it to

the claimant. The pay slip dated 5 February 2020 (**page 311**) shows gross pay to the claimant at the rate of £8.21 per hour; work for that month over 44 hours; and gross pay of £361.24.

27. On 2 November 2018 the second respondent sent a WhatsApp message (**page 244**) to the claimant saying, "*Motee u need to start gym*". The claimant understood "*Motee*" to mean (from Punjabi) "*fatty*". In exchanges with the claimant that followed that day, the second respondent continued, "*Take my member ship in same"; "Than we both go"; "I want u to be slim and smart"; "Boss also wants slim smart girls in office*"; The claimant was unhappy at the suggestions made by the second respondent. She ended that exchange with "*Oye*", by which she meant "*behave*", or "*watch what you are saying*" or "*sshh*".

28. On 3 November 2018 in a WhatsApp exchange between the claimant and the second respondent (**pages 292-296**), the claimant said, *"I left VIP entertainment*". She was referring to stopping work for a company through which she did some DJing work. In a reply the second respondent suggested (in Punjabi) that that kind of work was the "*work of prostitutes*" or work which is done in a brothel. Among her replies the claimant used the abbreviation "*Lol*" then said "*never*." She did so in an attempt to keep the tone of their exchange light because she worked for the second respondent, saw him every day, and was afraid of him. The claimant was hurt and angry. DJing was work that she had been doing for about 8 years.

29. On 3 November 2018 the exchange continued with the second respondent using Punjabi from which the claimant understood him to say, "*I'm not your brother*", "*be human*", "*Don't break my heart*" and (in English) "*I fency u*". The claimant understood these messages to mean that the second respondent was physically attracted to her. She replied (in Punjabi) using expressions suggesting that she "*would be a man*", and in that way he "*fancied*" her. In another message immediately following he offered to buy the claimant a Mercedes car "*so people get more jealous*". The second respondent continued in that exchange suggesting (in Punjabi) that someone would marry her only if she left "*this work of prostitution*". He asked (again in Punjabi) "*should I stop fancying you then*." The claimant was aware that the second respondent had

purchased a car for a female colleague. She understood that he did so in order that she would be more "*tied*" to him and the first respondent. The claimant was also aware that a male colleague asked the second respondent for a car. His response was to become annoyed and to dismiss him.

30. On 1 April 2019 the claimant sent two WhatsApp messages to the second respondent (**page 254**). The first said, "*Home is sorted*." The second said "*Written and signed all meters Gas us pay as you go*." She was referring to the fact that, on his instruction, she had found him a "*new*" flat in Scotland via a letting agent. She had collected the keys on his behalf. He replied to say, *"U can enjoy for 1 month till I come*" and "*Lol*". The second respondent was, at that time, in Pakistan. The claimant replied, "*Leh, I got my own*". The second respondent replied immediately saying, "*For date I mean*" then "😆*"*. The claimant was of the view that these comments were unnecessary.

31. On 15 April 2019 in another WhatsApp exchange (**page 255**) the second respondent suggested that; he could add the claimant to his insurance so as to allow her to drive his Porsche car; that "*Aunties*" would say as a result she was his girlfriend; that when he was in Scotland he intended to take her to the gym daily. These comments were unwanted by the claimant. She saw the suggestion of the need to go to the gym as being a personal comment about her appearance.

32. On 2 August 2019 the second respondent booked tickets to take the claimant to see a film at the Silverburn cinema. He sent a WhatsApp message at 19.06 to confirm (**page 257**). He came to the claimant's home that evening. He tried to telephone her to persuade her to go with him. The claimant had felt forced to agree to go with him. On the day, she did not want to go. She did not reply to his messages that day. She did not answer her telephone to him. She did not answer the door of her home to him. At 02.40 on 3 August, she messaged him **(page 257)** to apologise on the pretext of having fallen asleep on her sofa.

33. In August 2019 the second respondent discussed the claimant in front of some of his friends. She was present. August is the beginning of a wedding season. His friends were known to her. Some of them were to do with local Cash &

Carry businesses. The second respondent complimented her, in front of his friends, that the claimant looked "*really pretty*". He complimented her for having a "*good look*". His friends looked up and congratulated him on having pretty staff. In front of the proprietor of a neighbouring property he commented on her being "*made up*". He suggested that instead of going to a wedding (as she had explained) she was going "*somewhere else*". The claimant believed that he was suggesting that she was meeting a boyfriend. On other occasions when she had declined to "*go out*" with the second respondent, he suggested that she was going out with others. The claimant told him that he did not like such comments. She asked him not to repeat them.

34. On 4 September 2019 the second respondent sent a WhatsApp message to the claimant containing the graphic image of the genitalia of a woman (**page 259** and also on **page 260**). He immediately then said in another message, "*Look at what she is doing now*." The claimant understood him to be referring to an employee within the Budapest business. She was at that time known to the claimant. The second respondent then telephoned the claimant. He regarded the image as funny. He suggested to the claimant that it was the other employee's way of flirting with him. He said that he had sent it on to the claimant "*to let her know*" what she was doing. The claimant was horrified. She was angry. She was shocked. The claimant's message reply was for him to report it to the police and not to reply to their colleague.

35. In September 2019 the second respondent instructed the claimant to unpack his personal clothes from a suitcase, including his underwear. He told her to do so as this was "*woman's work*."

36. On 7 November 2019 the second respondent sent by WhatsApp to the claimant a video of a female running on a football pitch (**page 264**). It appeared to the claimant to be more about certain parts of her anatomy than to do with football. She saw it as being of a sexual nature, not to do with sport. The second respondent suggested that it was to be the first respondent's "*new marketing video*." The claimant had commented "*No it's not* [;] *dream on LMAO* 😂". The abbreviation stands for "*laughing my arse off*."

37. In March 2020 the second respondent was in Scotland. He had persuaded a female friend of a Hungary-based colleague to work for the first respondent. The second respondent said to both of them that as the gym next to the first respondent's premises was closed because of the pandemic, they could borrow a treadmill from him, exercise in the office so as to lose weight.

38. On 2 April 2020 the second respondent sent the claimant a WhatsApp message saying, "*Sent u 1338 more so now ur salary is 1700*" (**page 285**). The claimant understood this to mean that her salary had been increased to £1700 per month.

39. She replied that day (**page 286**). She referred to previous discussions between them about a car allowance and fuel. She noted that she did not have holiday entitlement "*as I'm not on the books*". She said that she did more than a full time role on and off site. She asked him to "*think about it*".

40. In April 2020 the claimant had the impression that a female colleague had rejected advances made to her by the second respondent. He suggested to the claimant that as that colleague was not interested in him she was therefore a lesbian. He then suggested that both of them (the claimant and her female colleague) were lesbians. He suggested that "*they should get together*". At this time, he repeated his comments from November 2019 to the effect that no-one would marry her unless she left "*this work of prostitution*", referring to her DJ work. He said that she should cease her DJ work because it was not a good job for girls but was "*prostitutes' work*". He said that he had discussed those views with the first respondent's accountant. The claimant felt degraded by his comments. She felt degraded by the idea of the second respondent sharing his views with others. She herself had cause to be in contact with the accountant to do with matters concerning the business.

41. At 10.18am on 16 April 2020 the claimant was at work in the main office of the first respondent's premises as it is shown on the plan (**page 136**). She was working and sharing that office with two female colleagues at that particular time of that day. The second respondent was in the office marked on the plan as his own. A colleague, Tasneem Sheik, was also at work at the time. She

was one of two colleagues who had been appointed by the second respondent a week or so before 16 April. The other was Zeenat Sattar. Around this time, the second respondent instructed Ms Sheik to, in turn, instruct the claimant to carry out a reconstruction of her office. The claimant explained that she was busy, and she would ask some of her male colleagues to help, later. On more than one occasion in a short period of time, she used the two windows between the two offices (as shown on the plan) to explain her position to the second respondent. She remonstrated with him. The second respondent told Ms Sheik that the claimant was "*an idiot*" and "*a pain in the arse*". With assistance, the claimant began to move some of the furniture around within the main office. The second respondent came into the main office. He shouted and yelled at her. He pointed his finger at close range in her face. He was spitting in her face as a result of his shouting. He said that another work colleague, Abida Parveen, had said that the claimant had said that when the business was set up in Budapest, the first respondent's business would close down. The claimant said that she wanted to ask Ms Parveen if this were true. By about 10.31am both the claimant and the second respondent went into the packing area via the small corridor. Ms Parveen was in that area. She confirmed that the claimant had indeed said as the second respondent had described. The second respondent continued to shout at the claimant. They both walked back towards the entrance to the small corridor. The second respondent pointed as if to signal that the claimant should go back into the main office. With both hands he grabbed the claimant's right arm. He pulled her from the packing area back into the small corridor. He told the claimant to "*get out*". He said to her that he shouldn't have tolerated her. He said that he had been "*tolerating her for months*." They both returned to the main office. The claimant returned a number of keys to the second respondent. They continued to argue. The second respondent insulted her by implying that she was a prostitute. He repeatedly shouted at her, "*I am going to fuck you*". The claimant understood him to mean that he would try to damage or destroy her life or reputation. The second respondent told her to leave immediately and not return. There then followed a discussion involving the claimant, Ms Parveen and the second

respondent. The claimant threatened to call the police. She left the premises at 10.38am.

42. The claimant believed that she had been dismissed by the second respondent because; she had stood up to him; she had rejected his advances; she had spoken up to him who saw himself as "*a man of power*"; she had no right to do as she had done, to reply to him; he was showing off to two recently recruited female members of staff; and was in her words "*making a stand*" in front of them. She believed that he would not have spoken to a male employee in the same way. She believed that he would not have pulled a male employee in the way he had done with her when she was pulled from the packing area into the corridor.

43. On 21 April 2020 (11.41am) the claimant emailed the second respondent (**pages 143-144** repeated at **page 141**). In it she; suggested arrangements for the collection by her of her personal belongings; referred to advice from the police following her belief that he had been charged; recorded her belief that she had been summarily dismissed on 16 April, by being told to leave and hand over keys; expected a letter to confirm her dismissal along with payment of what she believed to be due to her to 16 April; and referred to goods which she had purchased from the first respondent the previous month. The second respondent replied by 13.15pm that day. He said amongst other things; letters had been sent to her via lawyers; he denied any assault of her and threatened to report an attempt to pervert the course of justice; and set conditions for the claimant's attendance. The claimant in turn replied on 22 April at 00.11am. In it she noted her main concern was to be paid wages said to be due to her.

44. On 11 May 2020, the claimant received £385.00.

45. From about April until about the middle of 2020 the claimant was in receipt of Employment Support Allowance.

46. On 14 September 2020 the claimant began part-time employment with Premium Products 16 Limited. At that time she was paid £10.00 per hour (see **page 312**). She is paid 4 weekly. She initially worked on a part time basis. She

then worked full time with them. By April 2022 her net pay for the preceding 4 weeks was £1700.57 (**page 328**).

47. In the period between 16 April and 5 August 2020 the respondent purported to allege acts of misconduct on the part of the claimant. On the latter date, Tasneem Hussain, administration assistant of the first respondent wrote to the claimant purporting to summarily dismiss her (**pages 222-223**). The allegations included fraudulent theft of money (£17,718.29). The allegations had no factual basis. They were false. The second respondent told a few people in the community about those allegations. The claimant was advised by some of them that they had heard about the allegations from the second respondent. She heard from some of them that the second respondent had told them that she had "*stolen from me*"; that "*I'll let her off if she drops her claim*"; and "*it won't be good for her*."

48. Early conciliation began on 14 May 2020. A certificate was issued on 12 June (**pages 1 and 2**).

49. On 24 December 2021 the claimant's general practitioner wrote to her solicitor (**pages 329-330**). The letter says that; the claimant first presented in April 2020; she did so with symptoms of anxiety, said to have followed an incident with "*her boss at work*"; she was stared on medication for anxiety; she was referred to a counselling service; she next presented in May 2020; the claimant's self-esteem had "*plummeted*"; she reported that she was feeling "*upset all the time*"; her sleep had been affected; and she was at that time prescribed an anti-depressant for "*low mood*". The practitioner noted that the claimant had a past history of low mood and anxiety and was concerned that these issues had returned as a result of work issues. The practitioner explained that; symptoms continued "*well into 2021*"; she presented again in March or April 2021 "*with low mood and anxiety particularly related to the court case*"; she continued on an anti-depressant, Sertraline; and counselling was again suggested. The practitioner concluded that by December 2021 the claimant; was off anti-depressants but that her anxiety was exacerbated by the then up and coming final hearing of this case.

Comment on the evidence

50. We attached no weight to the material within the bundle which was not spoken to by the claimant. Similarly we attached no weight to the "*Expert Assessment and Opinion Report*" (**pages 182-211**) albeit the claimant was asked about some of it.

51. **Pages 238-296** (about a fifth of the overall bundle) was indexed as undated WhatsApp messages and translations of some of them. While we appreciate that the claimant may not have had responsibility for including them all or indeed indexing them, it was unhelpful to have (i) included that number where many were not referred to (ii) included them all together as a single index entry and (iii) not indexed them by date.

52. None of the three clips of CCTV footage had sound. We relied on the claimant's recollection of the verbal exchanges, albeit they were being made in a heated argument.

53. We accepted that the claimant's evidence was credible and reliable but with a degree of hesitation. The hesitation arose from the manner of asking questions by reference to her paper apart which was frequently used as a prompt for her evidence.

Submissions

54. Ms Greig made an oral submission in a number of parts. We mean in summarising it. First, on the evidence, she invited us to accept the claimant's evidence as both credible and reliable. Second, she argued that the claimant had made good her claim under section 26. There was, she said, an ongoing course of regular offensive incidents; evidence of negative and aggressive reaction by the second respondent to the rejection of his advances; and there was evidence of the claimant's negative reaction to his behaviour. Third, on the question of time-bar, she argued (under reference to the pled position at paragraph 4-22 of her paper apart) that the "*conduct*" on which she relied extended over a period either to the time of her dismissal on 16 April 2020 or (at worst) until earlier that month. Early conciliation began on 14 May, and thus

the claims were in time. The basis of her claim of "*conduct extended*" was supported by them having been carried out by the same perpetrator (the second respondent), in the same place (her workplace) and being of the same "*nature*." Alternatively, time should be extended on a just and equitable basis on the ground that the claimant had been intimidated thus explaining any "*delay*". Fifth, she addressed the claim under section 13. She accepted that if we found for the claimant on the factual basis of her claim under section 26, there was no need for that basis to be considered again under section 13. However, the claimant also argued that her dismissal was direct discrimination. She referred to the cases of ***O'Donoghue v Redcar & Cleveland Borough Council*** [2001] IRLR 615 and ***Nagarajan v Agnew*** [1994] IRLR 61 for the proposition that where there are "*mixed*" causes for a dismissal, as long as it could be said that one of them (not necessarily even the main one) was "*something to do with*" the protected characteristic then that is sufficient. Fourth, and on the question of the claim of victimisation she said; the employment ended on 16 April; everything alleged against her after that day was false; it was enough that the respondents believed that she had done or may do a protected act; that the claimant's email of 21 April (**pages 140-141**) when received was enough to show that belief; by 7 May (**pages 163-168,** letter from Ms Greig to respondent's agents) the claimant was clearly asserting claims so as to be a "*protected act*"; as the claimant's position became clearer, the respondents' allegations against her became more grave; the point is obvious comparing the allegations on 28 May with those on 10 June by which time the allegation of fraud had been included; and it was thus reasonable to conclude that the gravity of the (groundless) allegations increased "*because of*" the assertion of her claims of discrimination. Sixth, and under reference to the cases ***of Hall v Woolston Hall Leisure Ltd*** [2000] IRLR 578 and ***Hounga v Allen and another*** [2014] ICR 847 there is a distinction between seeking a remedy based on a contract found to be illegal and a claim of unlawful discrimination, "*a statutory tort*". The claimant's case was within the latter category and thus not unenforceable by reason of illegality. Finally, on loss, she handed up extracts from ***Harvey*** of example cases of awards within the middle band of ***Vento v Chief Constable of West Yorkshire Police*** [2003]

ICR 318, albeit she recognised the need to lodge a further undated schedule which she did after the hearing by email. She also sought an uplift of 25% on the whole sum (loss of earnings and injury to feelings). She concluded by arguing for a remedy against both respondents jointly and severally under reference to section 109(2) of the Equality Act 2010 and the case of ***Bungay and other v Saini and others***, UKEAT/0331/10. By email dated 30 August and at our request, Ms Grieg set out the passages of evidence on which she relied in support of the proposition that the dismissal was direct discrimination. It referred to two passages of evidence.

Relevant statutory provisions

55. Section 26(1)-(4) of the Equality Act 2010 provides, "*A person (A) harasses another (B) if- (a) A engages in unwanted conduct related to a relevant protected characteristic, and(b) the conduct has the purpose or effect of—(i) violating B's dignity, or(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.(2) A also harasses B if—(a) A engages in unwanted conduct of a sexual nature, and(b) the conduct has the purpose or effect referred to in subsection (1)(b).(3) A also harasses B if—(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,(b) the conduct has the purpose or effect referred to in subsection (1)(b), and(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—(a) the perception of B;(b) the other circumstances of the case;(c) whether it is reasonable for the conduct to have that effect*."

56. Section 13 of the Act provides, "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

57. Section 27(1) and (2) of the 2010 Act provides, *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2)*

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

58. Section 39(2)(c) of the Act provides, *"(2) An employer (A) must not discriminate against an employee of A's (B)—(c) by dismissing B*;"

59. Section 123(1) of that Act read short for present purposes "*provides proceedings on a complaint* [under the Act relating to work] *may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable." Section 123 (3) provides, "For the purposes of this section—(a) conduct extending over a period is to be treated as done at the end of the period.*"

Discussion and decision

60. We took account of the statutory provisions noted above and the caselaw to which reference was made in the submission and other caselaw referred to below.

61. It is convenient and logical to consider first the claim that the claimant's dismissal was direct discrimination. If it was not, it does not succeed. If it was, it is then necessary to consider whether it is unenforceable through illegality.

62. In our view the dismissal was not an act of discrimination. We took careful account of the evidence of what occurred on 16 April. We have made findings based on that evidence. We have taken account of the fact that no express words of dismissal were used at the time. Ms Greig referred us to the cases of ***O'Donoghue*** and the earlier decision of the EAT in ***Nagarajan.*** She relied on paragraph 15 of ***O'Donoghue***. It begins, "*The industrial tribunal's reasons for finding in favour of the appellant were set out as follows*" and then repeats paragraphs 16 to 19 from those reasons. Paragraph 19 is the employment tribunal taking account of what had been said in ***Nagarajan*** referring to an

earlier decision of the Court of Appeal (in ***Owen & Briggs v James*** [1982] IRLR 502) "*Where an industrial tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the industrial tribunal finds that the unlawful motive or motives were a sufficient weight in the decision-making process to be treated as a cause, not the sole cause, but as a cause, of the act thus motivated, there will be unlawful discrimination*." In the later case of ***Nagarajan v London Regional Transport*** [1999] ICR 877 decided in the House of Lords Lord Nicholls (discussing the previous provisions of the Race Relation Act 1976) said, "*Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question*." In the earlier case of ***James v Eastleigh Borough Council*** 1990 ICR 554 the House of Lords considered that cases of direct discrimination can be established by asking the simple question: would the claimant have received the same treatment as a man but for her sex? The Supreme Court considered the question in ***R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors*** 2010 IRLR 136, SC. Lord Phillips, then President of the Supreme Court, was of the view that in deciding what were the 'grounds' for discrimination, a court or tribunal is required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. The motive or intention behind the treatment complained of is irrelevant ("*Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious*" (EHRC Code of Practice paragraph 3.14. See also ***Amnesty International v Ahmed*** 2009 ICR 1450). Ms Greig accepted that the description of the claimant that she was "*an idiot*" and "*a pain in the arse*" did not suggest discrimination. These were words used by the second respondent very shortly before the time of her dismissal. On the claimant's case, she was dismissed because she stood up to the second respondent and had begun to

do so over some months prior to April 2020. There are two difficulties with this argument. First, even if the factual criteria applied by the respondents as their basis for the decision to dismiss her was that she had done so, that does not suggest discrimination either. We took account of our finding that the second respondent also said that he could no longer tolerate her, having done so for some months prior. That is not indicative of sex being a reason for her dismissal. Second, the claimant gave evidence that a former colleague male employee had annoyed the second respondent and then been dismissed by him because he had sought a car like some female colleagues. This suggested that he had behaved in a similar way with a male colleague. On the claimant's case, the second respondent had become angry at her in the exchanges leading up to the dismissal. In our view his anger was a contributing factor in his actions. But the evidence is that his anger was because, as she said, she stood up to him. Another way of describing it is to say that she openly defied him in front of others, indicated that she would not do what he told her to do, and challenged him. He reacted to that situation, but again that does not support a conclusion that sex was a factor. We answer Issue 1 (i) insofar as it refers to her dismissal in the negative.

63. In our view the claimant was harassed contrary to section 26. She was subjected to an environment of regular conduct of a sexual nature or that related to her sex by the second respondent. It had the purpose or effect of violating her dignity and created an intimidating, hostile, degrading, humiliating or offensive environment. The suggestion that she should cook and clean for him is degrading, humiliating and offensive. It connotes an outdated image of a subservient female. The messages which suggested that the first respondent required female employees of a certain physical appearance are clearly related to the claimant's sex. They suggested that females were employed for reasons unrelated to an ability to do the job. That is obviously degrading. It hardly needs saying that to suggest that the claimant was a prostitute or did the work of a prostitute relates to her sex and is degrading, humiliating and offensive. Messages suggesting the desire for a relationship relate to her sex, were unwanted and were humiliating. The image sent on 4 September 2019 and the video sent on 7 November 2019 are obviously degrading, humiliating or

offensive and of a sexual nature. We therefore answer Issues 1(ii) and (iii) "*yes*". We answer Issue 2 in the negative.

64. By 7 May 2020 the claimant had intimated claims of sexual harassment and victimisation (**pages 163-168**). That letter was a protected act as it made an allegation that both respondents had contravened the 2010 Act. Prior to that date no allegation against the claimant was of fraud. After that date (on 3 June) the allegations against her included one of fraudulent theft of a significant sum of money. We accepted the claimant's evidence that the allegations were untrue. We also accepted her evidence that the second respondent had told some of his community contacts that she had stolen from him and that he would overlook it if she withdrew her claims of discrimination. In our view the clear inference is that the false allegations were made because of the protected act. We answer Issues 3 and 4 "*yes*".

65. It is logical next to consider the question of illegality. If it is relevant and results in the other claims being unenforceable then they would be dismissed. As the case of ***Hounga*** recognised, discrimination is a form of statutory delict (or as the Supreme Court in that case said, tort). It is the effect of illegality on a delictual action that has to be considered. The facts in ***Hounga*** are very different from those here. In that case, the respondents offered to employ the claimant, a 14-year-old from Nigeria, as a home help in the UK in return for schooling and £50 per month. They helped her obtain false identity documents with which she entered the UK and obtained a six-month visitor's visa. She lived in their house and looked after their children, despite knowing that it was illegal for her to work in the UK. She was not enrolled in a school and was not paid any wages. After 18 months the first respondent evicted the claimant from the house, thereby dismissing her from the employment. The claimant issued proceedings in the employment tribunal for, amongst other things, unlawful discrimination in relation to her dismissal, contrary to section 4(2)(c) of the Race Relations Act 1976. The tribunal found that, prior to evicting the claimant, the first respondent had inflicted serious physical abuse on the claimant and had caused her extreme concern by telling her that, were she to leave, she would be sent to prison because her presence in the United Kingdom was

illegal. It has been said that in answering the question of the effect of illegality on a delictual action, the Court did so "*in a way that arguably raised as many problems as it solved*."[1] It would appear that the Court applied the "*inextricable link test*". It is possible to find a summary of it in the judgment of Mance LJ in the Court of Appeal's decision in ***Hall v Woolston Hall Leisure Ltd*** [2001] ICR 99 which is repeated in ***Hounga***. In ***Hall*** the employer dismissed the claimant because of her pregnancy and thus discriminated against her on ground of sex. Her wages were £250 net per week but, to her knowledge, were misrepresented on her pay slips as £250 gross per week so that the employer might account to the Inland Revenue for less sums than were due. Rejecting the employer's defence of illegality, the Court of Appeal allowed her appeal against a refusal to include in her award compensation for loss of earnings. At paragraph 79 Mance LJ said, "*While the underlying test therefore remains one of public policy, the test evolved in this court for its application in a tortious context thus requires an inextricable link between the facts giving rise to the claim and the illegality, before any question arises of the court refusing relief on the grounds of illegality. In practice, as is evident, it requires quite extreme circumstances before the test will exclude a tort claim*." In our view there is no "*inextricable link*" between the facts which give rise to the claims of harassment and victimisation in this case and the illegality (the non-payment to HMRC of income tax and national insurance contributions on the claimant's pay). Harassment is a free-standing cause of action. It was introduced as such in October 2005 to comply with European Community law. Prior to that, discriminatory "*harassment*" at work had to be brought as a claim of direct discrimination. Section 26 does not require the comparative approach of section 13. A claimant must instead establish a link between the harassment and a relevant protected characteristic. Section 26 is clear about the behaviour that is actionable. In our view the conduct of the second respondent in this case which we have found to be harassment has no link with the non-payment of income tax or national insurance contributions. The claim of victimisation is of

[1] Harvey on Industrial Relations and Employment Law/Division AI Categories of Worker/1. Categories of workers/B. Employees/(10) Illegality and ultra vires/(a) Illegality paragraph [66]

post-termination conduct. It self-evidently is not linked to any question of illegality. We answer Issue 9 "*yes*" and Issue 10 "*no*".

66. On the question of time bar, we accept that the conduct which gave rise to the claim of harassment extended over the period from about August 2018 until sometime in April 2020. Early conciliation began on 14 May 2020. The ET1 presented on 27 July was presented in time. No time bar question arises about the victimisation claim. We answer Issue 5 "*yes*"; Issue 6 "*from about August 2018 until sometime in April 2020";* and Issue 7 "*yes*". Accordingly, Issue 8 is unnecessary.

Remedy

67. The latest schedule of loss contains the following claims and assessment:-

    1. Loss of earnings (past loss only)
    2. Injury to feelings
    3. Uplift of 25% on 1+2
    4. Interest on injury to feelings
    5. Interest on lost earnings
    6. Impact of grossing up

68. We deal with each in turn. There is no award for lost earnings as the claim of direct discrimination arising from the dismissal does not succeed. We award compensation for injury to feelings in the sum sought, £16,000. We agreed that the unreported decision in ***X v Y and Z*** (2202979/04 from March 2006) in which an award of £15,000 was made is an appropriate benchmark. There is no uplift on that award as that claim is not one to which the ACAS Code applies. Interest on the award for injury to feelings is (as sought) £2,984.00. There is no interest due on lost earnings. The total award is therefore £18,984.00. It is not liable to grossing up.

69. The respondents are liable on a joint and several basis (***Way and Another v Crouch*** [2005] ICR 1362). This is reflected in our judgment. We accepted that

the first respondent was responsible for the actions of the second respondent in terms of section 109(2) of the Act and the case of ***Bangay*** to which Ms Greig referred.

Employment Judge: Russell Bradley
Date of Judgment: 04 October 2022
Entered in register: 04 October 2022
and copied to parties