EMPLOYMENT TRIBUNALS

Claimant: KZ

Respondent: The Nags Head Reading Limited

Heard at: Reading **On:** 16, 17, 18, 19 January 2023

Before: Employment Judge Shastri-Hurst, Mrs D Ballard and Mrs B Osborne

Representation
Claimant: In person
Respondent: Mr P Clarke (consultant)

RESERVED JUDGMENT

1. The claimant's claim of harassment related to sex is upheld in relation to the allegation that the respondent "failed to prevent any recurrence" of sexual harassment;
2. The claimant's claim of victimisation is upheld in relation to Issues 3.5, 3.6, 3.9, 3.10;
3. The claimant's claim of unauthorised deduction of wages is upheld, in that they were not paid for 117.70 hours of holiday for the annual leave year 2020-2021, totaling an underpayment of £1,177;
4. All other claims are dismissed.

REASONS

INTRODUCTION

1. The claimant was employed as a bartender by the respondent, a small, family-run pub, from October 2019 to 1 August 2021.

2. The claimant went through the ACAS early conciliation process between 3 October 2020 and 3 November 2020, following which they presented their

claim to the tribunal on 12 November 2020. By that claim form, the claimant raised claims of sexual harassment (S26 of the Equality Act ("EqA")), victimisation (s27 EqA) and unauthorised deductions from wages (s13 of the Employment Rights Act 1996 ("ERA")).

3. The claim relates to the claimant's allegations that they were sexually harassed by a contractor/customer of the respondent ("the Third Party"), and that the respondent failed to protect them from such behaviour. The claimant says that they made the respondent, namely Samuel "Jody" Oates (director) ("JO") aware of certain incidents in January 2020 and, following the claimant raising those complaints, they were subjected to a series of detriments.

4. The claimant also alleges that they were not paid holiday pay that they should have been paid for the leave year 1 April 2020 to 31 March 2021. The respondent's case is that the claimant was paid everything they were owed, and in fact may well have been overpaid.

5. The claimant represented themselves, with moral support from Mr Christopher MacLennan ("CM"), who was also a witness in support of the claimant's case. The respondent was represented by Mr Clarke, a consultant from Avensure Ltd, which provides employment and human resources consultancy to the respondent. The tribunal is grateful for the way in which both parties dealt with the case and presented their cases to the tribunal.

6. In determining the claim, the tribunal heard from the claimant and CM on behalf of the claimant. For the respondent, we heard from two of the respondent's directors, Ms Laura ("Lola") Lodge ("LL") and JO.

7. We also had a bundle, which was initially numbered up to page 351. There were a few pages added to that bundle during the course of the hearing:

    7.1. The claimant sought to add two pages of text conversation between CM and JO, which was the full conversation that stemmed from the messages we have at [197]. We numbered these pages [197a] and [197b].

    7.2. The respondent then sought to add two pages of email correspondence between JO and a consultant from Avensure, regarding holiday pay. We numbered these pages [352] and [353].

8. The above pages were added into the bundle by consent of the parties.

PRELIMINARY ISSUE - ANONYMISATION

9. An anonymisation order has been made in relation to the claimant. The reasons for that order are set out in a separate case management order.

ISSUES

10. The case was subject of a preliminary hearing on 20 October 2021, at which a list of issues was agreed upon. That list is at [62]-[64]. One additional issue was added, in that on the claimant's claim form it was clear that they were complaining that the respondent had not promoted them to supervisor, and that this was because of the claimant's protected acts. We discussed this point at the beginning of the hearing, and the respondent accepted that this was clearly pleaded, and just appears to have been left out of the list of issues. It was therefore agreed that this issue would be added as Issue 3.11, as set out below.

Sexual harassment

1. *This is a claim brought pursuant to the provisions of Section 26 and Section 40 of the Equality Act 2010 ("EqA"). The claimant alleges that they were the victim of assaults and other allegations of Sexual Harassment on days commencing 1 January 2020 until June 2020. Those claims against the respondent are brought on the basis that the respondent failed to prevent an occurrence of those acts and, after the first act occurred, failed to prevent any recurrence of that behaviour. The allegations of Sexual Harassment can be divided into three:*

2. *The first is that shortly after midnight on 1 January 2020, a contractor engaged by the respondent ("the Third Party") grabbed hold of the claimant by placing his hands between their legs. The Third Party was a customer in the pub at the time but had been working prior to that date and subsequent to it as a contractor. It is accepted that he was not an employee of the respondent.*

3. *Secondly, after that incident and up to June 2020, the Third Party continued to intimidate the claimant: he followed them into the kitchen on several occasions and made comments to them under his breath; he continually stared at the claimant whilst they were working; and every couple of weeks would deliberately push past them in order to make physical contact with them.*

4. *Thirdly, on 24 June 2020, the claimant was using the ladies' toilet. The lock on the toilet had been removed for repair at the time. The claimant alleges that whilst they were using the toilet on the ground floor of the public house, the Third Party was looking through the lock. He subsequently made a comment to the claimant when they left the toilet about the drains being blocked.*

5. *The claimant makes no further complaint about the Third Party after that date.*

6. *In so far as these allegations are concerned, the respondent does not accept that the allegations as pleaded by the claimant took place. In any event, they deny they are liable for them. In addition to factual denials they will also submit at the Substantive Hearing that the claimant's claims are, either in whole or in part, out of time and that it is not just and equitable to extend the statutory time limit.*

Victimisation

1. *The claimant contents that they made a number of Protected Acts. On two occasions in January 2020 they made a complaint to JO, setting out the behaviour of which they complain on 1 January 2020. On a further occasion in January 2020, CM also reported that complaint to JO. Those matters, if they took place, would constitute a Protected Act within the meaning of Section o27(2)(d) of the EqA. The respondent has no recollection of those complaints being made at the time and states that no complaint, that it can recall, was made by the claimant or on their behalf until after 24 June 2020.*

2. *After January 2020, the claimant contends that they made no further actual complaint to the respondent. They did, however, subsequently complain about the incident on 24 June 2020. In particular, they state that they made these complaints at a meeting with JO and LL, in July 2020; particularly at a meeting that took place on 17 July 2020.*

3. *The detriments of which the claimant complains are as follows:*

    3.1. Having made the complaint to the respondent about the Third Party's behaviour, the claimant states that the respondent agreed that the Third Party should be prevented from having access to the public house. In contravention to that assurance, the respondent permitted the Third Party regular access both as a worker and as a customer.

    3.2. The claimant suffered a loss of income as a result of a reduction in the number of hours they were able to work. The respondent had promised to invoke a harassment policy, but in breach of that undertaking, had not done so. This caused the claimant to become ill through stress and as a result of which they were unable to work. Not being able to work resulted in their income being reduced to statutory sick pay.

    3.3. At initial meetings between the claimant and the respondent, the claimant contends that the respondent undertook to put into place a harassment policy without delay. There was an unreasonable delay.

    3.4. The harassment policy as contended by the claimant was in fact never invoked.

    3.5. JO, it is alleged on 8 October 2020, snatched an empty mug from the hand of the claimant as they were making a cup of tea. This behaviour was aggressive and had not been exhibited by JO on previous occasions.

    3.6. The claimant was told off for not being near the bar on one occasion. They state that they left the bar area momentarily to look at the computer. When JO found they were not at the bar, he shouted at them.

    3.7. The claimant's shifts were cut short. Other shifts undertaken by other employees were also cut short during the pandemic, but

their hours were subsequently made up. The claimant's hours were not made up and they suffered a consequent reduction in wages.

3.8. LL went to visit the claimant's home with a new written contract of employment. the claimant felt this was intimidating. Other employees were given their contracts either at work, or they were sent by e-mail.

3.9. The claimant received regular text messages from JO disbelieving their allegations.

3.10. The respondent created a general hostile environment for the claimant.

3.11. The claimant was not promoted to supervisor.

Unauthorised deduction of wages

1. *The claimant pursues two claims. The first relates to outstanding holiday pay. The claimant contends that as of 6 October 2020 they were owed the sum of £430.00 in outstanding holiday pay. This claim is denied by the respondent who says that all moneys due have been paid.*

2. *Secondly, the claimant's hours of work were reduced from 3 August 2020 up to the day their claim was presented to the tribunal in November 2020. This started off at a reduction of two and a half hours each week and increased to seven hours each week. Each hour of reduction suffered a loss of £10.00 per hour.*

LAW

Harassment

11. We note that in the previous Record of Preliminary Hearing, the harassment claim was referred to as one of "sexual harassment". As we have set out below, this is not a case where it is said that the Third Party sexually harassed the claimant, and that the respondent is vicariously liable for that sexual harassment. The case is that the Third Party sexually harassed the claimant, and the respondent failed to protect the claimant from that conduct.

12. Therefore, it appears to us that this is in fact an allegation of harassment related to sex, as opposed to sexual harassment.

13. S26 EqA provides that:

> (1) A person (A) harasses another (B) if –
> a. A engages in unwanted conduct relating to a relevant protected characteristic, and
> b. The conduct has the purpose or effect of –
> i. Violating B's dignity, or
> ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:
a. The perception of B;
b. The other circumstances of the case;
c. Whether it is reasonable for the conduct to have that effect.

14. Whether or not the conduct complained of relates to the protected characteristic is a question of fact for the Tribunal – Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19. It therefore follows that a claimant's understanding and a respondent's intention are not strictly relevant to the issue of causation. The context in which the alleged harassment occurs is a key factor in determining whether the conduct was related to the relevant protected characteristic – Warby v Wunda Group plc EAT 0434/11.

15. In this case, the alleged unwanted conduct is the respondent's failure to prevent sexual harassment towards the claimant by the Third Party. It is not a case where the claimant alleges they were sexually harassed and the respondent is vicariously liable for that harassment. That kind of claim, of protection against third party harassment, was set out in s40 EqA but was repealed in 2013 by the **Enterprise and Regulatory Reform Act 2013**.

16. Whether the unwanted conduct has the effect required by s26(1) EqA, as opposed to the purpose in s26(1), the perpetrator's motive or intention is irrelevant. The test has both an objective and subjective element to it. Firstly, the perception of the claimant is taken into account. Secondly, the tribunal must consider whether it was reasonable of the claimant to believe that the conduct to have the effect set out in s26(1).

Victimisation

17. S27 EqA provides as follows:

(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 this 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.

...

Detriment "because of" the protected act(s)

18. In this context, "because of" means that the protected acts must have had a "significant influence" on the respondent's decision making and actions – Nagarajan v London Regional Transport 1999 ICR 877 (sex discrimination); Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469. "Significant"

means "an influence which is more than trivial" - Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

19. An example of the causative link required is found in Garrett v Lidl Ltd EAT 0541/08. G had a disability, and raised a grievance alleging harassment and failure to make reasonable adjustments (the protected act). As a result, G was moved from Store A to Store B, as reasonable adjustments could not be made at Store A. This move was despite G's wishes to stay at Store A. The Employment Appeal Tribunal held that G's claim of victimisation succeeded, as the move to Store B was caused, at least in part, by the animosity felt at Store A as a result of G raising a grievance.

Motive

20. A respondent will not escape liability by demonstrating that there was no intent, or malicious motive behind any detriment. The relevant question is simply one of causation, and whether the protected act was of sufficient weight, or of significant influence, on the perpetrator's actions, even if that influence is subconscious – Nagarajan v London Regional Transport [1999] IRLR 572.

Unauthorised deduction of wages

21. S27(1) **Employment Rights Act 1996** defines wages as:

> "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".

22. The Claimant's claim relates to their salary, specifically holiday pay, which falls squarely within this section, and is not an excluded payment under s27(2) **Employment Rights Act 1996**.

23. S13(3) **Employment Rights Act 1996** provides as follows:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

24. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This is an issue to be decided in line with the approach of the civil courts in contractual actions – Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT.

25. In other words, the Tribunal must decide, on ordinary contractual and common law principles, the total amount of wages that was properly payable to the worker at the relevant time.

26. In determining the terms of the contract in question, it is necessary to take into account all the relevant terms of the contract, including implied terms – Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA.

FINDINGS OF FACT

Commencement of employment

27. We have restricted our findings of fact to those that are relevant to the matters set out in the List of Issues.

28. The claimant commenced work for the respondent as a casual worker on 3 October 2019 at a rate of £8.50 per hour. Prior to being an employee, the claimant had frequented the pub as a customer, and applied to become an employee, having seen an indeed.com advert for a job there.

29. The claimant was not given a contract of employment at the commencement of their employment with the respondent, only receiving the contract at [83] ("the Contract") in October 2020, when it was delivered to them at home, along with the staff handbook by LL.

30. We understand that the terms within the Contract were the terms that were intended to apply throughout the duration of the claimant's employment.

31. When the claimant was given the job, JO explained that they were taking over from "Fiona" who had been a supervisor, and that hopefully one day the claimant would be a supervisor too. The role of supervisor at the end of 2019 simply meant a key holder for keys to the pub. This changed after the first Covid-lockdown, when some more responsibility was associated with that title.

32. In November 2019, JO mentioned to LL that he thought the claimant may one day become a supervisor, to which LL responded she did not want to give the claimant keys to her business.

33. In December 2019, the claimant asked whether they could have some more permanent shifts, and from that point they became a permanent member of staff doing 32 hours a week over five shifts.

34. Under the Contract, employees were entitled to 5.6 weeks' holiday, pro-rated for part-time staff, with the annual leave year being 1 April to 31 March - [83]. Given that the claimant was contracted for 32 hours a week, they were entitled to (32 x 5.6) 179.2 hours of holiday in each leave year.

January 2020

35. Each year, for New Year's Eve, the respondent sells tickets in advance for entry to the pub. New Year's Eve 2019-2020 was no different, other than sales were slightly slower than usual. The maximum number of tickets available was 100.

36. On 31 December 2019, the pub was busy, but not as busy as a usual Friday or Saturday night. The claimant was working that night, and they, along with the rest of the staff, worked for one hour, and then had a break for an hour; this was so that they could all enjoy the evening, as the New Year's Eve shift is longer than usual.

37. At one point in the evening, the Third Party brushed past the claimant, meaning that his hand touched their bottom ("the first incident"). This happened a second time around ten minutes later, when the claimant was walking towards the toilets ("the second incident"). The claimant told CM after the first incident, and then after the second incident signaled to CM that it had happened again. At the time, the claimant thought these two incidents were accidental.

38. Later on that night, during an hour that the claimant was on duty, someone grabbed the claimant between the legs from behind, to the extent that it hurt the claimant ("the third incident"). The claimant believed that the perpetrator was the Third Party, which we find was a reasonable belief given the Third Party's proximity to the claimant. However, we make no finding that the perpetrator was in fact the Third Party: we have not heard evidence from him and are aware that there is another person who has been implicated. For the purposes of this case, we do not need to find that the perpetrator was the Third Party; it is enough that the claimant was reasonable in their belief that it was the Third Party. The more pertinent fact is that we find the third incident occurred as the claimant says, in that they were grabbed between the legs from behind and were groped to the extent that they suffered some pain as a result. The claimant was, very understandably, deeply affected by the third incident.

39. Initially, the respondent, in the course of these proceedings, denied that the incidents had occurred as the claimant describes (see Grounds of Resistance paragraph 36 [77]. However, during the course of JO and LL's evidence, they both accepted that the incidents had occurred as the claimant said. We note that the claimant argues that JO (particularly) initially disbelieved them. This is based on the message at [221] "*[a]re you absolutely 100% that the offence was definitely made by [the Third Party]?*" and at [222] "*I'm afraid I've never heard of this...Are you 100% that the assault that you have told us about was [the Third Party] though...Is there a possibility it was someone else do you think?*".

40. We find that the disbelief that JO displayed in these messages was more in relation to the identity of the perpetrator, than a disbelief that the third incident happened at all. Specifically, regarding the statement "*I'm afraid I've never heard of this...*" we find that JO meant he had never heard that the respondent should have contractors' full name, address and birthday on file, as suggested by the claimant in their text on [222]. This was JO's explanation of the remark, and tallies with the natural reading of the text conversation.

41. We do however find that, although JO believed the facts of the third incident, he did not believe that this amounted to "sexual harassment". We find that he trivialised the incident and could not accept that it was an incident that merited the label "sexual harassment".

42. A few days later, still in early January, the claimant was at the respondent pub drinking with JO and others, and the Third Party was present with his wife: in total there were 6 or 7 of them around the table. At one point, the Third Party came up behind the claimant and grabbed them by the shoulders. The claimant jumped and shouted at him *"get off me".* The claimant felt the need to explain their reaction (which they thought may have

seemed over the top without context) to JO. At that point, the claimant told JO about the third incident only.

43. The claimant realised that JO had consumed rather a lot of alcohol on the night they had told him about the third incident. The claimant also noted that nothing happened as a result of this disclosure, and nothing was said by JO following it. So, a few days later, at the end of their shift, they reported the third incident to JO again, who responded that he did remember the claimant saying something like that. We find that this is one example of JO trivialising an allegation of sexual harassment, and failing to comprehend the impact that the incident had had on the claimant.

44. CM also told JO about the first and second incident in January 2020; CM was not aware of the third incident until some months later (on 24 June 2020), and so could not inform JO of that incident in January.

45. Although JO does not remember being told anything by the claimant on the occasions set out above, he stated to us that it could have happened as the claimant said. We also note JO's text to CM some months later on 25 June 2020 at [197a], in which he says *"...bar your comment to me at Christmas I knew absolutely nothing about any of this until yesterday afternoon".*

46. The claimant was clear in their evidence and, given the lack of JO's memory on this matter, we accept that JO was told about the third incident on two occasions by the claimant in January 2020. We also note the claimant's evidence that it was definitely the third incident they recounted to JO, as, at that time in January, the claimant considered the first and second incidents to have been accidental, and therefore would have had no need to report these matters to JO.

January to June 2020

47. Between January and March 2020, when the pub closed due to Covid, the claimant suffered further problems at the hands of the Third Party, as set out at the claimant's witness statement paragraph 27 (C/WS/27): we accept this evidence, as it was not challenged by the respondent, and we found the claimant generally credible in their evidence to us. The Third Party conducted himself in various ways so as to harass the claimant:

    47.1. Cat calling;

    47.2. Staring at them;

    47.3. Muttering sexist insults;

    47.4. Coming into the kitchen when the claimant was in there alone;

    47.5. Standing in the claimant's way so that they would have to engage with him.

48. The claimant told some of their colleagues that they did not wish to be in contact with the Third Party, whether that was to serve him, or for any other reason. Those colleagues took steps to intervene indirectly, to assist the claimant: for example, by serving the Third Party so that the claimant did not have to.

49. Throughout this time, the claimant did not mention their issues with the Third Party, or the three incidents from New Year's Eve, to JO again, or to LL. They did not attempt to have a formal meeting, and did not put their grievance in writing. The claimant told us that the parties simply did not communicate in writing, other than text message; other than that, everything was verbal. We also accept that the claimant found it difficult to talk about the incidents, and found it humiliating to have to do so, particularly when their disclosures had been met (so far) with inaction.

50. The pub closed due to the Covid pandemic and the Government's guidelines, from 28 March 2020 to 3 August 2020; the staff were placed on the furlough scheme, and were paid 80% of their salary. During this period, members of staff would come into work on a voluntary basis to assist with the general upkeep, as well as assisting with the project of converting a car park into a Covid-compliant area, so that it would be worthwhile re-opening in due course. The Third Party did some sporadic work on the car park project.

51. In June 2020, the claimant and some of their colleagues, as well as the Third Party, went on two bicycle rides as a Covid-compliant social event. The claimant does not accuse the Third Party of doing anything on these two occasions, but the claimant took steps to avoid the Third Party, by cycling ahead. On the second occasion, the claimant and a colleague stopped by a lake and decided to swim; this was at a time when the Third Party was not around. The Third Party came into the vicinity when the claimant was still in the water, and so they decided to stay in the water, rather than risk feeling exposed in front of the Third Party. This led to the claimant being covered in leeches and having to pull them off. We reiterate however that it is not alleged that the Third Party actually did anything untoward on these bike rides, but that the claimant took action to avoid him.

24 June 2020

52. The next incident relating to the third party's behaviour towards the claimant occurred on 24 June 2020 ("the fourth incident"). The claimant had initially said that this incident occurred on 18 June 2020, however it is now common ground that this was the 24 June 2020. The claimant was volunteering at the pub on this day: the claimant and others, including the Third Party, were working on the car park conversion.

53. Some work was being done in the respondent pub, which resulted in the locks being removed from the toilet doors, and the main door to the women's toilets was propped open by a door stop. The claimant had gone to the women's toilets, and pulled the door to. They heard a noise outside and looked through the hole left by the missing lock to see the Third Party looking through the hole, from a short distance away. We accept the claimant's account of the fourth incident, and note it was not challenged by the respondent.

54. We have considered whether the Third Party's actions on this occasion were inappropriate, as opposed to the claimant simply perceiving them as such (given the January incidents), when in fact the Third Party's actions

were innocent. We find that the third party's actions were not innocent, and were inappropriate, for the following reasons:

54.1. We accept CM's evidence at CM/WS/23 (which was not challenged) that the Third Party returned from the toilet area, acting in an odd manner and saying loudly "*Oh it was KZ! KZ was in the toilet! That's what it was – KZ in the toilet!*";

54.2. We find that, if the Third Party was behaving in an appropriate manner, he would have checked whether there was anyone in the ladies' toilets before approaching. He did not do this, and did nothing to alert any occupant of the ladies' toilets to the fact he was approaching;

54.3. The claimant was so certain something untoward was going on that they felt the need to leave work instantly (this is common ground between the parties).

55. After the claimant had walked out of the pub on 24 June 2020, JO asked CM why they had left. CM told JO something about the Third Party's behaviour towards the claimant, from which JO took the message that the claimant "hated" the Third Party – JO/WS/5. We find this an interesting, and telling, way of interpreting matters, and find that this corroborates our finding that JO trivialised the behaviour that the claimant experienced at the hands of the Third Party.

56. The claimant did not tell JO or LL about the fourth incident. The claimant told us in their evidence that *"[t]hat was the point, I was already upset and humiliated enough and didn't want to have to discuss it anymore".*

57. There was a text exchange between CM and JO the following day, 25 June 2020, in which CM expressly mentions "sexual assault", albeit he does not set out details – [198]. We note that, in this exchange, JO denies that the fourth incident occurred – [197a]. Although we note that JO in his evidence to us accepted that it had occurred as the claimant said. Again, we find that JO sought to trivialise the allegations, and simply could not believe the Third Party, his mate, was capable of such behaviour. LL also found out on 25 June 2020 that the claimant had some complaints of a sexual nature against the Third Party, although did not have details at that point. She did however speak to the Third Party, who was doing some work in the cellar, which suggests that LL thought the allegations were serious enough to seek an explanation from him; he accepted the first and second incident, but denied any other inappropriate behaviour towards the claimant.

17 July 2020 meeting

58. The claimant asked for a meeting with JO and LL, which took place on 17 July 2020. The claimant was accompanied by CM for support. It was on this date that JO, LL and CM all became aware of the full detail of the third allegation.

59. At this meeting, the claimant compared the Third Party to Donald Trump, saying that *"he grabbed me by the pussy"* - C/WS/68. JO's response to this was that the Third Party was "a giant toddler" and that the claimant should

not take his actions the wrong way. Once again, we see this as an indication of JO's wholesale lack of understanding of the gravity of this matter, and a lack of awareness as to the impact the incidents had had (very reasonably) on the claimant. In contrast, LL took the matter seriously and understood the gravity and nature of the allegation as being sexual harassment.

60. At this meeting, the claimant was asked what they wanted to happen. The claimant wanted a harassment policy and training to be put in place. It was agreed that the claimant would remain off work but paid until the policy was in place. In terms of the rate of pay, we find that it was agreed that the claimant would be paid her standard rate of pay, not just statutory sick pay. We accept the claimant's evidence on this point, as it correlates with the contemporaneous text message conversation we have on this point, in which there is no mention of any reduction in pay.

61. There was a discussion about whether to bar the Third Party, and it was the claimant's view that this would only make the situation worse. It was therefore agreed that the Third Party would be told that he could not come into the pub while the claimant was on shift. What appears to have been conveyed to him is that he was not to go behind the bar when the pub is trading, and that he was not to interact with the claimant at all – [144].

62. We find that it was the intention of the respondent, as at the 17 July 2020 meeting, that a harassment policy would be ready by the 30 July 2020 training day that was scheduled. We find this for the following reasons:

    62.1. In JO's statement, he denies that it was agreed that the claimant would be paid full pay whilst off and *"there would have been no reason to as [the claimant] was still on furlough and we were not due to open for over a fortnight"*. The pub was in fact not due to open until 3 August 2020, but this indicates that it was envisaged that the claimant would be back at work by the time the pub reopened;

    62.2. After the 30 July training day, LL apologised to the claimant for the failure to roll out a completed policy - [144/145]. There would be no reason to text to check how the claimant was after the training day, and to say *"I imagine you aren't happy with how I approached the harassment policy at the staff meeting*" unless there had been an understanding that the policy would be complete by that training day.

63. We find that LL agreed to produce the policy with no idea of the level of work that this would require of her. Once she started doing the work, she realised she was in over her head and needed Avensure's assistance. LL took the claimant's complaints seriously, but panicked somewhat about the size of the task when it dawned on her what it involved – including a complete overhaul of the staff handbook and employee contracts.

64. LL appears to have been trying her best to support the claimant – we note for example a text sent on 22 July 2020, in which LL said *"I need you to come to me and speak to me if you are still feeling anxious and we can work together to resolve it"* - [144].

30 July training evening

65. The respondent had scheduled a training evening for 30 July 2020. At that session, a template/temporary harassment policy was distributed to staff. This was not the "finished article", and we note that we do not have a copy of this version in the bundle.

66. There was no further discussion or mention of harassment, a new policy or any training that may be implemented regarding harassment.

67. Following this session, LL undertook an online sexual harassment course, of her own initiative.

12 August 2020 meeting

68. On 12 August 2020, the claimant met with JO and LL again, accompanied by their union representative. This meeting was at the claimant's request, and was to deal with issues wider than simply the allegations of sexual harassment. The claimant also wanted to discuss fairer pay for all employees, the claimant's entitlement to holiday pay, and the implementation of the harassment policy – C/WS/133.

69. The following day, JO discussed the allegations with the Third Party, who accepted accidentally bumping into the claimant (first and second allegation) but denied the third allegation. This was the extent of any investigation undertaken by the respondent into the claimant's allegations.

29 August 2020 meeting

70. CM told LL that the claimant wanted to meet prior to the commencement of their shift on 29 August 2020 - [177]. The claimant envisaged this being a standard back to work meeting, having been off sick. A meeting was therefore held, in which the claimant told JO and LL that they no longer wanted to work Wednesday and Friday night shifts, as that required the claimant to work with the supervisor (Emma Dixon, "ED"), who they found difficult to work alongside.

71. By a payslip of 30 August 2020, the claimant's pay included holiday pay for the leave year 1 April 2019 to 31 March 2020 (pro-rated for the claimant's start date in October 2019), as well as back-pay back to when they started work, to increase the claimant's salary by £1 - [296]. None of the claimant's pay-slips are itemised, and therefore it is difficult to understand the maths, but it is common ground now between the parties that this pay-slip does include holiday pay for the 2019-2020 leave year.

September 2020

72. A meeting was held on 3 September 2020, at the claimant's instigation, to discuss their shifts and why they did not wish to work Wednesday and Friday evenings. The allegations were not discussed at this meeting, however the claimant did raise other matters, such as not being permitted to move barrels or change kegs.

73. On 10 September 2020, the Third Party came into the pub to fix a glass washer; he then however stayed on at the pub as a customer. The claimant came to start their shift to find the Third Party drinking with a couple of others. The respondent could not explain to us who it was who asked or permitted the Third Party to attend to do work on that day.

74. On 11 September 2020, the claimant asked if they could take the Wednesday and Friday shifts as holiday, given they had some holiday entitlement left. They were told that they could – [179].

75. On 15 September 2020, LL emailed to the claimant the new version of the harassment policy - [123].

October 2020

76. On 3 October 2020, the claimant commenced the ACAS Early Conciliation process.

77. On 8 October 2020, the claimant was on shift along with CM, who had supervisor status. We find that, by this stage, the working relationship between the claimant and JO had become difficult, and that there was some tetchiness in their working together. There came a point in the evening when JO was upstairs, above the pub, and could see the claimant on the CCTV system. He observed the claimant mainly being behind the bar, near to CM, who was working that evening too. It was JO's view that the claimant should be serving customers, taking orders and waiting tables, not being behind the bar. At one point, JO asked CM to do some work on the computer, meaning the claimant was alone at the bar. When JO returned a few minutes later, the claimant was at the computer with CM. JO knew that there were orders waiting to be taken at the bar, so he asked the claimant if they were ok, and then asked them to pour the orders that were waiting at the bar.

78. The claimant's case is that they had checked all the tables, and then were taking a very short break talking to CM at the computer, when the claimant was chastised by JO, saying "this has to stop" or "this needs to change". He then took the mug that the claimant was intending to make tea in and snatched it from them.

79. We find that JO demonstrated some frustration towards the claimant, and indicated that he thought their attitude had deteriorated in recent times. He was therefore short and snappy with the claimant. We accept that the mug in question was JO's, however we find that he was snappy and brusque with the claimant in taking the mug away. In short, the whole interaction between JO and the claimant was prickly on this occasion.

80. The claimant was off sick from 9 October 2020.

81. On 14 October 2020, LL attended the claimant's home to deliver their new contract and employee handbook. The new contracts and handbook were ready for all staff members, and it was LL's responsibility to distribute them. LL took some to the post office, and hand delivered others. The claimant's home is geographically between the pub and the post office, and therefore LL sought to post the documents through their letter box on the way to post

others – [191]. The letter box to the block of flats where the claimant was living was full, and so LL knocked on the door to deliver the documents into the hands of the claimant. She also gave the claimant CM's documents. Although CM was on shift at the pub, LL deemed it prudent to deliver them to CM and the claimant's home, as opposed to giving the documents to CM whilst he was on shift at work. LL also delivered the documents by hand to several other employees, including "the two Laurens", as LL told us in her evidence.

82. The claimant found this interaction harassing, albeit they accepted that it may not have been intended in this way.

Reduction in shift hours (August – October 2020)

83. Due to Covid restrictions, there were two reductions in the pub's opening hours during the course of the pandemic. The first reduction in opening hours came when the pub reopened on 3 August 2020, when trading had to cease at 2300hrs. This meant that the pub lost 1 hour of trading every night, and two hours on a Friday and Saturday.

84. The staff shifts were generally 6 hours long, and 7 hours on Friday and Saturday evenings. When the government initially reduced opening hours to 2300hrs, the respondent was able to continue giving its staff 6 or 7 hour shifts by asking them to come in an hour earlier. Evening shifts would start at 1700hrs, or 1600hrs on a Friday and Saturday. In the claimant's case, they were told that they would have a new start time of 1700hrs in order to ensure they would still be paid for 6 hours – [224].

85. On 24 September 2020, the Government announced a curfew of 2200hrs. The respondent therefore had to reduce the shifts to 5 hours. They could not afford to have staff come into work 2 hours early and still pay them for 6 hours, when there was nothing for them to be doing in that 2 hour period. The start time of 1700hrs, or 1600hrs on Friday/Saturday, was confirmed to the claimant on 24 September 2020 – [182]. This reduction in opening hours affected evening shifts more than day shifts: given that the claimant only did evening shifts, they were adversely affected more than others.

86. The claimant, in their closing submissions, said that they were the only permanent member of staff who was not a supervisor, and had their hours cut. Their point was that there were zero hours employees who were given hours to make up the difference, whereas the claimant was not. The claimant says that they should have been given any hours available, as a priority over the zero hours workers. As we have mentioned, this issue only arose at the submissions stage.

87. In September 2020, the claimant asked to not work their Wednesday and Friday shifts, due to the difficulty they had working with ED, as set out above – see [224]. Although they wanted to still have 5 shifts a week, there was some difficulty due to restrictions imposed by the claimant of requiring two days off in a row, so that they could balance their job along with their obligations to their mother and grandmother – [225]. The respondent attempted to accommodate the claimant's wishes for their shifts, but the days the claimant wanted (day shifts Wednesday/Friday) were already

covered - [225]. The claimant was offered a shift on a Sunday afternoon, although that did not appear to fit with the claimant's need to have two days off in a row. We note that the claimant was told by JO that *"there may however be available shifts for the times you want while the weather holds out, hence I said I would send you the Available Shifts sheet when I've done it to try to help you out" - [228]*. The claimant was also offered some ad hoc shifts, see for example [232], [178].

88. We find that there was a genuine attempt on the part of the respondent to try to ensure its staff was not disadvantaged by the reduction in hours caused by the Government's restrictions. This attempt extended to the claimant, as there were attempts to give them additional ad hoc shifts.

Resignation

89. The claimant presented their claim form on 12 November 2020. The claimant had prolonged sickness absences during Autumn/Winter 2020 and Spring 2021. We can see reference to fit notes within the claimant's GP notes, and some of the actual fit notes, for the following periods:

89.1. 10.08.20 - 27.08.20 - [309];

89.2. 16.10.20 - 30.10.20 - [336]/[310];

89.3. 02.11.20 - 16.11.20 - [335]/[311];

89.4. 07.05.21 - 07.07.21 - [321].

90. By email of 22 July 2021, the claimant resigned - [263]. The effective date of termination was 1 August 2021.

CONCLUSIONS

Harassment related to sex

91. Within this claim are two acts of unwanted conduct by the respondent:

91.1. Unwanted conduct 1 – a failure to prevent an occurrence of the allegations of sexual harassment; and

91.2. Unwanted conduct 2 – after the first allegation occurred, a failure to prevent any recurrence of that behaviour.

<u>Unwanted conduct 1 – failure to prevent an occurrence of the allegations of sexual harassment</u>

92. This allegation must relate to the failure of the respondent to prevent any act of sexual harassment that we now know occurred on New Year's Eve 2019/2020. In other words, it is said by the claimant that the respondent should have had in place measures to prevent any act of sexual harassment occurring in the workplace.

93. We find, on the evidence we have heard, that there was no issue with the Third Party, or sexual harassment generally, at the respondent pub prior to New Year's Eve 2019/2020. The claimant had been a customer, prior to being a casual worker, and then an employee, of the

respondent, and had, up to January 2020, had a good experience of the respondent.

94. We find that the respondent had no understanding or awareness of its obligations to its employees. There were no adequate policies in place before November 2020, and a limited understanding of employee rights, including (for example) the need for itemised pay slips. This is despite the respondent engaging the assistance of Avensure.

95. To the extent that there was a failure to prevent the first, second and third incidents from occurring, in that the events did in fact occur, we find that there was no reason why the respondent would have been alerted to the risk of such an occurrence; it was not foreseeable given the lack of any such issue to date. We therefore find that the respondent did not fail to prevent such an occurrence, in terms of any blame being attached to the respondent.

96. In any event, if we are wrong on that, we are satisfied that the reason for any failure to prevent those incidents was a wholesale lack of knowledge of employer responsibilities, that did not relate specifically to sexual harassment or sex. To give an example, we find that the respondent would have been just as likely to fail to prevent a staff member being punched.

97. We therefore dismiss this claim of harassment.

Unwanted conduct 2 – failure to prevent any recurrence

98. A failure to prevent a recurrence can only reasonably be said to have occurred once the respondent was aware of a problem regarding sexual harassment at the pub.

99. We have found that JO was aware of the third incident as of early January 2020. We accept that LL was not aware of any of the incidents until 24 June 2020 (i.e. after the fourth incident).

100. Therefore, in terms of a failure to prevent a recurrence (the last "recurrence" is said to be 24 June 2020), that failure can only be laid at JO's door, as opposed to LL's.

101. On JO's own evidence, he did nothing at all about the allegations he had heard, until after 24 June 2020, when the claimant walked out of work. There was no attempt to investigate the third incident, and no steps taken to implement any policies or training to prevent any incidents of sexual harassment occurring again. This is despite the claimant showing signs of discomfort at work, to the extent that their colleagues noticed and tried to protect the claimant from the Third Party.

102. We therefore conclude that there was a failure by the respondent (specifically JO) to prevent a recurrence of sexual harassment following his awareness of incidents in January 2020. Although we find that the claimant themselves did not take steps before 24 June 2020 to escalate the issue to LL, or (for example) to ask for a formal meeting with JO or LL, we consider that the burden to act on the knowledge of the third

incident falls more heavily on the respondent, as the employer. We accept also that the claimant, for their part, was trying to process what had happened to them, and wanted to deal with it in a way that caused least disruption to all concerned: they just wanted to be able to get on with their job.

103. The next question we must ask is why that failure to prevent recurrences occurred – was it connected to sex so as to satisfy s26 EqA? We find that JO trivialised the third incident, and did not give it the weight it warranted. He effectively turned a blind eye: he did not, and still does not, grasp the serious nature of the allegations and ramifications for him and the respondent as an employer.

104. We note JO's evidence about warnings he would give staff about certain customers: *"that's so and so, don't worry about him, he's always gobby but not in a harassment type way*". When asked by the tribunal in what way these individual customers may present difficulties, JO said *"some of them are lonely men, we are a traditional old ale pub, they just talk to people, they will make jokes at them, but we don't find them funny in the slightest – there is nothing that would intimidate other than them being weird. They are just stupid sort of grandad jokes that aren't funny. Some of them have a really bad sense of humour".*

105. The tribunal understand from this that certain customers are known to make politically incorrect comments that are passed off as jokes. The nature of these jokes is given away by JO's comment that he does not find them *"funny in the slightest".* We take this to mean that the jokes in question are ones that have the potential to offend, and certainly are not politically correct. This evidence from JO corroborates our conclusion that he does not understand, or turns a blind eye to, the seriousness of sexual harassment, and that it is not something that can just be laughed off, or diminished, or explained away by saying *"that is just how X is".*

106. We also note that in the 17 July 2020 meeting, on hearing the full detail of the third incident (on the respondent's case for the first time), the response was to say that the third party was "*a giant toddler*" and JO said that the claimant *"shouldn't take his actions the wrong way":* this evidence from the claimant was not challenged. That is not an appropriate response to the gravity of the allegation that the claimant had made, and such statements trivialised the incidents. We find that JO trivialised the claimant's concerns about sexual harassment, which prevented him from taking any action following learning of the third incident. We conclude that this provides the requisite causal link for us to find that the unwanted conduct was related to sex.

107. Finally, we conclude that it was reasonable for the claimant to feel that an intimidating, hostile, degrading, humiliating or offensive environment was created by this failure to prevent any recurrence of sexual harassment. Ultimately, the respondent's failure to act on the knowledge of the third incident permitted the fourth incident to occur.

108. We therefore find that the claimant's claim of harassment related to sex in relation to "Unwanted Conduct 2" is made out.

109. There is however the issue of whether this claim was brought within the statutory time frame.

Sexual harassment – jurisdiction and time limits

110. The last incident that the claimant says should have been prevented by the respondent on the list of issues is 24 June 2020. The time for bringing this claim therefore expired on 23 September 2020. The claimant commenced the ACAS Early Conciliation process on 3 October 2020. The length of delay in bringing the claim was therefore 10 days.

111. The reasons relied upon by the claimant for the delay are two-fold. First, they say that they were not aware of tribunal deadlines until it was an issue raised in these proceedings; second, the claimant says they were trying to do everything they could to address the issues without having to resort to the tribunal.

112. In relation to the claimant's lack of knowledge, the question for the tribunal is whether the claimant ought reasonably to have known about the deadlines implemented at the tribunal. We find that the claimant was perfectly capable of undertaking research on the internet; they have clearly and admirably done research relating to ACAS and harassment policies and much more. We therefore find that the claimant, having the ability to undertake research, should have been aware of the tribunal deadlines for presenting claims. This is particularly so, given that from August 2020 at least, the claimant had the support of a trade union representative.

113. In terms of the claimant's attempt to resolve matters without having to come to the tribunal, this is an admirable aim, however is not sufficient justification to allow us to extend time on its own.

114. However, these two issues are just two of the factors we need to consider. The overriding issue for us to take into account is the prejudice to each party, should we permit time to be extended, or if we refuse to extend time.

115. We have found that the claimant's harassment claim (in part at least) has merits. To refuse to extend time would be to prevent the claimant from a judgment and award in their favour, for the sake of 10 days, when the respondent has been able to put forward its full defence, and we have had a full hearing on the issues.

116. In contrast, the prejudice to the respondent should we allow the extension of time is that they lose the ability to rely upon a technical limitation defence. Costs of defending the claim have already been incurred, and there has been no prejudice to the quality of the evidence, (for example it cannot be said that the delay of 10 days has caused the respondent's witnesses' memories to fade).

117. In balancing the prejudice to each party, we conclude that the prejudice suffered by the claimant should we refuse to extend time would be much greater than the prejudice suffered by the respondent in permitting an extension.

118. We therefore extend time, so that the tribunal has jurisdiction to deal with the claim of harassment.

Victimisation

Did the claimant do a protected act?

119. We are satisfied that, on the facts as we have found them to be, the claimant did protected acts in January 2020, in informing JO of the third incident that occurred on New Year's Eve 2019/2020. We are satisfied that the claimant's disclosures to JO fulfil both s27(2)(c) and (d) EqA, in that they made an allegation that the third party had contravened the EqA (by sexually harassing the claimant) - s27(2)(d) EqA. At the very least, we are satisfied that the claimant did *"any other thing for the purposes of or in connection with*" the EqA – s27(2)(c) EqA.

Did the detriments occur as the claimant alleges? If so, what was the reason?

120. Detriment 3.1 - we find that the Third Party did attend the pub as both a contractor and a customer whilst the claimant was on shift on at least one occasion, to fix a glass washer, and that this was in contravention of the parties' agreement that this would not happen.

121. We find that this occurred because LL and JO took no action to ensure that this agreement regarding the Third Party's attendance was enforced. It was not clear from the respondent's evidence who gave the Third Party permission to attend to fix the glass washer, or who permitted him to stay on as a customer.

122. We consider that the reason for this failure by the respondent was simply that they did not think about whether the claimant and the Third Party would come into contact. We find that, rightly or wrongly, the claimant's complaint about the Third Party in January 2020 did not operate on the respondent's mind in permitting the Third Party to attend the pub: the respondent basically forgot about its agreement with the claimant.

123. On that basis, the claimant's protected act in January 2020 was not a significant influence on the respondent's failure to enforce its agreement with the claimant.

124. We therefore dismiss this allegation of victimisation.

125. Detriment 3.2 and 3.3 - we take these two detriments together, as they both relate to the parties' agreement as to the time frame for completion of the harassment policy.

126. The claimant's complaint under Detriment 3.2 is that the respondent agreed to pay them their normal wage whilst the harassment policy was being drafted, so that the claimant could be off work, without losing income.

127. Regarding Detriment 3.3, the claimant says that there was an unreasonable delay in producing the harassment policy, which should have been finalised by the 30 July 2020 training session.

128. We have found above that it was agreed that the claimant would remain on their standard rate of pay during their absence. We have also found that there was an agreement between the parties, following the 17 July 2020 meeting, that the policy would be ready to be rolled out at the 30 July 2020 meeting. Anything after that date is therefore in breach of that agreement, and an unreasonable delay. We therefore find that these detriments did occur as a fact.

129. We then turn to the cause of these detriments, and consider whether the claimant's protected act was a significant influence on the respondent. As we have set out in our findings, we conclude that the respondent, in short, bit off more than they could chew in agreeing that they could have the policy up and running by 30 July 2020. The respondent did not really comprehend, as at 17 July 2020, what was involved in producing a harassment policy. LL had good intentions, but soon discovered that this was not a job that could be done lightly or quickly. In taking the issue seriously, LL then had to involve Avensure; we heard from JO that *"hundreds of emails"* were going back and forth between the respondent and Avensure around this time.

130. We conclude that the failure to get the policy finalised by 30 July, and the unreasonable delay that then ensued, was due to the respondent's ignorance of what this task involved. The claimant's complaint in January 2020 was not a significant influence on the minds of JO or LL.

131. We therefore dismiss these allegations of victimisation.

132. Detriment 3.4 - factually, we find that the harassment policy was implemented, at the latest on 14 October 2020, when the staff received their new contracts and employment handbooks, containing the new harassment policy. Therefore, we do not accept that this detriment occurred on the facts.

133. If we are wrong on this, we consider that the requisite causative link, that the protected act was a significant influence on the failure to invoke the policy, was not present. We come back to our findings above that the delay in implementing the policy was down to the respondent underestimating the work that this task required.

134. We therefore dismiss this allegation of victimisation.

135. Detriment 3.5 & 3.6 - we take these detriments together, given that they both arise during a conversation that the claimant had with JO on 8 October 2020. We note that, by this date, the respondent had been contacted by ACAS for the purposes of early conciliation and so was aware of the claimant's potential claim.

136. We have found that there was an unpleasant and tetchy conversation between the claimant and JO, which ended with JO walking away and snatching his mug. In terms of the reason for this conduct, we find that

there was a change in the way that JO viewed the claimant: he saw them now as being problematic. This was because the claimant had been making complaints (the protected acts) and causing problems and hassle for the respondent. We accept that this may have been subconscious, and that JO's motivations in the way he treated the claimant were not consciously as a result of their complaints. However, we are satisfied that the claimant's protected acts were a significant influence in how JO treated C on 8 October 2020.

137. We therefore uphold these allegations of victimisation.

138. Detriment 3.7 - we accept that the claimant's hours, and other employees' hours, were cut short. Even if it is the case that the claimant's hours were cut more than others, or were not made up in the same way others' hours were, we are not satisfied that this was because of the claimant's protected acts.

139. The respondent did attempt to offer the claimant some shifts to make up the difference. In any event, there is no good evidence before us that any failure by the respondent to make up the claimant's hours was significantly influenced by the protected acts. We note that it was LL who was in charge of the rota, and we are satisfied that LL was genuinely attempting to do her best regarding the claimant's complaints of sexual harassment.

140. We therefore dismiss this allegation of victimisation.

141. Detriment 3.8 - we accept that, as a fact, LL dropped the claimant's new contract and employee handbook at the claimant's house on 14 October 2020. In terms of the motivation for LL doing this, we accept that the claimant's house was between the pub and the post office, and that it was therefore a natural step to take to deliver the documents by hand. We find that the claimant's protected acts had no influence on LL's decision to deliver the documents by hand; it was simply a logical step to take, and a step LL took in relation to other employees who lived in the vicinity too.

142. We therefore dismiss this allegation of victimisation.

143. Detriment 3.9 - In terms of any disbelief shown by JO, we have found that the disbelief was in the identity of the perpetrator, rather than disbelief that the third incident factually occurred. We do however conclude that JO did not believe or understand that the third incident constituted "sexual harassment", or "assault". He disbelieved the nature and gravity of the incident, and trivialised it.

144. We are satisfied that JO's reaction to knowledge of the third incident in disbelieving that it amounted to "harassment" comes from the inherent nature of the protected act. Due to the protected act being about sexual harassment, JO trivialised the matter, failing to treat it as "harassment". Therefore, we find that, even if subconsciously, the protected act had a significant influence on JO's disbelief demonstrated towards the claimant.

145. We therefore uphold this allegation of victimisation.

146. Detriment 3.10 - this allegation is broad, in that the respondent is said to have created a generally hostile working environment. It was set out at the beginning of the hearing that this allegation covered:

146.1. A general feeling of lack of safety;

146.2. Being gaslighted;

146.3. Not being permitted to change the barrels; and,

146.4. Not being permitted to move the kegs.

147. Turning to the specifics:

147.1. Moving barrels – we accept that the claimant was told not to move barrels.

147.2. Changing kegs – the claimant's own evidence on this appears to be that they misunderstood the situation, having initially had the impression that they were being singled out. On the claimant's case therefore, we find that the claimant was not singled out at all in relate to changing kegs, and certainly not due to the protected acts.

147.3. Gaslighting – this allegation is vague, and we are not satisfied that any gaslighting (making the claimant question themselves) occurred, or was caused by the protected act, for the purposes of s27

147.4. General feeling of lack of safety – we accept that the claimant reasonably experienced a feeling of lack of safety in the work place.

148. Taking a global view of the events that took place from summer 2021 onwards, we accept that there was a souring of the working relationship between JO and the claimant, as set out above in relation to Detriments 3.5 and 3.6. We also find that the trust between JO and the claimant ebbed away, and so the claimant was not entrusted with changing the barrels. Coming back to what caused that decline in the relationship and the trust from JO's side, we are satisfied that this was his reaction to the claimant's protected act.

149. For these reasons and those set out in relation to Detriments 3.5 and 3.6, we are satisfied that the protected acts were a significant influence on the manner in which the claimant was treated when at work, that led to a general hostile environment, including a feeling of a lack of safety.

150. We uphold this allegation of victimisation.

151. We note that Detriment 3.10 is really an umbrella term, under which Detriments 3.5, 3.6 and 3.9 fit. In terms of remedy therefore, it will need to be taken into account that, really, Detriment 3.10 is the umbrella term under which the other three detriments that have been upheld fit.

152. Detriment 3.11 - we accept that JO may have led the claimant to believe they were going to be a supervisor soon after their employment commenced. Although there was a conversation between JO and LL in which LL was clear that the claimant would not be promoted, this conversation occurred towards the end of 2019. We find that this is the correct timing, as JO and LL's evidence correlates on this point, and is supported by [165], the text conversation in which LL makes it clear that the claimant would not be getting the keys.

153. Given that the decision not to promote the claimant was made prior to the protected act occurring, the protected act cannot have caused the decision.

154. We note that the claimant says that Emma was promoted above them, which supports the claimant's case on this allegation. However, we know very little about Emma; we are not in a position to find the reason why Emma was promoted above the claimant. Even if this situation was unfair, we are not satisfied that the protected act played any part in Emma being promoted over the claimant.

155. We therefore dismiss this allegation of victimisation.

Conclusion on victimisation

156. We uphold Detriments 3.5, 3.6, 3.9 and 3.10. The common link between these detriments being JO's inability to take the protected act seriously, due to the nature of it being one of sexual harassment. We accept that this motivation was very much subconscious, however that is sufficient for the purposes of a victimisation claim.

Unauthorised deduction of wages

157. We deal with the second issue of the wages claim first. The claimant claims for hours that they say they should have worked from 3 August 2020 had their hours not been reduced.

158. This is not a claim that falls within the remit of s13 ERA, as the claimant did not in fact work the hours for which they are claiming under this complaint. They are saying that they were deprived of being able to work (and therefore be paid) for certain hours.

159. On that basis, we dismiss this allegation of the wages claim.

160. If anything, this claim would be a remedy issue connected to Detriment 3.7 (and maybe Detriment 3.2), as really the claimant is saying that they suffered a detriment and should be paid for the loss of wages flowing from that detriment.

161. Given that we have dismissed Detriment 3.7 and 3.2, the claimant will not be entitled to losses flowing from the reduction of hours.

162. In terms of holiday pay, as we have set out in our findings of fact, the claimant was entitled to 179.2 hours holiday each leave year.

163. There are three holiday years during which the claimant was employed:

163.1. 1 April 2019 to 31 March 2020 (part year from 3 October 2019)

163.2. 1 April 2020 to 31 March 2021 (whole year)

163.3. 1 April 2021 to 31 March 2022 (part year up to 1 August 2022)

164. For the leave year 1 April 2019 to 31 March 2020, it is common ground that the payslip dated 30 August 2020 at the bottom of [296] encompasses 14 days' holiday pay, as was requested by the claimant's trade union representative at the time. It is agreed that this covers holiday pay for this leave year.

165. For the leave year 1 April 2021 to 31 March 2022, the claimant confirmed to us that they were happy to accept that holiday pay for this year was paid in the payslip at [272] dated 2 August 2021.

166. We turn our attention then to the leave year 1 April 2020 to 31 March 2021. The relevant payslips are those at [307] and forwards.

167. The holidays the claimant took in this leave year are set out in the table at [268] to [270], and are as follows:

167.1. 1 September 2020 – 6 hours.

167.2. 4 September 2020 – 7 hours;

167.3. 9 September 2020 – 6 hours;

167.4. 11 September 2020 – 7 hours;

167.5. 16 September 2020 – 6 hours;

167.6. 18 September 2020 – 7 hours;

167.7. 22 September – 6 hours;

167.8. 23 September – 6 hours;

167.9. 25 September 7 hours;

167.10. 30 September – 6 hours;

167.11. 2 October – 7 hours.

168. We do not have a table for the rest of this holiday year, and therefore we find that the claimant took no further holiday days in that leave year. The claimant therefore took 71 hours' holiday in that leave year.

169. Looking at the relevant payslips for the weeks in which the above days fall, and cross-referencing the hours worked and hours taken as holiday

on the table at [268] onwards, we calculate the difference in hours worked/holiday versus hours paid as follows:

Week ending	Hours paid	Hours worked	Hours holiday	Total hours payable	Difference between payable and paid
06.09.20	12 [296]	13 [269]	13 [269]	26	+14
13.09.20	31.5 [295]	19 [269/270]	13 [269/270]	32	- 0.5
20.09.20	29 [295]	8 [270]	13 [270]	21	- 8
27.09.20	24 [294]	7 [270]	19 [270]	26	+2
04.10.20	17 [293]	6 [270]	13 [270]	19	+2

170. In total, the claimant has been underpaid for 9.5 hours in that period. We find that this underpayment relates to holiday pay not being paid correctly, if at all. The claimant took 71 hours' holiday but was only paid for (71-9.5) 61.5 hours' holidays.

171. The claimant was entitled to 179.2 hours' holiday, and so the respondent failed to pay her for (179.2 - 61.5) 117.7 hours of holiday. At £10 per hour, this means that the claimant has been underpaid by £1,177.

172. We therefore uphold this part of the unauthorised deduction of wages claim, and find that the claimant is due £1,177 for the holiday year 2020/2021.

_____

Employment Judge Shastri-Hurst

_____

Date 21 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 24 February 2023

FOR EMPLOYMENT TRIBUNALS