



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Eslahi

v

**1. D&D Corporation Limited
2. Mr M Sharma**

Heard at: Watford

On: 13-21 February 2017
22 & 23 February 2017 (in chambers)

Before: Employment Judge R Lewis
Mrs P Breslin
Mrs I Sood

Appearances

For the Claimant: Ms C Bell, Counsel through FRU

For the Respondent: Ms S Berry, Counsel

RESERVED JUDGMENT

1. The claimant's claims of direct sex discrimination set out in the following paragraphs of the appended list of issues are upheld: 1.5, 1.11 in part, 1.17 in part, 1.19 and 1.21.2.
2. All other claims of direct sex discrimination, save in relation to dismissal, fail and are dismissed.
3. The claimant's claims of harassment related to sex set out in the following paragraphs of the appended list of issues are upheld: 1.5, 1.11 in part, 1.17 in part, 1.19 and 1.21.2.
4. All other claims of harassment related to sex fail and are dismissed.
5. The claimant's claim of victimisation (demand to repay alleged loans) is upheld.
6. The claimant's complaint of the failure to issue compliant particulars of employment succeeds and is upheld.

7. The claimant's claims of unlawful deductions fail and are dismissed.
8. The claimant's claim of unfair dismissal brought under the Employment Rights Act 1996 succeeds and is upheld.
9. The claimant's claim of sex discrimination by dismissal succeeds and is upheld.
10. The claimant's claim of wrongful dismissal (notice pay) succeeds and is upheld.
11. The claimant's claim in respect of failure to give written reasons for dismissal succeeds and is upheld.

ORDER

1. A remedy hearing will take place on Wednesday and Thursday **31 May and 1 June 2017** starting at 10am on the first day at the Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP.
2. No later than **10 May 2017** the claimant is to send to the respondent an updated schedule of loss.
3. The claimant is at liberty to serve an amended or supplemental statement on remedy provided that she does so no later than **17 May 2017**.
4. The respondent is at liberty if so advised to serve a counter-schedule, and to serve the statement of any witness to be called at the remedy hearing provided it does so no later than **24 May 2017**.
5. The parties are reminded of their continuing disclosure obligations, relevant to the remedy issues which remain to be decided.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

REASONS

Litigation history and case management

1. This was the hearing directed by this tribunal when it adjourned this hearing on 8 August 2016, and gave further directions, with a view to ensuring that the matter proceeded on the re-listed dates in a proportionate and structured fashion. After the telephone hearing on 9 August, neither party made any application to the tribunal for departure from or extension to any aspect of the case management structure, until the week before the hearing.
2. The following matters of case management arose at the start of the hearing and during the hearing:-
 - 2.1 Counsel who had represented the claimant in August, and whose personal arrangements the tribunal accommodated in re-listing, was no longer available. We did not enquire into the circumstances. We record our gratitude to Ms Bell and to FRU for assuming a substantial professional burden at short notice.
 - 2.2 The claimant applied to us to add a number of items to the agreed bundle. These included photographs of social venues used by Mr Sharma. We could see no prejudice in their late addition.
 - 2.3 The bundle contained transcripts of seven covert recordings made by the claimant (referred to here as T1 and following). It was agreed that the transcripts were accurately transcribed, and we were provided with good quality audio discs. On the reading day on 13 February we listened to the 60 minute extract prepared by the parties as directed. At the end of oral evidence and before submissions, we listened to the recordings in their entirety, a total of just over two hours. During deliberations, we listened to portions again.
 - 2.4 In the week before the hearing, the respondents applied for permission to rely on a report by a company called Cyfor. The tribunal was told that through internet research the respondents had discovered the existence of this company, which through software (which may have been of recent development) was able to interrogate the claimant's covert recordings for metadata, and therefore report on the dates and times when each recording was made, and the time. Ms Berry stressed that the report's conclusions on dates and times were findings of fact, not opinions. The Cyfor report was made available to the claimant at short notice before the hearing.
 - 2.5 After hearing submission, it seemed to us in the interests of justice to admit the Cyfor report, but we expressed our wariness as to the weight to be attached to it. Ms Bell asked to see the formal instruction given to Cyfor, which was produced. We agreed to her

request to put questions on behalf of the claimant to Cyfor, although we were not asked to consider the questions or the replies. In submission, Ms Bell reserved her objection as to the fairness of the procedure, and expressed scepticism as to the independence of Cyfor. We had some sympathy with the former point, tempered by the fact that the recordings were the unilateral production of the claimant.

- 2.6 We could see no issue as to the independence of Cyfor. We shared Ms Bell's concerns as to late production of the report, and noted that matter in admitting it. In the event, however, we noted that the date which Cyfor placed on six of the seven recordings was agreed by the claimant; and the timing of the recordings was in five cases out of the six not significantly challenged by the claimant. We set out below our reasons for preferring the respondents' evidence on the one recording about which there was substantial dispute (a disagreement between the parties of over three months as to when it was made), and note that one of our reasons for preferring the respondents' case on date was the advice of Cyfor.
- 2.7 It was agreed that we would at this stage deal with liability only. At the end of the hearing dates were provisionally set for a remedy hearing, which are now confirmed.
- 2.8 The respondents reserved their position as to strike out of the claim for victimisation, to which they returned in closing submission, in which context we were referred to Singh v Moorlands (Court of Appeal) [2013] IRLR 820, and to the primary authority referred to in that case, Lincoln v Daniels [1961] 1QB 237.
- 2.9 Witness statements had been exchanged. The claimant's witness statement ran to 76 pages of A4. It was discursive and at times unfocused. It dealt with irrelevant matters, and included submissions. Despite its length (and occasional prolixity) the claimant said in oral evidence that it was a selection of a larger narrative which would have been of book length if written down. The tribunal would have been greatly assisted by a concise, factual, chronological narrative statement.
- 2.10 The claimant was the only witness on her own behalf. The timetable set in August of one day for her evidence and one day for that of Mr Sharma was extended by one hour in the case of each, so that each gave evidence for a day and an hour.
- 2.11 The witnesses on behalf of the respondents were the second respondent, Mr Mahesh (Sunny) Sharma; Mrs Anju Smeeton, part-time book-keeper; Ms Aleks Rzewuska, employed by the first respondent as a manager between 14 October 2014 and July 2015; Ms Jana Sobotkova, employed by the first respondent since October

2013; and Ms Agnieszka Lemanska, employed by the first respondent between February 2011 and October 2013.

- 2.12 At the end of the oral evidence Ms Berry applied for the recall of the claimant. She wished to put to her points of detail relating to the recording which was in dispute. The recording at T42-44 was stated by the claimant to have been made on 10 June 2015 and by the respondents on 25 February 2015. The transcript referred to a telephone conversation the previous evening. It was common ground that there had been a telephone conversation between the claimant and Mr Sharma on 24 February. The claimant asserted that there had been a telephone conversation on 9 June. Mr Sharma denied that there had been. The importance of the point was that the respondents wished to put to the claimant that in order to make good her submission that the disputed recording was made on 10 June, she had fabricated evidence about a telephone conversation on 9 June. In order to make good that proposition, the recall was sought to put to the claimant points which the respondents submitted showed that Mr Sharma did not know of a telephone number upon which to call the claimant on 9 June. In reply to the application to recall, and before it was decided, the claimant prepared a supplemental witness statement in reply, and a statement from a new witness, Mr Sandoval, who claimed to have overheard the conversation on loud speaker on 9 June.
- 2.13 Having by that stage heard the evidence, it did not seem to us in the interests of justice to permit the recall of a witness who had been professionally cross-examined for several hours on a matter on which the evidential dispute was clear, particularly as the point of recall was circumstantial and potentially marginal.
- 2.14 Bundles before the tribunal ran to some 1,000 pages or more, although in the event we were referred to only a relatively modest selection of documents in the first volume. The reading lists produced by the parties were very modest indeed.
- 2.15 At the start of this hearing we were told that what had hitherto been a draft list of issues was now an agreed list. It was provided to the tribunal by email and is appended to these reasons. We refer to the numbering of the list in identifying each issue.
- 2.16 As Ms Berry correctly pointed out in closing, the claimant in her statement and in her oral evidence sought to introduce a raft of striking new issues of fact to the list of issues. Ms Berry wished to rely on that indiscipline in support of her criticism of the claimant's credibility. Ms Bell made no application to amend the pleading or the list of issues, but reminded us that authority indicated that tribunals should not 'slavishly' follow a list of issues. We bore well in mind that a significant application to amend had been made in August and refused (and could not disagree with Ms Berry that that application

related to the single most serious allegation of sexual harassment made against Mr Sharma).

- 2.17 We have adhered to the list of issues in this judgment, not we hope slavishly, but because in this bitterly fought dispute, it was a document produced to the tribunal by counsel on both sides; and no application had been made between August and February to depart from it. It did not seem to us remotely in the interests of justice to permit the claimant to disregard that structure and discipline.

General observations

3. We preface these reasons with a number of general observations, including observations about the problems which presented in hearing this case.
- 3.1 As is usual in our work, we heard about a wide range of issues, some of them in detail. Where we make no finding about an issue of which we heard, or where we make a finding which does not go to the depth to which the parties went, our approach does not represent oversight or omission, but reflects the true extent to which the point or issue was of assistance to us.
- 3.2 This case presented as hostile litigation, in which it appeared that the acrimony between the parties had affected representatives. While that is understandable, it is not of assistance to the tribunal, and we seek to disregard it, so far as possible.
- 3.3 The above may explain the exhaustive extent to which both parties had pursued points of detail, some of them peripheral, but with insufficient analysis of relevance. We found for example little assistance in the photographs or decor arrangements of pubs, clubs and restaurants visited by Mr Sharma. The minutiae of the claimant's financial arrangements, including her arrangements with her father, were at best of marginal relevance.
- 3.4 Both parties approached the case on a wholly binary footing. Each asked us to decide that its case was entirely in the right, and the opponent's case entirely in the wrong. The parties made limited concessions of their own errors or human frailty. Neither side accepted that the other might have made mistakes in good faith. Neither side made allowance for human factors on the other side.
- 3.5 The binary approach was not of assistance to us, and we do not follow it. We took care not to approach this case on the basis that if we accept one allegation or submission from one side, we must accept every allegation or submission from that side. That seemed to us contrary to the evidence and contrary to human experience. Human errors, poor use of words, mistakes in writing, are part of the everyday currency of every workplace.

- 3.6 If it were the case that either party wished us to make findings about the personality or character of the other, we decline to make any such finding other than arises from consideration of the evidence. We take particular care when considering Ms Bell's reliance on allegations that Mr Sharma behaved or spoke in ways that was "inappropriate". It is a dangerously imprecise word, which may be infected by moral considerations which are not before us. The usage which we make of that word is where we are asked to consider whether, by an objective standard, language or conduct has not been appropriate between the parties, or not been appropriate in the specific workplace.
- 3.7 The acrimony of this dispute, the frequent disregard in these events of a boundary between personal and professional matters, and the absence or ambiguity of paperwork in the workplace, together led to considerable reliance in this hearing on transcripts of recordings made covertly by the claimant of conversations between Mr Sharma and herself. We deal below and in context with the seven specific conversations, and set out our reasons for accepting the respondents' case on the transcript at T42-45, which we find with the respondents, was made on 25 February 2015 and not on 10 June 2015 as submitted by the claimant.
- 3.8 We note the following general points about the transcripts and the recordings.
- 3.9 First, we mention for complete avoidance of doubt that we find that no linguistic issue arises. English was not the claimant's first language and may not have been Mr Sharma's only first language. We are confident that in the matters before us, nothing turns on usage or understanding of the English language.
- 3.10 The claimant's evidence was that she had made a number of other recordings, which had not been preserved, and of which no transcript existed. We make no finding save to say that the claimant, in putting forward the recordings, submitted that they were not the complete recordings. We can make no finding about the content of a recording on which we received no evidence.
- 3.11 It was common ground that the recordings which we did have were incomplete, as it was obvious that a number began in mid-conversation, and ended in mid-conversation, and that some were interrupted by background noise which rendered words inaudible.
- 3.12 We accept in principle that a risk arises in recordings of conversations in which one party knows that there is recording and the other does not. It was common ground that Mr Sharma did not know that he was being recorded, and that the claimant was always aware of doing so.

- 3.13 Ms Berry submitted that there was plain evidence from the recordings that the claimant had manipulated or directed the conversations so as to entrap Mr Sharma to create a false impression from the transcript. We accept that that was a possibility in principle. We had no evidence that it eventuated to any material degree. We accept that the conversations (eg in particular T15) followed an agenda set by the claimant, who both wanted to speak on a particular topic and be recorded doing so. We could find no cogent evidence of Mr Sharma being lured into saying what he did not mean to say.
- 3.14 Everyday conversation is, we accept as a matter of common sense, loose, and there is considerable artificiality in reading it in transcript. There were particular dangers which arose in cross-examination on both sides in selecting out of context a few words as the basis for cross-examination or submission.
- 3.15 We accept that transcripts do not show us visual language, such as body language. We were greatly assisted by the original audio recordings.
- 3.16 We must bear in mind that apart from the recordings, the claimant and Mr Sharma were in daily or near daily communication and conversation, and that therefore the material before us was a modest proportion of what passed between them. We must also bear in mind that their interaction operated cumulatively, so that although we may read as a discrete document the transcript of a conversation on a Friday, the speakers are aware of what was said the previous Tuesday.
- 3.17 In light of all the above cautions, we have thought it useful to ask ourselves how and to what extent the recordings and transcripts have assisted us to decide this case. Taking the transcripts and recordings as a whole, we make the following general findings about what we have heard:-
- 3.17.1 Mr Sharma displayed a genuine passion for his work and for the business which he had created;
- 3.17.2 Mr Sharma showed an expectation that those who worked for him shared his passion and commitment to the business, an expectation which we consider to be unrealistic, in light in particular of the modest levels of remuneration available to staff including the claimant.
- 3.17.3 Mr Sharma's conversations with the claimant showed on both sides that the boundary between personal and work conversation had been blurred by the time of the first recording (late February 2015).

- 3.17.4 That said, all conversations which we heard were those between employer and employee, between whom there was an inherent imbalance of power, an imbalance of which the claimant was aware, but of which Mr Sharma was only partially and occasionally aware.
 - 3.17.5 The tapes record both parties, but more notably Mr Sharma, interacting in a way which we describe as volatile, ie showing unpredictable switches of significant emotion.
 - 3.17.6 The recordings show Mr Sharma but not the claimant as proactively intrusive into matters which were private and unrelated to the workplace (eg the conversation about the claimant's visit to her doctor at T66).
 - 3.17.7 The recordings show Mr Sharma repeatedly failing to manifest qualities of leadership or professional maturity, in a number of respects. We refer to the topics of conversation; volume and tone; switches between rudeness and courtesy; the occasional conversational use of obscenities; and the use of sexualised language. We deal with examples where relevant in our fact finding. Our generalised conclusion is that the use of such language represented Mr Sharma's lack of a sense of boundaries, his occasional sense of his own power, his volatility, and his lack of insight into the effect of such language on the listener, who was his employee.
4. As said, our approach has been to reject the invitation from both parties to take a purely binary approach. We have rejected the suggestion that if we believe Ms Eslahi in relation to some allegations, it must follow that we accept all of her allegations. Our general approach is that where an allegation rests upon her bare word, without any form of corroboration (which we interpret generously) from any other source, we do not find that the point has been proved, as we do not consider her a wholly reliable witness or narrator.
 5. In so saying, we consider that we have made allowances in favour of Ms Eslahi. She was, despite occasional use of legal vocabulary, plainly a layperson in law and inexperienced in legal analysis. It appears that when she first took legal advice, in about June 2015, she did so from solicitors whose area of practice was personal injury, and who appear to have been inexperienced in employment tribunal matters.
 6. The claimant told us that she had for some time been prescribed medication, including at the time of this hearing. We understand that to refer to citalopram, an anti-depressant. There was no medical evidence before us of the claimant's current state of health affecting her cogency as a witness.

7. We accept the claimant's oral evidence, which was that she had poor recollection of some detail of events which she described; and that she found the events difficult and painful to remember, and the recordings difficult and painful to listen to. While we accept that evidence, we cannot repair the consequent gaps in her evidence.
8. We accept also that shortcomings in the presentation of her witness statement may well have been the product of her inexperience in analysing the contents of the document, and in presenting it. We do not regard that in isolation as undermining her evidence.
9. When we consider the claimant's evidence in general, we are concerned by the following matters, which present cumulatively.
 - 9.1 The claimant presented allegations of a long course of conduct on the part of Mr Sharma which, before 24 February 2015, was almost wholly uncorroborated extrinsically.
 - 9.2 Despite Ms Berry's comments about manipulation and entrapment, there was almost nothing in the recordings which referred back to earlier events. If the claimant had indeed been minded to entrap Mr Sharma, or create a record for evidence, she had opportunities to do so. We take the absence in the transcripts of conversation about events in previous years to indicate that these events have not been proved. The reference to texting during the night was a striking exception.
 - 9.3 We note the claimant's undisciplined attempts to amplify her claims. Ms Berry rightly pointed out in closing submission that the amendment refused in August 2016 was on its face the most serious allegation against Mr Sharma, which rendered its absence from her claim form inexplicable. She sought at this hearing to introduce for the first time the allegation that she had been appointed by Mr Sharma in February 2013 because he was attracted to her. That was an attempt to taint the entire working relationship, start to finish, with sexually driven motivation. It was rejected.
 - 9.4 Ms Berry in submission criticised the claimant's evasion of direct questions. That criticism was in part well made. Like many witnesses, the claimant appeared evasive because she repeatedly answered what she thought was the underlying point of the question, not the question.
 - 9.5 The claimant in evidence focused on points which were of next to no assistance to the tribunal, but of some emotional importance to her. Ms Berry pointed to the two or three pages of her witness statement in which the claimant sought to excuse writing a thank you card to Mr Sharma, a point of next to no importance in the claim. We noted the frequency with which she told the tribunal about her father's wealth,

as an indication that she had no financial needs when her marriage broke down.

- 9.6 The claimant approached parts of this case carelessly, and without due regard to its gravity. We accept Ms Berry's submission that the original transcripts prepared by the claimant contained 176 mistakes. Most importantly, we set out below why we find that the transcript at T42 was of a conversation on 25 February 2015. We do not find that the claimant was caught out in a lie about it, which she sought to cover up in her witness statement. Our finding is that carelessness caught up with her, that she did not deal with it properly in preparing the case in the first place.

The legal framework

10. This was primarily a claim under the Equality Act 2010. The protected characteristic was sex. The key material provisions were section 13, 26, 27, and 123.

11. Section 13 provides

- (1) 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.

Section 26 provides,

A person (A) harasses another (B) if— 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.

12. Section 27 provides,

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.

13. So far as material, section 123 provides.

[P]roceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period;

14. A number of the claimant's complaints, including the matters on which the complaints have succeeded, were pleaded as both claims of direct discrimination and harassment. In upholding the former, we have taken care to consider how a man, in identical circumstances (as required by s.23) would have been treated. In upholding the latter, we note the separate elements which we must find, which are whether there was unwanted conduct; whether it had the stated purpose or effect on the claimant; and whether it was reasonable to do so.
15. In weighing up these points, we have noted a number of general, recurrent considerations about the relationship between the claimant and Mr Sharma. We do not set out exhaustive considerations, nor do we attempt to do so in order of priority. We note however the following.
16. There was, throughout the relationship, a significant imbalance of power and wealth in favour of Mr Sharma. The claimant had, in general, a sense of insecurity and vulnerability which we did not see in Mr Sharma. She was aware of lacking family support in the UK; and, when her marriage broke up, she was aware of what she considered to be her isolation, and of her dependence on her job and therefore on Mr Sharma as an individual. We accept that the claimant's family in Iran was well to do (and indeed were struck by her evident touchiness on that point), and we accept that she was particularly galled to find herself financially vulnerable at times.
17. Where we uphold the claims of harassment, we do so on the basis that the conduct was in each case unwanted, in the sense that it did not represent the free consensus of equals. Where for example we find that Mr Sharma texted the claimant late at night, we find that her responses were, at least in part, driven by the fact that he was her superior.
18. We have, in each case, considered with care whether the conduct was related to the protected characteristic of sex; and whether it had the statutory effect, and was reasonable to do so. In upholding those claims, we in general find it inconceivable both that a hypothetical man would have been treated in the same way; and that the conduct was not related to sex: we do not, for example, think that even if Mr Sharma were to drive to a male employee's flat to take him to a seminar, he would have texted him twelve times in less than an hour while doing so.
19. We attach no weight to the fact that the claimant may at times have appeared compliant with Mr Sharma's wishes. We repeat our above comments as to the free choice of equals. We accept that not unlike Mr Sharma, the claimant was at times moody, even volatile. That does not alter our general finding that Mr Sharma's behaviour towards her made her uncomfortable on and in relation to each of the occasions where we uphold her claims.
20. We find that the entire course of employment before us was, for the purposes of s.123, a single relationship, and a single act continuing to 10 June (and thereafter protected by post-victimisation provisions). If we did not, we would in the alternative find that it was just and equitable to extend

time in relation to any individual act or event until 10 June and the final breakdown of the employment relationship on that day.

Findings of fact

21. We now turn to the main fact find. As the list of issues was set out chronologically, we have found it most useful to cross-refer between our chronological fact find and the list of issues, and therefore we set out our conclusions as we proceed. We depart from chronology to deal first with the issue of pay, and therefore of unlawful deductions.

22. Pay and unlawful deductions

22.1 The claimant started at a salary of £20,000 (page 149). On 1 July 2013, a few weeks after her initial probation period, her salary increased to £24,000. Although it was common ground that the increase had taken place, the claimant denied having received the increase letter (157A), a matter on which we make no finding; the point does not assist. It was common ground that in 2014 the claimant received a pay rise of another £1,000 (158) which brought her pay to £25,000. In February 2015 Mr Sharma wrote a reference to an estate agent, stating that the claimant's pay was £30,000 per annum plus £5,000 bonus (161); he told us in evidence that he accepted that that was untrue and the purpose of the lie was to help the claimant to rent accommodation.

22.2 The claimant's payslips and pay records are consistent with pay of £25,000 per annum. She received a Christmas bonus in December 2013.

22.3 In October 2014 she received a one-off bonus of £200.00 (299) at the request of Mr Sharma's father.

22.4 Starting from December 2014, and each month for the next six until May 2015, the claimant received an additional sum which was recorded in the pay system as bonus, and which was £200 in December and £400 in January and thereafter £250 per month. These figures are all net.

22.5 The claimant's case was that these payments represented a contractual pay rise, as evidenced by the reference sent to the estate agent. The respondents' case was that the money represented loans to enable the claimant to rent a property independently after she had separated from her husband. The parties agreed that there was no written evidence of a loan agreement (or of any other arrangement about the extra payments).

22.6 Mrs Smeeton, who was a conspicuously honest and reliable witness, stated that the respondent did not have a bonus scheme and that nobody received a bonus in the true sense of a performance related

addition to basic pay. She was told to make extra payments to the claimant, and as she worked on Sage software which required her to categorise such payments, the only available category was bonus. We accept Mrs Smeeton's evidence, and find that the mere designation of the payments as bonus does not indicate that they reflected the quality of performance.

- 22.7 Mrs Smeeton's evidence further was that after the October 'bonus' she told Mr Sharma that if he was going to make regular additional payments to the claimant, they would have to go through the payroll and be taxed. Mr Sharma agreed to that. Accordingly the sums paid to the claimant described above were net sums on which the second respondent paid appropriate deductions. Mrs Smeeton explained that the puzzling document at 316, which appeared to show a bonus of £1,150 that month, was no more than putting through payroll the hitherto unrecorded figures for previous months.
- 22.8 We find that the claimant did not receive a pay rise. There was no evidence of her having done so, such as a letter comparable to that sent in May 2014 informing her of a pay rise. We make no comment on Mr Sharma's conduct in writing untruthfully for the estate agent, save that we do not find it to be evidence of a pay rise.
- 22.9 We do not find that Mr Sharma made a loan or loans to the claimant. Not only was there nothing recorded in writing at the time, there was no document or email to cross-refer, no matter how obliquely, to the possibility or basis of repayment. We note, and attach some weight, to Mr Sharma's outburst described at paragraphs 26.13 to 26.15 below, during which Mr Sharma angrily shouted at himself (but in the claimant's hearing) (emphases added to transcript), 'I must be frigging out of his head giving you bonuses and giving you ..'
- 22.10 The first suggestion of a duty to repay was made by Mr Sharma's solicitors on 18 June, in circumstances set out below. The fact that the sums were paid net to the claimant begged the question as to whether, in the event of repayment, the claimant would be expected to repay the deductions which she had never received, because they had been paid to HMRC.
- 22.11 We find that there was neither an agreement to repay when possible or on request; nor any agreement that the sums in question would be repayable if the claimant left her employment. There was no evidence that the matter was even mentioned.
- 22.12 We find that the sums designated as bonus were a series of gifts paid by the first respondent on behalf of Mr Sharma to the claimant, in recognition of the claimant's financial need following her separation from her husband. They were not repayable by the claimant. We find that up to her dismissal, her gross annual salary remained at

£25,000 which she has been paid in full and no deductions have been made.

22.13 There was evidence, which we found not easy to understand, of Mr Sharma having helped the claimant financially early in 2015 with the short term consequences of her separation. We accept that he contributed towards her removal costs, and that he paid her car insurance (which was an immediate sum, and commensurate with the luxury car which she then had). We do not consider that we need make findings on the detail. It is sufficient that we find that there was no evidence of any agreement or arrangement at the time that those sums were to be repayable, or of terms or timing of repayment. A loan was first mentioned in the solicitor's letter of 18 June. In the absence of that evidence, and in the context of the other payments then being made by the respondents to the claimant, we find that those sums were also gifts.

23. Events up to 24 February 2015

23.1 We deal first with the general fact find up to 24 February 2015. We approach the matter on that basis, because the period between the claimant's start of employment, and that date, was rich in allegations in the list of issues, but relatively limited in documentation, and largely missing from the recordings and transcripts.

23.2 In briefest outline we set the scene of these events. The claimant, who was born in Iran in 1979 or 1980 (the dates are recorded differently) set out her cv at 429D. We accept that she has working capability in three languages, and began working in the UK in 2007, after three years working in Belgium. She had no relatives in the UK, a matter of which, at times of difficulty, she became increasingly aware. She set out an academic record to Masters degree level.

23.3 After a few months in the UK, she took up employment in 2007 with Marks & Spencer, and remained with them until she joined the respondent in February 2013. We accept that she had a record of achievement at Marks & Spencer, but also that working for a company of its size and stature may not have prepared her for working in a small enterprise such as the first respondent.

23.4 The first respondent company was set up by Mr Sharma in 2002. We understand its line of business to be a form of brokerage, ie matching available large scale items available at discount from manufacturers with retailers (including well known high street names) wishing and ready to purchase. Examples were at pages 166A and following. We accept that it is a high speed competitive business, with Mr Sharma as its creator and driving force. He spoke with pride of having built up the business to a turnover of some £10,000,000 per annum, and of aspiring to double that.

- 23.5 The office premises were the ground floor of a residential house, of which we saw photographs at 429P. The ground floor rooms were not significantly converted and the photographs which we saw were compatible with residential accommodation being used as an office. We were shown a floor plan of the upstairs of the house, which had bedrooms, bathrooms and office space. The upstairs of the house was not available to office staff; the claimant mentioned that in over two years' employment, she had never been upstairs. Mr Sharma did not live in the house, although he might stay there if he worked late. He lived with his wife and son in Buckinghamshire, and his wife and son visited the office freely if they wished to.
- 23.6 Ms Bell cross-examined both Mr Sharma and other employees on the basis that Mr Sharma's marriage was in difficulty, that he had separated from Mrs Sharma (who attended the entire hearing) and Ms Bell put to Mr Sharma the name of an alleged girlfriend, which he denied with visible astonishment. We had no evidence on this, either directly or by implication (in any word, conversation or recording, cross-reference, email, or confirmation from any other employee or ex-employee) and we do not find that any such matter or event has been proved.
- 23.7 The office staff were all relatively young women. If the claimant sought to imply that that pattern of employment was based on sexual opportunism, we reject the suggestion. Mr Sharma's evidence, more realistically, was that their work was largely administrative and clerical; he paid modest salary; and it was the sort of work which attracted women. There was nothing untoward about the pattern of turnover of which we heard. All the other employees and ex-employees who gave evidence (apart from Mrs Smeeton) were of Eastern European origin and all spoke in positive terms of their experience of working at the first respondent. All gave evidence that they had not felt in any way sexually threatened or harassed by Mr Sharma, and none agreed that she had seen or heard the claimant in such circumstance.
- 23.8 It is common ground that Mrs Sharma met the claimant at Marks & Spencer, when she was there as a customer, and after they had chatted, she invited the claimant for an interview. The claimant attended for interview on 29 January 2013, and Mr Sharma made an immediate offer of employment (149) which the claimant accepted, starting at a salary of £20,000 on 7 February 2013. We deal separately with salary and pay issues.
- 23.9 The claimant was issued with a contract of employment (152) which was of curious drafting, but of which we need only say that it was not fully compliant with the requirements of part 1 of the Employment Rights Act, in that it failed to give details of, or reference to, a disciplinary or grievance procedure. The claimant's complaint to that effect is upheld.

- 23.10 The claimant's employment in the event lasted 28 months. We find that she was in general a satisfactory and competent performer in the functional requirements of her job. That general statement accepts that like any employee in any role, she made mistakes or sometimes had a bad day. In support of that general finding, we noted the pay rises awarded to her; the gift made to her by Mr Sharma's father, and a matter to which Mr Sharma referred in evidence: how struck he was that when on occasion she had been on holiday in Iran, the claimant telephoned him to remind him of work matters which he needed to attend to in her absence. We accept that when she started her employment, she did so in good spirit, and was an enthusiastic and respected colleague of the existing staff.
- 23.11 The claimant was married at the time of her recruitment. Her marriage fell into difficulties, and in November 2014 deteriorated to the point that she confided in Mr Sharma an allegation that her husband had been violent towards her.
- 23.12 The evidence before us as to whether the claimant "brought her personal life to work" was less helpful than might have appeared. It was a good example of an issue on which the binary approach of litigation was not helpful. We find, and we did not consider it to be disputed, that the claimant was not given to florid displays of emotion at work. We accept that on days when she came to work in a state of distress, colleagues were sensitive to her distress, and understood in general terms that the cause of it was domestic. We do not mean by this to suggest that Mr Sharma breached any confidences made to him by the claimant. We also accept that colleagues in the office understood the claimant to have to deal during working hours with personal matters arising out of her marriage difficulties, such as dealing with the bank, accommodation, her car and such like. All this made human common sense.
- 23.13 We do not accept the emotive denials made by the claimant that marriage difficulties, and then separation from her husband in early 2015, were matters which she took financially in her stride due to the support of her father. We accept that in the short term, the claimant experienced financial difficulties as a result of all the practicalities which follow from the separation of one household into two.
- 23.14 Mr Sharma gave evidence, which we accept, of having offered financial support to other employees which was additional to their contractual remuneration. He quoted examples of providing free accommodation to enable a new employee to relocate; paying the costs of an immigration solicitor; and paying course fees for an additional qualification. He also loaned one of the warehouse men a sum to contribute towards the deposit on his house. In that light, we accept that Mr Sharma saw nothing untoward in offering the claimant financial support, whether short term or one-off, or longer term and

more permanent, in consequence of her marriage breakdown. We have found separately that the sums were gifts.

23.15 The claimant's case, which was that Mr Sharma did so for an ulterior motive (which appeared to be the exercise of power over her, a wish to inter-meddle in her personal life, with the possibility of sexual favours in return) is one which we reject.

24. Issues 1.1 to 1.24

24.1 We now deal with issues 1.1 to 1.14, all of which arise in the period before 24 February 2015.

24.2 On issue 1.1, we accept the evidence of Mr Sharma, not significantly challenged by the claimant, and supported by the other witnesses, to the effect that if Mr Sharma needed to discuss a matter which was confidential, he conducted the meeting in his own office and shut the door. He did so out of everyday respect for personal privacy, and also because, as was common ground, the soundproofing in the residential premises was poor. We find that if this happened more often to the claimant than to others, the reason was not related to any protected characteristics. The reason was that the claimant was more demanding than others of Mr Sharma's time because of the break-up of her marriage, and she had greater need for support than other employees. We do not find that it has been proved that she was, in the words of the list of issues, "singled out for personal meetings with the door closed". The factual allegation has not been made out, and it fails.

24.3 Issue 1.2 was shortly stated. It was that Mr Sharma "would unreasonably and without any due cause touch the claimant's arm, hand or shoulder". The nature of the claimant's case was that she could not particularise this in the legalistic sense, but it was a frequent and recurrent event. Mr Sharma denied it. The other witnesses for the respondents denied either having experienced this themselves, or seen it happen between Mr Sharma and the claimant.

24.4 The transcripts were made over a 15 week period, at times when the claimant was wholly in control of the recording, and unlike Mr Sharma aware that recording was taking place. There was no reference to physical contact in any conversation, a matter which the claimant explained in cross-examination by stating that as a result of growing up in the Muslim culture of Iran, she found it difficult to speak of such matters. That answer, however, was one explanation of the absence of evidence, not corroboration of the allegation. We find that the allegation has not been made out and fails.

24.5 In issue 1.3 as drafted, we note for the first time (and comment only once, and with general effect) that we are not assisted by the use of emotive, non-descriptive words ("escalate") ("pester"). We do not

reject the allegation on a technical reading of the drafting. We reject it because there was no corroborative evidence of the claim of Mr Sharma having invited the claimant for lunch or to spend breaks. We accept that Mr Sharma was something of a driven man who did not routinely take structured breaks during the working day. We accept his evidence that it was rare for him to absent himself from the office for a formal lunch during the working day. As long as the claimant remained married, she had the use of a Marks & Spencer discount card through her husband's employment, and we accept that there were occasions when she went out to Marks & Spencer to buy food for or around lunchtime. We accept that there were occasions when Mr Sharma accompanied her. We take the point no further. The allegation has not been made out and fails.

- 24.6 That being so, it follows logically that allegation 1.4 has not been made out. We do not accept the claimant's bare assertion, unsupported by any other evidence, that Mr Sharma repeatedly and intrusively asked her to spend non-working time with him. We note that the allegation of being asked "once or twice a week to attend shopping trips on the weekend" appears to refer to a time when both the claimant and Mr Sharma were married and living with spouses, a fact which adds to our scepticism.
- 24.7 Issue 1.5 is that from January 2014, Mr Sharma "began to send the claimant text messages on a frequent basis and often at 2am or 3am. The frequency of the text messages worsened during the summer of 2014". We take the word "worsened" to mean "increased in number".
- 24.8 At T48-52, (the transcript of the conversation on 9 March 2015) the claimant, in the knowledge of being recorded, spoke to Mr Sharma about things which had made her believe that he had feelings for her which went beyond the professional, and which left her uncomfortable. The passage which relates to text messages was the following: [Claimant] " .. I do understand that because you have been.. trying to show it .. you know by texting me all the time .. since long time back you are trying you know .. you know you kept texting me so late .. So you were texting me like till one o'clock, two o'clock at night." Mr Sharma's reply was significant: "And you were texting me back too." The transcribed reply to that was "Yeah because you are my .." We take it that the cut off word was 'boss.'
- 24.9 We understand Mr Sharma to agree that there were periods of time when he and the claimant exchanged texts well into the night. There was no evidence of the nature and content of the texts. Mr Sharma explained that on upgrading his iPhone, previous data had been lost, and were incapable of retrieval. That was surprising evidence about a vital item of business equipment. We make no finding about the content of the lost records or the circumstances of their loss.

- 24.10 We can make no finding as to the precise frequency or the dates when the text message traffic began and finished. We accept that the language used in the transcript indicates an event in the past, and which does not continue at the time of the conversation.
- 24.11 We ask whether Mr Sharma would have engaged in exchange of texts, on any topic, with a hypothetical male comparator in the small hours of the night. We find it inconceivable.
- 24.12 We ask whether the exchange constituted detriment and unwanted conduct, noting that in the transcript, Mr Sharma shot back to the claimant the comment that she had replied to the texts, indicating complicity, and we understand the claimant's reply (cut off in conversation) to have been that he was the boss.
- 24.13 We find that there was detriment. Having regard to the imbalance of power between the claimant and Mr Sharma, we find that she was placed at the disadvantage of feeling unable to end the exchanges with her boss. We find that the conduct was unwanted, in the same sense, namely that it did not represent the exercise of free choice between equals.
- 24.14 We ask whether it was related to the protected characteristic of sex and we find that it was. It seems to us that in the matrix of the relationship between the claimant and Mr Sharma, gender was an inescapable factor, along with the imbalance of power and wealth.
- 24.15 Ms Berry submitted that the text claims were free standing claims, which were well out of time. We set out separately our general finding on limitation, as a result of which we find that the tribunal has jurisdiction to determine this part of the claim.
- 24.16 It follows that we find that issue 1.5 has been made out and that that element of the claim is upheld.
- 24.17 We find that issues 1.6.1, 1.6.2 and the first half of 1.6.3 (to the word "physique") are not made out and fail. There is only the claimant's bare assertion.
- 24.18 We take the sting of the second half of issue 1.6.3 to be that gym membership constituted an opportunity for physical proximity with which the claimant would be uncomfortable. If this were corroborated, it would be in the conversation recorded at T52-53, when there was discussion about Mr Sharma's (undisputed) offer to pay the cost of gym membership for the claimant, at a time when she was under financial pressures. We can see nothing in the transcript which makes good the alleged issue, which fails.
- 24.19 Issue 1.7 is not made out and fails. There was no corroboration of the claimant's bare assertion, and although the allegation is a

particularly strong and startling one, and gives rise to a large number of potential questions, it was never referred to in any recorded conversation, email or any other matter.

- 24.20 We heard some evidence about gift giving, as the basis for issue 1.8. We accept that Mr Sharma travelled abroad on business, and that when he returned to the office he brought back gifts for office staff, including the claimant. We accept that unsold, or surplus, goods from the first respondent's general business stock were available to staff including the claimant, and that staff including the claimant accepted them.
- 24.21 We accept Mr Sharma's evidence that there was a single occasion when he was due to travel to Dubai and the claimant asked him to bring back, if he saw it at duty free, a specific cosmetic product. Mr Sharma did so. We cannot see anything wrong either with the request or Mr Sharma's response, and we attach no evidential weight to it.
- 24.22 The claimant alleged in evidence that Mr Sharma brought secret expensive gifts, which he gave her, on the understanding that both would keep the gifts secret from other colleagues, the sting being that Mr Sharma thereby demonstrated his true feelings for the claimant, and placed her under obligations towards him. That allegation has not been made out for the general reasons already stated and we reject it.
- 24.23 Issue 1.9 has not been made out. It is a striking allegation (that in October Mr Sharma told the claimant that he was in love with her), and therefore particularly noticeable that in the recorded conversations when the claimant spoke about discomfort about what she thought of as Mr Sharma's feelings towards her, she made no mention of this allegation. Making every allowance for the claimant's poor recollection, we note that this striking allegation is not supported by any corroboration, even indirect or circumstantial. We deal below with Mr Sharma's use of the words, "I love you from the bottom of my heart" which was agreed to have been said on 25 February (T1).
- 24.24 The first part of issue 1.10 suggests that Mr Sharma responded opportunistically to the claimant's separation from her husband. We do not agree. We have not found the premise of the allegation (ie that before the separation there was a course of conduct), and we do not find that there was escalation, or a specific cause of the alleged escalation. The second sentence refers to 'considerable pressure' to accept financial help. As stated separately, the recorded discussion about gym membership does not bear out this language; we find that the claimant mentioned gym membership to Mr Sharma as a possible sacrifice which she had to make for financial reasons, and he responded by offering to pay for a membership for her. We do not agree that Mr Sharma put the claimant under pressure to accept

financial support; nor do we accept, as pleaded, that she rejected his financial help. The factual basis of issue 1.10 is not made out, and it fails.

- 24.25 Issues 1.11, 1.12 and 1.13 all related to the same event, of which the background was that in 2013 the claimant, Mr Sharma and Ms Lemanska had together gone to a motivational seminar, an experience which they found useful and enjoyable. On the way they had eaten together, and it was an unhappy indication of the parties' occasional descent into pointless detail that the tribunal heard that while it was common ground that they ate Lebanese style food together, there was dispute, of a significance which escaped us, as to whether they ate in a kebab shop, café, or restaurant. We decline to make any finding on the point.
- 24.26 In February 2015 the same trainer organised another seminar, and emailed direct to the claimant and Mr Sharma, inviting their attendance. Both wanted to attend. The event was to be on Wednesday 18 February 2015. It was common ground that having initially agreed to attend, the claimant changed her mind on the day of the event, or on the previous day. Mr Sharma (WS 24) attributed her change of mind to a trivial work disagreement, a matter on which we make no finding. The important point is that Mr Sharma agreed that he understood that the claimant had changed her mind.
- 24.27 It was common ground that Mr Sharma wanted the claimant to go with him, and that on the afternoon of 18 February, he sent her a text saying: "This is an order, go home and get ready, I will pick you up". We accept that Mr Sharma may have repeated orally the use of the phrase "It is an order".
- 24.28 The claimant went home to change. Mr Sharma drove to her home to collect her. Between 17:43 and 18:39 Mr Sharma texted the claimant eleven times and telephoned her once (406). He told us that the text traffic was to say that he was on his way, to ask for her postcode for his satnav, and to tell her that he had arrived outside the gated estate where she lived, so was ready to collect her. We accept that while that would account for three or four texts, it left twice that number unexplained.
- 24.29 The claimant and Mr Sharma attended the seminar. We were shown a photograph for which they posed with the speaker after the event (428).
- 24.30 We find that the factual basis of issue 1.11 has been made out. We do not attach disproportionate weight to the use of the word 'order' in context. We accept that the word was used in a sense which intended and conveyed both management instruction and an element of good humour and informality. We do not accept that the claimant understood that it was a peremptory management instruction, failure

to obey which might lead to disciplinary sanction. The context, however, cannot be separated from the exercise of management authority, at a time when both knew the claimant was emotionally and financially vulnerable and accordingly dependent on her employment. We add to that context the cumulative history which we have found of late night texting, and the curiosity of twelve communications within 54 minutes.

- 24.31 Taking those matters together we find that Mr Sharma overbore the claimant's free will in prevailing on her to attend the event. We find that he would not have done so in the case of a hypothetical male comparator, because with that person he would not have had the history of texting, nor do we find that he would have used text on the day in the manner in which he did. We find that he would have been more circumspect in the use of the word "order." To the extent that the claimant's free will about use of her free time was overborne, she experienced a detriment. We therefore find that complaint 1.11 as a complaint of direct discrimination has been made out to the extent stated.
- 24.32 We then go on to consider whether it has been made out as a claim of sexual harassment. We find that it has. In light of the context and history, we find that to a material degree (but not necessarily exclusively) Mr Sharma's conduct was unwanted and related to the protected characteristic of sex, in that it was an exercise of authority over a woman and that the claimant's free will was overborne. We find that she was intimidated, giving rise to a hostile environment. It was reasonable in the circumstances for Mr Sharma's words and actions to have that effect.
- 24.33 After the seminar, Mr Sharma drove the claimant home. There is then dispute of fact about two major matters, which form issues 1.12 and 1.13. The claimant's evidence was that Mr Sharma insisted on taking her out to dinner on the way home. Mr Sharma's evidence was that he had not eaten that day and neither had the claimant, and that she was content to be taken out for a meal. The claimant added to the point by stating that Mr Sharma had taken her to a venue called Mortons, a private members club of which Mr Sharma was a member. At the start of this hearing, the claimant added photographs of the venue to the bundle. Mr Sharma agreed that Mortons is a private members club of which he is a member, and said that he has often entertained his wife and children there.
- 24.34 It has not been made out that Mr Sharma overbore the claimant's free will by insisting on taking her out to dinner against her wishes. If Ms Bell sought to introduce a sexual innuendo about the choice of venue, we reject it. The bundle contained the receipt, showing that both had had a meal and drinks, and left by 10.45pm.

- 24.35 Mr Sharma then drove the claimant home, and stopped at the entrance to the gated development where she lived. The claimant had recently moved there. There was a dispute about a conversation which took place. The claimant alleged that Mr Sharma asked which window in the development was hers, which she could not identify as she had recently moved. She alleged that he then asked if he could come up to her flat. Mr Sharma denied this. We find that the allegation has not been made out. In so finding we add that not only was there no corroboration of this, but that this conversation took place at a time when the claimant said that she had begun making recordings, and shortly before the first recording which we had (made on 24 February). It was nevertheless not referred to.
- 24.36 We find that issues 1.12 and 1.13 fail because they have not been made out factually.
- 24.37 Issue 1.14 was a broad general assertion that Mr Sharma “always wanted the claimant to work late”. This allegation has not been made out, either as to its factual basis, or as a claim under the Equality Act. If the suggestion was that Mr Sharma tried to engineer occasions of being alone late in the office with the claimant on grounds of sexual opportunism, we reject the suggestion. We make the general finding that as Mr Sharma was away from the office for considerable periods, he expected all staff to work autonomously and responsibly, and beyond their contractual basic hours if the tasks so required. He expected the claimant to report to him on the ‘tracker’ (dealt with below) at the end of the working day. The claimant, like her colleagues, did so: the level of commitment which she showed by telephoning Mr Sharma from Iran was conspicuous.

25. Events on 24 February 2015

- 25.1 It might be useful to take a snapshot of where matters stood at 5pm on 24 February. The claimant had separated from her husband and undergone a period of stress and distress, including financial difficulty. She earned basic pay of £25,000, which since December had been topped up with sums which we have found to be gifts, and were the equivalent of placing her on pay of around £30,000 per year. We have found that by that date the respondents had discriminated against the claimant and harassed her in two respects, in relation to texting and in relation to some of the events of the evening of 18 February. The claimant had over two years’ service. She was in general capable and competent; we accept that she was moody, and at times unable to prevent events outside work affecting her at work, which in turn rendered her working relationships changeable.
- 25.2 The claimant’s evidence was that at some point in time about which she was vague, but possibly in late 2014, she began to record conversations with Mr Sharma. There was no extrinsic evidence of this having taken place, and no specific evidence of a trigger event.

There was no evidence of recording before 25 February 2015. The claimant's evidence was that she had never before recorded conversation covertly. Ms Berry made the only submission available in reply to an opponent's assertion of having once had but now lost relevant evidence, which was that it was not admitted, but that its absence must be taken to be convenient to the claimant. We can make no finding on the claimant's assertion of having made earlier recordings than those which we saw, save to say that it has not been made out, and that we confine our findings to the recordings which we have.

- 25.3 An event took place on the afternoon of Tuesday 24 February 2015 which was, at the time and subsequently, including at this hearing blown up from molehill to an entire mountain range. The factual basis was largely agreed.
- 25.4 Mr Sharma called into the office briefly at the start of that day and then was out all day. He returned at about 5.30pm. He had not had a good day. He had been involved in an ugly incident on the M25, when he felt that he had encountered a road rage episode, which had upset and shaken him. When he arrived at the building, he urgently needed to use the toilet. When he reached the building the claimant was at the end of her working day, had packed her belongings, and was clearly ready to leave. If Mr Sharma had been a few minutes later, they would have missed each other.
- 25.5 The claimant had not completed the "tracker" task at the end of the day, which, as we understood, involved the daily report to Mr Sharma of available manufacturers' offers and customer interest. We understood this to be a daily report giving a snapshot of the business.
- 25.6 Mr Sharma entered the building, saw that the claimant was about to leave, knew that the tracker report had not been given, and said to her abruptly words to the effect that they could do the tracker at 8.45 the next morning. He then rushed upstairs.
- 25.7 The claimant was unhappy that Mr Sharma had spoken to her abruptly in the presence of colleagues. She went to the foot of the stairs, and raising her voice (because he was not directly at hand), used words to the effect that she could stay to do the tracker then and there if Mr Sharma wished, and that there was "no need to treat me like a child". Mr Sharma did not hear what the claimant said. When he came downstairs, she had gone. He asked what had happened or been said. Ms Rzewuska and Ms D Lemanska were still there. Mr Sharma's son had also been present. It is an interesting reflection of the problems inherent in evidence giving that asked to repeat one or two sentences which they had heard, moments after the event, three eye witnesses gave two different accounts.

- 25.8 Ms Rzewuska and Ms Lemanska told Mr Sharma that the claimant had said something about him being “childish”. We do not accept Ms Rzewuska’s evidence that she reported the same actual words given in evidence by the claimant, because we accept Mr Sharma’s recollection that his son gave a different account, which tallied with the claimant, ie that she had objected to being treated like a child. On that account, crucially, she had not applied the word ‘childish’ to Mr Sharma.
- 25.9 This was a momentary, minor exchange. We find that the claimant perceived a personal slight in Mr Sharma’s words where none was intended. She raised her voice because she knew that Mr Sharma was distant, not to shout at him. She used a phrase with some emotive content, but whichever phrase she used, it was a heat of the moment outburst, which was not offensive on any objective analysis. It could at worst be criticised as inappropriate in the work context. A manager of maturity and leadership would have ignored it, or, at most, quietly told the claimant the next morning that she should not raise her voice, or use emotive language at work, but would then have closed down the matter.
- 25.10 The use of the word “child”, in either phrase, gripped Mr Sharma to the point of obsession. It maintained its grip on him to the extent that when for the first time in these events on 8 June 2015 he set out a management requirement in writing to the claimant, he still referred to it (166, dealt with in greater detail below).
- 25.11 Mr Sharma telephoned the claimant after 6pm, and asked her what she had said and why she had said it. For part of the conversation, he put his phone on to loudspeaker, so that Ms Rzewuska and Ms Lemanska could hear and comment. That was a further indication of poor management, as it plainly opened the door to conflict between the workforce, where speaking to each individual separately would not have done so. It was a regrettable indication of the claimant’s lack of insight that her immediate response was to accuse Ms Rzewuska and Ms Lemanska of lying, and of doing so deliberately so as to harm her. An employee of insight might have helped draw a line under the episode by apologising for her tone and misuse of a word, and even for any consequent misunderstanding.
- 25.12 We accept that the dialogue between the claimant and Mr Sharma in the phone call became heated. As he later admitted, Mr Sharma in the course of the conversation said to the claimant: “Who the fuck do you think you are? Fuck off”. We accept that he used words consistent with an end of the employment relationship, the effect of which could be taken as an instruction that she should not return to the office.
- 25.13 Issue 1.15 took the events of 24 February as far as Mr Sharma’s abrupt remark. We can see nothing whatsoever which relates in any

respect to any protected characteristic, however approached. The event was no more than a moment of bad temper at the end of a bad day.

25.14 Issue 1.16 refers to the telephone conversation on the evening of 24 February, and our finding is the same. It has not been shown to be related to protected characteristic in any respect. It was a continuation of the mutual bad temper which had preceded it.

26. Events on and after 25 February

26.1 The claimant came to work on 25 February, having decided, in light of the previous day's events, to record her conversation that day with Mr Sharma. It was common ground that they had a conversation recorded at about 37 minutes' length which started before 9am (T19). It was common ground that there was a later conversation of 26 minutes recorded at T1. For reasons which follow we prefer the respondents' evidence that it took place at around 11.44am rather than 10.30am as said by the claimant. There was a disputed conversation (T42) said by the claimant to have taken place 15 weeks later, and we prefer the respondents' evidence that it in fact took place at around 11:19am on 25 February, recorded at five minutes. We therefore accept that it was in sequence the second of three recorded conversations of the day.

26.2 We make that finding for a number of reasons, only one of which is the Cyfor report to that effect. The disputed conversation refers (T43) to an acrimonious telephone call the night before; there was agreed to have been an acrimonious conversation on the evening of 24 February. We attach considerable weight to reading the end of the conversation (T44) with the beginning of the next conversation at T1. T44 ends with Mr Sharma losing self-control, shouting almost irrationally and abusively, and stating that he will write a letter. T1 begins with Mr Sharma contrite, apologetic in tone (but not in words) and with the sound of a document being torn up. There is striking continuity between the sounds of a document being created and then destroyed. However, the single most powerful factor in our finding is the emotional and logical sequence which we heard and read between the end of T44, a gap of some 10-15 minutes, and the start of T1.

26.3 We do not find that in preparing this case, the claimant deliberately tried to mislead the tribunal about the disputed conversation. We accept that she made a very careless mistake in thinking that T42 had been recorded on 10 June. We deal below with her later evidence that there was telephone conversation on 9 June.

26.4 It is an invidious task to summarise findings of fact drawn on 70 minutes of conversation, which the tribunal has read in full, and listened to in part up to three times.

- 26.5 The first conversation on 25 February began at about 8:45am (T19). The claimant began with asking to speak about the tracker but stated that she needed to leave for a GP's appointment. Mr Sharma's tone was gentle, perhaps in reflection that he had overstepped a mark the previous evening. He told her to relax and have a cup of tea, and said: "You are not doing work, I'm not doing work mentally, my hands may not be shivering but my heart is sinking".
- 26.6 The conversation which unfolded was striking in Mr Sharma's repeated inability to let well alone. He plainly recognised that the claimant was unwell and upset, but could not stop himself opening and returning to topics which upset her, and he failed to direct the conversation in a way which would close off those topics. We note in particular his repeated circling around the momentary incident of the previous evening. We note the repeated instances in which Mr Sharma showed lack of insight into the imbalance between his position and that of the claimant, in authority, security and wealth. The conversation slid into attack by Mr Sharma on what he called the claimant's "mood swings" and consequent "yo yo lifestyle" as he termed it, a phrase which he used on a number of occasions to describe what he saw as the claimant's volatility.
- 26.7 In that context, and speaking of whether the claimant and he could continue to work together, Mr Sharma said:
- "We go our ways, you go and find yourself another job, I go and find myself another employee. But I can't have this. I have invested so much in you Maryam, so much, and this is the reward I get from you? That is not acceptable to you.. What have I made for you from where to what? I invested you in financial, I invested to you emotionally, I invested in to care, that's the most hurt to me, that's the most hurt." (T30)
- 26.8 The claimant raised the issue of whether the working relationship was also personal, and Mr Sharma stated:
- "I am not embarrassed if I said to you that was all about personal. I openly said to everybody yes I did care for you, I do care for you, and I said it to you and I said it to you a hundred times and I say it to you even now. Okay. If I didn't care for you, frigging heck, I wouldn't do all the things that I've been doing." (T32)
- 26.9 When the claimant stated that in return, she gave 100% commitment to her job, Mr Sharma replied:
- "Bullshit! Your commitment, 5.30 you are out. I asked you 110 times, Maryam devote yourself to the D&D, work with me, this is my vision, come talk, be the perfect woman."
- 26.10 The conversation returned to a recurrent theme, which was the contrast, in the claimant's eyes, between working for Marks &

Spencer and the respondent; and the understandable irritation felt by Mr Sharma at having his company compared with a giant with which there were no serious comparisons to be made. The conversation continued with Mr Sharma's repeated expressions of the aspirations of the business and the possibilities which it offered and concluded with the claimant going for her medical appointment.

- 26.11 What we found to be the second conversation began at T42 with a discussion of the claimant's contractual position and Ms Eslahi asking for something in writing from the respondent. It was clearly preceded by an unrecorded argument, in which Mr Sharma had again used purported words of dismissal as he had done the previous evening. Mr Sharma's tone is unrestrainedly angry (T42):

"I don't give a shit about your life anymore. From this moment onwards Maryam go and lead your life happily and wonderfully... You know my heart melted when I saw your car, when you knocked on the door and my thought, what was my first question is this the Maryam who came to the door because of the money and the job, or do you care for D&D and for Sunny Sharma. That was my question."

- 26.12 The claimant repeatedly told Mr Sharma that he could not dismiss her just by shouting at her, and had to put something in writing. The tone is well caught in the following exchange (T43):

Mr Sharma: "You challenge my authority by standing here and shouting at me";

The claimant: "I'm not shouting, you are the one who is shouting Sunny. I'm not shouting."

Mr Sharma: "Now I am but five minutes ago you were, so it's my turn."

- 26.13 Ms Eslahi (who of course knew that there was recording) presents in the recorded material as calm. The last eight lines of the transcript (T44) show Mr Sharma losing self-control.

"You have a right to talk to me like this? You have a right to embarrass me? You have a right to show your anger in the office? You had a gross misconduct, I am not bullying you, I'm the fucker arsehole who gave you every ounce worth of help in your, in your circumstances okay, and I am bullying you. Go and prove me in the court I bullied you I will tear you to the pieces, how much help I gave you. Go!"

- 26.14 Pausing there, Mr Sharma was first returning to the 'childish' incident of the night before, and then reproaching the claimant with the generosity which he had shown her when she needed it at the time of her marriage break up.

- 26.15 The following words followed, which sound as if they are recorded from a distance, ie as if Mr Sharma had moved away some distance

from the recording, and was shouting, partly to himself, and without inhibition:

“Think I must be frigging out of his head giving you bonuses and giving you bullies, you think the bloody court will believe you for that. They will get you frigging psychiatric treatment. I’ll write you a letter in five minutes, you can leave immediately.”

26.16 Our finding is that the third recording on that day begins at T1, about ten minutes after the above words. Although Mr Sharma used no word of apology, retraction, or express contrition, his tone and volume had changed to a solicitous near whisper:

“You are the last person Maryam I wanted this to do, the last person on the planet. I wasn’t expecting this. Neither were you probably expecting from me, neither from you. I love you from the bottom of my heart and I would never do anything but I cannot clearly, openly say in front of anybody in that office.”

26.17 We hear the sound of paper being torn, which we take to be an indication that the letter which Mr Sharma was typing in anger a few minutes previously was being destroyed. We accept his evidence that he showed the claimant the outside of the letter, but never gave it to her and destroyed it.

26.18 Having begun the conversation like that, and having told the claimant to go home, to rest, to have a drink of tea or water, Mr Sharma returned within moments to dispute: “What gives you the right to be so arrogant and so obnoxious?”. He then returned repeatedly to the child incident of the evening before. When we read the transcript and hear the recording, it is as if he cannot stop himself: “What? I shouted? Of course I did on the phone. How dare you challenge me because I said to you” (T4). There was then a prolonged conversation about the incident of the night before, repeatedly returning to Mr Sharma’s, “You insulted me in front of everybody” (T7).

26.19 Issue 1.17 contained a number of allegations. We reject the allegation that Mr Sharma asked the claimant “about where she is at night.” While those day’s conversations veered between professional and personal, we do not find that question was raised by Mr Sharma. Issue 1.17 continued “The second respondent intimidated the claimant by touching her hand/body.” We reject that allegation. Although the claimant stated in evidence that she found it difficult, given her Iranian heritage, to speak about physical contact between man and woman, our finding is that if during the recorded conversations Mr Sharma had made unwanted physical contact, the claimant, with her unilateral knowledge of the recording, would have responded with an express reference to the unwanted contact.

26.20 Issue 1.17 continued that Mr Sharma stated “That he had invested in her financially and emotionally.” We agree that this was said. We

agree that having regard to the cumulative effect of previous conversations, the reference to emotional investment would not have been made in conversation with a man, and constituted direct sex discrimination and sexual harassment for the general reasons set out above at paragraphs 14-19.

- 26.21 We agree that there was a moment in the recorded conversation when Mr Sharma said that in context he would give the claimant a payment in lieu of notice, and he referred at different times to four weeks, six months and one year. We do not consider that that language was related to a protected characteristic. It reflected rather loss of self control and absence of professional managerial insight.
- 26.22 It will be recalled that the claimant went to see her doctor on the morning of 25 February. The certificate that day signed her off to 4 March on a diagnosis of stress at work. We accept that the claimant left work early on 25 February and was off sick the next two days, Thursday and Friday.
- 26.23 The fourth recorded conversation took place on Thursday 27 February at the start of the day, and lasted a recorded three minutes (T65). It was by telephone. The claimant sounded weak and debilitated. Mr Sharma did most of the talking. The recording is incomplete. As we listened to the recording, it was difficult not to be struck by Mr Sharma's insensitivity. The claimant was certificated unwell and sounded unwell. He could not fail to use the opportunity of a purported welfare call to state his views about work, performance and related matters, and we note the intrusiveness (T66 and T67) with which he sought to probe the boundaries of the claimant's medical privacy. Mr Sharma did not challenge the fact that the claimant was unwell and was signed off, and we take the brief reference in the conversation to the sick note as an indication that the claimant had not given him the sick note (T66).
- 26.24 Issue 1.18 states: "Mr Sharma refused to accept the claimant's sick note and insisted that she continued to work. He told the claimant that she was dismissed." The allegation is not made out. On the contrary, the claimant was off sick for part of February 25 and for the next two days. The sick note was discussed on February 27. Mr Sharma betrayed no signs of concern about not having received it (T66) and referred only to what he called his 'right to know' what was wrong with the claimant.
- 26.25 The last line of issue 1.18 and issue 1.19 fail. Our finding is that Mr Sharma told the claimant on 24 February by telephone that she was dismissed. In the course of the next morning, she asked for written confirmation. Mr Sharma prepared a letter in anger. He then tore it up without delivering it or handing it over. The claimant remained in employment for another 15 weeks. There was no dismissal at that time.

- 26.26 Issue 1.19 succeeds to the limited extent that we find that Mr Sharma told the claimant “I love you from the bottom of my heart” (T1). We accept Mr Sharma’s evidence that he was passionate about the business which he had created, and that at one level cared about all his employees. We do not envisage that he would have used those words one-to-one to a hypothetical male comparator and we accept that they constituted detriment when spoken by employer to employee in a workplace setting. We consider that they constitute sexual harassment for the general reasons already stated. The claim succeeds.
- 26.27 Issue 1.20 is that “On the claimant’s return to work on 27 February, the respondents made no enquiries about her fitness to work and the causes of her stress”. We find that the claimant did not return to work on 27 February, and we have commented above, not favourably to the respondent, on precisely the opposite finding, namely Mr Sharma’s intrusiveness in probing medical matters which were not of legitimate concern to him. The allegation is not made out on its facts and not made out to relate to any protected characteristic. It fails.
- 26.28 The precise date and sequence of the claimant’s return to work remain unclear. Mr Sharma had written what he stated was a note of the claimant’s sickness absences. (177). Ms Bell raised a point as to the metadata of a typed transcript (175), which could not assist us. We accept that the claimant was at work for most of the weeks starting Monday 2 and Monday 9 March.
- 26.29 On her return, the ‘childish’ conversation continued to resonate. Convinced that Ms Rzewuska and Ms Lemanska had deliberately and in concert given Mr Sharma a false version of what she had said on 24 February, the claimant withdrew from normal conversation with them. It was a curious way of objecting to what the claimant saw as being treated like a child. In an office of three or four employees, this had, as the claimant must have known, a significant impact on the working atmosphere.
- 26.30 The next matter to which we were taken in detail (and in recording) was an event on 9 March, when Mr Sharma took the claimant to lunch, at the Royal Saracen Hotel. Mr Sharma’s intention was to try to clear the air with the claimant. That was perfectly proper in principle. The claimant gave evidence that in the course of the conversation, she slipped away from the table in order to start recording, hence the recording which begins at T48 and runs for 34 minutes, does not represent the totality of conversation on that occasion. We can plainly hear the background sounds of a public space. The claimant stated that the conversation took place at lunchtime, but the respondents timed it at later in the afternoon, after lunch.

- 26.31 Of the conversations which we heard, this seemed to us the one in which the claimant was most in control, in the sense that she seemed relatively unemotional, and appeared to us conscious of trying to lead the conversation.
- 26.32 The recording opens with a discussion about the relationship between the claimant and Mr Sharma, including their friendship, in which Ms Eslahi plainly states that she does not reciprocate Mr Sharma's feelings of friendship. It was in that context that there was conversation about texting late at night (48). .
- 26.33 Mr Sharma does not deny having feelings of friendship for the claimant, and is at pains to stress that the friendship goes no further. Not everything in this conversation was of assistance. The claimant asked us to draw an inference hostile to Mr Sharma from the fact that there was conversation about having had a drink at the Crazy Bear Hotel. Ms Bell suggested, with reference to photographs, that the décor and furnishings were indicative of a sexualised venue. We do not draw that inference from any material about the venue shown to us.
- 26.34 In answer to Ms Eslahi's questions about the nature and extent of his friendship for her, Mr Sharma expressed himself in sexualised language:
- “And even when your husband was not living with you I said “Ok don't go down that level Maryam try to build up your relations, try to be together.
- So clearly not having you as my girlfriend, or as a lover, or as a date, or to have sex. No way... I never intended it with you ever in two years and never would.” (T51)
- 26.35 The conversation returned to the same theme minutes later:
- “Any white person who turned round today would have never waited for two years on a woman to hit a line on, I am not that kind of person. Any white person would have, would have taken you and left you in the first six weeks, trust me. That's how those fuckers are. I somebody is asking you for a date, if anybody wants to have a relationship with you, if anybody wants to go to bed with you, they do not hang around for that long. Believe you me.” (T53)
- 26.36 There was a brief exchange (T54 to T55) in which Ms Eslahi challenged Mr Sharma's use of the language “from the bottom of my heart”, and Mr Sharma asserted that that language, and any actions which followed, were not confined to the claimant, but were shown to other employees as an expression of his passion about the business.
- 26.37 The claimant tried to explain her insecurity to Mr Sharma, but in doing so she touched on a raw nerve. She referred to her contract, which in turn led to Mr Sharma's past use of the language of dismissal, which in turn led to reference to Marks and Spencer (on this occasion

introduced by Mr Sharma, T56), which touched briefly back on the 'childish' conversation, which led Mr Sharma to mention what he perceived as the claimant's arrogance and its source in her receipt of money from her father, and to an audible deterioration in the atmosphere of the conversation. There was much momentary insight in the claimant's comment, "Sunny, I think the more we talk the worse it gets." (T60).

- 26.38 The claimant and Mr Sharma are heard walking from the hotel to his car. Mr Sharma introduced the topic of the claimant's "negativity in the office and those mood swings" (T60), which yet again led him to go back expressly to the 'childish' incident of 24 February. That in turn led the claimant to accuse her colleagues of lying about what she had said.
- 26.39 The conversation ends with a prolonged reproach on Mr Sharma's part about the claimant's attitude, and her volatility. At the end of the recording, there is a sense that the relationship has deteriorated in the course of the 34 or so minutes.
- 26.40 Issue 1.21 referred to this conversation. Issue 1.21.2 relies on the reference to a white man and bed. That allegation succeeds. For reasons already stated, we are confident that a male comparator would have been spoken to in the same way. For the general reasons given, we find that it was a matter of sexual harassment.
- 26.41 The remaining allegations under Issue 1.21 are not made out, being that Mr Sharma touched the claimant while they were in the car; that he became angry with her in public; and that he used the words, "He wont try anymore because he couldn't get anything from the claimant." We accept that Mr Sharma made reference to his commitment to work and his support for the claimant, but that he felt disappointed in her response. We do not consider that those have in any respect been shown to relate to the protected characteristic of sex.
- 26.42 We have considered with care whether the opening of the conversation, and in particular the general conversation about feelings, can be taken as probative of any of the other specific pleaded issues. We decline to make that finding, because to do so would be to adopt the course which we have rejected, ie that of broadening our findings on corroborated specific points into wider generalised findings on uncorroborated points.
- 26.43 There was little evidence before us of events between 9 March and 4 June. We heard that the claimant was in Iran for part of that time, and there was some evidence of sickness (177A) but it appears that in general it was a period of relative calm in the workplace. The final sequence of events at the workplace took place between 4 and 10 June, which were a Thursday to Wednesday.

Events of 4-10 June

27. We now turn to the final sequence of events. As stated, the events are those between 4 and 10 June. In the list of issues, those engaged are 1.22 to 1.25, and 9 to 11 inclusive.
28. The factual area of dispute can be shortly summarised. The claimant's case (WS151ff) is that on 4 June she came to work, having burnt her neck whilst straightening her hair. There was a mark on her neck. Her allegation is that Mr Sharma identified it as a love bite, which led him to engage in overt and explicit sexualised conversation. The claimant repeated her lack of interest in any relationship other than a working relationship. As a result of the accumulation of these events, Mr Sharma without justification wrote the claimant a warning letter on Monday 8 June which he gave her that afternoon (166). Mr Sharma was not at work on 9 June, but telephoned her at home that evening, and there was an acrimonious conversation in which she was dismissed. She returned to work the next day, and after further conversation, Mr Sharma again dismissed her. Her witness statement set out at length an account of a conversation about dismissal, which we have found to have taken place on 25 February, not 10 June.
29. Mr Sharma denied the above account in its entirety. He stated (WS43ff) that over a period of weeks at least the claimant's engagement at work deteriorated, and continued to affect the atmosphere at work. He noticed a mark on the claimant's neck, and told her to help herself from a stock item of cream which was available. Having reflected on the claimant's deteriorating attitude over the weekend of 6-7 June, Mr Sharma wrote a warning letter. He did not take advice and he had never written one before. He gave her the letter on 8 June and on 10 June, after his return to the office, the claimant confronted him, challenged the letter, and in a heated conversation left the office, never to return. He denied that he made a call to the claimant on 9 June, denied having dismissed the claimant, and pointed out that evidence indicated that he had no current telephone number on which to call the claimant on 9 June.
30. We had recorded transcripts of two conversations on 10 June. The parties were some distance apart on the timing of the first one, T15, the claimant stating it took place around 9am and the respondent at 11:54am. The second and final transcript was at T45, which respectively they timed at 1pm and 1:35 pm. Pages T42 to T44, which the claimant asserted occurred between those two conversations is the conversation which we have found took place over three months earlier.
31. Our findings are the following:
 - 31.1 The claimant's functional performance in the key tasks of her role was in general, across the period of employment, competent and performed to a standard which was acceptable. There was in the evidence a fleeting reference to a remark allegedly made by one

supplier that the respondent business had missed opportunities, but we had no evidence of a failing in performance by the claimant.

- 31.2 We accept that in the range of other behavioural factors at work, the claimant was inconsistent, unpredictable, and occasionally volatile; qualities which were all present in Mr Sharma. The qualities which we refer to in this paragraph are consistency of mood; consistent relationships with colleagues, and the ability to maintain composure under pressure. We add that there was no evidence of a respondent ever having sought external advice on managing these qualities, or ever having expressed in writing the professional standards which represented their expectation of the claimant's conduct, at any time before 8 June. We accept that Mr Sharma from time to time spoke to the claimant about these matters, and on reading and hearing over two hours of dialogue between the claimant and Mr Sharma, our finding is that he failed to convey to her in the language of line management his reasonable expectations of professional behaviour.
- 31.3 Issues 1.22 and 1.23 are not made out. There was no independent evidence which referred to the love bite or to Mr Sharma on 5 June having used the sexualised language set out in the claimant's witness statement at WS154. We remind ourselves that on the claimant's evidence she had by the end of 4 June intermittently been recording remarks made by Mr Sharma over a period of five months. She could of course not come to work on 4 June predicting that Mr Sharma would make a remark about a love bite. However, if he had done so on 4 June, then the following day might have been a useful day to use the recorder; we note also the absence of any reference to that allegation in heated conversations on 10 June.
- 31.4 We agree that there was some argument between the claimant and Mr Sharma on 4 June. We do not think that Mr Sharma would have referred specifically to an incident on that day in a letter four days later if there was no foundation for it (166).
- 31.5 We accept that in the general volatility of the claimant's performance, the week of 1 June was a period when matters were difficult. In so finding, we note that a number of her former colleagues commented on her changes of mood, and her ability to create a poor collegiate atmosphere, eg (as found above) by withdrawing from normal conversation with colleagues.
- 31.6 We find that Mr Sharma ruminated about matters and recent events over the weekend of 6 and 7 June. We accept that he had a genuine perception, based on observation, that the claimant's moodiness, fatigue and her attitude were affecting the office and needed at last to be addressed.
- 31.7 We find that the claimant had little insight into her behaviour or its effect; it was striking that when asked in evidence if she

acknowledged any basis for any of the criticisms made of her in the letter of 8 June, she denied it. Mr Sharma for his part had never written a warning letter before. He had no insight into the desirability of professional guidance, and little understanding of HR practice. We accept that he drafted a warning letter to be given to the claimant on Monday 8 June without considering any of the matters which an adviser would have considered basic: reference to an appropriate procedure for the issue of warnings (which did not exist); identification of the qualities to be addressed by the employee; identification of specific events; the possibility of a hearing before the issue of a warning; desirability of note taking; or the right of appeal. He did not consider the emotional impact of addressing his letter "Ms Eslahi" without even the prefix "Dear" or indeed the every day use of the first name.

- 31.8 Mr Sharma came to work with the letter, ready to give it to the claimant. The claimant worked well that day. In isolation, there would have been nothing to criticise in her work. Nevertheless, late in the working day, he asked to speak to the claimant alone, and closed the door. He began the conversation by saying, with reference to the claimant's work that day, "You've been amazing today." There was then a conversation and he handed the claimant the letter at 166. The letter should be ready in full. It is brief and starts "Following a series of incidents in the past, I am writing you an official formal warning."
- 31.9 The letter sets out general and generic failings on the part of the claimant and gives the single specific of "Your poor mannerism and conduct towards me, most recently on Thursday 4 June 2015." That does not give the claimant sufficient information. We note, remarkably, that the letter continues "In the past, there have been a number of incidences where voices were raised and inappropriate comments were made, which is not acceptable going forward." We take that to refer to events including the 'childish' incident on 24 February. It is a measure of Mr Sharma's inexperience in such matters that he thought it appropriate to base a warning on a minor event over three months previously, which had not at the time been subject to any formal step.
- 31.10 Mr Sharma was not in the office on 9 June.
- 31.11 The claimant gave evidence, (which Mr Sandoval would have corroborated) that on the evening of 9 June Mr Sharma telephoned her, was abusive and dismissed her. The respondents' case was that that evidence was tailored to the claimant's mistake about the date of the disputed recording. We find that there was no call on 9 June. We agree with the respondents that the claimant gave incorrect evidence of a call on 9 June, in order to tailor her evidence to her mistaken conviction that T42-45 took place on 10 June. We do not find that it damages her credibility any further than is stated in this paragraph.

We find that she was confused and mistaken. As we did not hear from Mr Sandoval, we make no finding about the draft statement which he submitted.

- 31.12 The claimant attended work the following day and the first recorded conversation took place before 12 noon. We find the opening section of the transcript (up to the lengthy interruption on T16) compelling. It explains also our rejection of the allegation that there was a telephone call the night before.
- 31.13 In the first portion of the transcript, the claimant asked Mr Sharma for five minutes “to talk about the letter you gave me on Monday”. Up to the interruption, the claimant used the word ‘letter’ 11 times and the word ‘formal’ 3 times. Those were her focus. She wished to challenge the letter, and to tell Mr Sharma that he had not followed what she thought of as “the correct procedure to give somebody a formal written warning.” We are confident that if Mr Sharma had telephoned her at home the previous evening, been heard on loudspeaker, yelled at her and dismissed her, she would have said so. The opening of the transcript (“Sunny do you have five minutes”) seems to us incompatible with the suggestion that there might have been an earlier but unrecorded conversation that morning about dismissal.
- 31.14 Accordingly we find that there was a short conversation in which the claimant challenged the letter and told Mr Sharma that he had not followed proper procedure. The conversation was then interrupted by Mr Sharma taking a long business call. Mr Sharma asked the claimant what was wrong with the letter and what she thought would be a right procedure, which the claimant declined to answer, understandably pointing out that it was a matter for the managing director to get his own company’s procedures right.
- 31.15 Mr Sharma said that he had not wanted to give her the letter and when asked why he had done so, replied (T17), “That’s what I am saying heartbrokenly because Maryam I will be honest.. The only and the only reason this has happened, this piece of paper, this shitty piece of paper in my hands, Okay I am calling my own piece of paper the shitty piece of paper, because Maryam you push the button, always to the contractual obligations. Contract, contract, contract.”
- 31.16 Those remarks capture something of the worst of Mr Sharma as leader and manager. Having geared himself up for the first time to issue written standards, he disavowed them almost immediately. He then returned to express his resentment at the claimant’s focus on contractual procedural obligations contracted hours. The recording ended seemingly in mid conversation (T18). The claimant stated that that was because of an incoming call, but we could not hear that on the recording.

- 31.17 The claimant telephoned ACAS and after doing so, the next recording starts with a six minute speechless sequence, in which there is sound of movement, consistent with the claimant walking and removing belongings.
- 31.18 The second recording, at around 1pm, focuses on the claimant stating "I am leaving now as you asked me to" (T45) and a confusing conversation in which Mr Sharma first repeatedly denies having said that he told the claimant to leave, repeatedly uses negative words, eg "No I am not sacking you I have said I will speak to the solicitors and whatever my solicitors say.. So you are leaving the premises of your own accord" (T45)
- 31.19 The claimant in reply repeatedly said words to the effect that Mr Sharma had dismissed her, and told her to leave, to go home and he would write to her. She made no reference to his having done the same the previous evening. In the middle of the second page (T46) Mr Sharma is recorded twice as saying "Yes I said.." and "Yes after discussing..". Ms Bell's point, that at those moments Mr Sharma was in fact agreeing with the claimant's account, despite his previous denials, seemed to us on further listening to be well made.
- 31.20 We find that between the two recorded and transcribed conversations there was an unrecorded conversation in which Mr Sharma conveyed to the claimant three points. They were first, the use of words of dismissal; secondly (and it may have been in the same phrase) that she should leave the premises; and thirdly that he would speak to a solicitor and then confirm in writing. As he told the tribunal, there was not in fact a retained solicitor at that time and it was at lunchtime that day that he made a Google search and found Messrs Owen White as a local employment practitioner.
- 31.21 We find that having heard Mr Sharma say to her words to the effect of dismissal and departure, the claimant spoke to ACAS, and in the second conversation informed Mr Sharma that she did not challenge his decision to dismiss and was leaving.
- 31.22 We have found that on at least one occasion Mr Sharma conversationally told the claimant to "fuck off" although neither at the time took those as words of dismissal. We note that among the repeated topics in their recurrent conversations were matters relating to the end of employment, such as contractual notice. It may well have been that Mr Sharma was accustomed to use words of dismissal loosely. He may well have been crying wolf.
- 31.23 However, Mr Sharma in our judgment failed to give any weight or thought to the impact on the claimant of receiving formal employment correspondence from him (166) about an aspect of her performance, after 28 months of employment; and as it happened when she had

been told her performance on that day was “amazing”. Her lack of insight into the impact of her own behaviour at work was also a factor.

- 31.24 She accepted Mr Sharma’s words at face value, and removed her belongings, telling Mr Sharma that she had accepted his dismissal of her.
- 31.25 Issue 1.24 relates to the issue of the written warning. We have set out above our findings as to the reasons and circumstances. We do not consider that it has been shown in any respect that that decision was related to a protected characteristic. In the absence of corroboration, the secondary allegation in issue 1.24, namely that Mr Sharma stated that it would be the final warning, is not made out.
- 31.26 At Issue 1.25, the claimant pleads three events which appear to be pleaded as “further unlawful treatment”.
- 31.27 Issue 1.25.2 fails because it quotes the conversation which we have found took place on 25 February and was not part of the dismissal.
- 31.28 Issues 1.25.1 and 1.25.3 fail and have not been made out. Although the claimant is heard repeatedly saying “I don’t feel safe” we find that there was no objective basis for her to feel physically unsafe, and we do not interpret the sentence “Please let me leave”, recorded three times, as physical interference with the claimant’s movement. We also, in the context of the ineptitude which led to this situation do not consider that this matter was related to the protected characteristic of sex. Likewise, having heard over two hours of dialogue between the claimant and Mr Sharma, we do not find that the fact that he raised his voice or swore on 10 June related to anything over than the heat of the moment. We note that the swearing allegation is almost certainly based on the disputed transcript.
- 31.29 When we consider the claimant’s claim for unfair dismissal, the first question to ask is whether there was dismissal. We ask whose decision it was that ended the employment relationship in the circumstances which we have found above. We find that it was Mr Sharma’s decision, accepted by the claimant. We then ask what was the reason for dismissal, namely the operative consideration in the mind of the decision maker. We find the decision maker was Mr Sharma. The respondents have not advanced any positive reason, nor one that was a potentially fair reason within the framework of s.98(2) Employment Rights Act 1996. We find that the reason was that Mr Sharma was accustomed as manager to lose his temper and say the first thing that came into his head, without consideration of his managerial responsibilities or the impact of his words. That is a factual reason, but it is not substantial, and it is not capable of being fair. There was no fair procedure which met the requirements of s.98(4) and the claimant’s dismissal was unfair on ‘ordinary’ principles. The claimant was entitled to notice, which she was not

given, or to payment in lieu, which she did not receive. Her claims for unfair dismissal, and for wrongful dismissal, are upheld.

- 31.30 We ask the more nuanced question which is whether the dismissal was an act of direct discrimination on grounds of sex and we find that it was. We find that at the time of dismissal, Mr Sharma's loss of temper arose out of the entirety of the history of seeking to manage the claimant which we have described. That history included the findings of previous discrimination and harassment set out above. We do not consider that the claimant's sex was the only reason for dismissal or the main reason. We need only find that it was a material reason, and having made that finding the claim of dismissal under the Equality Act succeeds.
- 31.31 Although Ms Berry's submission referred briefly to limitation, very little time indeed was spent on limitation. Having heard the totality of the evidence, we are confident in finding that Mr Sharma's management of the claimant was a single continuing act for the purposes of s.123 beginning (not as the claimant put it) with her recruitment, but with the earliest events in discrimination which we have upheld, namely the overnight text messaging.

32. Events after 10 June

- 32.1 The claim of victimisation was set out at Issues 6 to 8 inclusive. The factual matrix on which the claim was based was the following. After 10 June the claimant wrote to Mr Sharma on 16 June (167) setting out a short history of complaint, asking for written reasons for dismissal. The letter stated "There have been several occasions where you have raised your voice, used abusive language and initiated inappropriate conversations." The letter makes no reference to any protected characteristic or discrimination.
- 32.2 On 18 June Messrs Owen White solicitors replied on the respondents' behalf (168) setting out Mr Sharma's instructions on what had taken place and asserting that employment had ended by the claimant walking out of work on 10 June. It said that the claimant would be paid up to that date. As the respondents denied dismissal, no written reasons for dismissal were given. The complaint of a failure to do so on request must therefore succeed.
- 32.3 In its penultimate paragraph the letter stated:
- "We would remind you that you have also been lent various monies during the course of your employment which are now repayable as your employment has ended, but if this matter goes no further, then on a without prejudice basis, the company would not require repayment of those monies. That offer will be withdrawn if any further claims were made and we trust that in the circumstances that now you will have had an opportunity to reflect on your behaviour on 10 June, you will now accept that your employment ended due to your own actions and decisions and not as a result of actions undertaken by your employer. Please

therefore confirm to us in writing that you accept your employer's offer not to seek repayment of loans made to you in the past, and that this is accepted in full and final settlement of any contractual or statutory rights that you have in relation to your employment with D & D Corporation or its termination" (169).

32.4 Nothing turns on the fact that the reply was sent by Owen White rather than by either respondent personally.

32.5 The claimant replied on 24 June and after other matters stated:

"I confirm that I never applied for a loan in the company and I have never borrowed any money from Mr Sharma. I am shocked by this untrue accusation and I will pursue this matter in due course". (170).

32.6 There was further correspondence. On 29 June Owen White quantified the repayable sum at £3,707.19. On 27 July they provided a breakdown which included (174) the grossed up sums of the "bonus" payments which we have found to be net gifts. The letter therefore demanded that the claimant repay more than she had personally received. It also referred to car insurance and removal costs. On 9 September the claimant's then solicitors sent a 'Protocol Letter.' It set out a range of matters as the prelude to a personal injury claim, including but not limited to allegations of a broadly sexual nature.

32.7 When in due course the claimant pursued these proceedings, the first respondent counter-claimed in its ET3. The counter-claim was subsequently withdrawn. Ms Berry explained that the reason for withdrawal was the absence of a written loan agreement; Ms Bell replied that the withdrawal was evidence that the original claim was, in her word, 'malicious.'

32.8 The first matter for us to consider is whether there was a protected act and, if so, when. The claimant relied on four, occurring between February 2014 and September 2015.

32.9 It has not been made out that the claimant did a protected act in February 2014 as alleged. It was not clear to us in evidence that the claimant made a complaint in the presence of Mrs Smeeton, which, however expressed, could reasonably be taken to refer to a protected characteristic.

32.10 We find that the claimant did a protected act in one of the recorded conversations on 25 February 2015 (T1) when she told Mr Sharma "I really feel that you are harassing and bullying me". As that is a loose phrase which is in common usage to express a work grievance, we ask carefully whether we find that it refers to anything done under the Equality Act. In finding that it does, we attach weight to the accumulation of our previous findings. On our analysis, Mr Sharma had by then harassed the claimant in text messaging, and one week previously, on the evening of the seminar. The claimant spoke the

words and Mr Sharma heard them in that context. That seemed to us to indicate that the claim related to the protected characteristic, and went further than a general grievance.

- 32.11 We do not find that it has been shown as alleged at issue 6.3 that the claimant repeated the allegation on 10 June (the word appears at T44, which we have found took place on 25 February, not 10 June as alleged). That is however a second instance of a protected act on that day, ie 25 February. It is common ground that the “protocol letter” from the claimant’s then solicitors of 9 September (91), perhaps more by accident than design, constituted a protected act. While it made allegations of harassment, and referred to language of a sexual nature, it remarkably made no reference to the Equality Act.
- 32.12 We find that the claimant’s phrase “inappropriate conversations” in her letter of 16 June constitutes a protected act for the purposes of the Equality Act. In so saying, we have regard to the history and context. We accept that taken in isolation those words need not necessarily constitute a protected act. We consider that the correct test is to take them objectively in the context of all that had passed between the claimant and Mr Sharma, limited to the matters which we have found. By the time Mr Sharma received the letter of 16 June, we have found a number of episodes of discrimination and harassment had already taken place, and although Mr Sharma did not know that he had been recorded (or, if he did, the extent of the recording), he must be understood to have had in his mind recollection of the sexualised content of certain of the conversations.
- 32.13 We find that in response to the bundle of allegations made by the claimant on 16 June, including an allegation of appropriate language, the respondents chose to defend themselves with a counter attack which was unsupported by any document and not adequately analysed. The poverty of analysis is demonstrated by the fact that the purported claim included the NI and PAYE which had been deducted on Mrs Smeeton’s insistence. That meant that the counterclaim was predicated upon the claimant, at a time of financial difficulty, agreeing to pay back on demand substantially more than she had received. There was quite simply no discussion, let alone agreement, to that effect, as Mr Sharma well knew at all times. We find that he had no reasonable basis on which to conclude that a loan or loans had been made, and therefore no reasonable basis on which to demand repayment.
- 32.14 We find that the demand for repayment was in fact made in response to the claimant’s letter of 16 June. We therefore find that to a material degree it was made because the claimant had done or said something with reference to the Equality Act. It follows that we find that the test of causation is made out. We also find that the correspondence from Messrs Owen White in which the claim is set

out and then quantified, constitutes a detriment. We do not need to find if it was made as a threat or malicious, to use Ms Bell's words.

- 32.15 Ms Berry raised the question of whether this part of the claim is protected by litigation immunity, and we heard detailed submissions on the point.
- 32.16 The claim which the respondents wished to formulate was a claim for breach of contract. It was set out in the response of 24 September as a claim for £3707.19, and stated to be "in respect of unpaid loans that the respondent granted to the claimant to enable her to meet urgent financial problems she had. These loans were repayable on demand and a demand for payment was made in writing to the claimant by correspondence from the respondent's solicitors dated 18 June 2015, 29 June 2015 and 27 July 2015." The claim was particularised in the last of these letters.
- 32.17 The portions of Owen White's letters of which complaint is made are precisely mirrored in the counter-claim which was issued. The correspondence and pleading identify the same cause of action; the same terms of an alleged agreement; the same amounts; and the same headings as the alleged loans. Had the matter proceeded to a hearing, there would have been a complete overlap between the correspondence and the subsequent pleading.
- 32.18 We found most helpful the summary of the law at paragraph 66 of Singh v Moorland, set out below:
- Summarising this part of the case:
 - i) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;
 - ii) The core immunity also comprises statements of case and other documents placed before the court;
 - iii) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;
 - iv) Whether something is necessary is to be decided by reference to what is practically necessary;
 - v) Where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;
 - vi) In such cases the principle that a wrong should not be without a remedy prevails.

- 32.19 We found in this case most troubling the complete overlap between the pleading complained of and the letter for which immunity was sought. We can see some illogicality in accepting that the former but not the latter enjoys complete immunity.
- 32.20 In rejecting the submission of immunity, we note the emphasis placed in the quoted portion of Singh on the approach that the immunity may operate to deprive a wronged party of a remedy, that it should be limited, and that it should only be extended beyond evidence and statements of case where it is practically necessary to do so. That approach enables us to find that in light of our findings of fact that there were gifts, not loans, and that Mr Sharma had no reasonable basis for stating otherwise, we can see no necessity for extending the immunity to letters sent on his instructions, even in circumstances where the correspondence was partly said to be a means of avoiding litigation, and where the contents of the issued counter-claim were identical to the claims made in the correspondence.
- 32.21 On that basis the claim for litigation immunity fails. The claim of victimisation, limited to the contents of Messrs Owen White's letters 18 June 2015, 29 June 2015 and 27 July 2015, succeeds.

Appendix / LIST OF ISSUES

Direct Sex Discrimination and Harassment

1. Was the Claimant subjected to the following treatment by the Second Respondent?
 - 1.1 The Second Respondent regularly required the Claimant to attend meetings in his office. The office door was left open for other members of staff but closed when the Claimant was present. Other members of staff were not singled out for personal meetings with the office door closed.
 - 1.2 The Second Respondent would unreasonably and without any due cause touch the Claimant's arm, hand or shoulder.
 - 1.3 The Second Respondent's behaviour escalated from summer 2013 to the extent that he would pester the Claimant to go out and get lunch with him or ask her to spend breaks with him.
 - 1.4 By the end of the summer (July to August) 2013, the Second Respondent's requests continued to escalate to the extent that the

Claimant was being asked once or twice a week to attend shopping trips on the weekend or for a drink in the evenings.

- 1.5 From January 2014, the Second Respondent began to send the Claimant text messages on a frequent basis to her personal phone and often at 2.00am or 3.00am. The frequency of the text messages worsened during the summer of 2014.
- 1.6 The Second Respondent made the following sort of comments to the Claimant either verbally or by text:
 - 1.6.1 talking about his bedroom furniture and saying that if she did not like the furniture he would change it to suit her taste.
 - 1.6.2 talking about the Claimant's soft skin and when in her presence making excuses to touch her hands.
 - 1.6.3 comments about her physique and asked her to join his gym for "coaching" sessions.
- 1.7 By the summer of 2014, the Second Respondent tried to arrange for the Claimant to holiday with him in the Seychelles **[and/or Dubai]**.
- 1.8 The Second Respondent purchased gifts such as perfume, make up, alcohol and designer belts for the Claimant and gave them to her in his office but did not provide the same treatment to other members of staff when he returned from his business trips. The Claimant was told to take the gifts and make sure that others did not see them.
- 1.9 In October 2014, the Second Respondent told the Claimant that he was in love with her.
- 1.10 Around November 2014, when the Claimant separated from her husband, the Second Respondent escalated his conduct with more text messages, more invitations for drinks, more suggestions of a holiday. The Second Respondent put considerable pressure on the Claimant to accept monetary gifts in the form of gym membership, contributions towards her rent and payment for events (which the Claimant declined).
- 1.11 On 18 February 2015, the Second Respondent pressurised the Claimant to attend a seminar by Dr Demartini and sent her a text message saying "this is an order, go home and get ready, I will pick you up from your place". The Second Respondent came to her desk and insisted that she looked at her phone. He repeated that this was an order.

- 1.12 After the seminar on 18 February 2015 the Second Respondent refused to take the Claimant home until he had had something to eat. The Second Respondent took the Claimant to his private members club.
- 1.13 After eating on 18 February 2015, the Second Respondent drove the Claimant back to her flat and asked to come in.
- 1.14 The Second Respondent always wanted the Claimant to work late.
- 1.15 On 24 February 2015, the Second Respondent approached the Claimant at approximately 5.30pm whilst she was in the staff kitchen preparing to leave. The Second Respondent told the Claimant in a rude and aggressive tone "you are going? Fine but we will discuss the trackers tomorrow at 8.45am" at the start of the Claimant's shift.
- 1.16 On the same day (24 February 2015), the Second Respondent called the Claimant approximately 30 minutes after she left the office and told her to "think very carefully because there are serious consequences" in a threatening manner as he wanted an explanation of what she said to him as she left the office. Without allowing the Claimant to complete her explanation, the Second Respondent shouted at the Claimant in an aggressive manner and swore at her whilst telling her "never come back to this office", "who the fuck do you think you are", "fuck off" and "I don't want to see you ever in this office".
- 1.17 On 25 February 2015 the Second Respondent intimidated the Claimant in their conversations that day by asking personal questions about where she is at night, touching her hands/body; and saying that he had invested in her financially and emotionally. He offered her 1 year's salary.
- 1.18 The Second Respondent refused to accept the Claimant's sick note and insisted that she continue to work. He told the Claimant she was dismissed.
- 1.19 The Claimant requested written reasons and the Second Respondent typed a letter. He then proceeded to tell her that she was the last person that he wanted to dismiss, that he loved her from the "bottom of my [his] heart" and he could not "do this to you [her]" and therefore ripped up the letter in front of her and put it in the bin.
- 1.20 On the Claimant's return to work on 27 February 2015, the Respondents made no enquiries about her fitness to work and the causes of her stress.
- 1.21 On 9 March 2015, the Second Respondent insisted on a repeated basis that he wanted the Claimant to come out of the office to discuss

something with her. The Second Respondent took the Claimant to a restaurant with him and subjected her to unwanted conduct as follows:

- 1.21.1 being inappropriately touched by the Second Respondent in the car;
 - 1.21.2 telling her that “no white man would wait 2 years to take her to bed”;
 - 1.21.3 telling her he won’t try anymore because he couldn’t get anything from the Claimant;
 - 1.21.4 In public, the Second Respondent became angry with the Claimant.
- 1.22 On 4 June 2015, the Second Respondent made inappropriate comments that a mark on her neck was a “love bite”.
- 1.23 On 5 June 2015, the Second Respondent told the Claimant that he was in love with her and wanted to be with her.
- 1.24 On 8 June 2015, the Claimant was issued with a formal Written Warning with no valid reason. The Second Respondent verbally informed the Claimant that this was the final warning which he would give.
- 1.25 On 10 June 2015, the Claimant was verbally dismissed with immediate effect and the Second Respondent subjected her to further unlawful treatment including:
- 1.25.1 blocking her exit so she was unable to leave;
 - 1.25.2 in an aggressive and threatening manner telling the Claimant that she will have to prove in court that she has been bullied and he will “tear her to pieces”;
 - 1.25.3 shouting and swearing at the Claimant.
- 2 Does said treatment amount to direct sex discrimination under s.13 Equality Act 2010 (‘EqA’)? In particular:
- 2.2 Would the Second Respondent have treated a hypothetical male comparator this way?
 - 2.3 Has the Claimant established facts from which the court could decide, in the absence of any other explanation, that the Second Respondent contravened s.13 EqA?

- 2.4 Have the Respondents established that the Second Respondent's treatment of the Claimant was in no sense whatsoever on the grounds of sex?
- 3 Further and/or alternatively, does said treatment amount to harassment contrary to s.26 EqA? In particular:
 - 3.2 Was the conduct unwanted?
 - 3.3 Was the conduct related to sex and/or of a sexual nature?
 - 3.4 Taking account of the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect, did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
 - 3.5 Was the Claimant treated less favourably by the Second Respondent because she rejected the conduct than she would have been had she not rejected the conduct?
- 4 Does the conduct amount to a continuing act (or continuing 'state of affairs') for the purposes of s.123 EqA?
- 5 If not, would it nevertheless be just and equitable to extend time in the circumstances?

Victimisation

6. Did the Claimant do the following:
 - 6.1 In February 2014, in front of the Respondent's book-keeper say that she considered the Second Respondent's behaviour to be harassment which she could not tolerate any further;
 - 6.2 On 25 February 2015, tell the Second Respondent that his conduct towards her was harassment;
 - 6.3 On 10 June 2015 make an allegation that the Respondents had contravened the Equality Act by harassing the Claimant. This allegation was made orally to the Second Respondent;
 - 6.4 On 9 September 2015 in the pre-action letter sent to the Respondents (pages 91-94 of the bundle) repeating the allegation of unlawful harassment.
7. Accordingly, has the Claimant done a protected act within the meaning of s.27 EqA?

8. Was the Claimant subjected to a detriment for having done a protected act, namely the First Respondent lodging a false and malicious counterclaim against her?

Unfair/Discriminatory Dismissal

9. Was the Claimant, as a result of the Second Respondent's words or conduct, dismissed on 10 June 2015?
10. If not, did the Second Respondent's conduct as set out in para.1 above amount to a repudiatory breach of the implied term of trust and confidence entitling the Claimant to resign with immediate effect (pursuant to s.95(1)c ERA and/or s.39(7)b EqA)?

Wrongful Dismissal

11. Did the First Respondent wrongfully dismiss the Claimant in the circumstances, having not paid her for her contractual notice period of one month?

Unlawful Deduction of Wages/Breach of Contract

12. Did the Second Respondent in or around the end of August 2014, verbally promise to increase the Claimant's salary from £25,000 to £30,000 and thereby vary the terms of the Claimant's contract of employment?
13. Did the Respondents fail to pay the Claimant in accordance with that promise from 1 September 2014 until 10 June 2015?
14. If so, how much should the First Respondent be ordered to pay the Claimant in this respect?

Ancillary Issues

15. Was the Claimant's contract of employment compliant with ss.1-4 ERA? If not, the Tribunal must make an award of at least 2 weeks' pay (uncapped), pursuant to s.38 of the Employment Act 2002.
16. Did the Respondents fail to provide the Claimant with a statement of reasons for her dismissal within 14 days of her request on 16 June 2015 pursuant to s.92 ERA? If so, the Tribunal must make an award of at least 2 weeks' pay (uncapped), pursuant to s.93 ERA.

Remedy

17. What declarations should be made in respect of unfair dismissal and/or discrimination?
18. In the event that the Claimant is found to have been unfairly dismissed, the parties agree that she is entitled to a basic award of £950.
19. What compensatory award is the Claimant entitled to?
20. Has the Claimant taken reasonable steps to mitigate her loss?
21. How much should the First Respondent be ordered to pay by way of recoupment in respect of job seekers' allowance?
22. What award should be made for injury to feelings and/or personal injury?
23. Have the Respondents (and/or the Respondents' solicitors on their behalf) acted in a high-handed, malicious, insulting and/or oppressive manner? If so, what award should be made for aggravated damages?
24. What awards should be made for interest (discrimination and/or wrongful dismissal and/or unlawful deductions/breach of contract) and/or delayed payment (unfair dismissal)?
25. If the First Respondent is found to have dismissed the Claimant, the parties agree that the ACAS Code of Practice was not followed and that a 25% uplift of any award is appropriate.
26. What is the total amount of compensation the Claimant is entitled to after grossing up?
27. In the event the Claimant is successful the Respondent should also reimburse the Claimant for the ET issue fee of £250.
28. What financial penalty should the First Respondent be ordered to pay to the Secretary of State pursuant to s.12A of the Employment Tribunals Act 1996?

Employment Judge R Lewis

Date:

Sent to the parties on:22.03.17..

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For the Tribunal Office