Case Number: 1300500.17

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Miss E Brown	Mr S Kiyani t/a Aprana Cafe

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 7 & 8 June 2017

EMPLOYMENT JUDGE Harding

MEMBERS
Mrs Fox
Mr Liburd

Representation
For the Claimant: In Person
For the Respondent: In Person

REASONS

Oral reasons having been provided on the day, these written reasons are provided following a request from the respondent at the conclusion of the liability part of the hearing. The unanimous judgment of the tribunal was that all three claims bought by the claimant against the respondent succeeded.

The Issues

1 This was a claim brought by the claimant, Ms Brown, against the respondent, Mr Kiyani t/a Aprana café. At the start of the hearing we confirmed with the claimant that she was pursuing three claims; direct discrimination because of the protected characteristic of religion and claims of automatically unfair dismissal contrary to sections 104 and 104A of the Employment Rights Act 1996.

2 It had been clarified at an earlier case management hearing that there were two incidents about which complaint was made for the purposes of the direct discrimination claim; a comment that it was alleged that the respondent had made to the claimant on 21 December 2016 about her participation in a Christian wedding which had taken place on 17 December 2016 and the deduction of a day's wages from the claimant in respect of holiday taken on that day. At the start of this hearing we asked the claimant to confirm precisely how her direct discrimination claim was put. She explained that it was her case that the acts she complained about had occurred because what she had been doing on 17 December 2016 was associated with Christianity and singing in a Christian church. She clarified that the claim was not put on the basis that these things happened to her because of her own religion. The respondent's case was that the acts complained of had not occurred.

3 In relation to the unfair dismissal claims it was the claimant's case that she was dismissed for asserting infringement of her right to be paid the national minimum wage (Section 104) or for taking action to secure the benefit of the right to be paid at the national minimum wage (Section 104A). The respondent denied that it had dismissed the claimant. It was the respondent's case that the claimant had chosen to leave the respondent's employment after the respondent had discussions with the claimant about performance and conduct concerns.

Evidence and Documents

4 We firstly need to say a word about how the case had been prepared and the evidence that was before us. The claimant had prepared a brief witness statement, albeit one that was short on detail in respect of significant and disputed points such as the circumstances in which her employment came to an end. The respondent had not prepared a witness statement. This was despite having attended the earlier case management discussion at which all of the necessary preparatory steps were clearly explained to both parties, and despite the case management order, which set out the preparatory steps, having then been emailed to the parties (albeit after some not inconsiderable delay on the part of the administration). The claimant had, moreover, reminded the respondent in correspondence of the need to produce a statement. Rather than do this the respondent had simply submitted a document in which he said that he could defend the claimant's statement and "he could write down thousands of lines but there is no point in doing it all based on bunch of awful lies", sic.

5 This lack of witness evidence was compounded by the fact that, whilst the claimant had prepared a small bundle of documents, there was virtually no documentation at all before us relating to the events in question. In fact the only documents were some WhatsApp messages and two pages of a wage book. That, of course, made the parties witness evidence all the more important.

6 We discussed with the parties how best to proceed. Neither party wanted to have a postponement of the hearing in order to get the case better prepared. After some discussion it was agreed that we would take further oral evidence from the claimant and take all of the respondent's evidence orally by way of the judge asking questions of the parties. We agreed that once this had been done the parties would have an adjournment to consider what questions they might want to ask each other in cross examination. We explained to the parties that it would be normal to challenge the other side's case through questioning and that this often helped us to assess the credibility of a witness' evidence. In the event the respondent chose not to cross-examine the claimant and the claimant only had a very brief handful of questions for the respondent. In the circumstances we simply had to do the best that we could on the evidence that was presented. We also asked the respondent whether he would like the Tribunal service to arrange an interpreter to assist him because, whilst the claimant's English was good, it was apparent that English was not his first language. The respondent told us that he did not want an interpreter.

Credibility

7 The claimant we found to be a particularly credible witness. She gave her evidence in a straightforward and consistent way and was prepared to acknowledge matters that would not necessarily help her case. The most striking example of this was during the remedy hearing when she very honestly told us that the discriminatory acts did not really upset her (although she said they had made her angry) whereas, she explained, the non-discriminatory matters such as her dismissal had upset her a great deal more. The respondent we did not find to be credible. His evidence lacked any detail, it was frequently inconsistent and time and time again his response to questions was that he was "not too sure" and he could not answer the question.

Findings of Fact

8 From the evidence that we heard and the (very limited) documents we were referred to we make the following findings of fact:

8.1 The respondent, Mr Kiyani, at the relevant time, ran a small coffee shop in Birmingham. There were 2 people employed at the café; the claimant and a person we know only as Shahida. The respondent describes himself as Muslim.

8.2 The claimant came to be employed by the respondent having responded to an advertisement for a kitchen assistant on an App. There followed an exchange of WhatsApp messages between the respondent and claimant and then on 24 November 2016 the claimant went to the coffee shop for a two hour trial. Later that day the respondent told the claimant, again via a WhatsApp message, that he had decided to "take

her on board", page 2. He went on to say that he might need to adjust the claimant's hours from 10.00am - 3.00pm later (i.e. he might need to adjust the agreed hours of 10.00am – 3.00pm at a later point in time). He also informed the claimant that the first week of her employment would be training and after that she would be paid.

8.3 The claimant sent a message saying 10.00am – 3.00pm was fine and that "all of the above" sounds great. It had been agreed that she would work Mondays to Saturdays (6 days a week), 5 hours a day Monday – Friday and 4 hours on a Saturday and that she would be paid £150 a week, which equated to very slightly over £5 an hour. The claimant started work for the respondent on 25 November 2016. She was not issued with a contract of employment.

8.4 On 25 November the claimant told the respondent that she wanted to attend a wedding on 17 December and she asked if she could have the day off. The claimant is a member of a church choir and the choir was due to sing at the wedding. It had also been arranged that the claimant would sing her first ever solo at the service. At the time the claimant said she would work extra hours to make the time up albeit the respondent subsequently said this would not be necessary. The respondent confirmed that she could take the day off.

8.5 The claimant at this time was, in general terms, very enthusiastic about her new job. She quickly made a number of suggestions to the respondent about ways to improve the business, including that she could make mince pies on the run up to Christmas in order to try and attract more customers. She also provided the respondent with a list of cleaning equipment that she would need and told him he would have the cleanest kitchen he had ever seen, page 3. We accept her evidence and find that she did, however, also say to the respondent that she did not think that it was fair that she had had to work for nothing in the first week of the employment.

8.6 We accept the claimant's evidence and find that shortly after 25 November she had a conversation with the respondent about the day that she had booked off on 17 December and he seemed a little uncomfortable about it, likely, the claimant thought, because it was a Saturday and she was the only person who worked on a Saturday. However the arrangement remained in place.

8.7 From the beginning of December the respondent sometimes asked the claimant to come in earlier than the originally agreed start time of 10.00am. For instance, on 2 December the respondent asked the claimant to open up at 8.00am, page 9. She agreed to do so. She also offered to

stay on later that day in order to help clean up and she reminded the respondent that she had asked him to buy some cleaning products.

8.8 During the first week in December the respondent told the claimant and her colleague Shahida that he was going to start keeping one day's wages back from them both each week in order to make sure that they did not quit. The claimant told the respondent that she did not think this was right. She pointed out that she was also doing overtime and not being paid for this. The claimant mentioned during the discussion that the respondent had to pay the national minimum wage and the respondent told the claimant that he would put her wages up to the national minimum wage when the cafe was doing better.

8.9 The respondent was a member of a reward scheme which was referred to before us as Lyoness. We know very little about this save that the respondent is a representative for the scheme. If a person is signed up to the scheme they receive a card which they can use in stores to earn points and these points can then be used to obtain vouchers. At some point during the second or third week of December the respondent spoke to the claimant saying that instead of paying her the national minimum wage he would make it up to her via the reward scheme. He suggested joining the scheme would be well worth it. The claimant told him that she would take the national minimum wage and did not want to be part of the scheme.

8.10 On 14 December 2016 the claimant had a meeting with the respondent and his business partner Tahia. Both said to the claimant that they would love to be paying her the national minimum wage but they needed to get the cafe doing better first of all. The claimant, as she herself put it, then "had a moan". She told them that she could not live on the amount of money they were paying her and that she was now worse off than she had been on benefits. She said that she could not afford Christmas on the money they were paying her.

8.11 On 17 December the claimant took the day off from work in order to sing at the wedding, which was a Christian service.

8.12 On Wednesday 21 December both the claimant and the respondent were in work and there was a brief discussion about the wedding. The claimant told the respondent that she was very proud as she had sung her first solo in the church at the wedding.

8.13 The claimant was due to be paid for the preceding week – i.e. due to be paid for 14 – 21 December. As was the usual practice the claimant wrote in the respondent's wage book what she was due, namely £115. This was calculated as follows; the claimant was still nominally paid £150

per week. She factored in the respondent's practice of keeping back one day's wages (£25) and she also factored in that she had received a £10 advance meaning £115 was due, page 28.

8.14 The respondent in fact handed the claimant £90, page 28. The claimant queried this. We accept her evidence and find that the respondent said he could not pay her for 17 December. She asked why and the respondent told the claimant that it is haram to sing and that to do it in a Christian church and sing about Jesus is not something he agreed with or could pay her for. The claimant told the respondent that he could not refuse to pay her and that he was not paying her enough as it was. We accept the claimant's evidence and find that she was angry and confused by the remark and considered it to be unfair.

8.15 There was significant factual dispute between the parties as to what was said on this day. We made the findings of fact set out above for the following reasons. We accepted the claimant's evidence that a further deduction of one day's wages was made for the week of 14 – 21 December on top of the regular practice of deducting wages for one day of each week. We did so because this evidence was consistent with the information which appeared a page 28 - an extract from the respondent's wage book for that week which clearly showed an additional £25 deduction and only £90 being paid to the claimant - which the respondent was wholly unable to explain.

8.16 Our notes show that the respondent was asked at least 6 times during the hearing to explain the information that appeared on this page but he said he was unable to do so. Moreover whilst saying that he was unable to explain what appeared to be an additional deduction he also asserted that he was 100% sure that it was not made in respect of 17 December. This, to us, seemed to undermine his credibility in this regard – after all if he could not say why the deduction had occurred it seemed illogical for him to be able to say that it was definitely not in respect of the day off on 17 December.

8.17 Having found that this deduction had occurred we think it very likely that the claimant would have queried with the respondent why the deduction was made. After all, by this time there was a not insignificant history of the claimant raising queries and concerns about the level of pay she was receiving, she was on a very low rate of pay, and she was already subject to a deduction of one day's pay per week. Yet the respondent denied having any conversation with the clamant about it at all. Again we considered this undermined the respondent's version of events. It follows from our finding of fact that the claimant queried the deduction that there would then have been a discussion about why the deduction was made.

8.18 The claimant attended work the next day, 22 December. We accept her evidence and find that she started to shut machinery down in order to close up between 2.30 to 2.45pm, as the cafe closed at 3pm. The respondent arrived and whilst he was there a customer came in and bought some food. By this time the claimant's colleague Shahida had left with the contents from the till, as was usual practice, leaving the claimant only with a £20 note as a float. The customer tried to pay for the food with a £20 note and the claimant did not therefore have any change. In front of the respondent she took £15 of change out of her own purse and used this to pay the customer, putting the rest in the till. She took the £20 note out of the till for herself and also asked the respondent to provide a further £5, which he did, to make up the float.

8.19 We accept the claimant's evidence and find also that on this day she had bought in to work a large food box full of her own sugar and decorations and that when the respondent arrived she had these packed in a bag ready to take home.

8.20 The claimant by this time was extremely unhappy about the situation in relation to her wages and on 23 December she spoke to ACAS. She also called in sick to work saying that she had a migraine.

8.21 On 24 December the claimant was not due in work as it was Christmas Eve. She saw that the respondent had posted a message on a WhatsApp Group saying that he was a fair and honest employer. The claimant, who was feeling very aggrieved, sent a number of messages to the respondent. These included a complaint that she had never been paid overtime or holiday and that she had spent all day cooking and would not be paid for it. She complained that the respondent portrayed himself as a fair and transparent man and it was not true, page 15. These messages were sent between 5:18pm and 5:20pm.

8.22 At 5.22pm the respondent sent the following WhatsApp message to the claimant;
"U let us down couple of times sleeping at home not giving any notice u r late or not coming and lot o other things
Best is that you take your balance and work at some place where you think it's fair" (sic).

8.23 The claimant responded "are you kidding me. Sleeping at home? One day with a migraine omg. Then you owe me at £7.20 an hour from November 23 plus my holiday pay and overtime".

8.24 The respondent told her to come into the cafe on Boxing Day at 11.00am to sort it out and when she queried why she should go to the cafe that day he stated;
"you will come to drop key and get your balance", page 16.
He repeated that message again a few minutes later saying;
"Can you come in on Monday 11.00am to drop keys and get your balance", page 17.

8.25 We accept the claimant's evidence and find that she understood from these three messages that the respondent had dismissed her. The claimant refused to go to the café to meet with the respondent. For the avoidance of doubt we do not find that prior to this WhatsApp message exchange the respondent had spoken to the claimant about concerns in relation to her paying the customer out of her own pocket, removing property of the respondent's from the café or shutting up the café early. Neither do we find that the respondent had these concerns about the claimant at the time. We set out our reasons for making these findings in our conclusions. We do find, as set out above, that in the same WhatsApp message that the respondent informed the claimant that she "best take her balance" the respondent asserted that the reasons for this were that "U let us down couple of times sleeping at home not giving any notice u r late or not coming and lot o other things".

The Law

9 Section 13 of the Equality Act 2010 states that:
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B lass favourably than A treats or would treat others.

10 Section 23(1) provides that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

11 The burden of proof is set out in section 136 EqA which states:
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

12 The wording of section 13 because of *a* protected characteristic takes account of the ruling in **Coleman v Attridge Law and anor 2008 ICR 1128 ECJ** that the Framework Directive covers discrimination by association.

13 It is now well established that the term "because of" in the Equality Act has the same meaning as that given to the words "on the ground of" under the legacy

legislation; see for example **Onu v Akwiwu [2014] ICR 571**. Accordingly we directed ourselves in accordance with the legacy case law as follows. When dealing with claims of direct discrimination the crucial question that has to be determined in every case is the reason why the claimant was treated as he was, Lord Nicholls **Nagarajan v London Regional Transport [1999] ICR 877**. As Lord Nicholls stated in the case of **Nagarajan**;

"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant."

14 So far as the burden of proof is concerned, the proper approach has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258, Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748.** It was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant's treatment can be made this renders the elaborations of the "**Barton/Igen** guidelines" otiose. "There would be fewer appeals to this tribunal in discrimination cases if more tribunals took this straightforward course and only resorted to the provisions of s54A (or its cognates) where they felt unable to make positive findings on the evidence without its assistance." This approach was expressly endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37.** Lord Hope emphasised again that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where a tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

15 Accordingly although a two stage approach is envisaged by s.136 it is not obligatory. In many cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates

that the protected characteristic played no part whatever in the adverse treatment, the case fails.

16 Where the two stage approach is adopted Mummery LJ explained in **Madarassy** what a claimant must prove in order to establish a prima facie case at the first stage as follows:

> 55. In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in **Igen Ltd v Wong**:
>
> > '28 … The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent 'could have committed' such act.
> >
> > 29. The relevant act is, in a race discrimination case …. that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act),(b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts which the complainant, in our judgment, needs to prove on the balance of probabilities.'
>
> 56. The court in **Igen Ltd v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

17 It is clear that direct discrimination requires there to have been less favourable treatment of the claimant. That is not the same as unfavourable treatment. Treatment may be unacceptable, inappropriate, bullying or irrational but it may nonetheless be no less favourable than that given to others. It is implicit in the concept of direct discrimination that a person (actual or hypothetical) in a similar position to the claimant who did not share the claimant's protected characteristic or association with the protected characteristic would not have suffered the less favourable treatment. Establishing less favourable treatment may therefore involve a comparison of the claimant's treatment with the treatment of others, actual or hypothetical, (the statutory comparison). Section 23 identifies how that comparison should be made.

Unfair dismissal

18 Here of course dismissal was in dispute. In such circumstances it is for the employee to prove she has been dismissed. The question that has to be determined is who really terminated the contract of employment. Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all the surrounding circumstances **Sandle v Adecco UKEAT/0028/16**. Where the words are unambiguous the test is not what a reasonable listener might have understood the words to mean but what is the natural meaning of the words and what did the claimant understand them to mean, **Sothern v Franks Charlesly and Co 1981 IRLR 278**.

19 Section 104 ERA states, relevantly, as follows:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

But, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

The right not to suffer an unlawful deduction from wages by way of non payment of the national minimum wage is a relevant statutory right.

20 Whilst there is no requirement that an employer has actually infringed a statutory right in order for a claim under section 104 to succeed it is important to bear in mind that the wording of subsection (b) is that an allegation has been made that the employer "has infringed" a statutory right, not that the employer has proposed or threatened to infringe such a right. Accordingly there must be an assertion of a breach of statutory rights that relates to the past rather than a future event. **McPartland v Pybus UKEAT 170/99**: "the key to the right under section 104 is that there had been an infringement before the allegation is made". As to what is sufficient to amount to an allegation of infringement sub section (3) makes it clear that there is no need for the employee to specify the particular

right in question, but it must be made reasonably clear what the right claimed to have been infringed was. It would seem that what is required is that the employee at least refers to the constituent elements of the right, **Jimenez v Nelabrook Ltd UKEAT 614/97**.

21 Section 104A states, relevantly, as follows:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for dismissal is that –

(a) any action was taken, or was proposed to be taken, by on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies…..

(2) It is immaterial for the purposes of paragraph (a) …..

(a) whether or not the employee has the right,or

(b) whether or not the right has been infringed,

But, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

(3) The following are the rights to which this section applies –

(a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal.

As the claimant lacks the requisite continuity of service to bring an ordinary unfair dismissal claim then the burden of proving the reason for dismissal, in respect of both unfair dismissal claims, falls on her, **Smith v Hayle Town Council 1978 ICR 996**.

Submissions

22 The claimant did not wish to make any submissions to us. Mr Kiyani submitted that the claimant had said that he had said about haram and Jesus. He told us that as a Muslim he believed in Jesus. He said that he does not discuss religion even with close friends and that he would not have done so to an employee. He did not address us any further.

Conclusions

Direct discrimination

23 We have found as a fact that the conduct complained of - the comment and the withholding of wages - occurred. The claim was, of course, put on an associative basis.

24 The nature of the association asserted by the claimant was not a familial connection or indeed a connection with a particular person who is a Christian –

the connection arose more broadly out of her membership of the church choir at a Christian church - i.e. out of her association with the Christian church. We considered whether this type of association could properly be said to fall within the concept of associative discrimination. We concluded that it could for the following reasons. The wording of the statute on its face contains no restriction of any kind on the type of association that is needed. It is well established that a broad purposive approach should be given to the definition of direct discrimination. The Code itself (although of course it is not binding) suggests that an association with a group of people or an organisation is sufficient. At paragraph 3.20 of the Code the following example is given: "an employee is not shortlisted for an internal job because the applicant - who is not disabled himself - has helped to set up an informal staff network for disabled workers". This, the Code states, is a situation which could give rise to associative discrimination. Moreover the EAT has considered this issue, albeit in the context of a victimisation claim. In the case of **Thompson v London Central Bus Co Ltd [2016] IRLR 9** HHJ Richardson specifically addressed the issue of how widely the association in a case of associative discrimination should be construed. At paragraph 23 he explained that there did not require to be established any particular relationship between the claimant and the others. The EAT stated at paragraph 26 that there was no reason why membership of a trade union could never give rise to the form of association necessary to found a complaint of associative victimisation. It is a question of causation and it is fact sensitive. Moreover in **Lee v McArthur and others [2017] IRLR 69** a direct associative discrimination claim succeeded on the basis of an association with the gay and bisexual community. The protected characteristic was identified as being the sexual orientation of that community. Accordingly we conclude that less favourable treatment because of the claimant's association with the Christian church is sufficient.

25 Just as with a "standard" case of direct discrimination, where the putative discriminator must have knowledge of the protected characteristic before that characteristic can operate consciously or subconsciously on his mind, we consider that the putative discriminator in an associative discrimination case must have knowledge of the association in question. Whilst we were deliberating it became apparent that the claimant had not led evidence setting out specifically what she had told the respondent about the church service. However on the balance of probabilities we infer that the claimant told him she was singing in a service conducted in a Christian church given the explicit comment made by the respondent, on our findings, that he did not agree with the claimant singing in a Christian church.

26 We considered the complaint concerning the comment first of all. There was no actual comparator put forward and we therefore analysed the complaint on the basis of a hypothetical comparator who, we considered, would be a person working in the cafe who had requested time off work to sing at an event of a non-Christian nature or to sing at an event not associated with any religion.

27 We concluded that the claimant has established facts from which we could conclude that she was treated less favourably because of her association with the Christian church in comparison with the hypothetical comparator. Those facts are that, on our findings, there is an intrinsic link on the face of the comment itself between the comment and the religion of Christianity, given the specific reference made to the Christian church and Jesus. Moreover, the respondent did not just make reference to the Christian church, he expressed disagreement with the idea of singing in a Christian church – a factor which suggests that there was a negative connotation operating on his mind between the claimant's singing and the claimant's association with Christianity "to do it (sing) in a Christian church and sing about Jesus is not something I agree with". We conclude also that the claimant has proved that this less favourable treatment was a detriment. After all there is no requirement for there to be adverse consequences other than distress or upset or a real sense of unfairness, paragraph 26, **Deer v University of Oxford [2015] IRLR 481**, and there are very few cases where it can properly be said there is less favourable treatment because of a protected characteristic but no detriment. On our findings the claimant was angry and confused by the remark and considered it to be unfair. Accordingly the burden of proof goes across to the respondent to prove that the claimant's association with the Christian church was in no sense whatsoever the reason why the comment was made.

28 Before us the respondent did not advance any explanation for this comment having been made - the respondent simply denied that the comment had been made. This means that on an application of the burden of proof alone the claimant's case succeeds. In the alternative we would in any event have found that the comment was made at least in part because of the claimant's association with the Christian church. We would have inferred that this was the reason why the comment was made because of the overt nature of the comment and the intrinsic link within it to the claimant's association with Christianity.

29 The second part of this complaint related to the withholding of wages for this day. As set out above we have found that the comment was an act of direct discrimination. Moreover, on our findings, the comment was effectively *the respondent's explanation* for why wages were withheld from the claimant. Accordingly we make a positive finding (**Hewage**) on this basis that the reason why the claimant's wages were withheld was because of her association with Christianity – i.e. because singing in a Christian church and singing about Jesus was not something which the respondent agreed with.

30 We would have reached the same conclusion were we to have adopted a stage 1 and stage 2 analysis as per **Igen** as follows. The hypothetical comparator would be a person working in the cafe who had a day off work to sing at an event of a non-Christian nature or an event not associated with any religion. The claimant has established facts from which we could conclude that she was

treated less favourably in this regard because of her association with religion in comparison with the hypothetical comparator. The comment is the contemporaneous explanation given by the respondent as to why he acted as he did in withholding wages and there is an intrinsic link in the comment to the claimant's association with Christianity. Accordingly the burden of proof would have moved across to the respondent. The respondent did not offer any explanation for why he withheld the wages – in fact to the contrary before us he said that he could not say why he had done so and he would "need to check". It follows from this that this part of the complaint would succeed as a result of the application of the burden of proof, as the respondent advanced no explanation.

Automatically unfair dismissal

31 We firstly had to decide whether the claimant has proved that she was dismissed. We concluded that she had. Whilst it is true that the respondent did not use the actual word "dismissal" in his WhatsApp messages we have found as a fact that he said:
"Best is that you take your balance and work at some place where you think it's fair"
And then immediately after this he twice said, again via WhatsApp, that the claimant could come in on Monday "to drop her key and get her balance". The claimant told us, and we have accepted, that she understood these words to mean that she was dismissed. These words, we consider, are unambiguous and accordingly they should be taken at face value and in accordance with their natural meaning. Their natural meaning is quite clear - go and work somewhere else, bring back your keys (meaning, of course, the claimant could no longer access her place of work) and I will give you any final monies due. Even if the wording could properly be said to be ambiguous we conclude that an objective and reasonable observer, for the same reasons, would have concluded that these words amounted to a dismissal. Additionally, how the parties conducted themselves after this exchange was entirely consistent with the claimant having been dismissed. There were no messages from the respondent to the claimant suggesting that she was expected to work, all messages were concerning outstanding payments and keys and the like, and the claimant did not attempt to present herself for work.

32 Of course it was the respondent's case that the claimant was not dismissed but had resigned by her conduct in refusing to attend work. It is correct, on our findings of fact, that the claimant refused to meet with the respondent at the café but we have found as a fact that this was after the claimant had been dismissed.

33 In any event the respondent's case on this issue lacked cogency. At the case management hearing the respondent had explained that it was his case that he had spoken to the claimant about various conduct and performance issues (see paragraph 2 of the tribunal order) and the claimant had then failed to return

to work. In the respondent's response it was the respondent's pleaded case that the claimant was "caught red-handed" serving a customer out of her own pocket and with food containers in a bag ready to be taken away. The respondent went on in its response to say that "she did not have an answer for it". Clearly it is implicit in the statement that the claimant "did not have an answer for it" that some conversation about the alleged incidents was asserted to have taken place. This was consistent with how the respondent had put his case at the case management hearing, see above. However in oral evidence Mr Kiyani told us that he had *not* spoken to the claimant about his asserted concerns regarding her paying the customer from her own purse and the contents of the food containers.

34 Moreover before us the respondent specifically relied on three conduct/performance issues and the respondent's evidence in respect of these all three of these alleged issues generally lacked cogency. The respondent was unable to explain to us what it was that he had concluded the claimant had done wrong when she had paid a customer out of her own pocket, despite being asked on several occasions to explain this. At one point he suggested that the claimant might have been stealing. When it was pointed out to the respondent that he had accepted that this transaction had taken place in front of him (and in fact he had accepted that the claimant had asked him for change) he changed his evidence saying that he was not saying she had stolen. It was not clear however what, if anything, he was then alleging the claimant had done wrong. The respondent was not able to explain this to us. In relation to the assertion that the claimant was removing property from the respondent the respondent accepted that he had no evidence of this and that it was an assumption. These issues, we considered, undermined the respondent's case in respect of these matters. Likewise, in relation to the asserted concern about shutting up the cafe early, it was not clear the basis on which the respondent was asserting that the claimant had done something wrong and neither was the respondent able to explain this to us. It was not disputed that the claimant worked until 3pm and that the cafe also shut at 3pm. Consequently the claimant would inevitably have had to start cleaning up and shutting equipment off before 3.00pm (unless of course, as the claimant suggested, the respondent had an expectation that she would remain at work after her contracted hours and work on unpaid to clean up). Lastly we considered the WhatsApp messages undermined the respondent's case. Had these three matters been uppermost in the respondent's mind we would have expected these to be spelled out, or at least referred to, in the WhatsApp messages sent to the claimant when she was dismissed. Instead what featured in the messages at the time were allegations that the claimant had let the respondent down a couple of times by sleeping in, and had not given him notice when she was late coming in or not coming in – matters which the respondent did not seek to rely on before us at all.

<u>Section 104A</u>

35 We conclude that the claimant has proved that the principal reason for her dismissal was that she had taken action with a view to securing the benefit of the right to be paid at the National Minimum Wage. We reach this conclusion for the following reasons. On our findings of fact the claimant, from the very beginning of her employment, made complaint to the respondent that he was not paying her the National Minimum Wage. In the 4 weeks that she was with the respondent there were 3 discussions between the claimant and the respondent about the requirement to pay the National Minimum Wage and on 3 further occasions more general conversations were had in which the claimant variously said that she was not being paid for work or was not being paid enough. The claimant's statement to the respondent rejecting membership of the reward scheme and saying that she would "take the National Minimum Wage" could hardly have been clearer. We have little doubt therefore that payment of the National Minimum Wage was an issue that was uppermost in everyone's minds. Moreover we considered the timing of the WhatsApp messages to be very significant. Just 3 minutes after the claimant had again complained about the amount that the respondent was paying her she had been dismissed. This very strongly suggests that the claimant's complaints that she was not being paid the National Minimum Wage, which were actions taken to secure the benefit of being paid the NMW, caused the respondent to dismiss.

36 It was not the respondent's case that the respondent had dismissed the claimant because of performance and conduct concerns but even had this had been the respondent's case we would have rejected it for the reasons set out above. The lack of any other cogent reason for dismissal corroborates the claimant's case that the true reason for her dismissal was her actions to secure the benefit of the National Minimum Wage.

Section 104

37 We conclude that the claimant has proved that she had asserted an infringement of a relevant statutory right. The right not to have an unlawful deduction from wages as a consequence of not being paid the NMW is a relevant statutory right, see sub-section 104(4)(a) of the ERA 1996.

38 As to the allegation of infringement, whilst the claimant's first complaint was put in general terms – that it was "not fair" not to be paid at all for the first week of her employment - by the first week in December the claimant had specifically told the respondent that he had to pay her in accordance with the National Minimum Wage. It is implicit in this statement that there is an assertion being made that the respondent was not paying her currently at the correct rate – i.e. that he was infringing her right not to have an unlawful deduction from wages as a consequence of not being paid the NMW. Shortly after that the claimant told the respondent, whilst rejecting his offer of membership of the reward scheme, that she would "take the National Minimum Wage", and again an assertion is

implicit in that comment that she was not currently in receipt of the National Minimum Wage. These conversations would also, of course, have set the context for the more general complaints made after that by the claimant to the effect that she was not being paid enough or not being paid for overtime. Accordingly we conclude that the claimant explicitly asserted an infringement of her right to be paid the National Minimum Wage on two occasions; during the first week in December and the second/third week in December. Set against this particular context we conclude that the claimant's complaint on 21 December, that the respondent was not paying her enough, was also sufficient to amount to an allegation of infringement as it made it reasonably clear what the right claimed to have been infringed was - namely her right not to have an unlawful deduction from her wages by way of non-payment of the National Minimum Wage.

39 There was no suggestion from the respondent that the claim to the right and that it had been infringed were not made in good faith. To the contrary, the respondent twice acknowledged, on our findings of fact, that he was not paying the National Minimum Wage.

40 The next issue is whether the claimant has proved that her allegations of infringement of this statutory right were the principal reason for her dismissal. We conclude that the claimant has proved that the principal reason for dismissal was that she had alleged the respondent had infringed this right, and we do so for the same reasons that we concluded the claim under 104A succeeded.

Remedy

41 Having announced our decision and reasons orally on liability we moved on to deal with remedy. The claimant's witness statement had touched briefly on matters relevant to injury to feelings and mitigation of loss but once again detail was lacking. Consequently we again took some additional oral evidence from the claimant. The respondent was offered a brief adjournment once the claimant's evidence had been given to prepare his cross-examination but he told us that he did not need a break. He asked the claimant a small handful of questions but he told us that most of what he wanted to say related to points that he asserted we had got wrong in the liability judgment.

42 From the evidence that we heard we made the following findings of fact:

42.1 The claimant was angry and confused as a result of the incident on 21 December 2016. In her witness statement the claimant told us that the effect of the respondent's behaviour on her was "catastrophic", and indeed it was notable that the claimant was tearful and upset for much of the hearing before us. However we find that most of the hurt to her feelings, as the claimant very honestly told us, has arisen out of her dismissal and the non-payment of the National Minimum Wage not the incident on 21 December.

42.2 The claimant applied for Employment Support Allowance in January 2017. From the third week of January she has been paid income-related Employment Support Allowance in the sum of £74 a week. She also receives £56 a week in housing benefit.

42.3 She worked 29 hours a week for the respondent (excluding any overtime); had she received the National Minimum Wage of £7.20 an hour she would have earned £208.80 per week.

42.4 The claimant receives Employment Support Allowance because she has long-standing problems with her knee, which she injured several years ago in a car accident. The injury became worse about 2 years ago when she developed arthritis in the knee and about 18 months ago she came under the care of an orthopaedic consultant. The medical advice prior to the claimant starting work with the respondent was that she was unfit to work, but the claimant always felt that she was able to work. The advice has remained the same since then as has the claimant's own assessment of her fitness to work.

42.5 About the time that the claimant started work with the respondent she was told that she would need surgery on her knee and she is still waiting for a date for this. She is telling prospective employers that she has a bad knee and is waiting for surgery and this is likely having an adverse impact on her job search.

42.6 She has made considerable efforts to find work since her dismissal. She has applied for well over 100 jobs and attended 22 interviews. She has been offered one job which was unexpectedly in Manchester, as the role the claimant had applied for had been advertised as being in Birmingham. She turned this down because she did not want to relocate to Manchester.

42.7 She has applied for a wide range of work including bar work, waitressing, kitchen work, work in hotels and some graphic design jobs. She has previous experience in graphic design. She is looking for work in the Birmingham, Coventry and Leamington Spa area.

The Law

Injury to feelings

43 The case of **Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871** gave guidance as to the appropriate level of award when considering injury to feelings in discrimination cases. The case identified a lower band for less serious cases when the act of discrimination is an isolated or one

off occurrence and a middle band for serious cases which do not merit an award in the highest band. The highest band is for the most serious cases where the discrimination has been serious and has continued over a period of time. Revisions to these bandings were made in the case of **Da Bell v NSPCC [2010] IRLR 19** to take account of inflation with the lower band becoming £600 - £6,000, the middle £6,000 - £18,000 and the upper band £18,000 - £30,000. **Simmons v Castle [2012] EWCA Civ 1039** is authority for the proposition that with effect from the 1 April 2013 the proper level of general damages for pain, suffering and loss of amenity in respect of personal injury, nuisance, defamation and all other torts which cause suffering inconvenience or distress to individuals will be 10% higher than previously. We acknowledge that there are conflicting EAT authorities as to whether the 10% uplift first set out in **Simmons v Castle [2012] EWCA Civ 1039** should be applied to employment tribunal awards. We conclude that we should follow the approach set out in **Beckford v London Borough of Southwark UKEAT/0210/14**, and that an uplift should be made. (Note: prior to these reasons being promulgated but after we had reached our conclusions set out above the Court of Appeal confirmed in the case of **De Souza v Vinci Construction Ltd [2017] EWCA Civ 879** that the **Simmons v Castle** uplift should apply).

44 Accordingly the bandings are £660 - £6,600, £6,600 - £19,800 and £19,800 - £33,000. We kept in mind the dictum in the case of **Alexander v Home Office [1988] ICR 685**. Damages for injury to feelings, following discrimination being found against a respondent, should not be minimal since this would trivialise or diminish respect for the public policy to which the statute gives effect. On the other hand awards should be restrained since to award sums which are generally felt to be excessive would do almost as much harm to the policy, and the results which it seeks to achieve, as nominal awards. Ultimately a tribunal's task is to understand and evaluate what truly is the subjective effect of what objectively is discrimination, **Land Registry v McGlue UKEAT/0435/11**. Whilst the **Vento** bandings refer to the seriousness of the acts of discrimination what we are actually judging is the effect of the proven discrimination on the claimant, which will not necessarily directly correlate with the seriousness of the incidents. However, how serious the discrimination was will ordinarily inform how badly the claimant was affected by it.

Mitigation of Loss

45 Section 123(4) of the ERA: In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law….

46 In **Contract Bottling v Cave and anor 2015 ICR 146** Mr Justice Langstaff explained that, prima facie, what a dismissal causes an employee to suffer is the loss of their job and their income which comes from that job. On the face of it

this loss is open-ended and at the full amount of the pay which that employee was receiving. This prima facie position is, however, almost always moderated in practice by at least one major assumption. This is that at some stage in the future after dismissal the employee has a chance of obtaining another job. Indeed, if it is shown that the employee has acted unreasonably in failing to obtain such a job by the time of the Tribunal hearing by the Respondent's evidence, the claimant may be said to have failed to mitigate her loss. It was explained that the questions which arise are whether any new and substitute job would be at the same rate in real terms, and secondly, when, if ever, the new substitute job would be obtained. It was explained that, conventionally, awards tend to have been made by assessing the chance of getting another job at the same rate, by setting a period of weeks for which the Tribunal assesses in the future there will need to be compensation. It is not an accurate science. No-one knows when, if ever, an employee will obtain fresh employment and, if so, whether that will be at a rate below or above that which they had had with the respondent and indeed, if below, whether that would be only for a short period time before a higher rate might supervene, paragraph 18 **Cave**. (Mr Justice Langstaff also went on in this case to deal with Polkey but that it not relevant here).

47 The relevant principles relating to mitigation of loss were helpfully summarised in **Wilding v BT Plc [2002] ICR 1079** where Potter LJ relevantly said this;
Various authorities …… establish the following principles. 1. It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; 2. The onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss …….; 3. The test of unreasonableness is an objective one based on the totality of the evidence; 4. In applying the test……. the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account and 5. The court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. Sedley LJ went on to say:
It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he proposed; he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine the choice. It is only where the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that his defence will succeed.

48 Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 states as follows:
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. (Schedule A2 includes unfair dismissal claims).
(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

In **Holmes v QinetiQ UKEAT/0206/15** it was explained that if an employee faces an allegation of culpable conduct, whether because of misconduct or poor performance or because of something else, the Code applies. See also **Bethnal Green and Shoreditch Education Trust v Dippenaar UKEAT/0064/15** in which the respondent had alleged culpable poor performance against the claimant. This was disputed by the claimant and found not to be the reason for dismissal by the tribunal – the genuine reason for dismissal was found to be a desire to manage the claimant out because she was expensive. Nevertheless it was held that the Code applied and that the tribunal had correctly awarded an uplift.

Submissions

49 The claimant did not wish to make any submissions. After we had explained to the parties about uplifts under section 207A Mr Kiyani told us that he had given the claimant a lot of time and opportunity to discuss the matter with him and that she had not done so. He did not make any further submissions.

Conclusions and Further Findings

50 We conclude an award should be made for injury to feelings in the sum of £1,000. We reach this conclusion for the following reasons. Whilst we are, as set out above, judging the effect of the proven discrimination on the claimant the seriousness of the discrimination will ordinarily inform how badly affected by it the claimant will have been. This incident was, essentially, a one-off and of a relatively minor nature. Consistent with this the claimant told us, and we have accepted, that she felt angry and confused about the incident on the 21 December but she did not describe a more significant level of hurt than this. As we have set out above whilst the claimant had asserted in her witness statement that the respondent's behaviour had had a catastrophic effect on her the claimant very honestly told us, and we accepted, that it was her subsequent dismissal and the failure to pay her the National Minimum Wage which had greatly upset her, not the discriminatory acts. Even then the level of her hurt feelings was not such that any medical intervention such as visiting her GP, or medical treatment was necessary. We can only make an award for injury to feelings which is caused by the discriminatory acts and accordingly what we must try to do is separate out the hurt caused by the dismissal and non-payment of the National Minimum

Wage from the hurt caused by the discrimination. These factors, we considered, put the award very much at the lower end of the scale.

51 That has to be balanced against the fact that, unusually, the discrimination was overt and more likely therefore to have been injurious of feelings. We considered also that withholding a day's pay from a person who was already very poorly paid was likely to have had more of an adverse effect on feelings as compared with withholding a day's pay from someone who was well paid. These factors, we concluded, lifted the award above the very bottom of the band.

52 We applied a 10% uplift in accordance with the approach set out in **Simmons v Castle [2012] EWCA Civ 1039**.

53 Under the Employment Tribunals (Interest on Awards In Discrimination Cases) Regulations 1996 we must consider whether to award interest on the injury to feelings award. We concluded that it was appropriate to do so. Regulation 6 provides that interest should be awarded from the date of the discriminatory act until the remedy hearing, unless to do so would cause serious injustice. We did not consider that to do so would cause serious injustice, particularly as the amounts involved were relatively small.

Unfair dismissal

54 The claimant only had 4 weeks service and consequently she did not have sufficient service for an ordinary unfair dismissal claim. However, as set out above, her claims of automatically unfair dismissal succeeded. Section 120 of the Employment Rights Act provides for a minimum basic award to be paid in certain cases of automatically unfair dismissal. However claims brought under Sections 104 and 104A are not included within this section. Accordingly, given that the claimant only had 4 weeks service, she is not entitled to a basic award.

The compensatory award

55 The claims under section 104 and 104A cover exactly the same factual territory and it is clearly only appropriate for one compensatory award to be made in order to avoid double recovery. We firstly considered the extent to which any or all of the losses incurred by the claimant can be said to be attributable to her dismissal in the light of our finding that the fact that she had a bad knee and was waiting for knee surgery was making it harder for her to find a new job. We did not consider that this was something which could properly be said to break the chain of causation essentially because there was no intervening event that had caused these difficulties. To the contrary the claimant had experienced this level of difficulty with her knee even prior to her employment with the respondent and has been waiting for knee surgery since the start of her employment with the respondent. There had also not been any particular deterioration in her knee since her employment with the respondent had ended. Accordingly, it seems to

us, the respondent must take the claimant as it finds her – i.e. with a pre-existing condition which makes it harder for her to find work.

56 It is, of course, for the respondent to show that the claimant has failed in her duty to mitigate her loss. The respondent has failed to do this - the respondent led no evidence relevant to mitigation and did not address us on the issue at all. In any event we concluded, based on the claimant's evidence, that the claimant has acted more than reasonably in her attempts to mitigate her loss. She has made a large number of applications, and has applied for a wide variety of jobs in a reasonably large geographical area.

57 As we have concluded that the claimant has mitigated her loss, and she has yet to find alternative employment, we have to consider the date by which the claimant will be able to find herself alternative employment, see **Cave**, and the rate of pay. Given the type of work the claimant is looking for any alternative employment is likely to pay National Minimum Wage rates – i.e. when the claimant finds work it will be at an equivalent to what the claimant would have earned with the respondent had he complied with his obligations. There are factors, we conclude, which indicate that the claimant should be able to find alternative work quickly. She is looking for work in Birmingham - one of the largest cities in the UK and, save for the applications that she has made in respect of graphic design work, she is looking for a type of work in which vacancies occur very frequently. It is, moreover, a type of work that does not require a particular skill set. Moreover the claimant is articulate and enthusiastic and, we consider, well able to give a good account of herself in interviews. Indeed we consider that ordinarily work of the type which the claimant is looking for could readily be found by her within a matter of a few weeks in a large city such as Birmingham. These factors, however, have to be balanced against the fact that the claimant has been looking for work since her dismissal and has yet to be successful. As the claimant herself suggested we consider it likely that the fact that she is waiting for knee surgery is hampering her job search and may continue to do so. Weighing up all of these factors we conclude that, if the claimant persists with the level of job search activity which she is currently undertaking, as she tells us she will do, she will find an alternative job within the next month and a half.

58 The claimant had not been issued with a statement of employment particulars by the time her employment ended. However under section 1 of the Employment Rights Act 1996 the employer has 2 months from the beginning of the employment in which to issue such particulars. Accordingly an award does not fall to be made under section 38 of the Employment Act 2002.

59 We considered whether it was appropriate to uplift the compensatory award under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. We conclude that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, namely the

ACAS Code of Practice on Disciplinary and Grievance Procedures. We were mindful that we have found that the genuine reason for dismissal was that the claimant had asserted her right to the National Minimum Wage (not something to which the Code applies) and we have also rejected the respondent's case as he put it before us, which was that he had concerns at the time about three areas of the claimant's conduct/performance; the time that she was shutting up the café, paying a customer out of her own pocket and removing property of the respondent's. However, on our findings of fact, what the respondent did say to the claimant at the time of her dismissal is that "U let us down couple of times sleeping at home not giving any notice u r late or not coming and lot o other things. Best is that you take your balance and work at some place where you think it's fair". Sleeping at home and arriving late to work were not relied upon by the respondent before us as a reason for dismissal. However sleeping in at home and arriving late for work are allegations of a performance/conduct nature and on our findings therefore allegations of performance/conduct concerns were made by the respondent prior to dismissal. Whilst we have found that these were not the genuine reason for dismissal this does not mean the Code does not apply, see **Dippenaar**.

60 We conclude that the respondent failed to comply with the Code prior to dismissing the claimant because the respondent failed to provide any fair process. The respondent did not carry out investigations to establish the facts of the case, he did not inform the claimant of the problem, he did not hold a meeting with the claimant, and did not therefore allow the claimant to be accompanied at any such meeting, he did not inform the claimant of the outcome in writing and he did not provide an opportunity to appeal. Essentially there was a wholesale failure to comply with the Code. In his very brief submissions Mr Kiyani suggested to us that he had made repeated attempts to bring the claimant into work to discuss the situation with her. Whilst he did ask the claimant to meet with him at the café this was only after he had dismissed the claimant and in any event this was only for the purpose of enabling the claimant to return her keys to the cafe and to give her the balance of monies owed.

61 We conclude that the failure to follow the Code was unreasonable. As we have set out already there was a wholesale failure to comply with the Code, which culminated in the claimant being dismissed by way of a WhatsApp message. No explanation has been advanced by the respondent for this.

62 In deciding the amount by which the award should be uplifted we took into account the factors set out above. We balanced against this that this is an extremely small respondent - as far as we know there were only 2 employees. Moreover the claimant, of course, had only been employed with the respondent for an extremely brief period of time. Taking these factors into account we considered it just and equitable to uplift the award by 10%.

63 For the avoidance of doubt the Recoupment Regulations apply to income related ESA but not to housing benefit, see Regulation 4.

Case No:1300500.17
Employment Judge Harding
Dated:12/07/17

Judgment sent to Parties on

13 July 2017