

**Reserved judgment**



**Between:**

**Claimant: Ms I El Ali**

**Respondent: Interserve FS (UK) Limited**

**Heard at London South Employment Tribunal on 18-21 July 2017**

**Before Employment Judge Baron**

**Lay Members: Ms J Forecast & Ms P O'Toole**

**Representation:**

**Claimant: Edward Walker – Lambeth Law Centre**

**Respondent: Safia Tharoo - Counsel**

**JUDGMENT**

It is the judgment of the Tribunal that the claims made by the Claimant that the Respondent was in breach of the Equality Act 2010 are substantiated to the extent set out in the reasons below but not further or otherwise.

**REASONS**

*Introduction*

- 1 I first of all apologise for the delay in providing the parties with this document. This is solely due to the current shortage of judicial resources.
- 2 The Claimant has been employed by the Respondent as a Logistics Operative from 15 August 2016, and remained employed by the Respondent at the date of this hearing, although she had been on sick leave since 30 November 2016. On 24 January 2017 she presented a claim to the Tribunal. I held a preliminary hearing for case management purposes on 21 March 2017. At that hearing it was established that the Claimant was making one allegation of direct discrimination based upon the protected characteristic of sex, several allegations of harassment based upon the same protected characteristic, and several allegations of victimisation. Details of the allegations are appended at the end of this document.

- 3 The Claimant gave evidence herself and did not call any other witnesses. Evidence for the Respondent was given by the following:

Adeleke Ogunlaja – Logistics Manager  
Ahmed Abdisalam – Logistics Operative  
Richard McCarthy – Logistics Operative  
Andrew Zeitzen – Regional Facilities manager.

- 4 We were provided with a bundle of some 250 pages, and have taken into evidence those documents, or parts of documents to which we were referred.

*The factual allegations*

- 5 With the claim form ET1 were two schedules, one being a table setting out details of the allegations of harassment and the other being a table with the allegations of victimisation. In the tables appended to these reasons below we have extracted the factual allegations, and numbered them in accordance with the numbering system adopted at the hearing.<sup>1</sup>

- 6 In the notes of the preliminary hearing I recorded the following:

The sole claim of direct discrimination is that the Claimant did not become employed on the basis of a permanent contract, whereas male staff were confirmed in post.

*The facts*

- 7 It is appropriate to set out how we have approached this matter. Initially we set out some basic background information which is not contentious. We will then set out in chronological order some of the factual allegations being made and other matters about which we heard evidence. In this section we are not making any findings as to the merits or otherwise of the allegations, and we deal with those in a separate section below. We also make further detailed findings of fact when coming to our conclusions on the various allegations.

- 8 We record at this juncture that the Claimant's evidence was that she had prepared notes of everything which she said had occurred. However, those notes had not been disclosed to the Respondent and were not provided to us. That is at the very least unfortunate and the value of the oral evidence may well have been diminished by reason the absence of those notes. The Tribunal may have been persuaded that they were an accurate record of what occurred. Their production may have benefitted either the Claimant, or the Respondent, or both.

- 9 The Respondent provides contract cleaning, security and other services to Network Rail. It obtained a new contract to manage 'Service Yard 1' at London Bridge Station from August 2016. The principal function of the yard was to receive deliveries for the station and businesses based at

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<sup>1</sup> We have corrected the spelling of names where necessary.

the station. The team on site was to consist of a manager and eight operatives. Mr Ogunlaja was appointed as the manager, and the Claimant was appointed as one of the operatives. Mr Ogunlaja had been employed by the Respondent in several roles since 2012, and was promoted to this post. All the operatives were recruited specifically for the site. Susan Burden was the line manager of Mr Ogunlaja.

- 10 The Claimant and her colleagues were employed on the basis of a probationary period of 12 weeks. It is not necessary to set out the policy in detail. As is normal, the policy provided for the employer to be able to extend the probationary period.
- 11 The Claimant had worked in the security industry for some ten years, but did not have any experience of managing the movement of vehicles. After a period of training she and her colleagues started work in the yard on 26 August 2016. In particular the Claimant and her colleagues had banksman training before they started work on site. This involved ensuring the safe movement of vehicles on the site, ensuring the safety of the operative and others, and ensuring that damage was not caused to property. Mr Ogunlaja was responsible for continuing with the training as 'on-the-job' training after the site was opened.
- 12 Mr Ogunlaja worked from Monday to Friday during the day, and the operatives worked in teams on the basis of two shifts, being 7 am to 7 pm, and 7 pm to 7 am. They worked on the basis of a pattern of four days on and then four days off. The Claimant stated when she was interviewed that she was only prepared to work on the day shift, but was prepared to work to 10 pm occasionally.<sup>2</sup> The Claimant worked with one other person during her daytime shifts, as well as Mr Ogunlaja when he was on duty.
- 13 On the site there was a control room which had a good view of the whole of the yard. It was there that the manager and the operatives on duty were based. During the working day the site was checked by one of the operatives walking around it once an hour. Such checks took about five minutes. When vehicle movements took place then one or both of the operatives went down to the yard to supervise and marshal the vehicle.
- 14 The Claimant presented a grievance dated 13 September 2016 to which we refer further below. It is apparent from the details of the response that the Respondent accepts that it was a protected act for the purposes of the claims of victimisation. The grievance was referred to Mr Zeitzen. He held a meeting with the Claimant on 5 October 2016 and then met Mr Ogunlaja on the following day. Mr Zeitzen met Mr Abdasalam, one of the Claimant's colleagues, on 11 November 2016, and wrote to the

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<sup>2</sup> We understand that she did undertake the occasional night shift, but nothing turns on the point.

Claimant with the outcome of the grievance on 21 November 2016. We refer to that letter in more detail below.

- 15 Allegation 1. The Claimant and Mr McCarthy were on shift on the first working day of 26 August 2016 along with Mr Ogunlaja. When working in the yard the operatives were required to wear a hi-vis vest. As will be seen from the table of allegations, the Claimant alleges that on that day Mr Ogunlaja told her to remove her top, and that she said that it was her safety top. In her claim form she also alleged that Mr McCarthy laughed and giggled with Mr Ogunlaja after he had made that comment. She did not mention this matter to anybody until she spoke to Ms Burden on 11 September 2016. The allegation was mentioned in the Claimant's grievance in which she said the following:
- First Day on my shift me and my colleagues notice bit of anger in managers voice. He was stressed and irritated. After lunch he mentioned that I should remove my top.
- 16 When questioned about this matter at the grievance meeting on 5 October 2016 the Claimant said that she was removing her hi-vis vest and Mr Ogunlaja said that she should then remove her top. She said she could not remember if anyone else was there. Mr Ogunlaja denied ever making such a request, and said that the only comment he ever made about the Claimant's clothes was that they were always dirty, and that on one occasion he offered to pay for her to go back home to get changed.<sup>3</sup>
- 17 Allegations 2 & 3. These are two separate allegations in the schedule prepared by the Claimant but they are both said to have occurred on 31 August 2016. As allegation number 2 the Claimant alleges that Mr Ogunlaja said to her: "Once you go black, you never go back." The Claimant alleges that Mr Abdasalam was a witness on that occasion. Allegation number 3 is that Mr Ogunlaja made the same comment again on that day, and then unbuttoned his shirt and made the comment as set out above. The Claimant says that she did not recall whether there were any witnesses. These matters were not raised in the grievance.
- 18 On 1 September 2016 Mr Crompton visited the site. Mr Crompton is the Account Director responsible for the Network Rail contracts. He noted that on two occasions during his visit the Claimant was marshalling a vehicle in such a way that she was not in a safe position. The driver was not able to see her. Mr Ogunlaja had corrected her after the first incident, but another similar incident then occurred. That resulted in an email being sent by Ms Burden to Mr Ogunlaja on 2 September 2016 at 12:55 saying that Mr Crompton had stopped the Claimant from working until she received further training. Ms Burden asked if that was correct. It was not correct as far as Mr Ogunlaja was aware, and he told Ms Burden by

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<sup>3</sup> It was established in evidence that this occurred at some stage before the Claimant and her colleagues were provided with uniforms.

an email at 14:32 that he would arrange for the Claimant to be retrained as a banksman.

- 19 Mr Ogunlaja then sought to arrange for the Claimant to go on a further course during one of the days when she was not allocated to work. Unfortunately he inadvertently asked her to go to the wrong address on 7 September 2016, and then the Respondent refused to pay for a further course because the Claimant had already undergone training. The consequence was that the Claimant did not have further formal training.
- 20 Allegation 4. The Claimant is alleging that Mr Ogunlaja invited her out for a dinner date on 2 September 2016. The Claimant said in her claim form that there were no witnesses to this incident. The allegation was mentioned in the grievance, but she was not asked about it during the grievance meeting with Mr Zeitzen.
- 21 Allegation 5. On the same day it is alleged that Mr Ogunlaja aggressively snatched the radio, and there were no witnesses. This matter was the subject of considerable elaboration in oral evidence, and we assess all the evidence below. The point was raised in the grievance as follows:
- 15:20 p.m. I did reply to the radio, the manager came and snatched the radio aggressively from my hand and started shouting at me again and told me I should not be on site any way. I asked the manager what he meant by that comment. The manager in very aggressive and loud voice said that I should be allowed on site until been trained properly. I felt depressed from all this shouting and bullying, the manager could have told me in private and not shout at front of my colleagues about important the decision from the upper management.
- 22 This matter was not raised by Mr Zeitzen with either the Claimant or Mr Ogunlaga during the grievance investigation.
- 23 Allegation 6. This is an allegation that on 3 September 2016 the Claimant needed an email address, asked Mr Ogunlaga for it, and he said she should know it and called her stupid. The Claimant said that Mr McCarthy was present. It was mentioned in the grievance, although she did not refer to Mr McCarthy as having been present. Again it was not the subject of any specific enquiries by Mr Zeitzen.
- 24 Allegation 7. This allegation is set out above and refers to the charging of a mobile phone. The Claimant says that Mr Abdasalam was present. The point was raised in the grievance and she used the same language as set out in the allegation above. Mr Zeitzen did ask the Claimant about this point in the investigation meeting with her on 5 October 2016 but only to the extent of asking if anybody else was there. She replied that Mr Abdasalam was present, to which Mr Zeitzen asked how that was possible as he worked nights. The discussion then moved on to other matters. The point was also raised with Mr Ogunlaja at his meeting on 6 October 2016. The allegation was clearly put to Mr Ogunlaja and the notes of the meeting record that he replied as follows:
- We were all together and she took out her mobile phone from her pocket and we all laughed. There was nothing rude said.

Mr Abdasalam was also asked about the incident, and he simply denied that he heard anything or was aware of what had taken place.

- 25 Allegation 8. This incident was the subject of much evidence to which we will refer below. It is agreed that there was an incident which occurred on 9 September 2016 concerning the collection of a cleaning machine from the yard. Mr Ogunlaja was present in the yard with the Claimant and Mr Abdasalam for the purposes of this procedure, and Mr Ogunlaja was using it as a training opportunity for both of them. The Claimant and Mr Abdasalam were therefore close to Mr Ogunlaja. The Claimant had been responsible for arranging the parking of the lorry which had come to collect the machine. The lorry was not parked in one of the normal parking bays, but facing a wall because of its size. The cleaning machine was being driven slowly towards the lorry to be loaded onto it. At the time of the incident none of those involved were close to the cleaning machine, and they were not in immediate danger. There was a yellow line which the Claimant considered to be a safety line for the purposes of the manoeuvre, and she remained behind it. It is agreed that during that this marshalling procedure Mr Ogunlaja put out his left arm and pulled the Claimant further away from the machine and lorry by her right arm. This resulted in a bruise to the Claimant's right upper arm. The Claimant attended King's College Hospital that evening and the medical record of the attendance records the Claimant as having referred to 'being grabbed by the arm and pulled violently towards her attacker. There was 'visible bruising . . . consistent with fingertip marks on the medial aspect of the upper arm.'
- 26 This incident was also apparently the principal reason for the Claimant making a grievance. In her grievance she made extensive allegations about the incident. Mr Zeitzen raised this matter in his meeting with the Claimant. The Claimant recounted that all three of them were standing in the service yard, and said that the driver of the cleaning machine was driving slowly when Mr Ogunlaja pulled her arm and said: "Come back". In his meeting with Mr Zeitzen Mr Ogunlaja said that the Claimant had not been doing her job properly, and that Mr Crompton was not pleased and wanted her retrained. He said that on the day in question he wanted to work closely with the Claimant and Mr Abdasalam and he then said: "She wanted to run in front of the roadsweeper, I then pulled her back." He said that she was quite close to the road sweeper and that when she moved he (Mr Ogunlaja) held her back. He then added: "She is too quick in trying to show she can do a task."
- 27 Mr Ogunlaja then held what was described as an informal counselling session with the Claimant. The notes record that the two areas of concern were that the Claimant lacked confidence at work, and had made several mistakes in connection with vehicle marshalling. They record that the point about lack of confidence was not agreed by the Claimant. The action said to be required was to continue to support and

correct her over the next two sets of four-day shifts. She was to be supported and trained by Mr Ogunlaga working closely with her and building up her confidence in the job. The notes also record that the Claimant had said that she hardly understood Mr Ogunlaja's accent and that he spoke too fast, and also that she would appreciate the suggested support.

- 28 In his meeting with Mr Zeitzen Mr Abdasalam said that he had not been aware of the incident at the time, and that when they had returned to the office the Claimant asked him if he had seen anything. The notes of the meeting record him as having said that she was upset and started crying. In his witness statement to this hearing he also use the word "crying" but then changed his evidence to being that the Claimant had her head down and was upset but was not in fact crying.
- 29 The Claimant went to see Ms Burden on 10 September. We did not hear from Ms Burden, and the Claimant's evidence was limited. She said that she explained everything to Ms Burden and that Ms Burden said that she would provide a grievance template document to the Claimant. The Claimant was then off work on sick leave for two days and she returned to work on 16 September 2016.
- 30 The Claimant presented her grievance, as already mentioned, on 13 September 2016. A Mr Henderson was initially allocated to investigate it, but because of other commitments in early October 2016 he asked Mr Zeitzen to take over from him. In advance of any meeting with the Claimant or any others, on 4 October 2016 Mr Zeitzen of his own accord sent an email to Mr O'Neill of Network Rail asking if the CCTV footage was available in connection with the incident on 9 September 2016. He referred to a grievance having been raised. There was no reply to that email, and Mr Zeitzen sought to follow it up by telephone without success. He was told that it would not be made available for such purposes. He then sent a further email on 10 November 2016 and on this occasion said that the CCTV evidence was needed for training purposes. There was no reply to that email either. The evidence is limited but we accept that the Claimant made a request of a 'security person' who said that the CCTV footage would be made available. There was no further evidence on the point.
- 31 The Respondent had a procedure for a review of the probationary period part of the way through the period. The Claimant met Mr Ogunlaja on 5 October 2016 for the purposes of such review. Five criteria were set out. The Claimant was marked as requiring improvement in respect of two of them, being acceptable in respect of one, and good in respect of the remaining two. The areas noted on the form as requiring improvement were quality of work, vehicle marshalling, other operational procedure, and team work. The plan to improve the performance was informal counselling, and continuing support in the job. The overall performance was said to be "Fair".

- 32 Allegation 11. This is an alleged incident on 4 November 2016 concerning a radio. The Claimant did not give any further details about it nor any evidence about it.
- 33 Allegation 13. It was clarified that this allegation is that the Claimant's probationary period was extended whereas that of each of her male colleagues was not extended. In his witness statement Mr Ogunlaja helpfully set out the names of the other operatives, which had not previously been done by the Claimant. Only the Claimant and Mr Blagrove had been marked as "Fair" at the mid-term review meetings. Mr Blagrove had subsequently left the Respondent. The other six operatives all had their permanent employment confirmed following the conclusion of their respective probationary periods.
- 34 The Claimant's probationary period was extended for a further period of six weeks to 23 December 2016. That was confirmed by a letter from HR Operations sent on behalf of Mr Ogunlaja dated 15 November 2016. The letter stated that improvement was required in respect of safe vehicle marshalling and working safely and obeying basic instructions. Attached to that letter was a training plan with specific topics to be covered and a timetable for implementation.
- 35 Mr Zeitzen wrote to the Claimant on 21 November 2016 setting out the decisions he had made following his enquiries into the Claimant's grievance. His letter was divided into eight separate sections and we will deal with them similarly.
- 35.1 Mr Zeitzen first of all dealt with the incident on 9 September 2016 involving the yard cleaner (wrongly referred to as a forklift truck). Mr Zeitzen concluded that Mr Ogunlaja believed that there was an imminent threat to the Claimant's safety. Mr Zeitzen recommended that Mr Ogunlaja be counselled about the correct course of action, and that a verbal warning should have been given to the Claimant first.
- 35.2 The second matter was the alleged instruction to remove the Claimant's top. That was rejected on the basis that there was no evidence to support the allegation, and Mr Ogunlaja had denied it.
- 35.3 The third matter was another allegation concerning the use of the radio and one which is not before us. It is not necessary to record the details.
- 35.4 The fourth matter was an allegation about an incident on 1 September 2016 which has not been pursued before us.
- 35.5 The fifth allegation considered was the alleged invitation for dinner. Mr Zeitzen stated that Mr Ogunlaja had denied the allegation and it is apparent that the grievance was rejected in that respect although Mr Zeitzen did not actually say so.



- 35.6 The sixth matter concerns the alleged incident on 2 September 2016 relating to the radio. Again Mr Zeitzen said that he could not find any evidence to support the allegation, and Mr Ogunlaja had denied it.
- 35.7 The penultimate point relates to the Claimant going to the wrong address for the retraining course. That is not specifically a matter before us.
- 35.8 The final matter relates to the allegation that on 8 September 2016 Mr Ogunlaja made comments about the charging of a mobile telephone. Mr Zeitzen said he could not find any evidence in support of this allegation either and it had been denied by Mr Ogunlaja. He said that therefore the claim was unsubstantiated.
- 36 The Claimant was quite properly notified of her right to appeal against Mr Zeitzen's findings, but she did not do so.
- 37 Allegation 14. The final allegation is that on 22 November 2016 after the Claimant had completed updating a list of relevant contacts it was snatched from her by Mr Ogunlaja, and put in the bin. In her witness statement she expanded on that allegation by saying that the page had been ripped out of her hand so violently that it was torn in half. Mr Walker produced during the cross-examination of Mr Ogunlaja what he said was the document in question which the Claimant had put together again with adhesive tape, but he did not seek to introduce it into evidence nor did he show it to Miss Tharoo or Mr Ogunlaja.
- 38 Mr Ogunlaja held a further informal probation review meeting on 28 November 2016 following the Claimant's probationary period having been extended and she was told that there would be a more formal review at a later date. The Claimant was signed off sick from 30 November 2016. The Claimant contacted ACAS under the early conciliation procedure on that day, and presented her claim to the Tribunal on 24 January 2017.

*The statutory provisions and the law*

*The statutory provisions*

- 39 The material provisions in the Equality Act 2010 are as follows:

**13 Direct discrimination**

(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.

**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13, . . . there must be no material difference between the circumstances relating to each case.

**26 Harassment**

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

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

**27 Victimisation**

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
  - (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
  - (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

**136 Burden of proof**

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (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.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
  - (a) an employment tribunal;
  - (b) – (f) ....

*Further facts, discussion and conclusions*

40 Miss Tharoo provided the Tribunal with very detailed written submissions, and supplemented them with oral submissions. Mr Walker made oral submissions. We have noted those submissions and will refer to them specifically where relevant to do so.

- 41 We make an initial point about the legal basis upon which the factual allegations are made. The Claimant has presented her claims all on the basis of there having been unwanted conduct because of her sex, or it having been conduct of a sexual nature. She has not sought to maintain that what she alleged occurred was because of her rejection of any conduct of Mr Ogunlaga within section 26(3)(c) of the 2010 Act.
- 42 This case of course depends principally upon the credibility mainly of the Claimant and Mr Ogunlaga. There is no obvious reason why the Claimant should have deliberately made up specific allegations. On the other hand there were inconsistencies in her evidence. We have done the best we can in the circumstances to find the facts as to what occurred on the basis of a balance of probabilities in the light of all the evidence adduced to us. As will appear below we have not concluded that we accept the whole of the evidence of the Claimant, nor the whole of the evidence of Mr Ogunlaga.
- 43 Allegation 1. The Claimant says that Mr Ogunlaga asked her to remove her top. We find on a balance of probabilities that this incident did occur. We have noted the variations in the versions given by the Claimant as to who was present and exactly what was said, as mentioned by Miss Tharoo. The incident is alleged to have happened on 26 August 2016, and it was one of the matters of which the Claimant complained in her grievance dated 13 September 2016, less than three weeks later. The notes of the grievance meeting record the Claimant as having said specifically that she was removing her hi-vis vest and then was asked to remove her top. We have borne in mind that this was a predominantly male environment in which such a comment could be considered by the men at least as being a joke. Indeed, the Claimant said at her meeting with Mr Zeitzen that she knew how to take a joke. Clearly she thought that what had occurred went beyond that. We find that that clearly constituted harassment within section 26. It was unwanted conduct relating to the Claimant's sex which created a degrading atmosphere for the Claimant.
- 44 Allegations 2 & 3. The Claimant alleges that on two occasions Mr Ogunlaga made reference to 'not going back after black' and on one occasion he unbuttoned his shirt. The Claimant gave conflicting evidence about the number of times the comment was made and on what dates. Miss Tharoo made the point that the schedule attached to the claim form referred to two incidents on the same day being 31 August 2016, whereas in the Claimant's witness statement she referred to incidents on 26 and 31 August, and also 'several times'. No application to amend had been made, and so we did not have jurisdiction to consider the claim relating to 26 August. The Claimant also alleged that she had asked Mr Abdisalam for an explanation of the comments, an allegation which he denied.

- 45 We find against the Claimant in respect of these allegations. If the comments had been made by Mr Ogunlaga then they were clearly wholly and utterly inappropriate, and yet the Claimant did not mention them in her grievance despite mentioning matters alleged to have occurred on eight different days, most of which were significantly less serious. Her explanation in cross-examination was that perhaps the incident(s) had escaped from her mind. We do not find that credible and we cannot find that whatever occurred, if anything, was such as to violate her dignity or create a humiliating environment for her.
- 46 Allegation 4. Here the Claimant alleges that Mr Ogunlaga invited her out for a date. The bald allegation by the Claimant is that Mr Ogunlaga suddenly turned to her and invited her out. As Miss Tharoo pointed out there was no context provided. However, Mr Ogunlaga and Mr McCarthy both referred to a conversation about methods of obtaining access to the Shard building, and in cross-examination the Claimant accepted that there was such a conversation and also indeed that Mr Ogunlaga had suggested pretending to have a reservation for dinner in the restaurant. The Claimant's evidence was that after that discussion, and after Mr McCarthy had left to undertake the hourly round of the site, Mr Ogunlaga specifically invited her out for a date, and the Claimant ignored him. Thereafter, she said, he became aggressive towards her. The Claimant added that this was particularly objectionable as he was a married man, and the Claimant had a partner.
- 47 We accept the Claimant's evidence. This was clearly conduct which was not wanted by her, and having seen and heard her give evidence we find that Mr Ogunlaga's conduct in this respect created a degrading and offensive environment for the Claimant, and that that was the natural consequence of Mr Ogunlaga's suggestion.
- 48 Allegation 5. This allegation is that on 2 September Mr Ogunlaga snatched the radio from the Claimant's hand and made a comment about her not being entitled to be on site. Again the Claimant's evidence is inconsistent. In her schedule she stated that there were no witnesses. However in her grievance she referred to being shouted at in front of her colleagues, and in cross-examination she referred to Mr McCarthy and a CCTV technician being present. In her witness statement the Claimant did not set out any details of the allegation, and she elaborated on the matter under cross-examination. The evidence of Mr Ogunlaga was that on one occasion he did intervene when the Claimant was using the radio because, he said, the radio system was common across the whole of London Bridge station and that the Claimant should only answer it where the call sign 'Service Yard 1' had been used. He told the Claimant not to interrupt the conversation. Mr Ogunlaga accepted that he told the Claimant that she should not be on site until she had completed her further banksman training.

- 49 We find the allegations proved as a matter of fact. However, we do not find that they constituted harassment. We accept the explanation of Mr Ogunlaga in respect of each element. What occurred did not have anything to do with the Claimant's sex. The incident concerning the radio related to the possible misuse of the radio system. The comment about not being entitled to be on site was related to the issues concerning the Claimant's competence at banksman work.
- 50 Allegation 6. This allegation is that on the following day Mr Ogunlaga made reference to the Claimant asking stupid questions about an email address. Again there is a modicum of agreement as to what occurred. We find that there was an exchange about obtaining an email address. Mr Ogunlaga denied using the word 'stupid' and his evidence (which we accept) was that the email address in question was available on a board. If Mr Ogunlaga did use the word 'stupid' then it was not related to the Claimant's sex but rather as a consequence of being asked an unnecessary question.
- 51 Allegation 7. This allegation is about an incident on 8 September concerning the charging of a mobile telephone. Miss Tharoo again referred to the discrepancies between different versions given by the Claimant of exactly what was said. We accept that the Claimant has produced different versions, but we do not accept that as a consequence none of the versions or any variation of them did not occur. Mr Ogunlaga told Mr Zeitzen during the grievance investigation that the Claimant took her telephone from her rear pocket and they all laughed, but that nothing was said. That is not credible. Why, we ask rhetorically, would there be laughter simply because the Claimant took her phone from her rear pocket. We acknowledge that having a mobile telephone in a rear trouser pocket is common practice. We prefer the evidence of the Claimant. We further find that the comment falls into several of the categories in section 26(1)(b), and so constituted harassment.
- 52 Allegation 8. It is regretted that there is not unanimity among the Tribunal on this matter, and I have the misfortune to be in the minority. The basic facts are not in dispute, which are that Mr Ogunlaga used his left hand to make contact with the Claimant. It is unfortunate that there is no CCTV record available, and we note that the Claimant was very insistent that such record be obtained. That lends support to her version of the incident. What we are unable to ascertain with any certainty is how close the Claimant was to the moving cleaning machine.
- 53 The lay members have concluded that there was unwanted conduct by Mr Ogunlaga in that excessive force was used and that that caused bruising. They accept that the Claimant was moving forward in the direction of the moving yard sweeper and that it was appropriate to prevent her from doing so. The majority concludes that the manner in which this was done, and the force used, was related to the Claimant's sex, and that Mr Ogunlaga violated the Claimant's dignity in what he did.

- 54 I take a different view of the evidence. My view is that what Mr Ogunlaga did was entirely proper especially in the context of the Claimant being trained. Any bruising caused by what occurred was of course unfortunate, but I am not persuaded that Mr Ogunlaga's actions were in the slightest related to the Claimant's sex. I note his evidence to Mr Zeitzen was that the Claimant was quite close to the sweeper, that he held her back when she moved, and he added that 'she's too quick in trying to show that she can do the task'. I also note that in the notes of the Claimant's probation review of 11 November 2016 Mr Ogunlaga records one point as being that the Claimant being 'about to walk in front of a moving vehicle' was an example of the Claimant adopting an unsafe practice.
- 55 Allegation 9. This allegation is that no information or invitation was sent about the grievance report. This is the first of the allegations of victimisation. What we have to consider is whether what occurred was because of the Claimant's grievance, being the protected act.
- 56 The factual allegation was not clear. In cross-examination the Claimant said that she had not been notified in advance by letter of the meeting with Mr Zeitzen on 5 October 2016. In the schedule the Claimant also mentioned a delay in dealing with the complaint. The grievance letter was dated 13 September 2016. The policy said that the meeting with the employee to investigate the grievance would normally take place within 28 days. That is what occurred. There is nothing in this complaint.
- 57 Allegation 10. This breaks down into two parts. The first is that CCTV evidence was not gathered. As a fact that is true. In her witness statement the Claimant said that 'by the time it was chased up conveniently it had been deleted'. That is untrue and unfair to Mr Zeitzen. We have set out above the steps which were taken. Mr Zeitzen did what he could to obtain the evidence before the issue was raised by the Claimant. The second part of the allegation is that Mr Zeitzen showed no enthusiasm in investigating the complaint. We do here criticise Mr Zeitzen. His investigatory meeting with Mr Ogunlaga was wholly inadequate. It is noted as having lasted for 23 minutes. According to the notes of the meeting Mr Zeitzen did not seek to put each and every one of the complaints made by the Claimant in her grievance to him in detail. Mr Zeitzen also spoke to Mr Abdasalam, but that interview only lasted 12 minutes.
- 58 Further, the Respondent's grievance policy provides that after the meeting with the employee and after all relevant evidence has been gathered then there would be a 'Grievance Hearing'. The policy then provides that the employee should receive a response within seven days after 'the meeting'. That presumably should be a reference to the Grievance Hearing. There was no Grievance Hearing. It took nearly seven weeks after the initial meeting with the Claimant for the outcome to be provide, and not one week. A failure to investigate fully, and/or a

breach of the policy, does not mean that that was victimisation simply because the complaint under investigation included one of harassment. There was no evidence to enable us reasonably to conclude that Mr Zeitzen would have acted any differently if the allegations had not included issues of sexual harassment. He was quite simply not thorough. The burden of proof does not move to the Respondent.

- 59 Allegation 11. The Claimant alleges that on 4 November 2016 Mr Ogunlaga was intimidating and aggressive while she was changing radios. There was no evidence to support this allegation and it is dismissed.
- 60 Allegation 12. The Claimant alleges that the dismissal of her grievance was as a direct result of her discriminatory complaint. We can deal with this quite simply. Even though we have criticised the procedure adopted by Mr Zeitzen, he did speak to each of Mr Ogunlaga and Mr Abdisalam. The Claimant's allegations were denied. As Miss Tharoo submitted, it was a question of one person's word against others, and she pointed out that the Claimant had accepted in cross-examination that there were circumstances where a grievance might properly not be upheld. In our judgment Mr Zeitzen was entitled to come to the conclusion that the grievance should not be upheld based on the evidence provided to him. The fact that there were allegations of harassment does not mean that such grievance has to be upheld. There was nothing from which we could reasonably conclude that if the grievance had not included any allegations of harassment then Mr Zeitzen would have come to different conclusions.
- 61 Allegation 13. The Claimant here makes complaints concerning her contract of employment. In essence they are the same, which is that the Claimant's employment was not confirmed at the end of her probationary period. This is the one claim of direct sex discrimination. We differ from Miss Tharoo when she said in her written submissions that this is not a victimisation claim. We understand it to be both a claim of direct discrimination and also of victimisation. Mr Walker made reference in his submissions to an alleged lack of training of the Claimant. That is not the issue.
- 62 The Claimant accepted in cross-examination that it was within the Respondent's probation policy for a probationary period to be extended. She made a sweeping allegation that although most people made mistakes, those made by men were forgiven whereas the mistakes which she made were highlighted. We had before us the probation records of others. They all showed that the employee in question had been marked more highly than the Claimant. We are not in a position to go behind those marks or comments on the evidence before us. The Claimant also said that the probationary period was extended because she had refused to go out with Mr Ogunlaga.

- 63 There had been issues concerning the Claimant's performance, and as already mentioned, she and Mr Blagrove were both marked as 'fair'. There is no evidence from which we could reasonably conclude that the extension of the probationary period was for any reason other than those issues which had been raised and were causing concern.
- 64 Allegation 14. This is an odd allegation of victimisation. It is that on 27 November 2016 Mr Ogunlaga tore up a client contact list. The Claimant's written evidence was remarkably thin. She simply stated that in one incident Mr Ogunlaga had ripped a page out of her hand. No date or the nature of the document was stated. There is therefore little to support the allegation in the schedule. It was agreed by both the Claimant and Mr Ogunlaga that client contact lists were updated on a weekly basis, and that the old list was then torn up. There is wholly insufficient evidence to enable us to conclude that whatever occurred was because of the Claimant having made a complaint.
- 65 We find that the claims succeed to the extent set out above, but no further.

**Employment Judge Baron  
Dated 08 November 2017**



El Ali v Interserve FM (UK) Limited – 2300380/2017					
Schedule of allegations of harassment					
	Date	NATURE OF INCIDENT	PERPETRATOR	WITNESSES	TYPE OF HARASSMENT:
1	26/08/2016	<p>The Manager asked me to remove my top.</p> <p>The incident happened in the office where only myself and the manager were present.</p> <p>As part of my job, I have to wear a fluorescent high-vis vest on top of my uniform. In the process of removing the high-vis vest my manager said to me, "Remove your top". I said "I'm not removing it, that's my safety top".</p> <p>My interpretation of his comments was that it was of a sexual nature, regardless of whether he seriously believed I would have removed my top.</p> <p>As a result of his comments I felt disrespected and embarrassed.</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	<p>Richard (logistical operative – security). This witness laughed and giggled with the manager after he made these comments.</p>	<ul style="list-style-type: none"> <li>• Harassment of a sexual nature</li> <li>• Harassment on the grounds of gender</li> </ul>
2	31/08/2016	<p>Again, this incident happened in the office.</p> <p>Spontaneously, the manager made the following comments "Once you go black, you never go back". I did not understand what these</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	<p>Ahmed (logistical operative – security) was present when this comment was made.</p>	<ul style="list-style-type: none"> <li>• Harassment of a sexual nature</li> <li>• Harassment on the grounds of gender</li> </ul>

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		<p>comments meant and I asked a colleague for an explanation, Ahmed, and he explained it to me saying that it is a sexual term whereby once a non-black female has sex with a black man, they never want to have sex with a non-black man in future.</p> <p>This was the first of many occasions where he made the same comments to me.</p>			
3	31/08/2016	<p>Again, this occurred at the office. The manager made the same comment again ("once you go back..." etc). He then opened the buttons of his shirt, he exposed part of his chest, showing me his chest saying "If you look you will see that my body is lighter than my face".</p> <p>I was too shocked to say anything.</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	<p>I do not recall whether there were any witnesses.</p>	<ul style="list-style-type: none"> <li>• Harassment of a sexual nature</li> <li>• Harassment on the grounds of gender</li> </ul>
4	02/09/2016	<p>I was doing my work, watching the CCTV, and my manager was sitting next to me at the time.</p> <p>He then turned around and said to me, "Do you want to come out with me to have dinner or a meal, me and you together?"</p> <p>I ignored him and</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	<p>No witnesses</p>	<ul style="list-style-type: none"> <li>• Harassment of a sexual nature</li> <li>• Harassment on the grounds of gender</li> </ul>

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		<p>pretended I didn't hear it.</p> <p>This was not an innocent invitation to socialise with a work colleague, but I believe he was asking me out for a date for romantic/sexual motives.</p>			
5	02/09/2016	<p>I was sitting down working in the office, I was using the radio when the manager came around me, standing over me, and snatched the radio from my hand</p> <p>He said I should not be on site any way. I asked him why. He replied in a very aggressive and loud voice said that I should not be on-site until been trained properly.</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	No Witness	<ul style="list-style-type: none"> <li>• Harassment on the grounds of gender</li> </ul>
6	03/09/2016	<p>I asked the manager for an email address to help our clients to book deliveries online.</p> <p>He said I should know that already, and that I should stop asking stupid questions over and over again.</p> <p>He ended up giving me the email address as fast as he could and he did not let me write it down.</p>	<p>Manager</p> <p>Adeleke Angunlaja</p>	Richard (logistic operative – security)	<ul style="list-style-type: none"> <li>• Harassment on the grounds of gender</li> </ul>
7	08/09/2016	<p>The only way of communication on site is via radio and mobile phones due</p>	<p>Manager</p> <p>Adeleke</p>	Ahmed (logistic operative – security).	<ul style="list-style-type: none"> <li>• Harassment of a sexual nature</li> <li>• Harassment</li> </ul>

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		<p>to lack of radios in security office.</p> <p>When I removed the phone from my belt to place it on the table the manager Adeleke Angulaja said that;</p> <p>“ Ladies charge the phone from the bum, you don't need to charge your mobile because is charge already from your bum”.</p> <p>I was too shocked to respond to these comments.</p>	Angunlaja		on the grounds of gender
8	09/09/2016	<p>The driver of the broken machine was coming towards us and well away from yellow safety line, the driver was very experienced and had good visibility of me and Edeleke Angulaja so because the machine was broken the driver was about 2mph.</p> <p>The manager has all the sudden grabbed my right arm aggressively jerking the arm back without warning, causing me pain and panic, so I put my hand next to my body gently. I was shocked and dizzy did not feel well the all day.</p> <p>The manager physically assaulted me because I am a woman, and presumably felt</p>	<p>Manager Adeleke Angunlaja</p>	Ahmed (logistic operative – security)	<ul style="list-style-type: none"> <li>• Harassment on the grounds of gender</li> </ul>

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		confident that my perceived passivity would mean that there would be no retaliation, as opposed to such an assault against a man.			
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<b>Schedule of allegations of victimisation</b>				
	<b>Date</b>	<b>Nature of Incident</b>	<b>Perpetrator</b>	<b>Victimisation</b>
<b>9</b>	11/10/2016	No information or invitation letter were sent by management about grievance report	Manager Andrew Zeitzen	The company breached its grievance policy in the delay in dealing with my complaint
<b>10</b>	11/10/2016	The grievance was not investigated, in that important evidence like CCTV was not gathered. The investigating officer showed no enthusiasm in investigating my complaint	Manager Andrew Zeitzen	The company breached the grievance policy in [not] dealing seriously with my complaint, particularly in the investigation stage
<b>11</b>	04/11/2016	In the line of duty I was changing the radios as my manager followed me and gave intimidating attitude and aggressive body language	Manager Adeleke Ogunlaja	The manager was aware that he was the subject of discriminatory grievance against him and his actions against me were as a result of my complaint against him
<b>12</b>	22/11/2016	I received the outcome letter to my grievance, confirming that my grievance has not been upheld	Manager Andrew Zeitzen	The negative outcome of the grievance was as a direct result of the discriminatory complaint, and therefore, there is no issue about causation
<b>13</b>	15/11/2016	No1: I was not given a contract of employment, whereas all the other male staff were.  No2: My probationary period was extended whereas the other male staff were confirmed in their post	Manager Adeleke Ogunlaja	The person who subjected me to this victimisation was the same manager against whom I complained of sexual harassment

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<b>14</b>	27/11/2016	I completed a client contact list as advised in the past. After completing it, the manager snatched from me and put it in the bin. He did this without saying anything but in an aggressive manner.	Manager Adeleke Ogunlaja	The person who subjected me to this victimisation was the same manager against whom I complained of sexual harassment
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