



EMPLOYMENT TRIBUNALS

Claimant: Miss Amanda Steele

Respondents: (1)Uniquely Chic Furniture (Cheshire) Limited
(2)Michael Bennett

HELD AT: Manchester **ON:** 17 August 2017, 10 & 17 November 2017

BEFORE: Employment Judge Holmes
Mrs P J Byrne
Ms S Khan

REPRESENTATION:

Claimant: In Person ; Mrs M Ham , Lay representative on 17 November 2017

Respondents: Miss S Scully , Director of first respondent

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The respondents discriminated against the claimant by harassing her on the grounds of her sex.
2. The claimant is entitled to a remedy. The parties are invited to consider whether remedy can be agreed, or, in default, whether agreement as to any elements of the issues relating to remedy can be agreed so as to limit and define the issues to be determined by the tribunal on remedy.
3. The tribunal will re-convene to determine remedy on **4 January 2018 at 10.0 a.m.**
4. The claimant shall, unless content to rely upon the existing evidence, (in which case she is to so inform the tribunal) make and serve upon the respondents and the tribunal a further witness statement by **22 December 2017**, updating the medical position since the date of her previous witness statement, and in the light of her undergoing psychotherapy in late August 2017.

5. The claimant shall serve upon the respondents and the tribunal by **22 December 2017** any further medical evidence that she wishes to rely upon.
6. The parties shall by **29 December 2017** prepare and serve upon the other party and the tribunal any further submissions as to remedy, and in particular as to whether any award of aggravated damages such be made, and , if so, in what sum.
7. The parties will inform the tribunal by **29 December 2017** whether a further oral hearing is required, or whether they are content to rely upon written evidence , documentation and submissions.
8. In the event that a further oral hearing is required, but the date set is not convenient for any party, witness or representative, any party affected is to notify the tribunal by **29 December 2017** of this, specifying who is unavailable and why, the estimated length of hearing, and dates to avoid, and seeking any further case management orders as are considered necessary for the determination of remedy by the tribunal.

REASONS

1. By a claim form presented to the tribunal on 28 February 2017 the claimant complained of sex discrimination , in the form of harassment , allegedly perpetrated by the second respondent, who is a Director of, and shareholder in, the first respondent, on the night of 22 December 2016.
2. The response of both respondents denies the allegations, maintaining that the account alleged by the claimant of the second respondent's conduct is untrue.
3. The claimant has represented herself, until the final day of the hearing, when Mrs M Ham, a lay representative , represented her in cross examining the second respondent, and making closing submissions. The respondents have been represented by Miss Scully, a Director of the first respondent, and wife of the second.
4. A preliminary hearing was held on 18 May 2017, at which an application was made, unsuccessfully, to strike out the claim, and case management orders were made.
5. Miss Scully has a hearing impairment, and had raised with the tribunal how she may best conduct the hearing so as to be able to hear the evidence and follow the proceedings. At the outset of the hearing the tribunal checked that the layout of the room was suitable for her, and invited her to raise any difficulties that she may have. The hearing commenced on 17 August 2017, and the claimant gave evidence that day, cross – examined by Miss Scully. The second respondent was present , as was the respondents' witness Hazel Riley. No issues were raised during the hearing, which could not be completed, and was accordingly adjourned part heard to 10 November 2017.

6. By e-mail to the tribunal of 26 September 2017 Miss Scully raised with the tribunal that she had, unbeknownst to her, missed a good deal of what was said by the tribunal panel and the claimant. She therefore wished to nominate Hazel Riley, one of the respondent's witnesses, to put further questions in cross – examination to the claimant. This was copied to the claimant, who did not object to such a course.

7. The tribunal did not rule upon that application, and it was further considered when the tribunal re-convened on 10 November 2017. The tribunal further considered the application, which was based upon Miss Scully not hearing all of the evidence on the last occasion. The tribunal asked if she had prepared questions that she wanted to have put to the claimant. She had done so, and she produced to the tribunal a document of some 20 pages, in which questions, and alternatives in the event of particular answers being given, for the claimant were set out.

8. The tribunal did not share this with the claimant, on the basis that as they were cross – examination questions, she would be at an advantage if she were to have prior sight of them. She accepted this.

9. The tribunal adjourned to consider the application, and the questions. The tribunal's understanding of the application was that it was based on parts of the claimant's evidence in particular not being heard by Miss Scully, though apparently being heard by the second respondent. Perusal of the 20 pages of proposed further questions, however, revealed virtually a proposed complete re – run of the claimant's cross – examination. This was, in the tribunal's view, to give the respondents a "second bite at the cherry". The range of questions did not seem confined to those where Miss Scully had not been able to hear the answers, and hence the application, in that form, was refused.

10. The tribunal, however, made it clear to the respondents that if a further application was made, with the proposed further questions linked more specifically to aspects of the evidence of the claimant's evidence which had not been heard fully by Miss Scully, it would be considered further at the next hearing, which was a week away. Whilst Miss Riley would not be available to put the questions, the tribunal could see no difficulty in Miss Scully putting them, or perhaps, the second respondent himself, the important thing would be that Miss Scully heard the answers.

11. The matter was left there, and in the remainder of the second day Miss Scully herself and Miss Riley gave evidence for the respondents. The tribunal did not wish to adjourn with the evidence of the second respondent part heard, with the restrictions that would place him under, and for that reason, in part, and to allow for potentially further cross – examination of the claimant if new questions were formulated, the tribunal adjourned part heard to 17 November 2017, as this date too had been listed. The tribunal also indicated that the parties may wish to undertake further enquiries as to whether there was any documentary evidence which could assist the resolution of a factual issue as to on what day, precisely, the second respondent and Miss Scully returned from holiday in Cancun, Mexico in late December 2016.

12. On the third day, however, Miss Scully had not prepared any further list of further questions, and did not pursue the application to further question the claimant. The tribunal asked her if she was sure that this was her position, as she would not get another chance, and she confirmed that she did not want to take it any further.

She was reminded again to speak up if there was any part of the proceedings which she could not hear.

13. The tribunal proceeded to hear the evidence of the second respondent, cross – examined by Mrs Ham, a lay representative, who had been present through the hearings assisting the claimant. The evidence was concluded, and the parties made their submissions. These were in writing from each side, and addressed the factual issues to be addressed. No further documents were adduced before the tribunal.

14. Finally, as they had at the outset of the hearing, the parties were informed of the tribunal's powers under rule 50 to make anonymisation and other orders, to prevent the identification of any persons before the tribunal, or referred to in evidence before it. Both parties declined any such order, and, when the tribunal again, after the close of the case, and before judgment was promulgated, reminded them of this power, inviting any application before it was too late, each maintained their position, and no order was sought. No order is accordingly made.

15. There was an agreed Bundle, and several documents were added to it during the course of the hearing. Having read the documents, heard the witnesses, and considered the submission of both sides, the tribunal unanimously makes the following findings of fact (in the ensuing sub-paragraphs, references to “the respondent” in the singular are to the second respondent, unless expressly otherwise stated):

- 15.1 The claimant was employed by the first respondent, which is a small furniture retail and restoration based in Marple, as a furniture painter from 23 September 2015. The claimant had no written contract, and no written particulars of employment have been issued to her. The second respondent is a Director of the company, as is Miss Susan Scully, his wife. They employed some 4 to 5 employees. The claimant worked part – time, 2 days per week, usually Wednesdays and Fridays. She has a young child, for whom she is the sole carer.
- 15.2 The claimant had a good relationship with Miss Scully, and, to a lesser extent, the second respondent, though she saw less of him than she did of Miss Scully. Miss Scully had been very supportive to the claimant, helping her with issues relating to her son's disability, and the two were close friends.
- 15.3 On 10 December 2016 Miss Scully and the second respondent went away on holiday to Cancun, Mexico. In their absence Hazel Riley, then engaged to Miss Scully's son, was left in charge of the business. Alison Baguley, however, another employee was usually in charge of the workroom. The claimant was in work for two days whilst the respondents were away. An issue arose about some chairs that the claimant was supposed to be painting at home, and text messages were exchanged about this. Hazel Riley was concerned that the chairs would not be ready for Christmas, and raised this issue with the claimant. Hazel Riley considered that the claimant had undermined her, and told Miss Scully about this on her return from holiday on the morning of 21 December 2016.
- 15.4 Miss Scully spoke to the claimant that morning, and reprimanded her for undermining and upsetting Hazel Riley, and told her that she was not on a par

with other employees, alleging that she had not done much work whilst the respondents had been on holiday. The claimant did not agree, considered that this criticism was unjustified, and she was upset about it.

- 15.5 The claimant was not in work the following day, 22 December 2016. At 21.14 that night she received a call on her mobile phone from the second respondent. That call lasted for 28 minutes and 17 seconds. In it he discussed the reprimand that the claimant had received from Miss Scully, and she explained her side of the events that had occurred. She discussed other issues and relationships in the workplace with him, and how she was feeling. He reassured her not to be concerned, and how he would sort things out. Nothing untoward occurred in this phone call, and the respondent said he would call her back.
- 15.6 He did so at 22.12 that night. After initially talking about work, he then changed the conversation and said that he wanted to fuck the claimant. He went on to say how he would initially “fuck” her and then would “make love” to her. His voice was different, and he used a form of “gangsta” type vernacular. The precise details of what he said are set out in the claimant’s witness statement , but the essence of it was that he wanted to have sex with the claimant. She was shocked, and did not know how to respond. She tried to make light of it , saying that she would like to have sex with Gary Barlow, but that was not going to happen. After further comments about what he wanted to do to her, and how he would do it, he went on to say that he had an erection (which he called a “stiffy”) . He reminisced about the first time he had seen the claimant at her home, when he bought a piece of furniture from her, and how he had been thinking of her ever since then.
- 15.7 Whilst the claimant told him that there was not going to be intimacy between them, and that he loved his wife, he said he did love her, but he wanted to “fuck” the claimant.
- 15.8 The conversation continued, with the respondent discussing the van he was buying his wife, which meant that the claimant would get the old van, more reminiscing about another occasion he had seen her at her house, and how beautiful she looked, and how he wanted to come round to the house to fuck her.
- 15.9 The claimant tried to tell him how absurd this was, and how he was proposing to go back to his wife after having sex with her. The respondent then told her that his wife would never know. The claimant suggested that if he was so desperate he should use a prostitute, but he said he did not want to “pay for it”, he wanted to fuck her. He then said he was going to get some more wine (implying he was drinking wine at the time), and would call her back.
- 15.10 This call lasted for 48 minutes and 18 seconds, ending at 23.00. At 23.11 the claimant tried to speak to her sister, Deborah, texting her at 23.11 “You there” (page 62 of the Bundle) . She did not reply.
- 15.11 At 23.12 the respondent rang the claimant again. She took the call, hoping he was ringing to apologise and had now realised what he had said was inappropriate. He continued, however, to discuss sex, and how the claimant

had not had it for a long time. He discussed another employee, Alison, but said he did not want to fuck her, he wanted to fuck the claimant. He told her that she would not lose her job, but that even if she did , he would still pay her. The claimant took this as a suggestion that she would like a prostitute, and was annoyed at this comment, and said so. The respondent then appeared to snap out of his dreamworld, and told the claimant not to tell anyone about their “little secret”. He then asked if the claimant was recording the call, which she was not, and she told him so.

- 15.12 He went on to talk about his previous marriages, and how he had not cheated on his previous wives. He then went on to say that he was going to come to the claimant’s house because he wanted to fuck her. He asked the claimant to get some wine in for him, and the claimant told him that she would not be doing so. He continued , saying he was coming over to her house, there and then, and was going to fuck her.
- 15.13 The claimant told him not to, as she would not let him in, but he continued to say he was coming over. When she told him that this was not going to happen, and she was going to hang up, he relented, saying “maybe another time then”. The claimant told him she was hanging up , and going to bed as it now midnight (as indeed it was) . The respondent ended the call by saying “love you,” and “night night”, and how he would see her tomorrow, rather as a person would speak to their girlfriend or wife. The claimant hung up.
- 15.14 That call ended at almost exactly midnight (page 50 of the Bundle) . At 00.14 the claimant sent this text to her sister, Deborah Steel (page 62 of the Bundle):
- “My boss has been on the phone for last 2 hours saying he’s in love with me and wants to fuck me. and after fucking me he wants to make love. Omg Wtf. All I want is job 0”*
- 15.15 Her sister replied at 1.09 (same page) with a “horrified” emoticon, saying she would ring her in the morning. She did so, and advised her to write things down whilst they were fresh in her mind. The claimant wrote some handwritten notes (pages 51 to 57 of the Bundle, typed up at pages 58 to 61) that morning.
- 15.16 The claimant’s sister also sent her a message at 07.24 on 23 December 2016 with details of how to contact ACAS (page 63 of the Bundle). The claimant tried to contact ACAS , firstly at 08.07 (page 67 of the Bundle), and then again at 08.23 (page 68 of the Bundle) on 23 December 2016. The advice in the first call was not very encouraging, and hence the claimant rang the second time, speaking for 15 minutes 20 seconds. The advice this time was more helpful, and the claimant noted what to do.
- 15.17 The claimant was due in work that morning, and was to be picked up by Miss Scully around 9.00 a.m. She did not expect the second respondent to be in work, as she expected he would have a hangover.
- 15.18 The claimant was driven to work by Miss Scully. The second respondent had, before she left, told her that he had spoken to the claimant the previous night

by telephone, but said little about it, other than that the claimant had been very drunk and was rambling on about her personal life. The second respondent did not go into work with Miss Scully, or at all that day.

- 15.19 The claimant did not mention anything about the telephone calls to anyone at work, and did not want to tell Miss Scully. This was the last day before the Christmas holiday, and the claimant just wanted to get through the day.
- 15.20 The claimant's sister messaged her at 12.32 to ask if she was OK, (page 64 of the Bundle) and the claimant replied at 13.36 (page 65 of the Bundle), saying she was, but was running it through her head, and she commented that the second respondent had not turned up for work, saying "he's obviously got a hangover".
- 15.21 On 24 December 2016 the second respondent sent a text to the claimant (the time is not recorded but the claimant's evidence was that it was around 10.30 p.m.) in which he said:

"Hey up baba ! How are you.? X"

The term "baba" was a reference to the respondents' dog, and was used at work as a jokey nickname on occasion. The claimant did not respond.

- 15.22 On 1 January 2017 the claimant made enquiries about the CAB, and when it would re-open, by visiting the CAB webpage (see page 96 of the Bundle).
- 15.23 On 3 January 2017 the claimant made an appointment with the CAB to see an adviser, which could not be arranged until 16 January 2017.
- 15.24 On 4 January 2017 the claimant was due back in work. She did not go to work, as she could not face it, but sent a text message to Miss Scully, saying she could not come into work, as she was not well and was going to the doctor's (page 117 of the Bundle).
- 15.25 The same day the claimant reported the incident to the Police (pages 113 and 114 of the Bundle). No action was taken, and the claimant did not wish the Police to take any further action.
- 15.26 On 5 January 2017 the claimant saw her GP, and was given a sick note for stress at work. She told the GP that she had been subjected to sexual harassment at work, and that her boss had been making crude sexual remarks to her via text and phone call (page 115 of the Bundle). The relevant extract from the GP's notes records in the "History" given by the claimant on 5 January 2017 the following:

"Sexual harassment by boss – been making crude sexual remarks to her via text/phone call for past few weeks, nil physical"

He is boss/manager of business so unable to escalate further

Been to CAB yesterday for advice and they have advised log incident with police (which she has done) and booked in for ?legal appt on 16th Jan

Unable to go back to work – stressed/worried/anxious

Good friend's with boss's wife

Lives alone with son – coping at home but going to work a massive issue”

- 15.27 The claimant was given a sick note for two weeks (page 111 of the Bundle) with “stress at work” cited as the relevant condition.
- 15.28 The claimant had decided by 26 December 2016 that she would have to find a new job in the New Year (see her text to Tommy Slaven that day, page 69 of the Bundle). Over this period, from 26 December 2016 to 8 January 2017 the claimant was in text communication with a friend, Tommy Slaven. These text exchanges are at pages 69 to 89 , and 97 to 109 of the Bundle. In them the claimant repeats many details of what the second respondent had said to her, and how she had felt over Christmas.
- 15.29 Miss Scully tried to contact the claimant whilst she was off sick, to see when she may be coming back to work. The claimant avoided these attempts at contact.
- 15.30 On 9 January 2017 the claimant met with her sister, and on her way back home passed a delicatessen, “Charlie’s” , which was advertising a job vacancy. The claimant had been working on her CV with her sister, so went in and handed it in. She was told that she would be telephoned to arrange an interview.
- 15.31 On 13 January 2017 Miss Scully tried again to contact her at 11.01, and again at 12.45 (see page 117 of the Bundle), describing this last message as a “last ditch attempt to try to talk. The claimant put her off, saying she was in the middle of something (page 118 of the Bundle). The claimant at this point decided she had to resign. She had not secured alternative employment, and had not attended the appointment with the CAB, which was not until 16 January 2017, but she could not avoid the issue any longer, so she wrote a letter of resignation (page 116 of the Bundle), addressed to Miss Scully, saying:

“This involuntary resignation is the result of sexual harassment I have received from Michael Bennett.

The incident occurred on the evening of 22nd December 2016, Mr Michael Bennett telephone (sic) me with very sexually explicit requests and threats to turn up at my address to peruse (sic) his desire.

Although I have thoroughly enjoyed working for the business and enjoyed my role, I feel I can no longer work for Mr Bennett as since the episode has occurred I feel stressed, anxious and utterly disappointed to think that someone with a position of authority would ever think to suggest such things and feel this is acceptable behaviour.

As you are aware I have been to seek medical advice, and it is with deep regret that our relationship has come to this but I have been left with no other options.”

15.32 That letter was apparently sent by e-mail , though there is no e-mail in the Bundle showing when it was sent, but at around 16.35 the claimant sent Miss Scully a message telling her that she had sent an e-mail, but Miss Scully replied that she was not at work, and would look at the e-mail when she was. Later the same day, the time is not recorded, but Miss Scully had clearly read the claimant's resignation letter, as she sent her this message:

"Really ? Why did you come in work the next day?"

These messages are at page 119 of the Bundle. The claimant did not reply.

15.33 The claimant had her appointment with the CAB on 16 January 2017.

15.34 The same day she was telephoned by Ruth at Charlie's deli, at 09.39, and offered the job (page 121 of the Bundle).

15.35 The claimant started work at Charlie's deli on 19 January 2017, as is confirmed in a letter from that business dated June 2017 (page 136 of the Bundle), and she was given a permanent contract for casual work dated 2 March 2017 (page 128 to 129 of the Bundle).

16. Those are the relevant facts as found by the tribunal. There was a major conflict on the evidence between the claimant and the second respondent. This has been a claim which turns solely on its facts. The tribunal has had to make a stark choice between the evidence of the claimant, and that of the second respondent, as to what was or was not said in the two telephone calls. Only they can give that evidence, any other evidence is circumstantial. There is no halfway – house, no room for any alternative findings. If the second respondent said what the claimant alleges he said, sexual harassment is made out, and no alternative argument has been, nor , frankly, could be , advanced that this conduct was anything other than sexual harassment.

17. As will be clear from the findings of fact, the tribunal has preferred the evidence of the claimant . The parties are entitled to know what has led the tribunal to this conclusion. There is no hiding from the proposition that either the claimant or the second respondent has lied to the tribunal, and indeed, on other occasions, about the content of two of the telephone conversations on 22 December 2016.

18. The respondents' case is that the claimant has fabricated the allegations, in retaliation for being reprimanded by Miss Scully when she and the second respondent returned from holiday. It is contended that she has been motivated to create this mendacious account partly by pique at being unfairly reprimanded, and partly by greed , in an attempt to extort money out of the respondents.

19. The tribunal has carefully considered this possibility. As a starting point, the tribunal has considered the plausibility of such a contention. The background is that the claimant had worked for the respondents for 15 months, and liked her work. She had a good personal relationship with Miss Scully. Apart from issues that arose whilst she and the second respondent were way on holiday, she had no serious issues with her employment. True it is that she was not happy at being, as she saw it, unjustly reprimanded, but the tribunal finds it highly unlikely that this reprimand was likely to create such an angry a reaction in the claimant that she made up , and has persisted in these allegations. As it was, whilst she told others about them, she

did not raise them with the respondents until her resignation letter of 13 January 2017. If this was revenge, it was served very cold.

20. Further, the claimant did not simply make these allegations, she also resigned shortly afterwards. She did so at a time, the tribunal is satisfied, when she had no guarantee that she would get another job, or that, if she did, it would be permanent, or would fit with her childcare commitments. She therefore, as a one parent family, took a huge risk in resigning her employment with the respondents, employment which, until 22 December 2016, she had enjoyed.

21. Quite apart from the inherent implausibility of the respondents' suggestions as to why the claimant would make up these lies and act this way, the tribunal has also examined the evidence of the claimant and the second respondent for consistency and corroboration.

22. The claimant first made the allegation that the second respondent had said that he wanted to fuck her in a text message to her sister at 00.14 on what was then 23 December 2016 (page 62 of the Bundle). That was within 15 minutes of the end of the third telephone call. She had tried to contact her sister between the second and third calls, at 23.11 (same page), but had been unable to reach her. Whilst there is no content in that message, it is corroboration of the claimant seeking to speak to her sister after the second phone call, when the second respondent started to make the sexual suggestions to her.

23. Thus, if the claimant has, as a result of pique and greed, decided to invent malicious lies about what the second respondent said to her, she must have determined upon that course of action by 00.14 on 23 December 2016, for that was when she first, in very brief but clear terms, stated the main feature of what had been said to her, namely that the second respondent wanted to fuck her, and then to make love to her. Those are, the tribunal notes, very specific allegations, and have been a constant theme in her account.

24. The tribunal has considered her actions thereafter, which are well documented, as well as set out in her witness statement, and were:

Having received from her sister at 07.24 on 23 December 2016 details of how to contact ACAS, she then did so, firstly at 08.07 (page 67 of the Bundle), and then again at 08.23 (page 68 of the Bundle) on 23 December 2016;

On 1 January 2017 the claimant made enquiries about the CAB, and when it would re-open.

On 3 January 2017 the claimant made an appointment with the CAB to see an adviser.

On 4 January 2017 the claimant reported the incident to the Police (pages 113 and 114 of the Bundle).

On 5 January 2017 the claimant saw her GP, and was given a sick note for stress at work. She told the GP that she had been subjected to sexual harassment at work, and that her boss had been making crude sexual remarks to her via text and phone call (page 115 of the Bundle)

25. Further, the claimant made notes of the incident soon afterwards (pages 51 to 57 , typed up at pages 58 to 61) , and soon after it from 2 January 2017 through to 8 January 2017 , she was in text conversation with a friend , Tommy Slaven. Those texts are at pages 97 to 106 of the Bundle. They are interesting because in them the claimant repeats certain details (hotly disputed details) of the conversations that she had with the second respondent on 22 December 2016. For example she makes reference (page 97 of the Bundle) to the use of the term “stiffy” , to (page 103 of the Bundle) the second respondent saying how he first looked into her eyes he knew he was attracted to her, from day one, and (page 105 of the Bundle) to how he said he was coming to her house to fuck her.

26. The tribunal appreciates that all this could be an elaborate , self – serving, fabrication , carefully constructed to look like the truth. The tribunal appreciates that just because a lie is repeated often ., it des not become the truth. But for the respondents’ hypothesis to be correct, the claimant must, firstly, have hit upon this plan of deception within 15 minutes of the end of the third telephone call, for that is the time at which she first told the alleged lie, in the text to her sister. She then, first thing the following morning, contacted ACAS to give support to this lie, made notes, in which she made up the details of the lie, told her sister and Tommy Slaven about it, really intending that these repetitions of her lies would be used to support the case she was allegedly then plotting to bring, and then told the Police and her GP, all as part of a devious and malicious plot to make a false claim against the respondents.

27. This is all inherently implausible, and would require a degree of planning, cunning and determination worthy of the secret service of a foreign power. That all this has happened because the claimant received an unjustified reprimand , or because of her greed, or a mixture of the two, when there is no evidence at all of any previous issues between the claimant and the respondents, and particularly Susan Scully, whose friendship the claimant also has lost as a result of her alleged lies, makes the respondents’ contentions border on the preposterous. Added to this, it must also be borne in mind that if this was all part of an elaborate plot, this was a high risk strategy on the part of the claimant. She , a one parent family, with limited employment opportunities, resigned when, we find, she had not secured another job to go to, even if it may have been in prospect. She resigned before she had the meeting with the CAB on 16 January 2017. In short in resigning when she did, and saying why she was resigning, the claimant was burning her boats, not only in terms of her employment, but also in terms of her, and her son’s, relationship with Miss Scully.

28. There are, the tribunal accepts some legitimate issues on the claimant’s account which merited further questioning. Miss Scully raised them, as did the tribunal. The first is that the claimant allowed the conversations with the second respondent to continue, and answered a second (then the third of the night) from him after he had made the sexual comments to her. The claimant explained this, however, to the satisfaction of the tribunal. She was genuinely, and seriously, shocked at what she heard. Nothing like this had ever happened before. She had no idea that the second respondent harboured such thoughts about her. She did not know what to do. He was her boss, she liked her job and wanted to keep it. She thought it best to try to make a joke of it, and get him to see how his comments were inappropriate.

29. She took the last call because she thought he had come to his senses, and was ringing to apologise. In fact, as her evidence shows, his tone and language in the last call did change towards the end.

30. The tribunal accepts the claimant's evidence. Victims of such harassment do not always act rationally, and the tribunal accepts that the claimant did not know what to do for the best. The second respondent was her boss, and his wife was a good friend. The tribunal does not find that the claimant's failure to end the calls in any way undermines her credibility on the crucial issue of the content of those calls.

31. The next point is that the claimant went to work the following day. This may seem surprising at first blush, and nothing, both sides agree, was said about the previous night's telephone calls between the claimant and the second respondent. Much is made by Miss Scully about this. The claimant, however, did not expect the second respondent to be in work (and, as it turned out she was right, he did not go into work, whatever the reason) ,and it was the last day before Christmas. In any event, by then the claimant had clearly told her sister what had happened, and had contacted ACAS that very morning whilst waiting to be picked up by Miss Scully. The tribunal does not find that her going into work in these circumstances makes her account any less credible.

32. Miss Scully did put to the claimant the account recorded in her GP's notes (page 115 of the Bundle) . The entry relating to the claimant's consultation on 5 January 2017 does record that the claimant had given a history of "sexual harassment by boss", and goes on to state:

" – been making crude sexual remarks to her via text/phonecall for past few weeks, nil physical"

The claimant agreed that she has never claimed that the second respondent had been harassing her for weeks, or by text , although she did get the text from him on 24 December 2016. She had not told the doctor that, and could not account for how she had come to make that entry.

33. The tribunal does not consider that this undermines the claimant's credibility. It accepts that she did not give the doctor an account in those terms, and she has never in her texts and notes made such suggestions in those terms. These are not notes the claimant would see at the time, or be invited to check or correct, and so would not know if they were correct or not. The claimant is noted on this occasion to be "teary", and the tribunal's view is that it is highly likely that the GP had simply misrecorded or misunderstood what the claimant was telling her. In any event, it is clear that the claimant attended, in some distress, and was given a sick note because she complained of sexual harassment by her boss. The tribunal does not find this discrepancy in the account recorded by a third party seriously to undermine the claimant's credibility as a witness.

34. The tribunal has also considered the points made about the claimant's account on the claim form, and in the preliminary hearing , which are contended to undermine her evidence. The tribunal does not find that they do. Some discrepancy is inevitable, and these were minor ones, the tribunal considers. In short, the claimant's account has been documented from an early stage, the main features have been given to others at a very early stage after the alleged harassment, and

the claimant has acted entirely consistently throughout. Whilst it may, to some extent be self – corroboration, there is corroboration of her account from a very early stage.

35. In any event, whilst the tribunal examines the account of the claimant, and assesses her credibility, it does not do so in a vacuum. The tribunal is considering the credibility of the claimant's account in comparison with that of the respondents, particularly the second respondent. In that regard, certain facts are inescapable. On each occasion he made the telephone calls. They were all made when Miss Scully had gone to bed. The first one was quite late, at 9.14, but the second and third, to an employee who was supposed to be at work the following day, were very late indeed. That is, at the very least, odd behaviour, and even the second respondent accepted, not something that he had ever done with any other employee in the past. Secondly, whilst the respondents contend that the claimant was the one who had been drinking, and who was going on about her own sex life, and the second respondent was, as he says in his witness statement, getting fed up with the claimant midway into the second telephone call, he did not seek to end that call at that stage, and indeed rang her back again, 12 minutes later, at 23.12. Whilst he said in evidence that was out of "concern", his witness statement does not mention this, and indeed, paragraph 8 rather glosses over how the third call came about at all.

36. The tribunal appreciates that, as it was not until 13 January 2017, when the claimant resigned, that she made reference to the allegation that she had been sexually harassed on 22 December 2016 by the second respondent, the second respondent was not called upon for any explanation or account of what happened until then. His account therefore first appears in the response, and then the amended response, which is a much fuller account. There is thus less scope for corroboration, the tribunal accepts. That said, Miss Scully's initial response, by message, to what must have been something of a bombshell was merely "Really? Why did you come in work the next day", which is surprisingly restrained given the nature of the claimant's allegations.

37. In terms of motives to lie, whilst the respondents contend that the claimant's are vengeance and greed, there are, in the case of the second respondent, rather more obvious and, in the view of the tribunal, much more likely motives. It would clearly be difficult for the second respondent to admit to his wife, and business partner, that he had made sexually explicit overtures to the claimant. It is, the tribunal considers, possible that he did not remember what he had said. Whether he had or had not been drinking the tribunal cannot say, though it accepts that he told the claimant that he had. Whilst a possibility, the tribunal considers it unlikely that he did not remember, at least in general terms, what he had said to the claimant the night before. That he mentioned to his wife speaking to the claimant by phone the night before at all the tribunal considers was likely to be pre-emptive, as he must have been very anxious that the claimant would tell Miss Scully about the calls, and wanted to get his "side" of things in first, if only in brief.

38. The claimant, however, did not mention the calls to Miss Scully, and the second respondent therefore must have been rather worried as to whether she was going to say anything to her about them. This coincided, of course, with the Christmas holiday, when no one would be in work again until after it was over. The tribunal regards the text message from the second respondent on 24 December 2016 (page 49 of the Bundle) as significant, as the tribunal considers that this is

consistent with the second respondent , somewhat sheepishly, checking that the claimant was not going to say anything.

39. She had, in fact, already done so, as she had begun to tell her sister and Tommy Slaven, and had sought advice from ACAS.

40. Finally, whilst not a central issue (and it really only goes to credibility) there was a dispute over the day upon which the respondents (i.e Mr Bennett and Miss Scully) returned from their holiday in Cancun, Mexico. The relevance of this issue is that the respondents' case is that they returned on Thursday 22 December 2016, i.e the very day of the telephone calls, whilst the claimant is adamant that they returned, and she was reprimanded by Miss Scully, the previous day, Wednesday 21 December 2016. The claimant says that she was not in work on the Thursday, and that the respondents have sought to paint a picture that they returned that day to make it look like the second respondent's conduct may be attributable to jet lag, or lack of sleep. A further possible motive for the claimant seeking to suggest that her telling off occurred a day before may be to deflect any suggestion that she was still angry and smarting at her reprimand some 24 hours later.

41. Whatever each side's motive for seeking to advance one day in preference to the other, the tribunal considered that the date a person or person returned from a holiday in Mexico by plane into Manchester Airport was a matter which was likely to be recorded, either in an itinerary, e-mails, from bank or credit card statements , or any of a number of sources from which it would be possible to establish precisely when the return flight came into Manchester Airport. Miss Scully was remarkably vague on this topic, and did not know , she said, even the airline she flew with. The tribunal suggested at the end of the evidence on 10 November 2017 that the respondents might like to make enquiries, and produce some further evidence which would help resolve this issue once and for all. At the resumed hearing a week later, no further evidence was produced.

42. For her part, the claimant produced her childcare invoice, which demonstrated that she had childcare booked for Wednesday 21 December 2016. Further, Wednesday was one of her two usual working days. Whilst appreciating that this document does not , of itself, prove that the claimant actually went into work that day, as she claims, it is at the least supportive of that evidence. The absence of anything from the respondents to support their contention of return on Thursday 22 December 2016 , is another instance where, on the balance of probabilities , the claimant's evidence is to be preferred.

43.. Thus, for all those reasons, the tribunal does find that the claimant's account is to be preferred to that of the second respondent, and she was, therefore, sexually harassed by him on the telephone, on 22 December 2016, as she alleges, and her claims succeed.

Remedy.

41. We turn now to remedy. The hearing was listed to deal with liability and remedy, and the tribunal did invite submissions on remedy. The tribunal firstly makes to following findings of fact in relation to remedy.

41.1 The claimant lost not only a job that she enjoyed, but also the friendship of Miss Scully, who had been a good friend to her, and had been very supportive with issues relating to the claimant's son. This also impacted upon her son, who could not understand why he would no longer see Miss Scully, and the claimant could not explain the reasons to him.

41.2 Coming when it did, the discrimination ruined the claimant's Christmas, causing her anxiety and distress, and worry about her employment situation in the New Year. She worried about losing her home.

41.3 The claimant documented the way she felt at this time in notes (pages 90 to 93 typed up at pages 94 to 95a of the Bundle), and in her messages with Tommy Slaven. She had difficulty sleeping, and nightmares. She withdrew somewhat from contact with Tommy Slaven.

41.4 She became tearful, worried, withdrawn, and less confident. The difference in her personality has been noticed and commented upon in her witness statement by her sister Deborah Steele.

41.5 The claimant saw her GP on 5 January and 18 January 2017 (page 115 of the Bundle). The latter consultation was after she had resigned, and had been the CAB adviser. The claimant did not return to her GP until late July 2017 when she complained of panic attacks. She was prescribed Propranolol, and referred to psychotherapy. When seen again on 3 August 2017 she had found the medication helpful, and had arranged an appointment with a therapist (see Page 115a of the Bundle).

41.16 The claimant started therapy, with the Talking Therapies service, on 30 August 2017 (pages 115b and 115c of the Bundle).

41.17 The claimant commenced the proceedings on 28 February 2017. The respondents initially instructed solicitors, who filed a response on 5 April 2017. The claimant's claim was "vehemently" denied, and an application to strike out the claim was intimated, although at that time, partly on rather technical, procedural grounds. It was contended that the claimant resigned in response to being disciplined by Miss Scully.

41.18 By letter of 6 April 2017 (pages 23f to 23g of the Bundle) the respondents' solicitors wrote to the tribunal, copied to the claimant (for she responded to it on 10 April 2017), stating that it was the respondents' position that the claimant's claim was "entirely fictitious", and that there was no evidence to support her claim. Various points were made in support of these contentions, and the solicitors sought a preliminary hearing to strike out the claim, or a deposit order be made, on the grounds that it was scandalous, or vexatious, or had no reasonable prospect of success.

41.19 The tribunal, by letter of 12 April 2017 indicated to the parties that the tribunal would not list a preliminary hearing for a strike out or deposit order when there was disputed evidence. Any such application could be made at the forthcoming preliminary hearing.

41.20 A preliminary hearing was held on 18 May 2017, at which the respondent's solicitor again sought to have a preliminary hearing listed to strike out the claimant's

claims as having no reasonable prospects of success. This was not based upon any procedural or jurisdictional issues, but upon the merits. Regional Employment Judge Robertson declined this application, observing, at para. 6 of his judgment, that there was no prospect whatever that the tribunal would be prepared to make such an order in a wholly fact – sensitive case.

41.21 An order was made, however, for the claimant to provide full particulars of her claims, and by e-mail of 30 May 2017 (pages 13 to 16 of the Bundle) she provided them.

41.22 The respondents , then acting in person, provided a response to that document in a “response” document undated , but received by the tribunal on 15 June 2017 (pages 23a to 23e of the Bundle) , in which the respondents contended that the claimant’s allegations were totally untrue and fabricated, concocted out of malice and greed. This document goes on to make allegations that:

- a) The claimant’s mother and sister did little to help her with her childcare;
- b) The claimant had an addiction to painkillers, drank wine every night, and came to work with a hangover;
- c) It was the claimant who was drunk during the telephone calls with the second respondent.

41.23 These allegations have been repeated in the respondents’ witness statements, including a suggestion that she had been involved with cocaine.

42. The tribunal commenced its deliberations about remedy. There was no claim for financial loss, so the claims were for injury to feelings, plus an award under s.38 of the Employment Act 2002, for failure to provide a written statement of terms of employment. The claimant was, at this stage, represented by Mrs Ham, a CAB representative, who has a law degree but is not familiar with Employment Law, or tribunal procedure.

43. In relation to the injury to feelings award, the figure of £12,000 had been suggested in the Schedule of Loss. That is all that the figure in the Schedule of Loss means, it is a suggestion, and no party would be held to such a figure , whether it be too high or too low.

44. The tribunal’s provisional view is that this is likely to be a case where an award in the middle band of **Vento** would be appropriate, but that it is premature to fix where such an award properly would lie. To assist the parties, the original middle band of **Vento** was £5,000 to £15,000 . Recent Presidential Guidance (*Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879*), however, has invited tribunals to update that figure, in claims started before 11 September 2017 , and in accordance with para. 1 of that Guidance, the tribunal proposes to uprate the middle band of **Vento** for inflation in accordance with the formula set out in that paragraph. The relevant Index value for February 2017 is 268.4, which applied to the middle band of £5,000 to £15,000 produces a new range of £7,518 to £22,554. Further, however, the Guidance suggests then applying a further 10% uplift for claims after 1 April 2013, which then produces a new middle band of £8,270 to £24,810 , rounded

up. This accords with the new middle band for cases presented after 11 September 2017, of £8,400 to £25,200.

45. Whilst the tribunal commenced its deliberations on remedy, it was unable to conclude them, and it also considers that the opportunity to provide further information or evidence, and to make further submissions should be afforded to the parties.

46. Firstly, it appears that the claimant may be entitled to an award in respect of personal injury, or, if not a distinct and separate award, the medical consequences of the discrimination may be reflected in the injury to feelings award. It is noted that after the commencement of the hearing on 17 August 2017 the claimant underwent psychotherapy. A letter from her GP dated 3 August 2017 was presented to the tribunal, and she was due to start this therapy on 30 August 2017. The tribunal, however, has not had any further evidence as to the effect of that treatment, and the claimant's medical position since the beginning of August 2017. The claimant may wish to prepare a further statement, updating the medical position since early August 2017, and to submit any further medical evidence from her GP or therapist as to the effect of the treatment, her current medical position, and any prognosis if there is any ongoing medical issue which is attributable to the discrimination.

47. Secondly, whilst this was raised with the claimant's representative (who is an inexperienced CAB representative), and she declined to seek such an award, the tribunal does consider that this may be a case where it should award aggravated damages. Such damages are not meant to be penal, but can be awarded where there features of the respondent's conduct aggravate the injury to feelings sustained by the claimant.

48. The EAT in **HM Land Registry v McGlue UKEAT/0435/11**, held that aggravated damages 'have a proper place and role to fill' in discrimination claims. Such damages are not intended to be punitive in nature and are not dependent upon a sense of outrage on the part of the tribunal. The EAT considered the categories of conduct where it might be appropriate for an award of aggravated damages to be made, i.e. where the distress caused by an act of discrimination may be made worse by:

(a) being done in an exceptionally upsetting way, e.g. 'In a high-handed, malicious, insulting or oppressive way', per Lord Reid in **Broome v Cassell [1972] 1 All ER 801, [1972] AC 1027, HL**;

(b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive;

(c) by subsequent conduct: eg where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise, e.g. **Prison Service v Johnson, HM Prison Service v Salmon [2001] IRLR 425** and **British Telecommunications v Reid [2004] IRLR 327**.

49. The tribunal considers that ground (c) may well be made out here. The respondents have not only failed to apologise, but have disputed the claimant's account by questioning her honesty and integrity, raising allegations about her

character and family life and, at one point, seeking to have her claim struck out without a hearing. This potentially goes further than robust defence, and has prolonged , and exacerbated the injury to feelings that the claimant has suffered .

50. It is, however, only right that the respondents have an opportunity to respond to the potential award of aggravated damages, as they were not expecting such an award to be considered.

51. By way of further guidance, the claimant has sought an award under s.38 of the Employment Act 2002 for failure to provide a written statement of particulars of employment. This is sought in the sum of two weeks pay. The provisions require a tribunal to make an award of either two or four weeks pay, and the claimant has only sought the former. Given that the absence of such a document has had no bearing on the issues in this case, and the first respondent is a small employer, the tribunal is minded to make an award of two weeks pay under this head, which award should be against the first respondent alone, as the employer.

52. The claimant has sought that the other awards are made on a joint and several basis, as the first and second respondent are largely indivisible. The tribunal is minded to do so.

53. The tribunal will therefore not determine remedy, but will consider remedy further on 4 January 2018. The parties are to submit any further evidence and/or submissions on remedy in accordance with the directions set out above. If necessary, a further hearing can be held, and further evidence given. Alternatively, the tribunal can proceed on the basis of further written evidence and documents. The parties are to inform the tribunal as to how they wish to proceed.

54. It is appreciated that the respondents have been previously represented , and that they found this financially prohibitive. They may, of course, seek further legal advice, and the parties can seek to agree remedy if they see fit. If, however, this is not possible, the tribunal will determine remedy.

Employment Judge Holmes

Dated: 5 December 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON
8 December 2017

FOR THE TRIBUNAL OFFICE