EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: 1. B
2. C

Heard at: Manchester **On:** 28-28 February 2018
1 and 2 March 2018
10-13 July 2018
6-7 November 2018
(in Chambers)

Before: Employment Judge Langridge
Mr M C Smith
Mrs C Glover

REPRESENTATION:

Claimant: In person
Respondents: Mr S Ell, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The first respondent failed to pay the claimant in accordance with the National Minimum Wage Act 1998 between 1 October 2015 and 12 February 2017, and the claimant is entitled to additional remuneration representing the difference between the pay she would have received had the National Minimum Wage been paid, and the pay she actually received.

2. The first respondent failed to pay the claimant holiday pay in accordance with the Working Time Regulations 1998 during the same period.

3. The non-payment of the National Minimum Wage and holiday pay amounted to direct discrimination against the claimant because of her race and because of her sex, contrary to section 13 Equality Act 2010.

4. The respondents subjected the claimant to harassment related to her sex and harassment of a sexual nature, in breach of sections 26(1) and 26(2) Equality Act 2010.

5. The respondents further harassed the claimant contrary to section 26(3) Equality Act 2010 by subjecting her to less favourable treatment on the grounds that she rejected the second respondent's sexual advances.

6. On 14 February 2017 the first respondent terminated the claimant's employment without notice, and the claimant is entitled to be paid for her one week notice entitlement under section 86 Employment Rights Act 1996.

7. The respondent did not provide the claimant with written particulars of the main terms of her employment and accordingly the claimant is entitled to an award of compensation pursuant to section 38 Employment Act 2002.

8. A remedy hearing shall be fixed to deal with the question of compensation. Any further evidence which the parties wish to rely on at the remedy hearing (including documents or witness statements) shall be provided to the other party no later than 28 days before the date of the remedy hearing. Each party shall bring 4 additional copies of any new documents or witness statements to the Tribunal on the day of the hearing.

REASONS

Introduction

1. The hearing of these claims began in February 2018 and was completed by July 2018 after eight days. In presenting their evidence both parties required the assistance of interpreters, in Kurdish for the respondent and Polish for the claimant and all other witnesses. The language difficulties were reflected in the pre-prepared written statements of all witnesses, which (in the case of the claimant and her witnesses at least) had been written in English after being translated from Polish by an adviser. The Tribunal had to make allowances on behalf of both parties for the fact that the translation of some words and phrases was not as accurate as it might have been, such that it was particularly important to consider the oral evidence given by the witnesses.

2. The claimant represented herself throughout the hearing, having previously had some limited assistance from a Polish advice centre. She gave evidence on her own behalf and called two former colleagues, Beata Andrys and Katarzyna Wojtal, as well as her daughter Paulina. The second respondent gave evidence on behalf of himself and the first respondent, his company, and also called as witnesses two employees, Majdalena Gliwna and Marzena Cieniewicz.

3. In the case of the four current or former employees of the first respondent who gave evidence, the two witnesses called by the claimant had left their employment and the two who were called by the respondents were still working for the company. Ms Cieniewicz was employed as the shop manager, and all the others, including the claimant, were employed to work in the shop.

4. On the second day of the hearing in February an allegation of intimidation was made by Ms Wojtal. She reported that her current employer, a friend of the second respondent, had threatened to sack her if she gave evidence for the claimant. The

Tribunal advised the parties that it was not its role to hear evidence and adjudicate on the truth of that allegation, but made it clear that if it were true then it was a very serious matter and possibly also amounted to unlawful victimisation under the Equality Act 2010. The claimant and her witness were given time to decide what to do, and Ms Wojtal went on to give her evidence.

5. A difficulty which affected the hearing was the complete absence of any records from the first respondent about the claimant's terms and conditions of employment, her working hours and her pay, including holiday pay. Although the parties produced a joint bundle, a number of other documents such as correspondence from HMRC and many text messages were produced during the course of the hearing. The claimant had already prepared a record relating to her working hours, but at the request of the Tribunal she produced additional handwritten notes to assist on the question of hours worked.

6. In discussion with the respondents at the end of the third day of the hearing the Tribunal was told that the clocking cards directly relevant to this case (which were not in the evidence) had been sent to their accountants for payroll purposes. The second respondent said he collated a note of the working hours before sending the clocking cards, but he did not retain them or any copies. The collated data was sent to the accountants showing the total hours worked per week without any breakdown. The Tribunal was explicitly told during this discussion that the accountants held some records of working hours.

7. In answer to more questions from the Tribunal on this point, Mr Ell said he needed time to take further instructions, which was given. Following a call to the accountants during a break in the hearing Mr Ell was able to relay on the respondents' behalf what he had been told. On instructions, he said the accountants would produce a letter about how and when details of working hours were provided to them, and the letter would also deal with their involvement in an HMRC investigation. The accountants were to print some information they had and attach this to the letter. The Tribunal was also told that once the information had been passed to the accountant, the clocking cards were destroyed after the payroll was done. The respondents have been retaining clocking cards since HMRC carried out their investigation, and included some examples in the bundle. At the end of that day, the second respondent said he would check what ledgers he had containing details of the working hours he had collated.

8. At the start of the following day the respondents gave a further update. This was to the effect that the accountants were unable to get any information to the Tribunal that day, but it could be done within a short period of time. The Tribunal was specifically told that the respondents had a "book covering the period January to July 2016 recording cash paid as wages". The Tribunal was told that the respondents relayed information about the wages to be paid by telephone to their accountants. At the close of that day's hearing the Tribunal made an order that both parties disclose their records of the claimant's working hours, by 23 March.

9. When the hearing resumed on 10 July the claimant had complied with the order but the respondents had produced nothing. At this point the Tribunal was told that no records of hours worked had been kept by the accountants, and these were simply contained in the wage slips already disclosed and in the bundle.

10. In this second tranche of the hearing the claimant was recalled to give evidence in order to introduce various handwritten notes she had prepared in an effort to summarise her working hours, as well as numerous text messages which provided some information on that point. She also gave evidence about the wages she was paid by reference to her bank statements which had by then been produced.

Issues and relevant law

11. In her application to the Tribunal the claimant made a number of allegations, one of which amounted to an allegation of sexual assault. As a result, the Tribunal made an order pursuant to rule 50 Employment Tribunals Rules of Procedure 2013 protecting the identity of the parties.

12. A claim for unfair dismissal was withdrawn at a case management hearing on the grounds that the claimant had not completed two years' service with the first respondent so as to qualify to make such a claim. The remaining claims can be categorised broadly as two distinct types: claims relating to her working hours and pay; and claims relating to the second respondent's conduct towards her.

13. The claims relating to pay were made against the employer, the first respondent, and can be summarised as follows:

13.1 A claim under the National Minimum Wage Act 1998, based on an alleged failure to pay the claimant at the statutory rate when all her working hours were taken into account. The Tribunal had to deal with factual issues about the hours the claimant actually worked, which task was made extremely difficult by the lack of any formal records.

13.2 A claim under the Working Time Regulations 1998 for non-payment of holiday pay in accordance with the statutory entitlement of 5.6 weeks' annual leave. The claimant alleged that she had never received any holiday pay, except in June 2016 when she received a one-off cash payment of £190.

13.3 A claim for breach of contract or unlawful deductions from wages under Part II Employment Rights Act 1996, based on the allegation that the first respondent terminated her employment without giving or paying notice. If the Tribunal found that the respondent did terminate the employment, it was agreed that the appropriate period of notice (no express term having been agreed between the parties) would be 1 week pursuant to section 86 Employment Rights Act 1996.

14. Section 1(1) of the National Minimum Wage Act 1998 provides for workers to be paid at least the national minimum wage:

> *(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.*

15. Employers have a duty under section 9 of the Act to keep records.

16. The applicable hourly rates of pay are set by the National Minimum Wage Regulations 2015, and at the times relevant to these claims amounted to £6.70 (applicable between October 2015 and March 2016) and then £7.20 from April 2016 until the claimant's employment ended in February 2017.

17. Where an employer has not complied with the National Minimum Wage Act, section 17(1) provides as follows:

> *(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, the amount described in subsection (2) below.*
>
> *(2) That amount is the difference between—*
>
> *(a) the relevant remuneration received by the worker for the pay reference period; and*
>
> *(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.*

18. In other words, if the Tribunal were satisfied that the first respondent had not paid the claimant at least the national minimum wage for the hours she actually worked, she would be entitled under section 17 to receive the difference between the statutory rate and the rate she was paid. The non-payment can be enforced as a claim for unlawful deductions from pay under Part II Employment Rights Act 1996, as section 13 of that Act prohibits employers from paying less than the amount properly payable. A series of non-payments can be treated as a continuing act.

19. As an employee, the claimant was entitled under the Working Time Regulations 1998 to paid annual leave of 5.6 weeks, or 28 days. The respondents conceded during evidence that no such leave was provided in 2015 or 2017. The position during 2016 was in dispute.

20. The claims relating to the second respondent's conduct were alleged to be breaches of section 26 Equality Act 2010. Those claims included allegations about the second respondent's general attitude and behaviour towards the claimant during her employment, which could be categorised as harassment related to the claimant's sex. Such harassment is defined in section 26(1):

> *(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.*

21. Due to its sexual nature, some of the second respondent's alleged conduct could be categorised as falling under section 26(2) of the Act:

> *(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).*

22. A further harassment claim was made under section 26(3) of the Act, in that the claimant alleged the respondents treated her less favourably because she had rejected the second respondent's sexual advances:

> *(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.*

23. In relation to all the harassment claims, section 26(4) goes on to say:

> *(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.*

24. In order to constitute harassment, an act must be sufficiently serious and not trivial, though a one-off act or comment may suffice: Insitu Cleaning Co v Heads 1995 IRLR 4. A series of apparently less serious acts may cumulatively amount to harassment: Reed v Stedman 1999 IRLR 299. It is a question of fact and degree according to the circumstances of the case and the context in which the alleged harassment took place. Some acts of harassment are inherently unwanted, such as uninvited touching of a sexual nature.

25. When examining the effect on the claimant, the test has both subjective and objective elements. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 the EAT gave guidance on how to apply the test as to the 'effect' on a claimant. First, the Tribunal should establish whether the claimant did perceive that her dignity was violated, or that a certain environment had been created under section 26(4)(ii), and then go on to consider whether it was reasonable for her to have experienced that. Dhaliwal also provides guidance on the importance of context when assessing the purpose or effect of the act in question, stating that it is "important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

26. A further claim was made under the Equality Act 2010, amounting to allegations of direct discrimination. The claimant asserted that the principal reasons why the respondent did not pay her the minimum wage or holiday pay were that she was Polish and that she is a woman. Section 13 of the Act provides that:

> *13(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.*

27. The protected characteristics relied on by the claimant were her sex (by virtue of section 11 of the Act) and her race, meaning her Polish nationality (by virtue of section 9(1)(b)).

28. It was for the claimant to show that there were facts from which the Tribunal could conclude that she was treated less favourably than a real or hypothetical comparator because of each of her protected characteristics. It was enough for the claimant to show that the alleged treatment was to her detriment in the sense set out in Shamoon v Chief Constable of the RUC 2003 IRLR 285, in that it was something which a reasonable employee in her position could consider to be a disadvantage.

29. A causal connection between each protected characteristic and the unfavourable treatment had to be made out. It is not enough simply to say that an employee is female or Polish and then make assumptions about the reason why the employer conducted itself as it did. The Act requires the Tribunal to ask whether any unfavourable treatment was caused by the protected characteristic. In Johal v Commission for Equality and Human Rights UKEAT/0541/09, the EAT adopted the reasoning of the House of Lords in Shamoon and summarised the question as follows:

> *"Thus, the critical question we think in the present case is the reason why question posed by Lord Nicholls: "Why was the Claimant treated in the manner complained of?"*

30. The leading Court of Appeal decisions in Igen v Wong [2005] ICR 931 and Madarassy v Nomura International plc [2007] IRLR 246 established the principles to be followed. Firstly, a claimant must prove facts from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This is subject to the possibility that the respondent is able, through its evidence, to put forward an adequate explanation to displace any inference of discrimination.

31. In Madarassy the Court said that the words 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. If the burden does shift, then the employer is required only to show a non-discriminatory reason for the treatment in question.

32. Section 136 Equality Act 2010 sets out the statutory rule:

> *(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.*

33. The case of Ayodele v Citylink Ltd [2017] EWCA Civ 1913 has more recently reaffirmed the correct approach. Not only does a claimant bear the burden of proving primary facts from which discrimination might be inferred, but the court also identified three questions which Tribunals may consider:

- Did the alleged act occur at all?
- If it did occur, did it amount to less favourable treatment of the claimant when compared with others?
- If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?

34. Finally, under section 38 of the Employment Act 2002 successful claimants are entitled to receive compensation where the Tribunal finds that their employer had not, at the time the claims were brought, provided a written statement of the main terms and conditions of employment. Such a statement is required to be provided within 8 weeks of the employment starting, by virtue of section 1 Employment Rights Act 1996. If the statutory conditions are met, a successful claimant must be awarded at least 2 weeks' pay and may, in the discretion of the Tribunal, be awarded 4 weeks' pay.

Findings of fact

35. The second respondent is a director and the owner of the first respondent company, which operates as a Polish shop (references in this judgment to 'the shop' mean the first respondent). The shop was open every day from 8.00am to 10.00pm. At the time of the claimant's employment, the shop employed only Polish women to serve customers. In total, nine shop assistants worked there, one of whom was the manager, Marzena Cieniewicz. The claimant and all her colleagues spoke limited English, but enough to converse in simple terms with the second respondent, for whom English was also a second language. All the shop assistants were able to converse with customers in both Polish and in limited English as needed.

36. The claimant started working in the shop on 1 October 2015, at which time Ms Wojtal and Ms Andrys were already working there. The claimant agreed terms of her employment in a conversation with the second respondent at the start of her employment. It was explicitly agreed that she would work full-time on afternoon shifts over 5 or 6 days a week. Her normal working hours were agreed to be 2.00pm to 10.00pm. The respondents agreed to pay an hourly rate in accordance with the National Minimum Wage.

37. No agreement was entered into at the outset of the employment – or at any later date – as to the claimant's holiday entitlement. Instead, when she asked about this she was told by the second respondent that she was not entitled to holiday because she was Polish and Poles did not have the same employment rights as British nationals.

38. The evidence about the claimant's working hours was much disputed before the Tribunal, and these findings of fact have been reached after evaluating all the evidence about how the claimant's working conditions operated in practice. It is

necessary to review the conflicting evidence and draw conclusions about it within these findings of fact.

39. The claimant said her working hours were as agreed at the outset, being 2pm to 10pm over 5 to 6 days, and therefore totalling at least 40 hours a week, with some additional hours when a sixth day was worked or she went into work early. She always worked until 10pm and if the shop was busy, she was sometimes contacted by phone or text message with a request to come in earlier, typically starting between around 10am and 12 noon. On those days the claimant still finished at 10pm and did not leave earlier by virtue of the early start.

40. The respondents did not agree with this, though were unable to put forward a positive alternative description of the hours worked. In his oral evidence the second respondent was contradictory and evasive. When asked about the terms agreed at the outset of the employment, he spoke in generalisations rather than specifically about the claimant. He initially said all employees start on 16 hours, as the claimant did, that she then worked 24 hours and later 30 hours, divided across 3 or 4 days. These figures matched the hours stated in the payslips. He also said that in June 2016 the claimant increased her hours to 130 per week to support her case to be awarded custody of her children.

41. The idea that the claimant initially worked 16 hours a week was contradicted by the second respondent's witness statement in which he said she worked 24 hours a week for the first nine months of employment. He also said in oral evidence that the claimant's working hours, including her finishing times, were variable. He said she hardly ever stayed at work until 10.00pm and usually finished at 8.00pm or 9.00pm, depending for example on her social engagements. He acknowledged that she did not work Wednesdays and added that she had another couple of days off because she usually worked 2-3 days per week, and not Sundays. He said the claimant would sometimes be called in to work before 2.00pm, but in that case she would finish early, at around 3.00pm or 4.00pm.

42. The second respondent said he, not the claimant, paid tax on her behalf. When asked about records of the tax he paid on behalf of employees he was again evasive, making reference only to corporation tax.

43. It was common ground between the parties that the claimant's hours were reduced from January 2017. When asked why the payslip showed no reduction in hours, the second respondent said that either the hours must have been the same (contrary to his primary case that the hours were reduced because it was quiet after Christmas); or the accountant "may have made a mistake".

44. On the related subject of wages records, the Tribunal asked the second respondent during his evidence to explain why he had been unable to produce the "book covering January to July recording cash paid" which was apparently held by the accountants. This book was expected to be produced at the second tranche of the hearing. The response was: "We normally give the accountant a record but the accountant moved office and some papers were left in his previous office."

45. The Tribunal also considered the evidence of the other witnesses who worked in the shop.

46. Beata Andrys worked with the claimant between October 2015 and March 2016. Her evidence was that the claimant worked 2pm to 10pm on weekdays. At the weekend she started work at 8am on Saturdays and 9am on Sundays, finishing at 10pm on both days. She generally had one day off a week. This was consistent with the claimant's account.

47. Marzena Cieniewicz, the shop's manager, was asked how many days off the claimant had each week. In response she was evasive and said that "usually someone would have one or two days off a week". She went on to say that the claimant had 2-3 days off a week, and she could not have been off for 4-5 days as she "worked 4 or 5 days a week, sometimes 3". She said she didn't recall how often it was 4-5 days, nor could she explain how the hours were allocated to staff.

48. Majdalena Gliwna said she "couldn't say" how many days a week the claimant worked, despite being the person who was responsible for collecting the clocking cards each week showing the days worked.

49. The claimant's account of her working hours was supported by other sources of evidence, including some handwritten records and a small number of clocking cards which she was able to produce.

50. The shop operated a clocking card system, though it was unable to produce a single contemporaneous clocking card relating to the working hours of claimant or any other employee. The respondents included in the bundle of evidence a handful of clocking cards relating to other people, including (surprisingly) the second respondent. It was only midway through his cross-examination that it became apparent that these were samples created for the purpose of the Tribunal hearing. They had been understood initially to be examples of other people's clocking cards so as to make a comparison with the ones produced by the claimant. This was an important point given that the respondents alleged that the claimant's clocking cards were fabricated by her.

51. The clocking cards produced by the respondents could not be treated as authentic, and were certainly not contemporaneous records containing any meaningful information. The fact that the template for the respondent's clocking cards was different from the claimant's cards in no way undermined the authenticity of her records.

52. The claimant's evidence was that all the cards she produced were copied from the few originals she had retained. She used to complete some of the information on the clocking cards, for example to show her starting times. This was at the second respondent's request. She would take them to him for checking, and he used a calculator to total up the hours. The respondents accepted the cards as accurate because they paid her according to them. The handwriting on her cards was a mix of her own, the second respondent's and the manager's. She was told her to fill in the cards by hand when the machine was not working. The time stamp was often broken, and the time out stamp was never used at 10pm because no one on the second shift left earlier than that. She denied ever finishing at 9pm.

53. The clocking cards that the claimant was able to produce related to the weeks commencing 16 May, 23 May, 20 June, 11 July, 22 August and 7 November in 2016. In addition she produced four undated cards. The cards showed that on each of the

days worked, the claimant finished work at 10.00pm without exception, but had variable start times ranging from 11.00am to 3.45pm at the latest. In the case of each of the dated cards the claimant was recorded as working six days. On four of these days she worked between Monday and Sunday but not Wednesday. In the case of the six clocking cards which were dated, the total hours worked by the claimant each week ranged between 47 and 57. The undated cards showed that the claimant worked either four or five days each week with hours ranging from 31.5 to 42. As a whole the clocking cards reflected a typical working pattern of five or six days per week.

54. It was common ground between the parties that the respondent's clocking machine was erratic and often broken. The Tribunal was not given a clear explanation from any of the respondent's witnesses about how the clocking cards were processed.

55. Majdalena Gliwna gave contradictory accounts about this. In her witness statement she said she was the person who filled in the start and finish times, and staff would leave notes of those times for her to do that. The second respondent would then collect the clocking cards on Sundays. In her oral evidence Ms Gliwna said it was her job to fill in the names and dates on the clock cards and "the rest was filled up by the boss". The times on the cards were written by her if the machine was not working, and it was broken "very often". Sometimes she did this the day afterwards, and the second respondent would tell her what to put for the claimant's hours. It was "always the boss" who added up the hours worked. When shown the clocking cards produced by the claimant she acknowledged that one looked like the respondent's cards, but denied that the handwriting was hers.

56. The second respondent said that Ms Gliwna would write in the times and approve the clock cards, if the machine was not working, or he would do that in her absence.

57. Marzena Cieniewicz distanced herself from the whole issue of the clocking cards, saying that Ms Gliwna was responsible for filling them in. She claimed not to recognise any of the handwriting on the cards produced by the claimant.

58. The claimant's handwritten notes of her hours, produced in the original bundle for the benefit of the Tribunal, contained an estimate based on her recollections and on some text messages. Copies of a number of texts were also included in the evidence. Additional more detailed notes were produced by the claimant during the hearing, at the Tribunal's request. Overall, these records corroborated the claimant's assertions that she worked from 2.00pm to 10.00pm over five or six days a week, representing around 40-50 hours a week.

59. On Sundays the second respondent paid the claimant cash for all the hours she had actually worked, according to the shop's clocking cards. Those hours were consistently well above the hours stated on the payslips. The hourly rate paid was £5 from 1 October 2015 until the end of December that year, increasing at her request to £5.50 from 1 January 2016 until the end of March, and from 1 April 2016 the hourly rate increased to and stayed at £6. At the point of receiving her wages the claimant was not given any written record of the hours worked.

60. The claimant paid some or all of her wages into the bank on Monday or Tuesday. Entries on her bank statements showed regular cash deposits which support her evidence about the amount of wages paid. The amounts paid in (mostly in the region of £200-£300) routinely showed deposits exceeding the pay shown on the respondent's payslips. The respondents arranged for the claimant's payslips to show an unvarying pattern of hours worked, contrary to the reality. The hours worked were shown as 104 per month from October 2015 until May 2016, when the monthly figure increased to 130. Those figures equated to 24 hours and 30 hours per week respectively. As noted above, the payslip for January 2017 was consistent with previous months and showed 130 hours worked. The hourly rate shown on the payslip corresponded to the applicable rate for the national Minimum Wage.

61. The respondent made no attempt to reconcile the weekly cash paid, which was variable according to hours actually worked, with the calendar monthly payslips which showed identical hours and sums paid month after month. The more recent payslips showed the claimant's net pay as around £209 per month. She had no other source of income with which to make higher deposits than that into her bank account.

62. The claimant was not the only person whose payslips were presented in this way. The wages paid to Ms Andrys did not match the information on her payslip. Her wages for 16 hours a week were paid directly into her bank account, and additional hours worked were paid cash in hand.

63. In conclusion, the Tribunal accepted the claimant's oral evidence about her typical working pattern. It was corroborated by Ms Andrys and by the clocking cards and other records she produced. By contrast, the evidence provided on behalf of the respondents was unclear, contradictory and at times evasive. The lack of any written records underlined the lack of frankness in the information put forward.

64. The reality of the working arrangements was that the original agreement for the claimant to work 5-6 days a week from 2-10pm was followed throughout her employment, until January 2017. The claimant took Wednesdays and sometimes one other day off, taking more than 2 days on a few occasions when she had short holidays. The hourly pay she received was below the National Minimum Wage rate throughout, and the payslips were contrived to show that the statutory rate was paid.

65. The respondents made no arrangements to permit the claimant to take paid annual leave. On the few occasions the claimant took time off, she was not paid except when she was given a one-off lump sum of £190 cash in June 2016 when the claimant travelled to Poland for a few days. Initially the second respondent said in evidence that this was paid in a single payment, but later he said it was paid in 3 instalments. He acknowledged that this payment did not appear on the claimant's payslip and conceded that holiday pay was not paid for 2015 or 2017. He could not identify any occasion when any other holiday pay was paid in 2016. No records of holiday entitlements or pay were produced by the respondents.

66. At some point the claimant became aware that the respondents were not honouring their promise to pay in accordance with the national minimum wage. She made verbal complaints about this to the second respondent and Ms Cieniewicz, and also about the lack of any holiday pay. When she raised this with the second

respondent he said she was not entitled to the national minimum wage because it "doesn't apply to Poles".

67. When the claimant raised the question of holiday pay with Ms Cieniewicz, she was told, "you don't get holiday pay" but it was suggested that she "could try and talk to the boss". However, the claimant felt she did not have the language skills to do that, and her ability to raise this with the second respondent was inhibited by his general behaviour towards her.

68. In her cross-examination of the second respondent, the claimant attributed to him a comment about her and her colleagues in the shop. She claimed the second respondent said that "we were awful and didn't deserve holiday pay. Poles shouldn't earn as much as we earned". In answer to this question, he said he did not understand: "On the one hand you're saying I was interested in you, on the other hand I was saying Poles were awful. I'm either racist or romantic." He said he treated everyone the same way, avoiding any direct answer to the question.

69. The evidence from the respondents' witnesses on the subject of holiday entitlements and pay was again contradictory and evasive. When asked about the employees' entitlement to annual holidays, the second respondent had no answer, claiming that "the accountant would tell me how many days the employees could have". He said holiday pay was not shown on the payslips because "this is how the accountant's system works". The respondents would contact the accountant and he would tell them how much holiday to pay.

70. By the time the hearing resumed in July 2018, a new explanation was put forward to explain the absence of holiday pay records. The second respondent said this related to a problem with a former business partner. During the partnership they had kept records of everything in two books, and the partner took the records when their partnership ended. This was said to have happened in September/October 2016, though the claimant had no knowledge of such a partner. When asked whether holiday records existed for the period after that, the answer was: "No, because we have trust between me and the employees."

71. When Ms Gliwna was asked how many days' holiday were given to staff each year she did not know, though she claimed that staff were paid their normal weekly pay when they were away on holiday. She said the number of hours taken were "put in a notebook." Ms Cieniewicz said she could not confirm that the claimant did not get paid for holidays.

72. The above findings set out the facts as found by the Tribunal and also its reasons for reaching those conclusions after reviewing the conflicting evidence.

73. Returning to the narrative of the claimant's time working in the shop, from the outset of her employment she experienced unwanted attention of a sexual nature from the second respondent. He made clear that he was interested in having a sexual relationship with her, sent her text messages to this effect and tried to hug and kiss her. The claimant made it clear in return that she was not interested in any such relationship and explicitly told him (verbally and by text) that she wanted his behaviour to stop. Despite this the second respondent continued to subject the claimant to unwanted comments and behaviour, expressing his desire to have sex with her.

74. Katarzyna Wojtal felt that the second respondent did not hide his "great interest" in the claimant. She saw him watching her after she finished work, looking to see which direction she went in and with whom.

75. This unwanted behaviour occurred on a regular basis during her employment. The claimant was not the only person to receive sexual advances from the second respondent. Beata Andrys received texts inviting her to meet for sex in a hotel. He would also whisper lewd comments to her in the shop on a regular basis. On one occasion, he forced himself on her, as if he was trying to cuddle her, and held her tight before she pushed him away. This happened in the store room.

76. Ms Wojtal saw some of the texts sent by the second respondent to the claimant with proposals to have sex, which she was receiving constantly. One said he was living in a hotel after a fight with his wife and "I want you to come here now". She also received some texts of this kind.

77. In around February 2016 the second respondent was at work with the claimant and Ms Wojtal and asked the latter to translate into English that he wanted to have sex with the claimant, and wanted an affair with her.

78. Around that same time the second respondent insisted that he give the claimant a lift in his car. She was uncomfortable about this but accepted because she had heavy shopping with her. When they arrived at her daughter's house, the second respondent tried to kiss the claimant and told her they would go and have coffee and then have sex in a hotel. He asked her to tell him that she loved him. The claimant managed to escape from the car and get into the house.

79. The claimant's younger daughter, Paulina, started to visit the shop from around December 2015. Her visits became regular during 2016 and the second respondent had no complaint about this at the time. The claimant told her daughter about this incident. Paulina also witnessed the second respondent acting inappropriately on occasions when she was in the shop. For example, if her mother bent over, he would make comments about her physical appearance. This happened at the meat section at the back of the shop, where there were fewer people.

80. Paulina herself was on the receiving end of the second respondent's unwanted sexual behaviour. He tried to get close to her physically, making sexual comments and making her think he wanted personal contact. On one occasion he whispered that she looked sexy, which she felt was "not a nice way to talk to a 15 year old girl".

81. A more serious incident took place in the shop in around February 2016. At around 6pm the second respondent instructed the claimant to take some crates containing tomatoes down to the cold room in the basement. He followed her down there and closed the door behind them. The second respondent approached the claimant, touched her breast under her blouse and tried to kiss her. The claimant pushed him away and at this the second respondent slapped her face. The claimant was shocked and very upset and ran upstairs into the shop where she saw Ms Wojtal. Ms Wojtal had seen the second respondent follow her down to the store room, and after 5 minutes she saw the claimant come back with tears in her eyes, saying that "the boss wanted to kiss me", that she'd pushed him away and he hit her face in return.

82. The claimant also reported the incident immediately to her manager, Ms Cieniewicz, who said it was “between you and the boss”. In her evidence Ms Cieniewicz denied that it was reported, saying, “We didn’t talk about such things, only work-related things”.

83. Ms Wojtal left the shop on 25 February 2016 and Ms Andrys left the following month.

84. In around March 2016 the second respondent told the claimant's daughter that he wanted to take her mother to a sauna for a naked massage.

85. Up until May 2016 the second respondent continued to send sexually inappropriate text messages to the claimant, some of which she showed to her daughter. On 28 May the claimant left her phone in a secure area in the meat counter where she worked. This was an area not accessible by customers. Her phone was stolen from there and the claimant reported the theft to the police, who recorded it in a report dated 29 May. The police visited the shop to investigate but the second respondent did not cooperate in relation to the viewing of CCTV footage.

86. The claimant believed that the second respondent stole her phone (and let him know this) in order to deprive her of the evidence of the text messages. The texts stopped after the theft.

87. The second respondent continued to show interest in a sexual relationship with the claimant through his ongoing day to day conduct towards her. This continued until January 2017 with the exception of the text messages. Throughout this time the claimant continued to rebuff the advances.

88. In late December 2016 the second respondent accused the claimant of stealing £335 from the shop, from a drawer containing customers’ deposits for fish which they had ordered. He said he had proof of the theft on camera, though in fact he did not. The CCTV footage that was available did not show the removal of the cash from the drawer, and the claimant was not the only person visible in the video. Even though she denied taking the money, she offered to repay it as she knew she was being accused. The respondents did not require the claimant to repay the money and no disciplinary action was taken against her.

89. In January 2017 at around 9.00pm one evening, the second respondent told the claimant he would give her a lift home. This was not presented as an offer but as a statement of his intent. When the claimant refused and said she would take the bus, the second respondent became angry, stalking her around the shop to pressurise her to take a lift with him. At 10pm he told her he would be taking her home. After they both left the shop the claimant waited outside at the bus stop and saw the second respondent driving around looking for her, though she remained hidden from view.

90. Following this incident, the respondents began to treat the claimant less favourably because the second respondent finally accepted that she would not succumb to his sexual advances. Her working hours were reduced in January and February, sometimes to zero. No other member of staff had their hours reduced, or certainly not to the degree that the claimant did. Although the respondents’ witnesses tried to suggest that a colleague called Aldona lost hours, the claimant’s

contemporaneous texts to the second respondent challenged this, pointing out that Aldona was continuing to work long days.

91. At around this time the second respondent told the claimant that her daughter and partner could no longer come into the shop because they disturbed her at work, whereas this had never previously been a problem.

92. The reason why the claimant's hours were reduced was because the second respondent wished to punish her for resisting his advances about which he was angry. Nevertheless, the claimant chose not to leave her job because she had an ongoing case in the family court, and needed to show that she was working and earning an income.

93. On 2 February 2017 the second respondent sent the claimant a text saying, "I don't want you tomorrow or any other day this week". This was followed immediately by a text saying, "I let you know when we want you for work". On 14 February a further text was sent to the claimant saying, "Ol [all] week off, thank you". The claimant knew that the second respondent had terminated others' employment in this manner, telling them initially they were not needed for the next week and then never asking them back.

94. The claimant took these texts to be a message that her employment was being terminated. She replied by a text dated 15 February 2017 requesting her P45, as she needed to get a new job immediately in order to support her children. In response, the second respondent said the P45 would be forwarded. He did not suggest to the claimant that she had misunderstood his intentions and that she was welcome to return to work.

95. On 20 February 2017 the claimant began working for another Polish shop on the same street as the first respondent.

96. On 26 October 2017, some months after the claimant's employment had ended, HMRC wrote to the respondent saying they had completed their investigation following a check of wages records, and were satisfied that the National Minimum Wage had been paid. However, that letter made no reference to the period over which the records had been checked, or the nature of those records. It did refer to the fact that the respondent had previously kept no records but was now doing so.

Conclusions

97. Given the amount of conflicting evidence in this case it is worth beginning with some general conclusions and observations about the credibility of the witnesses. The Tribunal was impressed by the claimant, whose oral evidence was always consistent. Even where it differed from her written witness statement, and allowing for some minor translation difficulties, it was striking that the claimant only added detail and never contradicted herself. Throughout her cross-examination of the second respondent, the claimant asked questions which were wholly consistent with her version of events. When she was being cross-examined, the claimant became more emphatic and reinforced what she had to say. She became particularly animated in answering the challenge that she had made up the harassment allegations. When putting those difficult allegations to the second respondent

herself, the claimant did so with clarity and dignity, maintaining strong eye contact with him throughout.

98. The claimant made some fair concessions during questioning, for example where she misremembered some dates or the detail of her notes of working hours did not tally. Those notes were a good faith attempt to identify the hours she worked, a task which should not have fallen to the claimant at all. It was the respondents' responsibility to make and keep records in order to demonstrate compliance with the National Minimum Wage Act.

99. The Tribunal was also impressed by the truthfulness of the claimant's daughter, although making allowances for the fact that some of her evidence was about events as reported by her mother. That said, the fact that the claimant shared with her daughter her complaints about how she was treated at work, at the time of the events, did go some way to providing corroboration. The Tribunal also accepted the daughter's evidence that she had personally seen texts on her mother's phone and witnessed the second respondent's inappropriate behaviour in the shop at first hand.

100. The claimant's two former colleagues who gave evidence on her behalf, Beata Andrys and Katarzyna Wojtal, also impressed the Tribunal, which could not be said of the witnesses still employed by the first respondent. Their accounts on cross-examination supported the claimant's allegations and they too were consistent. By contrast, the respondents' two employees were visibly uncomfortable while giving evidence, and at times evasive.

101. As for the second respondent, the Tribunal had no hesitation in concluding that his oral evidence was unreliable, being repeatedly evasive and contradictory. A number of the examples of this are dealt with elsewhere in this judgment. In addition, the following examples illustrate the point.

102. The second respondent was unable to provide any clear or direct evidence about the hours the claimant worked. He gave inconsistent and wholly implausible explanations for the absence of pay records, at one time offering to obtain them from the accountants, then claiming the accountants had left them in their old office. The holiday pay records were later said to have been removed by a former partner, then it was suggested that no records needed to be kept because holiday arrangements were all done on trust. The Tribunal concludes that the respondents did not make or keep the pay records or, to the extent that any records do exist, they chose not to disclose them to the Tribunal.

103. On another issue, when asked about the claimant's phone being stolen, the second respondent was extremely evasive about the CCTV footage. He first said there were no cameras where the phone was placed, then claimed the claimant didn't even know where she left her phone. Finally, he said there were two CCTV cameras in the meat section and they were in fact working. As to whether he was the thief, he responded: "But I don't work in the meat section do I?", avoiding the fact that he had access to that area.

104. A similar lack of clarity was apparent in relation to the suggestion that the claimant stole cash in December 2016. In his written statement the second respondent said she stole £335 from a meat deposit in the safe. On cross-

examination he amended this to money being taken from a fish deposit kept in a drawer in the shop. This might be explained by translation difficulties, but on the subject of CCTV evidence the second respondent was contradictory. In his statement he claimed to have allowed the police to check the cameras "but only a couple of the 16 were working. The police said they didn't need to see them." On cross-examination this changed to his telling the police "we can check all 16 cameras". His final version was that there was a camera in the relevant area, but it was not working.

105. In her efforts to support the respondents Ms Gliwna gave very uncertain and inconsistent evidence on this point. In her witness statement she asserted that the second respondent "checked the CCTV and learned it was the claimant who stole the money". He "showed me the CCTV footage which clearly showed the perpetrator". On cross-examination she backtracked from saying it was the claimant she saw in the footage. At first she said a person was "clearly visible", then they were "not very, 100%, visible", suggesting the person was the claimant but unable to press that point with any confidence.

106. It was notable that although the respondents maintained this allegation of theft throughout the case, they took no action against the claimant at the time, neither disciplining nor dismissing her. The Tribunal concludes that this was because the second respondent knew she was not guilty of taking the money. It suited him to make the allegation, as an exercise of his authority over the claimant.

107. In his evidence the second respondent's response to challenges about the harassing behaviour was again unsatisfactory and evasive. He disputed that the day to day inappropriate behaviour took place, describing the allegations as "all lies" and adding: "You only worked 3 days a week. How could I do that when we're busy? We didn't have time for all this." Overall, the Tribunal noted that the second respondent did not meet these allegations during cross-examination with any sense of outrage or distress, which might have been expected if the allegations were indeed false. Rather, his response was characterised by deflection and mild denials, and at times was accompanied by a smile.

108. The Tribunal's conclusions on the particular issues in these claims are set out below.

Working hours and minimum wage

109. The Tribunal's detailed conclusions on the issue of working hours are already incorporated into the findings of fact, in order to show how the conflicts in evidence were weighed up and resolved. Having preferred the claimant's evidence about the hours she worked and pay she received, the Tribunal is satisfied that she typically worked around 40-50 hours per week, over 5 or 6 days. Her normal working hours were 2.00pm to 10.00pm. There was some variation in the weekly hours and sometimes she did work fewer than 5 days. Often her working day began earlier than 2.00pm, and occasionally it began an hour or two later.

110. The claimant was paid at the hourly rate of £5 from 1 October 2015 until 31 December 2015. From 1 January 2016 until 31 March 2016 she was paid £5.50 an hour, and from 1 April 2016 to her dismissal on 14 February 2017 she received £6 an hour. The cash paid each week matched the hours worked, at these hourly rates.

111. It was clear to the Tribunal that the claimant routinely worked more hours than the 24 or 30 hours indicated by her payslips. It follows that the respondent did not pay the claimant the National Minimum Wage for the hours she worked between 1 October 2015 and her last day of work on 12 February 2017. The calculation of the additional remuneration due to the claimant will need to be assessed at a remedy hearing.

Holiday pay

112. Throughout her employment the first respondent failed to allow the claimant to take paid holiday in accordance with the Working Time Regulations, based on an annual entitlement of 5.6 weeks. This was conceded for 2015 and 2017. The Tribunal's conclusions about what happened in 2016 are dealt with as part of the findings of fact.

113. The respondents produced no records of holidays taken or paid for. Contrary to the second respondent's oral evidence that he would arrange holiday pay by contacting the accountant who would tell him how much to pay, no paid holidays were granted. The only occasion when the claimant received a sum representing what the respondent described as holiday pay was the £190 cash payment when she had a short break in Poland in June 2016. In reality this was simply an ex gratia payment because the claimant had been asking for holiday pay. The amount bore no relation to working hours and the figure was arbitrary. Neither this payment nor any other entries for holiday pay appeared on the claimant's payslips.

114. The claimant is therefore entitled to receive holiday pay for the continuing breach of the Working Time Regulations 1998, from 1 October 2015 until her employment ended on 14 February 2017

Direct discrimination

115. The Tribunal considered whether the claimant was treated less favourably than a hypothetical comparator, by not being paid minimum wage or holiday pay. The comparator for the purposes of section 9 Equality Act 2010 would be a British national as distinct from a Polish national. For the purposes of sex discrimination that person would be a man. As the Equality Act does not permit dual characteristics to be conflated, race and sex had to be considered separately.

116. On race, the Tribunal accepted the claimant's evidence of the comments made by the second respondent about Poles and Polish women. The second respondent told the claimant every time she approached him to ask why she was not being paid correctly that as she was from Poland she should be happy to have a job, and the national minimum wage did not apply to Poles. He also said that being Polish did not entitle her to holiday pay, which was paid only to UK nationals.

117. The claimant's nationality was therefore explicitly said to be the reason she was not entitled to holiday pay or the minimum wage. Those comments clearly demonstrate less favourable treatment than a British person, who would have received these entitlements. The words used place beyond doubt that the reason why the respondents treated the claimant less favourably was because of her race. No other reason was put forward by the respondents.

118. In her evidence the claimant said that her Polish nationality was one of the reasons for her rights not being respected, but another factor was the second respondent's harassing behaviour towards her. The Tribunal is satisfied that his attitude towards her as a woman was part of the reason why he failed to pay minimum wage and holiday pay. The second respondent considered himself to be in a position of power over the claimant not only as an employee but as a woman, believing himself entitled to force his unwanted sexual advances on her repeatedly. He knew she was not in a strong position to complain or resist. This state of mind was part of the reason for not granting the claimant the wages and paid holidays she was entitled to. A male employee would not have been treated the same way, and such an improper wielding of authority would not have affected the working relationship with a man.

119. Applying the authorities referred to above, including Ayodele v Citylink, the Tribunal is in no doubt that the less favourable treatment occurred, in that the claimant was denied her legal entitlements in such a way that no British person and no man would have been. The primary facts having been established, and there being no explanation from the respondents to persuade the Tribunal that there was a non-discriminatory reason for the treatment, the Tribunal concludes that the reason was race and sex. The respondents' treatment of the claimant amounted to direct discrimination in breach of section 13 of the Equality Act.

Harassment

120. The claimant was unable, for understandable reasons, to identify every particular occasion when she was subjected to unwanted conduct from the second respondent during her employment, but the Tribunal felt her evidence was credible and accepted that this was a regular and even commonplace occurrence at work. The claimant's evidence about particular incidents was corroborated by the witnesses she called, whereas the evidence of the second respondent and his employees was not at all reliable.

121. Marzena Cieniewicz and Majdalena Gliwna claimed in their witness statements that no harassment took place, but they both worked morning shifts only, overlapping with the claimant for perhaps a couple of hours on any given working day but certainly not being present for the bulk of her afternoon shift. Both conceded on cross-examination they could not have known what was going on later in the day.

122. In his oral evidence the second respondent's response to challenges about the harassing behaviour was to deflect rather than deny. For example, when asked about Ms Wojtal passing on his comments about wanting sex and an affair with the claimant, he relied on the language barrier as a problem, questioning "so how could I use her to pass on messages?

123. On the subject of sending inappropriate texts asking for the claimant's address he said, "This is a big lie. When we employ someone you get their address so I had no need to ask for this."

124. When challenged about telling the claimant's daughter he wanted to take her mother to a sauna for a massage, his response was, "I didn't know she was your daughter for a year" and said they did not have time for such conversation at work.

125. About the incident in his car in February 2016, second respondent said: "She got into my car in the first place, so how did that happen?"

126. In answer to the most serious incident, which took place in the store room in February 2016, he had little to say beyond saying he could prove the claimant was lying, because vegetables were not kept in the store room.

127. As for trying to force a lift on the claimant at the end of the shift in January 2017, the second respondent simply denied leaving work at the same time as her, saying he stayed behind until 10.30pm to cash up.

128. Relying on the findings of fact set out in this judgment, the Tribunal concludes that the claimant's account of general day to day harassment and her evidence about specific incidents is credible. The acts of harassment by the second respondent which we have found proved are dealt with in detail above and can be summarised as follows:

128.1 day to day comments pressurising her to have a sexual relationship;

128.2 inappropriate texts to this effect (until May 2016);

128.3 attempts to hug and kiss the claimant;

128.4 watching her in the shop and making comments to others about her appearance (as witnessed by her daughter Paulina);

128.5 asking Ms Wojtal to pass on a comment about having sex and an affair;

128.6 the comment to Paulina about taking her mother to a sauna for a naked massage;

128.7 in February 2016, trying to kiss the claimant in his car and pressurising her into having sex with him;

128.8 In February 2016, trying to force himself on the claimant, touching her breast in the store room, and slapping her when she pushed him away;

128.9 In January 2017, following the claimant around the shop, pressurising her to take a lift home with him, and looking for her outside the shop afterwards.

129. Following Dhaliwal the Tribunal considered whether the second respondent engaged in conduct related to the claimant's sex, and whether that was unwanted, for the purposes of a claim under section 26(1) Equality Act 2010. Given the nature of the allegations, it is convenient to consider whether the conduct was of a sexual nature, in which case section 26(2) of the Act would also be engaged.

130. In both cases, it was necessary to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. This in turn meant examining the claimant's subjective experience of the conduct, and whether she believed it to have such an effect, as well as whether it was reasonable for her to perceive the conduct that way.

131. We conclude that the claimant did believe her dignity was violated and that her working environment was made intimidating, hostile, degrading, humiliating and offensive for her. In the circumstances of the case, it was entirely reasonable for the conduct to have that effect on the claimant. There was no mutuality in the exchanges between her and the second respondent. He wanted a sexual relationship with her, but she had no such interest in him. She made this plain from the outset and on a continuing basis, but the conduct continued for many months. There was a lessening of the intensity of the conduct over time, for example when the offensive text messages stopped after May 2016. By December that year the second respondent was finally getting the message that the claimant was not interested in him, but it was not until the failed attempt to force her to take a lift home in January 2017 that he finally gave up. At that point, the claimant was of no further interest to him as an employee either.

132. The Tribunal is satisfied that most of the conduct was plainly of a sexual nature in breach of section 26(2) of the Equality Act, and some was conduct related to the claimant as a woman, in breach of section 26(1) of the Act. In the latter category are the slapping her in February 2016 and the pressurising her to accept a lift in January 2017.

Further harassment

133. The respondents further harassed the claimant contrary to section 26(3) Equality Act 2010 by subjecting her to less favourable treatment because she rejected the second respondent's sexual advances. The less favourable treatment was the reduction in hours in January and February 2017, a fact which was not in dispute although the explanation for why this happened was disputed.

134. The respondents produced no evidence about the hours worked by the claimant and her colleagues in the first two months of 2017, and could not explain why the payroll records did not show this change. The reason given by the second respondent was that it was "normal to give staff more days off after Christmas because it gets quiet." He claimed that "everyone had their hours reduced", not just the claimant. He mentioned an employee called Aldona losing hours that month, but without being specific.

135. No other explanation for reducing the hours was put forward, except indirectly when the respondents attempted to suggest it was linked to the alleged theft of cash by the claimant. Mr Ell was instructed to cross-examine her on the basis that this was the explanation for the reduced hours, in contradiction to the second respondent's witness statement saying the reduction in hours was due to the shop being quiet after Christmas. In his oral evidence the second respondent reverted to his original explanation, saying the theft "was not in my mind" when deciding whose hours to reduce.

136. When giving evidence about this, Marzena Cieniewicz gave evasive answers, initially being unable to identify any person other than the claimant whose hours were reduced. When pressed she mentioned there were two others, one of whom was Aldona, but she said the others did not lose as many hours as the claimant. She could not name anyone other than Aldona. She said, "Not everyone lost hours, the claimant did" and, "It was the boss's decision".

137. The Tribunal did not accept that the reason why the respondent reduced the claimant's hours in January was that it was quiet after the Christmas period. There was no evidence that this was the case, but even if it were true, the fact remains that the claimant was singled out for this detrimental treatment, even on the evidence of the respondents' own witnesses. The loss of working hours was not spread between the claimant and her colleagues and the claimant was given no work at all in the last couple of weeks of her employment.

138. By the time of the claimant's last rejection of the second respondent's sexual advances in January 2017, and because of this rejection, he decided he no longer wished to employ her. His decision to reduce her hours down to nil was a calculated move designed to show her that she was no longer to be employed in the shop. The text exchanges on 14 February 2017 made that clear. Had the claimant not rejected the sexual advances, she would not have been punished in this way.

139. The Tribunal therefore concludes that the claimant was harassed within the meaning of section 26(3) Equality Act. She was treated less favourably than she would have been treated, had she not rejected the unwanted conduct of a sexual nature.

Notice pay

140. The second respondent's text exchanges with the claimant on 14 February, in the context of her knowledge that others were dismissed in such a way, coupled with the respondent's lack of any resistance to sending her P45, amounted to a dismissal by the first respondent. Even if that were not the case the Tribunal is satisfied that the claimant was entitled to treated herself as dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996, in that the respondents' conduct towards her and the withholding of any working hours was a fundamental breach of her employment contract.

141. There was no reason to terminate the claimant's employment without notice, and so this was a breach of the claimant's contractual right to notice. The claimant is therefore entitled to receive payment from the first respondent of one week's pay pursuant to section 86 Employment Rights Act 1996.

142. Finally, the respondent did not provide the claimant with written particulars of the main terms of her employment and accordingly the claimant is entitled to an award of compensation pursuant to section 38 Employment Act 2002. The amount of that award is to be determined at a remedy hearing.

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Employment Judge Langridge

Date 1 February 2019

SENT TO THE PARTIES ON

4 February 2019

FOR THE TRIBUNAL OFFICE

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