



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101694/2017 Held in Aberdeen on 13 & 14 June 2018 and 24 July 2018

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**Employment Judge: Mr. J Hendry
Members: Mr. A W Bruce
Mr. A N Atkinson**

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MS D Fitzpatrick

**Claimant
Represented by:
Mr. M Briggs
Solicitor**

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The Scottish Ministers

**Respondent
Represented by:
Dr. A. Gibson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the majority of the Tribunal, Mr. Atkinson dissenting, is that the claim has not been made out and is dismissed.

REASONS

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1. The claimant in her ET1 sought a finding that the respondents were responsible for the actions of the claimant's work colleagues who, she believed, had sent

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her various anonymous cards. They were not initially named. She contended that this amounted to harassment in terms of the Equality Act in relation to the protected characteristics of age, sex and race. We would add that in her ET1 the claimant had also 'ticked' other protected characteristics namely disability, gender reassignment, pregnancy or maternity and sexual orientation.

2. The respondents took preliminary points on the jurisdiction of the Tribunal (time bar) which we will come to later. In relation to the sending of the cards their position was that it was not known and not admitted that the claimant had received them or whether their contents gave rise to a claim for harassment. They denied that the respondents or their employees harassed the claimant and also raised the statutory defence that if anything had been done by an employee of the respondents, which could amount to an act of harassment, then the respondents had taken all reasonable steps to prevent that harassment occurring.

Issues

3. There were a number of issues for the Tribunal to consider. We first of all had to consider the statutory requirements of Section 26 of the Equality Act (Harassment) and whether the claimant could prove on the balance of probabilities that the cards came from employees of the respondents for whom they were liable and if so whether the statutory defence had been made out.

Evidence

4. The Tribunal considered the Joint Bundle of Productions lodged by parties. It then heard evidence from the claimant. Thereafter, it heard evidence on behalf of the respondents from the Head of People Advice Mrs Judith McKinnon. It considered the Joint Bundle of documents prepared and lodged by parties (JB1-29).

Preliminary Hearing Judgment

5. The Tribunal came to this case following a Preliminary Hearing that had been conducted by Judge Hosie in November 2017. His Judgment had been issued on the 29 January 2018. The claimant had given evidence at that hearing. He noted at paragraph 74: **“It was significant, in my opinion, that there was a complete gap in the complaints between 19 January 2011 and 13 February 2015. That did not suggest ‘an ongoing state of affairs’.”** He had recorded that the claimant was unable to say who had sent the cards and at paragraph 77 he recorded that although it was averred that the greetings cards were sent by the claimant’s work colleagues none were identified by her in evidence at that point.
6. The Judge allowed the claim of harassment in relation to the sending of the greetings cards to proceed but struck out paragraph 1-4 and 32-45 of the ET1 which related to other and generally much earlier matters.

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Preliminary Matters

7. On the morning of the hearing the claimant’s solicitor tendered a separate bundle of documents headed “disputed evidence”. These documents seemed to deal with what could be described as somewhat historic matters going back as far as 2010 in relation to disciplinary action and grievances involving the claimant and her colleagues. Mr. Briggs accepted that issues of admissibility arose and suggested that the documents should be accepted as a whole and then he would then address issues of admissibility. This was opposed by Dr Gibson.
8. The Tribunal indicated that given that all the documents were objected to it would prefer to hear argument first before accepting the Bundle let alone reading any of the documents tendered.
9. Dr Gibson was adamantly against the lodging and consideration of the documents. He wanted to deal with the admissibility of all the documents at this point. He suggested that it would be inappropriate for the Tribunal to read

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the documents. They were in his view “absolutely irrelevant”. He referred the Tribunal to the earlier Judgment of Judge Hosie who had struck out as irrelevant much of the earlier history. He believed that issues of notice arose both in relation to the lack of any pleadings to support any of the documents tendered and their production at this particular stage as the respondents would be prejudiced by their receipt. He observed that many of the matters touched on in the documents go back many years. He referred the Tribunal to Judge Hosie’s judgment and to the lengthy gap in time (between 2012 and 2015) during which no incidents had arisen in the workplace that the claimant founded upon. In summary, there was no fair notice of their use and the documents were irrelevant. He suggested that Mr Briggs could not rely on the doctrine of ‘similar facts’ because the sending of anonymised greeting cards had no similarity to previous difficulties that the claimant had experienced in the workplace.

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10. In response Mr Briggs accepted the Tribunal had a delicate balancing act to perform but in his view justice could only be served if the documents were admitted. This would allow the Tribunal to understand the entire history of the matter. He believed that a distinction had to be made. Judge Hosie was dealing with the matter of jurisdiction and not what might properly be called background which could inform the Tribunal as to the context in which the greetings cards were sent.

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11. The Tribunal adjourned to consider the matter. When it returned it advised that its view was very firmly that if Mr Briggs was going to refer to any particular document he should do so. It could then be objected to and the merits or demerits of that particular document being admitted into evidence could be canvassed at that time. Whilst it was invited to deal with all the documents at one time it rejected this approach accepting that there were substantial objections to the lodging of these documents as outlined in Dr Gibson’s submissions. The Tribunal observed that it was concerned that the detail of these previous employment issues would probably not assist it in determining who or who did not send the greetings cards.

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12. At this stage Dr Gibson helpfully conceded that there was no issue taken that the claimant did not have a difficult relationship with her colleagues and that concession was the proper starting basis for considering the events at issue.
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13. The Tribunal made reference to the case of **HSBC Asia Holdings BV v Gillespie [2011] IRLR 2009** to reinforce to parties its view that although these earlier incidents and documents might have some possible relevance it had grave doubts that they were sufficiently relevant to assist the Tribunal in the task before it especially given the passage of time. Nevertheless, as it had indicated it would not shut the door to the admission of any individual document providing that it could be justified. It was on this basis that the case then proceeded.
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15 **Facts**

The Tribunal found the following facts established or agreed:

14. The claimant lives in small village called Janetstown by Thurso. She has lived in Caithness for about 25 years. She is employed by Marine Scotland who are a directorate within the Scottish Government.
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15. The claimant is Canadian and holds dual Canadian and British citizenship. She speaks with a Canadian accent.
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16. The claimant began work on 19 June 2006 and was employed in the role of Fisheries Officer at the respondent's offices in Scrabster in Caithness. It is a busy office covering a large geographical area. There were at any one time approximately 15 staff in total based there including two Fishery Officers and a Senior Fishery Officer.
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17. The claimant is currently suspended from work.

18. The claimant for some years had a difficult personal and working relationship with a number of her colleagues employed by the respondents at the Scrabster office. She made complaints about the behaviour of two colleagues in particular namely a Reid Anderson and Derek Yuille. Mr Yuille was a Senior Officer. The complaints had a long and involved history which culminated in the claimant being warned that she was at risk of disciplinary action because of the complaints she had made against Mr Anderson. The claimant was initially given a disciplinary sanction in relation to these matters. It was appealed by the claimant and the appeal succeeded. The claimant's complaint against Mr Yuille led to disciplinary action being taken against him but no sanction being imposed on him. These various internal matters concluded in about in April 2012.
19. In 2011 the claimant was told by an employee, Jody Pasque, that the claimant was referred to as 'the old troll'. He no longer works with the claimant.
20. In about 2012 Mr Anderson, whilst remaining an employee of the respondents, relocated to Campbelltown and has currently no day to day dealings with the claimant. Mr Yuille at about the same time began working four days a week in Edinburgh. When working in Scrabster he worked on a different floor of the office to that on which the claimant worked and had little day to day dealings with her. The claimant did not notify the respondents of any further difficulties she had with work colleagues other than naming Mr Reid and Mr Anderson as being the likely senders of various greetings cards she received from 2015 onwards.

Receipt of First Card 13 February 2015

21. On 13 February 2015 the claimant received a Valentine's Day greeting card at her work address. The card was marked as being from a range of cards called 'Selective' The card was contained in an envelope postmarked 12 February 2015. The claimant's first name was correctly spelled. The front panel of the

card was decorated with a cartoon drawing of a long-haired man wearing women's clothing and a dog both in a love heart. The text on the front panel read "*I thought about buying you a pair of stress balls for Valentine's Day ...*" the right hand inside panel featured a further cartoon drawing of the long-haired man holding his crotch. The text on the right hand side panel read "... *but someone said your balls were stressed enough already*". The card contained a handwritten limerick on the left side inside panel that read:

IT ISNA NICE TILL TEASE OR MOCK
 BUT WE ALL CALL YE CANADIAN JOCK
 YE CAN GI IT A TWIRL
 BUT YE ISNA A GIRL
 WE KEN YE HEV TWA BALLS AND A *****

22. The claimant was upset at the receipt of the card. She regarded it as insulting being referred to as 'Canadian Jock' which she believed referenced her dual Canadian and British identity. She found the limerick vulgar and thought that this was a reference to her being perceived as gay or masculine. She had been told some time earlier by a former colleague that she had been called Canadian Jock by colleagues in the office.

23. The claimant is a private person with a small circle of friends and acquaintances. She had never received an anonymous Valentine's card before. She was upset by its contents. She believed that the card had been sent to her by colleagues or her former colleagues to upset her. She complained to the respondents' HR Help Team by email dated 13 February 2015 (JBp121) sending them copies of the cards.

"As you will see from the three attachments above. I received this vulgar card in the mail today at my place of work. It was delivered by a Royal Mail postman in a mail bag and then given to me by my Fisheries Officer, Steven Kozlowski. Steven commented that I was lucky to receive a Valentine. I said to him that it must be from the children, the loves of my life. When I opened the card I could see it was not from the children but someone who is being racist, misogynistic and vulgar. From what was

written on the card indicates it was sent from someone within Marine Compliance and given the history.

The card is a constant reminder that I will and still am subject to harassment.

5 *I spent three long hard years dealing with a bullying and harassment case which has taken its toll on me. This case involves senior management and others. I have only just been promoted to Senior Officer in a heavily male dominated work environment. This is the second card that I have received the first card was someone also within Marine Compliance who*
10 *thought I was off work due to stress etc. In the attachment it is not something I can ignore.*

15 *I would like an informal investigation immediately into this to find out who sent this card and for serious disciplinary action to be taken. I have approached HR first but if need be, will take the matter to the police. The envelope is sealed by the person who posted it ...”*

24. The claimant had received an earlier “get well card” when off ill. She had not reported this. The card was anonymous. She thought nothing of its receipt.

20 25. Ms Culpan responded on 16 February 2015:

25 *“You have asked for a formal investigation to be carried out to find who has sent you the card attached in the e-mail. The card was posted to you anonymously to the Scrabster office through the Royal Mail. Anonymous correspondence is not something that can be investigated under the disciplinary procedures. You may wish to report the matter to the police, however, I am not sure what action the police may take. I suggest you keep the card and envelope if you receive any more correspondence like this you will have it as evidence to give to the police.*

30 *I understand that it may be upsetting for you to receive this sort of correspondence. I would like to remind you of the support that is available from the Counselling and Wellbeing officer ...”*

26. Following this the claimant did not complain to the police.

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27. The claimant contacted her trade union and advised them about the card. Malcolm Clark a trade union officer e-mailed Ms Culpan on 16 February:

40 *“We spoke earlier prior to your latest response to DeeAnn and I was hoping for, and expecting more conciliatory response from HR on what is yet another distress matter for DeeAnn to deal with. As you know, she is an acknowledge whistleblower who then went on to experience various challenges as a result. This latest card – which almost certainly came from a current or former employee – is a direct result of DeeAnn standing*

up for herself and colleagues. Similarly, I would not be surprised if the previous open discussion between her management and HR about dismissing DeeAnn has encouraged this sort of harassment.”

5 He asked the respondents to reconsider the claimant’s request for an investigation. Ms. Culpan responded to the claimant on the 16 February:

10 *“Unfortunately, you found my reply disappointing but there is nothing more I can add to what I have said below. At the moment there is no evidence to suggest the card came from a Scottish government employee therefore this matter cannot be taken forward internally. It is your responsibility to raise the matter with the police and I suggest you do so.”*

15 She responded to Mr. Clark on the 17 February:

20 *“Malcolm, thank you for your e-mail below. The points you have raised has been noted. However the position remains unchanged from that stated in my e-mail dated 16 February. Based on the information that we have HR will not be taking this matter forward with the police or Marine Scotland management. Also if DeeAnn wishes to bring this matter to the attention of her line manager she can.”*

28. The claimant e-mailed Ms. Culpan on 19 February:

25 *“With HR currently being unwilling to engage with police on the matter I reluctantly feel that I am forced to do so I have had an informal discussion with the former Inspector of the police force and they feel that it is a matter that is worth investigating, especially given what I have been through previously. They also suggest that I should speak with my HR team and see if they would take the matter forward. Consequently I would be very pleased if you’d reconsider the Scottish government’s approach in supporting me in this matter.*

30 *I have also spoken with a forensics expert on handwriting. I have sent them the card that I received and they have determined that there is evidence of two people involved with the anonymous card. There is a small fee of £90 involved in receiving a report and I was wondering if HR has any allowances that would cover this fee.*

35 *Due to similar actions taken place some time ago with an enormous card sending, letter writing and e-mails by a person I suspected employed by Marine Compliance I am concerned for my safety. I don’t want this to be the start of a cascade of events that will affect my health and safety.”*

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29. Ms. Culpan reconsidered the matter and e-mailed on 24 February (JBp116) asking for further information in relation to the forensic report. She also wrote:

“You have made reference to similar actions taken place some time ago with an anonymous card sending, letter writing and e-mails. Can you provide me with more evidence and information about the correspondence you are referring to.” The claimant did not respond to this e-mail.

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30. The claimant's trade union officer, Lindsay Morgan e-mailed on the 25 June 2015 asking that the correspondence should be referred to the Police. Ms. Clemie responded on the 30 June (JBp114).

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“Having read the exchange of e-mails, I agree with the advice that June gave in February, that is that there is no evidence who sent the card and that we will not refer the matter to the police. In addition, there is no evidence so far as I am aware that is connected to events in 2009. Although I can understand why DeeAnn's concerned about the card I do hope that it is an isolated incident. It is, of course, open to DeeAnn to make a complaint to the police if she so wishes.”

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31. Ms Morgan expressed her disappointment in an email dated 28 July (JB p113) Ms Clemie responded on the 5 August that she would not reconsider her decision to refer the matter to the Police.

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Second Incident 17 February 2016

32. On 17 February 2016 the claimant received three further greetings cards (Valentines Cards) at the same time. On this occasion all three cards had been addressed to the claimant's home address in Janetstown. All three cards were contained in an envelope postmarked 13 February 2016 but were in turn in separate envelopes. The first card misspelled the claimant's surname. The second card misspelled the first name by adding an 'e'. He They had been addressed to the claimant using the same format; that was: the claimant's first name and surname, the first line of her address. None of the envelopes contained the claimant's postcode. All three cards were from the range 'Perfect Moments'.

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33. The front panel of the first card depicted a meerkat holding a red rose in its mouth. The text of the front panel read “Valentine no one compares to you” the right hand inside panel bore the text “Simples! Happy Valentine's Day”.

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The card contained handwritten note underneath the text reading “To one sexy mamma!” and 57 x’s.

34. The front panel of the second card depicted a front view of a sheep wearing sunglasses. The sheep’s wool had been fashioned into the shape of a love heart. The text on the front panel read “Happy Valentine’s Day” the right hand inside panel contained the text “With love (from me to ewe)” the card contained a handwritten poem underneath the text at the right hand inside panel the poem read:

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“Roses are red
 Violets are blue
 Oh how I wish
 I could be with ewe
 Ewe is hot hot hot
 So sexy hot hot hot
 Ewes certainly got it going on
 Ewe sexy ewe
 Ewe light up my life
 In every possible way
 Hugs + Kisses
 Xxxxxx”

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The front panel of the cards was adorned with cartoon love hearts and contained a polaroid picture of an index and forefinger side by side. The middle finger had a smiling face and a bow tie drawn on it. The index finger had a content face with long eyelashes. The text below read “me and you” the text above the polaroid picture read “I fancy you”. The right hand inside panel was adorned with further cartoon love hearts along with the text “Happy Valentine’s Day”. Below the text was written “U is sexy lol! Lol xx”.

35. On 18 February 2016 the claimant e-mailed Ms. Culpan (JBp154) advising her as follows:

5 *"I have received 4 cards this week that appeared to be from the same source as those cards that I received last year here at my place of work. They are not as vulgar as the last cards I received back in 2015 but I do consider them to be malicious correspondence. These cards on this occasion have been sent to my home address. Are you going to do anything about this and assist me in this matter."*

The matter was passed to Kerry Marshall in HR adviser who responded (JBp153):

10 *"June is on leave and not back until Monday therefore I will reply in her absence.*

Can you please scan and send copies of the card you received.

15 *Meantime, if you're concerned that these were sent to your home address and you view these as malicious then you may wish to report the matter to the police.*

I understand that it may have been upsetting for you to receive this sort of correspondence. I'd remind you that support is available from the Counselling and Wellbeing Officer ..."

20 36. The claimant e-mailed in response on 19 February (JBp152):

25 *"Hi Kerry, yes I do consider this is a very disturbing and malicious action on the part of the person who is regularly sending cards to me. Last year they were sent directly to my place of work whereas this time they have all gone to my home. But I do believe that they are all related to my whistleblowing and the difficulties I have experienced since I appreciate anything I said will be treated in confidence. Before sending something as sensitive to me as this can you please confirm they'll be treated as a work-related matter and considered as such."*

30 Ms. Marshall responded that she had asked for a copy of the cards to establish if there was anything work-related and she could not accede the request and treat the issue as work-related until she had a chance to consider the matter (JBp152).

35 37. The claimant wrote again on 22 February:

40 *"Kerry before I provide anything further given what I have to deal with at the moment. I have my suspicions. Given last year's episode of receiving a Get Well card when I was not ill, then a vulgar Valentine's card and on top of that a birthday card at my work was very disturbing and considered well over the top from my colleagues in the Scrabster office. Colleagues around the coast were aware of the incident and that I was taking formal*

action through HR at work and be making this known to yourselves to be investigated.

I truly believe that it is obvious that this has made them worried that I am certain that is why they sent it to my home address this year and guess it was done so that it can be cited as being non work-related.

If the person was genuine why did they not send me a sympathy card when I lost my mum. The method was not to be sincere or real but to cause distress and harass me.

I have sent the cards to you can you tell me how you will deal with this matter.”

Ms. Marshall responded:

“I considered that I have already answered the question you have raised in my email below dated 19 February 2016. I can only repeat what I’ve said again which is I asked for a copy of the cards to establish whether anything in their terms can be said to be linked to your role as a Fisheries Officer. Until we consider their terms I am not in a position to take a decision on your request to treat your receipt of the cards as a work-related matter.

I can only reiterate in the meantime, if you are concerned about the cards, you should contact your local police station, who may be able to undertake tests to ascertain the sender.”

38. The claimant responded:

“Hi, sorry I am not sure I am reading this correctly. Are you saying that if you receive vulgar and harassing letters, cards, e-mails or any other form of communication at your work it will not be considered malicious or inappropriate unless it actually mentions or states something that is totally work-related or related to the position that you are in within the Scottish government?”

Ms. Marshall responded that her e-mail has been misinterpreted and she simply needed a copy of the cards to establish what action if any might be taken.

39. The claimant did not provide them.

Third Incident 18 February 2016

40. On 18 February 2016 the claimant received a further greetings card addressed to her work address. The front panel of the card contained a photograph or representation of a Persian long haired cat. The cat had a grumpy expression. The text on the front panel read "Another Year Older ...!" The text on the right hand side panel read ".. AND JUST AS GRUMPY ..! HAPPY BIRTHDAY". Below the text on the right-hand side panel was a handwritten note saying "Cheer up 50 ain't so bad xx".
41. The claimant's birthday was in February. She was believed that colleagues in the office would probably be aware of the month. She had never disclosed the actual date. She was not 50 years old at this time but 49.
42. The claimant believed that the cards were sent by her colleagues. She again complained to the respondents' HR department and in particular to a Ms. Culpan about the matter.

Fourth Incident 28 February 2017

43. On 28 February 2017 the claimant received three further anonymous greeting cards (Birthday cards) at her home address. The cards received by the claimant were contained in three separate envelopes. All three envelopes had been postmarked 27 February 2017 in Inverness. All three envelopes had again been addressed to the claimant. The first two spelled the street name wrongly and none had a postcode. The first card was from the range 'Perfect Moments'.
44. The front panel of the first card bore a photograph of a monkey with a Mohican hairstyle, sunglasses and multiple ear piercings. Above the monkey was the text "Happy Birthday". On the right hand side panel was written "Have a wicked day". On the left hand inside panel was a handwritten note "*Those we shit upon when we climb the ladder of success are happily watching when we come tumbling back down*". The claimant took the card to be a reference to her recent promotion.

45. The front panel of the second card featured a cartoon drawing of a sexualised elderly lady dancing below a disco ball. One of her stockings was around her ankle and she had exaggerated features including exaggerated breasts. The text above the drawing read "IT'S YOUR BIRTHDAY NAN". The text on the right hand side of the drawing read "GO GET YOUR GROOVE ON!". The text on the right hand inside panel read "HAPPY BIRTHDAY". Below that text was a handwritten note reading "To an old Troll we miss ya NOT!!" The claimant took this to reference the fact that she was absent through illness. She was aware that colleagues had in the past referred to her as an old troll.
46. On the front panel of the third card was a picture of either a guinea pig or a hamster wearing a fur coat and tiara. The guinea pig or hamster was holding a champagne flute in one paw and carrying a handbag over the other. The text on the panel read "Have a fabulous birthday sweetie!" The text on the right hand panel read "Enjoy yourself" and below the text was a handwritten note reading "And stick the two fingers up to the lot of them 2 faced Shower of BA...RDS".
47. By e-mail dated 28 February 2017 the claimant advised Ms. Culpán that she received had three further cards. The claimant alerted the police that she had received these cards. The handwriting on envelopes 135 and 159 had some similarity. A Police investigation took place in relation to who sent the cards and it could not determine the author or authors.

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Witnesses

48. The Tribunal did not consider the claimant to be either wholly credible or reliable in her evidence. At various points we formed the view that she was not being candid particularly in relation to the timing of her naming the two suspected harassers at such a late stage in the proceedings. This contradicted the substance of her evidence which was that she had no evidence linking these people to the cards that had been sent. We were also unconvinced by

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her assertion that she had been so affected by the receipt of the cards that she had considered suicide, contacting she said 'Dignitas', despite later accepting that she told the respondent's Occupational Health Advisers that she had no suicidal thoughts. There was no medical evidence produced by the claimant to support her position that the receipt of the cards seriously exacerbated her health condition although we note she was signed off during this whole period with stress/depression from November 2016 nor more surprisingly was any evidence sought from friends, relatives or her partner as to the supposed devastating effect their receipt had on her. We regrettably formed the view that the claimant very much had her own agenda in these proceedings which was to reopen and reargue past events and to blame her employers. We did however, in the round, accept her evidence that the cards were unwanted and unsettling and that she had nothing to do with them being sent.

49. The evidence of Mrs. MacKinnon was credible and reliable although necessarily relatively limited to an extent as she had no direct involvement at the time in the exchanges that took place or decisions that had been made by Ms. Culpan and Ms. Clemie.

Submissions.

Claimant's Submissions

50. Mr. Biggs began his submissions by referring to the various protected characteristic that the claimant relied upon namely sex and age and the terms of section 26 of the Act. He submitted that the evidence that receipt of the cards was unwanted conduct had not been challenged nor that the claimant felt intimidated and humiliated by them. The most obvious recurring theme was he suggested one of a sexual nature. A Valentines Card has itself a sexual overtone. He then referred the Tribunal to the various cards sent in 2016. The matter should be looked at broadly. They all had some sexual content from 'Sexy mama', 'hot hot hot' to 'u is sexy lol'. The card at page 148/149 clearly references age and associates it with being grumpy and the card at page 160/161 references both age and sex.

51. In Mr. Briggs view the meat of the issue as he put it was who sent these cards. The claimant has a suspicion that the two named individuals were responsible but accepts that she has no direct evidence. She accepts that a number of
5 individuals seem to be involved given the differing handwriting used. There were matters that pointed to work colleagues such as the use of the nick names 'Canadian Jock' and 'old troll'. The use of these nicknames was never challenged. The fact that the claimant's address was used suggests work colleagues who could get access to that information. He accepted that the card
10 at page 163 seems supportive rather than one designed to mock the claimant.
52. He turned to the other possibilities touted by the respondents. None of these he suggested were at all likely or had any weight. It was quite wrong to suggest that there was any evidence to suggest that the claimant sent the cards to
15 herself or arranged this affair. They predate the decision taken to discipline her. The likely conclusion from a close examination is that the cards were sent by a work colleague or colleagues acting in concert.
53. The fact that the cards received after 2015 are less provocative than the card
20 sent in 2015 could be explained by the knowledge that the employers had suggested contacting the Police and that this warned those responsible leading to the later cards toning down the insults and being more of a 'dog whistle'. In other words outwardly innocuous but designed to wind up the claimant.
- 25 54. Notes had been produced by the respondents of Mr. Yuille and Mr. Anderson's positions on the situation denying any involvement in sending these cards. In Mr. Brigg's submission no weight should be put on these. They should have been called as witnesses and been open to cross examination. Dealing with whether the cards could have been sent by former colleagues he queried
30 whether this was likely as there would be no 'pay off' in them seeing how upset the cards would make the claimant.
55. The respondents also relied on the statutory defence that they had taken all reasonable steps. They could not in his opinion rely on this defence as it was

apparent that they had not taken all such reasonable steps open to them. They could have met the claimant and discussed who she thought might be behind the sending of the cards. They could have interviewed staff to ascertain if anyone knew anything about these matters. They could have reported the matter to the Police and invited an investigation of these matters.

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56. Finally, Mr. Biggs suggested that the issue came down to the Tribunal asking itself what the most likely option before it was and this must be that the cards were sent by disgruntled work colleagues. In relation to quantum Mr. Biggs urged the Tribunal to accept the claimant's evidence about the effect the receipt of these cards had on her and to award her £30,000 as injury to feelings.

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15 **Respondent's Submissions**

57. The respondent's representative responded to the points made by Mr. Briggs but also lodged written submissions. He began that although there were 8 cards sent only 7 were relied upon as being objectionable. He turned to the question of who had possibly sent the cards and his general submission was that there was simply insufficient evidence to show on the balance of probabilities who was responsible for the behaviour. He reminded the Tribunal that the respondents would only be responsible if the senders were employees at the time the cards were sent. The onus was on the claimant and she could not satisfy that onus. The email from the claimant's Trade Union representative on the 16 February contained a crucial admission which was that the claimant does not know who sent the cards. The claimant has suspicions and can make assumptions but this is not enough. The claimant had averred that it was her work colleagues who had sent the cards and she now says it is two named individuals. No new evidence has come to light to make her change her initial view which was that she could not say.

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58. The Tribunal should consider that one of the named individuals lives in Campbelltown and no longer works with the claimant. Why would he reignite a conflict some four years old? Would he drive from Campbelltown to Inverness to post cards to the claimant? Why was Mr. Anderson mentioned. He wasn't subjected to any disciplinary action. The claimant now says she was called 'Canadian Jock' and 'old troll' yet she did not tell her employers this when the cards were received or suggest that it must have been these two named individuals. There are no pleadings to back up this new position. At the Preliminary Hearing before Judge Hosie this position was not advanced when her case was in peril of being wholly rejected and she was under oath.
59. He continued that if this was a conspiracy then a number of people seem to be involved. Two cards look like the same handwriting and another two written by another hand leaving four other cards. In his submission the claimant's representative suggested that there were at a number of possibilities as to who sent the cards. The first was the claimant herself (or through agents). She was dissatisfied with the outcome of the earlier matters and was facing disciplinary action herself. The second was that they came from the wider community, the third from skippers or fishermen she interacted with through her role and the fourth/fifth were her two named colleagues, other current colleagues or former colleagues. In Dr. Gibson's submission the Tribunal cannot properly say that one possibility is more probable than another.
60. Dr. Gibson then turned to the evidence of supposed distress. He queried why she had not immediately gone to the Police if she was so distressed by the first card. The Tribunal should also take into account the lengthy gap in any recorded issues or incidents at work. The Tribunal should also look sceptically at whether any of the cards are really objectionable. It was clear that the anonymous nature in itself wasn't the issue for the claimant. No medical evidence of the impact of these matters had been produced nor any evidence from friends or colleagues. Nothing much was done by the claimant in the year that passed between each annual receipt of card. It was odd that if this was causing her distress then why she does not cooperate with her employers and

supply them with further information to allow them to consider funding a handwriting report. If she suspected Mr Yuille and Mr Anderson why not tell her employers? Why not mention it in the ET1?

5 61. Dr. Gibson then went on to consider the cards themselves. Some form of generalised bullying is not protected by the law and it was difficult to discern exactly which protected characteristics were at issue looking at the matter card by card. There was a complete absence of evidence as to motivation. Some of the cards were not insulting merely silly. If any award was made for injury to
10 feelings it should be at the very lowest level and no more than £1000.

62. If the Tribunal took the view that the various difficulties the claimant's case had to overcome could be overcome the respondents still had the statutory defence available to them. He referred the Tribunal to the evidence of Ms. Mackinnon
15 and how the employers had responded. He also referred the Tribunal to his written submissions and to the cases mentioned there.

Discussion and Decision

20 63. The Tribunal first of all considered the legal framework against which this case must be examined.

64. Harassment is defined in section 26 of the Equality Act 2010:

"26 Harassment

25 ***(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—

30 ***(i) violating B's dignity, or***

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

35 ***(b) the conduct has the purpose or effect referred to in subsection (1)(b).***

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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(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;

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(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

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race;

religion or belief;

sex;

sexual orientation.”

20 65. The Tribunal also had to consider the statutory defence provided by the Act in section 109:

“109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

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(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

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(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.”

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66. The Tribunal also considered the burden of proof. Section 136 of the Act is in the following terms.

“136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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(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.”

67. Useful guidance given to Tribunals in the cases of **Richmond Pharmacology v Dhaliwal (2009) IRLR 336**, that case relating to race discrimination and the later case of **Nazir and Aslam v Asim and Nottinghamshire Black Partnership (2010) ICR 1225**. In Dhaliwal the EAT made the following observations at paragraphs 69 and 70:

“.....The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law – such as a person's race and gender.

70. In our judgment, when a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed.”

68. The uncontested background is that the claimant had a difficult relationship with a number of her colleagues at the Scrabster Fisheries Office but that there had been no incidents in recent years other than anonymous cards being sent.

69. Dr. Gibson helpfully referred the Tribunal to the case of **Hendry v Clan Line Steamers 1949 SC** which is a useful reminder that when approaching the issue of what probably occurred in any given circumstance, the balance of probability, if one option before the Tribunal is as likely as another then one option cannot be said to be more probable than another. In support of this he suggested that the claimant could have sent these cards to herself, or they could be sent by a disgruntled third party who interacts or has interacted in some way with the claimant professionally, a former employee or current employee of the respondent and so forth. We heard very little evidence about the history of the office in Scrabster but gleaned that there had been staff

changes over the years with staff leaving for other posts within the Scottish Government and also out with the service. We did not know the exact numbers of people involved in either the original difficulties the claimant experienced other than the two individuals named by her.

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70. The claimant faced a number of hurdles the first was whether the cards could amount to harassment in the terms of the statutory protection. Looking at the protected characteristics first of all there was some debate as which of the protected characteristics was at play. We bore in mind that there is no general prohibition against harassment in the workplace and whether the cards could be linked to particular protected characteristics. We considered that the legislation was enacted to provide effective protection to employees and that we should take a common- sense view of the cards and their likely intended effect in the present circumstances.

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71. We examined, the cards individually and as a group. Dr. Gibson suggested that the 'hamster card' seemed unobjectionable. The claimant did not articulate a difficulty with it agreeing that it could be regarded as supportive. We will therefore discount it from consideration. The card at page 160 does in our view clearly reference both age and sex. We struggled to associate the 'monkey' card with any protected characteristic. The card with the 'grumpy cat' when looked at with the others seems to be referencing age and the claimants sex as cats in general (not tom cats) are often associated with the female gender rather than the male. This left the others which seemed to have themes relating to the claimant's sex. We considered that on the basis that the sender probably knew or knew of the claimant that the fact that she was a middle-aged woman who lived a quiet and reserved existence that the cards were meant to insult/upset her. The fact that they were sent over a period and anonymously reinforced the suggestion that they were meant to be hurtful and upsetting and would violate the claimant's dignity.

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72. The cards and perhaps the context in which they were sent provide the only limited evidence for the Tribunal to consider the vexed question of who, and

both sides accepted that it was likely to be more than one person, had sent them. The word bizarre was used in the proceedings and the Tribunal found this an appropriate description of the circumstances here. The Tribunal spent a considerable time discussing the evidence and trying to agree what, if anything, it could reasonably be said to indicate. Before we set out our reasoning we must make some further comment on how we viewed the claimant's evidence.

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73. If an employee complains about conduct directed towards them which comes from an anonymous source this presents considerable practical difficulties for any employer as to how to properly react. It also presents difficulties for the employee to demonstrate that the conduct is truly work related. It is the context in which the conduct takes place and the nature of the conduct, including the timing, that may provide some clue as to who the perpetrators could be. If for example there had been long standing conflict between an employee and say other employees, perhaps in a recognised group or department, the assumption might be that they could be behind any conduct aimed at upsetting or discomfiting the employee concerned. In other words there is usually a history of current antagonism. In the more common case the employee knows who they say are harassing them.

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74. In the ET1 the claimant makes reference to incidents that she found offensive involving at least four male employees. She averred that the behaviour she had experienced had continued from August 2006 until 2017 encompassing the sending of the anonymous cards. At paragraph 47 of the ET1 she refers to 'the conduct of the respondent's employees' She does not name those who she believes sent the cards although perhaps by implication it could be said to be the one or more of the four named individuals.

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75. At the hearing on time bar before Judge Hosie the claimant's evidence was that she did not know who sent them (**JBp65**). This reflects her position as articulated to her employer although we noted that her trade union

representative in 2015 says that the cards '*almost certainly came from a current or former employee*' (JBp126).

5 76. The Tribunal examined the evidence at some length. It considered the various options or possibilities that Dr. Gibson had raised and as a first step worked our way through these. The first suggestion was that the claimant had either sent the cards or arranged for them to be sent on her behalf. Various possible reasons were suggested such as her wish to reopen the past antagonistic history/outcome or to punish her employers in some way or to strengthen her position vis-a-vis expected disciplinary action when she returns to work. It was also suggested that she did this in order to, in some way, to bridge the gap or link the difficulties she had at work to the present day to allow her to refer back to these incidents going back to 2006. The last incidents that actually took place in the workplace that the claimant refers to in her ET1 took place in March 10 2011. Thereafter various internal disciplinary and grievance processes were played out ending in May 2014. One of the odd or bizarre aspects of the case is that there are no recorded incidents or workplace issues thereafter apart that is from the sending of the cards.

20 77. We were not attracted to this suggestion as a possibility for a number of reasons. If the claimant had wanted to inflame the situation and cast suspicion on her colleagues then frankly she could have done a much better job of it perhaps alluding more directly to information or events that only her colleagues would be likely to be aware of. The claimant is clearly an intelligent and able 25 women. Why would she only sent cards annually if she wanted to stir things up? Added to this whatever reservations we have about the claimant's evidence, and we have many, we do not judge her to be capable of such a Machiavellian intrigue which would have involved amongst other things recruiting co-conspirators, misspelling her name, misspelling the street where she lived and leaving out the postcode. 30

78. We then considered whether someone in the wider community could have sent these cards. The claimant lives in a small close-knit community and the

workplace difficulties could have been a local source of gossip and perhaps the taking of sides in the workplace disputes. The claimant's address was no secret and we accept could be easily identified. It did not seem to the majority to be an impossible or unlikely option.

5 79. There is in our estimation some possible link between the sending of these cards annually either on St Valentine's day or around the claimant's birthday that suggests that the same people are involved. They could, certainly, come from someone or some group with whom the claimant comes in contact through the exercise of her duties.

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80. It is unfortunate that the findings of the Police investigation were not made available to us. There was an indication that the cards or at least some of them were sourced at one shop.

15 81. We examined the cards closely. There are some possible indications that whoever sent the cards had some knowledge of the claimant's work as a civil servant as we have noted earlier. The claimant's suspected that because she had complained about the first card someone (an employee involved in their sending) decided thereafter to send them to her home address and try and
20 keep the matter away from the workplace and reduce the likelihood of the employers getting involved. We regarded this as being rather speculative. We did, however, consider whether there was other evidence which could provide more weight to the claimant's position. She told us that she had been referred to at work as 'Canadian Jock' a title that was used in the first card. This
25 supposed link had not been suggested by her to her employer. Nevertheless, with some reservations we accepted the claimant's evidence on this issue although we would observe that there would be nothing unusual about such a nickname itself given the claimant's background.

30 82. The majority placed less weight on the suggestion that a link could be made because she had been referred to an 'old troll'. This is not an unusual insult and shows no special knowledge as it were of the claimant. We noted that there had been some evidence from the claimant that she had been told that this insult had been used by work colleagues and Mr Atkinson felt he could

place some weight on this. He also took the view that the fact that the claimant was a very private person and yet was referred to in the cards as a 'sexy mama' and so on seemed to indicate that the sender(s) had some knowledge of her personality and what she might find upsetting or degrading. In his estimation there are two comments that seem more supportive of the claimant's contention that the cards are work related namely the comment 'miss ya not' (JBp161) a comment on the card during a period when she was absent through illness and (JBp157) the 'advice' given about climbing the ladder of success when she had been promoted.

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83. Dr. Gibson argued that these matters could be known by service users and others given the small community in which the claimant worked. We could not completely discount that possibility. We considered that the most that could be said was that there was some knowledge on the part of the sender to work related matters. We accepted that it could be argued that it might be less likely that a service user or a member of the local community, would know about a promotion but not improbable in a small community. Finally, it was argued that as the birthday cards were sent on the month of the claimant's actual birthday that showed the sort of knowledge that only a fellow employee could have gleaned. The claimant said that her birthday would have been quietly acknowledged in the office by a few close colleagues and the other colleagues might have become aware of the approximate time of year whereas this was less likely for others.

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84. It was at this point that the Tribunal found it difficult to agree whether there was enough evidence from which inferences could be drawn to demonstrate that on the balance of probabilities that the cards came from employees of the respondents. On the one hand the evidence could be described as being thin and speculative but was it sufficient to allow us to come to the conclusion that it was likely that the cards were sent by employees? Another more fundamental difficulty presented itself in that to be responsible for unlawful acts the perpetrators must be employees at the time they send the cards making the respondents responsible for their actions and this was a hurdle that gave the Tribunal considerable pause for thought.

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85. It concerned the Tribunal that if, as the claimant suspected, the sending of the cards was part of some historic vendetta stretching back to these earlier matters then how could we be sure that the people behind them were still employees. We had heard that staff come and go including leaving the service. It was argued that if those involved were former employees then it makes it less likely that they would still want to discomfit or annoy the claimant. We accepted that it was possible that, if such former employees were still in contact with current employees or service users they could glean information such as the claimant being absent from work unwell or that she had been promoted. A promotion would have led to a change in the claimant's official title which in turn would be public knowledge.
86. When coming to consider why someone might be involved in such an exercise as sending anonymous cards it was argued that only a current employee or employees would be more likely to get some pleasure from such behaviour such as hearing that the claimant was distressed, or becoming aware that she was complaining to her employers etc. We are not sure we can assess motivation in that simplistic way given the unusual nature of this case or say that one possibility is more probable than another when choosing between a current employee as a likely perpetrator and a former disgruntled colleague.
87. The claimant's representative relied on the comment that the author of card who wrote 'we miss ya not' showed that it must be a current employee. It seemed to the majority that this could also apply equally to a third party who used the service, or to someone who came in contact with the claimant outside work. The majority felt that nothing of any substance could be determined from this or from other similar aspects of the cards that amounted to more than suspicions.
88. Mr Atkinson relied on the combination of circumstances here starting from the accepted difficult work situation and the use of the work nickname Canadian Jock. He then looked at the card where the nickname 'old troll' was used along with words 'we miss ya not' associated as that comment was to a period when

the claimant was apparently absent through illness and in another card to reference to the claimant climbing the ladder of success (when she had been promoted). In particular, he pointed to the use of the word 'we' which he believed would better fit with the card coming from a workplace and being sent by a current employee. This led him to the conclusion that it was more likely to be someone from work that was behind the campaign. The majority while acknowledging that this was one interpretation of the comments on the cards could not put such weight on these matters or discount other possibilities as being as likely in particular that the cards could just as easily have originated from a disgruntled service user or a former employee who left the claimant's workplace harbouring a long-standing grudge against her.

89. The majority considered that one of the many difficulties that the claimant faced was that there was no evidence of any continuing difficulties at work with any staff member or group of staff members which might set the sending of the cards in some context that might lend weight to her suspicions or in other words point the finger of suspicion towards a current employee. Nor does the majority consider that the burden of proof assists the claimant as there are insufficient facts before us from which we can draw the conclusion that the cards were most likely to come from current employees.

90. The Tribunal in summary, could not agree as to whether a prima facie case had been made out and whether the cards could be said to have been likely to come from current colleagues. The minority view was that there was just enough to show on the balance of probabilities that the cards came from such a source.

91. We also considered whether the respondents could have made out their statutory defence. There is no doubt that an employer faced with such unusual circumstances faces considerable practical difficulties. It did however appear to us, and this was the unanimous view, that the reaction of the human resources department could have been more proactive. In coming to that conclusion, we did not accept that it was up to the respondents to inform the Police about the cards. We agree that it is not the employers place to do so.

They are not the aggrieved or complaining party and it is odd that the claimant only belatedly pursued this course.

- 5 92. We were frankly very surprised at the respondent's position that they could not make any investigation into the sending of the cards except if they had enough information to start specific disciplinary proceedings against a named individual. We could not understand why staff could not be questioned as to whether or not they knew anything about the cards, perhaps second hand, or about any source of continuing antipathy towards the claimant. At the very least 10 staff could have been reminded of terms of the appropriate policies and that the sending of unwanted cards might be regarded as being grounds for disciplinary action.
- 15 93. One of the grounds for inaction was, we were told, the terms of the respondent's disciplinary policy allowed employees a 'right to silence' and that they need not answer questions posed by the employer to them if they could incriminate themselves by answering. That seems an extraordinary situation. Two of the core duties an employee has to their employer are the duty to obey 20 reasonable instructions and the duty to respond truthfully to questions posed to them by the employer in relation to work matters.
94. In the round we were not convinced that in the circumstances here the statutory defence would have succeeded.
- 25 95. Finally, in relation to injury to feelings the Tribunal was unanimously of the opinion that it was not convinced that the claimant was as upset as she claimed regarding the receipt of these cards. If she had been distraught we would have expected her to have immediately contacted the Police, which she did not do. We were also surprised that although it was available there was no attempt to 30 corroborate the claimant's distress by leading evidence from witnesses.
96. For the sake of completeness if we had found the respondents responsible for the harassment we would have awarded her the sum of £2000 to reflect the

claimant's upset and distress at being harassed through the sending of these cards over a number of years.

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**Employment Judge:
Date of Judgment:
Entered in the Register:
And Copied to Parties**

**James Hendry
10 August 2018
13 August 2018**