Case No: 2501301/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms Sarah Hart**

Respondent: **Cutpay Merchant Services Limited**

Heard at: **North Shields** **On: 22 March 2018**

Before: **Employment Judge Bauer**
Ms Clare Hunter
Mr Jonathan Adams

Representation:

Claimant: **In person**
Respondent: **Mr M Rahman - Solicitor**

RESERVED JUDGMENT

1. It is the unanimous judgment of the Tribunal that the claimant was subjected to sexual harassment contrary to section 26(2) Equality Act 2010 ("EQA") and that the claimant was subjected to harassment related to race and religion contrary to section 26(1) EQA.

2. The Tribunal awards the claimant and the respondent is ordered to pay £800 as compensation for the harassment related to race and religion and £3000 as compensation for the sexual harassment.

3. It is also the unanimous judgment of the Tribunal that the claimant was subject to unlawful deductions from wages contrary to section 13 Employment Rights Act 1996 ("ERA") and pursuant to section 24 ERA the respondent is ordered to pay the claimant the following:

   Car allowance – £300;
   Commission - £100;
   Holiday pay – £191.07;

4. It is also the unanimous judgment of the Tribunal that the Claimant's claim of breach of contract in respect of her fuel expenses fails and is dismissed.

REASONS

Preliminary Matters

5. When the hearing commenced at 9.55am Mr Rahman explained that contrary to the Tribunal's previous orders, the respondent had not prepared the required hearing bundles. He explained that the bundles were in the process of being copied and paginated and that it would take approximately a further two hours before they were ready and he could collect them and return to the Tribunal.

6. In addition, Mr Rahman explained that Mr Norminton (the respondent's only witness) would not be attending the hearing. Apparently, Mr Norminton was working in London and Mr Rahman asserted that as Mr Norminton was not an employee of the respondent that the respondent could not compel him to attend. Mr Rahman explained that the respondent would rely upon Mr Norminton's witness statement which the Tribunal observed was unsigned and undated.

7. The Tribunal expressed its frustration at the delay but in light of the significant amount of documentation, it was decided that once the Tribunal had summarised the key issues in the case and clarified the nature of the claims (as detailed below) that Mr Rahman should leave, complete the work on the bundle and return as quickly as possible.

8. The Tribunal then sought to clarify the nature of the claimant's claims which were confirmed as follows:

   8.1. the respondent had engaged in unwanted conduct of a sexual nature contrary to section 26(2) EQA;
   8.2. the respondent had engaged in unwanted conduct related to race and/or religion contrary to section 26(1) EQA;
   8.3. the respondent had made an unlawful deduction from wages by failing to pay the claimant £300 of car allowance;
   8.4. the respondent had made an unlawful deduction from wages by failing to pay the claimant £100 of commission;
   8.5. the respondent had made an unlawful deduction from wages by failing to pay the claimant her accrued but untaken holiday pay of 2.7 days totalling £154.03;
   8.6. the respondent was in breach of contract by failing to pay the respondent her business mileage expenses.

9. At the 30 November 2017 preliminary hearing, the claimant's section 26(1) EQA claim was framed as an allegation of unwanted conduct on the grounds of religion or belief. However, when the Tribunal reviewed the claimant’s witness statements (which were not available at the preliminary hearing), it appeared that the nature of the claimant’s allegations were such that the relevant protected characteristic to which the unwanted conduct related was race and/or religion.

10. This issue was clarified with the claimant and she confirmed that the harassment about which she was claiming in this regard was related to race and/or religion rather than solely religion. The respondent agreed that this characterisation of this element of the claim was accurate and raised no objections to the relabelling of the claim accordingly. The claimant also alleged that all alleged acts of harassment had been committed by Mr Norminton.

11. The claimant agreed that the causes of action above were the sole claims the claimant was pursuing and that the "other amounts" box ticked in the ET1 related to the mileage expenses that she alleged she was due and that she was not claiming any further amounts.

12. The claimant confirmed that it was her position that all the alleged acts of harassment had been committed by Mr Norminton either by way of inappropriate text messages, telephone calls, comments and on one occasion when he placed his hand on her leg/thigh.

13. The Tribunal went through the issues to be determined and suggested that in the delay whilst Mr Rahman resolved the issues with the bundle that the claimant should focus on identifying precisely what conduct she alleged was the unwanted conduct about which she was complaining and on what basis she alleged that such unwanted conduct had the purpose or effect of creating the environment set out at section (26)(1)(b) EQA.

14. The Tribunal also explained that the claimant would need to establish that she was owed the various amounts she was claiming and the basis upon which she was owed such amounts.

15. Finally, the Tribunal explained the approach that would be taken to the hearing in terms of the presentation of evidence and the making of closing submissions.

16. The hearing was adjourned at 10.30am with the intention to reconvene once Mr Rahman returned with the finalised hearing bundles. The hearing reconvened at approximately 2pm.

17. Unfortunately, when Mr Rahman returned with the bundles they were not paginated, were in loose leaf form, did not contain all the relevant documents, were in places not in a sensible order and there were insufficient copies. Despite the difficulty involved, it was determined by the Tribunal that the parties between them had all the documents and had seen them in advance of the hearing, simply they were not contained in the convenient form of a paginated bundle. Therefore, it was decided (with the agreement of the parties) that a just hearing was possible and that the hearing should continue.

18. The claimant had small bundle of documents that were numbered and so any reference to page numbers below are a reference to the page numbered documents provided by the claimant. Otherwise, documents will be referred to by description and the various texts that form the bulk of the evidence will be referred to by date and either the time that is generally marked on the top of the page containing the text message (apparently the time that the text was printed or the screen shot was taken and not the time at which the text was sent or received) or the time of the text if this is marked on the text to which is being referred.

19. Due to the lack of time at the end of the hearing and the need for the Tribunal to deliberate, judgment was reserved. The Tribunal met again on 19 April 2018 for further deliberations. Therefore, this judgment is issued with full written reasons so as to comply with Rule 62(2) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

Issues

20. The Tribunal had the following factual and legal matters to determine:

    20.1. Was Mr Norminton an employee of the respondent within the definition set out at section 83(2) EQA;
    20.2. If not then was Mr Norminton an agent of the respondent within section 109(2) EQA;
    20.3. Contrary to section 26(2) EQA, did Mr Norminton engage in unwanted conduct of a sexual nature in the form of the texts, telephone calls between the claimant and Mr Norminton between 1 August 2017 and 5 September 2017 and 9 August 2017 by touching the claimant's leg/thigh;
    20.4. Did Mr Norminton engage in unwanted conduct related to race and/or religion by way of the comments made or texts sent to the claimant;
    20.5. If so, did the unwanted conduct above and keeping in mind section 26(4) EQA, have the purpose or effect set out in section 26(1)(b) EQA?
    20.6. If Mr Norminton is held to be an employee or agent of the respondent and that he engaged in unwanted conduct of a sexual nature or related to religion and/or race and that such unwanted conduct had the purpose or effect set out in section 26(1)(b) EQA then did the respondent take all reasonable steps to prevent Mr Norminton from engaging in such unlawful harassment in line with section 109(4) EQA;
    20.7. If the claimant was subjected to harassment contrary to section 26 EQA then how much (if any) compensation should the claimant be awarded;
    20.8. Is the claimant due amounts of commission, car allowance, mileage expenses and holiday pay and, if so, how much is she owed in this regard?

Findings of Fact

21. Having considered the oral evidence of the claimant and her witness, Ms Lauren Taylor, the statement of Mr Norminton and having considered the relevant documents, on the balance of probabilities and where appropriate taking account of section 136 EQA, the tribunal makes the findings of fact set out below.

22. The claimant was employed by the respondent as an Area Account Manager from 1 August 2017 to 5 September 2017 when she summarily resigned by way of her 5 September 2017 email to Mr Norminton.

23. The contractual relationship between the parties was primarily governed by the contract that both signed dated 1 August 2017 but was supplemented by the commission details set out in the 21 July 2017 email from Mr Sunny Miah (the respondent's managing director) to the claimant and the discussions between Mr Norminton, Mr Miah and the claimant at the meeting on 19 July 2017.

24. It is found by the Tribunal that it was agreed that the claimant would be paid a basic salary of £18,000 per year plus commission as set out in the 21 July 2017 email from Mr Miah. She would also receive a car allowance of £300 per month and business mileage expenses of 32 pence per mile. She was entitled to 20 days holiday plus bank holidays in each holiday year.

25. The initial contact with the respondent was with Mr Norminton by way of a telephone call on 12 July 2017. It is found that in his initial telephone

conversation with the claimant on 12 July 2017 that Mr Norminton introduced himself as the respondent's "Regional Sales Manager". There was then a meeting on 19 July 2017 between the claimant, Mr Norminton and Mr Miah. The claimant was offered the job by way of an email from Mr Miah dated 21 July 2017 and she accepted this job offer by way of her email dated 23 July 2017 to Mr Miah that was copied to Mr Norminton and Mr Monjer Rashid (the respondent's Operations Manager). The claimant's acceptance was subject to the agreement reached at the 19 July 2017 meeting that the claimant would be paid the £300 car allowance from the commencement of her employment.

26. On 1 – 2 August 2017, the claimant attended induction training that was run by a combination of Mr Rashid and Mr Norminton.

27. The claimant was expected to follow up leads and attend appointments that had been identified to/made for her by the respondent with a view to selling the respondent's services in the form of digital payment systems. The claimant was also expected to generate and follow up leads of her own.

28. The claimant had a sales and marketing background and was experienced in sales in the financial services sector albeit that her experience of selling digital payment systems was limited to that that she gained with the respondent.

29. The claimant reported to Mr Norminton throughout her employment. He was her line manager.

30. It is found that at least on one occasion Mr Norminton used the email sign off "Chris Norminton Senior Sales Manager Pay Merchant Services" page 9 of claimant's bundle). Further, his email address ended "@cutpay.co.uk". Further, in the text message at page 127 of the claimant's bundle Mr Norminton stated "I am part of the management team".

31. Mr Norminton requested and the claimant was expected to provide to him details of any sales she made and her progress towards sales. In fact, apart from the sale that was assigned to her by Mr Norminton on 17 August 2017, the claimant made no sales during the course of her employment. The claimant's lack of sales was an increasing concern for her, Mr Norminton and the respondent during the course of her employment.

32. For the reasons set out in more detail in the "Conclusions/Reasoning" section of this judgment, it is found that Mr Norminton was retained under a contract personally to do work for the respondent. Consequently, it is found that Mr Norminton was an employee of the respondent pursuant to section 83(2)(a) EQA.

33. On 21 August 2017, Mr Rashid sent an email to the claimant (among other staff) asking her to attend a trade event that was taking place over the bank holiday weekend. As a result, the claimant was also asked by Mr Norminton in a text at 13:22 on 22 August 2017 to attend a trade show over the 26 – 28 August 2017 bank holiday weekend with a view to generating sales.

34. On 22 August 2017, Mr Rashid sent a further email to both the claimant and Mr Norminton asking for a response to his prior email about their availability to work at the tradeshow. The claimant responded stating that her and Mr Norminton were going to attend the tradeshow on 28 August 2017.

35. On 28 August 2017, the claimant emailed Mr Norminton stating "I am emailing to advise you that as of today I am putting myself on sick leave due to stress and anxiety. I have a lot going on in my personal life and due to the added stress with work and certain other factors, I have no other option. My health has to take priority at present. I will consult my doctor tomorrow and contact you once I have had some guidance from him."

36. The claimant attended her GP on 29 August 2017 and was signed off sick for "stress-related problems" and was prescribed medication that she is still taking. She did not attend the tradeshow or return to work. The respondent failed to pay the claimant for her work in August. The claimant submitted an email on 5 September 2017 to Mr Norminton stating that she was resigning with immediate effect.

37. The claimant gave conflicting versions of these events in her two written statements. In the earlier statement, she stated that Mr Norminton putting her under pressure to attend the trade show made her feel "totally destroyed and could no longer work so I sought sick note from my GP". However, in her 21 March 2018 statement, she alleged that the incident where Mr Norminton touched her leg/thigh in the car on 9 August 2017 resulted in her visiting her GP and outlining to her GP "the issues facing me with my personal and professional life and that I was struggling to cope emotionally and I wasn't sleeping and my health was suffering." The claimant went on to allege that her GP put her on a sick note stating "stress-related problems" as the claimant did not want the situation "labelling as work related, because it was an accumulation of things but magnified and exaggerated by Mr Norminton."

38. The claimant was not paid for her work in August. At 06:23 on 5 September 2017 she sent a text to Mr Norminton seeking urgent payment of her salary and threatening to raise with ACAS the issue of her unpaid salary and "several other grievances" if payment was not made by 10am.

39. At 19:28 on 5 September 2017, the claimant submitted her resignation by email to Mr Norminton with her employment to terminate with immediate effect stating "I feel I can no longer work for a company, or a line manager who has such a low regard for their employees and their welfare and financial stability. Not only have I not been paid and not been communicated with during this issue, this is all happening while I have been placed on medication to assist in my mental health and I am receiving counselling support to enable me to be well again." The claimant went on to state that she would pursue a claim for unpaid wages, expenses and car allowance and will be seeking advice on a constructive dismissal claim. The claimant also stated "I cannot express how truly let down I feel by yourself, CutPay and the management team and the "promises" made the recruitment stage verses [sic] the reality."

40. On 6 September 2017, the claimant sent an email to Mr Rashid stating that she intended to pursue claims of sexual discrimination, sexual harassment, third-party race discrimination and unpaid wages.

41. The claimant explained to the Tribunal that she had been the victim of domestic violence during her previous four year relationship and that she had been suffering the ongoing negative mental effects of this relationship. During her evidence, she described herself as "emotionally and mentally not right" and Ms Taylor described her as being in a "vulnerable state due to her relationship

breaking down". The claimant explained that she was continuing to receive domestic violence support and that the last four years had been challenging and the she was not "just blaming" her mental state during the relevant period or since on the issues she faced with Mr Norminton and the respondent. In her 21 March 2018 statement the claimant referred to her GP signing her off sick for "stress related problems" and that she did not want her absence to be labelled as "work related" because "it was an accumulation of things but magnified and exaggerated by Mr Norminton." The Tribunal accepts that the claimant was in a vulnerable state as a result of these past issues.

42. The Tribunal finds that the claimant resigned for a combination of reasons – but that the primary reasons were her poor health due to a combination of the ongoing effects of her previous relationship and the stress at work mainly related to the lack of sales and the respondent's failure to pay her. The claimant did not present evidence to the Tribunal that the reason for her resignation was the harassment by Mr Norminton and the Tribunal concluded that at the time of her resignation the alleged harassment was not the reason for the claimant's resignation.

43. By the claimant's admission, the respondent was increasingly concerned about her lack of sales and it is evident from Mr Norminton's texts to the claimant on 23 August 2017 (18:01), 24 August 2017 (08:25, 10:10, 15.11, 17:23 and 25 August 07:01, 12:45, 14:39, 18.02, 15:54, 16:59 and 18:28 and on 26 August 2017 at 07:56, 12:05 and 15:28 that he was pushing her to provide details of what she was doing to generate sales as Mr Norminton had to report to the respondent's management.

44. Apart from the sale assigned to her by Mr Norminton on 17 August 2017 (a sale in fact secured by him), the claimant made no sales during the course of her employment. It was clear from the claimant's evidence that the respondent's business was highly sales focussed with a sales board and rankings intended to encourage sales. Further, the commission structure was intended to motivate staff to generate sales.

45. It is also accepted that the claimant was put under pressure by Mr Norminton to attend the trade show and that he made reference to her poor sales and the fact that if she did not attend that he would not be in a position to defend her poor sales record and her cost to the company and that there was a high risk of her dismissal.

46. It is found that due to the claimant's poor sales performance that if the claimant had not resigned on 5 September 2017 that her employment would have been terminated soon thereafter by the respondent.

47. It is found that Mr Norminton made the following comments/sent the following texts to the claimant related to religion/race:

    47.1. 2 August 2017 Mr Norminton said to the claimant - "That is just when you sell to pakis." - referring to the lowest rates of interest allowed by the respondent;

    47.2. 11 August 2017 Mr Norminton sent a text (see page 79/135 of the claimant's bundle) – "Tell him to fuck off, I bet he is a "sunny" too." - referring in a derogatory way to Sunni Muslims in the context of an attempt by a salesman at PC World seeking to sell the claimant allegedly

unnecessary additional equipment/software;

47.3. In late August 2017, Mr Norminton spoke to the claimant about her attendance at the Mela cultural festival/tradeshow and said that the event would be “full of pakis”.

48. It is also found that that this was unwanted conduct and had the effect of creating an offensive environment for the claimant contrary to section 26(1)(b) EQA.

49. In relation to the claimant's allegation that she was subjected to sexual harassment contrary to section 26(2) EQA in the period 1 - 8 August 2017, the Tribunal gave close consideration to the claimant's testimony, both in her witness statement and in oral evidence on the day of the hearing and it also considered Mr Norminton's unsigned and undated statement. However, the Tribunal has given limited weight to Mr Norminton's statement, particularly as Mr Norminton's testimony was not tested by cross-examination.

50. It is clear from the background texts that were produced to the Tribunal that a large number of texts with sexual content and a number of sexually explicit texts passed between Mr Norminton and the claimant with both individuals sending such texts to the other.

51. Mr Rahman drew the Tribunal's attention to discrepancies in the texts printed off and produced by the claimant. He alleged there had been an attempt by the claimant to manipulate the Tribunal by producing only selected texts. The claimant's explanation was that she produced those texts she considered to be relevant and in support of her case. Whilst it is accepted that the claimant did not produce the full range of texts, it also appears that the bundle of texts produced by the respondent did not contain the full range of texts (for example it is evident from page 79 of the claimant’s bundle that the respondent’s bundle did not contain the full exchange of texts related to the “Sunny” comment.

52. In reviewing the texts, the Tribunal has concluded that there is a distinction to be made between the texts sent before 9 August 2017 and those sent after this date. In the remainder of this judgement, the period 1 – 8 August 2017 will be referred to as the “Initial Period” and the period from 9 August – 5 September 2017 will be referred to as the “Latter Period”.

53. The claimant did not contend that Mr Norminton’s purpose was to create the environment anticipated by section 26(1)(b) EQA. Her case was that it had this effect.

54. As is detailed in the “Conclusion/Reasoning” section of this judgment, it is not accepted that any of the sexual texts sent by Mr Norminton to the claimant in the Initial Period amounted to sexual harassment contrary to section 26(2) EQA as it is not accepted that the relevant conduct was “unwanted” within the meaning of that section nor that the conduct had the purpose or effect set out in section 26 (1) EQA, particularly when the requirements of section 26(4) and, particularly section 26 (4)(c) EQA are taken into account.

55. On 9 August 2017, the claimant and Mr Norminton had made arrangements to attend an appointment together. There was some dispute in the relevant statements as to where the appointment was and the claimant conceded that Mr Norminton's statement was accurate in this regard and that the appointment was at a protein powder company.

56. Mr Norminton had travelled by train and was collected by the claimant from the station and driven by her to the appointment. The claimant was agitated primarily because she had had a tyre blowout that morning and had had to approach her ex-partner (something that was understandably difficult for her) to borrow his car.

57. It is found that during the journey that Mr Norminton put his hand initially on the claimant's knee and then moved it to her lower thigh while she was driving. It is accepted that this was sexual in nature and that it was unwanted by the claimant. It is also found that Mr Norminton asked the claimant how far it was to her home in the hope that the claimant would agree to go there with him.

58. Further, it is found that she did not accept or encourage Mr Norminton's advances. It is also accepted that the claimant telephoned Lauren Taylor after this incident in a distressed state.

59. For the reasons set out in the "Conclusion/Reasoning" section of this judgment it is accepted by the Tribunal that, despite the explicit text messages that had passed between Mr Norminton and the claimant in the Initial Period, that Mr Norminton's physical contact with the claimant was of a sexual nature, was unwanted and had the effect (although not purpose) of creating the environment set out in section 26(1) EQA and so amounted to sexual harassment.

60. In the Latter Period, there was a noticeable change in the claimant's response to the further sexual texts that Mr Norminton continued to send to her in that she generally attempted to de-escalate matters and did not respond in kind.

61. Again, the Tribunal's reasoning is set out in detail in the "Conclusion/Reasoning" section of this judgment but it is found that by way of the sexual texts that Mr Norminton sent the claimant during the Latter Period that the claimant was subjected sexual harassment contrary to section 26(2) EQA.

62. It is also found that the respondent agreed to pay the claimant £300 per month in car allowance from the commencement of her employment. It is also found that this amount has not been paid and is therefore due and owing.

63. It is also found that the £100 commission generated from the appointment that Mr Norminton and the claimant attended on 17 August 2017 with The Beauty Box Alnwick was assigned to the claimant. Therefore, she was entitled to be paid this amount and, on the basis that it has not been paid by the respondent, the £100 is due and owing to the claimant.

64. It is found that the claimant's holiday year ran from 1 January 2017 to 31 December 2017 and that she took no holiday during her employment. The claimant was off sick on the August bank holiday on 28 August 2017. The claimant has not been paid her accrued but untaken holiday pay and is therefore due the amounts of accrued but untaken holiday pay set out in the "Conclusion/Reasoning" section of this judgment.

65. It is found that the claimant undertook business mileage and that she was entitled to be reimbursed for such mileage at the rate of 32p per mile. However, the claimant did not provide any meaningful calculations or information in the schedules of loss that she provided or in her evidence that allowed the Tribunal to determine the amount of business mileage she undertook or the amount she

was due in this regard in a way that is fair to the parties. Therefore, the claimant has not made out this element of her claim and it is dismissed.

Law

66. In reaching the conclusions set out above and below, the tribunal has reminded itself of and given consideration to the following:

67. Sections 26(1) and 26(2) EQA - "*A person (A) harasses another (B) if—*
(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

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

(2)A also harasses B if—

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

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

67. Section 26(4) EQA – *"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."

68. The fact that an employee has put up with particular conduct or joined in with "banter", does not necessarily mean that the conduct is not "unwanted" (*Munchkins Restaurant Ltd and another v Karmazyn and others UKEAT/0359/09).*

69. Conduct that is related to a protected characteristic (in this case religion and race) because of the form it takes can amount to unlawful harassment even if the claimant does not possess the relevant protected characteristic. Therefore, engaging in racist or religious "banter that might offend co-workers regardless of their race or religion can amount to unlawful harassment "related to a protected characteristic (*English v Thomas Sanderson Ltd [2008] EWCA Civ 1421*).

70. The question of whether the alleged unwanted conduct has the effect required by section 26(1)(b) is to an extent assessed from B's subjective viewpoint in that section 26(4) EQA states that a Tribunal must take B's perception (as well as the other circumstances of the case) into account. However, A's conduct will only be

considered to have the necessary effect on B where it is reasonable for the conduct to have that effect.

71. The Tribunal has given consideration to the guidance given in *Weeks v Newham College of Further Education UKEAT/0630/11* when determining whether the required environment was created in this case and, in particular, has given consideration to the following:

    71.1. A decision of fact such as this must be sensitive to all the circumstances. Context is all-important.

    71.2. The timing of the claimant's objection to the conduct has an evidential importance. However, tribunals should be careful not to place too much weight on timing. Where conduct is directed towards the sex of the victim, it may be very difficult for her personally, socially or culturally to make an immediate complaint.

    71.3. In *Richmond Pharmacology v Dhaliwal 2009 ICR 724* guidance on the relevant test was given and it was noted that the claimant must have actually felt or perceived his dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions, the tribunal should then consider whether it was reasonable for him or her to do so.

    71.4. It is well established that the Tribunal must consider whether it was reasonable for the conduct to have the effect on the particular claimant.

72. In determining whether the respondent was an employee of the respondent, the Tribunal gave consideration to section 40 EQA "*An employer (A) must not, in relation to employment by A, harass a person (B)—*

    (a)who is an employee of A's;

    (b)who has applied to A for employment."

73. Sections 83(1) and (2)(a) EQA state *"(1)This section applies for the purposes of this Part.*

    (2)"Employment" means—

    (a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;"

74. Section 109(1) – (4) EQA states "*(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

    (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.

(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."

75. Subject to the defence in section 109(4) EQA, an employer will be held "vicariously liable" for harassment committed by an employee in the course of employment.

76. In line with *Jones v Tower Boot Co Ltd [1997] IRLR 168 (CA),* the words "in the course of employment" are not restricted to the narrow meaning used to establish vicarious liability in tort, but are to be given their ordinary meaning. The Court of Appeal stated that "Tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words 'in the course of employment' in the sense in which every layman would understand them".

77. In determining whether the section 109(4) EQA defence has been established (noting that the onus here is on the employer to establish the defence), in line with *Canniffe v East Riding of Yorkshire Council [2000] IRLR 555* Tribunals should take a two-stage approach, looking first at what steps the employer took and then considering whether there were other reasonable steps that it could have taken.

78. In determining the harassment aspects of this case, the Tribunal reminded itself of the provisions of sections 136(1)-(3) EQA that state *"(1)This section applies to any proceedings relating to a contravention of this Act.*

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision."

79. In line with *Ayodele v Citylink Ltd [2017] EWCA Civ 1913*, the approach to the burden of proof is: Can the claimant show a prima facie case? If no, then the claim fails but if yes, then the burden shifts to the respondent and consideration must be given to whether the respondent's explanation is sufficient to show that it did not discriminate.

80. However, the Court of Appeal has emphasised that the burden of proof provisions "need not be applied in an overly mechanistic or schematic way" (*Khan and another v Home Office [2008] EWCA Civ 578*). The *EHRC Employment Statutory Code of Practice* (EHRC Employment Code) also confirms that where the basic facts are not in dispute, a court or tribunal may simply consider whether the respondent is able to prove, on the balance of probabilities, that they did not commit the unlawful act (*paragraph 15.35 EHRC Employment Code*).

81. In determining the level of compensation to award the claimant for the harassment, the Tribunal took particular note of section 124(1)-(2) EQA – *"This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

(2)The tribunal may—

(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b)order the respondent to pay compensation to the complainant;

(c)make an appropriate recommendation."

82. The Tribunal reminded itself that when awarding compensation that the aim is to put the claimant into the financial position she would have been in had the (in this case) harassment not taken place (*Ministry of Defence v Cannock and others [1994] ICR 918*).

83. To be recoverable, the loss suffered by the claimant must be directly attributable to the act of (in this case) harassment (*Coleman v Skyrail Oceanic Ltd [1981] IRLR 398*). However, the normal tortious principle of "remoteness of loss" does not necessarily apply in discrimination cases.

84. It is noted that a Tribunal may take account of the likelihood of a claimant losing their job for non-discriminatory reason in the future and take account of such matters in assessing loss (paragraph 72 - *O'Donoghue v Redcar & Cleveland Borough Council [2001] EWCA Civ 701.)*

85. It is well-established that the Tribunal may make an award for loss of earnings and/or injury to feelings. An award for injury to feelings should be compensatory and not punitive.

86. While there is no minimum sum that can be awarded for injury to feelings, an award of less than the lower limit of the lowest band (see below) may diminish respect for the law (*Armitage and others v Johnson [1997] IRLR 162 (EAT)).*

87. When determining the amount of compensation for injury to feelings, awards should not be so high as to amount to a windfall, but neither should they be so

low as to diminish respect for the law. They should bear some broad similarity to the range of awards in personal injury cases. Tribunals should also take account of the "value of the sum in everyday life", either in terms of what it can buy, or its value in relation to earnings (*Armitage and others v Johnson [1997] IRLR 162 (EAT)*; approved by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*).

88. Paragraph 65 of the *Vento* judgment, set out three bands of potential awards:

- An award in the lower band would be "appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".
- An award in the middle band "should be used for serious cases, which do not merit an award in the highest band".
- An award in the top band would be made "in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race".

89. The 5 September 2017 Presidential Guidance which applies to claims presented on or after 11 September 2017 but before 6 April 2018 sets the above bands as follows:

- A lower band of £800 to £8,400.
- A middle band of £8,400 to £25,200.
- An upper band of £25,200 to £42,000, with the most exceptional cases capable of exceeding £42,000.

90. In determining the claimant's claims for unpaid commission, holiday pay and car allowance, the Tribunal had regard to section 13 ERA that states "*An employer shall not make a deduction from wages of a worker employed by him unless—*

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly

payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

91. In determining the claimant's claim that she was entitled to mileage expenses, consideration was given to the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994.

Conclusions/Reasoning

Mr Norminton's Employment Status

92. In light of the provisions of section 83(1)-(2)EQA, it is not necessary for the Tribunal to determine whether or not Mr Norminton was self-employed. It is only necessary for the Tribunal to determine whether or not Mr Norminton was under "a contract personally to do work".

93. The respondent produced a document entitled "Appointment to self-employed commercial consultant" between it and Mr Norminton dated 18 April 2017 that described Mr Norminton as self-employed. The claimant did not specifically rebut whether Mr Norminton was self-employed or not and instead focused upon the way in which she worked with Mr Norminton on a day-to-day basis and her understanding (on occasion by reference to the background documents) as to how the practical arrangements between Mr Norminton and the respondent operated.

94. It is noted that the consultant agreement between Mr Norminton and the respondent makes no provision for Mr Norminton to provide his services to the respondent otherwise than personally. There is no provision for him to carry out his duties via a substitute and the agreement is drafted in a way that anticipates Mr Norminton carrying out his services personally. The document entitled “Self-Employed Information Sheet” that was also provided by the respondent takes a similar approach and seeks information solely from Mr Norminton as an individual.

95. These arrangements were consistent with Mr Norminton providing his services personally.

96. The claimant’s evidence was that the bulk of her dealings during recruitment, during the course of her for employment, when she went off sick and when she resigned were with Mr Norminton directly. It was Mr Norminton that asked for details of her sales (not that there were any), the copies of statements, details of what efforts she had made to generate sales and to whom the claimant reported on such matters.

97. On at least one occasion, (29 July 2017 – see page 9 of the claimant’s bundle) Mr Norminton described himself as "Chris Norminton Senior Sales Manager Cutpay Merchant Services" in his email footer. On the balance of probabilities, it is also accepted that Mr Norminton introduced himself to the claimant on 12 July 2017 as the respondent’s “Regional Sales Manager”. Mr Norminton’s email address ended “@cutpay.co.uk”.

98. It was Mr Norminton who made first contact with the claimant during her recruitment. Mr Norminton was also the individual who (in his 17 July 2017, 08:11 text on page 12 of the claimant’s bundle) invited the claimant to her interview on 19 July 2017. Whilst Mr Miah was also involved in aspects of the claimant’s recruitment, Mr Norminton was also involved throughout and undertook the bulk of the communication with the claimant. He was present at the meeting on 19 July 2017 when the negotiations regarding her employment terms took place.

99. By his own admission, Mr Norminton “delivered most of the training” on 1 – 2 August 2017. He states in his statement that he was often “stood at the front, delivering the course in training.” It is noted that Mr Miah and Mr Rashid were also present.

100. It is accepted that at the training that Mr Norminton said to the claimant that she would be reporting to him. The claimant made specific reference to this in her statement and gave evidence to the Tribunal at the hearing that Mr Norminton was her line manager. In fact, she alleged that the rest of the sales team (with the exception of Sharon Owers, who reported direct to Mr Miah) reported to Mr Norminton.

101. The Tribunal noted the contents of Mr Norminton's statement in this regard. However, whilst Mr Norminton emphasised that he was not an employee of the respondent and was self-employed, he at no stage suggests that he was not obliged to provide services personally. In fact, the content of his statement suggests that he was highly integrated into the respondent's organisation and was expected to provide services personally.

102. As can be seen from the example texts set out below, the approach taken to Mr Norminton to the claimant was consistent with him being her line manager:

    102.1. 12 July 2017 – 17:22 – "did you get my email? Let me know your thoughts, you can have a great career and future with Cutpay I believe X";

    102.2. 12 July 2017 – 19:12 – "great to speak to you again and excited to hopefully have you on board subject to meeting next Wednesday for final interview/coffee etc. If you can reply with your thoughts to the pay proposal and I will get something in place vehicle wise. Chris";

    102.3. 19 July 2017 – 14:56 – "great to meet you today, happy with everything? Really looking forward to working with you.";

    102.4. 28 July 2017 – 09:44 – "can you let me know if you want accommodation or travelling from home? I know it is not far, just trying to sort hotels etc.";

    102.5. 28 July 2017 – 17:14 – "we start at 10 AM, I will be in from 8ish, I'm staying up there Monday and Tuesday nights. Have you had the official invitation email with itinerary.";

    102.6. 2 August 2017 – 17:14 – "can you ring Rob in the office in the morning to get you sorted on salesforce, sure you are not missing a capital or something. [Mr Norminton then provides appointment details for the claimant to attend a potential customer]. Doesn't have EPOS would like, will have Merchant statement with paymentsense.";

    102.7. 3 August 2017 – 17:19 – "I have ordered some new flyers and business cards for you.";

    102.8. 5 August 2017 – 17:25 – "ha ha I am hardly in, I am in Newcastle tomorrow and another day or so this week so will just stay up there, then out and about with new reps X.";

    102.9. 5 August 2017 – 17:25 – "loads of things wrong with me… I am a work addict at the minute mind! We've been delayed this new

launch by 2 months getting new contacts in place, like a coiled spring ha x.";

102.10. 5 August 2017 – 17:32 – "make sure your diaries full, what are your plans today anyone to see? Cold calling? Any news on Friday appointment moving?, x.";

102.11. 5 August 2017 – 17:45 – "the salesforce is doing my head in ha, I'm trying to plan tomorrow, but don't know they have any more appointments X Come on Lauren!";

102.12. 5 August 2017 – 17:46 – "got rid of him [i.e. Tony] today X. Just said I did not think it would work. He never replied to any emails/calls/texts so as far as I am concerned we will not be able to work together X.";

102.13. 8 August 2017 – 17:44 – "can you move the Friday app that is now tomorrow in salesforce. Also send me them statements and I reckon we will be able to sign some tomorrow afternoon or evening X.";

102.14. 10 August 2017 – 07:39 – "morning, need them statements for 9, I've got a meeting with Sunny, I'm getting grief do need to show everyone has stuff on Cheers.";

102.15. When the claimant responded saying she would sort the statement out later MrNorminton replied "Grrrrrrrr. I've been asking for them for 2 days, I've got Sunny on my back.";

102.16. 10 August 2017 – 19:29 – **"**Think I've got you an epos to sign up next week - already agreed the deal! Do not say I do not look after you.";

102.17. 10 August 2017 – 19:31 – "remember to send the figures spreadsheet when your home – you think you will get some of the pubs you have statements for in?";

102.18. 10 August 2017 – 19:38 "your not the type to jack in after one week, I'd be disappointed not only from a company point of view but as a person – you are better than that. You have more potential in this industry than anyone sat on that course you have it all apart from organisation hahaha. You'll be number one next week I'm with you whenever you need me as I want you to be number oneX.";

102.19. 24 August 2017 – 10:10 – "okay will any of the five come in today? Thank you please I need to find 4 deals somewhere today.";

102.20. 24 August 2017 – 15:11 – "how's it going hart I'm getting nervous.";

102.21. 24 August 2017 – 17:23 – “anything today so far?, Need to do my report.”;

102.22. 25 August 2017 – 15: 54 – 18:28 “any progress? Come on use this hot love look you have going on today. Sarah – it really is more important you scan the gills stuff in than anything else before six thanks. Have you done it?”;

102.23. 26 August 2000 1707:56 – “no stats again or paperwork? Come on help me out here.”.

103. The content of the above texts are consistent with the claimant’s evidence that Mr Norminton managed her on a day-to-day basis, did so personally and was highly integrated into the respondent’s business. Further, it is apparent from the texts that there were increasing concerns from Mr Norminton (due to internal pressure within the respondent) about the claimant’s performance.

104. The tribunal concludes that Mr Norminton line managed the claimant on a day to day/week to week basis. The claimant reported to him, was answerable to him in relation to her poor sales figures and in relation to the way in which she carried out her day-to-day activities.

105. On the balance of probabilities and based on the reasons set out above, the Tribunal concludes that Mr Norminton was contracted to personally to do work for the respondent and so was an employee of the respondent within the meaning of section 83(2)(a) EQA. Further, pursuant to section 109(1) EQA the conduct of Mr Norminton set out below was done within “the course of his employment” as per the meaning ascribed that phrase as detailed in the “Law” section of this judgment. The respondent brought no evidence in respect of the potential defence at section 109(4) EQA and so the Tribunal finds the respondent liable for Mr Norminton’s harassment as detailed below.

106. In any event, even if it had been concluded that Mr Norminton was not an employee with the meaning of section 83 EQA the Tribunal would readily have concluded (based on the facts found above) that Mr Norminton was an agent of the respondent within section 109(2) EQA thereby (in the alternative) rendering the respondent vicariously liable for Mr Norminton’s harassment as detailed below.

Harassment Related to Race/Religion

107. The Tribunal directed itself to the law as set out in the “Law” section of the judgement set out above.

108. The claimant gave credible and cogent evidence on the comments made by Mr

Norminton regarding race and religion as follows:

108.1. On 2 August 2017 Mr Norminton said to the claimant - “That is just when you sell to pakis.” - referring to the lowest rates of interest allowed by the respondent;
108.2. 11 August 2017 Mr Norminton sent a text at 17:08 (see page 79 of the claimant’s bundle) – “Tell him to fuck off, I bet he is a “sunny” too.” - referring in a derogatory way to Sunni Muslims in the context of an attempt by a salesman at PC World seeking to sell the claimant allegedly unnecessary additional equipment/software;
108.3. In late August 2017, Mr Norminton spoke to the claimant about her attendance at the Mela cultural festival/tradeshow and said that the event would be “full of pakis”.

109. Whilst Mr Norminton denied in his statement making such comments, this evidence was set out in an unsigned and undated statement and was not capable of being tested by way of cross examination. Consequently, it was given limited weight.

110. Mr Rahman sought to explain the second comment above by arguing that it was a reference to Mr Sunny Miah being a good salesman and so that Mr Norminton’s comment was, by reference to Mr Miah, a compliment to the PC World representative’s sales skills.

111. The Tribunal found this explanation unconvincing and, in light of the requirements of section 136 EQA and the overall lack of credible challenge to the claimant’s evidence, accepted that the comments were made and were, in the case of those referred to at paragraphs 108(1) and (3) related to race with the remaining comment related to religion.

112. The claimant also gave clear testimony (both in her witness statement and her oral evidence) that she had done nothing to invite or encourage such comments and she was offended by them. The claimant was also clear that although she was offended by the comments, they did not have a lasting effect upon her. She merely thought the comments offensive at the time.

113. The claimant gave no evidence in support of the contention that Mr Norminton's comments had the purpose of creating the environment anticipated by section 26 (1)(b) EQA and so no finding is made that this was Mr Norminton's purpose.

114. It is found that Mr Norminton's comments/texts in this regard were unwanted within the meaning of section 26(1) EQA and that they had the effect of creating an offensive environment for the claimant within the meaning of section 26(1)(b)(ii) EQA.

115. Therefore, in relation to the comments referred to above in paragraph 108 the Tribunal finds that Mr Norminton harassed the claimant contrary to section 26(1) EQA by engaging in unwanted conduct related to race in respect of the texts set out above in paragraphs 108.1 and 3 and harassed the claimant by engaging in unwanted conduct related to religion in relation to the text at paragraph 108.2.

Sexual Harassment in the period 1 August to 8 August 2017 (the "Initial Period")

116. The claimant alleged that she was subjected to sexual harassment contrary to section 26(2) EQA during the Initial Period by way of texts and phone calls from Mr Norminton.

117. The claimant presented no evidence in support of her contention that she had received telephone calls capable of coming within section 26(2) EQA. The claimant provided no dates, no content and no other testimony on the issue except to say that she had received telephone calls where Mr Norminton made inappropriate comments.

118. Whilst the Tribunal reminded itself of the burden of proof set out in section 136 EQA, the claimant did not establish the required prima facie case in respect of any such alleged telephone calls. On this basis that the Tribunal concluded that the claimant had not made out her case in this regard and therefore the allegations regarding the alleged telephone call were not accepted.

119. In relation to the texts that the claimant alleged amounted to sexual harassment in the Initial Period, she did not identify specific text on specific days within her claim documents, her statement or in her testimony. Despite the Tribunal's request that during the delay at the hearing that the Claimant be in a position to identify the specific texts about which she was complaining, the claimant's approach was more general in that she alleged that all texts of a sexual nature from Mr Norminton were unwanted (albeit that she was not offended by the first couple of texts).

120. Having examined all the texts in the Initial Period to determine what was said in the texts by Mr Norminton and the claimant, who initiated the texts of a sexual nature and how each individual responded to the other, the Tribunal does not accept either that the texts from Mr Norminton were unwanted by the claimant nor that in this Initial Period that the texts created the environment required by section 26(1)(b) EQA.

121. During the Initial Period both Mr Norminton and the claimant sent texts of a sexual nature to each other. Sometimes Mr Norminton was the instigator of a particular text or batch of sexual texts and sometimes the claimant was the instigator of such texts. The claimant often responded in kind to sexual texts initiated by Mr Norminton and, during the Initial Period, did not appear in any way to be offended or an unwilling participant in the relevant exchanges.

122. The claimant was specifically asked about this by the Tribunal. She alleged that her previous experiences of domestic violence and generally poor relations with past partners meant that her approach to men generally was to keep them happy. She emphasised that her main reason for responding in kind to Mr Norminton's sexual texts was because she was frightened about losing her job due to the pressure that she alleged Mr Norminton was placing upon her due to her poor sales record. Essentially, the claimant alleged that she was trying to keep Mr Norminton happy by responding to the sexual texts primarily because she was fearful for her job due to a lack of sales.

123. In the initial exchange of texts, it was the claimant that first moved the exchange onto a more informal footing. In her text at 17:13 on 29 July 2017 she stated in

response to there being the possibility of the team going for a drink after the initial training session on 1 August 2017 and potentially leaving her car "It is not the car it is my dignity you have to worry about hahaha." At 17:14 the claimant's response to Mr Norminton's stating that he was in his hotel was "Have a metrosexual bath with candles and get your zen on… You'll need it working with me."

124. Whilst Mr Norminton responded in a similar tone, it was the claimant that first adopted a tone that was less formal and more sociable. This is not to say that this was an invitation to Mr Norminton to send texts of a sexual nature. However, it was felt by the Tribunal that the Claimant's approach in this regard was contrary to her evidence that she felt concerned for her job or was motivated to keep Mr Norminton happy. The move to a more sociable and less professional/arm's length tone was instigated by the claimant.

125. Further, these texts were sent even before the claimant had commenced her employment, had attended the induction days or had a sales target. This cast doubt on her reasons for sending texts that were non-work related and it was considered by the Tribunal that these opening texts were significant when viewed in the context of the claimant's overall allegations and her justification for the sexual texts that she sent later.

126. On 3 August 2017 at 17:15 Mr Norminton said in relation to the claimant hoping to make her first sale "Better make it soon, I do not want my prediction of you getting the first one in to be wrong…" The claimant replied "Bet you say that all the girls ha ha." Mr Norminton replied "You would not believe what I say to girls! Even I do not believe it!"

127. There then followed a further exchange of texts on 3 August 2017 (the time is not clear but the texts are marked 17:15 – 17:18) where the claimant asked whether any of the other team had secured any sales and then went onto say "Or am I still in with a chance of popping the cherry." Apparently, this was a phrase used during the induction about securing an initial sale.

128. Mr Norminton replied "No nothing official, we could pop your cherry tomorrow." The claimant stated "Yeyyyy!!!!" And then said "Don't normally do anything on a first date like…". Mr Norminton replied "Not that type of girl…" and the claimant replied "Nah I'm classy as f%*k". Mr Norminton replied "Yeah I thought that…" And the claimant said "I can sense the sarcasm in your thumbs."

129. The exchange continued with Mr Norminton saying "What thumbs up?" The claimant replied "Will it be frowned if I have gin number 2???" Mr Norminton replied "Boo it would be more frowned upon if you didn't…" The claimant replied "Like you ya mean? #Pussy. Ps that's not bullying and harassment."

130. There was a further exchange in which Mr Norminton indicated he had been out for dinner and the claimant asked "That old chestnut. Hot date was it?" The exchange continued for a little longer but it was Mr Norminton who moved matters back to a more professional/work based footing.

131. Whilst this was mild and was not an invitation to more sexually explicit texts, it was the claimant that first introduced the sexual element to the texts by reference to the double entendre of "popping the cherry" that she then made more personal and suggestive by stating that she did not "normally do anything on a first date

like…".

132. The Tribunal considered that the approach taken by the claimant was not consistent with her position that she was simply keeping Mr Norminton happy because she was concerned about retaining her job.

133. There were further exchanges at 17:19 on 3 August 2017 and again it was the claimant that moved the subject away from work matters by suggesting that she had bought "night vision goggles" (apparently a reference to spying on people) and that she "thinks like a man". Mr Norminton replied "What?!? You think with your Dick? Knew there was something about you…". The claimant responded "So it's true… All men do think with [phallic aubergine image]. I KNEW IT!!!". Mr Norminton replied "That's what it's for". The claimant responded "I hope you don't type with it as well." Mr Norminton then said "It's like duck tape 101 uses." The claimant responded "So that's why it's called Dictaphone."

134. This particular exchange ended with the claimant sending three emojis with their mouths open. Mr Norminton responded "Mouth open at the wrong time there!!!!" The claimant then said "hahahahahaha!!!! I've got a mental picture that just won't quit." Mr Norminton responded "Sleep well with that thought" and the claimant said "I'll not sleep for weeks now."

135. The texts continued in this familiar way the next day on 4 August 2017 with Mr Norminton at 12:04 saying to the claimant "Love you" and the claimant responding "Everyone does. You're only human."

136. The texts continued in a similar tone later on 4 August 2017 with both the claimant and Mr Norminton exchanging texts about what they were doing that night and of a mildly flirtatious nature. Both responded in kind the claimant gave no indication that she was offended by the comments. The claimant made a reference to her rule that she did not engage in sexual activity until "date 10". This was a recurring theme in subsequent texts.

137. A similar tone continued on 5 August 2017 when at 17:22 the claimant said "Well… That and how much of the slave driver you are X." Mr Norminton replied saying "That bit hasn't started yet and are we talking work still…." The claimant invited Mr Norminton to choose a subject to talk about and after a further exchange of texts, he said "It would just turn to utter filth ha ha ha." The claimant replied "Oh would it?? I'm not sure I'm mentally stable enough mood for that today… plus ya don't want a sexual harassment claim do ya? Hahahaha." Mr Norminton responded "I have to stay professional." The claimant responded "I think that went out of the window a few days ago." The claimant's next comment was "I'm sure Sharon will kiss ya tail [meaning penis] if you promote her. Sorry… I opened the gin."

138. When Mr Norminton asked how much the claimant was blushing she replied "Too much cos I used to words "tail" and "kiss" to my boss. Ha ha ha ha this is why I was self-employed for so long ha ha ha."

139. The exchanges continued at 17:23 with Mr Norminton accusing the claimant of flirting. The claimant said "Oh sorry… I really didn't mean to make you feel uncomfortable or anything… feel shit now." Mr Norminton said "Who said you had made me feel uncomfortable. Ha ha ha ha." The claimant replied "Oh I dunno… I'm watching what I say now don't want you to feel like I'm being

inappropriate or anything." Mr Norminton replied "Don't be daft. I don't think you could ever say or do anything I find inappropriate."

140. Whilst the exchanges to this point had been flirtatious and to some extent sexual in content from both parties, the claimant then responded by making matters more explicit by saying "I won't flash my gash at you in the office or anything so you're safe… Cannot be held responsible for gin Harty mind X."

141. Mr Norminton sought clarification as to what was meant by "Gin harty" and the claimant explained that she is a liability when she has been drinking gin. Mr Norminton then said "Flashing all over? Ha ha ha ha." The claimant replied "Only cos I don't want Sunny to see! Think it will scar him for life ha ha ha. I do not know if I flash on gin… I don't think I do?! If I am in my hot tub it is a different story ha ha."

142. The texts on 5 August 2017 continued in a similar tone with the claimant and Mr Norminton exchanging texts of an increasingly sexual nature and with both parties contributing to the sexual content with no indication that either was concerned or offended. Both parties escalated the sexual content or introduced it into exchanges of text that were otherwise non-sexual. This tone continued on 7 August 2017.

143. Whilst it is accepted that the claimant may have had an underlying desire to please, it is not accepted that during the Initial Period that Mr Norminton's sending of sexual texts amounted to "unwanted conduct" within the meaning of section 26(2) EQA or that his behaviour had the purpose or effect of creating the environment required by section 26(1)(b) EQA.

144. The claimant initiated the sexual texts with the double entendre referring to "popping cherries" in her text on 3 August 2017 (referred to in paragraph 127-128 above). This was the first text with sexual content. Whilst Mr Norminton responded in kind, it was the claimant who first initiated the sexual content of the relevant exchanges.

145. Further in subsequent exchanges on 3 August 2017, both individuals sent texts of a sexual nature but the intensity of the sexual content was primarily escalated by the claimant (see paragraphs 126 - 141 above**)**.

146. There was an exchange of texts on 7 August 2017 (marked 17:42 – 17:43) that were extremely sexually explicit with the claimant and Mr Norminton exchanging in detail the sexual acts they would like to perform on each other and the effect it would have. These texts were lengthy, highly explicit and mutual.

147. The explanation by the claimant that she behaved in this way because she felt under pressure to secure sales and was worried about her job is not accepted. The first mildly sexual text was sent on 3 August 2017 by the claimant. This was only two days after her employment commenced and only the first day after the initial training/induction had been completed.

148. The most sexually explicit texts were sent on 7 August 2017, only a week after the claimant commenced employment.

149. There had been no suggestion within the texts or other evidence presented to the Tribunal at this stage or during the Initial Period that the Claimant's job was under

threat due to her lack of sales. She had only been in the role for a very short time and, apart from no such pressure being evident, it is also the Tribunal's view that her job would not have been and was not under threat at this stage. It was too early in her employment for this to be a credible explanation.

150. Whilst acknowledging that it is possible for an individual to "go along" with such behaviour or office banter of this type and yet for the conduct still to be unwanted and noting the requirements of section 136 EQA and section 26(4) EQA, it is not accepted by the Tribunal this was the case during the Initial Period.

151. It is the Tribunal's view that the claimant willingly participated in the exchanges and was often the instigator and escalator of the sexual content and that during the Initial Period that the conduct was not unwanted and that it did not have the effect required by section 26(1)(b) EQA.

152. Consequently, it is the Tribunal's finding that there was no sexual harassment contrary to section 26(2) EQA during the Initial Period.

Sexual Harassment in the period 9 August to 5 September 2017 (the "Latter Period")

153. On 9 August 2017, the claimant and Mr Norminton met to attend some sales appointments together. The claimant conceded that the references in her statement to the particular customer were incorrect and that Mr Norminton was correct as to the nature of the appointments.

154. The claimant was due to pick Mr Norminton up from the station but she had a tyre blowout that morning and had to arrange to meet her ex-partner to borrow his car. The claimant explained in her evidence to the Tribunal that she found meeting her ex-partner distressing.

155. The claimant and Mr Norminton sought to attend the initial appointment but the potential customer was not in and so they went to the second potential customer. This customer was provided with a quote and Mr Norminton and the claimant left. The claimant alleged that Mr Norminton asked how far the claimant's house was from where they were working with a view to going there together.

156. The claimant gave convincing evidence that this suggestion made her feel extremely uncomfortable and she lied about the distance to her home and suggested that they go to the Galleries shopping centre for a coffee instead. During this drive, the claimant alleged that Mr Norminton deliberately touched the claimant's leg, squeezed her knee and raised his hand to her lower thigh and that this was done in a sexual way.

157. Again, the claimant gave evidence that this was unwanted conduct and that she did not want, encourage or accept such physical contact and that she was upset by it.

158. It is accepted by the Tribunal that the claimant did not want this physical contact and was concerned about the possibility of Mr Norminton coming to her home. The claimant said in her 21 March 2018 statement "I instantly realised the situation had escalated and was no longer manageable in the mental state I was in. I tried my best to try and keep the conversation work-related and my responses short and to the point but this did not deter Mr Norminton."

159. The Tribunal heard evidence from Lauren Taylor who was not present for any of the events of 9 August 2017 and did not witness anything directly. However, she did give evidence as to the distressed state that the claimant was in when she telephoned Ms Taylor and told her what had happened.

160. The claimant said in the exchange of texts between her and Mr Norminton marked 14:31 on 9 August 2017 "I know. I am sorry I was standoffish if that is how you felt… Just needs to keep my head in work mode till I get some traction sales wise. X"

161. Mr Norminton replied "We can just keep it work if you would prefer gorgeous X. I'd personally like 24 hours locked in a hotel room service and cuddles X".

162. There was a further exchange later that day where the claimant said "Hey! Sorry kept my head down this afternoon! Yeah went OK. No quick hits but lots to go off so I'm happy(ier) than I was x."

163. Mr Norminton replied "OK that's good then – so why did you keep your head down – leaving as just work? X."

164. The tone and content of this exchange is consistent with the claimant's evidence that Mr Norminton's advances and conduct had been unwanted and had had the effect required by section 26(1)(b)(ii) EQA.

165. It is accepted by the Tribunal that the claimant did not want the physical contact with Mr Norminton on 9 August 2018. Whilst the Tribunal also concludes that the claimant had been a willing participant in the prior sexual texts, it is accepted by the Tribunal that the claimant realised on 9 August 2017 that things had got out of hand from the claimant's perspective and that matters had progressed to a point that was unwanted and created the effect required by section 26(1)(b) EQA.

166. In reaching this conclusion the Tribunal has had regard to the requirements of section 26(4). It finds that the claimant did genuinely feel that Mr Norminton touching her and asking to go to her home created an intimidating, humiliating and offensive environment for her. The claimant had been subject to past domestic violence and was still in the process of recovering from the ill-effects of her last relationship. She remained vulnerable and it is considered that this contributed to the claimant's reaction to Mr Norminton's advances on 9 August 2017 as against the approach she took in the texts. The claimant said in her evidence that "Texts are one thing but trying to come to my home or touching me is another thing."

167. The Tribunal also gave careful consideration to the other circumstances of the case and, in particular, to the texts that were disclosed. As is detailed above, the content of the texts immediately after the meeting on 9 August 2017 suggested a change of tone between the claimant and Mr Norminton and that his advances that day had been rejected.

168. As is detailed below regarding the Latter Period, the overall tone of the exchanges between Mr Norminton and the claimant changed, with the sexual content that had previously been evident from the claimant virtually disappearing. During the Latter Period, the claimant was not the instigator of the sexual content and did not tend to encourage Mr Norminton's ongoing sexual comments. Her

approach was markedly different from what had gone before.

169. These observations are all consistent with and support the evidence given by the claimant that the conduct on 9 August 2017 was unwanted and also supports the claimant's position that she was offended, humiliated and intimidated by Mr Norminton's physical advances on 9 August 2017.

170. Having concluded that the conduct had had the effect set out in section 26(1)(b)(ii) EQA, the Tribunal considered whether it was reasonable for the unwanted conduct to have this effect on the claimant. The Tribunal determined that the claimant being touched on her leg, knee and thigh by her line manager (when she did not want to be), while she was driving (and so could not easily avoid the contact) and in circumstances where she was still in a vulnerable state following her previous relationship difficulties was a situation where it was reasonable for this conduct to have the effect set out in section 26(1)(b) EQA. .

171. Consequently, the Tribunal finds that Mr Norminton did engage in unwanted conduct of a sexual nature on 9 August 2017 by touching the claimant and that, having considered the requirements of section 26(4) EQA, that the conduct had the effect set out in section 26(1)(b) EQA.

172. The claimant and Mr Norminton continued to exchange texts after their meeting on 9 August 2017. In examining the texts in the period following the 9 August 2017 meeting, the Tribunal concluded that there was a clear change of tone and approach by the claimant. She had not accepted or encouraged Mr Norminton's advances. It was apparent that the events of 9 August 2017 marked a shift in the claimant's attitude that the Tribunal concluded was consistent with the evidence the claimant had given that effectively things had got out of hand between her and Mr Norminton and that she did not want a sexual relationship with him.

173. During the Latter Period the claimant tended not to respond to or encourage the further sexual texts that Mr Norminton sent. Contrary to the approach that she had taken before, the claimant did not tend to escalate or initiate sexual texts. She was more focused on work and her tone was more that of a friend than sexual.

174. This change of approach was supported by the exchange of texts marked 19.30 on 10 August 2017. Mr Norminton said "You feeling better now? You seemed a bit stressed or off since I left yesterday X". The claimant replied "Oh things are just getting to me with work and I tend to just shut down and get on with things when I am like this." There was a further exchange where Mr Norminton stated "PS – do not shut off with me, as I really can help you work wise XXX". The claimant replied "What you mean? X" and Mr Norminton then said "You said you just shut off when you are stressed with work." The claimant replied "Oh. I meant I switch off to everything not work-related. You know like flirting and texting back and forth. Not to you altogether. X" Mr Norminton replied "ha ha ha I am not bothered about the flirting bit (well maybe a little ha) just did not want you switching off altogether and trying to do it all on your own – good luck tonight X".

175. This was a clear indication by the claimant (particularly when combined with her behavior and texts after the meeting on 9 August 2017) that she did not want to engage in flirting by text. This is also consistent with the claimant's evidence that about the events on 9 August 2017 and that she did not want the further sexual texts that Mr Norminton sent after 9 August 2017. It also supports her contention

that the sexual texts sent in the Latter Period had the effect set out in section 26(1)(b) EQA.

176. Despite the events of 9 August 2017, the claimant's change of tone and approach to the texts generally and her communicating her position in the texts set out above, Mr Norminton continued to send texts of a sexual nature.

177. The claimant maintained at the hearing that all the sexual texts (including those in the Latter Period) amounted to sexual harassment. The texts in the Initial Period have been addressed above. The Tribunal reviewed the texts in the Latter Period and sets out below those that it concluded amounted to unwanted conduct of a sexual nature that had the effect (the claimant did not allege or produce evidence that they had the purpose) of creating the environment set out in section 26(1)(b)(ii) EQA.

177.1. 9 August 2017 – 14:31 – "we can just keep it work if you would prefer gorgeous x. I'd personally like 24 hours locked in a hotel room, room service and cuddles x."

177.2. 9 August 2017 – marked 19:29 - "Nice, you getting more blow job tips x."

177.3. 10 August 2017 – marked 19:31 – "Don't say things like that, I'm just getting into bed to go to sleep. I'm now in bed thinking about you been over my desk, panties round your knees and well the rest just happens when my eyes close."

177.4. 10 August 2017 – marked 19:31 – "OK feel free to email me or text any of them you want help with as I'm staying in with a bottle of gin too! OK you can have an allowance till 6 if I can have an allowance on 10 dates."

177.5. 11 August 2017 – 19:21 – "I told you this, the fuckers tried to do it to me! They don't half try to shaft you up the arse without even spitting on its first X. I'll spit."

177.6. 11 August 2017 – marked 19:37 – the claimant said, "Well, he had a PC World uniform but you can tell he loved brown ha ha ha ha x". The claimant was referring to previous comment about brown clothes. Mr Norminton replied, "I bet you do too." The claimant stated "No fucking way!" Mr Norminton replied "Are we still talking clothes?" The claimant replied "You're not x."

177.7. 11 August 2017 – marked 19:38 – "Love a pep talk, or sex talk either I'm good for x."

177.8. 11 August 2007 – marked 19:38 – the claimant informed Mr Norminton that she will ring in 10 minutes as she was in the middle of something he replied, "You don't have to was just bird chat, ha ha ha x. Bored even. You tied up in an exciting way."

177.9. 11 August 2017 – marked 19:39 – In an exchange of texts, the claimant said, "But I tell you what… Fuck me over and I'll hunt you

down. Ha ha ha x." A number of texts are then exchanged and then Mr Norminton said "Can we just change that statement of "fuck me over" and add the word all in x."

177.10. 11 August 2017 – marked 19:39 – there's an exchange about past relationships and Mr Norminton texted the claimant "So cuddles wise, spoon or front?" The claimant replied in response to a previous comment Mr Norminton had made about having an "eventful" back story "Eventful??? X." Mr Norminton replied "Well, I've had a few relationships, but nothing exciting – XXX. What about you? X I'm in bed right now, you should be here on the right-hand side X."

177.11. Responding to Mr Norminton's previous question about cuddling, the claimant stated "On the cuddle. Q – I only cuddle for a bit. I need my own space to sleep X," Mr Norminton replied “Ha ha ha to the cuddle, any objection about been woken up in the night with something hard in your back? X

177.12. 11 August 2017 – marked 19:39 – "See we may have issues here, I hardly sleep, and if you're playing by the naked or sexy lady Nettie rule I'm going to be fucking horny so you would be getting disturbed, However you waking me up, or me waking up, finding myself in your mouth works well, deeper and slower the better. X"

177.13. 12 August 2017 – 06:48 – In response to the claimant’s advice to Mr Norminton and her offer for him to send her pictures of his "potential weekend romances" (he was away), Mr Norminton replied "Ha ha I’d rather just put you in my suitcase X".

177.14. 12 August 2017 – marked 19:39 – Mr Norminton sent a picture of himself to lying in bed to the claimant with the caption "Here is a potential weekend conquest for you. X. PS my room has a four poster bed. Is it wrong I'm thinking."

177.15. 22 August 2017 – marked 18:01 – "Yeah, I'm not overexcited by it, you're just excited at a day drooling over me X"

177.16. 23 August 2017 – 16:43 – "Is it wrong to be thinking about you being over my desk right now? Can I get away with saying I sent this to the wrong person?"

177.17. The claimant replied "You could but it would make you look like a Dick." Mr Norminton replied. "It was just in case you tried to do me for sexual harassment. What are you doing anyway?" The claimant replied “Trying to get some deals in…" Mr Norminton, then said "Not having my thoughts then?" The claimant replied, "Nope."

177.18. 25 August 2017 – 15:54 – "Any progress? Come on use this hot love, look you have going on today."

178. The claimant's responses to these texts and her general approach to Mr Norminton during the Latter Period was markedly different from the tone, content and approach taken prior to 9 August 2017. This is consistent with the claimant’s

evidence regarding her feelings about Mr Norminton's behaviour on 9 August 2017. Whilst the Tribunal did not accept the claimant's evidence that the texts during the Initial Period amounted to sexual harassment, it did find that the claimant's attitude to Mr Norminton's advances changed on 9 August 2017.

179. In the Latter Period, whilst there were still exchanges of a personal nature, the claimant tended either to ignore Mr Norminton's sexual texts, to respond to them in a way that changed the subject and/or that tended to discourage further such texts. Further, there were increased concerns during this period about the claimant's lack of sales. Both Mr Norminton (from his managers) and the claimant from Mr Norminton and because she was increasingly conscious about her lack of sales were under increased pressure in this regard.

180. By the claimant's admission, the respondent was increasingly concerned about her lack of sales and it is evident from Mr Norminton's texts to the claimant on 23 August 2017 (18:01), 24 August 2017 (08:25, 10:10, 15.11, 17:23 and 25 August 07:01, 12:45, 14:39, 18.02, 15:54, 16:59 and 18:28 and on 26 August 2017 at 07:56, 12:05 and 15:28 that he was pushing her to provide details of what she was doing to generate sales as Mr Norminton had to report to the respondent's management.

181. Whilst the claimant did not directly complain or object to the texts from Mr Norminton (although she did on 10 August 2017 indicate that her focus was not on flirting and sending texts back and forth) and she did on occasion continue to communicate personal and private information to Mr Norminton, the Tribunal accepted that the motive for such conduct was that the claimant was increasingly concerned about her job. Therefore, she was seeking to strike a balance between not encouraging or escalating the sexual texts from Mr Norminton but not alienating him either.

182. Her approach was consistent with her evidence that she found the ongoing sexual texts offensive and that they were unwanted.

183. Again, when considering whether Mr Norminton's conduct had the effect (the claimant did not evidence that his conduct had the purpose) of creating the environment anticipated by section 26(1)(b)EQA, the Tribunal had regard to section 26(4) EQA and took the same approach as detailed above in that it was accepted (for the reasons set out above) that Mr Norminton's sending of further sexual texts did create the required environment in the claimant's perception. The other circumstances of the case were also considered and the claimant's clear change of attitude and approach triggered by the events on 9 August 2017 were of particular relevance.

184. Consideration was also given to whether it was reasonable for the conduct to have the required effect. Despite the previous sexually explicit texts sent by the claimant, there was a clear change of tone and approach from the claimant that started on 9 August 2017. The claimant explained how she felt on 9 August 2017 and that she did not want matters to progress with Mr Norminton. Therefore, despite what had gone before and in light of the overall circumstances it was considered that the ongoing texts in the Latter Period (as set out above) did create the required environment and that it was reasonable for the conduct to have that effect.

185. Therefore, it is held that the texts in the Latter Period detailed above did amount

to unlawful sexual harassment contrary to section 26(2) EQA.

Unlawful Deductions and Breach of Contract

186. In relation to the claimant's allegation that she is owed £300 of car allowance. This claim is accepted.

187. At the meeting on 19 July 2017, the claimant was told that her basic salary would be £18,000 and not the £22,000 set out in the initial job advertisement. The claimant explained to the Tribunal that she knew with her outgoings that a salary at this level "would not work for her" and so sought to negotiate that the £300 car allowance would start at month one and not be subject to conditions rather than at month three and subject to conditions as set out in Mr Miah's email to the claimant 21 July 2017.

188. As evidenced by the claimant's email to Mr Miah on 23 July 2017 in which she stated "I'm delighted to accept, however can you just confirm that the car allowance will commence from month one as discussed and not month three as below" thereby restating the position that she understood had been agreed at the 19 July 2017 meeting. She did not receive a response to this email.

189. It was the claimant's testimony that the respondent had agreed to pay the car allowance at £300 per month from month one and this is borne out by the exchange referred to above. Mr Norminton referred to the issue in his witness statement and maintained that at the 19 July 2017 meeting that the car allowance would be paid after month three. No evidence was provided by Mr Miah who was also present at the meeting.

190. The document entitled "Terms and Conditions of Employment" dated 1 August 2017 and signed by both parties provides at clause 5.3 for the payment of a car allowance "if applicable".

191. There was also a text on 12 July 2017 at 19:12 from Mr Norminton to the claimant in which Mr Norminton stated "Great to speak to you again and excited to hopefully have you on board subject to meeting next Wednesday for final interview/coffee etc. If you can reply with your thoughts to the pay proposal and I will get something in place vehicle wise Chris."

192. The claimant's testimony on the issue of the car allowance was credible and supported by the background documents referred to above. Whilst Mr Norminton disputed the point, his witness statement was unsigned, undated and was not subject to test by way of cross examination.

193. On the balance of probabilities, it is found that the claimant has suffered an unlawful deduction from wages contrary to section 13 ERA and the respondent is ordered to pay the claimant £300 in this regard.

194. In relation to the £100 of commission that the claimant alleges she is due, this related to a "sign up" referred to at page 111 of the bundle of documents provided by the claimant in which Mr Norminton stated in a text "I have a sign up for you".

195. The claimant testified that she had driven Mr Norminton to an appointment on 17 August 2017 where Mr Norminton had made the sale but there was a need to

complete the relevant forms. Mr Norminton informed the claimant that the sale would be allocated to her and that as per the arrangements set out in the 21 July 2017 email to the claimant setting out the key terms related to commission that a £100 commission would be allocated to the sale of an "integrated EPOS bundle".

196. The Tribunal heard the evidence from the claimant on the issue of the £100 commission that she claims. The Tribunal found the claimant's testimony to be credible and accepts that the £100 commission was associated with the sale that was allocated by Mr Norminton to the claimant and is therefore payable.

197. The respondent's failure to pay this £100 commission amounts to unlawful deduction from wages contrary to section 13 ERA.

198. In relation to the mileage the claimant alleges she is due, it is accepted by the Tribunal that that the claimant was entitled to receive mileage expenses as set out at clause 5.3.3 of the claimant's contract of employment that states "The company shall reimburse you for the cost of fuel properly incurred during business mileage at a rate specified in the Company's Fuel Rate Policy." The Tribunal was not provided with a copy of this policy but heard testimony from the claimant that the rate was 32p per mile.

199. The claimant set out her claim for mileage expenses in both the schedules of loss she prepared (19 March 2018 and 8 January 2018) and also set out a calculation in the 21 November 2017 email that she sent to the respondent.

200. None of these calculations are satisfactory as a basis for the business mileage the claimant alleges she undertook. The claimant provides conflicting amounts of fuel expenditure during the relevant period and different percentages of personal mileage that she had undertaken.

201. Whilst it is accepted by the Tribunal that the claimant had undertaken some business mileage during the relevant period, she provided no credible evidence as to the amount of miles undertaken, receipts in support of the amounts expended nor a consistent assessment of the personal mileage that she had undertaken during the relevant period.

202. The burden of proof was on the claimant to establish the amounts she is due. However, the claimant failed to provide adequate evidence upon which to base a meaningful and fair calculation of the claimant's entitlement in this regard and therefore concluded that the claimant had not made out her case in respect of this aspect of her claim. Consequently, the Tribunal makes no award of business mileage.

203. In relation to the claimant's holiday pay, clause 9 of the claimant's contract of employment states she was entitled to 20 days holiday per year plus "normal bank and public holidays". The contract also sets the holiday year as 1 January to 31st December.

204. The claimant was employed from 1 August 2017 to 5 September 2017 totalling 36 days. On the basis that she is entitled to 28 days holiday per year (including bank holidays) the claimant had accrued 2.76 days holiday during the relevant period. The unchallenged evidence of the claimant was that she had not been paid any holiday pay during the course of her employment and therefore the Tribunal concludes that she is due to 2.76 days' holiday at the daily pay rate of

£69.23 totalling £191.07 holiday pay.

Remedy for Sexual Harassment

205. In terms of the claimant's damages for the harassment to which she was subjected, the Tribunal concluded that the claimant did not resign because of the harassment. Harassment was not mentioned in her resignation email and the emphasis was on the lack of contact during her sickness absence and the fact that she had not been paid.

206. Consequently, it is found that the claimant has not suffered any loss of earnings as a result of the harassment.

207. In respect of an award for injury to feelings, the claimant provided some background evidence as to the impact the harassment had upon her. In her 21 March 2018 statement, she referred to consulting her GP about the "issues facing me with my personal and professional life" and that she was "struggling to cope emotionally and was not sleeping" and her health was suffering. The claimant alleged in this statement that this was after the 9 August 2017 incident. However, she went on to say in the statement that her GP signed her off sick at this point. This was not the case and the claimant was not signed off sick until 29 August 2017. This was an inconsistency in the claimant's position regarding the impact the harassment had upon her.

208. She detailed the medication that she was prescribed and that she continues to take. She accepted in that statement that the problems she was facing were an "accumulation of things" that had been worsened by Mr Norminton's behaviour but that her state of health was not solely due to the harassment.

209. In her 21 March 2018 statement, she also alleged that she would find it hard to trust a male line manager and that the harassment had affected her confidence and general mental health and well-being.

210. The respondent in its ET3 provided social media postings in the period immediately after the claimant's resignation allegedly showing her enjoying herself with a view to casting doubt on the extent to which the claimant alleged that she had been affected by the relevant treatment.

211. The claimant gave limited evidence on the issue of injury to feelings to the Tribunal.

212. The sexual harassment consisted of the incident of touching on 9 August 2017 and then the ongoing texts detailed above. It was clear that the claimant was upset on 9 August 2017 as evidenced by her call to Ms Taylor. However, she continued to work and, although there was a change in tone and boundaries, continued to communicate with Mr Norminton about personal and sometimes sensitive background information. Whilst this may have been due to her concerns about her lack of sales, it also suggested that although the claimant was upset, offended and aggrieved by what had gone on that the extent of the impact on her of the harassment itself was less extensive than suggested by the claimant.

213. Whilst it is accepted that the claimant should not have had to put up with the sexual texts in the Latter Period and that this conduct and the events of 9 August 2017 amounted to sexual harassment, the content of the texts in the Initial Period

were often highly sexual and the claimant was a willing participant. While not suggesting that this means that the claimant had to tolerate further such behaviour, the Tribunal did conclude that when the overall context was considered that the extent to which the claimant was affected by the sexual texts in the Latter Period was less than she suggested.

214. The claimant did not mention the harassment as a cause of her resignation in the resignation email that she send to Mr Norminton. Again, this suggested to the Tribunal that its impact upon her was not as great as she suggested.

215. It is accepted that the claimant was affected by these texts and the behavior on 9 August 2017 and that she was upset and offended by them. However, it is not accepted that the impact from the harassment was severe or long-lasting.

216. Directing itself to the principle that compensation for injury to feelings should not be punitive and is intended to be compensatory and makes an award of injury to feelings of £3000 in relation to the unlawful sexual harassment.

Remedy for Race/Religious Harassment

217. In respect of the unlawful race/religious harassment, the claimant by her own admission found Mr Norminton's comments in this regard unnecessary and offensive at the time but they did not have the same impact as his direct treatment of her by way of his sexual harassment. Consequently, the Tribunal makes an award of £800 for injury to feelings in respect of the limited upset t that the claimant felt in this regard.

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Employment Judge Bauer

Date 3 May 2018

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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