Case No: 3305188/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms. E Domagala	v	Eunice Artisan Bakery Limited

Heard at: Bury St Edmunds **On:** 8, 9 & 10 October 2019

Before: Employment Judge: Mr. A Spencer
Ms. S Stones (non-legal member)
Mrs. S Blunden (non-legal member)

Appearances:
For the Claimant: Ms. D Janusz (Litigation Executive)
For the Respondent: Mr. M Laskowski (Director)

Interpreter: Ms. M Dubiel – Language: Polish.

JUDGMENT having been sent to the parties on 14 October 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant worked for the respondent as a sales assistant from October 2016. Her employment ended on about 14 November 2017 when she resigned without giving notice. The claimant went through early conciliation with ACAS between 6 February and 20 March 2018. She presented her claim form to the tribunal on 23 March 2018. The claim form raised complaints of unfair dismissal, sex discrimination, unlawful deduction from wages and failure to pay holiday pay.

2. The unfair dismissal claim was struck out following a hearing on 29 March 2019 because the claimant did not have 2 years' service with the respondent by the time her employment ended.

3. The claimant withdrew her claim for holiday pay during this hearing.

4. That left the following complaints for us to determine:

   4.1 a complaint of sex discrimination; and

   4.2 a claim for failure to pay wages.

5. The claims and the issues arising from those claims were clarified at the hearing on 29 March 2019. The key allegations and the legal provisions under which the claims are brought are set out in paragraph 8 of the case management summary prepared following the hearing on 29 March.

6. The respondent denies the claims for the reasons set out in its Response.

Witnesses

7. The claimant submitted witness evidence from two witnesses, they were the claimant herself Mr. Rafal Kalinowski. Mr. Kalinowski did not attend to give evidence before us. We were asked to take his written statement into account.

8. For the respondent we heard evidence from two witnesses, Mr. Marcin Laskowski the owner of the respondent company and Mr. Krzysztof Szydlowski a confectioner employed by the respondent.

9. With the exception of Mr. Kalinowski the witnesses gave evidence under affirmation and confirmed the truth of their written statements. We had the benefit of seeing the evidence of each witness tested under cross examination and the opportunity to put questions to each witness ourselves.

Documentary Evidence

10. We took into account the contents of an agreed hearing bundle and six additional pages of text messages exchanged between the claimant and Mr. Szydlowski in November 2017. These additional documents were produced by the claimant on the morning of the first day of the hearing. We provided the respondent with additional time to consider these new documents and on this basis the respondent did not object to these additional documents being taken into account.

11. The claimant sought to rely on further evidence that she produced on the morning of the second day of the hearing. This consisted of text messages from another witness. The claimant sought to rely on the evidence of that new witness. The evidence of that witness was set out in the form of a text message rather than a witness statement. The respondent objected to us taking into account this new material from a witness who was not being called to give evidence before us. We refused the claimant's application for the reasons we gave at the time. We have not taken that additional evidence into account.

Findings of Fact

12. Having heard the evidence our findings of fact are as follows:

    12.1 The respondent is a company in business as a bakery. They employ approximately 18 employees at a single site. The company is owned and run by Mr. Laskowski.

12.2 The claimant was employed by the respondent from October 2016 as a sales assistant.

12.3 Mr. Krzysztof Szydlowski is employed by the respondent as a confectioner. He began employment with the respondent in May 2017.

12.4 The claimant and Mr. Szydlowski were work colleagues and had common acquaintances. However, they were not friends outside work other than assisting each other from time to time. For example, the claimant helped Mr. Szydlowski with a mobile phone and by collecting him from the airport.

12.5 The claimant was not provided with a written contract of employment or a written statement setting out the main terms and conditions of her employment. The only document she was provided with was a brief email which is at page 60 of the hearing bundle which merely confirmed the claimant's employment status, working hours, pay, job title, annual holiday entitlement and prohibited smoking on the premises.

12.6 The respondent has a harassment and bullying policy, and a grievance procedure. However, these documents were kept in a manager's office and the staff were not aware of them or their terms. Mr. Laskowski's evidence was that the documents were not provided to the employees who were simply told that if they had a problem at work, they should raise it with their manager in the first instance, failing which they should raise it with him. Consequently, the policy had little practical relevance.

12.7 The claimant worked on a part time basis. She worked a total of 16 hours per week, working two days a week on a Saturday and a Monday. She was paid £450 per month by the time her employment ended. We calculate this to be £6.49 per hour. That calculation starts with annual pay of £5,400 which is £450 per month multiplied by 12 months. The claimant's annual working hours were 832 hours which is 16 hours per week multiplied by 52 weeks. Dividing the annual pay by the annual hours gives a figure of £6.49 per hour. That figure is below the applicable National Minimum Wage rate which at the time was £7.50 per hour.

12.8 By late 2017 the claimant was not intending to remain in the respondent's employment for much longer. She was finding the job difficult to juggle with childcare and intended to leave. She intended to begin looking for another job in December 2017 and to leave once she found suitable work. That would most likely have been by the end of January 2018. The claimant informed Mr. Laskowski of this. Mr. Laskowski said the claimant had given notice but we do not accept this. The claimant did not make any clear statement that she would leave on a particular date. The claimant had children to support, she was intending to start looking for other work and was unlikely to agree a leaving date without another job to go to. We are not persuaded that the claimant gave notice to end her employment.

She did nothing more than indicate that she intended to leave at some point in the near future. However, it is likely that she would have left by the end of January 2018.

12.9 Mr. Szydlowski perceived the claimant as being, as he put it, "very flirty with males". However, this perception was drawn from gossip and not from direct personal experience. However, this perception no doubt informed Mr. Szydlowski's treatment of the claimant.

12.10 The respondent's business consisted of a shop and a bakery. There were also offices upstairs which were used as a rest room or common room and a kitchen for use by staff. There was a dispute as to whether employees lived upstairs on a permanent basis.

12.11 The claimant's evidence was that employees rented rooms from Mr. Laskowski. Both the respondent's witnesses denied this.

12.12 However, Mr. Szydlowski accepted that he had slept there on at least one occasion after a night shift. He accepted that there was a bed for him to sleep in.

12.13 We find that it is more likely than not that the claimant's evidence on this point is true. Employees were living on-site. Both Mr. Szydlowski and Mr. Laskowski were keen to deny this. Mr. Laskowski in particular was evasive about answering the question put to him in cross examination and on balance we accept the claimant's evidence on this point which is corroborated by Mr. Kalinowski's evidence. We do not place much weight on Mr. Kalinowski's evidence, it was not given under oath and it was not tested under cross examination. However, we give it some limited weight. It corroborates the claimant's account.

12.14 The claimant swapped two work shifts with a work colleague in August or September 2017. She worked two shifts that had been allocated to her colleague. The effect of this was that the colleague was paid despite the claimant doing the work. The intention was that the colleague would cover two shifts for the claimant in return, but as the claimant left her employment that never happened.

12.15 The first allegation of sexual harassment arises from events on 23 October 2017. There is a conflict of evidence on the point between the claimant and Mr. Szydlowski. The claimant's account is set out at paragraph 11 of her witness statement. In contrast Mr. Szydlowski simply denies that the incident happened.

12.16 We prefer the claimant's evidence on this point. She appeared to be truthful and genuine when giving evidence before us. Her evidence on the point has been consistent throughout and was consistent with text messages that she sent to Mr. Szydlowski on 12 November 2017. Her evidence is also entirely plausible. She was intending to leave and Mr. Szydlowski's comment is entirely consistent with that intention. We were much less impressed with Mr. Szydlowski as a witness and did not find him to be truthful on the point. For those

reasons we find that what happened on 23 October 2017 is as set out in paragraph 11 of the claimant's witness statement. Specifically, Mr. Szydlowski said to her, "That he would have to have sex with her before Christmas".

12.17 There was limited material in the claimant's witness evidence about the effect this had upon her. We accept however that she was very shocked by Mr. Szydlowski's words.

12.18 The second incident of harassment is said to have taken place on 28 October 2017. On that day the claimant was working in the shop. She was serving a customer who was collecting a cake. The customer complained about the way the cake had been decorated. It was said to have been decorated differently to the way they had requested. The claimant went upstairs to speak to Mr. Szydlowski about the issue. The claimant says that when she did so Mr. Szydlowski closed the door behind her and made a comment to her that "there would be a rape".

12.19 Again, Mr. Szydlowski denies the claimant's account of the incident.

12.20 Again, we prefer the evidence of the claimant on the point. We had some concerns about the claimant's consistency on this point. She did give a slightly different account in her particulars of claim to the account set out in her witness statement. However, what has been consistent throughout is that she says that she went into a room with Mr. Szydlowski and others, he closed the door behind her and said, "Now there will be a rape". That evidence is consistent with the evidence of Mr. Kalinowski, the claimant's text message to Mr. Laskowski on 11 November and the claimant's text message exchanges with Mr. Szydlowski on 12 November. We find that the event did occur as the claimant sets out in her witness evidence. We reject Mr. Szydlowski's evidence on the point.

12.21 Again, there is limited material in the claimant's witness statement about the impact that event had upon her. However, we accept that the claimant felt embarrassed about the events and was also understandably scared by Mr. Szydlowski's conduct and concerned about him waiting outside the bakery to fulfill his threat. She felt unsafe as a result.

12.22 The third key event relied by the claimant took place on 11 November 2017. The claimant was working at the time, and it is common ground that there was an altercation between her and Mr. Szydlowski.

12.23 Mr. Szydlowski accepted that during this argument he shouted at the claimant and was aggressive towards her.

12.24 We also accept the claimant's evidence that he also said that if the two were alone he would have spoken to her in another way. We accept that this was said by Mr. Szydlowski. The claimant interpreted this to have a sexual connotation because of

Mr. Szydlowski's previous comments. However, we find that it was not intended in that way. It was said in the heat of the moment, during an argument between the two, that could be overheard by others. We find that it is more likely that what Mr. Szydlowski meant by the comment was that if others were not present, he would be less retrained about telling the claimant precisely what he thought of her. There was nothing obviously sexual about the comment and in the context in which it was made, it was unlikely to be a comment related to sex.

12.25 The claimant reported the rape comment to her manager, who advised her to report it to Mr. Laskowski. On 11 November the claimant sent a text message to Mr. Laskowski who was away in Poland at the time. In that message she complained that she had been shouted at and threatened by Mr. Szydlowski that day and at the end of the message she also referred to the rape comment.

12.26 Mr. Laskowski responded to say that he would not tolerate the behavior and that he would resolve matters when he returned to the bakery on Monday 13 November.

12.27 Mr. Laskowski contacted Mr. Szydlowski to confirm that a complaint had been made. He re-arranged Mr. Szydlowski's shifts so that he and the claimant would not come into contact on the Monday. He did not suspend Mr. Szydlowski from work.

12.28 On Sunday 12 November the claimant and Mr. Szydlowski exchanged several text messages with each other. The messages show that the two individuals were extremely angry with each other. Mr. Szydlowski was clearly aware of the claimant's allegations by this stage. His opening message to the claimant referred to her having made the complaint about the rape comment. The messages quickly became abusive on both sides, with both parties responding rapidly to each other's messages and clearly being angry with each other. During the exchange the claimant referred to the events on 23 and 28 October and Mr. Szydlowski denied the allegations accusing the claimant of lying about them.

12.29 Mr. Laskowski returned from Poland late on Sunday 12 November 2017. He met with the claimant the following day and the claimant told him what had happened. Mr. Laskowski took no steps to investigate matters apart from talking to the claimant. There was no attempt to identify and interview witnesses which any reasonable employer would do given the serious nature of the claimant's allegations. He also failed to investigate the claimant's references to Mr. Szydlowski and others drinking on the premises despite giving evidence before us that this was strictly prohibited.

12.30 Mr. Laskowski decided to hold a meeting with the claimant and Mr. Szydlowski. The meeting took place on Tuesday 14 November. The purpose of the meeting was to clear the air. The meeting was attended by the claimant, Mr. Laskowski, Mr. Szydlowski and Mr. Grzegorz Laskowski the general manager of the bakery. The

claimant was not told that this would be a grievance meeting, she was simply told the meeting was to try and calm the situation down between her and Mr. Szydlowski. The claimant was not given any opportunity to be accompanied to the meeting.

12.31 At the meeting Mr. Szydlowski accepted that he had been rude and had shouted at the claimant on 11 November, however he denied the comment about there being a rape. He had agreed with Mr. Laskowski that he would apologise for shouting at the claimant and being rude to her. However, he refused to apologise to the claimant about the rape comments saying that he had not made such a comment. It is common ground that after Mr. Szydlowski denied this the claimant became upset and left the meeting. It is also common ground that Mr. Szydlowski and the two Mr. Laskowskis caught up with the claimant before she left the site and that Mr. Szydlowski apologised to the claimant and two shook hands. The claimant accepted the apology at the time. However, she felt under pressure and intimidated into doing so. Mr. Laskowski said that he would arrange the work rota such that the claimant and Mr. Szydlowski would not meet in future and he also gave Mr. Szydlowski what he described as a verbal warning telling him that he would face disciplinary action if there were any further complaints.

12.32 The claimant considered the situation overnight. She concluded that she could no longer continue to work for the respondent, she had no confidence that the matters had been resolved and that Mr. Szydlowski would cease his behavior towards her. Quite reasonably, she no longer felt safe given the nature of Mr. Szydlowski's comments towards her and the inadequacy of the respondent's response. She did not return to work and it is common ground that her employment ended at this stage by reason of resignation.

12.33 Whilst working for the respondent the claimant had also worked in a cleaning job. She had worked 2-3 hours per week and was paid £10 per hour. After her employment with the respondent ended, she increased her cleaning hours to a total of 15 hours per week, thus she earned an extra £120-£130 per week. She therefore suffered no loss of earnings as a result of losing the job with the respondent and fully mitigated her loss.

Applicable Law: Sex Discrimination

13. There is no dispute that that claimant was an employee of the respondent. Sections 39 and 40 of the Equality Act 2010 ("the Act") prohibit the discrimination and harassment of employees by employers.

14. The two types of discrimination relied on in this case are harassment and direct discrimination.

15. Harassment is defined in s.26 of the Act and direct discrimination is defined in s.13 of the Act.

16. In discrimination claims, claimants benefit from a slightly more favourable burden of proof rule. This is set out in s.136 of the Act. Broadly speaking, this provides that once a claimant has proved facts from which an Employment Tribunal could decide that an unlawful act has taken place the burden of proof then shifts to the respondent to prove a non-discriminatory explanation for those facts.

17. Under s.109 of the Act anything done by an employee in the course of their employment must be treated as having been done by the employer. This is known as vicarious liability.

18. Finally, if a complaint of discrimination is upheld s.124 of the Act sets out the remedies that the Tribunal can award.

Applicable Law: Wages Claim

19. Workers have a right under s.13 of the Employment Rights Act 1996 (ERA) not to suffer unauthorised deductions from their wages. A deduction will be unauthorised unless it falls within the scope of s. 13(1)(a) or (b) of the ERA. A worker can present a complaint of unauthorised deductions from wages under s.23 of the ERA and s.24 of the ERA sets out the remedies that the Tribunal can award if there has been an unauthorised deduction.

Applicable Law: section 38 Employment Act 2002

20. Finally, s.38 of the Employment Act 2002 requires an Employment Tribunal to increase an award of compensation in certain circumstances. Broadly speaking this is where an employer has failed to provide a written statement of terms and conditions.

Discussion/Conclusions

21. Applying the law to the facts of this case our conclusions are as follows:

Incident on 23 October 2017

22. Firstly, starting with the incident on 23 October 2017:

23. The claimant asserts that Mr. Szydlowski's conduct towards her amounted to sexual harassment contrary to s.26(2) of the Equality Act 2010. We refer to the findings of fact that we have made as to what occurred on 23 October. Taking the essential elements of the s.26(2) definition in turn we conclude as follows:

    23.1 Mr. Szydlowski's conduct was plainly unwanted by the claimant, she did nothing to encourage it, and the comment was entirely uninvited.

    23.2 That conduct is also plainly of a sexual nature. This is self-evident from the words used.

    23.3 We also find that Mr. Szydlowski's conduct violated the claimant's dignity. The word violate is a strong word. Merely offending against dignity or hurting it is not sufficient. However, Mr. Szydlowski's

comment was not a trivial comment. The comment was so offensive as to violate the claimant's dignity.

23.4 We are also satisfied that Mr. Szydlowski's conduct, particularly when added to his conduct on 28 October, had the effect of creating an intimidating, hostile, degrading and humiliating or offensive environment for the claimant. Mr. Szydlowski's behavior made the claimant feel unsafe to be around him at work.

23.5 It follows from these conclusions that all the essential elements of the s26(2) definition are met and Mr. Szydlowski's conduct toward the claimant on 23 October amounts to unlawful sexual harassment.

Incident on 28 October 2017

24. The claimant asserts that the incident on 28 October also amounts to sexual harassment. Again, we refer to out earlier findings as to what was done and said by Mr. Szydlowski on that date. Again, taking the essential elements of the s.26(2) definition we find that Mr. Szydlowski's conduct on 28 October also amounts to unlawful sexual harassment. In particular, the conduct was plainly unwanted by the claimant, she did nothing to encourage it and the conduct comment was entirely uninvited. The comment was also plainly of a sexual nature, this is self-evident from the words used and the suggestion that the claimant might be about to be raped by Mr. Szydlowski violated the claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Incident/comments made on 11 November 2017

25. The third event that the claimant relies on in support of her claim is the comment made by Mr. Szydlowski on 11 November that he would talk to her differently if they were alone. We refer to our earlier findings as to what occurred on 11 November. Taking the essential elements for the s.26(2) definition in turn we find:

25.1 The conduct was unwanted by the claimant.

25.2 However, we are not persuaded that the comment was of a sexual nature. We find that the reference to talking differently to the claimant if they were not alone, was not a comment that had any obvious sexual connotation, it was not an overtly sexual comment. It might have had sexual connotations depending on the context. However, the context here was a heated argument between the claimant and Mr. Szydlowski. We find that what he was referring to was that he would be freer to express his views about the claimant if they were alone. His comment was not a reference to making sexual comments to the claimant if they were alone.

25.3 In the circumstances Mr. Szydlowski's conduct towards the claimant on 11 November does not amount to unlawful sexual harassment.

26. We referred earlier to vicarious liability. Under s.109 of the Equality Act 2010 the respondent is liable for the discriminatory actions of Mr. Szydlowski where those actions took place in the course of employment. We find that Mr. Szydlowski's conduct on both 23 and 28 October was sexual harassment and took place in the course of his employment. Both discriminatory comments took place on the respondent's premises and in the context of work. The respondent is therefore vicariously liable for Mr. Szydlowski's actions.

27. In some circumstances an employer can defeat liability under s.109 if they can show that they took all reasonable steps to prevent the discrimination. No such defense is raised in this case and this is plainly not a case where such a defense could succeed on the facts.

28. The claimant also alleges that the respondent's failure to deal with her complaints amounted to harassment. This claim is brought under the definition of harassment in s.26(1) of the Act. In other words, it is brought under the ordinary definition of harassment as opposed to the more specific definition of sexual harassment in s.26(2). We do not uphold this claim for the following reasons:

    28.1 We accept that there has plainly been a failure on the part of the respondent. The respondent dealt inadequately with the claimant's complaints. They were serious complaints, Mr. Szydlowski's behavior was appalling, it was conduct of the grossest type and it would warrant instant dismissal. The respondent singularly failed to appreciate the seriousness of those allegations and failed to deal with them appropriately. There was no proper investigation of the claimant's allegations, no interviewing of witnesses and taking the step of having a meeting to clear the air was wholly inadequate. The disciplinary action taken against Mr. Szydlowski was also wholly inadequate given the gravity of his behavior.

    28.2 The respondent's failure to act was plainly unwanted by the claimant. She wanted the respondent to take much more robust action and she was entitled to expect that. However, for the respondent's conduct to amount to harassment under s.26(1) it must be related to a relevant protected characteristic. The characteristic relied on is the claimant's sex.

    28.3 The conduct concerned was the respondent's failure to act on the claimant's complaints and the relevant protected characteristic was the claimant's sex. Thus, the key question for us to determine is whether that conduct related to the claimant's sex. Under the previous harassment legislation, the conduct had to be "on grounds of" a particular characteristic. However, the definition under the Equality Act 2010 is wider than that, s.26(1) uses the words "related to". Thus, the question for us is whether the respondent's conduct was related to the claimant's sex.

    28.4 The current legislation still requires there be a link between the conduct and the protected characteristic. This claim would plainly have failed under the old law because the respondent's failure to act was in our view not because of or on grounds of the claimant's sex.

We are satisfied on the evidence that the respondent in this case is an employer which plainly has little knowledge or expertise of good employment practice That is the reason for their failure to act. It was not because of the claimant's sex nor was it related to the claimant's sex and so although we remind ourselves that the current statutory definition is somewhat wider than the old definition the claim fails as the necessary link between the conduct and the protected characteristic is not present.

29. The claimant also brings a complaint of direct discrimination, she asserts that the respondent's failure to deal with her complaints was an act of direct discrimination and that she was constructively dismissed and that this also amounted to direct discrimination. Under s.13 of the Equality Act 2010 a complaint of direct discrimination requires us to undertake a comparison exercise. In this case we must compare the way the respondent treated the claimant with the way the respondent would have treated a hypothetical male employee in materially the same circumstances. In other words, a male employee making similar complaints of sexual harassment. The question is, whether the respondent treated the claimant less favourably than they would have treated such a comparator. We conclude that the answer is no. We are satisfied that the respondent would have treated a male employee in the same way.

30. The reason the employer failed to act adequately was because they have little or no knowledge or expertise of good employment practice. We are satisfied that the respondent would also have similarly failed to act had it been a male employee in the same position.

31. It follows from this that both claims of direct discrimination fail. The respondent's treatment of the claimant was not because of her sex.

32. Turning to the wages claim, the respondent now accepts that the claimant should be paid for the two shifts that she covered for her colleague. There is no longer any dispute that the claimant was not paid for working these shifts and that this failure to pay amounts to a deduction from the claimant's wages. The respondent does not seek to argue that that deduction was authorised. The respondent agrees that the sum payable should be £100, that is £50 per shift.

33. We have however found that the claimant was paid less than the applicable National Minimum Wage. We have taken into account the decision of the Employment Appeal Tribunal in the case of Paggetti v Cobb. That case is authority the proposition that an Employment Tribunal is under a duty to consider the National Minimum Wage when deciding a week's pay for the purposes of assessing the loss of earnings element of a compensatory award under s.123(1) of the Employment Rights Act 1996. This is because the effect of the National Minimum Wage legislation is to amend a worker's contract of employment to set a minimum rate per hour below which they should not be paid. Although the Paggetti case concerned assessing compensation for unfair dismissal we consider that there is no reason why the principle should not also apply in the context of assessing the appropriate sum to award for an unauthorised deduction from wages.

34. We consider that we must take into account the National Minimum Wage when calculating the sums due. In this case there are two shifts, and 16 hours work in total. The national minimum wage rate applicable at the time was £7.50 per hour which gives a total award of £120. We will make an award of this sum and make a declaration that the respondent unlawfully deducted this sum from the claimant's pay.

35. Finally, having upheld the claimant's complaints of sexual harassment we turn to the question of remedy. The power to award a remedy arises under s.124 of the Equality Act 2010. We will make a declaration that there has been unlawful sexual discrimination in this case and we will also order the respondent to pay compensation to the claimant for that discrimination.

36. The claimant seeks compensation for injury to feelings and also for loss of earnings. Taking each in turn, we deal first with injury to feelings. We remind ourselves that the purpose of the award is to compensate the claimant. It is not to punish the respondent for wrongdoing. Our focus must be on the impact the discrimination had upon the claimant. The claimant's representative invites us to award £10,000. The respondent suggests that no award should be made.

37. The claimant and her representative provided us with little material on which to assess the impact upon the claimant. The claimant's witness statement contained very little material on the issue. When the claimant gave evidence, we asked her for further details, and she provided some further limited details. The claimant was shocked, embarrassed, threatened and intimidated by Mr. Szydlowski's behavior. Quite reasonably she feared that he might rape her or sexually assault her. She was frightened to go into work. She felt unable to continue in her work and lost her job as a result. She had a family to support and the loss of the job no doubt caused her further stress.

38. In the case of Vento v The Chief Constable of West Yorkshire Police the Court of Appeal gave guidance to Employment Tribunals about how we should approach the assessment of compensation for injury to feelings. That resulted in three bands of compensation. Those financial bands have been increased over time and following the applicable Presidential Guidance on the issue the so called 'Vento bands' are as follows:

    38.1 A lower band of between £800 and £8,400 for less serious cases such as where the act of discrimination is an isolated or one-off occurrence;

    38.2 A middle band of between £8,400 and up to £25,200 for serious cases that do not merit an award in the highest band; and

    38.3 An upper band of between £25,200 and £42,000 to be applied only in the most serious cases for example where there has been a lengthy campaign of discriminatory harassment.

39. The claimant says that this case should fall within the middle band. We agree. This is plainly not a lower band case. It is not a one-off, isolated or less serious occurrence. It is however not appropriate for the top band

either. The case concerns two incidents of harassment. However, both were particularly serious, and this is a case where the claimant lost her job as a result of the harassment and the respondent's failure to take sufficient action to protect her. As we have said the evidence that we have been provided with about injury to feelings is limited but given our findings about the impact on the claimant we make an award at the lower end of the middle band. We make an award of £8,500.

40. We make no award to the claimant for compensation for loss of earnings. There is no financial loss in this case. In her remedy statement the claimant assessed her loss at £2,600. However, that figure did not give credit for the additional earnings from her increased hours for her cleaning work following her resignation from the respondent's employment. Those earnings exceeded the earnings she would have received from the respondent and so no loss of earnings has been suffered.

41. Finally, we come to the respondent's failure to issue a written statement of terms and conditions. Under s.38 of the Employment Act 2002 a Tribunal must make an additional award of compensation in certain circumstances.

42. The claimant has not sought such an award in this case, however the use of the word "must" in s.38 is such that we are compelled to consider such an award regardless.

43. In this case the conditions for such an award are present. We have upheld the sex discrimination complaint at least in part. That is a claim within schedule 5 of the 2002 Act. Further, we are satisfied that when this case began the respondent was in breach of the duty under s.1 of the Employment Rights Act 1996 to provide a statement of main terms and conditions of employment. The short document issued to the claimant to confirm her terms and conditions was wholly inadequate. In those circumstances we must make an additional award of compensation.

44. We must award at least 2 weeks' pay and if it is just and equitable to do so we may award the higher amount of 4 weeks' pay. When calculating a weeks' pay we must take into account the National Minimum Wage for the reasons given earlier. In this case we calculate a weeks' pay as being £103.85, which is £5,400 per annum divided by 52 weeks. We consider that the higher amount of 4 weeks' pay is just and equitable to award in this case. In deciding that we take into account the fact that the respondent is an established business. Mr. Laskowski said he had been trading for 10 years. It is also a relatively large business employing approximately 18 people and the email setting out terms of the claimant's work was woefully inadequate to comply with s.1.

45. For those reasons we will issue a judgment to address the following:

    45.1 A declaration that the respondent unlawfully discriminated against the claimant;

    45.2 A declaration that the respondent made an unauthorised deduction from wages;

    45.3 An order for the respondent to pay £120 for unlawful deduction from wages;

45.4 An order for the respondent to pay an additional £8,500 as compensation for sex discrimination; and

45.5 An order for the respondent to pay a further £415.40 for the failure to provide the claimant with a s.1 statement of terms and conditions.

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Employment Judge: Mr. A Spencer

Date: ……19 November 2019…….

Judgment sent to the parties on

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For the Tribunal office