



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110200/2019**

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**Held in Glasgow on 24 January 2020**

**Employment Judge R Gall**

10 **Ms C Penders**

**Claimant  
Represented by:  
Ms E Drysdale -  
Trainee Solicitor**

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**Garnock Social Trading Ltd**

**First Respondent  
No appearance and  
No representation**

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**Brian Andrew**

**Second Respondent  
No appearance and  
No representation**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that: –

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(1) The claimant resigned in circumstances where she was entitled so to do due to fundamental breach of contract by the first respondents. The first respondents are ordered to pay to the claimant by way of compensation, the basic award, being £400, together with the compensatory award, calculated as detailed in the Judgment and under deduction of benefits payable to the claimant, being £1,433.12.

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(2) The claimant resigned due to a discriminatory act. The (constructive) dismissal is therefore discriminatory. Interest is accordingly added, calculated

**E.T. Z4 (WR)**

in respect of past loss to date of Judgment, from the mid-point. That totals £21.71. The total award in relation to this head of claim is therefore £1854.83. The first respondents are ordered to pay that amount to the claimant

5 (3) The claimant was harassed by unwanted conduct of the second respondent which was related to sex and was of a sexual nature. It had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. An award is made against both respondents on a joint and several basis. The sum awarded to the claimant and payable by the respondents on that basis is £28,000. Interest is payable on that sum. 10 Interest amounts to £3532.31. The total award in relation to this head of claim is therefore £31,532.31. The respondents are ordered to pay that amount to the claimant on a joint and several basis.

(4) Through her constructive unfair dismissal the claimant has lost statutory rights. The Tribunal awards £350 to her in that regard. The first respondents 15 are ordered to make payment of that amount to her.

(5) The first respondents did not issue a statement of employment particulars to the claimant as they were obliged to do in terms of Section 38 of the Employment Act 2002. There are no exceptional circumstances which mean that the duty did not apply. The Tribunal awards the minimum amount of 2 20 weeks pay. That is £400. The first respondents are ordered to pay that amount to the claimant.

### REASONS

1. This was a claim presented to the Tribunal on 16 August 2019. It was brought against two respondents. Respondent 1 was the limited company which had 25 been the employer of the claimant. Respondent 2 was the managing director of respondent 1. He was also said to have been the individual whose behaviour had constituted harassment, as that term is defined in the Equality Act 2010 (“the 2010 Act”) That behaviour of the first respondent was also said to have led to the resignation of the claimant in circumstances where it was 30 said that she could appropriately claim constructive unfair dismissal in terms of the Employment Rights Act 1996 (“ERA”). If found to have resigned due to

a discriminatory act, the (constructive) unfair dismissal would be discriminatory.

2. The claim was served upon both respondents. Form ET3 was submitted by both respondents. The terms of form ET3 for each respondent were the same.  
5 No details of defence to the claim were provided by either respondent.
3. In those circumstances, when the case came before an Employment Judge for initial consideration in terms of Rule 27 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 letters were sent to both respondents. Those letters explained that the responses were *“totally lacking in the necessary detail”*. It went on to state that by no later than 4  
10 October both respondents had to set out full details of every aspect of the response to the claimant’s detailed claim form and attached statement of claim. It was said that those further details to be supplied required to engage with and reply to every point made by the claimant. It was also suggested that  
15 the respondents might find it helpful to take legal advice. No reply whatsoever was received to this letter of 21 September 2019.
4. The case proceeded to a Preliminary Hearing for case management purposes on 31 October 2019. There was no appearance by either respondent at that point. There was no response to a telephone call made to both respondents  
20 that morning seeking an explanation as to why they had not appeared. The Preliminary Hearing resulted in an Order being issued to both respondents. That Order required compliance by 15 November 2019. It was dated 31 October 2019 and issued to parties on 6 November 2019. The Orders required that full details of every aspect of the response be provided from  
25 each respondent.
5. Each of these Orders was issued on an “Unless” basis. The relevant Rule is Rule 38. That provides that if an Unless Order is not complied with by the date specified for compliance then the response, in this case, is dismissed without further notice.
- 30 6. There was no response from either of the respondents to these Orders. In that circumstance, the responses of both respondents were dismissed. That

was confirmed to those respondents, in line with Rule 38, by letter of 27 November 2019 from the Tribunal. That letter drew the attention of the respondents to the fact that an application could be made to the Tribunal in writing within 14 days of the notice to have the Order set aside. No such application was received from either respondent.

7. At the hearing on 24 January there was no appearance and no representation from either respondent. Evidence was heard from the claimant. She produced a bundle of documents.

8. The claimant struck me as entirely credible and reliable. I was conscious that there was no challenge to her evidence. Nevertheless she spoke in a matter-of-fact manner about the events and communications she described. I had no doubt that she was telling the truth. She was upset at some points, quite understandably given the events she required to talk about in evidence.

9. The following were found to be the relevant and essential facts in this case.

### **Background**

10. The claimant was employed by the first respondents from 14 January 2017 until 22 June 2019. At date of termination of her employment, the claimant was 31 years old.

11. The claimant was employed as a barmaid with the first respondents. Her gross weekly pay was £200. Her net weekly pay was £195. The first respondents did not ever issue the claimant with a statement of employment particulars.

12. The following parties are relevantly mentioned at this stage: –

- Brian Andrew, managing director of the first respondents, himself the second respondent, also known as “Butch”
- Peter Andrews, bar manager with the first respondents and for a large part of the claimant’s employment, her line manager.
- Lesley Everett, co-worker with the claimant

- Chloe Lindsay, co-worker with the claimant
- Julie Wilson, co-worker with the claimant
- Helen Turner, co-worker with the claimant
- Caren Thomson, who was appointed Bar Convener on 4 June 2019

5 13. In addition to clientele who appeared during the week for drinks and food, the first respondents operated on the basis of their staff supplying catering for functions at the premises. Those functions might be for christenings and baptisms, weddings, birthday parties or funerals. The claimant enjoyed her job with the first respondents in the early part of her employment and continue  
10 to enjoy her job with them in the latter stages of her employment, providing that Mr Andrew was not present in the premises.

#### **Working with Mr Andrew**

14. At first the claimant worked well with Mr Andrew. During the course of summer of 2017 however she became concerned as to the way in which Mr Andrew  
15 behaved towards her. He became “touchy-feely”. He started making remarks and comments to the claimant. He would pull up her top and try to see what colour her underwear was. He would touch her bra strap. He would lean in towards her and pull her close. He said that there were cameras watching the bar area and that from watching her on camera she was known as “rear of the  
20 year”. He said that he watched the claimant on camera whilst she was in the bar.

15. This behaviour occurred from around July 2017 until the claimant’s employment with the first respondents ended in June 2019. The claimant felt that she could not speak to others initially given that Mr Andrew was the managing director. She felt humiliated and disgusted. She was keen simply  
25 to do her job and then to go home. She enjoyed the job, as mentioned. Given attendance by Mr Andrew however she hated working with the first respondents when Mr Andrew was present and dreaded going to work in case he did show there.

16. The claimant did not ever encourage Mr Andrew by reacting favourably either to his behaviour or remarks. She sought to discourage him. When she showed her discomfort, Mr Andrew said that what was happening was “bar banter”.
17. Mr Andrew continued his behaviour as described above. The claimant changed what she wore when going to work. She had not worn clothing which was in any sense provocative. She ensured however that she wore clothing which did not emphasise her appearance.
18. Mr Andrew continued to make comments to her and to engage in physical contact. He would, for example, say when the claimant was ill with a cold that he would bring some Vick’s Vapour Rub along with him later and rub it on her chest. He continued to try to pull up her top to see her underwear. He invited the claimant to go to his house. He said to the claimant that if she told anyone of his behaviour no one would believe her as he knew members of her family. He said he also knew people in high places.
19. This continuing behaviour made the claimant feel worthless. She tried to speak to committee members of the first respondents. None of those to whom she tried to speak took any notice. This made her feel that she had no one to turn to.
20. Around Christmas of 2017 the staff of the first respondents were given vouchers for Bowfield Country Club. That is, amongst other things, a spa facility. Mr Andrew withheld the vouchers from the claimant and Julie Wilson. He said that they should not go other than with him and that he would take them there. That however did not occur.
21. The claimant spoke to her co-workers, Ms Everett, Ms Wilson and Ms Lindsay about the behaviour of Mr Andrew towards the claimant. They had also noticed it. They made a “pact” that if the claimant was called through to a different room by Mr Andrew one of them would follow so that the claimant was not alone with Mr Andrew.
22. Mr Andrew continued his behaviour however, including pulling the claimant towards him on various occasions trying to kiss her.

23. In February 2018 the claimant decided to speak to Peter Andrews who was her line manager, although Mr Andrews was managed by Mr Andrew, the person about whom the claimant was complaining. She exchanged texts with Ms Everett about that time, saying that she was going to speak to Mr Andrews. Those texts dated 10 February 2018 appeared at pages 47 to 49 of the bundle.
24. The claimant explained to Mr Andrews that Mr Andrew had been touching her, appearing at her house, saying that someone was watching her house and remarking on how many people were going in and out of the claimant's house. The claimant explained to Mr Andrews that she was frightened by this behaviour. This was a protected act in terms of Section 27 of the 2010 Act. Nothing significant however happened as a result of this disclosure of information to the first respondents. A meeting was held. Mr Andrew apologised and said that this behaviour would not happen again. The claimant was disappointed with this as being the outcome. She had hoped that Mr Andrews would make further enquiries with her and with others to find out what had happened. Her view was, however, that Mr Andrews had shrugged this off and was not particularly interested in calling Mr Andrew to account.
25. This made the claimant dread work even more. She knew that Mr Andrew would often be at the premises.
26. The first respondents were therefore aware at this point of the behaviour of Mr Andrew towards the claimant.
27. On 13 February 2018 a particular incident occurred involving Mr Andrew and the claimant. The claimant was travelling to work. Mr Andrew, known as Butch within the workplace, then started following her in his car. The claimant continued to drive to work. Mr Andrew was flashing his lights. He then overtook the claimant. The claimant made her way to work. She was shaking and was upset.
28. When the claimant got to work she telephoned Mr Andrews and told him what had happened with Mr Andrew following her in her car. Mr Andrews brushed this off. He said what he had said previously namely that "*Butch is the main*

*man.*” The claimant took from this that Mr Andrews was not going to do anything about that.

29. The claimant also sent a text to Ms Everett on the day in question. A copy of that text exchange appeared at pages 50 to 53 of the bundle. Ms Everett recommended to the claimant that she should go to the police as Mr Andrews was doing nothing about it and this was threatening behaviour.
30. This was not the first time that Mr Andrew had either followed the claimant when she was in her car or had appeared at her house. Previously when Mr Andrew had called at her house the claimant had tried to hide. Mr Andrew had then left notes in the door of her property for her.
31. Around this time the claimant tried once more to speak to Mr Andrews about this. She explained the position to him. She made a new sign stating that only bar staff should be behind the bar. She detailed the names of the bar staff. This was with a view to stopping Mr Andrew coming behind the bar. Mr Andrews spoke to Mr Andrew and said he should stay away from the social club when the claimant was on shift. Nothing however was done to enforce that and Mr Andrew ignored it.
32. The claimant was disappointed about this and shocked. She felt that she should have received support and help. This was particularly so as Mr Andrew continued to attend at the premises of the first respondents on almost every occasion that the claimant was working there. The claimant would swap her shifts sometimes with a view to avoiding being present when Mr Andrew was there. Mr Andrew would however check on the telephone to see if the claimant was working or not.
33. On 14 February, the day after Mr Andrew had followed the claimant in his car, the claimant was working on her own at the first respondents’ premises. Mr Andrew appeared soon after the claimant commenced her shift. He came into the bar area behind the bar. He was not supposed to be there. The claimant telephoned Ms Everett. She said that she was frightened and concerned about her own safety. Ms Everett contacted Mr Andrews and asked that he go to the premises, which Mr Andrews confirmed he would. Mr Andrews did



come to the premises. Mr Andrew behaved on the arrival of Mr Andrews as if nothing had happened. Mr Andrews remained in the premises until Mr Andrew had left. The texts and record of calls made between the claimant and Ms Everett on 14 February appeared in the bundle at pages 54 to 57.

5 34. On 20 February 2018 Ms Turner, a co-worker with the claimant, sent a message saying that there was an envelope for her which Mr Andrew had handed in. It was marked "private". The claimant thought that this was her notice because she had challenged his behaviour. It transpired that the envelope contained a calendar. No other member of staff had received a  
10 calendar. The claimant put the calendar in the bin. A text exchange between the claimant and Ms Turner in relation to events on 20 February appeared at pages 58 and 59 of the bundle.

15 35. In addition to the calendar, the claimant received occasional gifts from Mr Andrew. She received, for example, chocolates from him. The other staff members did not receive any such gifts. She received gifts of that type approximate once per week from Mr Andrew

20 36. Mr Andrew would phone the landline for the premises when he understood that the claimant was working there. On 29 March 2018, the claimant was scheduled to work. She did not in fact work that night. Mr Andrew phoned the club just before closing time. Ms Everett was on shift rather than the claimant. Ms Everett answered the phone. She did not announce who she was. Mr Andrew proceeded to speak to Ms Everett thinking she was the claimant. He asked Ms Everett, believing her to be the claimant, what she was up to later and whether she would be around later. Ms Everett sent a text to the claimant  
25 informing her of this. A copy of that text appeared at page 60 of the bundle.

30 37. In the summer of 2018, the claimant organised a bouncy castle party for her children at her home. Mr Andrew appeared at her house at the back door, uninvited. Ms Everett was there with her daughter. The claimant was terrified, particularly as her children were present. Her children saw her upset. Ms Everett managed to hide the claimant in the house so that Mr Andrew did not see her and the claimant did not have to see Mr Andrew.

38. The claimant would lock-up the social club if she was the member of staff on duty at closing time. Mr Andrew would encourage her to drop the keys off at his house. The claimant would ignore phone calls to that effect. She would also try to ensure that a customer stayed with her until she locked up the premises as she was scared that Mr Andrew might appear.

39. The claimant received regular telephone calls from Mr Andrew. She did not wish to receive those calls. She therefore blocked his number so that he could no longer contact her mobile. Those calls were initially work-related. They then became more personal with Mr Andrew asking the claimant where she was and telephoning on non-work-related matters around 20 times per week.

**2019**

40. In January 2019 the first respondents changed the rotas which the claimant worked. This meant that she worked with the second respondent on Monday mornings. Sometimes Ms Everett was present on those occasions. When she was not there, the claimant was exposed to the behaviour and comments of the second respondent which continued to be of the type detailed above. They involved requests made by the second respondent for the claimant to give him a kiss. They involved him lifting of the claimant's top, seeking to see her underwear. He would also move close to her.

41. The claimant had worked with Ms Everett in organising catering for funerals provided at the premises of the first respondents. In February 2019 however the first respondents removed Ms Everett from that duty. Mr Andrew would then work with the claimant on the catering for funerals.

42. At the beginning of June 2019 Caren Thomson was appointed bar convener. She replaced Mr Andrews. The claimant hoped that with Ms Thomson as a female supervisor she would receive more understanding of the behaviour of Mr Andrew towards her when she explained that to her. That did not however occur. Mr Andrew continued to make remarks to the claimant and to try to kiss her. He did this approximate 5 times per week. The claimant pushed him away when this occurred. She felt disgusted. Mr Andrew would come close to the claimant and try to push his body against hers. This occurred 2 or 3 times

every shift which the claimant worked when Mr Andrew was present. This made the claimant feel embarrassed, uncomfortable and disgusted. She dreaded going to work, however enjoyed work when Mr Andrew was not there.

5 43. On 21 June 2019 Mr Andrew attended the social club during the time the claimant was working there. The claimant went for a cigarette at the back door to the premises. Mr Andrew shouted to her to come into the kitchen to look at his daughter's wedding photographs. When the claimant went into the kitchen, Mr Andrew shouted at her. He said that she would have got the job as bar convener if she had slept with him. He went on to say that he knew that the claimant would not let that happen. He then said that Caren knew how he felt about the claimant and that Caren knew that he "*wants the pants off*" the claimant. Mr Andrews then appeared and asked that the claimant look at some CCTV from the previous night. The claimant was unable to work the CCTV retrieval system as she was upset due to the second respondent, Mr Andrew, being next to her. Mr Andrew was then going to leave the premises. He pulled the claimant towards him saying that he wanted a "*proper kiss*" before he left. He put his hand on the back of the claimant's neck and attempted to pull her face closer to his. The claimant managed to get free and ran through to the bar. This comment and the behaviour of Mr Andrew made the claimant feel disgusted, ashamed and worthless.

15 44. The following day the claimant sent a text message to Caren Thomson. A copy of that text message appeared at page 62 of the bundle. The claimant asked to meet Caren Thomson that day as she had some things she needed to discuss. She intended to speak to Ms Thomson about the behaviour of the second respondent, Mr Andrew, the preceding day.

25 45. Ms Thomson replied in a text, a copy of which also appeared at page 62 of the bundle, saying that she was out shopping for her daughter's prom dress, that she could message the claimant when she was back but otherwise would be in the club at 12 noon the following day.

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46. The claimant sent Ms Thomson a message later on 22 June saying that Mr Andrew had said to her that Caren knew how he felt about her and that he wanted the pants off the claimant but that she was never going to let that happen. A copy of that text appeared at page 63 of the bundle.
- 5 47. Ms Thomson subsequently replied to the claimant in response to her message as to the behaviour of Mr Andrew and the remark which he had made saying:-  
*“if that’s what was said he should not be saying it but you know what he’s like he never really means what he says. Do you want a meeting with him and me and Peter to discuss it? As far as I’ve been told Peter offered me the job because I have the experience that you and Lesley don’t. Nothing to do with kids”*
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48. The claimant had told Ms Thomson what had happened as she hoped that Ms Thomson might help. When she received the reply of Ms Thomson saying that Mr Andrew never really meant what he said, the claimant was shocked and incredibly disappointed. Her view was, given this response, that there was no stopping Mr Andrew. It was clear to her from this that Ms Thomson either would not, or could not, help her. She felt let down. Ms Thomson had been her last hope. She concluded that she did not work any longer with the first respondents. She sent a message to Mr Andrews saying that. This constituted her resignation. Mr Andrews telephoned her on receipt of that message saying that she should not be silly and should return to work. The claimant hung up the phone as she could not see that the respondents were prepared or able to tackle the behaviour of Mr Andrew.
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### **Events after resignation**

- 25 49. On 5 July 2019 the claimant contacted the police. She informed them of the behaviour of Mr Andrew and in particular of the incident on 21 June narrated above. The police viewed the incident as amounting to sexual assault on the claimant. A police investigation and subsequently criminal proceedings resulted. Weapons were seized from the property of Mr Andrew.

50. The claimant was very upset and concerned about possible repercussions from Mr Andrew due to her contact with the police. She has had a six-foot fence erected around our house. Panic alarms have been installed with emergency lighting also being installed. This has occurred due to her fear of the second respondent.

### Alternative employment

51. The claimant has had severe difficulties with her confidence and mental health following upon the experience of working with Mr Andrew and his actions and words as detailed above. She has struggled going out of the house, even to keep something essential such as a doctor's appointment. She keeps her children close to her at all times. She has been scared to walk about the streets of her local town of Kilbirnie. She has engaged with Women's Aid, Rape Crisis Scotland, Scottish Women's Rights Centre and her GP to seek treatment and support in dealing with the harassment and behaviour from Mr Andrew. The claimant's GP has placed her on medication for anxiety and stress. This is also with a view to aiding her sleeping in particular. The claimant has also sought assistance in connection with obsessive-compulsive disorder which had been triggered by the incidents. This has involved intensive and regular cleaning to point of obsession by the claimant and the sorting out of items in her house by colour or by name. Her concentration span is very short. She has antidepressant medication from her GP. She visits her GP once a week or telephones the GP if she is unable to visit. She is awaiting counselling. She finds it difficult to eat and has to force herself to do so. The claimant made contact with the Samaritans during early July 2019 and obtained assistance from them, helping her cope with the immediate intense crisis she was suffering at that point as a reaction to the behaviour of Mr Andrew.

52. The claimant has been unable to focus on obtaining another job. Her confidence is very low. She has recently approached a local charity shop to go in there to assist for 3 hours from time to time on a voluntary basis. She has taken this step to try to build up her confidence.

53. From time of her resignation in June 2019 the claimant has received universal credit in the sum of £727.13 per month. She has been certified as being unfit for work by means of a doctor's line since time of her resignation. She is currently being signed off for the period until 3 February 2020.

5 **The issues**

54. The issues for the Tribunal where: –

- (i) Did the claimant resign in response to fundamental breach of contract by the respondents entitling her to make a claim of constructive unfair dismissal?
- 10 (ii) If she did so, was that dismissal discriminatory and what compensation was to be paid to her in respect of it?
- (iii) Did the conduct of the first and second respondents towards the claimant constitute harassment in terms of the 2010 Act?
- (iv) If harassment had occurred what compensation would be ordered as  
15 being payable by the respondents to the claimant?
- (v) Was there a protected act done by the claimant as referred to in Section 27 of the 2010 Act? If there was, had the claimant been victimised because she had done that protected act?
- (vi) If the claimant had been victimised, what compensation was to be paid  
20 to her?
- (vii) Was the claim of discrimination, or any part of it, time-barred? If so, was it just and equitable to permit any such element of claim to proceed by extending time so that this could occur?
- (viii) In relation to awards of compensation which might be made, to what  
25 extent would they be awarded on a basis apportioned between the first and second respondents or on the basis of joint and several responsibility?

**Applicable law**

55. An employee who resigns in response to repudiatory breach of contract by an employer is entitled to claim constructive unfair dismissal and to bring such a case before the Employment Tribunal. This is in terms of Section 95 (1) (c).
- 5 56. To be in breach of the implied duty of trust and confidence, conduct requires to be intended to or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. A breach of the implied term of trust and confidence will be a repudiatory breach. Relevant cases in this regard are *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 22  
10 to and *Malik & Mahmud v Bank of Credit and Commerce International SA* 1997 ICR 462.
57. A repudiatory breach of contract may be constituted by one incident or by several instances of behaviour which build upon one another leading to a last straw. Resignation must take place soon after this last straw, failing which an  
15 employee may be held to have affirmed the contract.
58. Whilst there may be other motives leading to resignation, for a claim to be successful, resignation must at least in part be attributable to the repudiatory conduct of the employer.
59. If resignation occurs due to a discriminatory act, the dismissal (constructive)  
20 is discriminatory.
60. Section 26 of the 2010 Act sets out the circumstances in which harassment will be held to have occurred.
61. Conduct must be unwanted. It must relate to the protected characteristic. It  
25 must have the purpose or effect of violating the dignity of the claimant or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Unwanted conduct of a sexual nature which has that effect will also be sufficient to establish harassment.
62. In assessing whether harassment has taken place, account must be taken of the perception of the complainant and any other circumstances of the case.

The Tribunal also requires to consider the objective standard of whether it is reasonable for the conduct to have that effect as well as the subjective view expressed by the claimant.

63. Section 27 of the 2010 Act sets out the position in respect of victimisation.  
5 The claimant must have done a protected act as defined in that Section. The detriment to which the claimant is subjected must have been because that protected act was done.
64. An employer is liable in terms of Section 109 of the 2010 Act if the actions of the employee are done in course of employment.
- 10 65. A claim under the 2010 Act requires to be brought within 3 months of any alleged incident. This is so unless there was conduct extending over a period. If there is such conduct extending over a period then the end of the period is the critical time in terms of assessment of time-bar.
- 15 66. In relation to compensation, a joint and several award can be made if the Tribunal considers that necessary. The case of *London Borough of Hackney v Sivanandan and others* 2011 ICR 1374 confirms the view of the Employment Appeal Tribunal (“EAT”) that joint and several liability should be the norm where the claimant has suffered discrimination from respondents and the damage caused by that discrimination is indivisible as between respondents.  
20 This view was endorsed by the Court of Appeal in the appeal in that case. Where therefore it is not possible to identify distinct elements of loss caused by the individual wrongdoers, it is appropriate to make an award on the basis that it is joint and several as against the respondents.
- 25 67. An award in respect of injury to feelings is to be compensatory and not punitive. An award should not be so low as to diminish respect for the anti-discrimination provisions and legislation. It should not be so excessive as to give unmerited and untaxed benefits. The subjective nature of injury to feelings makes it hard to measure. The case of *Vento v Chief Constable of West Yorkshire* 2003 ICR 318 (“*Vento*”) lays down principles in respect of  
30 compensation and bands which apply. The amount of compensation which a Tribunal may award is to be set with regard to the cases of *Vento* and *Da’Bell*



5 *v NSPCC* 2010 IRLR 19. The Tribunal should also keep in mind the Presidential Guidance issued on 25 March 2019, the guidance relevant to this case, where the claim was presented August 2019. That guidance reflects the position in respect of claims presented on or after 6 April 2019 as involving a lower band of compensation of £900 to £8,800 for less serious cases. The middle band is £8,800 to £26,300. The upper band is £26,300 to £44,00. In the most exceptional of cases compensation might exceed £44,000. Those figures are said to include the 10% uplift detailed in *Simmons v Castle* 2012 EWCA Civ 1039 ("*Simmons*"). A Tribunal is to set out reasons why the 10% uplift referred to in *Simmons* does not apply if, in its view, it is not applicable in any particular case.

68. Interest is payable on awards made in respect of injury to feelings. The relevant provisions are contained in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

15 69. In an injury to feelings award, the relevant date from which interest is to run is, in normal terms, to be the date on which the act of discrimination complained of occurs. Interest ceases to be applicable on the day when the Employment Tribunal calculates the amount of interest. This is in terms of Regulation 6 (1) (a). Regulation 6 (3) authorises an Employment Tribunal to use a different period for calculation of interest if there would be "*serious injustice*" if other dates were not used.

70. For all other awards in respect of discrimination interest is awarded for the period beginning on the mid-point date and ending on the day of calculation. The mid-point date is the date halfway between the act of discrimination and the date of calculation of the award.

71. Any losses relating to the period after calculation, awards in respect of future loss in other words, do not have interest added to them.

72. In the case of *Al Jumard v Clywd Leisure Ltd and others* 2008 IRLR 343 the EAT commented that it was not necessary or, in that case desirable, to fix separate sums for injury to feelings which flowed from direct disability discrimination and the failure to make reasonable adjustments respectively

although it would not necessarily be wrong for a Tribunal to do that in an appropriate case. A Tribunal should keep firmly in mind that there were different forms of disability discrimination and that they may contribute in different measure to any injury to feelings because the extent which feelings are injured is not necessarily the same for each category of discriminatory act. The EAT went on to say that it did not accept that there should be some artificial attempt to assess loss by reference to each and every alleged incident of discrimination. It described that as "*wholly unreal*" and something which "*would be an impossible exercise*".

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10 73. The discriminator must take the victim as he finds her. Even if the victim is unusually sensitive or susceptible and a higher level of damage is sustained than otherwise might be the case, the discriminator is liable for the full extent of the loss or injury if it flows from the act of discrimination.

15 74. In calculating compensation in a case of unfair dismissal, recoupment provisions apply. The effect of those provisions is that any compensation payable is paid by the respondent to the government to the extent required to repay any benefits received by a claimant. Any remaining balance is then paid by the respondent to the claimant. That is not the procedure in discrimination cases. The list in Regulation 3 and Schedule 1 to the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 details the Tribunal payments in proceedings to which those Regulations apply. That list does not include the 2010 Act. In this case, therefore, the relevant sum received by the claimant as government benefits is not repaid by a respondent to the government. It is instead deducted from money paid by the respondent to the claimant. Applying that, government benefit received by the claimant is deducted from any compensation awarded in respect of loss of earnings due to a discriminatory dismissal.

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30 75. Section 38 of the Employment Act 2002 deals with the situation where there is no statement of employment particulars supplied to an employee. It states that where a relevant award is made by a Tribunal, the Tribunal "*must*" award the minimum amount of 2 weeks commencement pay unless there are

exceptional circumstances making an award or increase in that award unjust or inequitable.

### Submissions

- 5 76. Ms Drysdale had, helpfully, prepared written submissions. Those were thorough. They summarised the evidence and set out proposed findings in fact. They set out the law in this area as Ms Drysdale said it applied. They detailed the compensation which it was argued the Tribunal should award to the claimant. That comprised loss in respect of unfair dismissal, injury to feelings and an award in terms of Section 38 of the Employment Act 2002. In relation to that section, Ms Drysdale submitted that the Tribunal should award 10 the higher amount, namely 4 weeks pay. The claimant had worked with the respondents for 2 ½ years but had received no statement of employment particulars.
- 15 77. Ms Drysdale confirmed that the case pled of detriment due to the claimant having made protected disclosures (“whistleblowing”) was no longer being insisted upon by her.
78. A schedule of loss appeared in the bundle at pages 43 to 45.
- 20 79. In relation to unfair dismissal, the compensation proceeded on the basis that dismissal was an act of discrimination, although constituted by resignation of the claimant. On that basis a joint and several award sought in respect of the compensatory element. Loss of earnings was sought from time of termination of employment to date of Tribunal and onwards for almost 22 weeks.
80. The sum of £350 was sought in respect of loss of statutory rights.
- 25 81. In relation to injury to feelings, Ms Drysdale set out in her written submission her view that an award should be no less than £30,000. She urged the Tribunal to have regard to the fact that the harassment and discrimination had continued over a period of nearly 2 years. It had been regular. There been a significant effect on the claimant, which effect was continuing as she remained unfit for work. The claimant had described the impact when saying that she 30 felt she had no one to turn to, felt worthless, found it disgusting, was ashamed,

was embarrassed, felt unsafe both at home and at work following the incidents, was disappointed with the first respondents, was shocked, felt unsupported, felt petrified, was sick to the stomach, dreaded attending work and receiving phone calls from the second respondent, was afraid and was  
5 very low in mood. Security measures had to be taken at the claimant's home. She was afraid to leave her home. Her confidence had suffered. She said in evidence that this had "ruined her".

### **Discussion and decision**

82. As mentioned above, the claimant was in my view entirely credible in giving  
10 her evidence. She has therefore been subjected to very upsetting and entirely inappropriate behaviour by Mr Andrew, the second respondent. This occurred over a significant period of time. Other employees were aware of the behaviour of Mr Andrew. They sought to protect the claimant as far as was possible. They encouraged her to take this further to external bodies on the  
15 basis that the first respondents, although made aware of the behaviour, its extent and the upset it was causing, did not take any meaningful steps to tackle or prevent it. A meeting was held. An apology was given. The behaviour however continued as previously.

83. It is recognised that there was potentially some difficulty in tackling this in that  
20 Mr Andrew was the managing director of the respondents. There is, nevertheless, a duty incumbent on a manager such as Mr Andrews and subsequently Ms Thomson to take such matters seriously and to hold to account even someone in the position of managing director. The first respondents had an employee who was being subjected to what was, frankly,  
25 an intolerable situation. Physical contact of a sexual nature was taking place. Remarks of a sexual nature were being made. There was no suggestion that the claimant did anything other than indicate discomfort and that she took objection to both the remarks and the physical contact. On the evidence, the first respondents made things worse by altering the rota of the claimant so  
30 that she was to work with Mr Andrew on a Monday morning and also in relation to catering for funerals.

84. The claimant resigned on 22 June 2019. She did that following upon the remarks made by Mr Andrew on 21 June and his attempt to have the claimant give him “*a proper kiss*” by grabbing her head and pulling it towards her. That followed the encounter between the claimant and Mr Andrew that day. Mr Andrew was angry at that point and made the remark detailed above as to wanting “*the pants off*” the claimant.
85. The remarks made and this conduct were in my view sufficient to destroy the trust and confidence between employer and employee. A repudiatory breach of contract therefore occurred on 21 June. There had in any event, on the facts found, been behaviour by Mr Andrew, the managing director, such that there were various “straws” of very serious nature in existence prior to the events of 21 June.
86. The claim of constructive unfair dismissal was in my view therefore well founded and is successful. Further, resignation followed a discriminatory act. The dismissal is therefore a discriminatory act.
87. The conduct of Mr Andrew is also such that it constitutes harassment. It was clearly unwanted by the claimant. The conduct as detailed above, considered on the subjective and objective standards as required in terms of Section 26 of the 2010 Act, meets the test and is conduct in course of employment for which both the first and second respondents are liable. Although a meeting had taken place, on the evidence I had no basis for finding that the first respondents took all reasonable steps to prevent Mr Andrew from doing what was alleged or from doing anything of that description. The “defence” in Section 109 of the 2010 Act does not therefore apply.
88. On the evidence accepted, it was therefore quite clear to me that harassment, as that term is defined in Section 26 of the 2010 Act had undoubtedly occurred. The conduct was unwarranted. It was either of a sexual nature or was related to sex, being the protected characteristic. It appeared likely in some instances that the purpose of the conduct was to violate the claimant’s dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Insofar as that may not have been the purpose in relation

to any particular incident or remark which may have been made, it certainly was the effect of such an incident or remark.

89. In coming to the conclusion which I have, I have had regard both to the perception of the claimant in relation to these matters, to the other  
5 circumstances of the case and also have considered whether it was reasonable for the conduct to have the effect which it must have before harassment is established in terms of Section 26. I am entirely satisfied that applying both the subjective and objective standards harassment as defined in Section 26 has occurred.

10 90. Considering whether victimisation had occurred, it did not seem to me that there been any change in the behaviour of Mr Andrew towards the claimant after the complaint or grievance had been intimated by the claimant. I did not regard anything thereafter as having been done therefore because of that  
15 protected act. What happened thereafter seemed to me simply to be a continuation of the harassment on the basis that, despite a meeting where the attention of Mr Andrew was drawn to his behaviour and he apologised for it, he carried on regardless.

### **Time-bar**

91. Clearly, some of the instances of behaviour which have led to this claim  
20 occurred more than 3 months prior to presentation of the claim. If they were “stand alone” events, time-bar would apply to exclude them from being before the Tribunal, unless the Tribunal was satisfied that it was just and equitable to extend time to permit those matters to be before it.

92. If an event occurs more than 3 months prior to presentation of the claim, it  
25 may be heard by the Tribunal either through extension of time as just mentioned or if the Tribunal is satisfied that there has been conduct extending over a period. If conduct has extended over a period, then it is treated as being done at the end of that period. If that is so then the entire linked conduct is before the Tribunal.

93. On the evidence I was satisfied that there has in this case been conduct extending over a period. The conduct had been of the same type. It has involved the same person, Mr Andrew. There have been gaps where, for reasons unknown, there was no evidence before me as to conduct continuing. The conduct involved however resumed and was repeated. The period of time over which it occurred was just over 2 years. The last incident was immediately prior to dismissal. The claim was presented within time in relation to that incident. As there was conduct extending over a period with that period going back to the first matter about which the claimant give evidence, the Tribunal has before it for decision all of the incidents about which the claimant give evidence. Those incidents comprised conduct extending over a period. The last incident spoken about in evidence was within 3 months of presentation of the claim. There is therefore no need to consider whether an extension of time is appropriate.

## 15 **Compensation**

### *Constructive unfair dismissal*

94. On the basis of the claimant's age and weekly pay, she is entitled to a basic award of 2 weeks' pay. That results in some appeal to her by the first respondents of £400.

20 95. The compensatory awards proceeds on the basis of the claimant's net weekly wage being £195. Compensation for loss at that rate is sought for the period between 23 June 2019 to 24 January 2020, the latter date being the date of the Tribunal hearing. That period was 30.86 weeks. The sum awarded to the claimant is £6017.40.

25 96. In respect of future loss, the claimant's weekly wage of £195 is also appropriately used. The period of future loss in respect of which are what was sought was 25 January 2020 to 25 June 2020. That is 21.86 weeks. The amount claimed is £4262.14.

30 97. In respect of the discriminatory dismissal (constructive) the compensatory award sought was therefore £10,279.54. Deduction of benefits received is

appropriate. The legal basis for that is set out above. The claimant received £727.13 per month by way of benefits. That is £8725.56 per annum. The relevant weekly amount is therefore £167.80. Over the period in respect of which compensation is claimed, the sum received by the claimant by way of benefits was therefore £8,846.42. Deducting that amount from the compensatory element claimant, the balance due to the claimant is £1,433.12.

98. Interest is added to that amount. It is added from the mid-point. The mid-point is the date halfway between the date of the discriminatory dismissal and the date of the Judgment of the Tribunal. The period from date of dismissal, 22 June, to date of judgment is 32 weeks. Taking the midpoint in applying that to the calculation results in interest being payable for 16 weeks. The loss to date of Judgment, rather than to date of the Tribunal hearing is £881.92. Interest on that amount for 16 weeks is £21.71. No interest is however payable in respect of future loss. Future loss from date of Judgment for a 20 week period totals £551.20.

99. The harassment was of a serious nature. It was repeated and carried out over a relatively lengthy period of time. It had a devastating effect on the claimant. She gave evidence in a straightforward way about that. She became upset when describing the behaviour. In my assessment of evidence as to the impact, I was quite clear that she was not exaggerating. She produced text exchanges with other members of staff and spoke to those. She produced her communications with the Samaritans and with Rape Crisis Scotland. She spoke to those. She explained the impact upon her family life and security measures she had taken at the property. She spoke of the medical treatment of which she has been in receipt.

100. In assessing compensation under the principles of *Vento*, the Tribunal requires to exercise its discretion. This objective is to set what it considers to be a fair, reasonable and just amount of compensation having regard to the particular facts and circumstances of each case.

101. I was of the view that compensation in this case properly fell within the upper band of the *Vento* bands, as adjusted over time in terms of case authority and



the Presidential Guidance. For clarity, my view on the level of compensation proceeds on the basis that the 10% uplift in terms of *Simmons* applies.

102. The upper band applying the relevant Presidential Guidance lies between £26,300 and £44,000. The upper band is regarded as being appropriate in the most serious cases. Each case is different. In this case, the factors which led me to regard the injury to feelings award as being appropriately located within the top *Vento* band were, in particular, the length of time over which harassment had occurred and its serious nature. In addition, the claimant had made it clear that she did not wish contact or conduct of the type which occurred. Notwithstanding that, the contact had continued. There had been a heavy toll on the claimant's mental health and sense of well-being. She continues to be greatly affected by the events described in this Judgment.

103. Keeping in mind that the award is to be compensatory rather than punitive, I regard £28,000 as being appropriately awarded for injury to feelings.

104. To that amount, interest requires to be added. On the evidence, harassment started to occur around July 2017. No specific dates that month were given as the commencement date. Using my discretion, I have proceeded on the basis of taking 15 July, halfway through the month, as commencement date. Given the date of this judgment, interest is therefore applied for the period of 2 years 30 weeks. Interest amounts to £3532.31.

#### *Loss of statutory rights*

105. The sum of £350 was sought in respect of loss of statutory rights. That is regarded as an appropriate amount. The first respondents are ordered to make payment of that amount to the claimant.

#### *Failure to give a statement of employment particulars*

106. There was no evidence before me which would provide a basis for taking the view that there were exceptional circumstances making an award, or increased award, in terms of Section 38 of the Employment Act 2002 inappropriate. The minimum award is therefore to be made. The higher

amount may be awarded if the Tribunal considers that just and equitable in all the circumstances.

5 107. Time had passed in that the claimant had been employed for over 2 years without there being any such statement of employment particulars or contract of employment issued to her. This was not however a situation where she had asked for that. It was also not a situation in which the matters which were the subject of claim turned upon any issue which would have been resolved had the statement of employment particulars been issued to the claimant.

10 108. Whilst the behaviour of the first respondents was not as it should have been in that they had not complied with the statutory obligation to issue a statement of employment particulars, I did not see that there was a basis on which it was just and equitable that this result in the higher amount in terms of Section 38 being awarded. I therefore award the minimum amount, 2 weeks' pay. That amounts to £400. The first respondents are ordered to pay that to the  
15 claimant.

**Employment Judge : R Gall**

**Date of Judgment : 06 February 2020**

**Date sent to parties : 12 February 2020**