EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mrs F Istanbouli	**AND**	**(R1) Connect Way Limited t/a Sinuhe Restaurant** **(R2) Hossein Torfinejad** **(R3) Hussein Agha**

HEARING

HELD AT: **London Central** **ON:** 5 & 6 November 2019
25 February, 24 March and 12 May 2020

BEFORE: Employment Judge Walker
Members: Mrs D Olulode
Ms E Ali

Representation:

For Claimant: Mr Platt-Mills, of Counsel
For Respondents: Mr J Gerber, Solicitor

RESERVED JUDGMENT

1 The Tribunal declare that the Third Respondent harassed the Claimant by reason of her sex and that the First and Second Respondents victimised the Claimant.

2 The First Respondent breached sections 1-4 of the Employment Rights Act 1996 in failing to give the Claimant a statement of terms and conditions of her employment.

3 In the circumstances the Respondents are ordered to pay the Claimant the sum of £8,600 by way of injury to feelings. Additionally the First Respondent is ordered to pay the Claimant the further sum of £476 being an award for failure to provide a statement of terms and conditions of employment pursuant to section 1 and 4 of the Employment Rights Act 1996.

4 All the Claimant's remaining claims are dismissed.

REASONS

The Claim

1. The Claimant claimed sexual harassment against the Second and Third Respondents for which she alleged the First Respondent is vicariously liable, and victimisation against the First and Second Respondent, wrongful dismissal against the First Respondent and compensation for a failure by the First Respondent to provide a statement of the main terms and conditions of employment as well as breach of contract in respect of a failure to reimburse expenses.

Evidence

2. The Claimant gave evidence herself. Mr Torfinejad, the Second Respondent, gave evidence on his own behalf and on behalf of the First Respondent. Mr Dhaher Rdha gave evidence on behalf the Respondents and Mr Ali Azimi (otherwise known as Mr Agha, in these proceedings and who is the Third Respondent) gave evidence with assistance from an interpreter. We will refer to Mr Azimi as Mr Agha in this judgement, as that is the name by which he was referred to in the claim and in the evidence.

3. The Tribunal was provided with an agreed bundle of documents and we were also shown two photographs of the restaurant where the key incident took place as well as being given a copy of a document referred to as rules of employment.

Timing of the hearing

4. The hearing was listed for three days and was due to be heard on 5-7 November 2019. At the case management conference, the Claimant requested that the hearing be dealt with within two days, with the Tribunal reserving a decision if at all possible.

5. In the event the London Central Tribunal only had members available for two days and, in the light of the Claimant's request, it was listed with a tribunal panel that could not sit together for three consecutive days. This Tribunal thought it was possible to hear evidence for two days, and would then have taken steps to reserve the decision and sit in chambers on another day, thus meeting the original timetable. However this proved not to be possible.

6. The Respondents' representative requested that the Third Respondent, Mr Ahmed, be allowed to give his evidence on the first day, as he had a hospital procedure for an endoscopy booked for the second day. The Tribunal wished to co-operate with this. Unfortunately, when the Third Respondent came to give evidence, he did not appear to understand the oath. English was not his first language.

7. The Tribunal did not enquire in detail about the Third Respondent's procedure, but understand that the appointment had been fixed some six months beforehand, and would have been known to the Respondents on the date of the case management hearing at which the full merits hearing date was confirmed.

8. The Claimant pointed out, at the beginning, that the Claimant had been concerned that the Third Respondent would need an interpreter. The Claimant said this had been raised on several occasions with the Respondents, who had said it would not be necessary. However, we were told that nearer the time of the hearing, the Respondents suggested that the

Third Respondent would need an interpreter but proposed the Second Respondent would do the interpreting for him. The Claimant's representatives said they had told the Respondents that this would not be acceptable to the Tribunal, and indeed it would not have been. Interpreters are court appointed and must be independent accredited interpreters. The Respondents then apparently decided that the Third Respondent could give evidence without an interpreter.

9. The Tribunal's perception of the Third Respondent, when he was asked to give the oath, was that he found it extremely difficult to understand the words, and was certainly unable to understand the implications of what he was being asked to do. In the light of that, the Tribunal stopped him from continuing and we deliberated before reaching a conclusion.

10. It was the unanimous view of the Tribunal that the Third Respondent had not understood and would not be capable of answering the questions involved without a Farsi interpreter. Having made enquiries, we learned that it would not be possible to arrange that without some advance warning. We could not get an interpreter for the same day and we understood that Mr Agha might not be fit to return to the proceedings for the whole or the rest of the proceedings. In all the circumstances it was necessary to go part heard and to fix another day for hearing which was 25 February 2020.

11. This date was fixed after some consideration because the Claimant did not wish to return for any further hearing days, and indeed it was suggested that the Tribunal might hear her evidence on remedy out of order so that she could be released from the obligation to return. In the end the Tribunal concluded that this would not be possible as we were not satisfied that we would be in a position ourselves to ensure that we had all the information and had asked the correct questions which were relevant to remedy. Therefore, we decided that the Claimant would need to return on 25 February, if she wished to give evidence on remedy.

12. The evidence was completed and short submissions made on 25 February, but that took all day. The parties were to send written submissions to the Tribunal, which they did. A chambers day was planned. In the event, before the chambers day took place, Tribunal sittings were disrupted by the coronavirus crisis, so an in person chambers day could not take place. Instead, the Tribunal met remotely using video conferencing and subsequently exchanged further views, to ensure we had reached a unanimous decision.

Issues

13. The issues in the case had been identified at a case management hearing on 7 August 2019 and were as follows:-

Sexual Harassment (s.26 (1) (2) and (3) of Equality Act 2010

1. Did the Third Respondent engage in unwanted conduct of a sexual nature by slapping the Claimant's backside?

2. Did the Third Respondent's conduct have the purpose or effect of:

    a. violating the Claimant's dignity; or

    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant;

    taking into account the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

3. Was the Claimant treated less favourably by the First and Second Respondents because of her rejection of the conduct of the Third Respondent than she would have been had she not rejected the conduct? The following less favourable treatment is relied upon:

    a. On 4 November 2018, the Second Respondent;

i. indicated that the Claimant was partly to blame for the Third Respondent's alleged conduct;

ii. told the Claimant that if she wanted to succeed, she should ignore certain behaviour, including being slapped on the backside;

iii. proposed that the waitresses, including the Claimant, would no longer be allowed to enter the kitchen; and

iv. told the Claimant that if she was not happy with the response, she could quit

b. On 5 November 2018, the Second Respondent:

i. behaved in an aggressive manner towards the Claimant;

ii. behaved in an intimidating manner towards the Claimant;

iii. trivialised the Claimant's concerns;

iv. suggested that the Claimant was at fault for the alleged conduct of the Third Respondent;

v. summarily dismissed the Claimant;

vi. attempted to pressure the Claimant into not bringing a claim by telling her she had no proof, including asserting that there was no CCTV footage and the Claimant had no witnesses;

vii. slammed the counter and threw a coffee cup

viii. told the Claimant that, if she brought a claim, he would blacklist her name from every business in London and she would not find a job anywhere;

Additionally when it is alleged that the First and Second Respondents

ix. made false allegations of stealing against the Claimant;

x. threatened to contact the police;

xi. withheld the Claimant's holiday pay and wages; and

xii. demanded an apology from the Claimant.

Sexual Harassment (s.109 of EqA)

4. Were the actions of the Second and Third Respondents done in the course of their employment for the First Respondent

Sex Discrimination (s.13 of EqA)

5. In dismissing the Claimant, did the First and Second Respondents treat the Claimant less favourably than they treat or would treat others because of her sex?

   The Tribunal Judge's notes show that this allegation had already been withdrawn and we have therefore not addressed it.

Victimisation (s.27 of EqA)

6. Did the First and Second Respondent subject the Claimant to the following detriments:

   a. dismissing the Claimant summarily;

   b. threatening the Claimant that she would be blacklisted and would not find a new job;

   c. threatening to contact the police;

   d. withholding the Claimant's accrued wages and holiday pay for over a month; and

   e. not responding to the Claimant's Data Subject Access Request?

7. Did the First and Second Respondent subject the Claimant to any, or all, of the above detriments because the Claimant did a "protected act", or because the Second Respondent believed that the Claimant had done, or may do, a protected act, namely;

    a. The Claimant made an allegation that the First, Second and Third Respondents had contravened the Equality Act 2010; and/or

    b. the Claimant asserted that she would bring proceedings under the Equality Act 2010?

Wrongful dismissal

8. Was the Claimant wrongfully dismissed?

Failure to provide a statement of main terms of employment (s.1 and 4 of ERA)

9. Did the First Respondent fail to provide the Claimant with a written statement or particulars of employment?

Breach of Contract

10. Did the First Respondent breach the Claimant's contract of employment by failing to reimburse her for expenses properly incurred in the course of her employment?

Facts

14. The Claimant was a student and was working on a part-time basis as a waitress at the relevant time. The First Respondent is a company that operates a small Persian restaurant in northwest London. The Second Respondent is the owner of the restaurant and the Third Respondent is a chef who works at the restaurant.

15. The Claimant said that she had suffered an incident of domestic violence when she was young. She was brought up in Saudi Arabia and the incident

was not something she could challenge in Saudi Arabia. This, she said, left her traumatised. There is no evidence to support his, but the Tribunal was shown a letter dated 14 August 2018 from a psychiatric doctor who referred to interviews with the Claimant between 28 June 2018 and 14 August 2018 during which she was diagnosed with a major depressive order and panic attacks relating to what he referred to as "stressful life events". He recommended CBT, physical activity and healthy diet, and medication being a drug called citalopram, at 10mg per day.

16. As noted, the Claimant was employed on a part time basis by the First Respondent. There was also a Persian tapas bar on the same street. The Second Respondent owned that tapas bar, as well as being the owner and director of the First Respondent.

17. The Claimant was 19 at the time of the incident. She had come to the UK to study and was undertaking a degree at the University of London. She was interested in part time work. She told the Tribunal that she overheard her father saying to her mother that he was under some financial pressure and she decided that she wished to relieve some of that by earning some money herself and freeing her parents from the need to maintain her to the same financial level as they had been doing.

18. The Claimant told the Tribunal that after overhearing her parents' conversation, she found some work, initially at a hairdresser, which she left because she had a disagreement with the owner about the need to stand for long periods of the day. She wanted to be able to sit and this was refused. She then worked at a café owned by Mr Rdha, which was in the same street as the Restaurant. She said she wanted to work more in waitressing whereas Mr Rdha wanted her to do more cooking. Mr Rdha gave evidence that she was let go during her trial period after working only one week and that he and his manager had reservations about the Claimant `and he did not want her to work near the till. It is not necessary to go into that in any detail because they are matters about which the Tribunal has insufficient information to reach any factual conclusions. What is clear is that Mr Rdha knew the Claimant from that situation and as a result of his friendliness with the Second Respondent,

the Claimant was introduced to the possibility of working as a waitress in the First Respondent restaurant.

19. It is also clear from that evidence and from the evidence given by the Second Respondent that the First Respondent was desperately in need of waitressing staff. In consequence, the Second Respondent was keen to employ the Claimant.

20. The Claimant said she had no previous waitressing experience and certainly no understanding how to deal with tips. In fact, she went so far as to tell the Tribunal that some of her expectations about the proper use of tips were derived from watching movies.

21. The Claimant accepts in her own evidence that the situation with tips caused some tension between her and the kitchen staff. The Claimant had started work on 24 September 2018 and the Second Respondent gave evidence that in doing that she would have been introduced to the way of working in the restaurant by working alongside another waitress who would have shown her how they operated. She also would have some information from him although he clearly was not in the restaurant the whole of the time.

22. It was not disputed that the restaurant operated a till in conjunction with a computer system that required each member of staff to enter their own code in order to use the till. The Claimant was given a code under that system. When an order was placed, the computer prepared a document headed "order" which was effectively a bill for the customer which not only recorded the date and time but also recorded which person had placed it. The effect was that the Claimant's name would appear where she was processing the orders for customers. Additionally, if she processed the order, she would be involved with taking their payment.

Tips

23. Some clients would leave tips in cash and some would leave them as service charge through their credit card payment. The Claimant told the Tribunal that her understanding was that tips that were left on the table should be put in a tip cup or box, but any tips from the customer handed to the waiter

or waitress personally, could be kept by that member of staff themselves as they had earned it. This was disputed by the Second Respondent who said that was never the case and tips had to be shared and should have gone into a box if they were in cash format. The reason for this was that the kitchen staff would then have a share. The Second Respondent also said that he always processed the tips including those on credit cards and divided them up amongst the staff who had been on duty at the time and that they were provided to the staff relatively quickly after they were earned, usually on a weekly basis.

24. The Claimant admitted that her handling of tips caused animosity because she referred to one tip on 30 October, which she received, which she thought was £10, which she said was given to her personally. She thought she was entitled to keep it, that she knew that Mr Agha, the Third Respondent, being the chef employed by the Restaurant, was watching her so, to avoid a dispute with the kitchen staff, she hid it under a receipt to take it later. Later, when she was not being watched, she put it in her pocket because she said she was satisfied it was her own and she was entitled to it.

25. The Claimant says this was observed by the Third Respondent, Mr Agha, the chef, who told another member of staff who was arriving for a shift change. That member of staff confronted her about it and argued that she was stealing tips. This confrontation that occurred in the restaurant in front of Mr Torfinejad's daughter, who also worked at the restaurant and had become friendly with the Claimant. There was an altercation as a result of which Mr Torfinejad talked to the Claimant. The Claimant says he told her she was right and she could keep the tips but suggested that she should put all the money in the tip pot and tell him how much she had personally been given, and he would give that to her himself in full.

26. Despite her assertion that she was told by Mr Torfinejad that she would get the tips when, on 1 November, the Claimant received a £20 tip, she did not put it into the tip box. The Claimant said the customer had folded up the £20 note in his hand and he gave it to her when he shook her hand. She was

worried, however, that Mr Torfinejad might not transfer all of it to her because it was a big amount and so, as there were coins also left, she put those in the tin cup but she kept the £20.

27. The Tribunal have been shown some CCTV footage of events on 30 October and 1 November. Mr Torfinejad says that he was told by the chef, Mr Agha, that the Claimant had been stealing and he had seen her taking money from the till on 30 October and 1 November 2018. He said she took the cash, walked around the corner towards the kitchen and put the money in her pocket before returning to the till. Mr Torfinejad denies any conversation as alleged by the Claimant that he promised she would get the tips she claimed had been intended for her personally. He says it was always the case that tips went into a tip pot and were divided up in accordance with the process he described.

28. Mr Agha, the Third Respondent, said that he saw the Claimant taking tips, which he believed should have been shared with all the staff, so he spoke to Mr Torfinejad who told him that he didn't care.

29. The Tribunal found the Claimant's explanation about the tips implausible. First, the Claimant had no experience of waitressing and would have had to be shown how to operate by one of the permanent waiting staff as Mr Torfinejad said. Inevitably, that person would have shown her where the tip box was and would have explained what happened to tips. Secondly, she clearly hid tips. This was admitted by her and is clear from CCTV clips. We do not think she would have done this if she genuinely thought she was entitled to them. Her explanation about hiding them, even though she was entitled to keep them, because of not wanting trouble with the kitchen staff is implausible. Further, the distinction the Claimant made between a tip that was handed to her, and one that was left on the table, made no sense. On the Claimant's own account, the kitchen staff were upset as they thought they were entitled to a share of the tips that she was keeping.

30. We considered Mr Agha's evidence that Mr Torfinejad had told him he didn't care about the Claimant taking tips. Mr Torfinejad may well have refused to tell Mr Agha that he was going to take action about the Claimant taking tips. He certainly was not willing to dismiss her. The Claimant herself told us that Mr Torfinejad did speak to her. She told us that Mr Torfinejad had said she should put the tips into the shared pool and he would re-allocate the tips she claimed to be hers, to her. If that is the case, it seems he was desperate to keep the Claimant on his staff, as he said.

31. Our conclusion is that the Claimant knew she should have been sharing the tips initially. After a conversation with Mr Torfinejad, she was fully aware that she should put all the cash tips in the tip pot. Her suggestion that she was going to be re-allocated the tips by Mr Torfinejad makes little sense. Despite her assertions about this, the Claimant still hid tips, and admits she was worried she would not get that sum. That throws into doubt the entire explanation she has given and indicates she did not expect to get the tip reallocated to her. We do not accept her explanation that it was simply because it was a large tip.

Missing Till Money

32. The Tribunal have been shown some CCTV footage of events on 30 October and 1 November. Mr Torfinejad says that he was told by the chef, Mr Agha, that the Claimant had been stealing and he had seen her taking money from the till on 30 October and 1 November 2018. He said she took the cash, walked around the corner towards the kitchen and put the money in her pocket before returning to the till. Mr Torfinejad says he checked the CCTV and also checked the receipts and on 1 November, he found a transaction which was missing. He says that he has a computer system which enables him to look at all of the receipts and transactions and that he could see there was one which was not placed in the till and neither was there any cash to accompany it and he believed that the Claimant had destroyed the paper receipt and pocketed the cash.

33. Mr Torfinejad said that he confronted the Claimant with this situation on 2 November but she denied it. He said he decided to give her another chance despite the evidence because she was relatively young and good with customers and the restaurant was not well staffed. He says that after their chat she returned later in the evening with fairy lights, which he had not asked her to buy, nor had he given her permission to buy them. He accepts that he kept the fairy lights despite later events. The Claimant denied having any conversation with Mr Torfinejad about a till shortage at this stage.

34. Mr Torfinejad admitted in the course of giving his evidence that he did not routinely check the receipts or the till and the Tribunal were not given any breakdown of the other amounts in the till. We had a variety of receipts including some where the credit card payment had clearly been attached to the order/bill and some end of day reports which showed how much had been taken by way of credit cards including a breakdown by issuer specifying how much had been taken on Mastercard, Visa, Credit, Visa Debit.

35. One of the orders at page 45 of the bundle is dated 1 November and is for a total of £123.75. There is no credit receipt attached to it and the Tribunal was told, by Mr Torfinejad, that this was retrieved by him, as he has access to information on the till so that even if the hard copy till receipt was missing, he could still see a computer copy of it. In the absence of credit card documentation, it must have been paid in cash, but the cash was missing.

36. While it is clear that the order was taken by the Claimant as her name appears on it, we cannot reach a conclusion that she kept the cash, rather than putting it in the till. This is because the First and Second Respondent did not produce any form of audit to show the till receipts and, as we have noted, we had no breakdown of the other amounts in the till. We were told that it was the only cash payment of the night but we also know that Mr Torfinejad did not routinely check the till. We do not know who else was on duty that night, but the Claimant has suggested there were others on duty. We do not know if there was a possibility that someone else had taken the receipt and the cash. We do know the Mr Torfinejad took no steps to raise the matter in any official

way with the Claimant or to suspend her in order to carry out a full investigation, after finding out the problem. A theft of this nature would normally have resulted in an immediate investigation and a proper enquiry, as any reasonable employer would want to find out what they could to ensure they did not continue to employ someone who was guilty of theft. In the absence of those steps, there is insufficient evidence to support the Respondents' assertion that the Claimant stole money from the till, although it does not follow from this finding that we are suggesting that no money was missing. We are simply unable to reach a conclusion on the limited evidence we have.

Kitchen Incident

37. On Saturday 3 November the Claimant was working a double shift, which meant she worked from 11am to 11pm. Towards the end of the first shift she said there were no customers in the restaurant. In her witness statement she said this was around 4:45-5:30pm. She explained, "I would usually play calm Arabian style music to match the ambience of the restaurant. The chefs working the first shift were Ahmed and Mr Agha. Ahmed came out of the kitchen and asked me to change the music to something more fun. I refused and said that if Hossein came and heard party music, he would get angry with me. Ahmed kept begging me, and he and Mr Agha were joking around and calling my music boring and saying that they wanted a least one fun song while they prepare the food for the evening shift. I relented and said ok, because I wanted to get along with them. I played an old Persian song that is considered "wedding music" because of its up beat style. Mr Agha and Ahmed started dancing in the kitchen and called for me to join them. At first, I was just watching and laughing. Then they told me to dance with them so I walked over to them and just waved my hands back and forth, which is a "manly" way to dance to such music. Ahmed and Mr Agha were getting into it and I felt like I was finally part of the team, so I did as people do at weddings which is to make a sound which sounds like "LE LE LE" in Arabic this is called a zaghloot. Mr Agha then shooshed me loudly and slapped my lower back and then he slapped my butt hard which hurt and made a really loud sound"

38. I became really embarrassed and did not know how to react. Mr Ahmed and Mr Agha started laughing hard and were tearing up from laughter. I left the kitchen and felt humiliated.

39. Mr Agha denied this description of events and told the Tribunal that it was not possible as the kitchen is quite small. He agreed they had been playing music, but said that the Claimant could not have come into the kitchen and danced with them as there is a table, which is in the way, and there was no room for the Claimant to come around to the side of the table where he and Mr Ahmed were preparing the food.

40. The only contemporaneous documentary evidence that could have assisted in this matter would have been CCTV footage. The Respondent said there was only CCTV footage from the one camera, which was positioned close to the till in the restaurant area and did not cover the kitchen, so there is nothing to show what happened in the kitchen. The Claimant said she was sure there was also a camera in the kitchen. The Respondents deny this and as a result, although the Respondents have disclosed some CCTV taken in the restaurant area near the till, no CCTV of the kitchen area has been supplied. We were not told by the Claimant where the camera was in the kitchen and we cannot see any reason for there to be a camera in the kitchen, unless it was to protect an external door.

41. The Claimant raised some concerns about the footage of the restaurant area that the Respondent has disclosed. First the footage is not a consistent stream. It is a few sections of the total footage that was recorded. Secondly, in some cases the footage goes forward, then backwards and forwards again. The timing of the footage is also uncertain.

42. The Respondents do not dispute the fact that they have not produced the whole footage on the afternoon in question from the restaurant camera. Rather than providing all the footage for the entire period in which the Claimant said the incident could have occurred, the Respondents have

produced bits of footage over three days being 30 October, 1 November and 3 November. The first two days footage relates to the tips. The footage, which was taken on the afternoon of 3 November, shows the following. The footage starts at 17.16.27 with a view over the restaurant from a position behind the till. The view includes the table area and encompasses most of the restaurant seating area looking towards the door. There is a table beside the door, across a window, and it appears to be light outside. The subsequent footage often reduces the field of view and focuses on specific areas. The Claimant is behind the till area and walks around to a table just in front of the till area and moves a chair. She then goes back round to behind the till area while clicking her fingers as if to music.

43. The clip jumps back again and the Claimant is behind the till. She spends time on her phone. She appears to be scrolling through and eventually selects something. The footage jumps again back to the Claimant selecting something. The Claimant takes a sip from a glass. She walks around the till bar into the restaurant area. The Claimant then disappears into the kitchen area. We know she has gone into the kitchen area from the photograph of the restaurant taken facing that direction. She is out of view between 17.19.47 and 17.19.54, i.e. for about 7 seconds. She returns into view from the kitchen area and walks behind the till area, clapping her hands gently.

44. Then the Claimant comes away from the till area and walks into the restaurant towards the door. Near the door there is a small chest of drawers and she opens a lower drawer and then a drawer a little above that and appears to have picked up a napkin, or tea towel. The footage jumps from 17.20.15 to 17.21.32 at that point. However it later jumps back to 17.20.52 and moves forward from that time. To get a chronological sequence of events, we disregard the repeated footage. At 17.20.52. the Claimant moves back from the table in front of the till area towards the till, clapping her hands. While behind the till, she polishes a glass with a napkin. She then walks back out from the till area into the restaurant at about 17.21.20. She turns to look back at the kitchen with the glass and napkin in her hand. She smiles. She walks forward. Then she turns back round towards the kitchen again with a

smile and raises her hands and does a dance movement. She then drops her hands and steps to the table in front of the till where she puts the glass down. 17.21.30. Then the Claimant walks back to the till area and we see her stepping back to the till area while she does a sort of dance move. She is waving the napkin and bending her head down slightly.

45. The Claimant comes out from the till area again at 17.21.40 and walks into the centre of the restaurant with another glass and the napkin in her hand. She is polishing the glass. She turns back when in the centre of the restaurant to look at the kitchen. She smiles again. She continues to polish the glass and bounces her head a couple of times gently as if in time to the music. She then puts the glass on the table and turns to the till area. The footage stops at 17.22.11.

46. Under cross-examination, Mr Torfinejad explained that he does not download the footage as such. He has an app on his phone and he can play the footage on his phone. He can copy that footage onto his phone effectively using the screen shot process. That is why, on occasions, the footage ends with the screen shot of his phone home page, which it did.

47. Mr Torfinejad said that he only copied down footage that showed anything happening and he decided, when there was nothing happening, not to copy it at all. Additionally, on occasions he appears to have wound back and forward to review something, which also caused problems in terms of analysing the contents of the footage we do have but as noted, we have disregarded the repeated footage, where it was material.

48. There are other problems about the footage. It appears to begin at 5:16:25 and go on till 5:22:14. The Claimant suggested this might be an error in that the hour change had happened at the end of October and if the computer system had not automatically changed, it would be an hour out, so this could all relate to footage at approximately 4:16 rather than 5:16pm. Counsel for the Claimant suggested that in some of the video you could see that it was light outside the window, which would indicate that it could not have

been after 5 pm as by that time it would have been dark. We also know from Mr Agha that his shift ended at 5 pm and he would have gone home around that time.

49. We bear in mind that there are distinct problems with the footage. We have looked at it carefully and we have reached the following conclusions.

49.1 The footage probably was taken an hour earlier than the timer shows. It is light outside and that would not have been the case at about 5.20 pm in November.

49.2 The Claimant's own description of the event was that it occurred while she was playing lively music, usually played at weddings, and this was the first time she had put on any fun music that afternoon. Prior to that she told us that she had played calm music in keeping with the ambience of the restaurant. The footage appears to show her twirling her napkin and dancing which she would not have done if the music was calm. This does appear to be "fun" music that is playing. We therefore conclude it was footage taken at the time of the incident

49.3 The Claimant appears to be smiling at times after coming out of the kitchen and she smiles when looking at the kitchen area, so we do not think she felt immediately humiliated in the manner she describes in her evidence.

50. The Claimant used WhatsApp to communicate with her friends and the Tribunal has been shown various screen shots of her WhatsApp messages from her phone. The critical ones are marked as timed at 8:02pm through to 9:05pm on the day in question, 3rd November 2018. The Tribunal were told that the Claimant had these on her phone and when she provided them to her lawyers she was in Saudi Arabia and the effect of that was to change the time by 3 hours so that they appeared to have happened later in the evening. Assuming that is correct, these screen shots show WhatsApp messages sent between 5:02pm and 6:05pm.

51. The Third Respondent, Mr Agha, told the Tribunal that his shift finished at 5 pm and he would have left then. The WhatsApp messages between the Claimant and another waitress called Ghita appear at pages 51-52 of the bundle. The Claimant at apparently 5:02pm says to Ghita "did the kitchen guys ever touch you inappropriately". This is followed by the following:

"Ha ha ha ha".

52. The response that from Ghita came about an hour later to which she responds

"Ha ha ha ha. Yesssss U???"

53. The Claimant replies to Ghita asking how and then says "Hussein Agha just slapped my ass bro and I'm so embarrassed I am going to tell Mona but how did they touch you?" Ghita responds "me too he did the same thing".

54. The Claimant then responds "you're joking did you ever tell like Hussein or Mona" and then there is a voice message which has been typed out followed by the Claimant saying OMG (that is "Oh My God") "that's like me now I was gonna cry Ahmed and Hussein Agha laughed so much when he did it I literally didn't know where to put my face".

55. There were then some more voice messages between them and Ghita says "OMGGG". The Claimant then says it's not normal and he did it so hard I wanted to die like it's so embarrassing and asks Ghita - did he do it only once. Ghita responds I know it's embarrassing.

56. The Claimant on the next day replies "I told Mona, Mona told Hussein, Hussein is so angry and Mona is so angry" and then Ghita replies. Ghita's messages indicate that she used to feel awkward and she also refers to Mr Agha kissing her on her cheeks and when he did that he always kissed her mouth but she didn't want that to be told for the minute it was just between themselves.

57. The Claimant then responds saying that she is going to tell them that if Mr Agha is not fired she is going to quit. There then were quite a number of voice messages and the Claimant makes it clear she is going to call a lawyer, after which it appears that Ghita stops communicating with her.

58. As noted, the bundle contained transcripts of voice messages and although the Respondents' representative argued that they were not clear and were not accepted as genuine, the Respondents had allowed them to be put into the agreed bundle and had no particular information to explain why it was the Respondents were suggesting the messages were not genuine. We can see no reason to doubt their authenticity.

59. There are also transcripts of other voice messages with Mashima, who is Mr Torfinejad's daughter. These messages indicate the Claimant's father had told her that she had to give her weeks' notice if they did not fire Mr Agha but she rather assumed she would be the one who was going to leave. Her messages include further laughing indications "ha ha ha".

60. Mashima asked "if Hossein Agha stays, are you going to leave". The Claimant said "yes, she had to she's forced". Mashima then responds at one point saying "look anywhere you go there is always people like that. I have known Hossein Agha since I was a baby and even if he did anything, I don't think it was intentional and my dad has known him for even longer, like he's an old man he doesn't know what he is doing".

61. The Claimant's response to that is that her father had put his foot down and said he would rather pay for her for the rest of his life than work next to a guy who does that to girls.

62. They then had a discussion about a phone the Claimant used for music and the charger that Mashima returned to her, which she had left in the restaurant.

63. We asked the Claimant what she meant when she used laughing references in her messages and she said that she thought perhaps she was

embarrassed and made light of things. We note that she was communicating with a friend who was close to her in age and claimed to have experienced a similar situation.

64. Having considered the evidence carefully, we concluded that there was an incident on 3 November, in which Mr Agha did touch/slap the Claimant's backside when she had put on wedding music and they were in the kitchen. We accept there was a table in the way and it was a small kitchen but we consider that it must have happened because we do not think the Claimant would have made it up entirely. Soon after the event she texted her friend Ghita about it.

65. We do not consider the Claimant was humiliated as she said after the incident. She can be seen smiling and dancing in the CCTV. However, clearly the incident played on her mind as, over half an hour later, she raised it with Ghita.

66. Nevertheless, it was not a serious incident as can be seen from her demeanour and her first exchanges with Ghita, which include laughter indications. We reject the Claimant's statement that these just meant she was embarrassed.

67. The first message to Ghita was sent just after Mr Agha should have left the restaurant, as his shift had finished. We noted that as the Claimant exchanged messages with Ghita, she began to embellish and emphasise the event. The CCTV does show she was not particularly embarrassed at the time as she stood in the middle of the restaurant areas in full view of the kitchen and smiled at them and watched them a few times. Had she been truly embarrassed, she would have avoided that area and stayed mainly out of their sight.

68. The messages we have referred to reflect the fact that the Claimant told Mr Torfinejad's wife and daughter about the incident in which she said she as slapped on the backside by Mr Agha, later on 3 November. They in

turn told Mr Torfinejad that day. The Claimant did not go back and work in the restaurant again after 3 November, but she did go and see Mr Torfinejad twice after the incident on 3 November. They both give differing accounts of what happened when they met.

Meeting on 4 November 2018

69. The parties agree that Claimant went to the restaurant on 4 November. They also agree that she did buy some fairy lights and bring them to the restaurant and they were used in the restaurant, although they disagree as to when she brought them. The First and Second Respondents have not paid for them and say that the fairy lights were not requested by them. The Claimant says on 4 November, she went to the restaurant and met Mr Torfinejad who indicated that she was partly to blame, told her that she should ignore the behaviour, proposed that the waitresses would no longer be allowed in the kitchen, and told her that if she was not happy with the response, she could quit. Mr Torfinejad denies those expressions were used and says the waiting staff were not allowed in the kitchen in any event. We were shown a photograph of signs into the kitchen, which the Claimant says were intended to stop customers going into the kitchen but were not intended to stop the waitressing staff. The Claimant says the waiting staff had to go into the kitchen to get drinks bottles from a large fridge, which was in the kitchen, in the area behind the table where the kitchen staff prepared food, to top up a much smaller fridge in the till area. The Respondents deny this and all, including Mr Agha, say that the kitchen was too small an area for any more people than the kitchen staff, so the restaurant tried to stop waiting staff going in to the kitchen. They say there was a smaller fridge in the bar/till area for drinks for the restaurant, which was filled regularly.

70. It is clear that the Claimant and Mr Torfinejad had a conversation, but the evidence is contradictory and inconclusive. We do not consider anything significant happened as the Claimant went to meet with Mr Torfinejad again the next day at the coffee bar across the road.

Coffee bar meeting on 5 November2018

71. The Claimant and the Second Respondent, Mr Torfinejad, both agree they talked in the coffee bar on 5 November 2018, and the Claimant clearly complained about her treatment by Mr Agha. The restaurant premises are very small and it would have been impractical to meet there.

72. The Claimant did, as she said she would in her WhatsApp messages, insist that the Respondent should dismiss Mr Agha or she would resign. It is clear that she was demanding that the Second Respondent should dismiss the Third Respondent, Mr Agha, immediately. It is also clear that Mr Torfinejad did not want to take immediate action of that sort.

73. The Claimant says that the Second Respondent got angry and he threatened the Claimant with being black listed in response to the Claimant saying she would sue. We accept that he did make that statement. It is referred to in the Claimant's text sent on 5 November.

74. The Claimant's case is that Mr Torfinejad also told her she had no witnesses and that the kitchen staff denied anything had happened. Mr Torfinejad denies the Claimant's assertions about what she alleges he said, but says that he tried to keep matters calm and friendly and that he told the Claimant he could not rush a decision because he had to investigate. He told the Tribunal that by referring to an investigation, he meant he had to take some time to think. He also told the Tribunal that he had talked to Mr Ahmed and Mr Agha, who were the kitchen staff, and had suspended Mr Agha for a week on full pay. Mr Torfinejad told the Tribunal that both his wife and daughter worked in the restaurant. He could not have contemplated them being at risk from inappropriate behaviour and he took the allegation seriously. The Tribunal found that compelling and relevant evidence.

75. Mr Agha confirmed that he was suspended for a week, although there is no letter to confirm it.

76. We conclude that Mr Torfinejad did speak to the kitchen staff and he did tell the Claimant that he had done so, and that, as they denied it, she had no witnesses. That was a statement of fact at the time.

77. The Claimant says that when she was in the coffee bar with Mr Torfinejad, she told him about Ghita, and he was angry and told her to contact Ghita on the phone. We assume that the purpose of telephoning Ghita was to get her to confirm that she had also been subjected to similar treatment by Mr Agha. The Claimant says that she did get Ghita on the phone and there was a three way conversation. She says that in the course of that conversation, Mr Torfinejad told them both they were fired. Mr Torfinejad denies this and says that he did not say that and that Ghita continued to work for him. The Claimant also says that Mr Torfinejad threw a coffee cup, which Mr Torfinejad denies.

78. At page 66 of the bundle there is a text from the Claimant to the Second Respondent written in more formal terms recounting what she says happened today (sent on Monday 5 November at 7:42pm and read on Tuesday 6 November) and it says:

> "just to recount what happened today, you fired me and Ghita on the basis of causing a headache after claiming of being sexual harassed by the chef Hussein Agha. I have tried to reconcile the situation with you today and yesterday, but it seems clear that you are not interested in the wellbeing of your staff and decided to fire me because I raised complaints against Hussein Agha and Habib. You threatened me by saying that if I sue you, you will "black list me" from every business in London so that I won't be able to find a new job and won't work anywhere. You also discounted what happened by saying that I have "no witnesses" and that the kitchen said no one had touched me.
>
> I do not believe you handled this situation correctly or sensitive why you knew this is very upsetting for me. I am also aware that you did not follow the ACAS guidelines to handling claims of sexual harassment as

an employer, otherwise this situation would have been resolved without any severity. As the employer it is your job to handle situations of sexual and verbal harassment to administer care.

I would like my wages for last week as well as holiday pay I am entitled to as I have worked at Sinuhe for more than five weeks. You also owe me the money for the lights I brought for the Sinuhe tapas bar. Furthermore, I would like a formal apology of what has happened today and on the day of the physical altercation between me and Hussein Agha.

I do not want this to happen to anyone else. I do not feel it is right to stay quiet when I have the opportunity to speak up and explain the type of pain and embarrassment I felt from someone else. I will make a claim to the Employment Tribunal, not as a threat, but to ensure that no woman has to face the type of treatment I had to face today and on Saturday night.

Regards Farah Istanbouli.

79. The Claimant was insistent that Mr Agha be dismissed immediately and the purpose of her visit to Mr Torfinejad on 5 November when they talked in the coffee bar, was to demand that immediate dismissal or to resign. We accept Mr Torfinejad's evidence that he tried to calm matters, but it is clear the Claimant was making insistent demands. She was heated and definitely not calm. The Claimant had no intention of staying on if Mr Agha was not dismissed immediately. Her WhatsApp messages make clear that her father had insisted she leave. Mr Torfinejad was not prepared to do that and would not commit to dismissing Mr Agha.

80. We know Mr Torfinejad, the owner and director of the First Respondent, had little knowledge of employment law and seems not to have followed employment law or proper practice and procedure. For example, there were no statements of terms and conditions of employment given to staff. However, it would have been a breach of employment law to have

dismissed Mr Agha instantly, or to have formed any definitive intention to dismiss, before holding a proper disciplinary hearing with him. Therefore, while it may have been more accidental than deliberate, it was in fact right that Mr Torfinejad refused to commit to any immediate and precipitous action against Mr Agha.

81. Ghita, as we have noted, was another waitress who lived near the restaurant and also used to help out. She was Moroccan. Mr Torfinejad, in his witness statement, says that Ghita continued working in the restaurant until about mid January, when she returned to her native Morocco. We are satisfied that Ghita did work in the restaurant again after that incident.

82. We carefully considered the facts and whether, as the Claimant's text message says, she was dismissed. We concluded that, despite her statement in the text message, the Claimant was not dismissed. Mr Torfinejad had been willing to overlook all sorts of behaviour on the part of the Claimant previously and was desperate to retain her. However, the Claimant went to the meeting with one message, which was a demand. She wanted Mr Agha dismissed or she would leave. The Claimant was not calm and despite Mr Torfinejad's effort to calm things down, the discussion became fraught. We reject the Claimant's suggestion that tension was due to Mr Torfinejad's reaction to the Claimant complaining about the incident, or that he threw a coffee cup. Rather we conclude that the discussion became fraught because the Claimant was insistent that Mr Agha be dismissed and would not wait. We reject the assertion that the Claimant was summarily dismissed. The Claimant carried out her threat and insisted she would leave; she resigned.

Investigation

83. Mr Torfinejad said he did carry out an investigation of sorts. He said that he checked the CCTV and he spoke to Mr Agha and to Ahmed, who was the other person in the kitchen at the time, although there was no reference to this in the ET3 filed by any of the Respondents. Mr Ahmed did not give evidence, so we have nothing recording his explanation of events. Mr

Torfinejad did not make a note of his discussions with either Mr Ahmed or Mr Agha and did not ask them to write a statement so there is no record whatsoever of the investigation he says he carried out. We do know he checked the CCTV as one of the CCTV clips shows that it was recorded on 6 November 2018, which was after the meeting with the Claimant that led to her employment ending. We also know that the Claimant's text of 5 November refers to Mr Torfinejad having told her that he had spoken with the kitchen staff and they had said nothing had happened, which suggests he had spoken with them.

84. When the Claimant says that Mr Torfinejad discounted what had happened by saying that the Claimant had "no witnesses" and that the kitchen said no one had touched her, this was a statement of fact and part of his effort to explain why he could not take immediate action as she demanded.

Subsequent Events

85. The First Respondent drew up a P45. It showed the Claimant's leaving date as 3 November 2018.

86. The Claimant admits that she had some conversations with some friends, and some of her friends then wrote some bad reviews of the restaurant despite not having been to the restaurant. The Claimant says that she did not encourage them to do this. We find that lacks credibility. We conclude the Claimant was well aware of their plans to try to damage the Restaurant's reputation before they did so.

87. Having not responded to the Claimant's text of 5 November, the false reviews provoked a letter of 13 November 2018 from the First Respondent's solicitors, who wrote to the Claimant and complained that they were advised that their client did not dismiss her, but that she resigned voluntarily, after their client informed her that she had been caught stealing for a second occasion.

88. Their letter said that the Claimant only raised a serious allegation about sexual harassment after she had been notified about the stealing. The letter

referred to CCTV footage of the Claimant stealing which, it said, would be passed to the police. They asked the Claimant to stop the abusive online campaign and said that the Respondent would pay the Claimant in full for her wages and holiday once she apologised for stealing and her conduct generally, repaid all money stolen and withdrew the allegations of sexual harassment as well as undertaking to stop the online campaign.

89. In the event, this prompted the Claimant to seek legal support. One of the first things her solicitors did was on 14 December 2018 to write to the Respondents solicitors making a Data Subject Access Request under the General Data Protection Regulations. They also wrote a letter more generally about the Claimant's position.

90. Thereafter, the First Respondent did pay the Claimant her outstanding pay and holiday pay but the response to the Subject Access Request was limited to providing copies of the client's P45 and last pay slip and confirming the amount of money which had been paid to her. The First Respondent did not provide all of the documents which had been requested in the Subject Access Request, which included a copy of the rules of employment document signed by the Claimant, payroll information, any documents including written correspondence connected to the complaint made by the Claimant and the investigation into the allegation including any meeting notes and its resulting consequences as well as CCTV footage of the kitchen area recorded between 4pm-5:30pm and any documentation concerning the decision to terminate the Claimant's employment and internal communications regarding that as well as any meeting notes taken at meetings between the Second Respondent and the Claimant during the periods 3-5 November.

91. It is clear from these proceedings that a large part of the documentation requested simply did not exist. For example, the Second Respondent made no notes of his investigation or his discussions with the Claimant and he did not make a decision to dismiss the Claimant or indeed dismiss her. He did not have a copy of the rules of employment signed by her. However, the response to the subject access request was short and brief, did not include

the CCTV clips and did not explain why the remaining documentation was not supplied.

92. Eventually the Claimant issued proceedings and this claim came before the Tribunal.

93. Another matter of limited relevance is that Mr Rdha told the Tribunal that he also knew Ghita. He said she had come to see him and been upset about the prospect of being drawn into the dispute and that she felt that she had not meant to say any of the things that were being argued that she had said and that she thought it was all a joke. The reality is that Ghita did not make any formal statement either way. Mr Rdha's evidence on that point is clearly hearsay. Mr Rdha also said he had seen the Claimant pocketing tips when he had been in the restaurant and had told her that she should not do that, but as far as he knew she had kept the tips. Again, this is of limited relevance, as the Claimant does not deny that she kept some tips.

94. It appears that Ghita used to come and go to Morocco and that, while she did work in the restaurant from time to time, after November, she was not there continuously. We have no direct evidence from her.

95. We had no evidence from Mr Ahmed, who was the other member of the kitchen staff who was present in the kitchen at the time of the incident, despite the fact that he would have been a very relevant witness. He would have been able to tell the Tribunal what did happen in the kitchen on 3 November. We believe he had left the Respondent's employment prior to these proceedings being heard, but we had no information about the efforts made to trace him or whether he had been asked to give evidence but refused.

96. The Claimant's representatives pointed out that we did not hear from other potential witnesses, such as the Second Respondent's wife and daughter, but we do not think those witnesses could have given direct evidence on the key facts. It is clear that the parties were trying to have the

case heard in two or three days, which would have been proportionate. They would have been expected to limit the witness evidence to that which was directly relevant.

The Law

Section 26 of the Equality Act 2010 – Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

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

(i) violating B's dignity, or

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

(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).

(3) A also harasses B if—

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

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

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

Section 27 of the Equality Act 2010 - Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 109 of the Equality Act 2010 - Liability of employers and principals

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

(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.

Section 136(2) of the Equality Act 2010 – Burden of proof

(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.

Written statement of terms and conditions of employment - sections 1 – 4 of the Employment Rights Act 1996

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

Section 2 (6) of the Employment Rights Act 1996

A statement shall be given to a person under section 1 even if his employment ends before the end of the period within which the statement is required to be given.

Section 86 of the Employment Rights Act 1996 - Rights of employer and employee to minimum notice.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

Section 207A of the Trade Union Labour Relations (Consolidation) Act 1992 - Provision for Uplift

The section provides as follows:

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Submissions

97. It is clear from the submissions that much of the claim depends on the facts found by the Tribunal and both the Claimant and the Respondents urged the Tribunal to prefer their evidence and to doubt the credibility of the other.

98. The Claimant argues that the facts support her claim that she was touched inappropriately by the Third Respondent, that she had not stolen anything and that the allegation of theft was raised only after she complained about her treatment. The Respondent argued that this did not occur and the Claimant raised the allegations after she was told that she had been found stealing.

99. There is also a major factual dispute about whether the Second Respondent, acting for the First Respondent, told the Claimant she was dismissed or whether she resigned.

100. It is not disputed that the Respondent did not give the Claimant a statement of terms and conditions of employment as required by Section 1 of the Employment Rights Act 1996.

Claimant's submissions

101. The Claimant's representative urged us to accept the Claimant's version of events and reminded us of contemporaneous documents such as the WhatsApp messages, which the Claimant had produced.

102. The Claimant also urged us to take into account some of the failures on the part of the Respondent which, it was suggested, we should bear in mind. In particular, our attention was drawn to the fact that the Respondent did not call all the potential witnesses they could have. The Claimant said that the case of Wisnieswski (a Minor) v Central Manchester Health Authority [1998] EWCA Civ 596 allowed the Tribunal to draw inferences in certain circumstances from the failure to call a witness where their evidence is relevant to a case which needs an answer. In that case, it was pointed out that a satisfactory explanation for the failure may reduce or nullify the inference. A similar point was made in the case of Kwele–Siakam v the Cooperative Group Limited UKEAT/0039/17/LA at page 26. The Respondent failed to produce Ahmed, who was in the kitchen at the time of the incident, or Mona, the Second Respondent's wife, or his daughter, Mashima.

103. The Claimant also asked us to consider the behaviour of the Respondent such as producing a limited amount of the CCTV and failing to comply with orders on time.

104. On the facts, the Claimant said aspects of the Respondents' case were illogical such as saying that the Claimant was not allowed in the kitchen.

Waitresses needed to fill up the small fridge, which was in the kitchen. The Claimant also said that none of the Respondents' witnesses were reliable.

105. On the claims, the Claimant said that the reference to "rejection" in section 26(3) of the Equality Act must apply to a wide range of rejections and should not be interpreted narrowly, nor should it be interpreted only to apply to immediate rejection.

Respondents Submissions

106. The Respondent said the case turned on its facts. The key question was credibility. The Respondent said the CCTV demonstrated that the Claimant was stealing tips, as reported by Mr Agha. The Respondent relied on the images of the Claimant dancing and waving a napkin on the CCTV, which undermined her claim. The Respondent said the voice messages were all constructed. Additionally the Respondent said a smack itself could not be classed as discrimination.

Conclusions

Credibility

All parties urged us to consider they were more credible than the other. We found both the Claimant and the Second Respondent lacked credibility on occasions. Both were anxious to argue their case and both may have had their memories impacted by emotion as this clearly was a case with significant meaning for them. We have explained in the section on the facts we found what led us to our factual conclusions. We do not think it is necessary to go into more detail.

Sexual Harassment

Did the Third Respondent engage in unwanted conduct of a sexual nature by slapping the Claimant's backside?

107. As we have noted in the section on the facts in this judgement, we concluded that there was an incident and that the Claimant was touched or slapped on the backside. We have set out at length our reasons for reaching that conclusion in the facts section.

Did that conduct have the *purpose* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

108. We do not think that had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant says the music was wedding music. The Claimant says the incident happened after she made a zhaglout sound. She was behaving consistently with the type of music. On her account there is nothing to suggest that there was any purpose behind the action, other than excitement on the part of Mr Agha. The fact that there was tension between them over the tips, was not anything to do with Mr Agha's reaction to the music and dancing that afternoon. Moreover, it is also clear from her demeanour seen in the CCTV, that the Claimant was amused and continued to be amused for a while afterwards, when she was no longer in the kitchen. This is wholly inconsistent with someone acting deliberately to try to humiliate her.

If we consider it did not have that purpose, did it have the *effect* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

109. In reaching this conclusion we have to take into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

110. We concluded that the incident did not immediately humiliate the Claimant or create an intimidating, hostile, degrading or offensive environment for her. However, she continued to think about it and it led her to contact Ghita

a little later on. It did impact on her dignity and, as she reflected, she felt some degree of humiliation. In reaching that conclusion, we have taken account of the Claimant's perception. We were reminded about the Claimant's earlier history. We have limited evidence about the earlier history apart from the Claimant's assertion, but we recognise that her perception was impacted by an event in her past. We also note that the test has an objective quality to it. We must take account of the circumstances of the case. This was a small restaurant and we were told on several occasions that it was like a family. Physical familiarity is common in a family environment, when it is not appropriate outside it. Everyone involved in this incident had a cultural background where the "wedding music" that the Claimant played was connected with dancing and traditional celebratory behaviour of some significance. We are also required to consider whether it was reasonable for the incident to have had that effect. Weighing up all the factors, we do consider it reasonable for the Claimant to have been concerned. It was a mixed situation of work and a close knit group, but she was not in fact with her family. Personal contact of the nature of backside slapping is generally regarded as an intrusion and, despite her initial reaction to it, we are satisfied it had an effect on the Claimant's dignity, that she later felt humiliated by it, and that was reasonable.

<u>Was the Claimant treated less favourably by the First and Second Respondent because of her rejection of the conduct by the Third Respondent than she would have been if she had not rejected the conduct?</u>

111. The Claimant relies on a series of incidents. There was a fundamental issue, which applied to all claims brought under section 26(3) by the Claimant. The Claimant's representative asserted that the meaning of "rejection" in section 26(3) was wide enough to encompass her complaint about her treatment and it was argued on the basis that the Claimant's complaint about Mr Agha led to the list of treatments in the list of issues. The Claimant puts it as telling the Second Respondent and thereby the First Respondent, that the Third Respondent, Mr Agha's conduct was unacceptable. The Claimant did not refer to any case law in which this interpretation had been used. The

Claimant's submissions made a distinction between an immediate rejection and a later one, and said there was no requirement for it to be immediate.

112. We do not consider the legislation bears the meaning attributed to it by the Claimant. The Claimant complained about the Third Respondent. A complaint or grievance does not, of itself, amount to a rejection per se. We consider the word "rejection" to bear its normal and ordinary meaning. We have reviewed the examples in the Equality Act 2010 statutory Code of Practice. The Code says this type of harassment occurs when a worker is treated less favourably by their employer, because that worker has submitted to or rejected unwanted conduct of a sexual nature. One example is of a shopkeeper who propositions one of his shop assistants who rejects his advances and is then turned down for promotion. The other example cites a female worker asked out by a team leader and she refuses. She then does not get a promotion she applies for even though she is the best candidate because the team leader and the manager are friends and the manager has been told about the rejection by the team leader. The essence of the protection is that it applies to less favourable treatment which occurs because the individual has rejected the sexual conduct. There is no requirement for it to be immediate and that is not the basis of our determination. It can, for example, include someone who initially enters into a relationship, but later decides to end it. The event itself may take place over time.

113. In this case, however, there was a one off incident and the Claimant had no chance either to submit or to reject it. It was over before she could do anything. Her later complaint did not amount to a rejection within the meaning of section 26(3). Because the Claimant did not "reject" the conduct, which is a necessary requirement of a claim under this section, all claims under this heading must fail. Section 26(3) is not applicable to the facts of this case, in the manner asserted by the Claimant and we dismiss those claims.

<u>Were the actions of the Second and Third Respondent done in the course of their employment for the First Respondent?</u>

114. The Respondents did not argue that the actions of the Second and Third Respondents were not actions done in the course of their employment by the First Respondent, but this is no longer relevant as we have found the section does not apply.

Victimisation

Did the Claimant do a protected act or did the Second Respondent believe she done, or might do, a protected act namely making an allegation that the First, Second and Third Respondents had contravened the Equality Act and/or the Claimant asserting that she would bring proceedings under the Equality Act.

115. The Claimant did two protected acts, namely indicating that she might sue the Respondents at the meeting in the coffee bar on 5 November, and later in her text dated 5 November alleging that she might bring proceedings.

If she did, did the First and Second Respondent subject the Claimant to the following detriments because of that:

a. Dismissing her summarily
b. Threatening the Claimant should be backlisted and not find a new job
c. Threatening to contact the police
d. Withholding her wages and holiday pay for over a month
e. Not responding to the Claimant's data subject access request

116. The Respondents did not summarily dismiss the Claimant. We have found that she resigned.

117. We found that the Second Respondent did threaten the Claimant that he would blacklist her so that no - one would employ her because of her threat to bring proceedings when they met at the coffee bar on 5 November 2018.

118. We also found that the First and Second Respondents did threaten to contact the police by the solicitor's letter. We have found that there is insufficient for us to conclude that the Claimant was guilty of theft and we note that most employers faced with that suspicion would immediately have suspended the individual and investigated properly. They did not. However, it does seem that the threat to go to the police was not something the First and Second Respondents intended to do, prior to the false reviews being posted.

119. The Claimant did resign with immediate effect and was therefore due her back pay and holiday pay, which was not paid immediately. The letter sent by the Respondents' solicitors says amongst other things that the pay would be paid once the Claimant did a variety of things which include withdrawing her allegation of harassment. We note that the Respondent has shown itself to be unaware of employment law. The Claimant say the payment was delayed by about a month. We considered whether the solicitors letter is evidence that this was due to the threat of proceedings, as opposed to general lack of knowledge about employment law and what holiday pay, if any, was due. We concluded the First and Second Respondents were generally lacking in knowledge about employment law, for example given the failure to issue statements of terms and conditions of employment and this impacted on their behaviour but the solicitors letter specifically demands the withdrawal of the allegations of sexual harassment as one matter amongst several, before payment will be made and we cannot ignore that.

120. The failure to respond to the Subject Access Request was mainly because the documents did not exist. However the Respondents clearly did not pass on the CCTV clips, which we know they had. We had no explanation for this from the Respondents. As the Claimant has clearly raised a question which is enough in our view to shift the burden of proof onto the Respondents, the Respondents must provide a non-discriminatory explanation as to why they failed to provide the CCTV clips and as they have failed to provide any explanation, we are bound to apply the burden of proof in section 136 and thus find for the Claimant on this matter.

Wrongful Dismissal

Was the Claimant wrongfully dismissed?

121. The Claimant resigned with immediate effect. There was no dismissal.

Failure to provide a statement of the mains terms of employment

122. It is accepted that the First Respondent failed to provide the Claimant with a written statement of particulars of employment.

123. The Claimant had worked for over one month and was therefore entitled to it regardless.

Breach of Contract

Did the First Respondent breach the Claimant's contract by failing to reimburse her for expenses properly incurred in the course of her employment.

124. The Claimant is claiming both the costs of some fairy lights and some pumpkins. First there is a question as to whether she was asked to buy the lights or simply choose to do so. Our conclusion is that she chose to buy them and took them to the restaurant. She did not leave the pumpkins at the restaurant. The lights were used by the restaurant. Secondly, there is also a question as to whether, if there was a breach of contract, she mitigated her loss properly. It is worth noting that although the lights were kept by the Respondents, the pumpkin which the Claimant claims for was not delivered to the Respondents and as it was bought on Amazon, it would have been possible to return it.

Remedy

125. Having found for the Claimant, we then went on to consider remedy. We heard evidence from the Claimant about her position. She explained that she had not found another job until she took on an internship in her home

country some considerable time later. She explained that her parents had not wanted her to work in a role that did not enhance her career and that while her intention in taking on the waitressing job was to reduce her reliance on her father, to assist his financial position, he had told her not to look for another job. She had not tried to look for work with a larger chain of restaurants, which might have had a more sophisticated HR department and training to stop any harassment. She had not looked at other unskilled work in London such as shop work.

127. The Claimant said she had obtained another job at one point in a holiday period, but decided not to go and start the job on the first day, which she attributed that to some distress over the situation with the Respondents. Eventually she had been offered an internship in her home country, working under the auspices of a family friend and she trusted him and it had gone well and she was happy.

128. We note the Claimant took a decision early on to take no steps to mitigate her loss. While we know she had been on medication for depression, that had been the case prior to this incident. There was no reason why she could not seek other work and had she done so, she would have obtained work quickly. London has huge numbers of waitressing jobs and by now she could point to experience. The only reason she did not do so was the fact that she and her parents had agreed that she would not do so.

129. The Claimant resigned on 5 November, only 2 days after the incident, and before the First Respondent could reasonably have been expected to have addressed the position with Mr Agha.

Financial loss claim

130. The financial losses which the Claimant seeks in her Revised Schedule of Loss were not attributable to the Respondents, but rather to her own actions and therefore it is not appropriate to award compensation for them.

Injury to Feelings

131. We have found that the Claimant suffered some discrimination and she should be awarded a sum by way of injury to feelings. The actions we have to consider are:

(1) the slap; and

(2) the comments made by the Second Respondent about black listing the Claimant;

(3) the delay in paying monies for back pay and holiday pay due to the Claimant;

(4) the limited response to the subject access request**.**

132. In the case of Vento v Chief Constable of West Yorkshire Police No. 2 (2003), the Court of Appeal set guidelines on the amount of compensation to be given for injury to feelings (the so-called *Vento* bands) as follows:

- The lower band which is appropriate for less serious cases such as where the act of discrimination is an isolated or one off occurrence.
- The middle band for serious cases, which do not merit an award in the highest band.
- The top band for the most serious cases such as where there has been a lengthy campaign of discriminatory harassment.

133. In respect of claims presented on or after 6 April 2018, the Vento bands are as follows: a lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band);

134. Various cases have emphasised that what must be considered, in order to determine the appropriate band for Vento compensation, is the impact on the Claimant including Cadogan Hotel Partners Limited v Ozog

UKEAT/0001/14, Komeng v Creative Support Ltd UKEAT/0275/18, and Base Childrenswear Ltd v Otshudi UKEAT/0267/18.

135. We considered whether these matters had a sufficiently serious impact on the Claimant, so as to fall within band 2 rather than band 1. The Claimant urged us to regard this as a claim which falls into Band 2. Our view is that it falls more or less exactly between Band 1 and 2 and we therefore place it at that point and award £8,600. We do so because we do not think the Claimant was particularly upset or distressed after the incident itself and for that alone, the award would have been in Band 1. However, that was not the end of the matter. The Second Respondent went on to threaten to blacklist the Claimant, although that was a ridiculous threat and one that would not have impacted on her, even if it were real because she did not seek any other work. Further the Respondents delayed monies properly due to her and failed to reply fully to the Subject Access Request. We do not believe the Claimant could have taken the Second Respondent seriously in his threat to blacklist her, and she personally would not have been very concerned about the Subject Access request, but she did suffer some delay in payment according to the Respondents' solicitors letter. We have concluded that the threat to report the Claimant to the police for theft was made as the result of the Claimant's friends' false reviews and does not fall into consideration as part of the injury to feelings. Overall, however, we do consider that the series of events is such that the Claimant's injury to feelings should be at the border between Band one and Band two at the sum of £8,600.

Aggravated loss claim

136. The Claimant refers to the Respondents' behaviour and argues that this merits an award of aggravated damages. As noted in the Claimant's submission, aggravated damages are awarded only on the basis, and to the extent that, aggravating features have increased the impact of the discriminatory act on the Claimant and thus the injury to his or her feelings. They are compensatory, not punitive. The Claimant argues that the matters which can justify such an award include the manner in which the wrong was

committed, the motive and subsequent conduct. However, it is important to focus on the aggravation of the injury to the Claimant's feelings and not on the seriousness of the conduct. In fact in Commissioner of Police of the Metropolis v Shaw, it was suggested this should be approached carefully and should amount to a subheading in relation to injury to feelings where there were aggravating features, which particularly affected the Claimant, and not a separate head of claim.

137. We have considered the Claimant's submissions about the factors which should be taken into account and which might merit an aggravated damages award. First we do not accept that the Second Respondent screamed at the Claimant on 5 November as alleged. Secondly the letter sent by the Respondents' solicitors on 13 November was provoked primarily by the Claimant's friends' false reviews, which we have noted, we believe the Claimant knew about. Any failure on the part of the Respondents' solicitors to comply with the time table are a matter which would be considered in relation to costs if they led to unnecessary costs but they did not impact on the Claimant's injury to feelings.

138. Overall, we are satisfied that our award for injury to feelings adequately addresses the Claimant's injury and no additional award is necessary.

Failure to provide a statement of terms and conditions of employment

139. Additionally we must make an award for failure to provide a statement of terms and conditions of employment. Pursuant to section 38 of the Employment Act 2002, the Claimant is entitled to an award of £476.06.

Wrongful Dismissal

140. No award is due for wrongful dismissal as the Claimant resigned and was not dismissed.

Expenses

141. The First Respondent should pay the Claimant the sum representing the cost of the fairy lights, as the First Respondent, through the Second Respondent, accepted them. While she had not been asked to buy them, the Claimant requested payment on 5 November, which was on any account, within a day or two of her providing them and on that basis, it seems the Second Respondent treated them as a business item and not a gift, otherwise he could have returned them. By accepting them and retaining them, he treated them as a business item for which reimbursement is appropriate. We do not have a separate sum for the lights as we understand the sum we have been given is also for the pumpkins, which were not requested by or given to the Respondent and which could easily have been returned. Therefore, at this stage we can make no award.

Uplift

142. We have considered whether an award for failure to comply with the ACAS code is appropriate. This was a small employer, which largely disregarded the requirements of employment law. However, despite that, the Respondent carried out some investigation and met with the Claimant. We have found that the Claimant resigned rather than being dismissed and in the circumstances that pre-empted any other steps. We do not consider any uplift is appropriate.

Employment Judge Walker

Dated: 26/5/2020……..

Reserved Judgment sent to the parties on:

26/5/2020.....

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For the Tribunal Office