EMPLOYMENT TRIBUNALS

Claimant **Ms Dagmar Capandova**

Respondent **Biffa Polymers Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Middlesbrough **On 13-16 January, 31 March and 1 April 2020**
Before Employment Judge Garnon **Members Ms P Wright and Ms C Hunter**

Appearances:
For Claimant Mr D Robinson-Young of Counsel
For Respondent Mr C Edwards of Counsel

Interpreters Czech Language Mr Tomas Grunt
Polish Language Mr Robert Zaborniak and Mr Pavel Giers (on different days)

JUDGMENT

The unanimous decision of the Tribunal is the claims of harassment are well founded to the extent described in the reasons, but the claims of direct discrimination are not.

REASONS (bold print is our emphasis and italics quotations)

1. The complaints and issues

1.1. By a claim presented on 14 January 2019, the claimant, born 20 February 1975, brought complaints of direct discrimination and harassment based on the protected characteristics of sex and race under of the Equality Act 2010 (EqA). Office of National Statistics-v-Ali held each type of discrimination is separate from the others and must be pleaded. There are no claims of indirect discrimination or victimisation.

1.2. At a preliminary hearing Employment Judge Johnson noted the parties had prepared a list of issues. In Price-v-Surrey County Council Carnwath LJ, as he then was, observed "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented".* The claimant alleges not only acts of two colleagues, Bogdan Piatek and Adam Cywinski, were unlawful but also the way those allegations were dealt with by Stephen Brunton (Shift Manager) on 16 September 2018 and Donna Wright (HR Business Partner) on 14 November 2018 were unlawful. She confirmed she had no complaint about the way her written grievance was handled by Mr Brass from December 2018 onwards.

1.3. Chapman-v-Simon precludes the tribunal dealing with acts which are not pleaded. An application was made to amend the claim by adding a matter covered in her witness statement, but not in the claim form or list of issues relating to the conduct of Mr Jamie Allcock. Her witness statement at paragraph 31 explained why she had not included it in her claim form or written grievance as a conscious decision, not a misunderstanding or mistranslation of her instructions. The well-known passages in Mummery J's Judgment in Selkent Bus Company-v-Moore were quoted in Abercrombie -v- Aga Range Master Limited 2013 IRLR 953 by Underhill L.J. who continued:-*".. the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it will be permitted".* We refused it for reasons given orally, mainly because it would undoubtedly involve a very different enquiry and may have caused an adjournment of a case in which the claimant had many other facts upon which she could rely.

1.4. The parties list of issues is unnecessarily long. The liability ones broadly expressed are:
(i) does the claimant prove on balance of probability (which means **more** likely than not) primary facts from which it could be inferred she was treated less favourably because of sex and/or race or subjected to unwanted conduct related to sex, race or of a sexual nature by any person for whose acts the respondent is liable?
(ii) if so, does the respondent show she was not?
(iii) is the Tribunal precluded from dealing with any claim by s123 EqA? She commenced Early Conciliation on 5 December so anything happening or ending after 6 September is plainly in time.

2. The Relevant Law

2.1. Unlawful conduct under the EqA requires an **act** and a **type** of discrimination. The acts in s 39 include subjecting to 'detriment' which means anything the person concerned might reasonably consider changes their position for the worse or puts them at a disadvantage.

2.2. One **type** is direct discrimination set out in section 13 which says:

*(1) A person (A) discriminates against another (B) if, **because of** a protected characteristic, A treats B less favourably than A treats or would treat others.*

Avoiding legal technicality, in direct discrimination claims, as said in Shamoon-v- Royal Ulster Constabulary, we must look for the "reason why" treatment was afforded.

2.3. Section 9 says the protected characteristic of "race" includes

(a) colour;
(b) nationality;
(c) ethnic or national origins.
(2) In relation to the protected characteristic of race—
(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.
(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

2.4. Section 40 includes:

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;
and section 26 defines harassment thus:

(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.

The relevant protected characteristics include sex and race.

2.5. Section 26(1) and (2) require a link between the protected characteristic **and the conduct,** not proof of why someone acted as he did, provided the unwanted conduct relates to sex or race or is of a sexual nature and reasonably has the proscribed effect. There are two aspects to this case (a) the alleged acts of Mr Piatek and Mr Cywinski (against the latter brought mainly on the basis of 'effect' not "purpose") both said to constitute harassment and (b) the actions or inactions of a manager, Mr Brunton and Ms Wright of HR which may be put as harassment or direct discrimination.

2.6. Section 212(1) includes *"detriment" does not, subject to subsection (5), include conduct which amounts to harassment.* So if detriment caused by conduct falling within s. 13 has an effect proscribed by s26, it is s. 40 which is infringed, not s.39. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was related to a protected characteristic but did not do so **because of** it, there was no direct discrimination Porcelli-v-Strathclyde Council. The authors of the IDS handbook "Discrimination at Work" take the view s 26 covers both conduct done because of a protected characteristic and conduct related to one. In Bakkali-v- Greater Manchester Buses Slade J said *"It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant*

protected characteristic would not be related to that protected characteristic of a claimant. We respectfully disagree, as we have seen many examples of unwanted conduct, possibly done because of something relating to a protected characteristic, but in which the conduct itself did not. However, if it is both, we can only find harassment proved.

2.7. On the issue of whether conduct is "unwanted, it was said in Munchkins Restaurant Limited v Karmazyn EAT/0359/09 "*there are many situations in life where people will put up with unwanted or even criminal conduct which violates their personal dignity because they are constrained by social circumstances to do so... Putting up with it does not make it welcome, or less criminal. It is therefore not completely beyond the scope of reason to think that women in this particular situation should behave as they did'.*

2.8. In deciding whether conduct has the effect referred to in S.26(1)(b) each of the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect must be taken into account. The test has both subjective and objective elements. The subjective part involves looking at the effect the conduct had on the claimant. The objective part requires the tribunal to ask itself whether it was reasonable for the conduct to have had that effect **on her**. The EAT in Richmond Pharmacology v Dhaliwal 2009 ICR 724 gave guidance as to how the 'effect' test should be applied. In Pemberton v Inwood 2018 ICR 1291, Lord Justice Underhill, who sat as the President of the EAT in Dhaliwal, revised his guidance thus: '*In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so*.'

2.9. The EAT adopted this in Ahmed v Cardinal Hume Academies EAT 0196/18, The 'other circumstances' part will usually shed light both on the claimant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Employment Code notes relevant circumstances can include those of the claimant. They can also include the environment in which the conduct takes place (see para 7.18).

2.10. In Dhaliwal Underhill P said in assessing effect, '*One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*' . In HM Land Registry -v-Grant 2011 ICR 1390, Lord Justice Elias said '*When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*.' In determining whether a remark violated a worker's dignity, it is

relevant to consider the purpose of making it **in context**, Heafield v Times Newspapers Ltd EAT/1305/12. These cases **do not mean** the harmful consequences of insensitive conduct cannot be harassment, simply because no harm was meant. In Nazir and Aslam v Asim and Nottinghamshire Black Partnership 2010 ICR 1225 HHJ Richardson QC stressed the importance of whether the conduct related to one of the prohibited grounds, and of looking at the ***context*** of the conduct both in deciding whether the burden of proof has passed, and in determining whether the respondent has put forward a non-discriminatory explanation

2.11. Harassment may result from separate incidents. The EAT in Reed v Stedman 1999 IRLR 299, counselled against carving up a case into a series of specific incidents and then trying to measure the harm or detriment in relation to each. Instead, it endorsed a cumulative approach quoting from a USA Federal Appeal Court decision: '*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' (USA v Gail Knapp (1992) 955 Federal Reporter). This was approved by the EAT in Driskel v Peninsula Business Services Ltd and, although both cases were decided before the EqA, we think the same approach should apply.

2.12. The subjective part is a factual inquiry. Tribunals should bear in mind different people have different tolerance levels. Conduct that might be shrugged off by one person might be found much more offensive or intimidating by another. The objective test is intended to exclude liability where the claimant is hypersensitive and unreasonably takes offence. As said EAT in Dhaliwal , '*While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.."* Underhill P also said '*Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question*.'

2.13. If we find it was not reasonable for conduct to have the proscribed effect, the claim will fail, Ahmed v Cardinal Hume Academies EAT/0196/18. However, we must consider whether it was reasonable for the conduct to have the effect on ***that particular claimant***. The EAT in Reed v Stedman said '*it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.*'

2.14. As for direct discrimination, malicious motive towards the claimant, is not a requirement where one is looking for the reason why something is done, Amnesty International-v-Ahmed. Unreasonableness does not show why acts were done, Glasgow City Council-v-Zafar, neither does incompetence, Quereshi-v- London Borough of Newham. An alleged discriminator, sometimes subconsciously, may make stereotypical assumptions. As explained in Anya-v-University of Oxford, a finding a person would behave equally unreasonably towards others should not be based on the hypothetical possibility he might, but on evidence that he does.

2.15. Failure to deal adequately with a complaint does not constitute direct discrimination merely because the complaint is of discrimination or harassment, Eke v Commissioners of

Customs and Excise 1981 IRLR 334. So in Conteh v Parking Partners Ltd, 2011 ICR 341.where a complaint of racial harassment by a client was dealt with inadequately by a manager because he feared losing the client, there was no direct race discrimination, as the reason for inaction was not to do with race.

2.16. Section 109 includes
(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(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.
The respondent does not argue a defence under ss (4)

2.17. Section 136 includes
(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.

Reversal of the burden of proof was first explained in Igen-v- Wong The first two paragraphs of guidance contain
(1) it is for the claimant who complains of ..discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful .. or which .. is to be treated as having been committed against the claimant. These are referred to below as "such facts".
(2) If the claimant does not prove such facts he or she will fail.
Royal Mail-v-Efobi confirms the claimant must prove primary facts she alleges are more likely than not to be true otherwise the point of reversal is not reached. Once it is, Ladele-v-London Borough of Islington gives good guidance in paragraph 40.

2.18. That two accounts differ, does not mean one witness is lying, because as Sedley LJ said in Anya," *a witness may be credible and honest but mistaken*". Elias J. said in Law Society –v- Bahl "*101….. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself..".* People may have reasons for not telling the whole truth about **something** which does not mean they are lying about **everything**, but in Base Childrenswear Ltd v Otshudi 2019 EWCA Civ1648, a Tribunal had upheld a claim of a racially discriminatory dismissal where the respondent gave a false reason for dismissal. The Court of Appeal on 11 October 2019 held if a respondent fails to show the relevant protected characteristic played no part in its motivation, it fails.

2.19. Section 123 includes:
(1) Proceedings on a complaint within s120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

2.20. Conduct "extending over a period" has been considered in many cases notably Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. A succession of connected acts is an act extending over a period.

2.21. The wording of s 120 is significantly different from its various predecessor Acts. The Tribunal may consider a claim otherwise out of time if it is just and equitable to do so. The guidelines on that discretion are described in British Coal Corporation v Keeble 1997 IRLR 336. The length of **and reasons for** the delay, whether the claimant was being advised at the time, and if so by whom, and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. Using internal proceedings is not **in itself** an excuse for not issuing within time ,Robinson v The Post Office, but is a relevant factor since for over a decade Parliament has tried various means to ensure that before employees rush to a Tribunal, they try to resolve problems internally. A Tribunal may still consider evidence of acts not pleaded or out of time which points to proscribed grounds being, or not being, the cause of acts of which complaint is validly made, as established in Chattopadhay-v-Holloway School, Din-v-Carrington Viyella, explained by Mummery J in Qureshi v Victoria University of Manchester extensively quoted in Anya.

3 Findings of Fact

3.1. We heard the claimant, Ms Dagmar Capandova, and, for the respondent ("Biffa"), Mr Bogdan Piatek, Mr Adam Juskowiak, Mr Adam Cywinski, Ms Donna Wright and Mr Stephen Brunton. We had a concise agreed document bundle to which 20 pages, disclosed during the hearing by Mr Cywinski, and two pages of a medical record by the claimant were added.

3.2. The claimant was born in the Czech Republic and lived there until April 2013 when she moved to Middlesbrough with her long term partner and their daughter who is now aged 26. They already had family living here. Her partner found employment and, within a week, she began working in a factory. Her daughter went to college. The claimant speaks Czech and has picked up some English which is still not particularly good. Her grievance letter. and later her instructions to her solicitors, were drafted by her in Czech then translated by her daughter, for whom that is also her first language, into English. The claimant was appointed by Biffa on 24 February 2017 but actually began work in early March. The shift pattern was four 12 hour day shifts, four days off, four night shifts and another four days off. In addition, there were overtime shifts. She was assigned to "C" shift which had only one other woman who was Polish. She worked overtime on other shifts. Each shift had 20 to 25 people. Around a quarter of staff were English, most were from Poland. She was the only Czech.
3.3. The western part of the former Czechoslovakia is now the Czech Republic and its north border is with Poland which is a large country. The claimant is from the east part of that border called Morovia. Mr Juskowiak is from 50 kilometres north of the border in a region of

south Poland called Silesia, and claims he can understand 80% of what a person from Czech Morovia says. Marcin (Marco) Gibas, his line manager is from the same region as is the claimant's former manager. We accept people from either side of that border can understand one another to an extent. The claimant's partner is from Prague, which in not in the same region and the claimant says he does not understand Polish but he has not given evidence to confirm that. He speaks some English. He is a car dealer who drives an Audi which the claimant's supervisor Mr Jamie Allcock said was his dream car. The claimant said her partner has not drunk alcohol for 10 years after having a bowel operation.

3.4. Mr Piatek, aged 39, is from Central Poland. He has been a Maintenance Technician for the last five years, previously he was a Process Operator. He came to the UK 13 years ago, joined Biffa on 21 January 2008 and met the claimant when she started. He works a different shift pattern and they normally worked on a different shift. The claimant says from almost the start, he made comments to her about being Czech such as "*Hey Czech, you here again? What are you wanting* ***here****? Don't worry you are not going to be* ***here*** *long'*. "Here" in the first sentence was a reference to her being on overtime again which Mr Piatek's statement says she rarely was. The other respondent's witnesses confirm her evidence that she was always eager to work overtime and did. When we asked her what she thought the two emboldened words "here" meant, was it "in the UK" or "on overtime", her reply was she thought he meant at Biffa. She found that threatening and intimidating.

3.5. Mr Piatek would call her ***'gypsy",*** the word in both Polish and Czech being "*cygan*". When she told him her blonde hair and fair skin showed she was not, he asked if her partner was. He is not either. Mr Robinson-Young referred in cross examination to "*Czech gypsies*". Like us, Mr Juskowiak knew nothing specific about gypsies in the Czech Republic but he said, in Poland as in many countries, gypsies are stereotypically viewed as more inclined to live by stealing than working, so to use the word in either language about someone is regarded as insulting.

3.6. These comments were said in the work area, the canteen or the smoking area, sometimes in front of other people. She did ask him why he was saying these things but he never responded. She did not report it to her line manager thinking she had to put up with it. The last incident involving him was on **Thursday 13 September 2018**, her first day back at work after a holiday, when the claimant found her boots had been taken from the locker room on which the lock was broken and, as she saw Mr Piatek doing overtime on her shift, she asked him to fix it. She says he replied he would not do anything for "*a Czech person*" so she should not bother him and swore at her, in Polish, words which literally mean "*Go to arse*". The phrase is almost the same in Czech. The claimant's witness statement was sparse on dates and detail, and this swearing was first clearly expressed in her oral evidence. She said the lock was mended that day but not by Mr Piatek .

3.7. Mr Piatek said he had a good working relationship with the claimant but did not speak very often with her. He speaks some English but spoke with her in Polish as her English is not good. He understands little Czech. He says he has always been helpful to her and given casual greetings "*hello, how are you*". He says they had two conversations he recalls, one when she asked for a lift home and he suggested she speak with Piotr Malyjurek (who lives near her). She does not recall this at all. On the other occasion, he says she asked him to put a "Ladies" sign on the Ladies locker room door because, when she was in there, a truck driver had entered thinking it was a toilet and found her naked (a detail not in his statement). Such requests come from supervisors or managers, not operators directly to the

maintenance team, so he said it was not part of his role to fit the sign, but reported the request to Ms Kerri Cave. He says this request was in the few days leading up to her leaving on the sick which would put it between 13 and 16 September 2018 and the claimant went with him to see Ms Cave (the date and that detail were not in his statement either and we had no evidence from Ms Cave). The claimant says she only ever changes her trousers in that room so would not be naked and the woman who was in there when the truck driver came in was someone else. We have two similar but significantly different versions.

3.8. Mr Piatek denies **any** comments about her nationality, saying he was first made aware of allegations at a meeting with Martin Brass (Engineering Manager), and Ms Wright on 12 December 2018 when he denied saying anything nasty to her. His statement says "*At the Redcar plant, there are people from many different cultures and backgrounds and I am friends with many including those from the Czech Republic inside and outside of work*". **He accepted in cross examination there are no other Czech people so this is wrong.** He denied (i) saying the italicised words in 3.4 -3.5 above but admits he may have asked if she was on overtime in order to be friendly(ii) saying he would not help a Czech person. There was some scope for the different versions to be based on misunderstanding. Mr Robinson-Young gave Mr Piatek every opportunity to say that but he maintained steadfast denial.

3.9. The claimant says there has been tension between Poles and Czechs generally for years but her evidence it was to do with both leaving the satellite states of the former USSR or the start of the Second World War made little sense. She described Biffa as a "*big Polish family*" where married couples and other relatives form the greater part of the workforce.

3.10. Mr Juskowiak joined Biffa on 24 October 2011 as a Process Operator. He met the claimant when she joined in 2017. They had a good relationship and worked on the same shift. They did not socialise outside work but were friends on Facebook and messaged each other outside of work hours. He has never had her telephone number. There are no allegations against him but he was a vital witness in enabling us to decide the truth. We accept he never heard Mr Piatek make comments about her nationality and says this is not something he would do as he is always helpful and respectful. We accept that is his experience of Mr Piatek but the fact he did not hear anything does not mean it did not happen and the fact Mr Piatek was always helpful and respectful to a Polish man, does not mean he was not otherwise to the claimant.

3.11. Mr Cywinski was a Process Operator until January 2019 when he was promoted to a Lead Technician. He came to the UK permanently in 2006, joined Biffa in September 2014 and met the claimant when she joined. At first, they worked on the same shift on the same machine until about June 2018 when he went to another line but was still on the same shift. He is from the same part of Poland as Mr Piatek. He does not speak Czech, spoke in Polish, using some English, to the claimant. He is about 10 years younger than her.

3.12. The claimant says from around May 2017, Mr Cywinski began to make sexual comments to her which went beyond normal factory banter such as asking if she would stay in a hotel with him, and he would "*pay for it*". He asked when she last had sex with her partner. Initially, she felt she had put up with it but it became worse. He would try to work as close to her as possible so he could touch her. He made sexual comments in the presence of another female worker, Dana Zduniac, who is Polish. When she was present, the claimant asked him how he could speak to her in such a way when his wife was pregnant but it did not stop him. He just laughed it off.

3.13. As the claimant agrees she would sometimes have lifts in Mr Juskowiak's Nissan Juke car which picked her up on the way to Biffa's premises, with Tomas Vass, one of two Slovakians, Michal Soluch, Marcin Soski (both Polish) and Mr Cywinski. Occasionally if there was not enough room, someone would sit on someone's lap. She said in her oral evidence they "*made fun of her* "asking what her partner would say if he knew she was squashed in with men but, contrary to the impression we had from reading her statement, she did not say Mr Cywinski sat next to her or she on his lap. He is a small man and she said she would have "*squashed him* " if she had. The claimant says Mr Cywinski's last act was **just before she went on holiday on 5 September 2018**. She was not clear what it was, but thinks it was him touching her breasts in a manner she demonstrated which was not accidental contact. She says it was last in a series acts of similar, unambiguous, acts.

3.14. The claimant needed to work and did not believe there was anyone she could easily talk to. Her line manager, Mr Brunton could not speak Czech or Polish. She had been given an induction pack which included a grievance procedure written in English. Her then supervisor from Silesia, had explained some things to her but she still did not know what to do. She put up with what was going on for a long period but it was causing her increasing upset, stress and anxiety to the extent she did not like being at work.

3.15. Mr Cywinski strongly denies **any** sexual conduct or inappropriate acts. He says he and the claimant shared break times and had a good working relationship. On 12 December 2018, at an investigation meeting conducted by Mr Brass, Ms Wright and Bartek Chytra as translator, he denied, as he did before us, ever suggesting the claimant should go to a hotel with him for sex or asking when she last had sex. He says they would joke about being boyfriend and girlfriend, talk about their personal, but not sex, lives and she never said she felt uncomfortable. He denied trying to be close to her so he could touch her, said he used to greet her by kissing her cheek occasionally, as he did other female colleagues which is common for Polish people, and she did the same. As with Mr Piatek, we had two very different accounts and must do our best to decide which is the more reliable.

3.16. Facebook Messenger messages produced by Mr Cywinski on the third day of the hearing were important. He says they show himself and the claimant having friendly exchanges inconsistent with the case she is now bringing. We find nothing sinister in the fact Mr Cywinski was acting as the conduit for offers of overtime made to the claimant but he clearly was which was a work related legitimate reason to be messaging her. A quote from Shakespeare which he sent to her on 30 September 2017 finishes with Polish words which mean "*I like you very much* " but we accept that was part of a chain message he forwarded. He sent another message at 7.33 am on 5 October 2017 meaning " *Send a heart to someone you like, I send it to you*" followed by pictures of hearts and flowers, to which she replied with a picture of a kitten (she likes cats) surrounded by hearts with the word "Lovely" written above but no text written by her. The messages and illustrations which accompany them from Mr Cywinski are romantic rather than sexual and Mr Giers, translating that day, said the language shows the one on 5 October was originally written by a female. We find these messages were not "wanted" by the claimant but she had no difficulty with Mr Cywinski flirtatious ways in the early months of her employment, which is why other people, including Mr Juskowiak, were so surprised by her later claims.

3.17. On 30 November 2017 the claimant went to the doctor because she had mouth infections. Mr Cywinski contacted her at 3:10 pm asking how she was and what the doctor

had said. She replied she was seeing the doctor at 16:10. At 7pm he asked again how she was and she replied she had been given antibiotics. Mr Cywinski's reply when translated means there was no need for her to go to the doctor because he could have given her an "injection" (followed by a laugh,"HaHaHa" in English but in Polish"*Hihihi*"). His evidence this was a joke notwithstanding he had no ability to inject somebody with a hypodermic syringe was unbelievable. He, **only reluctantly,** admitted giving her an "injection", in Polish as in English, has a double meaning of putting his penis inside her. Another significant feature of this exchange is her asking him what the word "*szlas*" means. Mr Giers explained it was the past tense of the verb "go". This illustrates the limitations on the claimant's understanding of Polish in that it is not unusual for people using a language with which they are not familiar to be limited to using verbs in the present tense. On 6 February 2018, he asked for her mobile phone number which she provided. We accept she did so not to miss out on overtime, but **it will later become clear it is relevant he had it**.

3.18. Mr Cywinski invited the claimant, along with some colleagues including Mr Juskowiak, to a party on 25 August 2018 at his house to celebrate the birth of his son. She arrived at about 5 pm having been given a lift by her partner. At the party she accepts she consumed alcohol, as did everyone else there, and was dancing with people including Mr Juskowiak with whom she spent most time, which is unsurprising as she and he understood one another better than others there. However, not only she but Mr Juskowiak steadfastly deny kissing or being "intimate" which were words Mr Cywinski used to describe their behaviour when interviewed by Mr Brass on 12 December. His evidence to us was he may have mistaken about what he saw but mentioned it to Mr Brass because it "may" have been relevant. That makes no sense. We find he was trying to paint her as a" loose woman" whose allegations against him should therefore not be believed. The claimant says she only went to the party in the hope that by meeting Mr Cywinski's wife it would persuade him to stop his sexual approaches to her. An invitation to come for coffee which Mr Cywinski made to her on 26 August caused her to take the view he never would. Mr Giers explained the words in Polish were an invitation to come to where Mr Cywinski was, at home with his wife, mother and daughter, not to meet somewhere else, but that is what the claimant feared so she did not reply until the next day saying she still felt unwell.

3.19. Mr Robinson-Young gave Mr Cywinski every opportunity to accept he was a joker and/or "*ladies man*" who may have said or done something like that which the claimant alleged but purely in jest not meant to cause offence, or that she had misunderstood him. He did not say that but maintained a steadfast denial. The claimant said he once "exposed himself", when asked she put it as undid the fly of his trousers while facing her, and on another occasion put his hands on her breasts from the front in a way she demonstrated on the interpreter. We accept both occurred, and may have been meant as a bawdy joke . There can be no ambiguity the sexual element of either act or inviting her to come to a hotel. Mr Robinson-Young also put it to Mr Cywinski he was "obsessed with" the claimant, which he strongly denied. We believe he was, in a fairly harmless, though persistent, way, not one which would pose a threat to her, but which she reasonably found offensive.

3.20. Mr Piatek says he was first made aware of the allegations against Mr Cywynski during the meeting with Mr Brass and Ms Wright and was very surprised as he has often seen them share their breaks and they appeared to be very good friends. He has not witnessed inappropriate behaviour, heard Mr Cywynski say anything inappropriate or heard or seen anything to suggest the claimant was uncomfortable in his company.

3.21. A problem in the claimant's witness statement is failure to put events in chronological order or indeed in some instances to put dates on them at all. However, it is likely the occasions upon which he unzipped his trousers in front of her and grabbed her breasts happened after he had ceased working on the same line as her in June 2018. In about June, the claimant who left her work boots in her locker, usually unlocked, found someone had urinated in them. This is not something Mr Cywynski would do if he was trying to persuade her to have sex. She says she told a manager she needed new boots but it is not clear if she explained why. It happened more than once. Anyone could have gained access to the ladies locker room and there would be no CCTV there, but it is not likely any man would risk being seen coming out of there. The claimant produced some evidence she had received treatment in February 2019 to deal with a painful dental condition caused by infection. There is no evidence that infection migrated to her mouth from infections she had contracted in her feet due to wearing urine soaked boots, as she suggested to us.

3.22. Our Employment Judge asked the claimant if she could explain what appeared to be an escalation of her anxiety from the summer of 2018 onwards. She was not able to provide an explanation but it coincides with the urine in her boots. She spoke for the first time of Mr Jamie Allcock, her Shift Supervisor, keeping her work under close observation, since well before the incident on 15 September, but only when our Employment Judge said that was what supervisors do and asked why she found it odd, did she say he would follow her to the toilets and wait outside for her. In short, much of what the claimant said in her oral evidence lacked detail or any discernible order and, but for matters we mention in our conclusions, we could understand anybody thinking she was making it up as she went along. As will be seen other people, including women, may have had a motive to harass her.

<u>13 September</u>

3.23. On 5 September 2018, the claimant went on holiday to Greece with her daughter, and told her at length about what had been going on. She did not feel she could speak to her partner as it would have made him angry and upset. She returned to work on Thursday 13 September at 8am.

3.24. Mr Brunton manages 14 of the 21 staff on C shift. His line manager is Kevin Watson. He did not know the claimant well and had only spoken to her since becoming manager on C shift in May. He says she was a good worker, always happy to help, friendly, sociable and cheerful. **In around June 2018** she asked Mr Brunton to change her breaks to 10 am from 11.30, he thinks to be on the same breaks as Polish employees including Mr Cywinski. She says she only asked because she was having to work too long without a break. He agreed to her request where operations allowed and she took some breaks with them until she went sick in September 2018. Mr Cywinski says she asked to change her breaks **in September** when she returned from holiday which cannot be right. Mr Brunton explained the claimant worked on a part of the line separate from everybody else. He or her supervisor would check on her frequently and she would say she was fine. Mr Brunton spoke to her when she returned from holiday and she seemed "distant". He asked if she was OK and she replied she did not want to discuss it. She denies saying she had any issue at home. He told her to come and talk to him if she needed to. We have already recounted the incident between her and Mr Piatek on that day, which happened in the morning.

<u>14 September</u>

3.25. On 14 September 2018, Mr Brunton was asked by Mr Watson to speak with the claimant as she had apparently been quite abrupt to site cleaning staff earlier that day.

Separately, the other woman on shift, Agata Halat who is Polish, had told Mr Brunton the claimant had approached her in an aggressive manner. Both reports were out of character. Mr Brunton asked Mr Allcock, as Shift Supervisor, and Mr Juskowiak, to help translate, to his office to discuss the matters with the claimant. The claimant spoke as best she could in English with help from Mr Juskowiak.

3.26. Mr Brunton told her he had received reports about her behaviour the previous day. She explained she was very tired but did not feel she had done anything wrong. He asked about her tiredness and **understood her** to say (a) she had been woken in the early hours by her "*husband*", with whom she did not have a relationship but they were still living in the same house, who had **been drinking,** and she found him sitting surrounded by lit candles, papers and empty alcohol cans (b) she was being *psychologically abused* by him. Mr Brunton asked if there was anything he or Biffa could do. She replied she did not think so. He said he would speak with his line manager to see if there was anything. He did not consider it appropriate to discuss her conduct in any detail but said she needed to remain polite to colleagues. She said she understood but did not agree she had been abrupt in any event. The claimant admits saying she was tired but not that it was due to her partner. The meeting then concluded. She went with Mr Juskowiak to apologise to Ms Halat.

3.27. After the meeting, Mr Brunton spoke with Mr Allcock to confirm the key points and asked him to keep an eye on the claimant during the day. He went to see Mr Watson whom he told about the information disclosed. He thinks Mr Watson then spoke with HR.

3.28. Mr Juskowiak says he accompanied the claimant to the meeting, to assist with translation as he understands English better than she does. He corrected his statement to say the claimant had said her husband had ***appeared drunk***, ie was acting as if he was, and **he had understood** her to say she had been psychologically abused by him so that is what he translated to Mr Brunton. **Mr Robinson Young asked Mr Grunt to speak in Czech to Mr Juskowiak certain extracts of what was said that day and Mr Juskowiak's understanding was not complete**. Everyone, including the claimant, agrees she did not mention anything about the way she was treated by other employees.

3.29. Ms Donna Wright is a Human Resources Business Partner for Biffa's parent company, based in Staffordshire, who provides day-to-day support to Biffa's senior management team, and about six other subsidiaries. She is in weekly contact with managers at site and attends at least once a month. On 14 September 2018, she received a phone call from Mr Watson saying **an employee** had said she was being psychologically abused by her husband and asking Ms Wright what support Biffa was able to provide. She gave details of the Employee Assistance Programme and suggested she could contact a local women's refuge. She understands Mr Watson later that day gave the employee information sheets and a telephone number to contact if she felt she needed to. Mr Brunton says so too. The claimant does not recall receiving any. We find she did, but may not have understood them. **At this time, Ms Wright did not know the name of the employee**.

15 September

3.30. On this day, the claimant alleges Mr Allcock, who was about to go on holiday, shook hands with his team and after he shook hers she found a substance in her hand she believed to be semen. If Mr Allcock had shaken hands with others immediately before the claimant, it is virtually impossible he could have masturbated into his hand before shaking her hand. When our Employment Judge asked when she thought he did so she said his

trousers were wet but did not say how that was significant. When she later gave an account to Ms Wright, she said the substance looked like semen but "*it could have been that he spat on his hand*" (Page 87) which some people do before a handshake. In our view, it is highly unlikely it was semen, it could have been saliva or some non bodily fluid.

Sunday 16 September

3.31. The claimant's statement says she had a ***series of meetings*** during the period leading up to the incident where someone put excrement in her lunch box. This is wrong. She had **one** on 14 September.

3.32. The claimant, like everyone else, had two lockers, one for dirty clothes, the other for clean. She gave evidence the keys to one locker could open another so people could gain access to hers and did so to plant a bottle of juice mixed with vodka which the claimant threw out because alcohol in the workplace is banned. All the respondent's witnesses said keys to one locker do not, **or should not**, open another, which we accept. We also this incident happened, probably when she left her locker unlocked, and suggests somebody was trying to get the claimant into trouble, but who and why is a mystery.

3.33. We find on this, or maybe another, day someone opened her bag which she left in the canteen and disturbed its contents. Another woman's bag had been opened one day and something in it was stolen. The claimant kept no valuables, only her lunch and a few cosmetics in her bag, so nothing was stolen. We have no idea who might have done it, but the motive was probably to steal.

3.34. On that morning she found toilet paper smeared with excrement in her lunch box. A little later when working, she had to rush several times to the toilet to defacate, which caused her to conclude someone had put **laxatives in her coffee.** On her break she went to the canteen and asked Mr Cywinski and Mr Soluch if they wanted coffee. They said not. Shortly after she came back screaming and threw her jar of coffee into the bin. This is corroborated by Mr Cywinski. On that morning she **believed** someone had put laxatives in her coffee. Mr Cywinski says he did not know anything about excrement in her lunch box or laxatives in her coffee until Mr Brass told him during the investigation. There is no reason why he would do these acts as his alleged interest in the claimant was sexual. Mr Piatek knew nothing about either incident and we have no evidence he was even at work that day.

3.35. A little later the claimant asked Mr Juskowiak to come with her to see Mr Brunton. She had not told Mr Juskowiak what the issue was. They entered Mr Brunton office saying she wanted to raise something. She told Mr Juskowiak in Czech/Polish about **how she had been treated by Mr Allcock**. He was shocked and translated it to Mr Brunton. Paragraph 31 of the claimant's statement reads "*I did go to see Mr Brunton on 16 September 2018 and I did raise an issue about how I was being treated* ***and*** *an incident that had occurred with Mr Allcock. The incident where I thought that he had behaved in a grossly sexual manner did happen. It contributed towards me feeling that I could not cope at work and taking sick leave. however, on reflection, I do not think that the probability was that it was a sexual act and it is for that reason that I have not pursued that matter or raised it in my Claim Form or in my grievance.*

3.36. Paragraphs 13-15 of Mr Brunton statement recounts what was translated to him thus

13. During the shift on 16 September 2018 Dagmar and Adam Juskowiak came to my office. Adam explained that Dagmar wanted to raise something with me. Adam explained that he was not aware what the issue was, but that Dagmar had approached him to come and see me. They both sat down and started to talk to each other in Polish.
14. Adam then explained that Dagmar had told him that when Jamie had finished work on the previous day (to go on a family vacation for a week) he had gone round the team to say goodbye and had shaken colleagues' hands. Dagmar explained that after Jamie shook her hand, she found what she believed to be semen in her hand. Dagmar believed that prior to seeing her Jamie ejaculated onto his hand.
15. Clearly this was an extraordinary allegation. I therefore asked Adam to get Marcin Gibas, (known as "Marco") Prep Manager straight away. Marco is also Polish. Dagmar repeated her allegation to Marco, who confirmed to me what Dagmar was saying.

3.37. Mr Brunton said he would report her allegation to Mr Watson and would arrange for it to be investigated further. The claimant said she did not want the allegation investigated. Mr Brunton said given its seriousness it would have to be, but Mr Allcock could not be interviewed until his return. He denies saying nothing could be done or she should get back to work or risk losing her job, as she alleges. We find he said he could do nothing about Mr Allcock **without evidence** which he could not gather until he returned and **asked if she was able** to stay in work. She confirmed she was. At this meeting she made no allegation against any other colleague in particular, race harassment by Mr Piatek or sex harassment by Mr Cywinski, which she later raised as part of a grievance. The claimant says Mr Brunton was dismissive, intimidating and his behaviour suggested he did not believe her. We do not accept that, but it does not mean we think the claimant is lying. Again, everyone was trying to deal with matters without a skilled interpreter. We understand why she would name Mr Allcock as a manager about whom she at the time felt very strongly but be reluctant to make allegations against colleagues. As set out above she repeated it in front of Mr Gibas, and Mr Brunton could not believe his ears. He probably reacted with “disbelief” in that sense, which she took as him not believing her. Mr Brunton informed Mr Watson what had happened.

3.38. After the lunch box and laxative incidents the claimant could not cope any longer so left shortly afterwards at about 2.30 pm. She went to see her doctor who signed her off sick from about 18 September. She has not returned. From then Biffa dealt with her through HR.

<u>Before the Grievance</u>
3.39. Probably on 17, maybe 18, September, Mr Watson contacted Ms Wright saying the claimant had made allegations against Mr Allcock. Only then did Ms Wright learn the claimant was the employee whose behaviour in the days prior to this had out of character and had said her partner was abusing her. Both sides may have made errors as to dates.

3.40. The claimant’s partner, who uses on Facebook the identity “Vincent Brazil” not his real name, contacted Mr Juskowiak on Facebook messenger asking to meet. Mr Juskowiak suggested meeting in a Matalan car park close to their respective homes but did not know why he wanted to meet. When they did, the claimant’s partner asked about Mr Allcock who the claimant had said he had touched her inappropriately. Her partner said he had concerns about her mental well-being. Mr Juskowiak said he had not witnessed any inappropriate behaviour. The claimant’s partner did not refer to any allegations against anyone other than Mr Allcock and did not make any reference to Mr Cywinski or Mr Piatek. Mr Juskowiak’s statement says they met **on 18 September 2018**, and a document at page 63 records a

meeting between Mr Juskowiak and Mr Watson headed "*11:00 am (Approx)*" **that day** in which Mr Watson was told by Mr Juskowiak what was said at a meeting "*this morning*". Mr Juskowiak also told Mr Watson the claimant had a "*strong depression* "and her partner said she had been "*under the mental health centre at Hemlington*".Mr Edwards said medical records showed the claimant had been investigated for schizophrenia but the claimant said that was because her sister had been diagnosed with it and she was afraid it may be hereditary. We have seen no firm medical evidence to show any relevant problem.

3.41. In the course of these proceedings, Biffa have produced text messages and Facebook posts the claimant sent or received which suggest she discussed sexual matters. The claimant says the translations are inadequate and the messages were sent to the daughter of Dana Zduniac who is Polish with whom the claimant felt comfortable.

3.42. It is also clear the police were asked by Biffa to visit the claimant at home. She says they came on 17 September and asked her about stealing from Biffa, but Biffa say they were sent out of concern for her welfare after what they understood her to have said about her partner. As in the two preceding paragraphs, we have no **reliable** evidence to enable us to draw conclusions either way about any witnesses' truthfulness or accuracy .

3.43. The claimant's first sick note is dated 19 September, on which day Ms Wright made a referral to Occupational Health (OH), but it was made online and we cannot see a date on it.

3.44. Mr Cywinski says he had noticed a change in the claimant when she returned from holiday. She has been off work sick since shortly after and he has not had any contact with her. He heard people saying she had made serious allegations about Mr Allcock. He says he tried to contact her by Facebook messenger to see if she was OK but did not receive a reply. Mr Juskowiak did not contact her after she went off sick either and noticed she had deleted him from Facebook. We could not understand why Mr Cywinski did not text or ring her in September, as he had been so concerned when she had her mouth ulcers the previous November and **he had her mobile phone number**. On his account they were good friends, nothing more. She had told no-one other than her daughter of anything he had done wrong, so **unless he knew he had something to hide**, the normal course would be to make every effort to find out how his good friend was. When our Employment Judge asked about this, he said he had tried to ring but got no answer. Asked why he had not sent a text, he said he had, but produced no evidence, despite having produced the messages referred to at 3.16 and 3.17 above. We did not find this credible.

3.45. The claimant attended an OH appointment on 18 October 2018 and Ms Wright received the report on 26 October 2018 which said the claimant had a reduction in mental wellbeing including anxiety and insomnia. She told OH she had been subjected to abuse from male colleagues making inappropriate comments, invading her private property and touching her inappropriately, often in a sexual manner, this conduct had escalated over "*the last couple of years*" and she had previously raised this with management "*7 months ago*" . Ms Wright knew this timescale was not correct. The OH examination was conducted in English with the claimant using a translation tool on her phone to help her. She says, and we accept, there are several inaccuracies in the report as to times. When it says things had become worse over two years, she meant two months. When it says she reported some matters seven months earlier, she meant about 7 weeks. Ms Wright was concerned by the report and wrote to the claimant, inviting her to a meeting on 14 November with herself and

Laura Robertson (now Taylor), Business Development Manager. Prior to the meeting, the claimant asked Ms Taylor, rather than Ms Wright, if she could bring a companion but did not say it was her daughter. In line with normal company procedure, she was told she could be accompanied by a trade union representative or a work companion but if she wished to bring someone for emotional support, they could wait in reception. She attended alone.

3.46. **T**hey met as planned with an external translator and Ms Taylor took thorough notes. Ms Wright said Biffa wanted to support the claimant back to work and investigate the complaints she had made. The claimant had not previously seen the OH report and spent some time with the translator at the start of the meeting going over it. She corrected some errors. Ms Wright asked her to provide the details of the complaints she had raised with OH so Biffa could investigate properly as it has zero tolerance to sexual harassment. The claimant repeatedly refused to name anyone involved saying she would only give details to her lawyer or the police because she knew no-one would believe her, and she did not trust Biffa. Ms Wright sought to reassure her Biffa would take her allegations seriously and investigate thoroughly, but she was not prepared to provide further details. She said she had not raised these concerns previously because she had been dealing with them herself.

3.47. In relation to the meeting with Mr Brunton on 14 September the claimant denied having said she had problems in her personal life, said her partner did not drink and everything was fine. She made new allegations (i) someone had urinated in her boots (ii) a colleague had exposed himself to her (iii) someone had left excrement in her lunchbox and (iv) someone had gone through her bag. She was either not able or not prepared to give further details. In relation to Mr Allcock, she said she had thought what she had found in her hand had been semen, but it could have been saliva, she could not be sure.

3.48. The claimant says the way Ms Wright spoke to her made her feel intimidated because Ms Wright seemed defensive and her tone of voice make the claimant feel uncomfortable even with an interpreter present. All she seemed interested in was getting the claimant back to work and saying if she could not, she would have to leave. We do not accept that, but it does not mean we think the claimant is lying. As Ms Wright says, Biffa's priority was to investigate the allegations and take action on any form of harassment. As the claimant accepts Ms Wright offered her the chance to work on any shifts she chose. Although the claimant **felt** pressured to return and name those who had harassed her, it was not reasonable, even having regard to her perception for her to feel thus. Ms Wright said, rightly, what any responsible HR officer would. We accept Ms Wright's evidence as to the tone and content of the meeting.

3.49. Later that day, Ms Wright met with Mr Juskowiak, without a translator, to discuss the allegations against Mr Allcock and his meeting with the claimant's partner. Mr Juskowiak said the claimant was Facebook friends with himself and Mr Cywinski and told her he thought the claimant was depressed, as did her partner.

3.50. **In her interview with Ms Wright, the claimant spoke through a translator two very significant paragraphs.** When Ms Wright asked her, page 83, if she thought things had been done to her because she was Czech, her reply was:
"*To be honest it's a silly thing my husband has a nice car his business is to sell and buy cars all of us even Polish families were born in a deep communism so people are jealous when we have something they ask us why do I have this and why I work in a factory. This all*

happened because people are jealous of the car. English people don't understand it because English people don't care what cars people have etc."
and at page 85 she says
" *To be honest I think all of this hell is caused by the Polish people* ***I don't know why*** *maybe because I didn't sleep with them or* ***I didn't get on with them*** *I really do not know what I did. That is why I want to get to the bottom of things. This is hidden bullying.*"
Even with the lack of punctuation, it is plain the claimant is giving reasons other than race or sex why people may seek to cause her harassment or harm. **She also gave orally to us vague evidence of gossip in the factory about another woman sleeping with a male colleague. It is distinctly possible some colleagues believed, wrongly, she had slept with Mr Cywinski while his wife was pregnant and found that reprehensible.**

The Grievance
3.51 The claimant tried to attend Biffa on 28 November to hand in her sick note but was prevented by security who had been told of a message exchange she had with a colleague in which something was said which caused alarm she might set fire to Biffa's premises. In our view, this was an over-reaction by security, but understandable.

3.52. The claimant wrote a grievance letter on 30 November which set out her complaints about Mr Piatek and Mr Cywinski but does not include everything that had happened, for example, someone urinating in her boots. She was prescribed antidepressants at that time which she continues to take. When having to rely on her daughter to translate, it was difficult through her daughter to express details of a very sexual nature.

3.53. Ms Wright arranged for the grievance to be investigated. She sought to meet the claimant again but she said she was not well enough and this has been the position since. There was a thorough investigation by Mr Brass. Mr Brunton was interviewed, on 12 December 2018 and only at this stage became aware of all her allegations. He was surprised by them because, to the best of his knowledge, she had a good working relationship with all of her colleagues. She had never raised with him concerns regarding any and nor had any colleagues raised any about her. She had never raised any allegation someone had put excrement in her lunch box and laxatives in her coffee. The grievance was not upheld because, although Mr Brass spoke to everyone he possibly could, none provided corroboration of what the claimant said. The outcome letter is at page 172

3.54. Mr Juskowiak told us he was surprised to read the allegations of harassment against Mr Cywinski and Mr Piatek. He used to share breaks with My Cywinski and the claimant and they had always got along very well. They would sometimes share breaks with Mr Piatek but less frequently. Mr Juskowiak would often give Mr Cywinski and Mr Soluch lifts to and from work and sometimes would also take the claimant if her partner was working. He has never seen Mr Cywinski behave inappropriately towards or say anything inappropriate to the claimant or Mr Piatek say anything inappropriate or offensive about her nationality.

4 Submissions in outline and Our Conclusions
4.1. By 16 January 2020 we had heard all the evidence and adjourned to 31 March and 1 April for submissions, deliberations, delivery of judgment and remedy if needed. The Covid 19 pandemic changed all that. Written submissions were delivered by consent, deliberations took place by remote means and remedy will, if necessary, have to be decided later.

4.2. Both Counsel agree the outcome will depend on our findings as to who is the more credible and reliable. We have all found it very much a balance of probability case.

4.3. Mr Robinson-Young submits
12. *The respondent's case and their defence are partially based on a denial of the facts put forward by the claimant, furthermore they would have the tribunal believe that the claimant was suffering from a pre-existing mental health condition — of which there is no evidence. In other words, the respondent would have the Tribunal believe the claimant is a crazy woman, not to be believed who is making unsubstantiated claims and complaints about some of the people working for them in their plant. Nothing could be further from the truth.*
13. *If the Tribunal accepts my submissions on these points that Adam Cywinski was ready to mislead the Tribunal regarding acting inappropriately with the claimant, it follows that the claimant's allegation that he made sexual comments on a daily basis, he touched her breasts, he asked her to go with him to an hotel, more likely than not to be true.*
14. *It was very obvious from the claimant demeanour when she was giving her evidence that the behaviour Mr Cywinski exhibited towards her was unwanted and made her feel very uncomfortable.*

4.4. Mr Edwards preliminary observations encapsulate his arguments on credibility and reliability very well. He says the respondent's evidence has been consistent (both to the tribunal itself, and what individuals told management when the allegations were investigated nearer the time). He says this should be contrasted with the claimant's evidence which shows a history of making outlandish or extreme allegations which have no basis in evidence, and/or which she has not pursued, and/or which fly in the face of probability (for example Mr Allcock masturbating into his hand, or Mr Cywinski exposing himself on the shop floor in front of unnamed witnesses). He says her conduct is not that " *of someone who was subject to the repeated and severe harassment she now alleges: for example, she went to the party at Mr Cywinski's house to celebrate his new baby in August 2018 . Would she really have gone if he had been making grossly unwelcome comments for over a year, groped her, exposed himself to her etc as alleged? No. And would he really have invited her in such circumstances, to meet his wife, baby and mother? Again, no.*

4.5. He says her evidence of what the police said when they visited her house on about 19 September 2018 and her evidence that any key would open any locker flies in the face of common sense. Further, when she raised the masturbating 'allegation', she failed to mention other key things she clearly would have mentioned had she believed them at that point to have occurred, eg a sustained campaign of harassment by others; laxatives put in her coffee, excrement in her lunch box; alcohol in her locker; and her shoes being urinated in. He adds "*The shoes, laxatives in coffee, excrement in lunch box, and alcohol was of course all physical evidence C would easily have shown management (or at very least taken a photo of) which might have proved her case, yet she did not even mention it at the time.* Nor did she mention Mr Cywinski exposing himself in her witness statement, yet this is one of the most serious allegations she has made. Our findings of fact show we accept why she went to the party and understand why she "held back" some allegations at first.

4.6. Hesitancy by a witness answering questions which would tend to indicate in an English speaking person they are struggling to find an answer, may in a non English speaking witness indicate no more than that they are having difficulty understanding the question being asked. It is also a problem when dealing with witnesses who give evidence in a language other than English to assess their credibility by reference to such things as the

differences between their witness statements on the one hand, grievance letters or records of interview on another and finally in oral evidence. It is not easy for solicitors taking instructions from a non English speaking witness to ensure what is in a witness statement in English accurately reflects everything the witness wants to say. Many solicitors are wary of crossing a line between pressing a client for more clarity, which they should, and phrasing a statement for them in a way some say is unprofessional.

4.7. Many witnesses, English or not, present accounts which assume a reader has knowledge of places, people and working systems which no one not in the same workplace could have. Many accounts lack detail or chronological order and leave matters they think are obvious unsaid. It would be easy to find fault with statements in this case of the claimant and most of the respondent's witnesses. Discrepancies may indicate witnesses are making up or embellishing evidence, but could point to nothing more than accounts, given in a different language and under pressure, being incomplete.

4.8. We have made allowances for all of these factors when assessing the witnesses' evidence in this case. However, on most points, notwithstanding we think the claimant has misinterpreted **some** things said by Mr Cywinski and Mr Piatek, and exaggerated on some points, we have come to the conclusion her evidence has not been fabricated and is to be preferred. In many cases, and this is one of them, the facts alleged against Mr Cywinski and Mr Piatek, are so stark that, if proved, no other inference is possible than that they constitute one or other of the statutory torts. We found the claimant convincing because she was consistent on most important points, even under firm but fair cross examination, without being so polished as to suggest she had "rehearsed her story". She was upset by certain recollections without being over-dramatic. We accept some of her evidence does not seem logical or even plausible and may be exaggerated but when someone feels moderate allegations, **which they know to be true**, are not being taken seriously , or are not being believed at all, they tend to make more serious ones. Mr Edwards submissions, good though they are, fall into the error identified best by Sir Patrick Elias in Bahl of assuming a witness who is not credible or reliable on some matters is not credible or reliable on any.

4.9. Dealing first with Mr Piatek, it is most unlikely the claimant would have picked a maintenance technician on a different shift **at random** to accuse of making remarks related to race, had he not done so. The fact no-one has been found to corroborate the making of comments does not mean they were not made. Although the remarks clearly relate to her race, they are not massively offensive about Czech people and **if the claimant were inventing them, we would expect her to invent much worse**. Mr Piatek came across as a serious, quiet man who got on with his work. In his oral evidence he said *'In England for the first time I've heard about Czech gypsies coming to England. I had a friend in Poland who was a gypsy'*. To us this suggests he probably used the term Czech gypsy to the claimant. Mr Piatek's refusal to accept Mr Robinson-Young's invitation to say he may have said something like it but meant no harm, made his evidence less credible.

4.10. One of the most significant things the claimant said was to describe the workforce at Biffa as" *one big Polish family*". Combined with her working in a building on her own for much of the time, this would have given her a sense of isolation. This is the important context we mention in paragraph 2.10 above. Her change of mood when she returned from holiday was probably due to her having unburdened herself to her daughter and been encouraged not to suffer in silence any longer. She can base her claims related to the protected characteristic of race on being "non-Polish". It would not be a valid defence that

Mr Piatek would treat a Slovakian or Hungarian just as badly. The claimant has showed a tendency to categorise all Polish people as being against her because she is Czech, when in our view that may only be true of Mr Piatek. However, even if he did not have the purpose of harassing her, but was making the type of sarcastic comments we hear English, Welsh, Irish and Scottish people make occasionally about each other, **the effect on her must be viewed in the context she was the only Czech there.** We accept he said *Hey Czech, you here again? What are you wanting **here**? Don't worry you are not going to be **here** long'*. Even without any swearing these would create an intimidating and hostile environment for her. Paragraphs 2.11-2.13 are important to this. His comments were unwanted and pass both subjective and objective tests in Dhaliwal on the basis of their cumulative effect approved by the EAT in Driskel . Biffa has not advanced a statutory defence under section 109(4), and had it done so it would have failed because as an organisation it took no steps to ensure its non English workers did not discriminate between each other.

4.11. It is unlikely the claimant would have invented the remarks and acts of a sexual nature by Mr Cywinski, who says they were good friends, if there were no truth in them. Again if the claimant were inventing them, we would expect her to invent much worse. Also she could have picked anyone, or more than one person, to accuse. Mr Robinson-Young gave Mr Cywinski every opportunity to accept he may have said something like that alleged flirtatiously or in jest but he refused to. Most importantly, some of his evidence flew in the face of documents he himself had produced especially the remark about giving the claimant “an injection”. We are not convinced Mr Cywinski’s conduct was always unwanted, but it became so certainly from the summer of 2018. One telling comment made by him in his oral evidence was noted by Ms Hunter as *'I never **crossed the line** at work'* . To us this implies he recognises there was something going on but it did not cross the line **for him** ,wherever he puts the line , but it did for the claimant .

4.12. Of particular significance was the improbability of his evidence as to why, if he had done nothing wrong, he did not do far more than he did to find out how she was after she went off sick. Also, at paragraph 3.12, the claimant named a witness, Dana Zaduniak, who was not called by the respondent to deny having heard what the claimant alleges was said in her presence. Again, Biffa has not advanced a statutory defence under section 109(4).

4.13. Mr Cywinski and Mr Piatek are both Polish but face very different allegations made by the claimant. In both cases, the acts of which complaint is made were unwanted and fell within s 26(1)(b). There is primary fact from which we could infer they had that purpose, but, even if they did not, the conduct certainly had that effect and it was reasonable it would. Section 212 has the effect that even if they did it because of race in Mr Piatek’s case and sex in Mr Cywinski’s case, the claim succeeds under section 40, not section 39.

4.14. We agree with Mr Robinson-Young the harassment complained of involved employees of the respondent, in the course of their employment, mostly at work and most of the text messages were in the course of Mr Cywinski's employment, as the reason for her receiving them initially was to communicate about overtime shifts. Mr Edwards does not suggest they were done outside the course of employment.

4.15. The conduct of both men extended over a period but only in Mr Cywinski’s case was claim issued outside the time limit, then only by a few days. Mr Robinson Young argued the claimant’s failure to raise complaints earlier or more thoroughly was due to her lack of understanding of the induction training given to her and the policies handed to her being in

English, but she has not pleaded indirect discrimination. However, the point is one relevant consideration under the tests in Keeble. We find it is just and equitable to deal with it.

4.16. Much of paragraphs 4.6 and 4.7 above, would apply equally to the problems which Mr Brunton and Ms Wright faced in trying to investigate the allegations the claimant made. Added to that was the claimant's reluctance, due to lack of trust in Biffa as an organisation to deal with her complaints fairly, to give Ms Wright anything to help her do so. The law cited in 2.14 and 2.15 above explains why we find for the respondent on the claims relating to Mr Brunton and Ms Wright. Although Mr Brunton could maybe have acted a little more competently in the way he dealt with the claimant initially, his failure to do so does not show primary fact from which we could infer race or sex had anything to do with it. He was struggling to deal with serious allegations made in a language he did not understand helped only by Mr Juskowiak and Mr Gibas doing their imperfect best. We find **nothing** to criticise in what Ms Wright did and certainly no basis for inferring direct discrimination. There was no racial content in anything either of them said or did. so no harassment either.

4.17. We accept somebody put excrement in the claimant's lunchbox, laxatives in her coffee, alcohol in her locker, urinated in her boots and went through her bag. These were the acts of a person, probably more than one person, which had a profound effect upon the claimant and understandably so. **The conduct itself does not relate to race or sex and is not of a sexual nature.** She cannot say, nor can we tell, who did it, still less why. In addition to being the only Czech employee and one of the few women in the workplace, there is ample evidence of her being a person of whom others may be jealous because her partner had a nice car, and she may have come across as greedy for working as much overtime as she did. Other people observing the close relationship between her and Mr Cywinski may well have believed they were having an affair when his wife was pregnant and found that reprehensible if they thought she was "leading him on". We cannot, and have no wish to, find Biffa liable only because these acts were probably done by **one** of their employees without a prima facie case that sex or race was the reason for these acts.

4.18. A major factor when assessing compensation will be that we believe the claimants feelings have been greatly injured by the totality of the behaviour to which she was exposed, but can only compensate for the injury caused by the acts which we have found proved being harassment by Mr Cywinski and Mr Piatek. Furthermore, the behaviour which caused her to go off work on the sick was that in the last paragraph. Ms Wright offered her an opportunity to come back to work on different shifts and have her allegations fully investigated. Her decision not to do so was based on her lack of trust in Biffa as an organisation but nothing Biffa did reasonably caused that lack of trust.

Employment Judge Garnon
Date signed 1 April 2020