Case No: 3304411/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss PM Jessemey	v	Lodge Services Limited

Heard at: Bury St Edmunds

On: 20, 21 and 23 January 2020
22 January 2020 (Discussion day – no parties in attendance)

Before: Employment Judge M Warren

Members: Ms S Stones and Mr V Brazkiewicz

Appearances:
For the Claimant: In person.
For the Respondent: Mrs J Barnett (Consultant).

JUDGMENT having been sent to the parties on 11 February 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The background to this case is that it was originally issued in September 2014 and arises out of Miss Jessemey's employment with the respondent as a store detective, which came to an end in June 2014. She brings claims of unfair dismissal, direct sex discrimination, harassment on the grounds of sex, part-time worker discrimination and unlawful deduction of wages and/or breach of contract.

2. The matter came before Employment Judge Manley sitting in Watford on 17 December 2014, when it was set up for a hearing in February 2015. Employment Judge Manley identified the issues in the case at that hearing.

3. At that time, the regime of Employment Tribunal fees was in place, Miss Jessemey did not pay the fee that was required before the case came on for a hearing and was therefore struck out. Subsequently of

course, there was the Supreme Court Unison, decision which said that the Tribunal fee regime was illegal. As a consequence, Miss Jessemey was able to reinstate her claim.

4. Upon the claim being reinstated, it came before Employment Judge Smail sitting in Watford on 21 August 2018, when he listed it for hearing in February 2019. He took the precaution of listing the matter for a short telephone preliminary hearing a few weeks before the final hearing, just to make sure that everything was ready.

5. That short telephone hearing came before me on 11 January 2019. By that time Mrs Barnett, who had not previously been involved, was instructed in the matter. The case was in danger of not being prepared in time, but we were able, I thought, to get matters back on track, so that the hearing would be able to take place in February.

6. Unfortunately, this proved not to be the case. On 25 February 2019 the case came on for final hearing before Employment Judge Laidler with two Members, Mr Allen and Mr Schooler. It was unable to proceed as the respondent attended not with Mrs Barnett, but represented by its HR Manager, Mrs Atkins. For reasons described by EJ Laidler in her hearing summary and Judgment, the case was unable to go ahead; she was critical of the respondent in strident terms, reserved the question of costs of that occasion and re-listed the matter for hearing here in Bury St Edmunds on 5-8 August 2019.

7. The matter came before EJ Laidler again on 5 August 2019, ready for its 4 day hearing. The members on that occasion were, Miss Feavearyear and has it happens, Mr Brazkiewicz, who is here with me today. It was decided that the matter could not proceed, because a week or so before hand the respondent had successfully applied for a witness order with regard to the key witness in this case, Mr Tolmie, who was no longer in its employment. I was the Judge who granted the witness order. Mr Tolmie had been uncooperative with the respondent. Once subject to the witness order, he became co-operative and the respondent wanted time to prepare a witness statement. The matter was therefore postponed once more and thus, it came before us this Monday, 20 January 2020.

The Issues

8. As I have already mentioned, the issues in this case were identified by Employment Judge Manley on 17 December 2014. There were key allegations relied upon in respect of the direct sex discrimination, harassment related to sex and discrimination on the grounds of part-time working identified, itemised a) to i) as follows:

    “a) Mr Tolmie calling her “Honey” repeatedly when he spoke to her in person of on the phone;

    b) Mr Tolmie talking over the claimant so that she was not heard;

    c) Mr Tolmie commenting on “another assault on a female officer” dismissively around February 2013;

d) Mr Tolmie failing to deal with a male colleague of the claimant about whom concerns had been raised around November 2012;

e) Mr Tolmie insisting the claimant should be paid £7 per hour even though she believed other male colleagues and at least one male interviewee were on higher hourly rate. Mr Tolmie stated that it was because she was part-time;

f) Mr Tolmie refusing the claimant holiday to attend her brother's wedding in September and insisting she swap her shifts;

g) Mr Tolmie reducing the claimant's shifts in January 2014 so she only had 12 hours work instead of 16;

h) Mr Tolmie's dismissive attitude to the claimant at a performance meeting around March 2014, stating that she lacked relevant skills and was ambitious;

i) The respondent not progressing the claimant's concerns about Mr Tolmie raised in February 2014 and her grievance of 14 May 2014."

9. A list of issues is a case management tool. As the EAT has a number of times reminded us, we must decide a claimant's pleaded case. We have noted that missing from the above list are matters referred to in the claim form, namely that:

j) On the 6 June 2014, Miss Jessemey was injured in an assault and she was not paid properly thereafter;

k) After Miss Jessemey had raised a grievance, Mr Tolmie had gone to client stores and encouraged managers to ask for a male security guard rather than a detective and to do away with her.

The evidence

10. We have had before us two witness statements, one from Miss Jessemey and the other from Mr Tolmie. We heard evidence from each of them.

11. We have had two bundles, one from the respondent properly paginated and indexed running to page 167, and one from the claimant where she has identified documents by marking them PJ01 through to PJ29. Although it looked as if this might create an inconvenience, I think it is fair to say that the hearing went smoothly and that documents were in one bundle or another did not really cause us great difficulty.

12. Other documents that we had were a skeleton argument from Mrs Barnett at the beginning and written submissions from her at the end. Mrs Barnett had also prepared a helpful table setting out the allegations and the respondent's response to them.

13. What I should make clear is that what we did not have before us, were

witness statements from Mr Lochrie and Mr Cockerill. I mention that because we know that such statements existed, but they were not placed before us for this hearing.

The Law

14. Turning next to the Law, I explained to the parties that I had prepared a detailed explanation of the relevant law which I would not read out, but which would appear in any written reasons I was required to prepare in due course. I gave a lay person's explanation, as set out below, so that non-lawyers present had some understanding of the context of the things that we were going to say:

    a) Constructive dismissal is where an employer has behaved so badly that the employee is entitled to resign and treat him or herself as if they were dismissed.

    b) Harassment is where behavior related to a protected characteristic, (in this case sex or gender) creates what I will refer to as the proscribed environment, which is one that is intimidating, hostile, degrading, humiliating or offensive or violates the individual's dignity.

    c) Direct discrimination is when a person is treated less favourably than somebody else and the reason for that difference in treatment is, (in this case) gender or sex.

    d) It is a feature of discrimination legislation that if an allegation is found to be harassment, it is not, by definition, direct discrimination – it is one or the other.

    e) Part-time worker discrimination is where a person is treated less favourably than a full time worker is treated. It is a feature of this particular type of discrimination that the claimant has to present to the Tribunal an actual person in the same circumstances as the claimant, doing the same job as the claimant but full-time and show there is a difference in their terms and conditions of employment.

    f) In a discrimination case, it is initially for the claimant, (Miss Jessemey) to prove to us facts from which we could possibly conclude that there was discrimination, ignoring any explanation from the respondent. If she proves such facts, then we look to the respondent to prove to us that discrimination played no part in what it did. If the respondent does so, the claim will fail, if the respondent fails to prove that discrimination played no part in its actions, the claim will succeed.

15. There follows my lawyer's explanation of the law.

Constructive Dismissal

16. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

17. Section 95 defines the circumstances in which a person is dismissed as including where:

> *"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

18. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

19. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347).

20. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

21. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

22. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…..If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

23. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the

cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

24. In Kaur v Leeds Teaching Hospitals NHS Trust [218] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

25. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act can not be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

26. A fundamental breach by an employer has to be, "accepted" by the employee; if she leaves it too long before resigning, she will be taken to have affirmed the contract. In a recent review of the law of affirmation in the employment contract context, HHJ Burke QC in Hadji v St Luke's Plymouth UKEAT 0857/2012 summarised the law as follows:

> *"(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.*

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44."

27. The employee must prove that an effective cause of her resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, the breach must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13)

28. An employee is perfectly entitled to wait for a period of time to seek alternative employment before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.

29. There is also implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

30. Section 111(2) of the Employment Rights Act 1996 requires that a claim of unfair dismissal must be brought within 3 months of the date of dismissal, or:

"(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

Direct Discrimination

31. Miss Jessemey says that she was directly discriminated against because of her gender, (sex discrimination). The relevant law is set out in the Equality Act 2010.

32. Gender is one of a number of protected characteristics identified at s.4.

33. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

34. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of

the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

35. Direct discrimination is defined at s.13(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".*

36. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

37. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? There is no difference in meaning between the term, "because of" in section 13 and "on the grounds of", under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

38. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he knew it or not, acted as he did, because of the protected characteristic? - (see paragraphs 13 and 17).

39. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

Harassment

40. Harassment is defined at s.26:

"(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…

(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.

(5) The relevant protected characteristics are—

…

sex;..."

We will refer to that henceforth as the proscribed environment.

41. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA.

42. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst 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."

43. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that Employment Tribunals, "*should not cheapen"* the significance of those words, they are an important control to prevent trivial acts causing minor

upsets being caught up in the concept of harassment.

44. Section 212, the definitions section of the Equality Act, at subsection (1) provides that, "detriment" does not include conduct which amounts to harassment. This means that it is not possible to have the same conduct defined as direct discrimination and harassment. One might say that harassment has priority; if the conduct is harassment, it is not a detriment and not therefore direct discrimination.

Employer's Liability for Acts of Employees and the Statutory Defence

45. Section 109(1) provides that an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment.

46. Employer's though do have a potential defence to an action seeking to hold them liable for acts of employees, that is that they took all reasonable steps to prevent the discrimination taking place, s.109(4).

Burden of Proof

47. Section 136 deals with the 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.*

48. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

49. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

50. Madarassy v Nomura International plc [2007] IRLR 246 CA also confirms that a mere difference in treatment is not enough, Mummery LJ stating:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the*

balance of probabilities, the respondent had committed an unlawful act of discrimination"

51. In Denman v Commission for Equaltiy and Humand Rights and Others [2010] EWCA Civ 1279 Sedley LJ made the point though, that the something more which is needed need not be a great deal, it might for example be provided by a failure to respond to, or an evasive or untruthful answer to, a questionnaire or by the context in which the act has occurred. In other cases, that something more has been statistical evidence suggesting unconscious bias, inconsistent explanations or refusal to provide information.

52. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

53. Section 123(3) provides that conduct extending over a period of time should be treated as having been done at the end of such period.

Part-time worker discrimination

54. Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides:

"1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

…"

55. It is significant that regulation 5 (1) makes reference to, "a comparator"; a claimant must identify an actual comparator, someone in the same situation as her, but working full-time. There is no provision for a hypothetical comparator in the part-time worker legislation.

Unauthorised deduction from wages

56. Section 13 of the ERA prohibits a deduction being made from a worker's

wages that is not authorised in the contract of employment or authorised by the worker in writing in advance. Any claim in that respect must be brought within 3 months of the deduction, or the last deduction if there were a series of deductions.

Credibility

57. Before we come to our findings of fact, some comments about credibility. The events in this case took place a long time ago; 6-8 years ago. It is important that we keep that in mind. It is important that we have regard to the fact that people may not recall very clearly, if at all, or accurately, events which took place a long time ago. We hesitate before criticising somebody for any failings in their memory in that regard.

58. We need as always, but more so because of the time that has elapsed, to look to the documents for corroboration wherever that may be possible. In that regard, Miss Jessemey's allegations are set out in a long and detailed grievance letter of May 2014; that provides some corroboration to her account.

59. Miss Jessemey's allegations about Mr Tolmie's demeanour and the way that he spoke to her, are corroborated by an email from a Danni Smith, exhibit PJ12. That has to be treated with caution, it is hearsay evidence and Miss Danni Smith was not here to have what she wrote tested in cross examination under oath. But equally, we gave Miss Jessemey a stern perjury warning and yet notwithstanding that, she confirmed this was an email she had received from Danni Smith in 2015. It is a document the respondent has had for some time, certainly at least since the last hearing in August. It could have traced Miss Smith and if what was said was not true, or that Miss Smith had not sent such an email, it could have done serious damage to Miss Jessemey's credibility.

60. One of the allegations against Mr Tolmie was that he talked over Miss Jessemey. That is something which manifested itself when he was giving evidence.

61. Mr Tolmie's overly long, rambling answers were in our judgment, often evasive. We felt that he was deliberately trying to confuse or obfuscate.

62. It is right to say that correspondence in the bundle to which Miss Jessemey was taken with regard to her grievance, shows that the respondent was properly attempting to deal with her grievance raised in May 2014, but really, although that appears as the last issue as identified by Employment Judge Manley, if one looks at the ET1, Miss Jessemey's real focus is the lack of progress after she made an oral complaint about these matters in February 2014 to a Mr Lochrie and indeed, that is the focus in her witness statement.

63. What of another document in the bundle that the respondent took Miss Jessemey to, at page 158? That is an email written by Mr Tolmie to Human Resources in April 2013, in which he asks that arrangements be made to pay Miss Jessemey her 5 days holiday pay and querying whether she could be paid for a day which she had lost through no fault of her own.

The respondent points to this as evidence that Mr Tolmie was nice to Miss Jessemey and her assertions that he was not, lack credibility. However, the truth of the matter is that what he does in this email is no more than he has to do, or ought to do. He asked Human Resources to arrange for payment for 5 days accrued holiday pay arising out of Miss Jessemey's employment with the previous employer, before the TUPE Transfer.

64. Overall, we would have to say that we found Miss Jessemey a credible witness and that Mr Tolmie was not.

Findings of Fact

65. The respondent is a privately owned security company. The nature of its business is neatly summarised at page 48 of the bundle; the respondent's TUPE Transfer pack, giving information to transferring employees about its business. It was established in America in 1919 and in 1930, moved its international headquarters to the United Kingdom. Its service portfolios were expanded to include retail security and customer service activities. It says that it is recognised as one of the most experienced retail specialists in the world, with offices throughout the UK, Europe and South Africa, and affiliates in the USA and the Far East.

66. Mrs Barnett tells us that in the UK, the respondent has 1200 employees. In the East of England, Mr Tolmie told us that he managed about 100 people as at the end of Miss Jessemey's employment.

67. Miss Jessemey had been employed by a company called Stealth as a store detective, contracted to provide the services of store detective to a national retailer called Superdrug, from 5 December 2011. She Lives in Colchester.

68. Miss Jessemey's contract of employment is at page 36:

    a) Clause 3.3 says she has no permanent place of work and could be required to work at a number of sites in accordance with the demands of the business.

    b) Clause 3.4 provides that she may be required to work at specific locations, but that wherever possible the employer will try to ensure that her work is within a reasonable travelling distance of her home.

    c) Clause 4.1 states that her rate of pay is £7 per hour.

    d) Clause 4.4 states that her hours of work are 24 hours per week.

    e) Clause 6.7 deals with part time employees and holiday pay.

    f) Clause 6.10 makes it clear that holiday pay may not be carried over.

    g) Clause 13 deals with probationary periods. We note there is no reference at clause 13 to any increase in pay at the end of the probationary period, or there being a reduced rate of pay during the

probationary period.

69. The hours of work were amended to 16 hours per week by letter dated 23 April 2012, at page 43.

70. During the course of her employment with Stealth, it was agreed that if Miss Jessemey was working in stores located in Ipswich or Clacton, (she also worked in Colchester) she would be compensated for the extra travelling by being permitted to include 1 hour of travel on her timesheet, for which she would be paid. Thus, she would work a 7 hour shift instead of an 8 hour shift but be paid for 8 hours of work.

71. This is evidenced by Miss Jessemey's timesheets, one of which is at PJ25. We understand she has many others which she proffered to the respondent's to see, an offer on which they did not take her up. What Miss Jessemey says was on her timesheets was not disputed or challenged.

72. The respondent company won the contract for Superdrug from Stealth. Staff were told of this in a letter of 6 July 2012, (page 44). The transfer took place on 3 September 2012.

73. Before the transfer, Miss Jessemey had a consultation meeting with a Mr Simpson. Notes of this are page 83. Notable here is that a handwritten note is made of the store at which the person consulted works and their working hours. For Ms Jessemey, the note refers to working at Colchester, 1000-1800 hours, 8 hours of work. Work at Clacton interestingly is recorded as 1030-1730 hours, which is 7 hours of work. Then, apparently in different ink and perhaps even different handwriting, it reads:

"Ipswich pay half travel on occasions."

74. Miss Jessemey says that with regard to that last entry, she did not know where that came from and she says it is not correct. She points out that there is a difference in ink. She thinks it may have been added afterwards. We have already seen from the timesheets that the arrangement was that she was paid 1 hour for travel to either Clacton or Ipswich and that is not recorded here. She has signed the note, (page 84).

75. There is a copy of the TUPE welcome pack in the bundle starting at page 45. It includes the respondent's various policies. Miss Jessemey says that she does not think that she received this. Mrs Barnett in submissions, suggested that this was not credible. Suffice to say that Miss Jessemey was hesitant about saying she had not received it, saying that she did not think she had and that it would not make sense for her to have done so because later, she sought a copy of the grievance policy to help her raise her grievance. We were not taken to any signed receipt for it. It does not greatly matter, one way or the other.

76. Miss Jessemey's unchallenged evidence was that on 5 September 2012, she telephoned a team leader with the respondent called Mohamed Hajinur, to enquire what she was to do about her travel time. He told her that she could continue claiming for 1 hour for working in Ipswich and Clacton and to book in when she started travelling. Mr Tolmie

said in evidence that there was no such person with the respondent. However, the respondent has had Miss Jessemey's witness statement since August 2019 and if that was the case, we are sure they would have checked whether there was such a person, sought to interview him and would have provided evidence that there was no such person in their employ, if that was the case.

77. On 9 November 2012, Miss Jessemey had a meeting with Mr Tolmie. The document relating to this is at PJ21 and at page 106. Mr Tolmie told Miss Jessemey that he would not pay her travel time, he accused her of fraud and threatened her with the Police. In response to her protests that this what she had previously been permitted to do so, he told her that she was working under a new contract. When Miss Jessemey indicated that she would raise the matter with Human Resources, he said that they would involve the Police and she would lose her job. Thereafter, Miss Jessemey did not claim for her one hour travel time and worked a full 8 hour shift at Clacton and Ipswich.

78. Miss Jessemey says that she also asked at this meeting, if she could have a pay rise, saying she had been on probation at Stealth at £7 per hour which should have gone up to £8, but that Stealth would not do that because of the pending transfer of the business. Mr Tolmie told her that she could not have a pay rise and be paid £8 per hour, as were her colleagues, because she worked part time.

79. On 10 January 2013, Miss Jessemey was assaulted at work. Mr Tolmie made a public comment along the lines of "Another female officer was assaulted recently". Miss Jessemey says and we accept, that Mr Tolmie was disdainful when saying this, as if her gender was therefore significant. Mr Tolmie asked Miss Jessemey if a male guard would be better suited to the store in question.

80. On 18 January 2013, having spoken to her Trade Union, Miss Jessemey spoke again to Mr Tolmie about her hours travelling. He repeated to her that this was a new contract. She again asked for £8 per hour and was told that she could not have a pay rise because she was part-time.

81. In January 2013, Miss Jessemey reported to Mr Tolmie that an assistant store manager at one of her stores had complained to her that a male colleague had made improper advances to young female staff, had pestered them on Facebook and was leaving early, but claiming for the full shift. Miss Jessemey says that Mr Tolmie did nothing about this. Mr Tolmie says he investigated and the client's staff did not substantiate the allegations. He says he would not have told Miss Jessemey about any action he was taking, which in our view would have been the correct approach. It is the sort of issue that perhaps one might have expected to see documents about, but for the passage of time. Miss Jessemey says that Mr Tolmie told her these matters were not of her concern, that it was up to the client to raise these things with him and that he would not be taking any action. Miss Jessemey says she passed that on to the client and that the assistant manager concerned confirmed that she had spoken to Mr Tolmie but he would not listen to her and that he talked over her.

82. On 14 February 2013, Miss Jessemey spent a day training a recruit.

83. On 20 February 2013, Miss Jessemey made enquiries about what leave she had remaining. Mr Tolmie told her she had a few days left but that she had to take the money instead, because she was part-time. He said that she should arrange her days of work so that she had time off in between.

84. In March 2013, the store manager at Colchester, someone called Kat, told Miss Jessemey that she found Mr Tolmie did not listen to her and talked over her.

85. On 30 April 2013, Mr Tolmie emailed Human Resources regarding holiday, that is the document at page 158 we referred to above.

86. Later, Miss Jessemey sought leave for 21 September 2013, the day of her brother's wedding. Mr Tolmie told her that she could not have that day off because she was part time, but that she should re-arrange her shifts so that she was free that day. He told her that she would be paid for her years' holiday in her March 2014 wages. We have not been taken to any holiday pay records of the respondent. If what Miss Jessemey says is true, such records would show that she had taken no holiday at all during 2013-2014. We have noticed at page 76 the respondents leave record, which does indeed suggest that no leave had been taken. Miss Jessemey's case is corroborated by the fact that the documents in the bundle show that she booked leave whilst she was working with Stealth, (pages 95 and 97) and yet did not book holiday during the 20 months or so she was working with the respondent.

87. On 27 September 2013, Miss Jessemey was absent from work with a stress related stomach upset. She was similarly absent from work on 8 November, 15 November and 18 December 2013.

88. On 27 December 2013, Miss Jessemey was threatened with a screwdriver whilst arresting someone. She raised with Mr Tolmie that she had only attempted to arrest that person who she had anticipated was likely to be violent, (rather than seek to deter that person in the first place) because he was placing pressure on her to make arrests. Mr Tolmie blamed the client, who he said was pressing for more arrests. He asked her whether a male guard would be better suited to the store.

89. On 28 December 2013, Miss Jessemey called in to say that she was not well after the incident the previous day, (having not slept) and that she would not be in. She received a text from Mr Tolmie that she could not carry her hours over to the next week and in subsequent discussion, suggested that a male guard would be more suitable for the premises at which she worked.

90. For the month of January 2014, Miss Jessemey was allocated the equivalent of 12 hours a week.

91. On 3 February 2014 the company trainer, Mr Lochrie, met with Miss Jessemey to discuss her concerns. He had heard that she had

issues from a work colleague. She explained to him that she felt that Mr Tolmie had a problem with women, that he called her "honey", that he always made reference to gender when there was an incident, that he would talk over her, he would not give her a pay rise and had not allowed her to take any holiday during the year. Miss Jessemey was assured that these matters would be investigated by a Mr Cockerill.

92. On 8 February 2014, Mr Lochrie sent a text to Miss Jessemey asking if Mr Tolmie had been better with her? She replied that she had not heard from him.

93. On 15 February 2014, Mr Lochrie visited Miss Jessemey and assured her that everything with regard to her concerns was in hand.

94. On 13 March 2014, Mr Tolmie attended Miss Jessemey's place of work to carry out a performance review. He discussed with her, her ambitions. He made a comment to her that it was a good job she had not said she wanted to be a manager, as she did not have the relevant skill set. Miss Jessemey said that she was interested in becoming a trainer. Mr Tolmie replied with a negative demeanour, that was ambitious. He told her that she would be no good at training. He told her that she was not worth the expense, in the context of a discussion about further training on CCTV and first aid. Miss Jessemey had previously refused to cover a store at Braintree and Mr Tolmie suggested that this showed a lack of commitment on her part. He cut her off when she tried to explain the financial implications of working in Braintree. Miss Jessemey tried to discuss holiday, Mr Tolmie spoke over her, saying that people had not been putting in requests in time and told her that the best way to take holiday, was in effect, to bookend a 2-week period with her shifts at the beginning and the end. Miss Jessemey says that Mr Tolmie accused her of having been late that day, which she had not, that was a lie. She says that in response, Mr Tolmie laughed at her, she tried to explain that she sometimes had an upset tummy through stress and that again, Mr Tolmie laughed at her. At page 128/9 is the respondent's written record of the discussion, which includes:

> "Peta has had a productive year with good reports from stores. Her area is difficult due to the lack of hours and store locations but managers happy with her. Has potential to develop as a trainer when her personal circumstances allow."

95. It is fair to say that is not consistent with Miss Jessemey's version of events and she has signed the document but on balance, we accept that her account is broadly accurate.

96. Frustrated at the lack of apparent progress following her complaint to Mr Lochrie and that her April pay had not included her anticipated accrued but untaken holiday pay, Miss Jessemey raised a formal grievance on 14 May 2014, which is copied at page 134. Miss Jessemey, amongst other things, raised the following matters:

    a) That she had not been allowed to take annual leave for over 19 months;

b) That Mr Tolmie regularly called her “Honey”;

c) That he made a distinction between male and female security officers, with negative connotations as if female officers are somehow inferior and less capable;

d) He makes references to other female officers being assaulted;

e) That he hectored her into making arrests when it would be safer to put people off, in other words deter;

f) That she had previously been paid 1 hours travel and that Mr Tolmie had put an end to that;

g) That when she had raised that under TUPE her terms and conditions should not have been changed, he had replied “It’s a new contract”;

h) That she had been threatened with the Police if she wished to take to HR her complaint about the lack of travel time payment;

i) That she had been told that she wasn’t worth much to him and so would not be getting an increase in pay;

j) He told her that she would only be paid for 1 hour’s extra work for every arrest made late in a shift, regardless of how long it took her to follow through the post arrest process;

k) That she had approached him about the behaviour of a colleague as reported to her by a store manager, in response he had seemed angry and disinterested;

l) Also, that the same store manager had reported back to her that Mr Tolmie would not listen to her;

m) She set out her complaint about not being able to take leave for her brother’s wedding, being told that she could not take holiday because she was a part time worker and that she would get paid for her holiday in the March 2014 wages, but was not;

n) She complained that in January 2014 she had only been given 6 shifts, at a total of 48 hours, equating to 12 hours a week;

o) She referred to the performance review: that Mr Tolmie had said to her, “It was a good job she didn’t want to be a manager because she did not have the relevant skills”, that he had told her she would not be any good at training and that he would not bother wasting his money with her on CCTV or First Aid training;

p) Finally, she complained Mr Tolmie had repeatedly told her that she was not allowed to take holiday, because she was part-time.

97. On 15 May 2014, Miss Jessemey attended work to find that her shift had

been changed without her having been informed. She remained in store and worked. She informed Mr Tolmie. He accused her of not checking shifts. He told her to book in the next day as if she was working, when in fact she was not due to work, as it was too much work for him to change the shift. The respondent's control confirmed to Miss Jessemey that Mr Tolmie should have informed her by text of the shift change, which he had not done, and that she should not do as he suggested, They said to her there would have been no difficulty in Mr Tolmie simply changing the rota to show her has having worked on the day she in fact worked.

98. On 6 June 2014, Miss Jessemey was assaulted again at work. This resulted in her finishing work very late, attending the police station the following morning and therefore being late to start her shift. Mr Tolmie was angry with her for being late. Miss Jessemey was not paid in full for her late hours and her time at the police station. She worked 3 hours overtime and was only paid for 1 hour, (she would not know that until the end of June, so that in itself could not have been a reason for her subsequent resignation).

99. On 10 June 2014, a store manager at Ipswich told Miss Jessemey that Mr Tolmie had tried to persuade him that his store would be better off with a uniformed male guard rather than Miss Jessemey. At about the same time, Miss Danni Smith, Assistant Manager of the Colchester store, told Miss Jessemey that Mr Tolmie had tried to persuade her that she would be better off with someone other than Miss Jessemey. These incidents confirmed to Miss Jessemey her fears that putting in her grievance would result in adverse treatment by Mr Tolmie. She therefore resigned by letter dated 12 June 2014, which is copied at page 150.

100. In this letter, she writes that the reasons for her resignation are set out in her grievance. She goes onto say that she had been informed by clients that Mr Tolmie had been visiting stores without listing his attendance by signing in and out, so that his attendance could not be traced. He had endeavoured during these visists to convince the staff in those stores that they would be better off without her. She explained in her final paragraph that she had been offered the opportunity to work elsewhere for more money and more hours and she had decided to take that opportunity. She explained that she would be using up her accrued holiday, so that she did not have to remain working with Mr Tolmie any longer.

101. We accept Miss Jessemey's evidence that she took the decision to resign because of the matters that we have highlighted. We accept that she went to one job interview, she was offered the job and took it. We accept that she loved her job with the respondent as a store detective at Superdrug and that she would not have resigned otherwise.

102. We note that on 19 June 2014, (page 152) the respondent wrote to double check that Miss Jessemey had not resigned in haste. It raised the matter of the pending grievance and invited her to a hearing in that respect on 30 June, but said that if it did not hear from her by a particular date, it would assume that she no longer wished to continue with the grievance.

103. Miss Jessemey replied on 27 June (page 153) stating that the respondent

had informed her that it regarded her resignation as a withdrawal of her grievance, (that is a mis-reading of the respondent's letter) and she wrote that she would not be attending the grievance hearing.

104. The respondent replied (page 154) on 1 July to point out that she had mis-read or mis-understood their earlier letter and that they would only regard the grievance as not pursued if she did not attend the grievance hearing.

Conclusions

105. The first question is, have the allegations been made out? We consider each of them in turn.

a) Mr Tolmie was in the habit of addressing women and Miss Jessemey in particular as "Honey".

b) Mr Tolmie did talk over Miss Jessemey when she was trying to talk to him about matters of concern, such as her rate of pay, her holiday, payment for her travel, where she was to work and whether in certain circumstances, it was better to arrest or deter.

c) Mr Tolmie did react to Miss Jessemey being assaulted at work with questions about whether she should be replaced with a male security guard.

d) We accept that it would not be accurate to say that Mr Tolmie did not take action with regard to the male colleague about whom Miss Jessemey had reported concerns expressed by a store manager. He spoke to the store manager concerned. Miss Jessemey herself acknowledges that. It is not surprising that documentation is not available, given that the incident was 6 years ago, 5 years before the case was revived. It is a fair point the respondent makes that it would not have reported to Miss Jessemey, any action it might or might not have taken.

e) Mr Tolmie did tell Miss Jessemey that she could not be paid £8 per hour because she was part time.

f) Mr Tolmie did refuse Miss Jessemey's request for leave in order to attend her brother's wedding and he did tell her to swap her shifts so that she would not be scheduled to work on the date of the wedding.

g) Miss Jessemey's hours were reduced to 12 hours a week in January 2014.

h) Mr Tolmie did remark on 13 March 2014 that Miss Jessemey lacked the relevant skills required for a managerial position. He also told her that she was not any good at training. He was dismissive of her, telling her that she was not worth the expense involved in training her for CCTV Operation or First Aid.

i) The respondent did not progress the complaint Miss Jessemey

made to Mr Lochrie in February 2014. When one reads her claim form carefully, this was really the focus of her complaint, rather than any failure to progress her later written grievance.

j) Miss Jessemey was not paid for the additional hours that she worked after carrying out an arrest on 6 June 2014.

k) In June 2014 Mr Tolmie went to the store managers that Miss Jessemey served and attempted to persuade them that they ought to do without her and have a male security guard instead. Although in her claim form she said that this was in, "late June 2014" from her evidence it is clear that this happened before she resigned: there would have been no need for Mr Tolmie to persuade store managers to do without Miss Jessemey if she had already resigned.

106. Having regard to Miss Jessemey's pleaded claim overall, Mr Tolmie's behaviour towards her could accurately be described as bullying and belittling.

The claim of constructive dismissal

107. These allegations together amount to a breach of the implied term requiring an employer not to act in a way that would undermine mutual trust and confidence. The respondent did not have reasonable and proper cause for its actions.

108. Reducing Miss Jessemey's hours to 12 per week in January 2014 was itself a free-standing breach of contract and not one that she had accepted, for it was part of her complaint to Mr Lochrie.

109. We accept that Miss Jessemey resigned because of these matters. The last straw was Mr Tolmie trying to persuade store managers to do without her, endorsing her concerns that by raising her grievance, "raising her head above the parapet" as she put it, life would be made unpleasant for her at the respondent. That was itself a breach of the mutual trust and confidence implied term. She was entitled to find alternative work to go to before resigning, she did so very quickly. She did not affirm the contract and she resigned because of the breach. Therefore, Miss Jessemey's claim of unfair dismissal succeeds.

Less favourable treatment because of part-time status

110. The difficulty here is that Miss Jessemey has to name a person, a co-worker doing the same job that she was doing, also TUPE transferred across at £7 per hour, but working full time, who was subsequently paid £8 per hour. Unfortunately, she has not done so. For that reason, Miss Jessemey's claim in that respect cannot succeed.

Harassment

111. We must decide whether the allegations amount to harassment before we consider the question of direct sex discrimination: any act of harassment is

not a detriment and not therefore, direct discrimination.

112. To amount to harassment, the allegations must be related to Miss Jessemey's gender and must create the proscribed atmosphere. Are there facts from which we could conclude, absent an explanation from the respondent, that Miss Jessemey has been subjected to harassment related to sex, i.e. gender? We analyse the allegations in turn:

a) Addressing women as "honey" is patronising, demeaning and degrading. Mr Tolmie did not address men as "honey". It is clearly related to gender.

b) All the instances of talking over others in the evidence, albeit much of that hearsay, are in relation to conversations with women. Mr Tolmie's tendency was to talk over women and have less regard to what they had to say. It is a tendency that is therefore related to gender.

c) Repeatedly questioning whether a male security guard is to be preferred is related to gender. It was clear from Mr Tolmie's evidence, cutting through some of his very long and rambling answers, that his attitude was that female security officers, be they store detectives or security guards, were more vulnerable than their male colleagues would be.

d) The complaint about lack of action with regard to the male colleague was not made out.

e) Refusing to pay Miss Jessemey £8 per hour was not related to her gender, it was because she had been TUPE transferred to the respondent on that contractual rate and commercially, the respondent did not want to give a pay rise if it could avoid it.

f) Similarly, refusing Miss Jessemey's holiday was not related to her gender, it was related to her part-time status and the evidence was that there was a 50/50 male/female split of part-time staff. By persuading part-time staff to organise their shifts so that they had the breaks they wanted without the need to take holiday and to take an illegal payment in lieu at the end of the holiday year, made life easier for the manager in his not having to arrange cover.

g) Reducing the claimant's hours to 12 hours a week for January was not related to her gender; there was nothing that we could see that suggested it was.

h) With regard to Mr Tolmie's dismissive attitude towards Miss Jessemey at the performance review on 13 March 2014, the context was that Mr Tolmie, a man addressed female subordinates as "honey", who talked over women, who thought that female security personnel may be more vulnerable and/or less effective and should be replaced with men, is the sort of person who would be dismissive of a woman report when he is in a managerial situation.

i) Not progressing Miss Jessemey's complaint to Mr Lochrie is related to gender, in that part of the complaint clearly related to potential sexual harassment and it appears, not to have been taken seriously.

j) Not paying Miss Jessemey for her extra hours after an arrest were not related to her gender, but to a desire to save expense and increase profitability.

k) As with c), attempting to persuade store managers in June 2014 they would be better off with a male security guard instead of Miss Jessemey, was related to her gender.

113. So, the allegations upheld that are related to sex and have the potential to create the proscribed atmosphere are:

a) Mr Tolmie addressing Miss Jessemey as "honey";

b) Talking over her;

c) and k) Suggesting she should be replaced with a male;

h) Being dismissive towards her, and

i) The respondent not progressing her complaint about these matters in February 2014.

114. This was all unwanted conduct. In our judgment, these are facts from which we could conclude that the proscribed atmosphere has been created, (having regard to Miss Jessemey's perception and the circumstances of the case) and that it was reasonably regarded as such by Miss Jessemey. The burden of proof then shifts to the respondent.

115. Can the respondent provide a non-discriminatory explanation?

116. Mr Tolmie's explanation for using the term "honey" is that he is from Northern Ireland and ex-military police. Neither of those are an excuse, or an acceptable one. He tells us that he has undergone diversity training with the respondent and elsewhere, if that is so, either the training was very poor or his inappropriate mode of address is all the more inexcusable.

117. Mr Tolmie's explanation for querying whether or not a male security guard would be better, was as we have said, rambling and evasive. It left us with the impression, as we have explained, that he had a negative attitude toward women working in security, that they were more vulnerable to assault and less effective as a deterrent.

118. There is no explanation for Mr Tolmie talking over women or being dismissive on 13 March 2014, just a denial.

119. There is no explanation for the lack of progress on the oral grievance to Mr Lochrie in February 2014. Mr Tolmie simply referred to being aware of the May 2014 grievance.

120. There is therefore, no satisfactory explanation for the upheld allegations. The respondent has not satisfied us that there was no harassment related to sex and Miss Jessemey's claim in this regard therefore succeeds.

Direct sex discrimination

121. Those allegations which have been found to be harassment may not also be direct discrimination. So, we consider each of the remaining non-harassment allegations in turn and ask ourselves whether there are facts from which we could conclude that Miss Jessemey had been treated less favourably than a hypothetical male comparator. That comparator would be a male store detective who had transferred under TUPE, working 16 hours per week, paid £7 per hour, with the same arrest record as Miss Jessemey and having been assaulted in the same way and in the same circumstances as Miss Jessemey had been.

122. One overarching factor we keep in mind is Mr Tolmie's attitude to women as explained above:

d) Mr Tolmie would have acted the same way on receiving information from a report that a store manager had complained about a colleague of that report. He would have taken the matter up with the store manager concerned and would not have reported back to the comparator whatever action he had taken with regard to the comparator's colleague.

e) If the comparator had asked for a pay rise to £8 per hour, Mr Tolmie would have refused, or rather, would not have taken the request forward to Human Resources and more senior management, for the same reason, for commercial reasons. The respondent would want to keep wages down to the minimum.

f) The comparator would also have been refused leave. Mr Tolmie would have been just as keen to persuade a male part-time employee to arrange his shifts so that he did not take leave or did not have to take leave and could claim his accrued holiday pay illegally at the end of the year.

g) We were not provided with any explanation as to why Miss Jessemey's shifts were reduced to 12 hours a week. In submissions Mrs Barnett referred to Mr Tolmie's paragraph 16 and Miss Jessemey's unwillingness to travel, but there was no explanation as to why throughout her employment she was able to work 16 hours a week but that was reduced to 12 hours in January 2014, contrary to her contract of employment.

j) Not paying for extra hours following arrest was for commercial reasons: to save money. A male store detective would have been

treated the same way. There was no evidence to suggest otherwise.

123. Having regard to Mr Tolmie's attitude to women we could conclude that he reduced Miss Jessemey's hours because she was a woman and in the absence of an explanation, conclude that he did so. The claim of direct discrimination in this respect only, succeeds.

124. We should record that in closing submissions, Mrs Barnett sought to rely upon the statutory defence, that the respondent had taken all reasonable steps to ensure that discrimination did not take place and so it should not be held responsible for the actions of Mr Tolmie. We did not allow her to do so, because the statutory defence had not been pleaded. This was significant in this case because had it been pleaded, Miss Jessemey would have had the option of joining in Mr Tolmie as a respondent. It would also have meant that the steps taken by the respondent to prevent discrimination would have been identified as an issue, giving rise to a call for evidence in that regard and questions to be asked of Mr Tolmie.

Unpaid wages

125. We find that Miss Jessemey's contract was varied by agreement whilst she worked with Stealth, so that whilst working at Ipswich and Clacton she would be paid 8 hours work on the basis of 1 hour travel and 7 hours in store. She is entitled to an extra hours' pay for each day that she worked in those locations. This was evidenced by her timesheets. There was a series of deductions and the claim was therefore in time so long as it had not been more than 3 months between the last deduction and the issue of this claim on 26 September 2014. The last deduction claimed is for work on 7 June 2014, deducted from the payslip issued on 30 June 2014. The claim is therefore in time in this regard.

126. Clearly, whilst Miss Jessemey was dealing with the police as a consequence of an arrest, she was working and contractually entitled to payment. In respect of each occasion when she was paid for only 1 extra hour when she had worked for longer, she is entitled to payment for the shortfall, so long as there were no more than 3 months between the last such deduction and the issue of this claim on 26 September 2014. The last claim is made for extra time worked on 7 June 2014, deducted from the 30 June payslip and so again, the claim is in time.

127. In breach of contract the respondent prevented Miss Jessemey from taking the holiday she was entitled to. She should now receive payment for that untaken holiday, insofar as it has not already been paid.

Extensions of time

128. Although the original claim was issued on 26 September 2014, it was subsequently struck out by reason of the unlawful tribunal fees regime. Miss Jessemey applied to reinstate her claim promptly. In those circumstances, in relation to the wages and unfair dismissal claims, it was not reasonably practicable to issue this 2018 claim in time and it was issued within a reasonable period of time after the expiry of the time limit.

It is just and equitable to extend time in relation to the discrimination claim.

Remedy

129. Having given our decision as to liability we proceeded to hold a short hearing as to remedy.

Law

130. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case).

131. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to any action taken by the employer.*"

132. In respect of discrimination, where a claim has succeeded under the Equality Act 2010, section 124 provides that the Tribunal may order the Respondent to pay to the complainant compensation of an amount corresponding to the damages the Respondent might have been ordered to pay by a county court. Such compensation can include damages for injury to feelings, (s119 (4)). Those damages would be payable by reason of a statutory tort on the part of the Respondent, the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that she would have been in but for the discrimination, (see Ministry of Defence v Channock [1994] IRLR 509 EAT).

133. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

a) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

b) Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

c) Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

d) In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

e) Tribunals should bear in mind the need for public respect for the level of awards made.

134. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

a) The top band should normally be from £15,000 to £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

b) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

c) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

135. Those bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19.

136. Where a Claimant has succeeded on grounds of discrimination and unfair dismissal, the elements of compensation inevitably overlap, although unfair dismissal compensation is subject to a statutory cap on the level of award. In such cases, the Tribunal should award compensation under the discrimination legislation, (see D'Souza v London Borough of Lambeth [1997] IRLR 677).

Findings

137. Miss Jessemey had produced a 3 page schedule of loss. We went through the schedule of loss with her. In large part, the figures that she mentions are not disputed and our award on that basis is therefore as follows:

a) For unfair dismissal the basic award is 2 x £138 which is £276.

b) Because Miss Jessemey went straight to another well paid job, her loss of earnings claim is limited to 1.5 weeks' pay at £168.

c) She incurred travelling expenses to attend an interview for that job in the sum of £28.80.

d) We award for loss of statutory rights £450.

e) For injury to feelings in relation to the discrimination claim, Miss Jessemey claims a mid-Vento band figure of £8,000. The Vento bands that apply are of course those from 2014, not the current bands, which are much higher. £8,000 is not opposed by the respondent and seems to the Tribunal an appropriate figure, so we award £8,000 in that respect.

f) We find that the periods of absence due to stress were caused by the discrimination, by the harassment by Mr Tolmie. We therefore we award her the claimed loss of earnings amount of £336.

g) We talked through with Miss Jessemey the claim for an uplift of her compensation for failure to follow the ACAS Code of Practice and for failure to provide a statement of written terms and conditions of employment. She decided not to pursue both those aspects of her schedule of loss.

h) Then we have a free-standing claim of unpaid overtime, which we award in the sum of £206.50; that is for those occasions when Miss Jessemey had to work later because she had made an arrest and had been paid only 1 hour rather than the full amount of additional time extra.

i) Her holiday pay is awarded as claimed in the sum of £964.92.

j) Travel pay: this is an unlawful deduction of wages claim for not paying her the 1 hour travel which had been pursuant to her contract for which she has succeed an in respect of which we award the sum claimed, £476.

138. The total of all those figures is **£10,906.22** and that is the amount of compensation we shall order the respondent to pay the claimant.

Costs

139. That leaves the question of costs that has been left outstanding from February 2019; reserved costs in respect of the abandoned hearing on that occasion. After that hearing, Employment Judge Laidler set out her criticisms and concerns. We have talked through with Mrs Barnett what happened. We note that the order which I had made a few weeks earlier was in fact that a physical copy of the bundle should be delivered to the claimant by 18 January, Employment Judge Laidler recorded in her hearing summary that it had been delivered on 1 February. An email from Miss Jessemey of 13 February confirmed that she had received the bundle on 1 February.

140. With regard to the hearing itself, it was never the case that Mrs Barnett was to appear to represent the respondent, something I do not think

Employment Laidler appreciated. It was always the case that the respondent was going to represent itself through its Human Resources Director.

141. Mrs Barnett told us, (and this is entirely plausible) that she had sent the witness statements and the bundle to the Tribunal in advance of the hearing and they had been lost by the Tribunal service.

142. Then we heard that Miss Jessemey had only served her witness statement at midnight, the day before the hearing; it should have been served on 4 February.

143. We also noted from the Tribunal file that there are a few emails of protest from Mrs Barnett leading up to the hearing, about the absence of a witness statement from Miss Jessemey.

144. Mrs Barnett suggested that perhaps the Human Resources Director who had attended the hearing did not communicate very well with the Tribunal; that certainly seems to be the case.

145. It seems to us that this is a situation where there was something of a muddle, not helped by a late witness statement from the claimant and not helped by the Tribunal characteristically losing correspondence. In those circumstances, we do not feel that we can make a finding that the conduct of the respondent was unreasonable and we do not think it appropriate therefore to make a time preparation order.

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Employment Judge M Warren
7/9/20
Date: ……

Judgment sent to the parties on
10/09/2020
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For the Tribunal office