EMPLOYMENT TRIBUNALS

Claimant: **Mrs O Ania**

Respondent: **Advanced Training Academy (UK) Ltd (1)**
Mr S Islam (2)

Heard at: Watford Employment Tribunal — On: 20, 21, 22 October 2020 and 23 October 2020 in chambers

Before: Employment Judge Tuck QC
Mr P English
Ms A Moriarty

Appearances
For the claimant: Mr Nwaike, solicitor
For the respondents: Mr McCracken, counsel

JUDGMENT

The unanimous judgment of this tribunal is that:

1. **The principal reason for the claimant's dismissal was not a protected disclosure.**

2. **The claimant was not subjected to detriments because she made protected disclosures.**

3. **The claimant was not discriminated against because of her race.**

4. **The claimant was subjected to one act of harassment related to her race on 27 September 2018; this claim was not presented within three months of it occurring, but was presented with such other period as we find to be just and equitable.**

5. **The claimant is owed outstanding holiday pay.**

REASONS

1. Following early conciliation between 1 November 2018 and 21 November 2018 the Claimant presented an ET1 on 4 December 2018. She was employed by the first respondent for about 11 months from September 2017 until 18 October 2018 as an administration assistant. Her initial claim was solely for detriments and automatically unfair dismissal for whistleblowing, but by amendment, her claim is now also for race discrimination and harassment.

2. **Evidence.**

2.1 We were provided with two bundles of documents numbering 496 pages, and additionally accepted a further bundle from the Claimant continuing pagination to page 538. We read such documents as we were referred to either in the statements or in oral evidence.

2.2 We heard evidence from the Claimant, and on her behalf from Mrs Rumi Begum, a previous colleague and now a trainee solicitor.

2.3 For the Respondent we heard from Ms Tochi Onweugbu – also known as Jane Knight, who is married to the second respondent, Mr Sofiqul Islam, and from Mr Sofiqul Islam himself.

2.4 We were unable to find that any of the accounts given to us by the four witnesses were entirely accurate, and we have rejected significant parts of the accounts of all four.

3. **Facts.**

3.1 The First Respondent is a training provider, supplying courses such as door supervision and CCTV surveillance, for organisations such as the Security Industry Authority and NOCN – a national training body. It was set up initially (in around 2009 it seems) as the Advanced Training College of North West London Ltd by Mr Sofiqul Islam the second Respondent. The name of the company was changed to Advance Training Academy (UK) Ltd in January 2010, and at around that time Ms Tochi Onweugbu became a director. She ceased being a director in June 2011. Mr Islam seems to have ceased and recommenced his directorship at various times, and also has had other companies of which he has been a shareholder and director, including BS Security Services Limited, which was dissolved in February 2016, and more recently Simply Training and Education Ltd. Mr Lanford Holmes was a director and/or shareholder in various of the companies alongside Mr Islam. Mr Islam in evidence said that Mr Holmes had been his manager when both worked for a local authority and that they had decided to go into business together, initially providing security for events, and later providing training within that industry.

3.2 In his witness statement Mr Islam appeared to suggest that he could have no liability in this matter as Mr Holmes was the shareholder and director when the Claimant was employed. He also contended that he was not an “appropriate person” to whom any protected disclosure could be made. Both these assertions were without any foundation whatsoever. Throughout the material time Mr Islam worked as the most senior person in the First Respondent and

as Mr McCracken confirmed both orally and in his skeleton argument, Mr Islam was, at all material times, acting as the servant or agent of the First Respondent, such that the first Respondent is vicariously liable for Mr Islam's conduct towards the Claimant, and he would have been an appropriate person to whom any protected disclosure should be made.

3.3 The claimant is Nigerian and she describes her race as being of the Yoruba tribe. She saw an advert to work at Advanced Training Academy (UK) Ltd on gumtree; the contract type was said to be "permanent" and hours said to be "part time", though in the body for the advert it said full time was 9am to 6pm and part time 20 hours per week, with the full time salary being £16,000 p.a.

3.4 The claimant applied and was interviewed on 17 November by Mr Sofiqul Islam. Ms Onwuegbu was heavily pregnant at this time and gave evidence that the advert -which she had drafted - was designed to try and recruit two employees, one full time and one part time. She said the posts were both to cover maternity leave – of her and the wife of the principal trainer used by the first Respondent who also worked in the office. Mr Islam said that during the interview he told the Claimant that the post she was interviewing for was maternity cover. Ms Onwuegbu had her baby in December 2017 and in fact took approximately six weeks off work and returned by February 2018. When Ms Onwuegbo returned to work neither the claimant's nor Mrs Begum's role or hours changed.

3.5 The Claimant and Mrs Begum – who replied to the same advert, was interviewed at around the same time and started on the same day as the claimant – both denied that there was ever any mention of any role being maternity cover. We accept their evidence that there was no mention of the posts being for maternity cover. The start and end dates did not coincide with the maternity leave taken by either Ms Onwuegbu or the other employee, and we do not accept, as alleged, that there was nowhere in the advert to make clear that the posts being advertised were maternity cover or fixed term, as asserted. Furthermore, when the Claimant was dismissed in October 2018 Ms Onwuegbu confirmed she was replaced, again at odds to an assertion that she was engaged only as maternity cover.

3.6 Mr Islam stated that during interview he told the Claimant that her administrative work would involve booking students onto courses through a number of websites, including BS Security, West Academy and National Training Skills. This we accept as upon starting the Claimant was given relevant website passwords; however we do not accept (as recorded in the interview notes) that he expressly told the Claimant that these were "trading names"; we consider it highly unlikely that there was any discussion about the legal identity of any entities involved.

3.7 There is no dispute that the Claimant and Mrs Begum having completed their interview were 'invited' to attend the First Respondent's offices for a week to "be trained" and assess whether they wanted to accept the role. Neither were paid for that week's work.

3.8 There was a dispute as to whether the Claimant and Mrs Begum were provided by Mr Islam with notebooks to use at work, to record details of students –

including their credit card details – when booking courses. We do not consider it necessary to resolve this dispute to determine the issues which are before us, but do make the following findings:

3.8.1 We accept the evidence of the claimant and Mrs Begum that credit card details were recorded manually and retained by the Respondent beyond the period of initial deposit payments being made – either in notebooks or on paper 'booking forms' which were used.

3.8.2 We reject entirely the suggestion of the Respondent - made most overtly in the fraud report submitted on 23 January 2019 – that the claimant was wrongfully retaining credit card details to pass on to "national and international criminal gangs" – or indeed to misuse herself. There was absolutely no evidence before us to suggest such misconduct on the part of the claimant and we accept her evidence that the card details she recorded in her 'purple notebook' were purely to process course fees for the first respondent. Furthermore we entirely reject any suggestion that her dismissal in October 2018 was in any way because of the manner in which she recorded credit card details of students.

3.9 Mr Islam accepted that the first Respondent never provided written contracts of employment to the claimant – nor indeed to any other member of staff. Mr Islam told us that he considered a verbal contract was sufficient having conducted a google search; despite having been issued with contracts himself when he was a local authority employee. Furthermore, whilst Mr Islam criticised the manner in which the claimant requested holiday leave, he agreed that he did not have in place any written policies or procedures governing annual leave – or indeed any aspect of the employment relationship. Payslips were however provided and payment tax / national insurance contributions were paid.

3.10 The claimant and Mrs Begum were responsible for booking students onto courses; students could book by telephoning the office, or through a number of websites including Advanced Training Academy, BS Security, West Academy and National Training Skills. Each had, as the claimant says in her statement, different telephone lines and email addresses. Students would however attend the same courses – with attendance lists specifying which "vendor" they had booked through. The price for any particular course on occasions varied depending on the vendor. Generally students would pay a deposit over the phone, and pay the balance when the attended the first day of the course, and there would generally be approximately 12-15 students on a course. The Claimant and Mrs Begum said that they were instructed to ask students to bring cash to pay their balances; Mr Islam said that students could choose to pay via cash or card, and that it varied – he produced a number of course attendance sheets with manuscript markings of 'cash' or 'card' The Claimant would also be sent to course locations across London to collect cash from students and ensure their enrolment details were completed, and to pay for venue hire in cash. We prefer the evidence of the Claimant and Mrs Begum that a high proportion of transactions were in cash. The Claimant showed us receipts for venue hire having been paid in cash, and she was not provided with funds to pay for venues in advance; the respondent was confident that it would collect enough cash 'on the day' from students to satisfy its bills.

3.11 The Respondent placed emphasis on a letter from its accountant dated August 2020 which said that for the year ending 31/12/18 total sales, including VAT were £126,671 of which £117,764 was received in cheques and bank transfers and just £8907 was received in cash. These figures suggest that after VAT, sales were £105,559. From this figure expenses would need to be met which included fees of course tutors, venue hire (variously between £80 and £160 per day when external venues were used), the wages of 4 staff members (if all four were paid the same £16kp.a. as the claimant and Mrs Begum this is £64,000) and office expenses, before Mr Islam received any remuneration, or anything was paid to the director / shareholder. Given that the respondent did not suggest that it was running at a loss, and the evidence from all parties was of a busy office, with an average of two courses for door supervisors per week, generally at a rate of £160 per person, and a variety of additional and more expensive courses, these figures were surprising. There was no evidence however that the Claimant was aware of what figures were being submitted either to the first respondent's accountants, on VAT returns or to HMRC at any point during her employment.

3.12 The evidence from all witnesses was that working relationships were cordial initially. There are no complaints of interactions between the Claimant and either the Second Respondent or "Jane Knight" (who we accept neither the Claimant nor Ms Begum were initially aware was the married to Mr Islam) between November 2017 and August 2018. Whilst we had evidence that in July 2018 the Claimant and Mrs Begum sent 'template emails' from their work email addresses to their home email addresses, and there was a dispute as to whether they did this on instruction because of a new server being installed – or because they were misappropriating such templates to prepare to set up in competition – it seems that on the Respondent's case this was not something Mr Islam knew of at the time, it therefore did not lead to any dispute and could not have been in his mind when dismissing the Claimant.

3.13 We were provided with WhatsApp exchanges between the Claimant and Second Respondent in relation holiday for 22 to 24 August 2018. The claimant sent a message on 7 August 2018 saying "Hi, I will be away from 3 days holiday 22-24 August for family matters. Thank you." Whilst we heard some evidence about the wedding of another member of staff, Neil Alam, with an assertion that Ms Begum was allowed to attend his wedding but the claimant was not; however Mrs Begum's statement says this was 1 August so this leave request did not relate to that. The response from Mr Islam to the Claimant's text was "Not holiday, it will be absent" to which the Claimant replied "That is fine. But I don't know why it has to be absent. You said we are entitled to 1 month leave and we don't even have a sick leave, topping with the fact that I haven't even been paid to date 7 August. I believe in fairness and when someone works for you, they have to have a life to deal with family matters. If you say its absent then I take it from the 21st then, thanks." His reply to this was "All you worry what you will get not what you will contribute to the business". The exchange went on in an similarly bad tempered tone with the claimant asserting that she has "rights" and the second respondent saying "if you think we are not good

why you here then? And "if performance is not improve your right will not work here". In oral evidence Mr Islam said that the claimant could not have paid annual leave because she had breached the oral instruction to complete a holiday request for two weeks in advance. In the bundle we had a holiday request form dated 3 August 2018 purportedly completed by the Claimant. In her statement the claimant denied completing or signing this form, and there did seem to be some difference between the signature on that holiday form, and other of the claimant's signatures, eg on other forms and on her statement. In any event the text request was two weeks prior to the date for which leave was sought. Mr McCracken submitted that this was a robust exchange, but did not demonstrate a fractured relationship at this time. The tribunal disagree and our finding is that by August 2018 the relationship between the parties was deteriorating.

3.14 Mrs Begum told us in oral evidence that there was "no problem [between the claimant and second respondent] before 4 September", then in her statement says she was present "on many occasions when the Respondent made other racist comments towards the Claimant in the open office".

3.15 The claimant claims that the refusal of her holiday leave was because of her race. She compares her treatment to Mr Alam and Mrs Begum; he had a week off the week of his wedding. He is not a comparator in the same material situation as the claimant. Mrs Begum said she was permitted paid leave to go to Mr Alam's wedding on 1 August 2018 and she says the claimant was not. However we were not given details of how or when Mrs Begum made the request. Nor was it apparent to us that the Claimant requested leave to attend that wedding. We noted that it was not in dispute that during her period of employment the Claimant received £805.36 by way of holiday pay, so it is certainly not the case that all holiday requests were refused. Whilst we find that the responses of Mr Islam to the reasonable request for leave for 22-24 August 2018 was unreasonable and provocative, we are unable to see any connection to the Claimant's race.

3.16 In her statement the claimant says that the Respondent was "paying her as they wish" and that her payslips were not correct. This allegation was not any part of the claims before us save for a holiday pay claim for which we had no calculation for how she reached the view that she had been underpaid by £98.72 (having received £318.72 in July 2020), nor for how Mr Nweike in his written closing submissions reached a figure of £132.07. Mr Nweike in his closing submissions stated that he understood that an annual salary of £16,000 would attract holiday pay in addition to that sum. This was clearly misconceived and it is not clear whether the Claimant misunderstood what she was due to receive on the basis of his advice.

3.17 The claimant says that on 30 August 2018 she received a call from student alleging that "the Company is a fraud and that he has checked with Company House and found that National Training Skills and West Academy have been dissolved." She says the student asked her why the respondents were operating companies that are dissolved, booking courses, examining students and issuing certificates in the names and requested a refund of his course fees. Neither the Claimant nor Mrs Begum were permitted to give

refunds to students, and they had to refer any such requests to Mr Islam. We accept their accounts that they were not aware – at least initially during their employment – that "Jane Knight" was permitted to give refunds either. She says that she told Mr Islam about this call and its content on the day, and that he said "Ok" and that he would deal with it. She says that on 3 September the student called back and was angry, and that on this occasion she put him on hold and went into Mr Islam's office, at which point he shouted at her asking "are you an investigator" and saying it was for him to deal with the matter, and it was not her problem."

3.18 The Claimant asserts that from the response she received on 3 September, she "suspected that something was not right". Her evidence is that this was the first time she had fears of any irregularities in how Mr Islam ran the first Respondent. This was inconsistent with the account she gave us orally of her and Mrs Begum being instructed to ask students to bring cash, receiving cash without giving receipts, always told to refuse refunds, that there was overbooking and deliberate failing of students, that course balances were taken from student credit cards without their permission if they did not attend courses and complaints from those students ignored, and that there were non-existent venues advertised for courses outside London, which the Respondent would then cancel and inform students that an alternative in London was available, and if they could not travel to London they would lose their deposits. The claimant says that she acted on this suspicion on 3 September by making Company searches on all the companies "namely Advance Training Academy UK Ltd, BS Security Ltd, West Academy UK Ltd and National Training Skills UK Ltd. I was surprised [to] discover from Company House that it is only Advance Training Academy that is still registered with the Company House whist the other three… have all been dissolved". The second Respondent says that in fact BS Security Services Ltd was dissolved on 9 February 2016 (as shown in the document before us at page 471), but the other two have never been registered as limited companies and were used only as trading names. There is no evidence that either West Academy UK Ltd or National Training Skills UK Ltd had ever been set up as limited companies or indeed later dissolved. We therefore reject the Claimant's evidence that she conducted searches as she states in her statement.

3.19 The claimant also says that she was concerned about dissolved companies "issuing certificates", but we had no evidence of what any certificates issued recorded on them. We were told that the Respondent administered courses recognised by national bodies including the SIA and NOCM.

3.20 The claimant says that on the morning of 4 September 2018 she made a protected disclosure in the following terms:

"I went to the Second Respondent's office and made a protected disclosure to him orally that:

(a) I am concerned that the three other companies, namely BS Security, West Academy and National Training Skills that they are trading with are dissolve names [sic] in the Company House;

(b) I am concerned that they are committing a criminal act; by booking courses for students, collecting 70% of their registration fees in cash without receipts, examining the students and issuing certificates in the names that are not registered, instructing staff to be collecting money from students without receipts and not rendering returns to HM Revenue and Customs in respect of the fees collected, and also retaining the students' bank card details' and

(c) I would not be part of his and his Company's criminal act and as such would no longer be invigilating the students that are booked in the names of the three dissolved companies."

3.21 She says that the reaction of the First Respondent was to become angry and shout asking if the claimant had come to investigate his company or what, and he then told her to leave his office. The second Respondent says this exchange simply never happened. Mrs Begum says she was aware that the Claimant went into the Second Respondent's office and made a protected disclosure, and that the second Respondent was angry with her shouting at her asking whether she was sent to investigate.

3.22 The Claimant then says that she telephoned the HMRC, and sets out as a quote that she said the following:

"I am concerned that the Respondents are committing criminal act [sic] by; booking courses for students in the names of BS Security, West Academy and National Training Skills which are dissolved, collecting 70% of the students registration fees in cash without receipts, booking the students and issuing certificates in the names that are not registered, instructing staff to be collecting money from the students without receipts and not rendering returns to HM Revenue and Customs in respect of the fees collecting, and also retaining the students' bank card details".

She says she was given reference number "RQST3142239". The claimant did not take a note or record at the time what she had said, and was not able to tell us where she recorded the reference number. She said that she received advice from HMRC to stay in her employment and not tell her employer she had made the report "for safety reasons". The claimant does not allege that she made any further calls to HMRC. She did not receive any confirmation correspondence from them at all.

3.23 The claimant says she returned from her break on 4 September 2018 and told Mrs Rumi Begum that she had called HMRC to "disclose to them the criminal act being committed". Both the claimant and Mrs Begum give accounts that the Second Respondent overheard this account and he "then stood up and left", the claimant adding that as he did so he "looked at [her] with disdain].

3.24 Mrs Begum said that she made a note of what the Claimant told her had been reported to HMRC; she was cross examined closely about this and said she made a note that night, at home, in a notebook. She sets out as a quotation in her statement the same "disclosure" as that set out in the claimant's witness statements, with the same syntax errors. She said that she gave her notes, including this one, to Mr Nweike and that as a trainee solicitor she understood

the importance of this contemporaneous evidence. There was however not copy of any such note in the bundle before us.

3.25 Our conclusion on this key dispute of fact, is that we cannot accept it is more likely than not that the claimant made the disclosures to Mr Islam or to HMRC on 4 September as alleged. Our reasons for this are as follows:

3.25.1 The claimant could not have searched the three company names as she alleges for the reasons set out above at paragraph 3.18.

3.25.2 There is no contemporaneous evidence, though the Claimant must have recorded the reference number somewhere to be able to quote it in her witness statement now, and despite Mrs Begum saying she kept a contemporaneous note.

3.25.3 The claimant says that she declared on 4 September 2018 that she would no longer invigilate exams "for the dissolved companies" – but exams were for those booked through all four websites, and save for not invigilating on 8 September there is no evidence that the claimant refused more generally to invigilate, and indeed the argument on 18 October with "Mrs Knight" was about invigilation the following weekend.

3.25.4 On the day of her dismissing on 18 October (to which see below), the Claimant in WhatsApp messages said "I will be contacting HMRC….". She did not say she had done so, or would do so again. In cross examination she said this was because she intended to contact them again, but she has at no point suggested she did so.

3.25.5 We have had careful regard to the situation at the end of September / beginning of October when the Claimant drafted a witness statement for the county court (set out below) and consider this to be incompatible with the Claimant making a statement on 4 September that she wanted nothing to do with the running of fraudulent companies.

3.25.6 Finally, we find it difficult to accept that the Second Respondent was accused of criminal activity by the Claimant, then heard that he had been reported to HMRC, and made no reaction beyond repeating what he had said on 3 September that the Claimant was "not here to investigate me". That was not consistent with how he presented to us when giving oral evidence, when he replied very rapidly, very fully and at times with intemperance to each allegation being put to him. Mr Nweike submitted that the Second Respondent was cognisant of it being improper to dismiss an employee for whistleblowing and this is why he did not react by dismissing her immediately. We are not satisfied that the Second Respondent was cognisant of any employment rights, and indeed in the text exchange about holiday leave in August he was very dismissive of any "rights". We do not consider such a consideration would have tempered his behaviour. Further, we find that his reaction to receiving an ET1 from the Claimant was to report her to Action Fraud claiming she was involved with national and international crime rings – with no foundation whatsoever.

3.26 The claimant's case is that the real response of the Second Respondent to her disclosure was to throw her teacup in the bin, first into a bin in the office on 14 September 2018 and secondly into the outside bin on 19 September

2018. The Second Respondent admits he threw away the teacup saying that it was dirty and he wanted the office to be tidy in advance of a visit from an examining body. We do not accept his evidence that the cup was any dirtier than any of the others, and accept the claimant's evidence that this was petty behaviour designed to annoy her. It is in keeping with their deteriorating relationship as demonstrated by the messages exchanged over the August 2018 holiday request.

3.27 In September 2018 the claimant had a number of dental appointments, the last of which was scheduled for 27 September 2018. The claimant says the Second Respondent refused her requests for leave to attend the appointments, but she went ahead on 27th and did attend. We accept her evidence in this regard; in cross examination Mr Islam was clearly irritated by the claimant arranging appointments during work hours and showed no sympathy or empathy for an employee who needed an emergency appointment when she was in pain and discomfort. We do consider the refusal for time off to be entirely unreasonable, and note again the absence of any policies which could have ensured that employees know what they can legitimately expect when making such requests.

3.28 The claimant says that on her return on 27th Mr Islam said to her "Olu, which area is that your area, Mgbati, Mgbati, Yeah? You people are fraudsters." Mrs Begum says she heard this. We note that the claimant alleges that both Mrs Begum and Mr Alam laughed at this comment. Mr Islam denies having said this and says that despite being married to a Nigerian for 10 years and having visited Nigeria on at least three occasions, he knows nothing of Nigerian tribes or stereotypes about people from different tribes, and had never heard of the term "Mgbati". We do not find his assertions of an absolute absence of any knowledge of Nigerian tribes to be plausible. In circumstances where we find the second respondent was annoyed and irritated that the claimant had come into work after attending the dentist appointment, we think it more probable than not that he did make the comment as alleged.

3.29 The claimant and Mrs Begum allege that on occasions when dealing with black customers Mr Islam would say to the Claimant - "Olu this is your brother". This is not an allegation set out in the list of issues and does not appear to have been made in the ET1, in the application to amend or in the amended particulars of claim. Mr Islam vehemently denied saying this, saying it would "make no sense because if they were her brother they would be my in-law" – relying on his wife being a Nigerian too. Whilst we have heard evidence about this allegation there has been no application to amend to add it as an allegation of direct discrimination or harassment.

3.30 In late September the second Respondent went to Bangladesh. The First respondent – and also "The West Academy" – were sued in the County Court by a student about a qualification which the student failed after being accused of plagiarism. The claimant prepared a witness statement setting out the position of both Advance Training Academy and The West Academy, signed by her on 1 October 2018. The claimant alleges that she was instructed to "draft a defence" to this claim - a task given to her to "set her up to fail" as Mr Islam

knew she was not a lawyer. In fact she did not draft a defence, but a factual witness statement. We do not accept that this was a task given to her to set her up to fail; he was going to be absence. A great deal was made by Mr Nwaike of the Claimant having an English degree as put several times to Mr Islam that this was widely known within the first respondent – in these circumstances it is difficult to see why drafting a factual statement, which consists of one and a half pages of typed text, should be such an onerous task for her. We accept Mr Islam's evidence that he gave this to the Clamant to do because he was about to be out of the country and did not have time to do it himself.

3.31 The statement drafted by the Claimant and signed by her was made not only on behalf of Advance Training Academy but also on behalf of "The West Academy". We found it impossible to reconcile this with her evidence that on 4 September she had searched for this company and found it had been dissolved and she was so concerned she contacted HMRC and told MR Islam she would "not be part of his and his Company's criminal act".

3.32 We note that we did not hear any evidence of ongoing difficulties such as further incidents akin to that with the teacup, nor were we told of further instances of the Claimant refusing to invigilate exams. The pettiness of the "teacup" incident was such that if it was a deliberate detriment imposed because of a protected disclosure, we would have expected it not to have been an isolated incident. It is not however said to have been part of a campaign to try and force the claimant out of her employment.

3.33 In his statement Mr Islam said that Tochi Onwuegbu returned from maternity leave on 23 September 2018 and that he told the claimant and Rumi Begum on about 5 October that they had been expected to leave their jobs with the First Respondent "a months ago" [sic] but "she" (it is not clear which) had requested to continue the jobs for a few days more. We reject this account entirely. Ms Onwuegbu – as confirmed in evidence by her as well as the Claimant and Mrs Begum, had returned from maternity leave in February. The First Respondent accepts that he did not give any written notice, and in fact Mrs Begum's employment continued until December 2018 when she resigned. This evidence lacked any credibility and was one of a number of spurious and groundless reasons put forward by Mr Islam to argue that the claimant's employment would not have continued beyond October 2018 in any event, to try and avoid or at least limit any liability he might face.

3.34 18th October ended with the Claimant's employment terminating, and the police attending the Respondent's premises to escort her away. Ms Onwuegbu said that she telephoned the police because otherwise she and the claimant would have ended up having a physical fight. The accounts we have from Ms Onweuegbu, the claimant and Ms Begum are all contradictory. On 18 October:

3.34.1 Mr Islam was in Bangladesh. We do not accept that he told the staff that Jane Knight had been left in charge; rather, as is apparent from the WhatsApp exchanges, he remained fully in contact with the office and any work matters continued to be referred to him in his physical absence.

3.34.2 A security course was scheduled, to be taught by Kevin Hyde. We did not have the course admission report detailing the number of students,

who they had booked through, what rates they had been charged or which (if any) had been given refunds. This was a significant omission in the evidence given the factual disputes about what took place on that date. Doing the best we can from the contradictory accounts of those present, it seems likely that there were approximately 16 students signed up. They were required to pass an English competency test to be eligible to take part in the course. They attended the First Respondent's office to pay the balances due on their course fees and ensure they had given id documents etc. When this process was completed the Claimant took the students to a tutorial room approximately 100m away from the office.

3.34.3 Ms Onwuegbu says that the claimant then returned to the office, before going over to the course room a second time with a marking guide to the English competency exam which was to 'guide' or 'assist' the tutor. Both respondent witnesses say this would never be necessary as the same exam is always used, the tutor Kevin Hyde is American and native English speaker such that marking guides were not necessary, and in any event she was not tasked with preparing marking guides.

3.34.4 In fact in her written witness statement Ms Onwuegby says the claimant told her "she already prepared answers for those students that Kevin should just guide and pass them"; this is consistent with the text that the Claimant sent to Mr Islam at 16.31 that day which included "I have answered the English assessment papers and given to Kevin so all he needs to do is just to guide the students". These accounts both suggest that the claimant was in fact completing the English assessment papers FOR the students.

3.34.5 The parties all agree that Kevin Hyde considered that some of the students did not to have a sufficient level of English to sit the course. These students followed the claimant out of the tutor room, asking her for a refund. Claimant said she could not give a refund and they followed her she went to a restaurant where she hid. The claimant's account was that she was intimidated by these students and was hiding in the restaurant.

3.34.6 Mrs Begum's evidence was that on the Claimant's return from the restaurant some students wanted refunds because they had paid different prices for the same course from different companies, all of which are owed by the same people. She says they came at break time, and then again at lunch time when "the manager Jane Knight was in the office". They told Jane Knight they did not want to do the course and so were refused refunds and returned to class. Mrs Begum's account says nothing of failing the English assessments and not being eligible to complete the course.

3.34.7 Ms Onwuegbu in her statement said that three students failed to pass their English test and she did not understand why the claimant refused the refund and argued with the students, and that she approved the refunds and gave them.

3.34.8 We were provided with no evidence of the receipts upon receiving cash from the students, nor of any refunds.

3.34.9 Even on the claimant's account that the student's disquiet continued for 2 hours, this incident was over before lunchtime. However, matters escalated later that afternoon. It is apparent that the claimant said that

she was not willing to invigilate the examination that Sunday with the students currently undertaking the security course because she feared for her safety and alleged that some were gang members. Ms Onweugbu concurred that this is what the Claimant said to her. Of course if students had failed English assessments and been given refunds as Ms Onwuegbu asserts, these students would not be at the exam that weekend.

3.34.10 By 4.30pm the Claimant had sent a lengthy WhatsApp message to Mr Islam about her argument with "Janet" (she obviously meant Jane). The evidence of Mrs Begum and Ms Onweugbu was that in the course of this argument the Claimant said words to the effect that Jane was behaving as she was because she was "fucking the boss". This was not put to the Claimant, and the first time the tribunal heard this allegation was in Mrs Begum's evidence. Ms Onweugbu was upset and angry about this expression and answered that she was in fact married to Mr Islam.

3.34.11 Ms Onweugbu elephoned her husband after this exchange. In response to that call and the Claimant's text to him, he replied by text at 16.38 saying:

"Olu, this getting nasty therefore you don't have to continue work for us. Please droop the key we will do it ourself… this is small office we can't effort to have standby staff…we don't need your service from tomorrow."[sic]

3.34.12 The Claimant refused to leave the office; this position is clear not only from the oral evidence but also the text she sent to Mr Islam saying "you can put it in writing and I will pass it to my lawyer. I will continue to come to the office as usual as I know my right and under this circumstances things can only get nasty. So because Jane is your wife you have to take whatever she says at the staff's expense …."

3.34.13 At 16.56 Ms Onweugbu called the police. We had the CRIS police report confirming that a complaint of "rowdy or inconsiderate behaviour" was made. The police arrived at 17.52 and recorded that the claimant told them that she had been "unfairly dismissed and wanted a letter confirming the fact that she had been terminated". She also said that she did not have a copy of an employment contract and "did not recognise Tochi as a person of authority in the company". After she called the second Respondent again, Ms Onweugbu prepared a one line letter stating:

"This is to confirm that your employment is terminated with immediate effect from Advance Training Academy."

3.34.14 A purple note book in which the claimant had made notes – most often at the start of her employment – was placed by the police in a sealed envelope and given to Ms Onweugbu for safe keeping. The claimant says she handed this to the police saying it had to be preserved as it contained relevant evidence, and Ms Onweugbu alleged she was concerned the claimant was stealing the book containing students' card details and she required the police to search and confiscate the book.

3.34.15 A number of whatsapp messages were exchanged between the Claimant and Second Respondent after she had left the office. This included the Claimant typing:

"You will be hearing from my barrister, tax office, awarding bodies and the company house.

Good luck to you and your wife scam. Its time for you to pay for all your fraudulent business.

I are ["n't" is clearly missing] the criminal running companies that are desolved [sic] and not paying the right taxes. I will be contacting hmrc and records from Paypal can be requested the tax man. I told you I never lose. ….."

3.35 The claimant presented her ET1 on 4 December 2018, and this was served on the first Respondent on 4 January 2019. On 23 January 2019 Mr Islam completed a crime report to "Fraud Action". He reported that the claimant had worked for the company and "we suspected that she's been taking our customer credit card details from the Company by writing these card details in her personal notebook…. When we confirmed her action was correct we called police to remove her from the business and police searched her bag and founds lots of credit card details… this was then confiscated and given back to the company. She must have been using the customers' credit card details for herself or transferring to local or international criminals". In answer to questions from the Tribunal Mr Islam had no explanation whatsoever as to why he made this report on 23 January, having had this notebook since 18 October. He had no basis whatsoever for alleging misuse by the Claimant let alone liaising with "national or international criminals". The first respondent's ET3 was presented on 24 January 2019. We are satisfied that this crime report was made vindictively as a response to having to prepare an ET3.

3.36 The final complaint is that the Respondent refused, because of the protected disclosure on 4 September, to provide two references for the Claimant – one to Ranstad education and one to Hayes. The only documents provided to us in this regard were emails between Ranstad and the Claimant where she is asked for the Respondent's details and then told a reference request had been made, and with Hayes an email asking for confirmation of whether or not the claimant agreed to the first Respondent being approached, and we have no response to that. The claimant says that Emma from Ranstad told her that someone at Respondent (person unknown) was rude when they phoned about the reference request. Surprising no copy of email actually requesting reference was before us. Mr Islam denied ever receiving any request.

3.37 In circumstances where there is no evidence before us of an actual request having been made to the Respondent, and only second had evidence of a phone call with a person unknown, we are not in a position to find on a balance of probabilities that there was a "refusal" as alleged.

4. **Issues.**

The issues falling for determination were clarified at a PH on 20 July 2020, and confirmed at the outset of this hearing.

Public interest disclosure (PID)

5.1 Did the claimant make one or more protected disclosures (ERA sections 43B as set out below. The claimant relies on subsection(s) of section 43B(1)(a), namely that a criminal offence has been committed.

5.2 What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure? The Respondent's case is that the claimant's contract was for a fixed period to cover maternity leave, and that in any event her conduct caused her dismissal.

5.3 Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

5.4 If so was this done on the ground that she made one or more protected disclosures?

5.5 The alleged disclosures the claimant relies on are as follows:

a. On 4 September 2018 telling the second respondent that she had discovered that the three other companies – BS Security Ltd, West Academy UK Ltd and National Training Skills UK were dissolved according to Company House, but that he was still trading with those companies.
b. On 4 September 2018 telling the second respondent that he and his company, Advance Training Academy are committing criminal acts by instructing staff to collect fees from students in the name of the First Defendant and the three dissolved companies without receipts, and not rendering returns of the fees collected to HM Revenue and Customs, and also by retaining the students' bank details.
c. On 4 September 2018 the Claimant disclosing to HMRC (**if orally, this fact is to be set out clearly in her witness statement, if in writing the document is to be disclosed)** that the Respondents were committing criminal acts by instructing staff to be collective course fees from students without receipts and not rendering the returns to HMRC, and also retaining students' bank card details.
d. The claimant disclosing to HMRC (**on a date, and whether orally or in writing - to be set out clearly in her witness statement)** that the Respondent was trading with the names of three companies which had been dissolved with Company House, namely BS Security Ltd, West Academy UK Ltd and National Training Skills UK.

5.6 The alleged detriments the claimant relies on are as follows; the Second Respondent:

a. Shouting at the claimant on 4 September 2018 and asking her to leave his office
b. Throwing the claimant's teacup in the bin on two different occasions:

On Friday 14 September 2018 when she had left hers with those of other staff; Mrs Rumi Begum found this in the bin on the morning of 17 September 2018.

On 19 September 2018 again having left it with other members of staff, and again finding it in the bin on the next morning.

The claimant says that the Second Respondent confirmed having thrown her teacup in the bin on the two occasions.

c. Giving the claimant a task of drafting a defence to a claim by a student, Tina Walters, in the Taunton County Court, on 30 September 2018 when he knew she was not a lawyer and did not have the experience to carry out the task (setting her up to fail).
d. Refusing to provide a reference to Randstad Education and Hays Education.
e. Making a false crime report against the Claimant via the online Action Fraud Report on 23 January 2019.

Discrimination: Time limits / limitation issues

5.7 Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA"). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

EQA, section 13: direct discrimination because of race.

5.8 Have the respondents subjected the claimant to the following treatment:

a. On 7 August 2018 the Claimant sent a text message to the Second Respondent that she would be away for three days from 22nd to 24th August 2018 to attend to family matters. The Second Respondent refused the holiday and text back "not holiday. It will be absent".

b. On 7 and 19 September the Second Respondent refused the claimant permission to attend her dental appointments; she re-arranged her appointment to 27 September 2018 but was again refused.

5.9 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators, Mr Neil Alam and Mrs Rumi Begum (who are of Bangladeshi origin) and/or hypothetical comparators.

5.10 If so, was this because of the claimant's race, which she describes as being Yoruba Tribe from Nigeria and/or because of the protected characteristic of her race more generally?

EQA, section 26: harassment related to race

5.11 Did the Second respondent engage in conduct as follows:

a. On 27 September 2018 on her return from the dental appointment (which she attended without permission), shouting at the Claimant "Olu, which area is that your area – Mgbati, Mgbati – yaah? You people are fraudsters". (The claimant says this was witnessed by Neil Alam and Rumi Begum who laughed).
b. Giving the claimant a task of drafting a defence to a claim by a student, Tina Walters, in the Taunton County Court, on 30 September 2018 when he knew she was not a lawyer and did not have the experience to carry out the task (setting her up to fail).

5.12 If so was that conduct unwanted?

5.13 If so, did it relate to the protected characteristic of race?

5.14 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Holiday Pay.

5.15 On the termination of the Claimant's employment:
how many days holiday entitlement had she accrued,
how many days had she taken,
how much (if anything) was she paid on termination of her employment
how much (if anything) is outstanding.

5. Law.

5.1 PIDA

5.1.1 Section 43B of the Employment Rights Act 1996 provides:

> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
>
> (*a*) that a criminal offence has been committed, is being committed or is likely to be committed,

5.1.2 A disclosure must involve the conveying of facts – the mere making of allegations will not constitute a disclosure for these purposes, as confirmed in *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] IRLR 38.

5.1.3 The facts disclosed must give rise to the whistleblowing having a "reasonable belief" that a criminal offence has been (or will be) committed. The Court of Appeal In *Babula v Waltham Forest College* [2007] IRLR 346, explained this requirement as follows:

> ''Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute.'

5.1.4 The requirement that disclosures must be made in good faith was considered by the Court of Appeal in In *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837. We must consider:

(a) the numbers in the group whose interests the disclosure serve;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
(c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) the identity of the alleged wrongdoer ; 'the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest' although this should not be taken too far. "

5.1.5 Finally, when considering causation section 47B ERA asks whether a worker has been subjected to any detriment "on the ground that the worker has made a protected disclosure" – i.e. a reason why test, while s103A ERA asks whether the reason, or if more than one, the principal reason for a dismissal, is that the employee has made a protected disclosure.

5.2 Discrimination:

5.2.1 Section 39 Equality Act 2010 ("EqA) provides that an employer must not discriminate against or victimise a person, including by dismissing them, or by subjecting them to any other detriment.

5.2.2 Section 136 provides that, where a claimant can demonstrate a *prima facie* case of discrimination, a tribunal must hold, absent any explanation, that such discrimination occurred, thereby reversing the burden of proof and requiring the alleged discriminator to show that their action was non-discriminatory. For a *prima facie* case of discrimination to be made out, the claimant must first prove facts which could establish that the respondent has committed an act of discrimination, per *Ayodele v Citylink* [2018] ICR 748. Section 136 operates in respect of any contravention of the EqA.

5.2.3 Section 123 provides for the time limits within which claims must be presented to the ET. The tribunal has jurisdiction to consider a complaint if the claim is presented within three months of the act of which complaint is made. If the claim is presented outside the primary limitation period, that is after the relevant three month period, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balancing of prejudice between the parties using the following principles:

5.2.3.1 The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended. I have been referred to the case of *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, in which this principal was again set out by the Court of Appeal, at paragraph 26: "The burden of persuading the tribunal to exercise its discretion to extend time is on the complainant".

5.2.3.2 The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.

5.2.3.3 This is the exercise of a wide general discretion and may include the date from which the claimant first became aware of the right to present a complaint. The existence of other timeously presented claims will be relevant because it will mean on the one hand that the claimant is not entirely unable to assert her rights and on the other that the very facts upon which she seeks to rely may already fall to be determined. Consideration

here is likely to include whether it is possible to have a fair trial of the issues.

5.2.3.4 There is no requirement to go through all the matters listed in s.33 of the Limitation Act 1980 providing no significant fact has been left out of account. Those factors – which were read to the parties in the course of this hearing – are:

- The length of and reasons for the delay

- The extent which the evidence is likely to be less cogent

- Whether the respondent's conduct contributed to the delay

- The duration of any relevant disability, that is something which deprived the claimant of the mental capacity required in law

- The extent to which the claimant acted promptly once she knew that act or omission might be capable of giving rise to a claim; and

- Steps taken to receive relevant expert advice.

5.3 Direct Discrimination:

5.3.1 Section 13 EqA provides that:
"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.

5.3.2 An ET is required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (*Nagarajan v London Regional Transport* [1999] IRLR 572 HL). Accordingly, a Tribunal is required to consider making an explicit finding of the reason why it occurred. (*Amnesty International v Ahmed* [2009] IRLR 884 EAT).

5.3.3 Hale JSC explained the operation of "because of" in section 13(1) EqA in *Essop v The Home Office and Naeem v Secretary of State for Justice* [2017] IRLR 558, [17]):

> "… The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is *Bull v Hall* [2013] UKSC 73, [2014] 1 All ER 919, where reserving double-bedded rooms to 'hetero-sexual married couples only' was directly discriminatory on grounds of sexual orientation. At

other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: an example is *Nagarajan v London Regional Transport* [1999] IRLR 572, where the tribunal's factual finding of conscious or subconscious bias was upheld in the House of Lords, confirming the principle, established in *R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] IRLR 173 and *James v Eastleigh Borough Council* [1990] IRLR 288, that no hostile or malicious motive is required. *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it."

5.4 Harassment

5.4.1 In respect of a claim for harassment s.26 of the 2010 Act provides that;

(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.

5.4.2 In "purpose" claims, in the absence of clear evidence as to the alleged harasser's motive or intent, the tribunal will be required to draw inferences.

5.4.3 The test of whether conduct had the "effect" of creating an adverse environment – adopting the shorthand of Underhill J, (as he then was), in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 – has both subjective and objective elements. The tribunal must consider the effect of the conduct from the complainant's subjective point of view. The tribunal must also ask whether it was objectively reasonable for the conduct to have had that effect, see *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151. The tribunal should also consider the complainant's own behaviour and perspective as part of the context of the alleged harassment (*Pemberton v Inwood* [2018] IRLR 542).

6 Submissions.

6.1 Both parties submitted written submissions which were supplemented orally.

6.2 Essentially Mr McCracken's case for the Respondent was that:

6.2.1 All discrimination claims were out of time; they had not been set out in the ET1 which complained only of whistleblowing. On 21 October 2019, in anticipation of a PH listed for 28 October 2019 an application to amend to add claims of discrimination was added. As EJ Lewis noted, the amended grounds referred to claims under section 26 and 17 of the EqA (assumed to be a typo fors27), but there was no indication of the protected characteristic, the basis of unlawful treatment being alleged or the protected act. In November 2019 a further Amended grounds of complaint was submitted; though this did not set out the alleged words used in the claims of direct discrimination or harassment. An amended ET3 was submitted in December 2019 and having considered the matter on paper, on 14 January 2020 EJ Lewis permitted the application to amend saying that "the draft amendment requested constitutes a re-labelling of the existing claims and is therefore allowed". The matter then came before me on 20 July 2020 to finalise the list of issues; this was the first time specific allegations now said to constitute direct discrimination and harassment were set out. He submits that no evidence was led to give reasons of the late submission of the discrimination claim, nor as to why it would be just and equitable to extend time.

6.2.2 In any event the evidence of the Respondent witnesses should be preferred.

6.2.3 As to the whistleblowing, he submits that there was no disclosure as a matter of fact. In any event the claimant could not have had a reasonable belief in the content of the disclosure (eg of dissolved companies which had never been registered). Finally, he says that the claim must fail as a matter of causation.

6.2.4 As to holiday pay, Mr McCracken on behalf of the Respondent said that they were prepared to accept the calculations of the Claimant / her solicitor (even though they were unreasoned).

6.2.5 Mr McCracken accepted that as we would be making an award for holiday pay in any event, we must consider section 38 of the Employment Act 2002 and make an award for failure to provide written terms and conditions of employment.

6.3 Mr Nwaike submitted that there was clearly a qualifying disclosure made to the second respondent, and then to HMRC, and that once the claimant had made this she was subjected to detriments. He submitted that the claimant was not dismissed immediately on making her disclosure because the Respondent knew it could not do this, but he then managed her exit seeking

to rely on the end of a maternity cover period and then misconduct. He emphasised that the Respondent's business was poorly run, and that Mr Islam was not a reliable witness. As for discrimination he said that it had been permitted as an amendment because it was relabelling, the initial ET1 having said that Mr Islam intimidated her and "passed rude comments". In relation to holiday pay he submitted that an employee on an annual salary should receive additional sums to reflect holiday pay; he was unable to explain the basis of this submission, or to explain how he reached an underpayment figure of £132.07.

7 Conclusions on the issues.

Our unanimous conclusions on the issues are as follows:

7.1 We are not satisfied, on a balance of probabilities, that it was more likely than not that the claimant made the disclosures as she alleges on 4 September 2018 for the reasons set out in our findings of fact. We accept that she had concerns about how the Respondent business was being operated – and find it unlikely that these arose for the first time when she received telephone calls from a student on 30 August and 3 September 2018. We also accept that she telephoned HMRC to report these concerns and received a reference number, though think it more likely than not that she did this after the termination of her employment – as indeed she indicated in her WhatsApp message she intended to do.

7.2 Whilst our finding that there was no protected disclosure disposes of the PID Claims, we have gone on in any event to consider the reason for the claimant's dismissal and the alleged detriments.

7.3 We do accept that the claimant passed on complaints that the student raised, to Mr Islam, on 3 September and that his reply was to the effect that she was not there to investigate the business. However, even if that amounted to a protected disclosure (we remind ourselves that it is not alleged so to do), we do not accept that the principal reason for dismissal was because of any concerns about how the business was being run had been voiced by the Claimant. Whilst we wholly reject R's contention that her contract was for fixed term to maternity leave, and also reject Mr Islam's evidence that he had effectively given notice to the Claimant in September 2018, the principal reason for dismissal was the altercation the claimant had on 18 October 2018 with "Jane Knight", his wife.

7.4 Mr Islam did throw the claimant's tea cup in the bin twice. He admitted doing this, telling her it was because it was dirty. We consider that this petty behaviour was likely to be caused his irritation after their exchanges about holiday leave and her assertion that she had "rights" – something he was quick to disavow and effectively threaten dismissal. We note that beyond the teacup incident and the giving of the work on the county court claim, this is not said to have been part of some lengthy campaign to try to encourage the claimant to resign. Whilst these incidents no doubt caused the Claimant irritation and perhaps some distress, even if we had found a protected

disclosure, we would have rejected this as a claim of detriment caused by such a disclosure.

7.5 Nor are we satisfied that the task of drafting a witness statement in support of a defence to a claim in the county court was a detriment imposed in any way because of a protected disclosure. Mr Islam did not consider whether this would be outwith the claimant's ability or 'comfort zone' and simply tasked her with this before leaving the country.

7.6 We are unable to conclude that that there was, as a matter of fact, any refusal to provide a reference to the claimant In any event we can see no causative link between that and any disclosure.

7.7 As to the crime report, we conclude on a balance of probabilities this crime report was a vindictive act done by Mr Islam without foundation, and done because an ET1 had been presented. However, the presentation of the ET1 was not alleged to be a protected disclosure (or indeed a protected act, which in any event it would not be as it contained no allegations of discrimination).

7.8 Turning to the claims of direct discrimination, and the complaints about how holiday requests in August and September were answered, we do not find that the claimant has shown a prima facie case that she received less favourable treatment because of her race. Neither Mr Alam nor Ms Begum assist as comparators when we have no information about how their holiday requests were submitted or initially answered. We note that the dates for holiday making up the subject of this claim do not coincide with Mr Alam's wedding on 1 August, and so the comparison of Ms Begum having time off for that but not the claimant takes us no further. The burden of proof has not shifted, and these claims fail.

7.9 As to harassment related to race, we do accept that Mr Islam, when irritated that the claimant had come in late on her return from a dental appointment on 27 September 2018, made the comment to her "which is your area – Mgbat, Mgbati yeaah? You people are fraudsters". He objected to paying the claimant a full day's pay for a dental "appointment", telling us in evidence that if it was an appointment it was not unavoidable. We have no doubt that this comment was unwanted by the claimant, that it related to her race, and that it created an adverse environment for her. We uphold this claim.

7.10 We do not however accept that giving the claimant the county court task related to race, or had the purpose or effect (considering objectively the reasonableness of creating the requisite effect) of creating an adverse environment for the claimant. This claim is rejected.

7.11 We have therefore upheld one claim; that of harassment by the "Mgbati" comments. We have therefore gone on to consider the issue of time limits. It is clear that there was no claim for discrimination in the ET1; the claimant did not tick any of the boxes indicating discrimination, and as EJ Lewis recorded in his PH of 28 October 2019 "the claim form, which she presented

in person, indicated claims of public interest disclosure only and no other". The claim of harassment must be considered as having been presented to the ET on the date on which it was accepted by way of amendment; i.e. on 14 January 2020. The claim is therefore out of time. We have considered the reasons for this. The claimant prepared her claim form herself, and did seek to include complaint about Mr Islam's behaviour towards her. When the matter was listed for its first PH, she sought promptly to make clear her claim. Most fundamentally however, the Respondents do not (contrary to Mr McCracken's submission) suffer any prejudice by the late presentation of this claim. Mr Islam in evidence recalled clearly the events of 27 September when the claimant returned from her dental appointment, and was clear in his evidence before us of his irritation. The phrase in dispute was denied with Mr Islam saying he did not know the term "Mgbati" and so would not have used it. We have not accepted his evidence on this issue, but it is not because passage of time has dimmed recollections. In the circumstances, we do find that it is just and equitable to extend the time limit.

7.12 Finally, in relation to holiday pay, Mr McCracken took a commendably pragmatic approach and has agreed the underpaid sum of £132.07 as claimed.

8. Next Steps.

8.1. If the parties do not reach agreement as to the compensation, the matter will be listed for half a day before this tribunal. We have provisionally listed this to take place at **10 am on Friday 11 December 2020**; if either party is unable to attend on that date, both parties must send in dates to avoid between 1 December 2020 and 30 April 2021.

8.2 The claimant will receive an award of £132.07 in respect of holiday pay. She will receive an award for failure to provide written terms and conditions of employment which will be either the minimum of two weeks, or the maximum of 4 weeks. Having heard evidence over three days, the initial view of the tribunal, subject to what parties may submit, is that the maximum period will be appropriate in this case where the claimant, we accept, asked for a contract and was denied one.

8.3 Finally, the claimant will be entitled to an award for injury to feelings for the one act of harassment found. This harassment was not alleged to have led to any financial losses, so it will only be an award for injury to feelings. To assist the parties in any negotiations, the tribunal's preliminary view – subject to further evidence and submissions – is that this is likely to be within the lower band of Vento. It was a one off comment, and the Claimant did not describe having to leave the office because she was so upset, or taking any time off work. This is not however our final conclusion, and if necessary we will hear further evidence from the Claimant and submissions from both parties.

_____
Employment Judge Tuck QC

29 October 2020
Sent to the parties on:

12 November 2020…

For the Tribunal:

……T Henry-Yeo..