



# EMPLOYMENT TRIBUNALS

**Claimant:** MS MUNA ABDI

**Respondent:** DELTEC INTERNATIONAL COURIER LIMITED

**Heard at:** Watford ET                      On: 9, 10 and 11 November 2020

**Before:** Employment Judge Skehan  
Ms Kendrick  
Mr Hoey

## Appearances

**For the Claimant:** In person  
**For the Respondent:** Ms Bell, Counsel

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## JUDGMENT

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1. The claimant's claim for unlawful harassment on the grounds of sex and race and religious belief is successful to the extent as set out below. This matter has been listed for a remedy hearing to be heard, at Watford Employment Tribunal on 13/01/2021 commencing at 10 AM.
2. The claimant's claim for equal pay is unsuccessful and dismissed.

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## REASONS

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3. These written reasons are produced upon oral request from the claimant, following the tribunal giving their oral reasons on 11/11/2020.
4. At the outset of the hearing the tribunal revisited the list of issues to be determined by the tribunal set out by EJ Manley within her case management summary of 29/04/2019. The list of issues identifies 5 separate allegations of discrimination, said to be direct discrimination or harassment on the grounds of sex and/or race and/or religious belief. The

respondent conceded liability in relation to 2 of those 5 allegations. The tribunal heard evidence in relation to liability only and issues relating to remedy were to be dealt with thereafter. The tribunal noted that the claimant claimed, within her ET1 that the termination of her employment was tainted by discrimination. It was agreed with the parties that findings of fact in relation to the reasons for the claimant's resignation would be considered by the tribunal at the remedy stage of the hearing.

### **The Law**

5. The claimant raises issues of harassment that are pleaded in the alternative as direct discrimination. We note the provisions of section 212(1) of the Equality Act 2010 providing that harassment and direct discrimination claims are mutually exclusive. Section 26 of the Equality Act 2010 sets out the definition of harassment as conduct related to the protected characteristic which has the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant. In deciding whether the conduct has this effect, the tribunal will take into account the perception of the claimant the other circumstances of the case and whether it is reasonable for the conduct to have had that effect. Direct discrimination is provided for within section 13 Equality Act 2010. The question for direct discrimination is whether, because of the protected characteristic the respondent has treated the claimant less favourably than it has treated or would treat others. For the purposes of direct discrimination, the employment tribunal needs to consider a comparator and we have, in the absence of any actual comparator, considered a hypothetical comparator in materially similar circumstances to the claimant as set out below.
6. Equal pay law provides that an employee is entitled to contractual terms, including those related to pay, that are as favourable as those of a comparator of the opposite sex in the same employment if they are employed on equal work. In the claimant's case, she claims 'like work' meaning work that is the same or broadly similar to her comparators. The Equality Act 2010 achieves this by implying a "sex equality clause" into the contract of employment, which has the effect of importing into the employee's contract the more favourable term(s) of the comparator. However, even if the employee shows that she and the comparator are doing equal work, the employer has a defence – known as the "material factor defence". The sex equality clause does not apply if the employer proves that the difference is attributable to a material factor that is not based on sex.

### **The Evidence**

7. We heard from the claimant on her own behalf and Mr Cunningham on behalf of the respondent. Both witnesses gave evidence under oath and their witness statements were adopted and accepted as evidence-in-chief. The witnesses were cross-examined. The tribunal asked questions of both witnesses in accordance with Rule 41 of the Employment Tribunal Rules. As is not unusual in these cases the parties have referred in

evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact.

8. The respondent is a large distribution services provider based in Hounslow Middlesex. It is part of a global network of affiliated companies, currently operating in 150 countries. The respondent employs approximately 250 people in the UK. Mr Cunningham was the respondent's CEO during the claimant's employment. He has since retired from the business.
9. The claimant is black and of Somali origin. She moved to the UK as a child. The claimant wears a hijab, a headscarf covering her head and hair. The claimant was employed as an Evening Operations Clerk from 06/11/2017 until her resignation with immediate effect on 01/09/2018. The claimant reported to Mr Simon Hocking (Simon). We were referred to her contract of employment of 07/11/2017. The claimant was offered a role on a starting rate of £7.75 per hour Monday to Friday working between 16:30 and 22:00 hours. The hours of work suited the claimant as she was also a student during this time and had caring responsibilities. The claimant's hourly rate increased to £7.85 effective from 01/04/2018 and £8.75 effective from 01/08/2018.
10. The claimant describes a chaotic working environment within the Export Department with a juvenile atmosphere where there was little training or guidance with a high turnover of staff. Mr Cunningham told us that it was difficult to recruit experienced staff in the export department.
11. The respondent referred to the standard job description for an Operations Admin Clerk, and told the tribunal that the claimant's job description would be identical with the exception of evening hours. Mr Cunningham says that the claimant's job mainly focused on 'pre-alerting'. We were referred to a document within the export department known internally as 'the blue book'. This was a training manual with 39 separate sections. The respondent said that the claimant's duties included some but not all elements contained within the blue book. In particular the claimant's duties excluded duties relating to data freight and CNS, being the respondent systems that interacted with HMRC systems in relation to export entry procedures. The claimant, in response to an employment tribunal requests to clarify her equal pay claim, sent details of her role to the tribunal on 02/06/2019. These details concentrate on the 'pre-alert' duties carried out by the claimant. By August 2018 the claimant was fully capable within her role. She carried out her allotted tasks completely and was able to function alone for the evening shift.
12. The claimant alleges that in August 2018, her work was the same or broadly similar with that of her colleagues being Mr Tyrel Tripp (Tyrel) and Mr Oliver Rolls (Oliver). Mr Cunningham addresses both roles within his witness statement and gave further evidence during his oral evidence. We were referred to an email from Ms Chowdhury dated 03/05/2019 and told

that Ms Chowdhury had a detailed knowledge of working in the Export Department and at the time the email, was on secondment to the HR department.

13. In August 2018 Mr Tyrel Tripp and Mr Oliver Rolls had recently started employment with the respondent. The claimant told the tribunal that she did not know her colleagues' job titles during the course of her employment, but she was sure that they carried out the same work because they were simply requested to copy what she was doing. This is the basis of the claimant equal pay claim. Oliver and Tyrel were paid a salary of £20,000 which is more than the claimant's equivalent hourly rate.
14. Mr Cunningham says both Oliver and Tyrel were employed as 'Export Clerks'. We were referred to their contract of employment and job descriptions. The Export Clerk role was a different role from that of the claimant's Operation Clerk role. The Export Clerk role included all of the tasks expected of an Operation Clerk along with export entries. Neither Tyrel nor Oliver had any experience when recruited. At the time of their dismissal, they were still relatively new and had mastered neither the claimant's duties nor the extended part of their role relating to export entry procedures. Their roles were different to that of the claimant. The export clerk's role attracted a higher salary than the operations clerk as it was considered, when the individual was fully trained and operational in all aspects, to be a more responsible role. There were larger consequences for the business in respect of getting it wrong. Repeated HMRC mistakes could result in a loss of ability to trade on the respondent's part.
15. The claimant was upset and annoyed about the disparity in pay between her and her colleagues and raised it with her line manager, Simon, on more than one occasion. At no time during the claimant's employment was the disparity in pay explained to the claimant in the terms it was explained during the tribunal. We note that Simon in his letter of 20/08/2018 tells Mr Cunningham that the claimant was upset because her colleagues been paid more than she was. Simon explained that her pay was set by the company not by him and the new starters were paid a higher position to 'fill the position quickly'. Mr Cunningham told the tribunal that Simon was correct in that he did not set the salaries but mistaken in his explanation for the disparity and referred to the difference between the two roles as set out above as the reason for the disparity in pay.
16. On 10/08/2018 there was a discussion in the office between the claimant, her female colleague Arouge, Tyrel, Mr Brandon Tripp (Brandon) and Oliver within their office. The claimant cannot remember how the discussion started. During the course of the discussion the topic of 'white privilege' was raised by the claimant and/or her colleague. The claimant considered that this discussion developed into an argument. Tyrel and Oliver told the claimant that 'the majority of crimes in England are made by black people'. This exchange is referred to within Simon Hocking's letter of 20/08/2018. Mr Cunningham told us that Simon had been informed of the discussion by Oliver and/or Tyrel. Within her claim form and during the course of cross-examination the claimant told the tribunal that she

countered her colleagues' argument. Oliver and Tyrel sought to research their argument on the Internet and, despite finding information suggesting that their statements were unsubstantiated, they reiterated their position to the claimant. The discussion was heated. The claimant says that she was clearly upset and describes this discussion as a 'vile discussion'. The discussion was interrupted by Mr Mark Davies, the claimant's senior line manager. The claimant made no complaint to Mr Davies. The claimant had previously had her mobile phone stolen at work and was upset with Mr Davies for failing to compensate her for that.

17. For the sake of completeness, we also note the claimant's colleague, Arouge addresses this exchange within her subsequent meeting with Mr Cunningham on 22/08/2018. Arouge tells Mr Cunningham of an uncomfortable dynamic within the office and refers to a debate between them all regarding crime and race and said she didn't understand the reaction from the boys. Arouge said that the boys left the office in a happy mood and agreed to disagree. She had no idea where their subsequent comments came from. Arouge described her working environment as 'now okay'.
18. Shortly after this exchange on 10/08/2018, the claimant, in the proper course of her duties, used a colleague's login details to log into her computer. On logging into the computer, the claimant saw a 'WhatsApp group chat.' The group included the claimant's manager Simon and the claimant's colleagues Oliver, Tyrel and Brandon. We do not set out the entirety of the WhatsApp exchange however consider it important to address the content of the WhatsApp messages that the tribunal considers fairly described as highly offensive and threatening and includes threats of violence directed personally towards the claimant. They include the below comments interspersed within the WhatsApp conversation:
  - 18.1 [Tyrel] 'Fucking immigrants'.... [Oliver] 'smell like fucking chucked tikka' [Oliver] 'Fucking cunts, lot of them' [Tyrel] 'FUCKING YES, FUCKING SUFFER, YOU LITTLE POSTBOX', [Brandon] 'Bruv whats her problem, Come we bang her' ..... 'bruv someone shut this terrorist up before I get vexed, bmt ill rip her head scarf off, ill swing them both mums.' The WhatsApp conversation is littered with smiling and laughing emojis and emojis of women wearing the hijab.
19. The offensive comments on the WhatsApp discussion of 10/08/2018 are made between 4:44 PM and 6:04 PM, being around or after the time of the office discussion relating to crime and race. The claimant saw these exchanges between her colleagues and took a screen shot of them.
20. The claimant complained to Mark Davies the following day on 11 August about her phone and her pay. The claimant makes no reference to the previous day's arguments in relation to race and crime or her discovery of the WhatsApp discussions.
21. The claimant told the tribunal that she complained to Simon about the discussion relating to race and crime but he did not take the complaints

seriously telling the claimant that it's a 'he said she said' scenario. The ET1 refers to Simon 'running back and forth all day'. The claimant says that following the exchange with her colleagues in relation to race and crime and discovering WhatsApp discussion on 10/08/2018 she had decided to record her discussions with Simon. We were referred to the transcript of a discussion between the claimant and Simon on 10/08/2018. During this discussion the claimant complains about her pay and says, inter-alia:

21.1 .....I've been here 10 months and still being paid minimum. I know for a fact they get paid more than me that is irritating the fuck out of me..... I'm pissed off that these lot are like yoots that talk like shit has and I'm thinking to myself that I am going to punch these little kids cos they don't know what the fuck they are doing, they don't know how to behave in the workplace. It's like what are they, in school or in their friggin work they gotta decide .....

22. The claimant was permitted further time by the tribunal to examine the audio tapes and we were referred to a further conversation with Simon that took place on 14/08/2018. The tribunal listened to the audio and the claimant informed us that the tape recorded Simon speaking, not Brandon as indicated, saying:

22.1 '..... I hate racism.... All that's going to happen is going to be you and Arouge versus them 3 and it's just going to go around and around in circles.

23. The claimant logged into her colleague's computer again on 14/08/2018, . She noticed that the What's App chat continued. The group's icon had been changed to a black hijab display picture. The name was now 'ALHAMDULLAH'. A further exchange within the What's App group happened on this day including the comments, '[Oliver] 'Mums, that was so funny... How has he gonna and said allaham, then paused' [Tyrel] 'ALLAHUMMMMDILILAAHH' [Oliver] 'had me in stitches' [Simon] 'Man fucked up [laughing emojis] ' [Brandon] 'smiley faces & hijab emojis' [Oliver] OMG of the funniest things omg .. Muna, Looooool'... ' This exchange accompanied a discussion within the office using references to 'ham'.

24. The claimant reported the WhatsApp discussion to the respondent by email to Helen Burgin on 16/08/2018. Ms Bergin forwarded the email that evening to Mr Cunningham the respondent's CEO. The contents of the WhatsApp discussion were described by Mr Cunningham as including extremely inappropriate and foul language, some derogatory and deeply unpleasant comments made about the claimant and Arouge. Mr Cunningham describes the conversation as puerile and the participants seem to think they were being amusing, when in fact they were being very offensive.

25. There is a dispute between the parties in relation to the contact between Mr Cunningham and the claimant between 16/08/2018 and 22/08/2018. In considering this conflict we note that the claimant's evidence is unclear

and appeared confused. The ET1 refers to 'Paul (CEO)said we will speak'. This suggests some contact between the claimant and Mr Cunningham. Mr Cunningham has been clear in his evidence and have provided a detailed account of his contact with the claimant. Mr Cunningham told the tribunal that he met with the claimant and her colleague on 17/08/2018 in person he told them he was aware of the allegations and shocked by them and that he would take appropriate action. His first priority was to quickly move the claimant a colleague out of the export office and into a different place away from the colleagues who had participated in the WhatsApp conversation to minimise the contact with them while Mr Cunningham carried out an investigation. Mr Cunningham said that the claimant agreed to the move and at no time complained about his plan to move their office. The notes of the meeting records that the claimant was asked by Mr Cunningham how she was now feeling at work and responded that she felt good and was able to continue with her work without being in a playground atmosphere. The claimant told the tribunal that she thought it was weird she was dealing with the CEO and not HR. She was upset and mad about the move and told Mr Cunningham that she was happy with it because she did not want to disagree with the CEO.

26. Mr Cunningham met with Simon to discuss the allegations. Simon provided an initial letter to Mr Cunningham addressing his behaviour. Following the investigation Simon was issued with a final written warning. Simon was a long-standing employee with an excess of 10 years service. Mr Cunningham dealt with Brandon in a similar way. He carried out an investigation followed by disciplinary proceedings resulting in a final written warning. Mr Tripp had less than a year's service with the respondent. As Oliver and Tyrel were both still in their probationary periods having recently commenced employment with the respondent, Mr Cunningham took the decision that they were unsuitable employees for the respondent and their employment was terminated immediately on 20/08/2018.
27. Mr Cunningham met with the claimant on 22/08/2018. The claimant explained the background to Mr Cunningham including the conversation relating to race and crime as set out above. Mr Cunningham apologised to the claimant and told her that the behaviour of those concerned was unacceptable and the business will be taken or has taken appropriate action.
28. The claimant told the tribunal that despite her office move, 'Simon kept coming in staring at her and Arouge and the others kept coming in with smirking faces'.
29. The claimant resigned from her position with immediate effect by email dated 01/09/2018.

### **Deliberations and Findings**

30. We heard oral submissions from Ms Bell on behalf of the respondent. The claimant, acting in person did not provide submissions but the tribunal confirmed that it would review the entirety of the evidence heard in accordance with the applicable law. We set out our deliberations and findings addressing each item within the list of issues in turn. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

'On 10/08/2018 Oliver roles and T trip stated that the majority of crimes in England are made by black people.'

31. The respondent disputes that this comment was made. We do not consider it noteworthy that the claimant cannot remember how this conversation began but can remember part of the conversation she found offensive. This does not in our view detract from the claimant's credibility. We note the reference to this discussion within the letter from Simon of 20/08/2018 that there was a discussion as set out above relating to black crime. The claimant did not report this to Mark Davies who came into the office following this heated discussion because she was upset with Mr Davies due to a lack of action over her stolen mobile phone. The claimant took the opportunity to complain to Mark Davies on 11/08/2018 about other matters yet chose to make no mention of the argument related to race and crime. No reference to the discussion in relation to race and crime was made by the claimant within the email complaining about the WhatsApp discussion. However, the extreme content of the WhatsApp discussion may go some way to explaining why previous complaints have fallen by the wayside. While this may be relevant to remedy, we do not consider that this affects the claimant's credibility. The claimant raised this discussion with Mr Cunningham during their meeting of 22/08/2018 and it is recorded within the notes. In considering the entirety of the evidence, the claimant has shown on the balance of probability that the comment relating to black crime was made as alleged by the claimant, by way of a repeated assertion to the claimant that the majority of crime in England was made by black people.
32. The respondent disputes that the comment constitutes harassment or direct discrimination. The respondent submitted that the comments made to the claimant while misguided, represent free speech. The employment tribunal makes reference to the WhatsApp exchange between the claimant's colleagues that occurred at around the time of this discussion. We draw an inference from the WhatsApp exchange that supports the claimant's evidence, that the tone of the conversation was directed towards the claimant as a black woman and considered vile by the claimant. The tribunal does not consider that any arguments relating to free speech assist the respondent or disapply the application of the Equality Act in these circumstances. We were requested to find that the claimant had misrepresented her position by reference to the transcript of 10/08/2018 set out above and find the balance of power was with the



claimant, who was using threats of violence against her colleagues and more than able to hold her own with her colleagues. We find, taking the entirety of the evidence into account, that the office environment in which the claimant worked was chaotic and juvenile as described by the claimant. It was one in which inappropriate language was commonplace. The claimant was no exception as shown within the transcript. However, the tribunal does not make any finding of fact that would suggest the claimant held any balance of power or was in any way responsible for the comments and/or actions of her colleagues that are the subject matter of this litigation.

33. When looking at whether this allegation constitutes harassment we find that the comments were unwanted comments relating to race that had both the purpose (inferred by the tribunal by reference to the WhatsApp chat) and the effect (by reference to the claimant's evidence) of creating an intimidating, hostile, degrading, humiliating and offensive environment for the claimant. In reaching this conclusion we have taken into account the claimant's perception, the other circumstances of the case are set out above and whether it was reasonable for the conduct to have that effect.
34. Simon Hocking did not take the claimant complaints seriously stating it was a he said she said allegation. We have carefully considered this allegation. The claimant initially alleged that Simon took this approach on 10/08/2018. We were thereafter referred to the transcript of 14/08/2018 are set out above. In considering the entirety of the evidence, we note that Simon was the claimant's manager and was likely to have had considerable interaction with the claimant on a daily basis. We find that Simon took this approach as alleged on 14/08/2018 and it is likely that this approach was repeated to the claimant. He ignored the claimant's complaints and he dismissed the concerns as a, 'he said she said scenario'.
35. We have considered whether these words and lack of actions in themselves could constitute:
  - 35.1 Harassment: We consider this to be a managerial failing and inadequacy within the respondent that will be relevant to the issues of remedy. The words and actions reflect poor managerial approach, potentially coloured by self interest and desire to protect his friends. However, we do not find that the words and failure to act are in themselves connected to any protected characteristic and therefore, while relevant, we do not consider this to be a separate instance of harassment
  - 35.2 direct discrimination: as set out above we consider this to be a managerial failing. On the balance of probability we consider the inadequacy of Simon's response to the claimant to be connected to a lack of managerial skills, factors relating to his own position and the position of his friends rather than the claimant's protected characteristics. We consider that a hypothetical comparator in similar circumstances to the claimant who raised issues with Simon

in relation to her colleagues inappropriate and offensive behaviour, within the work environment of the export department at that time, would have been similarly ignored by Simon. We do not consider Simon's words and failure to act to be direct discrimination in its own right.

36. On 10/08/2018, the claimant saw conversation on a WhatsApp group which included Simon, Oliver, Tyrel and Brandon which contained a number of threatening and offensive comments about the claimant related to her religion and sex.

On 14/08/2018, the claimant style the name of the WhatsApp who had changed to a version of an Islamic greeting with a black hijab the display picture. Further discriminatory and offensive comments have been made on that day.

We were referred to the respondent's correspondence of 12/03/2020 where the respondent admitted liability for direct discrimination and harassment on the grounds of race, religion and sex under both of these headings. We find the content of the WhatsApp discussion as set out above constitutes harassment in that it is unwanted conduct that has had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for the claimant. We note the provisions of section 212 of the Equality Act and made no finding in respect of direct discrimination

37. On 15 August the claimant reported the matter with copies of WhatsApp messages to HR. The claimant was moved to another department with a colleague was not spoken to until 22/08/2018. It is common ground between the parties that the claimant reported the WhatsApp discussions to the respondent's HR department on 15/08/2018. It is common ground that the claimant and her colleague were moved to another office while the investigation was undertaken. It is denied that there was any delay in speaking to the claimant. On the balance of probability, we have preferred Mr Cunningham's evidence as set out above in relation to his contact with the claimant following her complaint. We find that the claimant was spoken as set out by Mr Cunningham prior to 22/08/2019 and this matter has fallen away.

38. We have considered whether Mr Cunningham's actions in moving the claimant could be considered harassment. We find that Mr Cunningham was appalled by the content of the WhatsApp messages and was dealing with the investigation process in a way he thought best. Mr Cunningham's aim was to separate the claimant from those involved with the WhatsApp discussion. Mr Cunningham informed the claimant and her colleagues at an early stage of his decision to move them to a separate office. Neither the claimant nor her colleague objected to this move. Mr Cunningham considered that they agreed to this move. We do not consider that Mr Cunningham's actions in moving the claimant, within itself, can in any reasonable sense be said to be conduct related to any relevant protected characteristic.

39. We have considered whether this action could be direct discrimination. We do not consider that Mr Cunningham's treatment of a hypothetical comparator would be any different to that of the claimant. We consider that Mr Cunningham would be more likely than not to take similar steps to separate the victim from the perpetrators. For this reason we conclude that the claimant was not less favourably treated by Mr Cunningham on the grounds of any protected characteristic. We find that this allegation does not constitute direct discrimination.
40. While we do not consider Mr Cunningham's moving of the claimant to be harassment or direct discrimination we do consider the respondent's dealing with the matter to be inadequate. We make this comment highlighting the content of the WhatsApp exchange, the expressions of hate and in particular the threats of physical violence made by Brandon, who was to continue working alongside the claimant, that was at least condoned by Simon, the claimant's direct line manager, who would continue to have everyday contact with the claimant. The claimant has shown on the balance of probability that she continued to have negative interaction with these individuals following Mr Cunningham's response to her complaint by reference to 'smirking faces'. The respondent's handling of the claimant's serious allegations will be a matter taken into account by the tribunal when considering matters of remedy.
41. Was the claimant engaged in like work with Tyrel and/or Oliver. That is, was her work and theirs the same or broadly similar and such differences as there were between their work were not of practical importance in relation to the terms of their work? If so should the claimant's contract be modified as to include a sex equality clause? Can the respondent show facts that constitute a material factor defence?
42. We find that the claimant's duties were limited to pre-alert duties as set out above and did not contain any expectation that she would carry out export data freight and CNS duties. We have found on the balance of probability that there were fundamental differences of practical importance, being a requirement to deal with the export entry systems linking to HMRC, between the claimant's role of Operations Admin Clerk and that of the comparators being Export Clerk. For this reason we conclude that while there were large similarities between the claimant's role and that of the comparators, the claimant was not employed on like work, when compared to the comparators. The comparators role had a substantial and important export element that was not present in the claimant's role. There is a real difference between the type of work reasonably expected by the respondent to be done and the skills and knowledge needed for the export clerk role. Greater importance and responsibility was attached by the respondent to the role of the comparators. We do not consider that a requirement for an initial period of training or an initial period where the comparators are not undertaking the entirety of their role negates the fundamental differences between the roles. We do not consider this to be a scenario where it is appropriate to imply a sex equality clause.

44. In conclusion:

44.1 The claimant's claim for unlawful harassment contrary to the Equality Act 2010 is successful to the extent set out above. This matter has been listed for a remedy hearing.

44.2 The claimant's claim for equal pay is unsuccessful and dismissed.

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Employment Judge Skehan

Date: ...23/11/2020.....

Sent to the parties on: ....25/11/2020..

....T Henry-Yeo.....

For the Tribunals Office