Case No: 2204912/19

EMPLOYMENT TRIBUNALS

Claimant: **Ms. C. Towns**
Respondents: **(1) SL Media Group Ltd**
(2) Mr. R. Johnson

London Central Remote Hearing (CVP) **On: 19, 22 February 2021**

Before: **Employment Judge Goodman**
Mr P. Secher
Ms N. Sandler

Representation
Claimant: Mr C. Clarke, counsel
Respondents: Mr. S. Morris, solicitor

JUDGMENT

1. The claim of sexual harassment under section 26(2) succeeds.
2. The respondents are jointly and severably liable to the claimant.
3. The award for harassment to be paid to the claimant is £1,692.44, made up of £1,200 for injury to feelings, £322 financial loss, and £357.67 interest.

Details of the Employment Tribunal Fast Track process for enforcement are contained at the following link: https://www.gov.uk/government/publications/form-ex727-i-have-an-employment-or-an-employmentappeal-tribunal-award-but-the-respondent-has-not-paid-how-do-i-enforce-it

A non-paying respondent may be named and fined by the government through the following process: https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement "

REASONS

1. This is a claim for sexual harassment, or harassment related to sex, arising from a brief internship in September 2019. The second respondent is the owner and director of the first respondent company, of which he was the only employee.

2. The respondents dispute that the Equality Act applies to these events. It is argued that the claimant was neither an employee nor an applicant for employment. If the Equality Act does apply, the facts of what is said to have happened are disputed.

3. It is worthwhile looking at the history of this case as it may affect the quality of the evidence. The work relationship ended on 30 September 2019. The claimant went to ACAS for early conciliation on 24 October 2019, and presented her claim to the employment tribunal on 14 November 2019. By 17 February 2020, when no response had been filed, Employment Judge Stout listed he case for a remedy hearing on 2 April 2020. That hearing was overtaken by the pandemic lockdown and did not take place. On 28 July 2020 Employment Judge Spencer issued a rule 21 judgement and listed a hearing on remedy for 15 October 2020. A notice of that hearing was sent the parties on 5 August 2020. On 17 September the respondents' representative, Peninsula Business Systems, filed a draft response and applied to set aside the judgement, saying the respondents had not received the proceedings. Meanwhile, the claimant had prepared a witness statement and hearing bundle for 15 October 2020 hearing. At the hearing, Employment Judge Russell decided to set aside the default judgement and listed this hearing to decide all the issues. Last week, the bundle was updated with additional material from the respondent, the respondent filed a witness statement, and the claimant updated hers. All this means that the second respondent's evidence is given long after the event, and the claimant may not recollect all details by now either. On both sides there were some discrepancies between the witness statement and the contemporary texts, telephone records and WhatsApp messages.

4. Live evidence was given the tribunal by the claimant, Chloe Towns, and the second respondent, Reece Johnson. The tribunal read a short witness statement from Owen Buckland, the claimant's boyfriend, but he was not questioned because he could not remember any detail of what was said on the morning of 30 September when Mr Johnson phoned him.

5. There was a hearing bundle of 185 pages, and two later additions.

Findings of Fact

6. The first respondent is a company of which the second respondent is sole director. Incorporated in 2017, the last accounts filed, made up to 31.10.19, show that it as a dormant company. According to the Companies House register it is in the advertising business; the work the claimant was asked to undertake was to call pubs and restaurants offering contract cleaning services. The second respondent described the business as a start-up. He also has regular work as a DJ, working 4-7 nights a week in London and at various south coast towns. He also has or has had interests in companies managing property, several dissolved, others on the register.

7. The claimant had her 19th birthday early in September 2019. She moved to London to live with her boyfriend and to look for work. She had signed up for a law degree with the Open University, but only followed it for a month. Before that she had done waitressing and bar work. She saw on Indeed, a jobs website, an advertisement placed by the first respondent for a trainee personal assistant role. It said:

> "this role starts as an internship for the first two weeks as stated in the advert. This time allows you to gain experience in a role like this and for you to prove yourself with punctuality, organisation, creative thinking and being innovative. self-motivation is a key part of this role. Expenses, travel and commission will be paid during this first two weeks."

After describing a role involving branding, marketing, and the opportunity to earn a substantial amounts of money, it went on:

> ..“after this time a comprehensive basic salary will be offered. This will be a progressive salary increasing with responsibility and performance. once the director is satisfied with your performance, you will start at £9 per hour on a 10 am to 4pm standered day, this we may require you to wqork obvertime. then the salary will increase on completion of your probation, a £18-£22 basic and an OTE of £48,920 upwords is what we expect to pay during your first year.” (spelling and punctuation not corrected).

8. The claimant applied with her CV and received in reply an invitation to interview on Monday 23 September at a serviced office (hired for the day) in central London. The message purported to come from Fiona Gilliham, Executive Director, but Mr Johnson said in fact it had been some time since she worked for another company he ran, and he had edited and pasted text from an earlier letter; the Indeed and Regus accounts were in Ms Gilliham’s name.

9. The claimant was interviewed by Mr Johnson who asked her to start on Wednesday 25 September at 10.30 at the Lightbox in Chiswick. She arrived soon after 10, and waited in the business lounge open to the public. Mr Johnson sent a message saying “grab a seat be down in the few minutes” but in evidence said this was misleading because he was still parking his car at the time, and was not in his office, which is on a higher floor.

10. She was given an undated letter offering her an internship with SL Media Group Limited to take effect from 25 September 2019 and to end “before 11/7/2019” (sic). She was asked to attend Monday to Friday “between the hours discussed with the manager” with a 30 minute lunch break. The letter said the internship was an opportunity for her to gain some work experience, and “in no way is this an offer of employment and you are not considered to be an employee”. There would be no salary, but she would be paid reasonable expenses. The rest of the letter deals with confidentiality and copyright, and deductions for expenses owing if company equipment was damaged. She was provided with a tablet.

11. The claimant also signed a new starter details form. Among other things it asked for details of her bank account.

12. Another document she was asked to sign was a nondisclosure agreement, lasting two years from termination by either party about the confidentiality of information about business plans, practices and personnel.

13. All these documents are dated by 25 September 2019 and so seem to have been backdated to her start date. The date they were actually signed is disputed. In our finding the new starter form was signed on Thursday 26 September (the date asserted by the second respondent) as it was photographed for the respondent’s record on that date. Having regard to other discrepancies , we believe the nondisclosure agreement was signed on Friday 27 September, rather than on 25 September as the second respondent says, but like the others dated 25 September being the start date.

14. The claimant says that during the first day at work the claimant asked a number of questions about her personal life, in the context of needing to earn money in the case of her relationship breaking down. This, as all of the conversations during the

week, is denied. In our finding there were such questions, but of themselves were not seen by the claimant as harassment. Plausibly they may have occurred in the course of introductory discussion and by way of conversation, although in most professional settings they would be viewed as unwise.

15. In the course of the second day, the claimant says the respondent asked about her love life and said he did not see anything wrong in having a little fun on the side no it isn't serious, and that he also referred to massage places "you can go to which have a happy ending at the end of it" and that he had used occasionally. Again, this is denied. In our finding, such remarks were made. They are inappropriate as between employee who have no other relations and where the employer takes the initiative. There is no evidence that the claimant was upset by these remarks at the time, though she viewed them with hindsight by the end of day three.

16. There was contested evidence about who was where. In our finding the claimant arrived on time for work each day. The second respondent did not spend all day with her as he had other engagements. For example on the first day there was conversation between 30 to 60 minutes, and later meet up at barn station to handle the business cards when she went on to see a prospective client in barking. On the second day, she arrived on time, there is second respondent may have arrived at about 11 or as late as 3 pm, but they spent some time together. An employee who was not making notes at the time and it did not see the day's events is remarkable may well have misremembered what happened when, but is less likely to have made up whole conversations, and we accept what she said even if it is not clear that it happened precisely when she said it did. She relies on Google records of her movements each day which show that she worked long days and where she was at each time. The respondent has produced some car parking receipts only.

17. Towards the end of the second day the respondent says he lost confidence in the claimant's ability to do the job, because of the relatively low number of leads she had generated from her calls. He says he was "gearing up to let her go next day". Next morning he telephoned the runner-up in the interviews, a woman called Isabella, and offered her the same work experience terms, which she accepted. Isabella was to collect the tablet on Monday.

18. On the third day, Friday 27 September, the claimant started work at 8 a.m. as required. At some point in the middle of the day there was a conversation with the respondent when, learning that she only made eight appointments that day, he said she should get 10 or he would have to hire someone else and share the opportunities with her, which would cut her pay in half. Respondent asked her into his office on the first floor of the lightbox to sign some papers. This, she says, is when she was asked to sign the nondisclosure agreement. She says that on signature the second respondent commented jokingly that now he could say anything he liked because she could not reveal it. It was in the office he says, said that he was considering setting up an escort service and asked she if she was interested – if she joined the business they would have to try out the possible people to guard the website to see if there are any good, and then, that he said the claimant should try him out and wrapped a hand moved towards his groin area, then saying he was joking. The claimant describes how she had to wait some time to get out of the room because he was collecting papers and postponing the departure. On the pavement he gave her a hug, and said he wanted her to be "very comfortable with me to the point where we can openly talk about escorts and I want to be able to go away with you on a business trip and give you a gift waiting in your hotel room". They

were to meet again on Monday. He sent a message with a list of material she should read and study over the weekend in preparation for better performance on Monday.

19. The second respondent denies that any of these remarks were made. We noted that although she was challenged in cross examination about the detail of her movements on various days, she was not challenged on what had been said to her, or that she had misunderstood. It was suggested that she had made up the whole story for gain.

20. The tribunal accept there are a number of discrepancies, and we are still not clear that the nondisclosure agreement was signed on Friday rather than on one of the two preceding days. However, weighing up the evidence of the two, we find the claimant more credible.

21. An important piece of evidence, because close in time to the disputed events, is a message the claimant sent to her boyfriend's mother on the Sunday afternoon. She wrote "hiya, I have a slight dilemma. This new job… The guy I'm working with has been a little inappropriate with me on Friday making a comment about "trying him out" in that way. Sorry I feel weird explicitly saying it so I hope you get what I'm trying to say. He's getting me to do all this extra work outside of working hours bearing in mind it's unpaid for first two weeks and has threatened me as if I don't do it then he will hire someone else to do it or not offer me a job at the end of it because employment isn't guaranteed. I'm on the fence about going back and I just wanted to see what your thoughts were what I should do".

22. We know some of this is actually true - for example, the second respondent was bringing someone else in. She was also working very long hours, the advertisement having suggested her core hours would be 10-4. She had been told that her performance was not good enough. It would be rational consider whether to go back the second week and work more long hours with the threat that this would be wasted input. There was no need to add that the second respondent was being "inappropriate" or "weird", both of which would be understood from one woman to another as indication of some sexual attraction or intent. The details of what he said or did might not have been revealed straight off, and may have depended on their exact relationship. She may well have felt inhibited at giving the detail to her boyfriend's mother, how friendly they were. We considered whether she had embellished some less sinister comment, but concluded that the sequence of remarks rang true, and in particular that the hug suggested he understood from her reaction that he may have crossed a line.

23. It was suggested that he had prevented her from leaving the room. In our finding this is wrong. She wanted to leave, and was waiting for him to collect his things, which seemed to take a long time, and rather than leaving of her own initiative she deferred because he was the boss and she was much younger (by 13 years) , and she needed his approval if she was to complete the unpaid spell successfully, but she was not forcibly detained.

24. The claimant decided on the Sunday evening not to go back to work. She decided to post the laptop back but was advised against because of the risk of damage for which she might be charged. There was a plan for the boyfriend to return it.

25. Although the claim form says that the claimant resigned, in fact she took no steps. Soon after 8 AM the second respondent telephoned to ask where she was. Her boyfriend took the call, as shown by the claimant's contemporary message and in the

respondent's evidence, while he says he has no recollection of taking the call. The second respondent said angrily that he would report to the police the tablet was stolen, the claimant said someone could collect it, the second respondent said he had some bailiffs in the area (though here, the complainant's contemporary messages with her boyfriend's mother are cut off) and in the event arrangements were made for her to hand it over at Clapham Junction station, which was done.

26. A few days later the claimant asked about payment of £12 for her travel during the period, asking if she should send her bank statements as evidence. The respondent says he did not reply because he needed receipts.

Relevant Law

27. Section 13 of the Equality Act 2010 prohibits direct discrimination where a person treats another less favourably than he treats or would treat another on grounds of a protected characteristic, which includes sex. The discriminatory act alleged in this case is dismissal.

28. Section 26 of the Equality Act prohibits harassment, defined as this:

> (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) v iolating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).

29. In order to decide whether conduct has the effect in 26(1) (b), tribunals must take into account: the perception of B, the other circumstances of the case, and "whether it is reasonable for the conduct to have that effect" – section 26 (4).

30. Sections 39 and 40 deal with who is covered by these provisions in the field of work. Section 39(1) states that an employer must not discriminate against a person in the arrangements he makes in deciding to him to offer employment, or the terms on which she offers employment, or not offering that person employment.

31. Section 40 provides

> **Employees and applicants: harassment**
>
> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's;
>
> (b) who has applied to A for employment.

32. Who is an employee is widely defined in section 83 (2), and includes not just those employed under a contract of employment or apprenticeship but also those working under a "contract personally to do work".

33. Mr Morris, for the respondent, did not make any submission on this point, but relied on the denial in the response that the claimant was an employee within the meaning of the Act.

34. For the claimant, Mr Clarke referred the tribunal to 2 cases: **Murray v Newham CAB 2001 ICR 708,** and **X v Mid Sussex CAB 2012 UKSC 59**. In the first case, concerning disability discrimination against a would-be volunteer, there is no mention of any issue as to his status; he was treated as an applicant for employment . The **Mid Sussex** case by contrast discussed at length whether the Equality Act applied to volunteers. The volunteer had worked for six months before being asked (related to disability) not to come any more. By the time the case reached the Supreme Court, the volunteer was not relying on the provision of the Disability Discrimination Act that made it unlawful to discriminate "in the arrangements which (an employer) makes for the purpose of determining to whom he should offer employment" and instead relied on the fact of dismissal, and on the Framework Directive, in particular that it applied to "conditions for access to employment, to selfemployment or to occupation", seeking to argue that occupation was wider than employment and would cover volunteering. The Supreme Court concluded that as the Framework Directive discussed training and work experience, it was not directed to voluntary activity.

Status - Discussion and Conclusion

35. The Tribunal, having considered the facts of this case, hold that it is clear from the advertisement and the invitation to interview that the two-week unpaid internship was advertised as an unpaid trial period, which would turn into paid work after two weeks. The claimant entered the "internship" because she understood it was likely to lead to paid work, not because she wanted any training or work experience to embellish her CV. The details of hours, pay and probation period before pay would increase clearly show that both parties to the agreement contemplated paid work if she was satisfactory in the first two weeks. It was part of the "arrangements for offering employment", of the nature of an extended practical test following interview. It is in no way like the six months of carrying out a full range of duties of the CAB volunteer; it was never contemplated that the volunteer would be paid more than expenses at any stage. The claimant's understanding corresponds to the objective reading of the advertised terms and invitation to interview. The work experience letter is silent as to what was to happen next, or even on when the period was to finish, ad does not reflect the agreement between the parties, the terms of which must include the prior documents on the basis of which she was offered the placement and on which she accepted the offer and started work. If the respondent says that the advertisement and into the invitation to interview were *only* for training and work experience, then the dangling of pay expectations looks like a trick. In our finding, the disputed events are covered by section 39 (1) and section 40.

36. The Tribunal has not been asked to consider the application of National Minimum Wage Act, or whether the claimant was in fact a worker. Had we done so, we might have been concerned that she was asked to do real work, not shadow someone else, was expected to attend certain hours, and then threatened with someone else being hired because her performance in the number of leads recruited was below expectation. These are not characteristic of work experience. We would have invited submissions on the point had it been pleaded.

37. As to whether there was harassment, in our finding the remarks on the Wednesday and Thursday by themselves were insufficient to amount to intimidating or hostile conduct by themselves, but they are background indicating the truth of what happened on Friday which did amount to unwanted sexual conduct which was degrading, humiliating and offensive, and which is, in today's delicacy of language, "inappropriate", though that term may cover a range of conduct.

38. Formally, we did not consider the termination of the placement on 30 September as discrimination because of sex, but as an aspect of remedy for the harassment which led her to decide not to continue.

Remedy

39. Having heard the evidence on the first hearing day, it was agreed that we would give an indication of our decision on liability by 12 noon on the second day, which we did. We then heard evidence on remedy and reserved judgement. We were invited to give an ex tempore decision, but declined because there was insufficient time to type out full reasons and then read them, and there is no facility for recording a CVP hearing.

40. The claimant explained her upset. We do not accept the full account in her witness statement for a number of reasons. It was suggested, without detail, that she had suffered depression following the work experience period. In oral evidence she agreed she had been diagnosed with depression in 2017 and had continued to take antidepressants, with occasional changes of prescription, from then, and have not sought alternative or additional treatment as a result of what occurred. We concluded there was no aggravation of depression. We accepted that her confidence may have taken a knock.

41. The witness statement indicates that she was without work until June 2020 because she found it so difficult to be interviewed after her experience. The schedule of loss shows two periods of mitigation before she got a job at the beginning of March 2020. The first of these was a three-week spell in telephone sales starting 12 November 2019 and paid £1,500 gross per month. She resigned the job voluntarily concerned about the content of what she was selling. She certainly made comprehensive efforts to find other work, applying for traineeships in all sorts of fields, including as swimming instructor and trainee radiographer, although she agreed she had no swimming qualifications or relevant GCSE. She did not in the six weeks between ending with the respondent and starting a new job look seriously at being a waitress or bartender, though for that. It was reasonable to look for office work with a view to developing career rather than the limited hours of minimum wage hospitality jobs.

42. However, in our finding it was unlikely that even if she had completed the two-week work placement the respondent would have gone on to pay her as he promised. At best, in our finding, he would have offered her some commission only deal. The real harm done by her decision to end the arrangement and not go to work on 30th September was that she lost that week, and probably - because she was knocked back and upset – the next, when she might have jobhunting. In other words, she lost the chance of finding paid employment earlier than 12 November. However, it cannot be said that she would have been able to find suitable work earlier than 12 November. There may have been some effect as she asserted, of loss of confidence in interview, but she was not able to describe any interview where she felt she had missed a second interview because of nerves, and she had no track record of relevant employment. That is why it is a loss of chance. Doing the best we can, we award one week's loss of earnings, taking as a measure the amount she earned in the next sales job, which she said was £1,500 gross, month. That will have been £310 per week after deduction of income tax and national insurance contributions.

43. In addition to that, we award £12 for loss of expenses over the three days. Like most people she will have used a bank card to tap in and out of public transport, and could not be expected to produce receipts other than bank statements.

44. We turned injury to feelings. The schedule of loss seeks £30,000. In our finding the account in the witness statement is exaggerated, and at one point it occurred to us that it may have been cut and pasted from some other statement, as it refers to race as well as sex. There has never been a race claim. There is a difference in race

between the claimant and the second respondent, but it is entirely wrong to think that it featured in any way in what happened. The suggestion of depression resulting is exaggerated. We do not blame the claimant for a statement prepared by her solicitor, safety, save that she did sign it with a statement of truth and should have checked it with a more critical eye. Though not trivial, this was harassment at the lower and of the lower band of **Vento v Chief Constable of West Yorkshire (2002) EWCA Civ 1871**, as updated following Presidential Guidance from time to time. The guidance current as of presentation of this claim set that band at £800-£8,800. We decided the just award was £1,200.

45. We were invited to award aggravated damages because the respondent had denied all events and forced her to a hearing, and had threatened her with an order for costs. This had not been pleaded or included in the schedule of loss. We did not hold there was anything untoward or insulting in the way the claim had been conducted, nor were there any other features indicating an aggravated award. The mention of costs arose from an offer of settlement (which the claimant's counsel should not have mentioned, as it was privileged). There is nothing improper of itself in mentioning costs in the context of settlement negotiations.

46. The Industrial Tribunals (Interest on Awards in Discrimination The Cases) Regulations 1996 provides that in discrimination cases tribunals may award interest on awards and should consider whether to do so. Interest is awarded at the judgement rate (8%) from the date of injury for awards of injury to feelings, and from the midpoint of loss for awards of specific financial loss. In this case it is 73 weeks from 30 of September 2019 to today, and 72 weeks for the loss of chance award. That makes ££134.77 and £35.67 respectively.

47. The individual and corporate respondents are for practical purposes identical and there is no reason to make an order apportioning liability between them. They are jointly and severally liable.

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Employment Judge Goodman

Date: 22nd February 2021

JUDGMENT and REASONS SENT to the PARTIES ON

23 February 2021

FOR THE TRIBUNAL OFFICE