EMPLOYMENT TRIBUNALS

Claimant: **Mrs J E Witt**

Respondents: **(1) New Quay Honey Farm Limited**
(2) Mr S C O Cooper

Heard at: **Cardiff** **On: 11 to 13 January 2021**

Before: **Employment Judge P Davies**
Members: **Ms A Burge**
Mr B Roberts

Representation:
Claimant: **Mr D Brown (counsel)**
Respondent: **Mr J Morgan (counsel)**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that

1. The Claimant was unfairly dismissed. The First Respondents do pay the Claimant the sum of £10,223.00 (being a basic award of £5278.50 : compensatory award of £4544.50 : and loss of statutory rights £400)
   The Recoupment Regulations do not apply
2. The Claimant was victimised as a result of doing a protected act namely making an allegation that the Respondents had contravened the Equality Act 2010.
3. The Claimant was the subject of harassment because of her age.
4. The Claimant was not undertaking “like work” for the purposes of making a claim for equal pay
5. The First and Second Respondents do pay the Claimant the sum of £6,000 as compensation for injury to feelings in respect of the discrimination and harassment together with interest of £ 720

REASONS

1. By a claim received on 11 December 2019 the Claimant, Mrs Janet Elizabeth Witt, complained of unfair dismissal, discrimination because of age and discrimination because of sex, notice pay, holiday pay, and arrears of pay. The Claimant had been employed by the First Respondent, New Quay Honey Farm Limited, but the claims of discrimination/victimisation/harassment had also been brought against the Second Respondent, Mr Samuel Charles Orlando Cooper.

2. The Response dated 20 January 2020 which was filed on behalf of the First and Second Respondents denied that the Claimant had been unfairly or constructively dismissed as alleged or at all, and denied that the Claimant had been subjected to any discrimination, victimisation or harassment and also denied that the Claimant had been subject to a breach or breaches of the Equal Pay Provisions of the Equality Act 2010 as alleged or at all.

3. The parties had agreed a list of issues. It was agreed that the Claimant had continuity of service from 19 April 2002 and that all the claims were in time. Although the agreed List of Issues included sex discrimination contrary to Section 13 of the Equality Act 2010 namely, did the Respondent treated the Claimant less favourably than they treated or would have treated others on the basis of her sex with the alleged detriment being paying the Claimant a lower rate than her comparator Mr Mark Grinszpan, this was not pursued as it was accepted that it related to pay and could only be a claim made under the Equal Pay provisions of the Equality Act 2010.

4. The Tribunal heard evidence from the Claimant; Mr S C O Cooper; Mr Mark Grinszpan, ex-employee of the First Respondents; and Ms Katie Reynold, ex-employee of the First Respondent.

5. The Tribunals findings of fact are as follows: Prior to the Second Respondent setting up the limited company of New Quay Honey Farm Limited (the First Respondent) in 2015, the business of keeping bees and producing honey, mead and related products at the farm situated in Llandysul, West Wales, had operated as a honey farm from 1995. At that time the farm was being run by the Second Respondent's parents. The farm had a farm shop, a tea room, and exhibition regarding bees and was operated on a seasonal basis, although the farm itself operated for the entire year. The season was from just before Easter and would finish typically in October.

6. The Claimant commenced employment in the farm shop on 19 April 2002. It appears that the Claimant was not issued with any Statement of Terms

and Conditions at that time regarding her employment. The Claimant was issued with an Employee Handbook and a written Statement of Employment on 6 April 2006 (page 46 of the bundle). That written Statement of Employment under the heading job title says that the Claimant is "Shop Manager". That document is not entirely accurate because the document says that employment began on 6 April 2006 whereas it was in fact 2002. Under the heading hours of work it is said that the Claimant is employed to work part-time and that normal working hours would be 24 hours per week which should be worked every Sunday, Monday, Tuesday between the hours of 10.00am and 5.30pm. It also states she will regularly be required to work weekends. Under paragraph 11 headed ''ending the employment'' there is reference to the minimum statutory notice for the ending of employment. In paragraph 12 there is reference to a disciplinary procedure with possible outcomes being oral warning, written warning, final written warning, and dismissal. There is reference to what would be normally considered to be gross misconduct with a list of non-exhaustive matters such as serious insubordination. It gives the right for the employee to be suspended during any investigation and that any decision to dismiss will be taken only after a full investigation. Under paragraph 13 there is a grievance procedure.

7. It was not in dispute that the Claimant would have received that document of the terms of her employment. What is in dispute is whether the Claimant received a subsequent Contract of Employment which begins on page 53 of the bundle. That document in paragraph 1 under job title says that the Claimant is "Assistant Shop Manager". In paragraph 2 under the heading start of employment it says the employment started on 1 March 2015. Under the paragraph 4 notice period there is said to be a maximum of 12 weeks' notice. Under paragraph 6 salary there is nothing put in regarding the payment per hour. Under hours of work and overtime it is said the normal hours of work are from 9am until 5pm from Tuesday to Saturday. This document is not signed by the Claimant. The Claimant denies ever receiving such a document. It is noted that under a page heading duties and responsibilities there is reference to shop manager and candle making.

8. Although the Claimant worked only during the season, by agreement the salary earned during that season was spread into equal amounts and paid over the whole year that is payments for 52 weeks of the year.

9. At page 260 there is a Contract of Employment for Mr Grinszpan. That Contract of Employment describes Mr Grinszpan as "Operations Manager". It also refers to employment starting with the company on 1 March 2015. Mr Grinszpan's salary is left blank. Mr Grinszpan's signature appears on page 265 with the date 10 May 2019.

10. The Second Respondent said that both the Claimant and Mr Grinszpan's contracts were put together in 2019 by a seasonal worker on behalf of the First Respondent. This individual was identified as Miss Maggie Woodcock. The Second Respondent says that the Claimant side-stepped the signing of the new contract by requesting time to read the information and then letting it drift. The Second Respondent said that because of the Claimant's attitude being confrontational he was not clear in his mind what the best way forward was. The Claimant denied ever receiving this contract of employment. We accept the evidence of the Claimant in relation to this matter. It has been the subject of some disagreement between the parties at this hearing about what was the proper job title of the Claimant, Shop Manager or Assistant Shop Manager. The details contained in the contract about commencing employment in 2015 bear no relationship with the fact that the Claimant had been working in the shop since 2002. Indeed she was the person who ran the shop for most of the working week, except in relation to when she did not work at the farm. It is highly unlikely that the Claimant would have accepted this contract of employment which refers to her as Assistant Shop Manager and gives a date of commencement of employment as 2015. We find that this contract of employment was never provided to the Claimant to sign.

11. The Claimant was employed as a Shop Manager and her duties included stock management, till operator, communicating with customers, assisting with school visits, training staff that were needed from time to time in the shop, and teaching wax candle making on school visits where this was needed. From the time that the Claimant commenced her employment in 2002 there was some flexibility when she worked, for example, she would sometimes return February or March to prepare the shop ready for Easter. Usually the Claimant's employment would end at the end of October and she would be working 4 days a week plus extra days such as bank holidays. Up to 2015 the Second Respondent's parents were running the business. The Claimant got on particularly well with the Second Respondent's mother and she became a friend of the Claimant. The Claimant and the Second Respondent's mother would socialise as well as interact in relation to the Claimant's employment.

12. Although the Second Respondent had from time to time been involved with the business, it was not until June 2011 that the Second Respondent and his family moved back to Wales in order to work on the farm. As a result of the illness of his mother, the Second Respondent took over control of the honey farm in the new financial year of 2015. The First Respondent company was set up to operate and run the honey farm. The Claimant said that until 2015 that she had little contact with the Second Respondent and we accept that evidence. The Claimant accepted that when the Second Respondent took over that she disagreed with some of the things that the Second Respondent was doing because he was not

involving her in the matters. As an example the Claimant said that one of the things which she found frustrating was that she did not have enough stock and the Second Respondent did not understand that stock was needed. The Claimant said she was running the shop as the Second Respondent's mother had taught her and if she asked any questions she was talked down to by the Second Respondent. In short the Claimant was frustrated with the Second Respondent's management style.

13. The Second Respondent's evidence was that the Claimant gave every appearance that she disliked him making changes to the operation of the business. The Second Respondent referred to changes such as putting shelving in and where stock was displayed as well as changes in labelling. However the Second Respondent accepted that the Claimant was a good worker and someone who he referred to as "stalwart" in some respects. Having heard the Claimant give evidence, and noted that some time ago in the 70's the Claimant had been a teacher for 10 years, and also having the evidence of the Second Respondent, it seems that the difference in management style of the Second Respondent from that of his mother was a source of concern on the part of the Claimant. As an example the Claimant said that in relation to shelving that she deemed it necessary to move some jars that had been placed on a counter which resulted in the Second Respondent becoming angry, and thereafter there were exchanges on two occasions with the second occasion being a sort of apology. Frustration on the part of the Second Respondent which resulted in him becoming angry we find to be correct on the balance of probability taking into account matters which occurred around the time of the ending of employment, and supported by the witness Ms Reynold who described the Second Respondent's conversations on at least two occasions with individuals over the telephone and his raising his voice.

14. We accept the evidence of the Claimant that she was not resistant to change as such but that she was not told of the changes and/or the manner in which changes had been implemented and there was a lack of consultation and discussion. This was something that the Claimant found frustrating. There is no doubt that the Claimant wanted to undertake her duties as efficiently and effectively as possible.

Employment of Mr Mark Grinszpan (comparator)

15. Mr Mark Grinszpan was employed as the Tea Room Manager at the farm from April 2016. Mr Grinszpan's background includes having been a head chef in the Feather Royal and at the Black Lion in New Quay. He ran his own business of a pub/restaurant for 3 years. The duties that Mr Grinszpan was employed to undertake included making cakes for stock and managing stock rotation; responsibility for all health hygiene and cleanliness; designing pricing working profit for all items on the menu, managing staff rota, hiring of temporary staff, serving customers, and

general duties. Mr Grinszpan would also make marmalade to be sold in jars as well as chutneys. From 2019 baguettes were also served in the tea room.

16. In November 2018 Mr Grinszpan started doing extra amounts of work which he described as bits and pieces. Mr Grinszpan also started to work in the meadery either processing mead or bottling and on the stock management calculations of the duty payment. It was then that the Second Respondent considered that Mr Grinszpan should have the title of Operations Manager being the most senior member of staff on site if he was not present and if there was any problems, for example, in relation to difficult customers in the shop that he would be in charge of dealing with the situation.

17. Mr Grinszpan continued to be employed outside the season. We find that he was highly regarded by the Second Respondent who increased his hourly rate to reflect the amount of work being undertaken as well as the responsibility given to Mr Grinszpan. These changes in respect of Mr Grinszpan's employment would have been at a time when the Claimant would not physically be working at the farm. The Claimant said that she did not know about Mr Grinszpan's role until she went back to work in 2019 when she was aware that Mr Grinszpan had been doing work in the meadery though she was not entirely sure what the work involved. Although aware that Mr Grinszpan had been working over the winter the Claimant said that she was not there in the winter to know all the details.

Events in August 2019

18. About 2 to 3 days before 16 August 2019 the Claimant had a discussion with Mr Mark Grinszpan about how much he was being paid per hour. The Claimant's hourly rate had increased to £9 per hour from May 2019. Mr Grinszpan told the Claimant that he was being paid £10 per hour. Mr Grinszpan said that the Claimant appeared to be upset about this difference. We accept the evidence of Mr Grinszpan. The Claimant then at some time had a conversation with Ms Reynold about how much she was earning and also whether she was aware how much Mark Grinszpan was getting more. The Claimant said to Ms Reynold she did not agree with it and that she was going to speak to the Second Respondent.

19. The Second Respondent's evidence was that he had been informed by Ms Reynold about the fact that the Claimant seemed surprised about the difference in pay between herself and Mr Grinszpan some 2 or 3 days before 16 August 2019. We accept the evidence of the Second Respondent was made aware by Ms Reynold about the concerns that the Claimant had expressed about the disparity in pay between herself and Mr Grinszpan.

20. The Second Respondent was aware that the Claimant was not present in November 2018 when Mr Grinszpan was promoted. He did not inform the Claimant at any time about what had occurred and the increase in salary. We find this was consistent with his management style which was not to involve staff in changes or communicate with staff about such matters. As an example Ms Reynold said that the Second Respondent made decisions alone and things were not discussed with a lot of the staff. This appears to be part of the difficulties which had arisen during the course of the later stages of employment with the Claimant.

21. The Second Respondent said that having been informed by Ms Reynold about the Claimant's surprise about the salary differential, he did expect the Claimant to require an explanation because she was not present in November 2018 when Mr Grinszpan was promoted. The only communication that the Second Respondent had when the Claimant returned to work in 2019 was to say that any difficult customers could be referred to Mr Grinszpan.

Events on the 16th August 2019

22. There is a wide divergence of evidence between the Claimant and the Second Respondent about the sequence of events and what took place on 16 August 2019.

23. However it is common ground that on the morning of 16 August 2019 the Second Respondent was working in his office when the Claimant came in. The office is adjacent to a stockroom where staff come and go during the day. The Claimant did not knock as it was not necessary to do so. She said "hello Sam" and said she disappointed to find out that Mark was paid £10 and she was paid £9 per hour. The Claimant said that what she was paid was unfair. The Second Respondent said that it was about responsibilities to which the Claimant said it was about equality. The Claimant then left the room. The Claimant says she did not use the word discrimination, which is what the Second Respondent says was used by her not the word equality, and that she was not disrespectful and say rubbish to the Second Respondent. We accept the evidence of the Claimant that the Second Respondent was angry in his response and that she considered it best to leave because she was not looking for a confrontation. We reject the evidence of the Second Respondent because it is more probable than not that the Second Respondent was angry about the fact that the Claimant was talking about equality, which the Second Respondent understood was a reference to discrimination related to the disparity of pay.

24. The events which then occurred support the Claimant's account of the attitude of the Second Respondent and the fact that he was in an angry

frame of mind. The evidence of the Second Respondent himself then and later indicated that he was very agitated about being accused of discrimination.

25. The Claimant went back and then upstairs to the exhibition area before coming down to the shop. The Second Respondent approached the Claimant in the shop and shouted that she was behaving like a child. The Second Respondent said that he asked the Claimant why she thought it was OK for her to just barge into his office make unjustified accusations and refuse to listen to his replies and that her approach was very childish. Whilst the Second Respondent said that he did not say the words behaving like a child, we accept the evidence of the Claimant that the Second Respondent did say those words and that he was in an angry state and did also say words about “how dare you” and also said “shame on you”. We accept that the Claimant was subjected to these outbursts by the Second Respondent because he was so exasperated that he lost his temper.

26. We accept the evidence of the Claimant that she picked her bag up and walked through the tea room and kitchen and said to Mr Grinszpan that she was leaving.. She then walked up to where her car was parked some distance away. The Second Respondent followed the Claimant and was shouting at her. The Second Respondent agrees that he followed the Claimant and the Second Respondent says he was saying that her actions were unreasonable and it was unnecessary for her to walk away. The Second Respondent agrees that the Claimant did not respond to one word that he had said. The Second Respondent says he left her at the car and walked back to the office. He then alleges that the Claimant narrowly avoided hitting him with her car. We accept the evidence of the Claimant that she did not respond to the Second Respondent and that the Second Respondent carried on shouting and swore at her until he was walking in front of her car. The Claimant had to drive down the track and the Second Respondent made a V sign to the Claimant and that she did not seek to narrowly miss him as suggested by the Second Respondent.

27. Mr Grinszpan’s evidence was that on the 16th August because there were no doors between the shop and the tea room, it being one building, that he heard a loud voice being the Second Respondent who was raising his voice. Mr Grinszpan did not think anything. Ms Reynold said that on 16 August she did not hear an initial discussion but observed parts of it. When the Second Respondent came in he was upset that the Claimant had accused him of discrimination. The Second Respondent had a raised voice and was angry and upset. She did not hear anything such as “fuck off”. Ms Reynold said that she had seen the Second Respondent angry like that before being once or twice on the phone when he was being messed around. Ms Reynold said that the Claimant was annoyed as well.

28. The evidence of Mr Grinszpan and Ms Reynold is more consistent with the account given by the Claimant of the attitude of the Second Respondent and his mood in addressing the Claimant, than it is with the Second Respondent's evidence when he denied that he was angry on that day. We find that the Second Respondent was angry and that he was confrontational to the Claimant as demonstrated by his not leaving matters as they were in the shop but following the Claimant to her car and continuing to remonstrate by shouting and swearing. We have no hesitation in accepting the evidence of the Claimant about what occurred on 16 August 2019.

29. The Claimant was due to work next on 20 August 2019. The Second Respondent said in his evidence that because 16 August was a Friday and very busy that he did not write to the Claimant that day that due to his personal commitments, being his children, and his next working day was Tuesday 20 August 2019. Again it is common ground between the parties that there was no communication between the Claimant and the Second Respondent from the time that the Claimant left work on 16 August until the events which occurred on 20 August 2019 when the Claimant attended for work.

Events of 20 August 2019

30. The Claimant says that over the weekend she was considering going to the police because of what had happened but decided not to. She attended for work on 20 August assuming that the Second Respondent would have now calmed down. The Claimant arrived for work at about 9am. She went to speak to Mr Grinszpan and asked him to come with her to speak to Sam and Mr Grinszpan said yes. Ms Reynold was present and said that she would come however the Claimant would have gone home she said if Mark had said no to coming with her. The Claimant said that she had nothing to apologise for and she had not given the impression of resigning at all. The Claimant had not said on 16 August that she was leaving and would not ever be back. We accept that evidence of the Claimant and that she did not say, as remembered by Ms Reynold, that she was leaving and will not ever be back.

31. The Second Respondent arrived for work at about 10am. Ms Reynold said that she spoke to the Claimant after she had arrived and said hello and everything seemed to be quite normal. When the Second Respondent arrived Ms Reynold said she told him that the Claimant was there, and the Second Respondent asked her to be around so she followed the Second Respondent into the tea room. The Second Respondent said it did not make any sense in the Claimant arriving back for work because he believed that the Claimant had handed in her notice and resigned on 16 August. The Second Respondent denied that he said to the Claimant on

20 August that she was fired or told her not to come back. We accept the evidence of the Claimant that the Second Respondent did say because it is clear that this is what the Second Respondent desired. During the weekend the Second Respondent had approached one of the persons associated with an owl attraction linked to the farm and asked that person if they were interested in taking the role of Shop Manager. That person had agreed. We reject the evidence of the Second Respondent that he had not made any definite plans along that line. We find that by 20 August 2019 the Second Respondent had determined that the Claimant was not going to come back to any form of employment with the First Respondent.

32. The Tribunal was referred to correspondence between the parties after 20 August 2019 which it is helpful to look at in order to assist in consideration of what took place on 20 August 2019.

33. The Claimant wrote a letter sent by Royal Mail recorded delivery dated 28 August 2019 saying "Dear Mr Cooper, I write further to our last face to face conversation, which took place on 20 August 2019. Please provide me with the reasons for my dismissal in writing by 12 September 2019". (Page 61 of the bundle). On about 12 September 2019 the Second Respondent sent a reply to that letter (page 62 of the bundle). The Second Respondent starts by giving an account of matters from 16 August in which he says he repeatedly asked the Claimant not to leave. The Second Respondent says "in view of your statement there was nothing to discuss and that you had driven off something you had never done before your actions seemed both definite and final. As far as I can ascertain, you made no attempt to contact me on the phone Friday Saturday Sunday or the Monday about the situation, so I was forced to conclude that you had left for good, and made alternative arrangements to staff the shop. Your appearance in the shop on Tuesday 20th was very surprising, and you're unwillingness to discuss previous events, made the situation impossible as I had already engaged a replacement."

34. The written reply of the Second Respondent about his actions over the weekend and the views that he had come to do not support the evidence of the Second Respondent that he had not filled the position of Shop Manager and that he had not considered that the Claimant had ended her employment. Indeed in his evidence to the Tribunal he described the Claimant as being a good employee in many respects a stalwart in some respects and on the day her actions were confusing. It is surprising that if the Claimant had said that she was leaving and never coming back that the Second Respondent did not have mention this in his reply. He had had sufficient time to consider what to say since his reply was several days after the letter from the Claimant asking for reasons for her dismissal.

35. We accept that the Claimant's evidence that on 20th August that the Second Respondent was quite aggressive. The atmosphere was such that another employee Miss Eleri Jones intervened to say that there were customers present and that they should continue the conversation away from the customers. The Claimant was looking for someone else to be present other than Ms Reynold. The Claimant cannot remember if she was asked by the Second Respondent to come from behind the counter but the Claimant was clear that she did not want to be alone with the Second Respondent. However she did go to the office with the Second Respondent after Eleri Jones's intervention. At this time Mr Grinszpan was in the kitchen. The Claimant says that the Second Respondent did not say to arrange a meeting. When they had gone into the office the Claimant says that every time she tried to speak the Second Respondent shouted over her about her accusing him of discrimination. Amongst the matters the Claimant said that she was described as "old woman" .We accept that the Second Respondent did say this as his view was that the Claimant was a person resistant to change and set in her ways.The Claimant cannot recall all of what was said by the Second Respondent but there was no talk of a resolution or any offer to discuss. The Second Respondent says that he was saying it was clear his understanding was the Claimant had resigned her position on the Friday and that he took exception to her accusation of discrimination very much. The Second Respondent says that he was called "a fool" by the Claimant. The Claimant denies saying that to the Second Respondent but we accept that it probably was said by the Claimant who was responding to the accusations of discrimination and the fact that she was called "old woman" by the Second Respondent. Whilst the Claimant may have been reluctant to have gone into a meeting with the Second Respondent and may have been concerned at his behaviour, it was likely that she would have responded to the statement of being "old woman". The Claimant had a very poor view of the Second Respondent by this time because of his behaviour. It would be consistent with her calling the Second Respondent a fool.

36. The Claimant then left the office area and walked to the Second Respondents parents' house. The Claimant says that the Second Respondent's father told her that there was no point so she walked away. By then the Second Respondent had taken her bag and put it on the bonnet of her car.

37. In the Claimant's bag were 3 or 4 payslips that she had picked up that morning because she had seen her name on the top and assumed that because she was owed payslips they were her payslips. In fact only one was her payslip and the others were payslips of other employees. We accept that the Claimant did not deliberately take other peoples payslips.

38. The Claimant then left as she believed that she had been dismissed by the Second Respondent. The only other contact between the parties were a number of telephone calls made by the Second Respondent to the Claimant asking about the payslips. The Second Respondent said there were about 5 telephone calls because the Claimant would not go back herself except to come to the end of the drive so an employee such as Katie could come to collect the payslips. These were very difficult conversations between the parties which would be consistent with what had happened on earlier on 20 August 2019.

Submissions

39. Both the Claimant and Respondent made written and oral submissions. It is not the intention of the Tribunal to repeat all matters particularly those set out in the parties' written submissions.

40. On behalf of the Respondent it was submitted that the heart of the case is what really happened on 16 and 20 August 2019. It was submitted that what occurred on 16th was the Claimant accusing the Second Respondent of paying more to Mr Grinszpan in an abrupt fashion and that the Claimant failed to put in any written grievance about the matter. There were no links to sex. Further the words used by the Claimant it is clear that the Claimant had not been dismissed and that the Claimant was resigning. The Claimant was asked to reconsider her resignation and she called the Respondent a fool. Therefore the Claimant resigned on 16 August 2019. The Claimant had not indicated any change over the next one to two days.

41. The Claimant had not made a protected act for the purposes of a victimisation claim. The term "old woman" was not in the letter written by the Claimant. Regarding equal pay the Claimant could not assist in relation to everything done by Mr Grinszpan. It is clear that the Claimant's work was not like work to that of Mr Grinszpan.

42. The Claimant has not looked for any other job although she did get a job on 2 October 2019. Issues of ***Polkey*** and contributory conduct arise. It is not part of the reason for the dismissal of the Claimant that it had anything to do with discrimination. The Tribunal should look at its own notes in order to come to conclusions which support the proposition that there is no victimisation or harassment or discrimination of any kind.

43. On behalf of the Claimant it is said that the Claimant did not resign and the key question is who really terminated the contract of employment. It was the Respondent who dismissed the Claimant. The Second Respondent did say that part of the reason for dismissal was because of the claim of the allegations of discrimination. The Second Respondent had already engaged a replacement before the Claimant came to work on 20 August 2019. In short the Claimant's evidence is more reliable than that of the

Second Respondent. Regarding mitigation of loss because it is said that the victimisation resulted in dismissal the same rules do not apply as they would in an unfair dismissal case. It is clear that the Second Respondent accepted that he was being accused of discrimination insofar as an equal pay was concerned. That was a protected act and pursuant to Section 136 of the Equality Act 2010 the burden of proof has been met in this case.

44. Being called "old woman" is discrimination because of age and the Claimant must succeed in this claim.

45. Regarding like work all the comparator's duties are in the tea room and there was like work between the work of the Claimant and that of the comparator Mr Grinszpan.

46. How can a protected act be contributory conduct or how can ***Polkey*** apply in this situation because the Claimant is not blameworthy at all. Even if the Claimant called the Second Respondent a fool it did not contribute to her dismissal. There should be no reduction at all or if there is to be it must be very low reduction. The First and Second Respondents have joint and several responsibility in respect of the victimisation and harassment. It is accepted that this is probably a case where aggravated damages are not appropriate or the ACAS Code.

47. Both the Claimant and Respondents representatives cited a number of reported cases in support of their submissions which are contained in the written submissions. There was a further discussion towards the conclusion of submissions regarding how the pandemic would have impacted upon a calculation of compensation if the Tribunal were to find liability. It was accepted on behalf of the Claimant that the Claimant's employment would have terminated in August 2020 in any event, unconnected with matters the subject of these claims. However, the Claimant would have been entitled to notice of termination of employment which would need to be taken into account.

The Law

48. The right not to be unfairly dismissed is contained in chapter 1 of part X ''Unfair Dismissal'' in the Employment Rights Act 1996. Section 95 sets out circumstances in which an employee is dismissed, which includes in sub section (c) the following provision "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

49. Section 98 of the Employment Rights Act 1996 says that in determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show (a) the reason (or if more than one the

principle reason) for the dismissal and (b) that it is either reason falling within sub section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". Sub section (4) says that "where the employer has fulfilled the requirements of sub section (1), the determination the question whether dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case".

50. In the case of ***Martin -v- MBS Fastenings (Glynwed) Distribution Limited*** **[1983] IRLR 198** at paragraph 15 it was said "whatever respective actions of the employer and employee at the time when the employment is terminated, at the end of the day the question always remains the same, "who really terminated the contract of employment?" If the answer is the employer, there was a dismissal…. If the answer is the employee, a further question may then arise namely "did he do so in circumstances such that he was entitled to do so without notice by reason of the employer's conduct?" If the answer is "yes" then the employer is nevertheless to be treated as if he had dismissed the employee".

51. In the case of ***Kwik Fit Limited -v- Lyneham*** **[1992] IRLR 183** it was said… "a resignation by an employee is a repudiation of a contract of employment, a fundamental breach. It should be accepted by the employer within a reasonable time (see ***Western Excavating (ECC) Limited -v- Sharp*** **[1978] IRLR 27** Court of Appeal per Lord Denning at page 29, 15 see also ***London Transport Executive -v- Clarke*** **[1981] IRLR 166**). In many cases the acceptance will be by inference. Thus where words or actions a prima facia unambiguous, an employer is entitled to accept the repudiation at its face value at once, unless the special circumstances exist, in which case it should allow a reasonable time to elapse during which facts may arise which cast doubt upon that prima facia interpretation of the unambiguous words or action. If he does not investigate these facts, a Tribunal may hold him disentitled to assume that the words or actions did amount to a resignation, although to paraphrase the words of Lord Justice May the Tribunal should not be astute so to find. One then asks what is that reasonable period of time? It may be very short ***Martin*** **[1983] IRLR 49.** It may be over a weekend – ***Barclay*** **[1983] IRLR 313**. The test is objective and one of reasonableness. It is only likely to be relatively short, a day or two, and it will almost certainly be the conduct of the employee which becomes relevant but not necessarily so". In the case of ***Willoughby -v- CF Capital Limited*** **[2011] IRLR 985** it is also helpful. In that case it was said "the special circumstances exception as explained and illustrated in the

Authority it is I consider not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself the giver of the notice did in fact really intend what he apparently said by it. In other words he must be satisfied the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so called exception to the rule is well summarised by Wood J in paragraph 31 of ***Kwik Fit***'s case and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted".

52. Section 27 of the Equality Act 2010 defines what is meant by victimisation. "(1) a person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act or (b) A believes that B has done or may do a protected act (2) each of the following is a protected act – (a) bringing proceedings under this act (b) giving evidence or information in connection with proceedings under this act (c) doing any other thing for the purposes of or in conjunction with this act (d) making an allegation (whether or not express) that A or another person has contravened this act (v) the reference to contravening this act includes a reference to committing a breach of an equality clause or rule."

53. In the case of ***Nagarajan -v- London Regional Transport*** **[1999] ICI 877 (HL)** it was said that in relation to a claim of victimisation or harassment it is enough that the protected act or protected characteristic in question be a significant influence for the treatment complained of.

54. Harassment is defined in Section 26 of the Equality Act 2010. Section 26(1) says "a person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) 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. Sub section 4 says that "in deciding whether conduct has the effect referred to in (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 was reasonable for the conduct to have that effect. By sub section (5) the relevant protected characteristics include age.

55. Section 65 of the Equality Act 2010 under the heading of "Equal Work" says in sub section (1) that "for the purposes of this chapter, A's work is equal to that of B if it is – (a) like B's work…." By sub section (2) A's work is like B's work if (a) A's work and B's work are the same or broadly similar and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work. Sub Section (3) is from a comparison of one person's work with another's for the purposes

of sub section (2) it is necessary to have regard to (a) the frequency with which differences between their work occur in practice and (b) the nature and extent of the differences".

56. Section 136 of the Equality Act 2010 is headed "Burden of Proof". This section applies to any proceedings relating to a contravention of the Equality Act 2010. Sub section (2) says "if there are facts from which the Courts could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the Court must hold that the contravention occurred. Then in sub section (3) it says "but sub section (2) does not apply if A shows that A did not contravene the provision. And by sub section (4) the reference to a contravention of this act includes a reference to a breach of an equality clause or rule.

Conclusions

57. We find that the Claimant was dismissed by the Respondents on 20 August 2019. We do not consider that the words used by the Claimant on 16 August amounted to a termination of the contract of employment being a resignation. The exchange between the parties on 16 August was not only words exchanged in the heat of the moment but also the words used by the Claimant cannot properly be understood in the context and the circumstances as the Claimant terminating the contract of employment.

58. We find that the Second Respondent had formed a clear view that the Claimant would not return to her employment as Shop Manager as a result of what he considered to be the accusation of discrimination and the general attitude of the Claimant towards himself. It would seem that deep feelings nursed by the Second Respondent about the Claimant's view of himself contributed to the angry exchange from himself towards the Claimant on 16 August 2019. The actions of the Second Respondent in securing another person to undertake the role of Shop Manager over the weekend, together with the express words used on 20 August 2019 by the Second Respondent made it clear that the Claimant was expressly dismissed on 20 August 2019.

59. The accusation of discrimination, albeit the Tribunal has found that the words used were equality by the Claimant, were said by the Second Respondent in his oral evidence to be part of the reason for the breakdown in communication. when the Second Respondent was cross examined about the contents of his written statement paragraph 41 in which he said he felt it was out of the question the Claimant could continue representing in the circumstances as she had been rude to him directly and aggressively and had walked off the job on a whim on the Friday. This part of the evidence together with the findings about the Second Respondent being angry and taking exception to the accusation of discrimination very much supports the conclusion that the accusation of

discrimination because of pay inequality was a significant influence in the reason why the Second Respondent dismissed the Claimant.

60. For the avoidance of any doubt we do not accept the Respondents submissions that the words used by the Claimant regarding equality does not connect with any differential in pay with sex at all. The Respondents submit that identifying a difference in pay without more does not get the Claimant over the line. However that ignores the context in circumstances in which the words were used and the understanding of the Second Respondent. The Claimant was complaining that her pay was less than that of her male comparator Mr Grinszpan and that there was not equality. The Second Respondent understood this to be a discrimination allegation because of the difference in pay.

61. In the circumstances we find that the accusation made by the Claimant on 16 August 2019 was a protected act in the meaning of Section 27 of the Equality Act 2010 and that the Claimant was dismissed, that is suffering a detriment as a result of making that allegation. This allegation was not made in bad faith, and it is not alleged that it was so made in bad faith. Sub section (5) of Section 27 says contravening this Act includes a reference to committing a breach of an equality clause or rule.

62. Applying the statutory test under Section 98(4) we find that the dismissal of the Claimant was unfair. Further that it was an act of victimisation by the Respondents.

63. We have heard submissions regarding remedy. We reject the submissions of the Respondents that there was contributory fault on the part of the Claimant. The use of the word fool by the Claimant to the Respondent was after the Claimant was informed that she was being fired and called “old woman”. It would not be appropriate to reduce the basic or compensatory award because there is no contributory conduct leading to the dismissal on the part of the Claimant. As far as ***Polkey*** is concerned this is not a case in which we consider that the ***Polkey*** principles apply and no reduction will be made in relation to any ***Polkey*** consideration.

64. The remedy for unfair dismissal is that of compensation. Up to the 20 August 2020 that would be just over a year, 53 weeks which would give a gross loss of £9,900.40. From this must be deducted the earnings of the Claimant which is some £5,355.90. This would lead to a figure of £4,544.50 We consider that in the circumstances the Claimant has mitigated her loss by finding other employment. There is no evidence of other employment that would be available to the Claimant during this period of time which would have made up her partial loss. The Respondents did not adduce any evidence directly of other employment

for which the Claimant could have applied. We therefore award the figure of £4,544.05 as compensation.

65. The basic award figure of £5,278.50 is agreed arithmetically. We also make that basic award. The loss of statutory rights figure we consider to be £400.

66. There is a claim for notice pay of 12 weeks at £207 being £2,484. The £207 is a gross figure. If notice monies were to be paid it would be paid as damages for breach of contract at the net figure of £186.80. However there is some uncertainty about notice money payment because no direct evidence was given about the fact that the redundancies of Mr Grinszpan and Ms Reynold in August 2020 took account of any notice they were given to terminate their employment or not. Bearing in mind the impact of the pandemic and Welsh Government restrictions we would require further evidence to be satisfied that any notice period compensation would extend the amount of compensation which would be paid in this case. We consider the amount up to 20 August 2020 as being a just and equitable figure, although taking into account the point made on behalf of the Respondents that where victimisation is part of the reason for dismissal ordinary rules of just and equitable do not strictly apply.

67. As to the injury to feelings award. It was submitted on behalf of the Claimant that a figure to include harassment of being called “old woman” and the victimisation would be appropriate to be considered as a whole. The events all concern the dismissal itself. We agree with that approach. Whilst there is no doubt that the Claimant was upset about being called “old woman” we find this was said on one occasion and the Claimant was able to make a robust response to this. We take into account the relevant Vento Guidelines and the effect that the discrimination had upon the Claimant. We consider that the figure for injury to feelings falls within the lower bracket of the relevant Vento Guidelines, and that taking into account all the factors the award will be one of £6,000 for injury to feelings. In addition to that figure there will be a figure of interest to be paid at the prevailing rate from the time of the discrimination to the present time.

68. There is no evidence that the Claimant claimed state benefits in the period of time between when she was dismissed from her employment with the Respondents and obtaining new employment or after that employment ended. Therefore the Recoupment Regulations do not apply. For the avoidance of any doubt we do not consider that this is a case in which there should be an uplift in relation to the award for unfair dismissal for breach of any ACAS procedure.

69. In relation to like work it is necessary to consider the two parts of Section 65(2) of the Equality Act 2010 namely whether the nature of the work being done by the Claimant and the comparator is the same or broadly similar. It is not necessary that the two jobs under comparison be identical. In the case of ***Dance and others -v- Dorothy Perkins Limited*** **[1978] ICR page 760** Mr Justice Kilner-Brown stated "we feel that it is vitally important to reiterate… that it is no part of a Tribunals duty to get involved in fiddling detail or pernickety examination of differences which set against the broad picture fade to insignificance". The comparison of jobs must take into account the whole job.

70. We have already referred to some aspect of the Claimant and Mr Grinszpan's job in this Judgment. The Claimant said that although a lot of the work she did was similar, she did different work from Mr Grinszpan and agreed that having read Mr Grinszpan's statement there were differences although the Claimant said that the value of work is not necessarily more. The Claimant said that there are some differences and that they had different jobs.

71. The Claimant worked in the shop and occasionally helped out in the kitchen and in honey/mead tastings. The Claimant agreed that about 95% of her time was behind the counter but she did engage with customers and explained about products and the exhibition. About three or four times a year the Claimant would conduct a candle workshop for school children. The Claimant said that if it was quiet she found work to do such as labelling and ordering from about 15 companies. When they were needed, individuals that she identified as Ruth or Polly or Eleri were taught how to work in the shop when she was not there. Since 2015 the Claimant estimated that she had trained four people. As far as placing orders she would do so if goods ran out. It was the Second Respondent who decided prices. The Claimant did not decide who was employed in the shop and described the Second Respondent as providing very little support. The Claimant did not work in any preparation of food.

72. The comparator Mr Grinszpan was managed by the Second Respondent. Although Mr Grinszpan worked in the meadery from April he would be in the tea room during the season. Mr Grinszpan's role was to manage the tea room, to meet and greet customers, take orders, clear tables and do cleaning. Mr Grinszpan also produced cakes and filled jars with chutney and other preparations. Mr Grinszpan was involved in interviewing staff. Mr Grinszpan was responsible for food hygiene and food safety training. Mr Grinszpan had completed a first aid course, which the Claimant was not invited to attend. There would be an annual visit by the Environmental Health Officer which Mr Grinszpan would be directly involved with.

73. We find that whilst there were some aspects of management for example dealing with customers and processing their orders which were undertaken by the Claimant and Mr Grinszpan, the role of the Claimant and Mr Grinszpan were not broadly similar or the same. Mr Grinszpan had a role in the period where the claim is made for equal pay as Operations Manager and in particular had responsibility to deal with any matters such as difficult customers in the absence of the Second Respondent. In effect he was second in command. In addition Mr Grinszpan not only served customers but also produced the products which they consumed i.e. cakes and latterly baguettes. The Claimant's candle making for three or four times a year was an infrequent event whereas Mr Grinszpan on a daily basis during the season had to produce food for consumption by customers. Mr Grinszpan would have to mark up for sale the goods which he produced. He would be responsible for ordering all the ingredients that were needed.

74. The second limb for consideration of like work is whether the difference between the work that Mr Grinszpan did and that of the Claimant should not be of practical importance in relation to terms and conditions of employment. The nature of the work undertaken by Mr Grinszpan did involve day to day consideration not simply of production of food but also adherence to environmental health legislation and supervision of individuals that he had interviewed to work alongside himself in the café. His skills and level of responsibility were different practically compared to that of the Claimant. Whilst the Claimant said that she used her educational background to put across answers regarding the honey production and bees, this is not the same as the skills and responsibilities that were exercised by Mr Grinszpan at the same frequency or level of responsibility. Looking at what was actually done in practice those differences were significant.

75. For these reasons we find that the Claimant's work was not of like work to that of Mr Grinszpan.

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Employment Judge P Davies
Dated: 11th February 2021

JUDGMENT SENT TO THE PARTIES ON 18 February 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche