EMPLOYMENT TRIBUNALS

Claimant: **G**

Respondent: **Future Cleaning Services Limited**

Heard at: **Cardiff (by video)** **On: 23, 24 and 25 November 2020 and in chambers on 28 January 2021**

Before: Employment Judge R Harfield **Members Ms P Palmer Mr D Ryan**

Representation:
Claimant: In person
Respondent: Ms Quigley (counsel)

Interpreter: Ms Castello

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's complaints of direct race discrimination, harassment related to race, harassment related to sex, direct sex discrimination and victimisation are not well founded and are dismissed;

2. The Claimant's complaint of an unauthorised deduction from wages in respect of reduction of the claimant's hourly rate of pay is not well founded and is dismissed;

3. The Claimant's complaints of unauthorised deduction from wages in respect of the payments made to the claimant on 20 April 2018, 15 June 2018, 10 August 2018, 7 September 2018, 5 October 2018, 19 October 2018 and 22 February 2019 are well founded and are upheld. If necessary, a remedy hearing will take place at a future date to decide what remedy should be awarded in respect of these unauthorised deductions.

REASONS

Introduction

1. The claimant presented her claim on 5 December 2018 complaining of race discrimination, sex discrimination, holiday pay, arrears of pay, and a claim for "other payments" [1-11]. Acas early conciliation took place between 5 November 2018 and 5 December 2018. By way of an ET3 presented on 8 January 2019 the respondent defends the claim [12-20].

2. The claimant has been a litigant in person throughout. A series of case management preliminary hearings were conducted to identify the issues in the claim and make case management orders. At a case management hearing before Employment Judge Frazer on 13 March 2019 the claimant was directed to provide further particulars of her race discrimination and sex discrimination complaints [31-35]. At a further case management hearing on 19 July 2019 [56–67M], where the claimant had some assistance from an ELIPS representative, Employment Judge Brace directed that the full hearing would only determine liability issues (does the claimant win her complaints) and that issues of remedy (what remedy the claimant should be awarded) would be determined, if relevant, at future date.

3. Employment Judge Brace permitted the claimant to amend her claim to relabel a victimisation claim, add a further alleged act of discrimination that had allegedly occurred since the claim was originally presented, and to add a further claim for an authorised deduction of wages, again in respect of events which occurred after the claim was originally presented. Employment Judge Brace also identified the liability issues that were to be decided at the full hearing. Unfortunately the full hearing originally listed for 27 to 31 March 2020 did not proceed because of the Covid 19 pandemic. Employment Judge S Davies conducted a further case management hearing and updated the case management orders [97A97F]. The claimant withdrew one part of her unauthorised deduction from wages claim. The hearing was then relisted. Due to ongoing Covid 19 restrictions the relisted hearing proceeded before us fully remotely by video using the CVP platform. The claimant had the services of an Italian interpreter throughout.

4. At the start of the hearing the tribunal considered the claimant's applications for a restricted reporting order and anonymity order. These were granted and oral reasons were provided at the time. An anonymisation order was made in respect of the claimant and two third party individuals who worked at a site where the claimant cleaned. In this Judgement those individuals are referred to as "Worker A", "Manager B" and the location as "Site C." The restricted reporting order was granted indefinitely and similarly prevents those individuals being identified.

5. We had before us a joint bundle extending to 365 pages. References in brackets in this decision [ ] are references to page numbers in that bundle. We also had a witness statement bundle. The claimant produced three witness statements (pages 1 to 14 of the witness statement bundle) and the respondent produced written witness statements from Ms Wyard, Ms Dickinson and two for Mr Risbey (pages 15 to 50 of the witness bundle).

6. We heard oral evidence from those witnesses other than Ms Dickinson. Ms Quigley told us that Ms Dickinson had recently left the employment of the respondent and whilst she had initially committed to attend to give oral evidence, more recently she had withdrawn from that commitment citing ill health. Ms Quigley confirmed that the respondent had not sought a witness order for Ms Dickinson and that the respondent was not seeking a postponement of the hearing in order for Ms Dickinson to be compelled to attend. We heard oral submissions from the parties as to the status of Ms Dickinson's written witness statement and decided that we would admit the statement as evidence, but the fact that Ms Dickinson was not at the hearing to approve her statement under oath and to answer questions would affect the weight, if any, we gave to her evidence. We also told the claimant that she would have the opportunity to provide any comments she wanted to make on what Ms Dickinson said in her written statement given she was unable to ask Ms Dickinson questions about it.

7. We received closing oral commitments from the parties and Ms Quigley provided written closing submissions which the claimant was given time to read. The hearing had to conclude at 5pm on the last day which gave a cut off point for the claimant's closing comments. The Tribunal made it clear to the claimant that if there was more that she wished to say by way of closing comments then the case would be relisted back to another day, and she should not feel pressured in that regard. The claimant, however, said that she was content that she had opportunity to say what she wished. We have not repeated the parties' submissions in this Judgment but we have taken them into account. There was no time left for tribunal deliberations and delivery of an oral judgment and therefore the judgment was reserved to be delivered in writing. The tribunal panel then met remotely in chambers on 28 January 2021 for deliberations.

8. At times during the proceedings the claimant had sought to identify other types of claim that she wished to bring such as malpractice, stress at work, bullying and defamation. It was explained to the claimant at the case management stage that these types of claim are not actionable free standing claims that can be heard in the employment tribunal. The claimant has also at times referred to complaints of breach of contract and unfair dismissal but likewise it has been explained to her that those claims cannot be heard because the claimant remained an employee of the respondent. During the course of the proceedings before us the claimant also referred to bringing an indirect discrimination claim. It was again explained to her that she had not brought an indirect discrimination claim. Considerable time had been spent at the case management hearings identifying and recording what the claimant's claim was said to be and why.

The issues to be decided

9. The issues for us to decide are set out in the updated case management order of Employment Judge Brace [67E to 67G] which we summarise follows:

"Time limit/ limitation issues

(a) Were the claimant's complaints presented within the time limits set out in Sections 123(1)(a) and (b) of the Equality ACT 2020 ("EqA")?

(b) Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc

EQA, section 26: Harassment related to race (nationality)

(c) Did the respondent engage in conduct in failing to take steps to deal with:

   (i) The harassment from employees of clients at SFX Swansea Central which had arisen on 17 October 2017;
   (ii) The harassment from employees of clients at ECP69 Swansea which had arisen on 26 October 2018; and
   (iii) The harassment from employees of clients at ECP69 Swansea which had arisen on 27 February 2019

(See paragraph 3 of the claimant's Statement of Issues dated 17 April 2019) [39A – 39D]

(d) If so, was that conduct unwanted?

(e) If so, did it relate to the protected characteristic of race (nationality)?

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

EQA section 13: direct discrimination because of race (nationality)

(g) the claimant relies on the conduct of the respondent in failing to take steps to deal with the harassment related to race, as alleged.

(h) Was that treatment "less favourable treatment" i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

(i) If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

EQA, section 26: harassment related to sex

(j) Did the respondent engage in conduct in failing to take steps to deal with:

(i) the harassment from employees of clients at Site C which had arisen on 18 July 2018; and
(ii) the harassment from employees of clients at ECP69 Swansea which had arisen on 27 February 2019?

(See paragraph 3 of the claimant's Statement of Issues dated 17 April 2019)

(k) If so, was that conduct unwanted?

(l) If so, did it relate to the protected characteristic of sex and/or was it of a sexual nature?

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

EQA, section 13; direct discrimination because of sex

(o) The claimant relies of the conduct of the respondent in failing to take steps to deal with the harassment related to sex/ sexual harassment as alleged.

(p) Was that treatment less favourable treatment" i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

(q) If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

EQA, section 27, Victimisation

(r) Did the claimant do a "protected act"? The claimant relies upon the following:

(i) Grievance submitted on 22 August 2018 (ii) Grievance submitted on 17 October 2018.

(s) Did the respondent subject the claimant to detriment/s as follows:

(i) removed her from SFX Cwmdu Park site on 2 October 2018;
(ii) removed her from ECP69 on 4 March 2019?

(t) If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act.

Unauthorised deductions

(u) Did the respondent make unauthorised deductions from the claimant's wages (Section 13 ERA) in period from 6 April 2018 to 22 March

2019 and if so, how much was deducted? The claimant claims the amount of the deduction is £178.47

(v) Was the claimant, from 9 October (and ongoing) paid less in wages than she was entitled to be paid and if so, how much less? The claimant claims that the amount of the deduction is £354.62.

Relevant legal principles

Direct Discrimination

10. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

11. Sex is a protected characteristic. Race is also a protected characteristic and includes, colour, nationality, ethnic or national origins (section 9(1)).

12. The concept of treating someone "less favourably" because of a protected characteristic inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case."*

13. It is well established that where the treatment of which the claimant complains is not overtly because of sex or race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 and the authorities discussed in that case at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

Harassment related to sex or race

14. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) *A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(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).

(3) *A also harasses B if –*

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to.. sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b) and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably, than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

(a) the perception of B;

(b) the circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

15. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

(i) was there unwanted conduct;

(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
(iii) was it related to a protected characteristic.

16. It was also said in the case that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity
or creating an adverse environment for her, then it should not be found to have done so.

17. In Grant v HM Land Registry 2011 IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

18. The phrase "related to" a protected characteristic encompasses conduct associated with the protected characteristic even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

Victimisation

19. Section 27 of the Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act. Section 27(2) defines a protected act as:

(a) bringing proceedings under the Equality Act;
(b) giving evidence or information in connection with proceedings under the Equality Act;
(c) doing any other thing for the purposes of or in connection with the Equality Act;
(d) making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act.

Equality Act - Burden of Proof

20. Section 136(2) of the Equality Act provides that:

> *"If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred."*

21. Section 136(3) goes no to say that *"subsection (2) does not apply if A shows that A did not contravene the provisions."*

22. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Liability for Third Party Harassment

23. Section 109 of the Equality Act makes an employer vicariously liable for the discriminatory acts of their employees (or a principal for the acts of an agent when carrying out the functions the agent is authorised to do) except where there is a defence under section 109(4). There is nothing expressly within the Equality Act that makes an employer liable for acts of discrimination committed by a third party. Provisions making an employer liable in certain circumstances if an employee was harassed by third parties were introduced in 2008 and survived in section 40 of the Equality Act 2010 until they were repealed in 2013.

24. Now an employer can be liable for harassment in those situations only if its own failure to prevent such incidents amounts to harassment in its own right and was itself related to a protected characteristic in some way. That was confirmed by the Court of Appeal in **Unite the Union v Nailard [2019] ICR 28**. Underhill LJ said at paragraph 99 that the repeal of the third party harassment provisions meant that "*the 2010 Act, for better or for worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction..."*

25. Likewise in a direct discrimination claim, the claimant has to show on the facts of their particular case (and with the benefit of section 136 if necessary), that the employer's inaction in addressing a complaint of third party harassment amounts to less favourable treatment because of the protected characteristic (such as race or sex). This involves showing that someone of a different race or sex would receive better treatment by the employer in responding to the complaint and that the reason for the inaction, in the mental processes of the decision makers at the employer, is materially influenced by the protected characteristic (such as sex or race.)

26. The principles in **Nailard** were revisited and reconfirmed in **Bessong v Penine Care NHS Foundation Trust** UKEAT/0247/18/JOJ.

Unauthorised deduction from wages

27. Section 13 of the Employment Rights Act 1996 says:

> "*An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised— (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

28. Section 14 Employment Rights Act 1996 says:

> "*(1)Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*
>
> *(a)an overpayment of wages, or (b)an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker."*

29. Section 23 of the Employment Rights Act gives a worker the right to complain to an employment tribunal that there has been a deduction of wages in contravention of section 13. Under section 23(2) a tribunal shall not consider such a complaint unless it is presented before the end of the period of 3 months (as adjusted for Acas early conciliation) beginning with the date of the payment of the wages from which the deduction was made. Section 23(3) specifically provides that where a complaint is brought in respect of a series of deductions the trigger date for the running of the time limit will be the last deduction in the series. Section 23(4) gives a tribunal a discretion to extend time where it is satisfied it was not reasonably practicable for a complaint to have been brought within the primary limitation period and if the claim was then presented within such further period as the tribunal considers reasonable.

30. In Bear Scotland Ltd and others v Fulton and others [2015] ICR 221 the Employment Appeal Tribunal held that whether there has been a series of deductions is primarily a question of fact. It may involve consideration of issues such as whether there is sufficient similarity of subject matter so that each event is factually linked with the next in some way. It may also involve considering whether there is a sufficient frequency of repetition. However, the Employment Appeal Tribunal also held that Parliament did not intend a non payment made 3 months after the last to be characterised as having such similar features it would be part of the same series. A gap of 3 months between deductions will therefore extinguish the tribunal's jurisdiction to consider a complaint. In effect, it breaks the chain of deductions.

31. Section 23(4A) also provides (with some exceptions not relevant here) that a tribunal cannot consider a complaint about a deduction from a payment of wages where the deduction was made before the period of 2 years ended with the date that the tribunal claim was presented.

Relevant background and findings of fact

Initial hours of work and rates of pay

32. To decide the issues raised in this case it is not necessary for us to make findings of fact in relation to every dispute between the parties. The findings of fact that we

do make, applying the balance of probabilities are as follows. The claimant is Italian. She started working for the respondent as a cleaner in June 2015. The claimant's terms and conditions are at [117 – 118]. The respondent provides cleaning services to customers at various sites in the UK. The claimant initially worked at three sites, Screwfix Swansea Central (or SFX Central), Screwfix Swansea, and Biffa Swansea. In September 2015 she then started working at Eurocarparks /ECP69 and in December 2015 Screwfix Cwmdu Parc (or SFX Cwmdu). From April 2017 until December 2017 the claimant stopped working at Screwfix Cwmdu before returning. In September 2017 the claimant also started working at a second Eurocarparks site; ECP218.

33. On 24 September 2015 the claimant's then manager, Mr Murphy, wrote to her [119] saying "I had a discussion with you and we agreed some changes to the sites on which you are allocated to work. I have set out below the proposed changes to your contract of employment." The letter then sets out the hourly rates for the sites the Claimant worked on with Screwfix at £8 an hour, Biffa at £6.50 an hour and ECP at £7.75 an hour. Mr Murphy also sent the claimant a text message confirming the ECP rate was £7.75 [122]. As far as the Tribunal understands it the hourly rates for Screwfix and Biffa at the time were correct but an issue arose because the claimant was being paid at ECP at £7.50 an hour and not £7.75.

34. The claimant was then sent a further letter dated 27 October 2015 found at [120]. This letter apologies for the error in the hours worked/pay rate for each site and set out what are described as the claimant's contractual working hours/ pay rates with Screwfix increased to £8.20 an hour, Biffa increased to £6.70 an hour and ECP reduced to £7.50. (It should be noted that on 1 October 2015 the national minimum wage had increased by 20p an hour from £6.50 to £6.70). Overall, across the sites and hours worked the claimant ended up better off.

35. So far as the Tribunal understands the position, the claimant complained that she was being paid £7.50 an hour at ECP and not the £7.75 as originally promised by Mr Murphy. At [121] there is a text message she sent on 28 October 2015. She states that she was told Mr Murphy had made a mistake when telling the claimant the hourly rate and the respondent would not change the hourly rate to £7.75. The respondent says that as a gesture of "goodwill" they paid the claimant at £7.75 an hour for her work undertaken until 27 October 2015 but at £7.50 after that. The claimant was then paid £7.50 an hour until May 2017 when the hourly rate went up in general to £7.80. The claimant says that she carried on working at the site for £7.50 between October 2015 and April 2017 because she could not afford to lose the working hours. The claimant said in evidence she did not raise a grievance at the time because she had spoken to her supervisor. She also did not raise it in her two later letters of grievance of 22 August 2018 and 17 October 2018. The claimant said in evidence to the Tribunal that she considers that since October 2015 her hourly rate of pay at ECP has been 25p less than it ever should have been. We return to this in our conclusions below.

9 October 2017 and removal from site at Screwfix Swansea Central

36. On 9 October 2017 Mr John, a manager at SFX Swansea Central emailed the claimant's new line manager, Leon Andersen [184–185] making various complaints about the claimant including that she had been sitting in the staff room on her phone looking at Facebook and that when asked to clean one of the bins by the duty manager, Shaun, the claimant had got defensive. Mr John reported that when he and the Branch Manager, Mr Williams were having a discussion, that the claimant had walked past them and had said she had not received an apology from Shaun for the way that he had spoken to her. Mr John reported that he had told the claimant that Shaun had not spoken disrespectfully and had simply asked her to change the bins. Mr John reported to Mr Andersen that the claimant had then said "you think it's a foreigners job to change bins and not yours." Mr John said that he had replied that this was not the case. Mr John reported that the claimant later asked to speak to Mr Williams in the staff room and that Mr Williams had asked the claimant if she stood by what she had previously said and that the claimant had said "yes its in every Screwfix and Biffa leave it for the foreigner to do." Mr John said in his email to Mr Andersen "this is not the case and will not be tolerated and is not acceptable in ANY workplace. The management team feel that we need another cleaner after this event."

37. The claimant's version of events is that on 17 October 2017 (it seems likely the claimant has the date wrong given the date of the email mentioned above) that Shaun had shouted at her, complaining that she had not emptied a bin. The claimant says that Shaun had placed plastic in the wrong bin after she had already emptied it and that she challenged him about how he was speaking to her and complained to the branch manager. The claimant did not report the incident to the respondent at the time or complain to the respondent at the time that she considered she had been discriminated against on site. The claimant said in evidence that this was because it was only sometime later that a former colleague of Shaun (also a friend of the claimant) told the claimant that Shaun had said not to speak to the claimant because she was a cleaner and because she was foreign. The claimant said in evidence that she therefore only realised later on that Shaun did not like her because of her nationality. The claimant's evidence in that regard is at odds with the contemporaneous email of Mr John in which he identified that the claimant at the time had openly accused Shaun, and Screwfix in general (and indeed Biffa), of leaving bins for foreigners to empty and he said was an accusation that the Screwfix staff had taken exception to.

38. On 26 October 2017 Mr Andersen wrote to the claimant [122D] saying "I am writing to confirm that following a conversation regarding the altercation between and staff at Screwfix Swansea Central, you will no longer be allowed to work at this site." He said that the claimant would be given additional hours at ECP in Swansea to compensate for the loss of the hours and that it did not affect the claimant's

employment at other sites. That day the claimant emailed Julia King at the respondent [122F] saying that Mr Andersen had told her that the manager at Screwfix Central did not want her to clean there anymore. The claimant referred to a discussion with Ms King and Mr Andersen the day before, and in her email she questioned whether it was lawful to remove her duties in this way and without a meeting with Screwfix management. She asked to speak with the HR Manager. There is no evidence before the Tribunal of there being a response to the claimant from Ms King although clearly there had been some initial discussion between them and Mr Andersen. The claimant disputes that she was offered more hours at ECP as she states she was already working there.

18 July 2018

39. The claimant says that on 18 July 2018 when working at Site C, employee A slapped her bottom when she was washing a cloth in the canteen. She says she reported it to Manager B who laughed and said “did you like it?” The claimant says she was shocked but did not report it at the time to Mr Andersen as she thought that the respondent would not defend her, and that it would start a fight that would end up with her losing work from another site.

21 August 2018

40. On 21 August 2018 the branch manager at Screwfix Swansea Cwmdu emailed Mr Andersen saying that the amount of complaints he had received from his team about the claimant was “monumental.” He said that she was distracting them from work by moaning, was rude and abrasive to customers, that she had been spoken to about taking gloves from their spillage kit. He said they were happy with their alternative cleaner, Gifty [128].

Claimant’s first grievance letter

41. On 22 August 2018 the claimant sent Mr Andersen a letter of complaint [123– 124]. The claimant complained about various matters including an underpayment of wages, a lack of small sized cleaning gloves, delays in approving holiday requests, and her sites not being covered in her absence. The claimant also referred to her previous removal from Screwfix Swansea Central. She said “I was offended by one of the workmen and had to defend myself accordingly. Surely in this day and day women in the workplace should not be made to feel threatened.” She complained that the work at ECP did not compensate her as she was working further away, costing her more in petrol and travel time. The claimant also said “other two bad episodes are happen to me on the workplace but I didn’t report them due to my fear, anxiety, to lose another site since the past experience.”

42. The claimant's letter was acknowledged by HR on 24 August 2018 [125] where it was said that "a full investigation has now been launched into your concerns which we are taking seriously. It may take a few weeks for us to complete our investigations but will contact you again with our findings." In fact to the Tribunal's knowledge nothing happened with the claimant's grievance at that time. Ms Dickinson states in her written statement that she passed the grievance back to Mr Andersen and presumed he was dealing with it informally, but that it later transpired he had not.

Complaint by Screwfix Cwmdu

43. On 5 September 2018 the branch manager at Screwfix Cwmdu emailed Mr Andersen again setting out their suspicions the claimant had been using their gloves [127 – 128]. The manager did so again on 13 September 2018 [126 - 127]. He said that he had challenged the claimant and that she said "you know my situation and I had to bin the pink marigold gloves yesterday." He said that the claimant "continued to rant at me in front of customers that were on the shopfloor and staff members." Mr Williams said that he would like Gifty to clean Monday, Wednesday and Friday and added "I can't continue with [the claimant] in my store as she is constantly upsetting my team/ taking my stock."

44. On 12 September 2018 the claimant emailed Mr Andersen complaining that her payslip was missing 6 hours for Biffa and asking how the investigation of her original grievance would proceed [135].

45. On 28 September 2018 the respondent wrote to the claimant requiring her to attend a disciplinary hearing on 1 October at Screwfix Cwmdu [133- 134]. The letter said that they had received complaints that the claimant had been taking stock without permission and had demonstrated poor behaviour. The letter said that the client had lost trust and confidence in her ability to be able to carry out her duties and they had asked to remove the claimant from site. The letter said that the claimant may be given a first or final written warning and that if they were unable to persuade the client to reconsider their decision they may have to dismiss the claimant for "some other substantial reason" if they could not find her suitable alternative employment. The meeting was then moved to 8 October 2018 [135].

46. On 1 October 2018 the assistant store manager, Emily, at Screwfix Cwmdu emailed Mr Andersen [129] making a further complaint about the claimant. She said that she asked the claimant for the cleaning cupboard keys and that the claimant had refused to hand them over. Emily said that the claimant had demanded to speak to her about her disciplinary and had shouted at her. That day Mr Andersen emailed Ms Dickinson [129] confirming he had spoken to Emily and that Emily had complained about the claimant shouting at her. He reported that he had telephoned the site to speak to the claimant and that he had been told the claimant was too busy to speak with him. He reported that when he did speak to

her he told her that she was suspended from the site until the Monday when the meeting was due to take place. He reported that the claimant had initially said she would not leave site. The claimant admits that she refused to hand over the key, saying that she was working, that the client had another key and that Emily had spoken to her in a bad manner.

47. On 4 October 2018 the claimant emailed Ms Dickinson and Mr Andersen again complaining that her earlier grievance had not been dealt with. She asked for a disciplinary investigation pack. In response, Ms Dickinson emailed the claimant with a letter confirming her suspension from Screwfix Cwmdu until the disciplinary matter was resolved. Ms Dickinson said that as she had learned the claimant's grievance had not been resolved, the meeting already scheduled for 8 October would instead hear the claimant's grievance in the first instance [138]. The accompanying letter referred to a fresh allegation that the claimant had refused to hand over the keys on 1 October and had shouted at the site manager. It said that the allegations may potentially constitute gross misconduct.

48. The grievance hearing on 8 October 2018 was not effective as the claimant attended but said she wished someone other than Mr Andersen to deal with her grievance [146]. It was rescheduled to 16 October 2018 [147]. On 12 October 2018 the claimant emailed Ms Dickinson complaining about various things including that she had been suspended without pay [149]. She asked to move the date and location of the grievance meeting as she did not want it to take place at the site where she had been suspended. The same day the claimant also reported sick [131].

Claimant's second grievance letter

49. On 17 October 2018 the claimant sent a second grievance letter [154 – 155]. The claimant referred to her earlier removal in October 2017 from Screwfix Swansea Central and said that she had lost trust and confidence in her manager who she said should have investigated the issue and followed a fair procedure. The claimant said she had felt frustrated and discriminated against. She said she felt the same thing was happening again. The claimant referred back to her first grievance letter and said "the other two episodes I mentioned in the first grievance are regarding two offences done to me, one about bullying and one about unwanted physical contact." The claimant then alleged that previously at Screwfix Swansea Central she had been shouted at, judging her job, in front of colleagues and customers. She said "I'm a person as well before to be a worker so I don't accept from anyone a bad attitude or a bad action towards me and if this happens then I have the right to defend myself first and will report the matter to the appropriate person, second".

50. The claimant said that the respondent was "responsible about all the situations of discrimination, harassment, bullying or any other issue can happen to me on the

job and what can cause harm to my health and safety." She referred to the antiharassment and bullying policy. The claimant did not in the letter set out what had she said happened at Site C other than the reference to unwanted physical contact.

51. On 24 October the claimant emailed Mr Andersen and Ms Dickinson about various matters including missing payments and querying her return to work. Ms Dickinson told her not to return to work at Screwfix Cwmdu saying "the client is unhappy and do not want you to work for them at that site – you will be given the evidence from the site that we have, following your grievance meeting." Ms Dickinson told Mr Andersen to resolve the claimant's pay queries. The claimant responded to complain that she was being dismissed from the site without an investigation or a meeting [130].

52. On 25 October 2018 Ms Dickinson sent the claimant the emails from Screwfix Cwmdu setting out their complaints [158]. She said "after the grievance meeting tomorrow the managers will need to discuss with you a reduction of your working hours as the client do not wish for you to work on the site as detailed in the evidence available to us. We are not taking any disciplinary action against you, but you can no longer work at this site which will result in a reduction of hours for you unless we can find you replacement work."

Grievance meeting

53. The grievance meeting took place on 26 October 2018 heard by Mr Risbey, Contracts Manager, and Ms Davey, Area Supervisor [163 – 170D]. There was a discussion about the claimant's payslips and her concerns that she continued to be underpaid. Ms Risbey and Ms Davey promised to look into the claimant's concerns about underpayments and promised that either Mr Anderson or Ms Dickinson or Mr Risbey would get back to her, which should be by the end of the following week. There was a discussion about booking annual leave and cover for annual leave. There was a discussion about provision of gloves.

54. In relation to the removal from site October 2017, Mr Risbey told the claimant that the matter was considered closed as the claimant had not appealed within the 28 days allowed at the time. (In fact the letter the claimant had received at the time contained no mention of a 28 day appeal time limit.) The claimant said that nobody had spoken with her other than a phone call with Mr Andersen. She said that the worker at Screwfix had offended her in front of customers and colleagues, that she had the right to defend herself, and she had been removed without an investigation or meeting. Mr Risbey explained to the claimant that if a customer does not want an employee on site then the respondent had to remove the employee and that the respondent could not do anything about it. The claimant said she considered that to be discrimination. Although she did not identify a particular type of discrimination. Mr Risbey said he did not consider it to be discrimination. Mr Risbey advised the

claimant repeatedly that if she was facing confrontation on a site then she should not engage but walk away and report it to her manager.

55. There was a discussion about the incident at Site C. The claimant explained that someone had slapped her bum and that when she spoke to the branch manager he said “did you like it.” The claimant identified the store and said she did not report it. She was asked when it happened and she replied it was some months ago, 4 months ago, but she could not remember now. Mr Risbey said “Unfortunately its too late to deal with that but” and the claimant said “I know.” Mr Risbey told the claimant that this kind of conduct was completely unacceptable and that if it ever happened again the claimant should report it straight away to her manager. The claimant then moved the discussion on to her grievance about being removed from Cwmdu. Later on in the meeting Mr Risbey said that whilst the respondent could deal with that type of misconduct involving their own staff, there was less they could do about customers’ staff. He said they could come in and investigate that type of allegation but it is likely that it would be denied. The claimant questioned how she could therefore be defended from such treatment. Mr Risbey told her that she could ultimately be moved from site for her own safety and they would then try to get her another site.

After the grievance meeting

56. There was also a discussion about the claimant’s removal from Screwfix Cwmdu. The claimant was again told that if a site said they did not want a particular person on site then the respondent has to remove the person. Mr Risbey said the respondent had to take the customer’s word and take the person off site as otherwise they could lose the contract. He said that contracts were difficult to get and easily lost. The claimant said she had asked Emily why she was asking for the key and that Emily had said “what do you mean why?” She said that Emily had a bad attitude. Mr Risbey told the claimant that it was Screwfix’s property and they did not need to give an explanation and that the claimant should just hand over the key. Mr Risbey again said that if a customer does not want an employee on site then the employee does not go on site.

57. Ms Davey told the claimant that she would speak to Mr Andersen and Ms Dickinson about everything and it would be typed up and emailed to her. In fact there is no evidence of minutes being sent for approval or of the claimant being given any written outcome to her grievance. Likewise she was not offered any right of appeal. Ms Dickinson says in her written statement that she received an update from Mr Risbey and that she believed the claimant’s concerns had been addressed. Ms Dickinson said that she received no further information about claims of bullying or

harassment and no further information about the grievance. Ms Dickinson says she did not receive an appeal from the claimant or further contact from the claimant about the grievance and that as it raised historic matters she therefore considered the matter closed. Mr Risbey said that a copy of the notes of the meeting were sent to Ms Dickinson and that he had no further involvement in the grievance or a grievance resolution. He said he was not the claimant's line manager and had only stepped in to attend the grievance meeting. He said that he anticipated any next steps would be taken by Mr Andersen, Ms Dickinson or Payroll.

58. The claimant says she also did not receive a response to her complaints about underpayment. Ms Dickinson says in her statement "I understand that these were investigated and it was concluded that there were no payments due to the Claimant." However, there is no contemporaneous evidence of an investigation or a response being sent to the claimant about her pay queries and we were unable to test by way of oral evidence what Ms Dickinson meant by saying "I understand."

59. Ms Dickinson says in her written statement that she asked Mr Andersen to raise the incident of 18 July 2018 with the client. Ms Dickinson says the claimant advised that the person involved was called "Dia". Ms Dickinson says that Mr Andersen told her that the branch manager (who the Tribunal notes is the individual the claimant says asked her if she "liked it") had no knowledge of the incident and that no one called "Dia" worked there. The Tribunal has been given no documents at all relating to this alleged investigation or when it allegedly took place. The claimant in the grievance meeting did not give a name and was not asked to do so. It is not known where the name "Dia" came from as it is not the name given by the claimant during these proceedings of the individual involved. The claimant says she was not asked any further about the incident at all or asked to confirm or check the name given. Mr Risbey who dealt with the grievance told us he knew nothing about this apparent investigation. His evidence was that he did not believe it could be investigated because of the passage of time and because he considered it to have been a one off incident. He said, however, that it would have been open to HR to take a different view.

Incident of 26 October 2018 at ECP69

60. The claimant says that on 26 October 2018 when working at ECP69 two workers there had a bad attitude towards her. The claimant says they asked her to empty a bin in the warehouse which the claimant says was not in her cleaning instructions. The claimant says that a worker, Jodie, then moved the bin in front of her in an aggressive way. The claimant says that she believes the staff were intimidating her due to her nationality as she says that they have bullied her about her Italian accent and that they excessively monitored her work. This allegation seems to have been mentioned for the first time in the claimant's statement of issues prepared during the Tribunal proceedings and the claimant gave no other details of it whether at the time or since.

61. On 29 October 2018 the claimant emailed Ms Dickinson [173] about various matters including whether the warehouses were within her duties. The claimant explained on 30 October 2018 that she wanted to know if the warehouses were in her duties as she could not see them on the instruction sheet. Ms Dickinson said "if not on your list I would have thought for health and safety reasons you do not clean the warehouses, I will get this checked for you" [171]. On 1 November 2018 the claimant went on to explain that on 26 October Matt had asked her to empty a big bin that was not her duty and that to start with she ignored him. She said that he told her that the cleaner who had covered for her had emptied the bin and that 5 minutes later Jodie had placed the bin in from of her. She said she had followed Mr Risbey's advice and had emptied the bin and reported the matter to Ms Dickinson. She said the warehouse was not on her duty instructions and therefore it must not happen again. She said "I advise Leon to talk with any manager and give aware to those people that they must THEY MUST RESPECT ME and they must think to do their job." She said she wanted an apology from Matt and Jodie. The claimant again also referred to hours she had not been paid for. On 4 November 2018 the claimant sent to Ms Dickinson the clocking in and out sheets for Biffa and ECP [175]. On 27 November 2018 Ms Dickinson asked Mr Andersen to answer the warehouse question [195]. The claimant says that nothing was sorted.

Removal from site at ECP69

62. On 19 February 2019 the manager of ECP69 emailed Mr Andersen saying that the claimant had left without mopping both toilets and asking for an explanation as to why basic tasks are not completed. He said "not sure we will be able to continue with [the claimant] if this doesn't get addressed. Toilets not mopped, office not mopped, shop not mopped"[189]. On 20 February 2019 Mr Andersen further reported [188] that he had visited the site and a few areas had not been cleaned to standard. Mr Andersen said "I would like a letter sent out to [the claimant] explaining about her cleaning standards, and hold a formal meeting about this, or would it be a disciplinary seeing as this has happened before?" On 23 February 2019 the store manager then further complained that the claimant had been asked on 22 February 2019 to empty the warehouse bin and that the claimant had responded with "this is not my job." The manager said "I need this resolving asap… poor standard of cleaning and a blatant disregard for carrying out tasks that you have agreed are in the cleaning contract. Please advise when this will be resolved. Can we have a different cleaner?"[187]. The claimant denies that there was anything wrong with her cleaning standards and practices.

63. On 26 February 2019 Mr Andersen messaged the claimant to tell her to empty all bins on all sites when she cleaned [190]. The claimant replied to say that she did.

64. The claimant says that on 27 February 2019 there was a further incident at ECP69. The claimant was mopping the floor in the canteen and two workers came in to use the facilities. The claimant says that she stopped mopping to wait for them to finish and that she told them that. The same female worker, Jodie, was there and the claimant says that Jodie said "fucking bitch" in a low voice and then rubbed her shoes on the wet floor saying that she was joking.

65. On 28 February 2019 the store manager emailed Mr Andersen following on from a conversation and said "I would like to confirm that we would like to request the removal of [the claimant] from our branch as the cleaner. Our recent conversations regarding the poor quality of cleaning at the branch, the refusal to carry out tasks that you have agreed are in the cleaning contract, and your recent visit following my email with concerns we feel that this is the only way forward" [191]. Mr Andersen forwarded it on to Ms Dickinson saying he had spoken to the claimant in July 2018 about cleaning at the site and also said "I have spoken to her by telephone about emptying of ALL bins on site."

66. On 4 March 2019 Ms Dickinson advised Mr Andersen that he should tell the claimant about the latest complaint and also tell that she would be suspended from the site and invited to a disciplinary hearing. Mr Andersen telephoned the claimant that day to tell her. He reported to Ms Dickinson that the claimant had kicked off at him on the telephone [193]. On 5 March 2019 Ms Dickinson referred Mr Andersen to her email from 27 November 2018 about the warehouse and said: "This is the email I asked you to confirm to [the claimant] that she had to empty the warehouse bins. We had a discussion that it was not on the cleaning specification but you were going to notify her." Mr Andersen replied to say "this was done via telephone conversation" [195].

67. The claimant spoke with Ms Dickinson on 5 March 2019. Ms Dickinson says that she asked the claimant if she had seen Jodie swearing at her and that the claimant said she had not been looking. Ms Dickinson says she asked the claimant how she therefore knew the person had sworn at her and that the claimant said she knew because she was there mopping. Ms Dickinson says that during the call the claimant did not say she thought that she was being sworn at because of her sex or race. Ms Dickinson says that if there had been such an indication she would have raised it with the client and ensured an investigation took place.

68. On 7 March 2019 the claimant was sent a letter confirming her suspension and her invite to attend a disciplinary hearing on 8 March 2019 to be held at the ECP Hub. The allegations were identified as a failure to follow management instruction and poor cleaning standards and that the client had asked for the claimant to be removed from site [201].

69. The disciplinary meeting had been arranged for the other client site but the claimant attended the wrong site. The manager of ECP69 telephoned Mr Andersen to tell him that the claimant was there at the wrong site. Mr Andersen reported that the manager had said that the claimant "had squared up to him demanding that he give her an explanation and email as to what he had said." Mr Andersen said that he had been waiting for 20 minutes and was leaving the site as the claimant knew where she was supposed to attend. He said he wanted to proceed to remove the claimant from working at ECP69 [203]. He later reported that he had briefly spoken with the claimant [204]. The claimant was therefore removed from working at ECP69.

70. On 8 March 2019 the claimant emailed Ms Dickinson [205] saying that she was confused by the reference to the Hub. She said that she had telephoned Mr Andersen but that her calls had not made it through and that he should have waited for her. She complained that the manager of ECP69 had ordered her to go away, so she had told him not to speak to her like that and had told him any accusation must be put in writing and documented with evidence.

71. Since the events in question the respondent has lost their contract to clean at the Screwfix sites. The claimant exercised her right not to transfer under TUPE to the new service provider for Screwfix.

Discussion and Conclusions

Direct race discrimination and harassment related to race complaints

<u>17 October 2017</u>

72. Applying our findings of fact and the relevant law to decide the issues in the case our conclusions are as follows. The claimant says that the respondent failed to take steps to deal with harassment received from the employees of clients of SFX Swansea Central. It is said that failure by the respondent amounted to either direct race discrimination or harassment related to race by the respondent in its own right.

73. Taking into account the email at [184-185] it is more likely the incident happened on or around 9 October 2017. The claimant says that she did not herself identify that her treatment by Shaun was related to race at the time. In fact, the email at [184-185] shows that the claimant directly accused the client of leaving it to foreigners to empty the bins at the time. The claimant did not, however, report that accusation to the respondent at the time.

74. The claimant did complain to the respondent when the related altercation led to SFX Swansea Central asking for her to be removed from site. However, there is no evidence before the Tribunal that the claimant herself told the respondent that she considered she was the victim of race discrimination or harassment related to race at the time [122F]. The claimant's first grievance letter of 22 August 2018 [123 – 124], some 10 months later, complained about being removed from the site and said she had been offended by an employee of the client and had to defend herself but likewise did not say she considered it to be race discrimination.

75. The claimant's second grievance letter of 17 October 2018 used the words discrimination and harassment and said the behaviour of the SFX employee "should not happen in a civil country, multiracial and democratic" but still did not clearly express a specific complaint of race discrimination or harassment related to race. At the grievance hearing the claimant talked about there being a "bad attitude" towards her as opposed to again making an obvious complaint of race discrimination or harassment. The claimant used the word "discrimination" when discussing being removed from the site without being given a reason, and said that she had not been treated like a person. But again, it was not an obvious complaint of race discrimination or harassment related to race and was more of a complaint that she thought her treatment was unfair. Mr Risbey explained his view at the grievance meeting that it was not discrimination [169W].

76. The Tribunal does not consider that the respondent would have understood at the time that the claimant was complaining directly to them that she was the victim of race discrimination or harassment related to race. In that sense there was no complaint of harassment made to the respondent that there could be any inaction on their part in response to.

77. To the extent that it could be said that Ms King or Mr Andersen did not respond to the claimant's complaint that she had been unfairly treated by the employee at Screwfix and had then been unfairly removed by them from the site, then the Tribunal accepts that the claimant did want action taken. However, the Tribunal does not find that any such inaction by the respondent related to the claimant's nationality. The Tribunal finds that the reason why no more was done by the respondent at the time was because, as subsequently explained by Mr Risbey at the grievance meeting, the client had requested her removal and the respondent would go along with those client requests and not "rock the boat." The Tribunal could find no evidence to say or on which it could be inferred that such decision making by the respondent in terms of the respondent's conscious or subconscious mental processes, related in any way to the claimant's nationality.

78. By the time of the grievance hearing that position remained the same, and indeed by then the events and the claimant's removal from site were long past. In terms of any further inaction at that point of the grievance hearing, the Tribunal accepts that by then there would have been nothing that could sensibly have been done,

particularly bearing in mind the nature of the complaint that the claimant made at the time.

79. Likewise the Tribunal does not consider there is any evidence to suggest that the claimant was treated less favourably than someone of a different nationality would have been treated in the same or similar circumstances. There was no evidence before us to suggest that the respondent would have taken more action in the same kind of circumstances where a similar complaint was made by someone of a different nationality. Furthermore, the Tribunal, as above, finds that any inaction that could be said to have happened was because of the fact the client had requested the claimant's removal from site which the respondent would not override and, by the time of the grievance hearing, also the passage of time. The claimant's complaints of direct race discrimination and harassment related to race are therefore not well founded and are dismissed.

<u>26 October 2018</u>

80. On 1 November 2018 the claimant complained to Ms Dickinson about the incident with the bin at ECP69 [171]. The claimant did not, however, specifically complain that she was the victim of race discrimination or harassment related to race. Her complaint was about being shown a bad attitude, a lack of respect and being asked to do something that she did not consider fell within her cleaning instructions. The claimant only added in her allegation that she had been bullied about her Italian accent (in respect of which she has given no details) in April 2019 [39B] once these proceedings had started and she was being required to provide further particulars. At the time of the claimant's actual complaint on 1 November 2018, there was no recognisable complaint of harassment made to the respondent that there could be any inaction on their part in response to.

81. There is no evidence before the Tribunal as to what Ms Dickinson or Mr Andersen did specifically in response to what they did understand the claimant's complaint of 1 November 2018 to be about. By February 2019 the emptying of the warehouse bins was still posing a problem. The claimant had said in her email of 1 November 2018 that she was acting on Mr Risbey's advice and was reporting the matter and asking her line managers to take action. She therefore did want action taken.

82. The Tribunal considers it unlikely that the respondent would have taken the kind of steps envisaged by the claimant in her email. However, the respondent could have taken some steps to see if they could diffuse the situation and, in particular, have a dialogue with the claimant and the client about the emptying of the warehouse bins. By 2019 the client had said that Mr Andersen had agreed the warehouse bins should be emptied but there is no clear evidence before the Tribunal as to what the claimant was told about this back in November 2018. In

March 2019 Mr Andersen said he had a telephone conversation with the claimant [195] but there is no evidence before us of when that was said to have happened or what was said.

83. The Tribunal is unable to conclude, however, that any lack of action, particularly in relation to dialogue with the claimant, was because of or related to the claimant's nationality in any way. In particular, the Tribunal is unable to find that the claimant has established facts from which we are able to infer, in the absence of an explanation from Mr Andersen, that the reason related to or was because of the claimant's nationality. There is nothing which points in that regard, particularly bearing in mind our finding that there was nothing before Mr Andersen from the claimant to suggest that she was saying she was the victim of race discrimination or harassment related to race in respect of the incident on 26 October 2018. The claimant has therefore not discharged the primary burden of proof that would shift the requirement to provide a non discriminatory explanation over to the respondent.

84. Further, in respect of the direct race discrimination claim, there is no evidence before the Tribunal that the claimant was treated less favourably than someone of a different nationality would have been treated in the same or similar circumstances. There was no evidence before us to suggest that the respondent would have taken more action in the same kind of circumstances where a similar complaint was made by someone of a different nationality. The claimant's complaints of direct race discrimination and harassment related to race are therefore not well founded and are dismissed.

<u>27 February 2019</u>

85. On 5 March 2019 the claimant reported to Ms Dickinson that she considered she had been called a "fucking bitch" whilst mopping the floors. Ms Dickinson's evidence is that the claimant did not say she thought she was being sworn at because of her race. There was nothing about what was said to the claimant or the wider circumstances as reported by the claimant that gave any suggestion that the event was related to her nationality at all.

86. There is no evidence of Ms Dickinson taking specific action in response to the claimant's complaint which Ms Dickinson appears to attribute in part to the claimant having apparently said she had not seen the person swear and had just assumed it was directed to her. It also has to be set within its wider context that by that time the site had started complaining to Mr Andersen about the claimant and had asked for her removal. The day before the claimant had been told by Mr Andersen that she was being suspended from the site and being called to a disciplinary hearing.

87. It is not clear within that wider context quite what steps the claimant says that the respondent should have taken. The claimant was not telling the respondent that she was a victim of race discrimination or harassment by the client and that this was all tied up in the client's criticism of her and request to remove her from site. The claimant's specific allegation was a small part of a much wider picture involving the client none of which obviously included any complaint of discrimination. At the time it was also anticipated that there was going to be a disciplinary hearing where this concern could have been discussed.

88. The Tribunal is unable to conclude that any lack of action (if indeed there was a lack of action) was because of or related to the claimant's nationality in any way. In particular, the Tribunal is unable to find that the claimant has established facts from which we are able to infer, in the absence of an explanation from Ms Dickinson, that the reason related to or was because of the claimant's nationality. There is nothing which points in that regard, particularly bearing in mind our finding that there was nothing before Ms Dickinson from the claimant to suggest that she was saying she was the victim of race discrimination or harassment. The claimant has therefore not discharged the primary burden of proof that would shift the requirement to provide a non discriminatory explanation over to the respondent.

89. Further, in respect of the direct race discrimination claim, there is no evidence before the Tribunal that the claimant was treated less favourably than someone of a different nationality would have been treated in the same or similar circumstances. There was no evidence before us to suggest that the respondent would have taken more action in the same kind of circumstances where a similar complaint was made by someone of a different nationality. The claimant's complaints of direct race discrimination and harassment related to race are therefore not well founded and are dismissed.

Direct sex discrimination and harassment related to sex complaints

<u>18 July 2018</u>

90. The claimant did not report this incident in any meaningful sense until the grievance meeting itself. Mr Risbey himself did not initiate any action in respect of the claimant's complaint other than the grievance meeting being reported back to Ms Dickinson. He told the Tribunal that was because he considered that the allegation was too historic and would have to be promptly reported in order to be investigated. We asked him whether he had thought about the fact it could leave the claimant or a colleague having to continue to attend that workplace. He told us that at the time he thought it was a one off complaint as there had been no others, although he also accepted that with hindsight maybe more could have been done. In his exchanges with the claimant at the grievance meeting he talked about how the respondent might investigate this kind of allegation with the client (perhaps more so than other kinds), but he also said such investigations were

difficult as the allegations tend to be denied and it becomes the client's word against the cleaner's. He talked about how the outcome could be to remove the worker from the site and try to find another location for them. He spoke in general about the difficulties in challenging clients and the risk of losing contracts. It is certainly not a decisive factor, but it is also relevant to note that the claimant herself appeared to agree with Mr Risbey that it was by that time too late to deal with the complaint.

91. In determining the harassment complaint and the direct sex discrimination complaint what matters is what was in the decision maker's mind. Action could have been taken or initiated by Mr Risbey to look into the claimant's complaint. The Tribunal finds that Mr Risbey did not do so principally because he did not want to rock the boat with the client by raising the matter, and he self supported his own conclusion that regard by drawing on the time which had passed since the incident and the fact no one had brought any other similar complaints to his attention.

92. The Tribunal finds that this is the reason why Mr Risbey did (or did not do) what he did and it is not related the claimant's sex. As such Mr Risbey did not engage in unwanted conducted that was related to the claimant's sex. In respect of the direct discrimination claim he did not treat the claimant less favourably than he would have treated a male employee in not materially different circumstances. There is no evidence before the Tribunal that if a male employee had complained to Mr Risbey of having experienced harassment related to sex at the hands of an employee of a client that Mr Risbey would have taken more action.

93. As set out in our findings of fact little is known about the investigation that Ms Dickinson says she asked Mr Andersen to initiate and what it is he did in that regard and when. The claimant says she was not spoken to and it is therefore not known where Ms Dickinson/ Mr Andersen got the name from or indeed why they did not clarify the correct name with the claimant. It appears to have been a half-hearted investigation. The Tribunal is, however, unable to conclude on the evidence before us that failings in that regard were related to or because of the claimant's sex. There is no evidence before us that Mr Andersen would have taken more action in similar circumstances if it had been a male employee making a complaint of harassment related to sex. Further, he did not outright fail to or refuse to take the complaint, as a harassment related to sex complaint, back to the client which might otherwise be indicative of a wish to bury a harassment complaint. As such, on all the evidence available, the Tribunal finds it likely that Mr Andersen did not push the investigation in a more committed way for two main reasons. First, a desire, like Mr Risbey, not to rock the boat too far with a client given the risk of losing contracts. Second, because he had a deteriorating relationship with the claimant who, it is likely, he saw not following instructions, causing problems with clients and therefore trouble for him. As a result the claimant was not someone who he was likely to make an extra effort for. Again, those are reasons which are unrelated to the claimant's sex. The claimant's complaints of direct sex

discrimination and harassment related to sex are therefore not well founded and are dismissed.

27 February 2019

94. This is the same incident already considered above as a race discrimination complaint. Similarly there is no evidence that the claimant told Ms Dickinson that she thought she was being sworn at because she was female. It is notable in that regard that the alleged culprit was herself female. There was nothing before Ms Dickinson to suggest that the claimant was complaining of sex discrimination or harassment related to sex. As set out already above it is also important to view the incident within the much wider context there was at that time.

95. The Tribunal is unable to conclude that any lack of action (if indeed there was a lack of action) was because of or related to the claimant's gender. In particular, the Tribunal is unable to find that the claimant has established facts from which we are able to infer, in the absence of an explanation from Ms Dickinson, that the reason related to or was because of the claimant's sex. The claimant has therefore not discharged the primary burden of proof that would shift the requirement to provide a non discriminatory explanation over to the respondent.

96. Further, in respect of the direct sex discrimination claim, there is no evidence before the Tribunal that the claimant was treated less favourably than a male would have been treated in the same or similar circumstances. Whilst it could be said that it is unlikely a man would be called a "bitch" there is no evidence before us that a male employee making a complaint of having been sworn at in equivalent male orientated terminology would have seen more action taken by the respondent. The claimant's complaints of direct sex discrimination and harassment related to sex are therefore not well founded and are dismissed.

Victimisation

97. The Tribunal does not consider that either of the claimant's grievance letters constituted protected acts as they do not amount to an allegation that some one had committed an act of discrimination within the meaning of the Equality Act. The claimant's second grievance letter does use the words "discriminated", "harassment" and refers to a "multiracial" country. However, whilst accepting that an allegation of unlawful discrimination does not have to be an express one, the letter overall does not reasonably read as amounting to an allegation of discrimination within the meaning of the Equality Act. The claimant does also refer to "unwanted physical contact" but the letter gives no context to that to suggest it was harassment related to a protected characteristic.

98. In any event, even if the claimant did perform a protected act we do not consider that the claimant was subjected to a detriment because of any such protected act.

99. Screwfix Cwmdu had been complaining about the claimant and saying they preferred their alternative cleaner before the claimant had even brought her first grievance [128]. The branch manager then asked for the claimant to be removed from his store for the reasons set out in his emails. In particular, he considered that the claimant was upsetting his team and was alleging that the claimant was taking their cleaning gloves without permission. The Tribunal is satisfied that this is the reason why the claimant was removed from working at that site. The client would not have the claimant continuing to work there and the respondent's practice was to comply with those client decisions. There is no evidence before the Tribunal that the client knew about or was involved in the claimant's grievance in anyway and no evidence before us that the respondent failed to challenge Screwfix Cwmdu in some way because the claimant had brought her grievance. Any lack of challenge of clients, in the Tribunal's judgment lies with the respondent's practice of not wishing to rock the boat with clients and the need to comply with client decisions.

100. In respect of the claimant's removal from ECP69 in March 2019, likewise the emails from the client, particularly those at [197] and [191] show to the Tribunal's satisfaction that the operations manager asked for the claimant to be removed because of concerns he held (even if disputed from the claimant's own perspective) about the quality of cleaning, mopping not always being done, and the refusal to empty the warehouse bins. The Tribunal is satisfied that this is the reason why the claimant was removed from working at that site. The client would not have the claimant continuing to work there and the respondent's practice was to comply with those client decisions. There is no evidence before the Tribunal that the client knew about or was involved in the claimant's grievance in anyway and no evidence before us that the respondent failed to challenge ECP in some way because the claimant had brought her grievance. Any lack of challenge of clients, in the Tribunal's judgment lies with the respondent's practice of not wishing to rock the boat with clients and the need to comply with their decisions. The claimant's complaints of victimisation are therefore not well founded and are dismissed.

Unauthorised deduction from wages

<u>The reduced ECP hourly rate</u>

101. The respondent accepts that the claimant was initially told the contractual hourly rate was £7.75 and that they later told her this was a mistake and that it was reduced to £7.50 in October 2015. That amounted to a proposed variation of the contract by the respondent which would have required the claimant's agreement. The respondent's case is that the claimant agreed to that variation by continuing to work under the ECP contract at the reduced hourly rate.

102. The leading case in this area is Abrahall v Nottinghamshire County Council [2018] IRLR 628. The Court of Appeal held that an employee's conduct in continuing to perform a contract where an employer has made clear they wish to modify it can, in principle, be reasonably understood as indicating acceptance of the change. The Court of Appeal held that ultimately each case must be assessed on its own facts and circumstances. The inference of acceptance of the changed terms must arise unequivocally. The passage of time can be relevant as the time may come when an employee having a period of time to think about their position ceases to be a reasonable explanation for the employee's lack of action in rejecting the variation.

103. There was no Union or collection negotiation involved in this case. This was a variation of the claimant's contract which had an immediate practical consequence for her in terms of her pay and the respondent's position was unequivocal: the hourly rate being offered was just that. Whilst the claimant originally objected, her objection was refused and the respondent continued to pay her the reduced hourly rate. The claimant did not complain again or raise a grievance. She did not tell the respondent that she was only continuing to work for that client under protest and that she was reserving her contractual rights. She continued to work on site for the reduced hourly rate. She said that was because she could not afford to lose the hours. The risk of losing that site could only be avoided by the claimant accepting the terms and this therefore in itself supports the proposition the claimant decided to accept the lower hourly rate. The Tribunal is satisfied that the claimant's conduct after a period of time and by continuing to work for that client, was only referrable to her having accepted those new varied terms. After the initial protest the claimant carried on working at ECP on that lower hourly rate over a 19 month period. As a result the claimant was not paid
less than was properly payable to her and the claimant's claim for an unauthorised deduction from wages does not succeed in this regard.

Underpayments in various pay periods

104. The claimant says that she was underpaid in respect of payslips dated 20/4/18, 15/6/18, 10/8/18, 7/9/18, 5/10/18, 19/10/18 and 22/2/19. Her calculations are set out at [208 – 209].

20/4/18

105. The claimant says she was underpaid by 4 hours work when working across the two Screwfix sites in the pay period 13/3/18 to 12/4/18. The respondent's summary record, as explained to us in evidence by Ms Wyard, is at [364]. The relevant entry is at 2-18 and shows the claimant working for 8 hours but only being paid for 7. The annotations in the right hand column explain that in the pay period before the claimant had completed 7 cleans at 1 hour but had been mistakenly paid for 8. 1 hour overpayment was therefore recovered in the pay period in question. Section 14 of the Employment Rights Act has the effect that there is no

unauthorised deduction from wages where the purpose of the deduction is an overpayment of wages. The Tribunal therefore accepts that in respect of that recovery of 1 hour there was no unauthorised deduction from wages.

106. The respondent does not dispute that the claimant was owed 2.5 hours holiday pay in that period for Screwfix North. It is also not disputed that it went unpaid in that pay period. [364] refers to "Easter bank holidays missed 2.5." The respondent argues that there was no underpayment because the loss was made good in the following pay period, shown at line 3-18. The Tribunal finds, however, that it was an unauthorised deduction from wages under section 13(3) of the Employment Rights Act as the amount of wages paid to the claimant on the occasion of the payslip of 20/4/18 was less than the total amount of wages properly payable to the claimant on that occasion(i.e that pay period/that pay slip). That it was subsequently reimbursed does not mean that there was not a deduction at the time. The claimant is therefore entitled to a declaration that there was a deduction from wages on that occasion. Whether there remains any reimbursement ultimately due to the claimant is a matter for any remedy hearing, if necessary.

107. The remaining 0.5 hours was for work done at Screwfix North that went unpaid to the claimant in the pay period. Line 4-18 at [364] shows the claimant being paid an hour due for period 2-18. However, again the fact it was subsequently reimbursed does not mean there was not a deduction at the time of the pay period. The claimant is therefore entitled to a declaration that there was a deduction from wages on that occasion. Whether there remains any reimbursement ultimately due to the claimant is a matter for any remedy hearing, if necessary.

15/6/18

108. The claimant says she was underpaid 4 hours holiday pay from ECP218 for a bank holiday on 28 May 2018 and holiday requested for 4 June 2018. The respondent disputes that anything is due saying that there are no holiday request forms. One day was however a bank holiday which the claimant says, and the Tribunal accepts, she would be paid for without a form being submitted. In respect of the day's holiday, there is a holiday request form for all sites including this at [340]. The Tribunal therefore accepts that the claimant did take authorised holiday on those dates and is entitled to be paid. There was therefore an unauthorised deduction from wages in respect of that 4 hours holiday pay.

109. The claimant says she was also underpaid holiday pay at Screwfix Cwmdu and Screwfix North. The respondent accepts that they failed to pay 1.5 hours holiday pay for Screwfix North, however, argue that this is offset by a later entry at 20-18 where it is said the claimant was overpaid as she was paid for 11 hours work having only performed 9 hours. As above, however, the Tribunal finds that it was an unauthorised deduction from wages at the time that that pay was due for the pay period in question and the claimant is therefore entitled to a declaration. Whether

the claimant is entitled to a financial remedy is a matter for a remedy hearing and in particular, whether the respondent can show when and how each reimbursement was made good.

110. The claimant also says she was underpaid by 1 hour's holiday pay in respect of Screwfix Cwmdu. The respondent accepts this but says that it is offset by overpayments to the claimant allegedly made in general. The claimant is, however, entitled to a declaration that there was an unauthorised deduction at the time and whether there is a financial remedy due will be a matter for a remedy hearing, if necessary.

10/8/18

111. The claimant says that she was not paid for 2 hours holiday pay at Biffa taken on 27 July 2018. The respondent says there is no evidence to support the claim. However, the holiday request form is at [342] and the claimant's payslip at [301] does not show the relevant holiday payment being paid to her for this particular site as opposed to others. It was also one of the underpayment complaints that the claimant pursued at the grievance meeting in respect of which we have found the respondent did not revert to her about. The respondent has adduced no evidence to the contrary to show that the claimant was paid the sum. Ms Wyard told us that she did not work on the Biffa contract and therefore did not check the Biffa figures or prepare a spreadsheet about them and no one else did. The Tribunal therefore finds that the claimant did suffer a deduction of wages of 2 hours holiday pay.

7/9/18

112. The claimant says that she took holiday on 27, 28, 29 and 30 August 2018 totalling 8 hours holiday pay due in respect of Biffa but she was only paid for 2 of those hours [303]. The claimant's holiday request form is at [344]. As above, the respondent has adduced no evidence to the contrary. The Tribunal therefore finds that the claimant did suffer a deduction from wages in respect of 6 hours holiday pay in this pay period.

5/10/18

113. The claimant says she was again underpaid by 2 hours holiday in respect of Biffa for 18 September 2018. The claimant's payslip is at [305] showing the holiday pay was not paid and the holiday form is at [346]. Again the respondent has adduced no evidence to the contrary and the Tribunal therefore finds the claimant did suffer a deduction from wages in respect of 2 hours holiday pay in this pay period.

19/10/18

114. The respondent accepts that the claimant was underpaid by 1 hour in this pay period in respect of ECP69. The respondent says however that in general the claimant was overpaid at ECP69. The respondent says, as explained by Ms Wyard in her evidence, that the claimant had been previously overpaid holidays because she was mistakenly paid according to a 6 hour contract and not a 4 hour contract. They are shown as yellow entries in the boxes on the right hand side of the table at [365]. Section 14 of the Employment Rights Act disapplies section 13 where the *purpose* of the deduction is the reimbursement of the employer in respect of an overpayment of wages. Whilst the claimant may well have in fact been overpaid, there is not sufficient evidence before the Tribunal clearly showing that the underpayment at the specific time in question had the specific purpose of reimbursing the respondent for an earlier overpayment of wages. As such, the claimant is entitled to a declaration that she suffered a deduction. Whether there is a financial remedy due to the claimant is a matter for any remedy hearing.

22/2/19

115. The claimant says that during this pay period she worked 10 hours for Biffa and took 10 hours holiday on 8, 11, 12, 13, and 14 February 2019. The holiday form is at [348]. The payslip at [330] shows the claimant being paid 10.25 hours work and 8 hours holiday totalling 18.25 and therefore a deficit of 1.75 hours. As this is Biffa the respondent again has not provided any evidence to the contrary and the Tribunal therefore finds that the claimant suffered an underpayment of 1.75 hours pay/holiday pay.

116. In respect of ECP69 it is accepted that the respondent failed to pay 4 hours holiday pay. The respondent says that the claimant had been previously overpaid holiday pay because it had been mistakenly previously paid as a 6 hour contract as opposed to a 4 hour contract. As above, we do not find we have sufficient evidence clearly showing that the underpayment at the time it happened had the specific *purpose* of reimbursing the respondent for an earlier overpayment of wages. As such, the claimant is entitled to a declaration that she suffered a deduction. Whether there is a financial remedy due to the claimant is a matter for any remedy hearing.

117. This claim was only listed for a liability hearing and whilst the deduction from wages claim in total is only for a relatively limited amount the Tribunal did not consider that we could fairly and appropriately deal with remedy beyond making the declarations that we have made above. The parties are strongly encouraged to see if they can resolve the value of the deduction from wages claim without the need for a further hearing bearing in mind the limited value. If not, if the respondent is seeking to argue under section 25(3) of the Employment Rights Act that it has made good any or all losses to the claimant in respect of the deductions we have made declarations about, it will need to adduce clear evidence of specifically how and when it is said each of the individual losses are made good. The Tribunal does not currently consider it is sufficient to simply say that in general the claimant had been overpaid and that can be offset to make good

any losses. For one, the respondent cannot ultimately know this as they themselves accept that they have not checked the Biffa sums.

118 In relation to time limits the Tribunal is satisfied that there was a series of deductions over the period and there was no break between any deductions of 3 months of more so as to break the chain. The claimant when raising these issues with the respondent would group them together as part of one theme or one dispute. The deductions were all of a similar kind and were factually linked and occurred with sufficient regularity to be considered a "series." The claim was presented within 3 months of the last of the deductions and it is therefore not out of time.

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Employment Judge R Harfield
Dated: 22 February 2021

JUDGMENT SENT TO THE PARTIES ON

23 February 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS