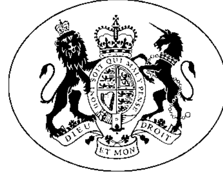


# EMPLOYMENT TRIBUNALS

| Claimant | Respondent |
|---|---|
| Ms C. L. Wallace | H-C One Ltd |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

Held at Newcastle (by Cloud Video Platform) On 12-13 April 2021
Before Employment Judge Garnon Members Ms B. Kirby and Ms E. Wiles
Appearances
Claimant: in person
For the Respondent: Ms J. Hale Solicitor

**JUDGMENT**

**The unanimous judgment of the tribunal is:**
**1. The claims of direct sex discrimination, victimisation and unlawful deduction of wages are not well founded and are dismissed.**
**2. The claim of harassment is well founded to the extent set out in the reasons below. We award compensation of £ 3000 and interest of £320.**

**REASONS** ( bold print is our emphasis, italics are quotations, and numbers in brackets are pages in the bundle)

## 1. Introduction and Issues

1.1. By a claim presented on 16 April 2020 after Early Conciliation from 2 March to 2 April, the claimant, born 28 April 1973 and employed from 18 October 2019 to 7 February 2020 brought complaints of direct sex discrimination, harassment and victimisation under the Equality Act 2010 (EqA), and unlawful deduction from wages under the Employment Rights Act 1996 (ERA).

1.2. On 6 August 2020 Employment Judge Johnson conducted a preliminary hearing with the claimant in person and Ms J Hale for the respondent. In Mervyn-v-BW Controls 2020 IRLR 464 Lord Justice Bean ( Bean L.J.) said if an issue potentially emerges from reading a claim or response the Judge's duty is to identify it. Employment Tribunals (ET's) should be accessible to unrepresented parties so deficiencies in a claim need to be addressed. The worst course is to leave an issue unaddressed and risk it emerging at the full hearing. Employment Judge Johnson worked through the claim and wrote :
*Insofar as they can currently be identified, the issues in the case (the questions which the employment tribunal will have to decide) are as follows:-*

*(i) Were those comments, alleged to have been made by the claimant's colleagues, actually made?*
*(ii) What exactly was said by those colleagues?*
*(iii) Were those comments "unwanted" and if made, did they have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?*
*(iv) If made, did they amount to less favourable treatment in the sense that such comments would not have been to or about a male comparator?*
*(v) Was the claimant's formal grievance a "protected act" as defined in Section 27 of the Equality Act 2010?*
*(vi) If so, did the raising of the grievance have a material influence on the respondent's decision to dismiss the claimant?*
*(vii) Was the claimant contractually entitled to any travelling expenses for attending the training course referred to? If so, how much?*

1.3. In Price-v-Surrey County Council Lord Carnwath observed employment judges " *have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented".* **That said,** Chapman-v-Simon precludes the tribunal dealing with claims which are not "pleaded", which means set out in the claim, or added as an amendment. Office of National Statistics-v-Ali held each type of discrimination is separate. It is necessary to specify, the **act** and the **type** of unlawful conduct relied upon. As set out, the only act of victimisation alleged was dismissal. Although in our findings of fact we mention some things which could have been argued as detriments we cannot deal with them, but they would have made no difference to remedy anyway.

1.4. In the harassment claim the legal issues are:
1.4.1. Did the respondent, or some person for whose acts or omissions it is liable, engage in unwanted conduct falling within s 26 (1) (2) or (3) of the EqA?
1.4.2. Did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
1.4.3. If not, did it have that effect, taking into account her perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

1.5. In the claim of direct discrimination because of sex
1.5.1. Did the respondent or some person for whose acts or omissions it is liable treat the claimant less favourably than it treated or would treat a man?
1.5.2. Has the claimant proved primary facts from which the Tribunal could infer the difference in treatment was **because of** sex?
1.5.3. If so, does the respondent's explanation prove a non-discriminatory reason for it?

1.6. In the claim of victimisation
1.6.1. Has the claimant carried out a protected act or did the respondent or some person for whose acts it is liable believe she had or might?
1.6.2. Was she dismissed at least in part because of that?

1.7. Was a deduction from her wages for a taxi fare to a training course lawful?

**2. The Relevant Law**

2.1. Section 40 EqA makes harassment unlawful and s 26 says
*(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 gender reassignment or 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 other circumstances of the case;*
*(c) whether it is reasonable for the conduct to have that effect.*

2.2. Section 27 of the EqA includes:
*(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*
*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

Section 39 (4) then includes:

*An employer (A) must not victimise an employee of A's (B)—*
*(c) by dismissing B*
*(d) by subjecting B to any other detriment.*

2.3. Section 13 includes:

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

Section 39 includes

*(2) An employer (A) must not discriminate against an employee of A's (B)—*
*(c) by dismissing B;*
*(d) by subjecting B to any other detriment.*

2.4. Shamoon-v-Royal UlsterConstabulary held in direct discrimination and victimisation we must determine the "reason why" the claimant was treated as she was. Sex, or the protected act, need not be the only or main reason, only a more than trivial factor. However, it must cause the dismissal or other detriment In the Employment Appeal Tribunal (EAT) in Law Society-v-Bahl, Mr Justice Elias ( Elias J as he then was) said *: It is important to appreciate that whilst less favourable treatment will usually, albeit not inevitably, constitute a detriment, the converse is far from true.* ***There will be many acts which an employer or his servant or agent may take towards someone which will be a detriment even although it is not discriminatory in any way.*** *…It follows that merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct.*

2.5. In Nagarajan-v-London Regional Transport, Lord Nicholls explained conscious motivation on the part of the discriminator is not a necessary ingredient of victimization. Chief Constable of West Yorkshire-v-Khan and Villalba-v-Merrill Lynch 2006 IRLR 437 held the protected act must have a significant influence on the decision of which complaint is made. Failure to deal adequately with a complaint is not unlawful merely because it is of discrimination or harassment, Eke-v-Commissioners of Customs and Excise 1981 IRLR 334 but if it shows a "cover-up" that could point to victimisation.

2.6. As Neill L.J. said in King-v-Great Britain China Centre , very few people are prepared to admit discrimination even to themselves. Tribunals may infer it from proven facts. Unreasonableness does not show the reason why something was done Glasgow City Council-v-Zafar neither does incompetence Quereshi-v-London Borough of Newham). Section 136 EqA states:-

*(2) If there are facts from which the court 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.*
*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

2.7. Elias L.J. explained this in Ladele-v-London Borough of Islington

*40. Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*

*(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan-v-London Regional Transport 1999 ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*

*(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p.886F) as explained by Peter Gibson LJ in Igen-v-Wong 2005 ICR 931, para 37.*

*(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen-v-Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than*

*reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:*
*"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."*
*If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden* ***by proving on the balance of probabilities*** *that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination….*

*(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, .. of the employee.* ***So the mere fact the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one****. As Lord Browne Wilkinson pointed out in Zafar-v-Glasgow City Council 1998 ICR 120 :*
*"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."*
*Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl-v-Law Society 2004 IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.*

*(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see Brown-v-Croydon LBC 2001 ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.*

*(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya-v-University of Oxford 2001 IRLR 377 esp.para.10.*

As explained in Anya factors which are not "obvious" may point to sub-conscious discrimination particularly when good equal opportunities practice exists in a company but is not followed.

2.8. In Eagle Place Services Ltd-v-Rudd Judge Serota Q.C. cited from Bahl with approval and said :
*"The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful*

*discrimination to be made. **Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."***

2.9. Section 109 includes

*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

*(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

*(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show B took all reasonable steps to prevent A—*

*(a) from doing that thing, or*

*(b) from doing anything of that description.*

There is no ss (4) defence pleaded and if it had been it would not have been shown on the facts .

2.10. Section 212(1) EqA includes "*detriment" does not, subject to subsection (5), include conduct which amounts to harassment".* Before harassment was made unlawful in itself, if a person engaged in conduct related to sex or of a sexual nature towards another but did not do so **because of** sex, there was no direct discrimination Porcelli-v-Strathclyde Council**.** Under section 26 the link is now between the protected characteristic **and the conduct not the "reason why" the conduct occurred.** The authors of the IDS handbook "Discrimination at Work" take the view s 26 also covers conduct done because of the protected characteristic. In Bakkali-v-Greater Manchester Buses Ms Justice Slade said *"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. **It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant.*** We have seen many examples of unwanted conduct, done because of a protected characteristic or act, but in which the conduct itself did not overtly relate to one. We believe s13 and s27 still cover that. Section 212 is to prevent the same act or omission being both victimisation/direct discrimination and harassment.

2.11. In deciding whether conduct has the effect referred to in s.26(1)(b) each of the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect must be taken into account. The test has both subjective and objective elements. The subjective part involves looking at the effect the conduct had on the particular claimant. The objective part requires the tribunal to ask whether it was reasonable for the conduct to have had that effect **on her**. Tribunals should bear in mind different people have different tolerance levels. Conduct that might be shrugged off by one person might be found humiliating or intimidating by another. In Reed-v-Stedman the EAT said , '*it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.*'

2.12. Richmond Pharmacology-v-Dhaliwal 2009 ICR 724 Pemberton-v-Inwood 2018 ICR 1291 and the EHRC Employment Code note relevant circumstances can include those of the claimant. They can also include the environment in which the conduct takes place (see para 7.18 of the Code) and the **context**, eg that the alleged harasser was the claimant's manager, Heafield-v-Times Newspapers Ltd

EAT/1305/12. As Mr Justice Underhill, then President of the EAT said in Dhaliwal '*Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question*.' His Lordship added in assessing effect, '*One question that may be material is whether it should reasonably have been apparent the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*'. In HM Land Registry-v-Grant 2011 ICR 1390 Elias LJ said '*When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*.'

2.13. Reed-v-Stedman counselled against carving up a case into a series of specific incidents and trying to measure the harm or detriment in relation to each. Instead, it endorsed a cumulative approach quoting from a USA Federal Appeal Court decision(USA-v-Gail Knapp): '*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' This was approved in Driskel-v-Peninsula Business Services Ltd and, although both cases were decided before the EqA, the same approach should apply. **However, all the acts must be covered by s26. The claimant cannot add to such acts matters she found "harassing" on other grounds. The claimant focused on the imprecise word "bullying". If, for example, a manager "gave her a hard time" over her work that is not the same type of conduct as conduct related to sex.**

2.14. Section 13 ERA includes
*(1) 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.*

However, section 14 includes

*(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—*

*(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.*

In our judgment if a payment is made to a third party on the workers behalf of a debt owed to that party by the worker section 14(1) (b) would still apply

**3. Findings of Fact**

3.1. We heard the claimant, Claire Louise Wallace, and, for the respondent, **only** Ms Louise Dey and Mr Adam Hassan. We had an agreed bundle of documents.

3.2. HC-One Limited is a provider of care for the elderly employing around 23,000 people in the UK. The claimant was a Care Assistant at Acomb Court Care Home (the Home) which has 76 beds and employs about 80 people. She started on 18 October 2019. Her contract of employment (62-68) provides for a six month probationary period during which her performance would be regularly assessed by the Home Manager or someone she nominates.

3.3. Ms Helen Hewison worked at the Home as a Senior Carer. The claimant said some carers had left because of her manner. She used to watch the claimant and comment she was doing so. One night the claimant said she felt tired and, in front of others, Ms Hewison told her to "*just get on with it*". Another member of staff told the claimant to just ignore her. She also was told Ms Hewison and Darrel Wilmot, Senior Carer, were friendly with Lynne McCarron, the Home Manager.

3.4. Louise Dey started as a carer and worked her way up to Deputy Manager at the Home. She now holds that position at a different home. In her time she had dealt with some staffing issues but had access to Adam Hassan, the Human Resources Adviser, Tracy Dixon, the Area Manager and Ms McCarron to ensure she was doing the right thing. Ms Dey and Ms McCarron had concerns about the claimant's performance. She had not previously worked in a care home. Ms Dey spoke to her early in her employment for talking inappropriately about the frequency and smell of residents' incontinence but dealt with it informally because she was new. The claimant says **before 21 December** she had been called in on her day off and accused of saying things about residents with no evidence other than a member of staff had told management. This was one of the claimant's "own goals". A tendency to believe more senior staff, whatever they say, over a newcomer is commonplace and need not be related to any protected characteristic or act. It is "just" unreasonable.

3.5. The claimant complains of lack of training. There are online modules called "Touchstone" and for some, **but not all**, a manager had to sign her off as having completed it . That apart training was mainly "on the job" by shadowing others. She asked when they were going to send her for formal training. She was told it was at Gateshead and they would put her on the next course in January. She was told to just do her Touchstone, given a laptop and a book in which to record what she did. She was also told other new staff working on the floor were "untrained" like herself. However, on about 12 December 2019, she went for training in Moving and Handling to another home in Newcastle, but arrived late. Whether that was due to the train being late, as she says, or her missing a train, the plain fact is she, unlike others, did not arrive on time.

3.6. A few days before 21 December Ms Hewison "befriended" the claimant on Facebook after looking her up. The claimant was reluctant to accept her as a Facebook friend as she likes to keep her work and personal life separate but at that point they were getting on reasonably so she did. On Saturday **21 December** at about 7.45 pm, the claimant, about to finish her shift, went to the Nurses Station (a small room off the lobby) where, she says, Ms Hewison took it upon herself to use her own phone to show Mr Wilmot, Shirley Charlton and Felisia Rosales Garcia, Care Assistants, photos from the claimant's Facebook page of her wearing a black leather basque and fish net stockings, done for a rock magazine when she had been a model. Ms Hewison said the claimant looked like a "*slut*" and asked Mr Wilmott "*doesn't she look like a slut*?" He agreed saying she "*looked like she belonged on a porn site*". Ms Charlton shook her head and said nothing. Ms Garcia said she "*looked like a go-go dancer*". The claimant tried to laugh it off, went upstairs to get a rota and, when she came down, Ms Hewison asked if she was married. The claimant replied she was not but had co-habited with a couple of men over the years. Ms Hewison said "*one in the front, one out the back*". As the claimant went to clock off, Ms

Hewison shouted "*where you going? Pink Lane*?". Pink Lane in Newcastle is notorious for prostitutes. The claimant left in tears and a member of the public asked if she was OK.

3.7. On **Christmas Day** the claimant was on Ms Hewison's floor where she was the Senior. The claimant went to the room of a resident ("J"). Ms Hewison followed her, sat next to her on the bed while she brushed J's hair and commented "*she's a fan*". The claimant mentioned to J she had been out that weekend with friends. Ms Hewison commented "*I bet I know what you got for Christmas*". This was taken by the claimant as a reference to having sex.

3.8. Later that day the claimant told Ms Hewison she found her comments on 21 December offensive. Ms Hewison said they were "*only joking*". She then added she had stuck up for the claimant with other staff in the past but was not going to do so again. The claimant overheard her say to another member of staff that the claimant had taken offense to her comments on 21 December adding "*if she's not off my floor* ***I am going to have her***". Later that day the claimant was taken to the Nurses Station by Ms Hewison who told her J's relation had made a complaint about the claimant saying J " *did my head in* ". The claimant denied this but was moved on to the Nursing Floor for the remainder of her shift where she was shown by the Acting Senior Carer how use a sling, which she had not been shown before.

3.9. On **26 December 2019** in the morning, the claimant was working on the top floor where Charlotte the Senior Carer "*barked*" she was late. The claimant does not deny being late. Ms Dey says that day Charlotte saw the claimant was not using the footplates when residents were in wheelchairs and continued to ignore her directions so Charlotte took the matter to the registered nurse on duty, Valentine. He contacted Ms McCarron who was on call out of hours. She said to send the claimant home. Valentine told her she was Incompetent, not listening to instruction, asked if she thought the job "*was working out*", she was being sent home as she was a risk to residents and Ms McCarron would be in touch. None of these events have any relation to sex, and there is no evidence they were instigated by Ms Hewison in retaliation for the conflict the claimant had with her the day before.

3.10. On **27 December 2019**, an anonymous complaint was received through the respondent's whistleblowing hotline. The caller said on the night of 21 December 2019, she had been in the lobby of the Home and overheard Ms Hewison, Mr Wilmot, Ms Charlton and Ms Garcia passing around the claimant's photograph making fun of her and calling her a prostitute and a slut. The caller said Ms Garcia had said the claimant looked like a "*go-go dancer*" and Ms Hewison had said to the claimant as she was clocking out *'are you going to Pink Lane'*.

3.11. Ms Dey explained when an anonymous complaint comes in through the company's DATIX system to head office, the Home is notified so necessary action can be taken. Ms McCarron's allegedly "investigated"(70-81) on 28 December 2019, by taking statements from all four who confirmed they had been at the nurse's station for handover when **the claimant** showed the photograph around and talked about being a model. This led to them laughing and joking about it. Ms Hewison commented about the photographs being in an adult magazine. They said the claimant routinely showed staff pictures of herself. None admitted to hearing any reference to Pink Lane. Ms Hewison's interview is a tirade of criticism of the claimant's work, none of which she had raised with anyone else before.

3.12. Ms McCarron's conclusion (73), reached **without speaking to the claimant** was the anonymous complaint "*did not tally*" with the statements and all the employees including the claimant had been participating in "banter". As it was anonymous it was not possible to verify details with the complainant. The action to be taken (74) was supervision sessions with staff involved and the bullying policy would

be reiterated. Ms Dey does not know if that was done but recalls bullying was bought up at a "flash" meeting with staff when Ms McCarron reminded them what was acceptable and what was not. Ms Dey gives no evidence of when that was or of the claimant being told about the anonymous complaint.

3.13. We find Ms McCarron made up her mind on 28 December without even speaking to the claimant, the anonymous caller's version of what was said by Ms Hewison on 21 December was untrue. The claimant denied to us she had sent the anonymous complaint and we believe her. The respondent assumed she had and we thought it possible which is why our Employment Judge asked her directly at the start of her evidence. We asked her to name any people in the lobby who could have heard what was said and she mentioned two carers, named Rebecca and Jenna, neither of whom she named in her grievance or at any point before. It is often small details which lend credibility to an account, in this case the mention of Pink Lane in both the anonymous report and the claimant's later formal grievance.

3.14. Ms. Hale submitted the four written statements are consistent and credible. They read well but that does not mean they are true. Ms. Garcia has left the country. Astonishingly, neither Ms Dey nor Mr. Hassan could tell us whether Ms. Hewison, Ms. Charlton or Mr. Wilmot still worked for the respondent. Ms. Hale said it was a policy decision not to call evidence from these "junior" employees. The result is we have the claimant's credible testimony including such details as the mention of "Pink Lane", a DATIX report corroborating it which the claimant credibly denies making and absolutely nothing apart from written statements taken by Ms Mc Carron, who has left the employment and also not been called, to contradict it. This is not an unfair dismissal case in which the respondent only has to show what it reasonably believed. The claimant had done enough to show her version of what Ms. Hewison said on 21, and 25, December is more likely than not to be true and the respondent has not come close to showing otherwise. Ms Dey gave a guarded reply when asked to describe Ms. Hewison's style but the impression was of efficiency but bluntness. When evidence cannot be tested and no assessment made of a witness, the respondent cannot be surprised we prefer the claimant's account.

3.15. The claimant was on leave in Scotland until after the New Year. Ms McCarron spoke to the claimant on **30 December 2019 by telephone** (69) about on Boxing Day (a) not listening to guidance (b) not following moving and handling instructions (c) inappropriate ways of addressing family and staff (d) recurrence of issues raised previously by SCA's. The claimant says on that day she told Ms McCarron about what happened on 21 December. We accept that was mentioned but not in detail.

3.16. At about 8 am on 6 January 2020 the claimant rang Ms Dey or vice versa. On 6-7 January 2020, she was to attend training at Springfield House, Gateshead, a home operated by the respondent. The fact she had been sent home on 26 December and spoken to Ms McCarron on 30 December provides no logical explanation for her being uncertain, as she claims to have been, her attendance at it was still required. The claimant does not drive and lives in walking distance of the Home which is in Hexham. She was told she had half an hour to get to the Home as Stephen, a carer who was giving her a lift, was leaving soon. When she got there he had left and she had half an hour to get to Gateshead. Public transport would not get her there in time. Ms Dey says the claimant said she knew a taxi driver who would take her. The claimant accepts she was not authorised to take a taxi at the respondent's expense. The next day Stephen could not take her anyway but could bring her home so she took a taxi again. At that time of day the journey by taxi or public transport to Gateshead would take about 45 minutes. Mr Hassan says the claimant "*of her own volition and without any approval*" used the Home's taxi account, at a cost of £54 each day charged to the home. When that was discovered £108 was deducted from her wages. The expenses policy (52-61) under the travel section (55) says all travel

bookings should be pre-approved by a manager and failure to seek pre-approval would result in her being responsible for the cost. It also says (56) taxis are not appropriate for journeys over 10 miles. The claimant says £108 was an unlawful deduction from wages. The respondent relies on s 14(1)(b) ERA which, in our judgment does cover the factual situation. This part of the evidence has another significance. The claimant is ready to blame others for not getting to training on time but reluctant to accept responsibility for her own omission to allow herself enough time.

3.17. Jenny Christie, Learning and Development Facilitator, reported to Ms Dey and Ms McCarron by email (82), the claimant had not completed training satisfactorily, been disengaged, not self-aware and unable to do practical tasks without assistance. We accept Mr. Hassan's evidence the email dated 7 January is as strong an indictment of a new carer's performance at a course as he has ever seen. Ms Dey told the claimant on **9 January 2020** (85) she was not to use any moving and handling equipment until she had been signed off by a Safe People Handling (SPE) coach. She also told her she had yet to complete several modules on Touchstone and needed to as soon as possible. During their meeting, the claimant did mention she had raised a grievance, but Ms Dey said that was an entirely separate matter. The claimant's version is not significantly different about that part of the meeting as to what was said.

3.18. The claimant's version is very different on other points. As Lord Justice Sedley said in Anya, a witness may be credible, honest but mistaken. It appeared from our pre-reading of her statement there was one meeting "*with Lynn and Louise*" at which she was told by Ms McCarron (a) the taxi fares were not being allowed (the taxi driver had contacted Head Office who paid but informed him the fares were coming out of the claimant's wages) and (b) somebody had whistleblown to Head Office about "abuse" in the Home, of which the claimant knew nothing, and about the way she was treated on 21 December. The DATIX document shows that person had overheard from the lobby but did not say the incident happened there and there is indeed some mention of what might be termed abuse of residents and understaffing, neither of which the claimant has raised. She would have done had her intent been to cause trouble for the respondent or Ms Hewison. It is possible the claimant was the anonymous caller, but the more one looks at the DATIX document, the less likely that becomes.

3.19. We accept Ms Dey's recollection that after she had discussed the training course with the claimant Ms McCarron came into the room and said she wanted to speak with the claimant at which Ms Dey left. Documents recording a discussion (90-93) which have spaces for dates and times were left blank by Ms McCarron who spoke to her only about the anonymous call. The outcome letter, purportedly of her formal grievance (94) says a meeting happened **on Wednesday 8 January** but the respondent accepts the date is wrong. Both sides versions are lacking in times and even order of events. The notes are woefully lacking in detail. Ms McCarron told the claimant she had Interviewed staff on duty and in her view the claimant was not being bullied. The claimant says, **after that,** she knew she would not be dealt with fairly so she "*took it to Head Office*" raising a formal grievance on 9 January 2020 (84) by email at 11.59. The notes show this meeting was about the anonymous call not the formal written grievance.

3.20. HR from Head Office acknowledged the grievance at 14.57 on 9 January and asked the claimant if she had raised with the Home Manager. On 10 January at 13.26 she said she had which must be a reference to their undated talk . Mr Hassan says only then was the e-mail passed to him to action. The claimant also told Ms Pixton in HR she had already raised her concerns with Ms McCarron who had done nothing about it so she now wanted to speak to the Managing Director. The grievance policy (43-51) says issues should be resolved informally in the first instance. Mr Hassan adds "*It had not been*

*raised with Lynne McCarron previously (although there had been a similar anonymous complaint previously) so I arranged for Lynne McCarron to deal with the matter in accordance with the grievance procedure. Lynne McCarron has left the business, but I supported her through the grievance process and investigation. Lynne had already taken statements from staff members when she had investigated a similar anonymous complaint*". He refers to the earlier notes at 75-81. Ms McCarron confirmed her conclusion in letter of 20 January 2020 (94) headed" Outcome Formal Grievance Hearing". The grievance was not upheld as she was satisfied there had been no bullying because the claimant had shown the photographs to colleagues in the first place. Mr Hassan spoke to Ms McCarron about her decision. She explained witnesses had said it was the claimant who had been showing colleagues photographs from Facebook and said she had done modelling in the past. He says "*This had led to some banter between the colleagues' present including a comment being made by Helen Hewison that Claire looked like a porn star. Lynne said Helen Hewison, had admitted to making this comment but it had been part of the banter and not malicious.*"

**3.21. It appears no investigation other than that conducted on 28 December was ever done**. The respondent's pleaded case is Ms McCarron investigated it, supported by Mr Hassan. He confirmed he does not know whether she spoke to any of the four staff again, but it is unlikely she did. She did speak to the claimant but about the anonymous call not her formal grievance and it is anyone's guess when she did so. The events of 21 December were never taken seriously by Ms McCarron and **we must decide why.** Was it because Ms McCarron believed the claimant had or would allege breaches of the EqA, undoubtedly a protected act, by making the anonymous call or raising the formal grievance or just because Ms McCarron did not want to know anything which might challenge Ms Hewison's style of management and/or could not be bothered to probe the facts because the claimant as a newcomer was not performing well and Ms Hewison had been there a long time ? **We find it was the latter. In any event, neither Ms Hewison's reaction to the complaint of harassment nor Ms McCarron's poor handling of it are pleaded acts of victimisation.**

3.22. Ms Dey continued to be concerned about the claimant's practice and recalls discussing safety concerns with Ms McCarron, Mr Hassan and Ms Dixon. She says it is unusual, even for a person new to care, to fail two formal moving and handling assessments. So, it was decided Ms Dey would conduct a probationary review meeting with her. It would not be appropriate for Ms McCarron to do so because she was dealing with the grievance. The probationary review meeting would take place after Ms McCarron had completed the grievance investigation and fed back to the claimant. Her letter of 20 January was given to the claimant at the same time as the next letter mentioned.

3.22. By letter of 21 January 2020 (95) Ms Dey invited the claimant to a probationary review meeting to discuss how she was progressing and, if her probationary period was passed, the next steps for her development. The letter said it was possible her probationary period would not be passed, and her employment would be terminated. Before that meeting Ms Dey conducted another Safe People Handling course with her but could not sign her as competent. She was still having trouble using the sling correctly, putting it upside down and/or back to front. When using the slide sheet she was not pushing down into the bed, she was trying to lift the resident with the slide sheet. Other participants were having to lead her too much and Ms Dey felt there was a risk of injury to the residents. She reported this back to Jenny Christie by e-mail dated 23 January 2020 (96)

3.23. Ms Dey and the claimant met on 24 January 2020. The claimant chose not to be accompanied but there was a notetaker (98-104). In sharp contrast to Ms McCarron's notes most of the entries for times etc are there. Ms Dey said the claimant was still not grasping moving and handling techniques and had turned up late for training on one occasion saying her train was delayed but others on the same train had turned up on time. She had failed to complete online training modules, some meant to be completed by November 2019 including administering thickening agents, nutrition and hydration. The claimant said she was having difficulty getting her workbooks signed off. Some modules did need to be signed off by a supervisor but the content had not even been completed, so the work could not be signed off. Because she had not completed the thickening agents training, she did not understand the importance of making sure some residents drinks were thickened so they could swallow them.

3.24. Ms Dey also raised inappropriate language in a lift when she attended the training at Springfield House making derogatory comments about the Home. The claimant denied this but the employee who reported it was said to be "a trusted employee". Ms Dey had spoken to the claimant previously about inappropriate language. The tendency to believe established staff over newcomers generally or the claimant in particular predated any sex harassment or grievance.

3.25. Ms Dey concluded the claimant could not continue working at the Home which was not the right place for her. She was new to the care environment but not grasping the basics so her employment would end with two weeks' notice she was not required to work. Ms Dey confirmed her decision in writing on 31 January 2020 (105-106) and her right of appeal. The claimant says she was escorted off the premises. The question for us is whether her raising a grievance, or any believed or anticipated protected act, played any part in the decision to dismiss her. Ms Dey says it did not.

3.26. On 1 February 2020 Mr Hassan received an e-mail (107-110) from the claimant and confirmed Ms McCarron's grievance outcome. He received a letter (112) which it was decided would be treated as an appeal. He asked Tracey Dixon, Area Manager to deal with it. She attempted to meet the claimant without success as she said matters were now in the hands of her solicitor. He heard nothing more.

## 4. Conclusions and Remedy

4.1. In the harassment claim we find the facts in 3.6 and 3.7 are proved on balance of probability. Even if not having the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking into account her perception and the other circumstances it was entirely reasonable for the conduct to have that effect. The comment about her looking like a "go go dancer", and maybe even a "porn star", could be described as "banter" but those about being a slut and going to Pink Lane could not . They are covered by s26. Ms Dey and Mr Hassan agreed that was so.

4.2. Ms Hale submitted such remarks were not made and/or the claimant having instigated the showing of the photograph the conduct was not **"**unwanted". We reject both totally. The claimant's account is credible and corroborated by the anonymous call and the respondent has come nowhere close to showing the comments were not made. Even if the claimant had showed photographs of her modelling career at some times, that is not licence to say to her things implying she was a promiscuous " slut" or a prostitute.

4.3. In the claim of direct discrimination the claimant not proved primary facts from which we could infer any difference in treatment was **because of** sex.

4.4. In the claim of victimisation the claimant carried out more than one protected act. The first was when she confronted Ms Hewison on Christmas Day and Ms Hewison retaliated as set out in paragraph 3.8 and by her long condemnatory statement about the claimant's work she had "let go" before. If that subjected the claimant to detriment, which means placing her at a disadvantage, it is not a pleaded claim. Neither is the bias of the investigation nor as the claimant says "*not taking it seriously*" anything more than unreasonable conduct which would have been no better whatever allegations she had made against Ms Hewison. Had she said Ms Hewison was, for example, sleeping on the job and she, especially if supported by others who had worked with her for some time, had denied it that would have been good enough for Ms McCarron. Obviously, the grievance was a protected act, the respondent probably anticipated a tribunal claim and it believed her to have been the anonymous caller.

4.5. The claimant fails on all but the harassment claim because the respondent has proved it, and every other person for whose acts it is liable, had a wholly non-discriminatory reason for dismissing her. The claimant spoke very fondly of the residents, especially J. Being kind and empathetic towards them is a great asset for a carer. However, lifting or moving an elderly person, who may have osteoporosis or other disability, incorrectly is a danger to their health and safety. The respondent's view she lacked competence and either the will or ability to learn, was the entire reason for dismissing her. The existence of the reason is well evidenced by emails from and to the Learning and Development Facilitator. With no disrespect to the claimant she came across to us as a pleasant, kind lady but not well organised or fitted for the "hard skills" needed to be a carer. That is why people like Charlotte and Valentine, as well as Ms Hewison, kept a close eye on her and picked up on her shortcomings. She views this as "bullying", we do not, but, even if it was, it has nothing to do with sex actual, perceived or anticipated protected act.

4.6. The deduction from her wages for taxi fares was lawful by reason of s 14(1) (b)?

4.7. In light of our conclusions financial loss arising from dismissal is not recoverable. Compensation for injured feelings is not meant to punish. What matters is the effect on the claimant. The following summary of the principles in Prison Service-v-Johnson is invaluable

*a "Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*

*b Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."*

*c Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.*

*d In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*

*e Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made"*

4.8. Commissioners of the Metropolitan Police-v-Shaw held it is wrong to focus entirely on the respondent's conduct rather than the impact on the claimant and thus in practice introducing a punitive element. The reason ET's sometimes **appear to** focus on the conduct can be explained thus. In a book on damages for personal injury, if a person has been injured in a car accident, one does not read a report about how bad the defendant's driving was, but about clinical findings, X rays and MRI scans of the injury. Feelings cannot be scanned! If one watches a boxing match and sees a punch landing, one can imagine how much it hurts by drawing on experiences one has had of being struck. One can convey that to a person who has not seen it, by describing the blow. However, then one must remind oneself the person being struck may be a professional boxer with a high pain threshold at one extreme or a frail person who would be hurt far more by the same punch. ET's start by describing the conduct next asking "*how would we feel if that happened to us*?" and finally "*Is this claimant more or less likely than us to feel hurt having regard to all we know about her*"? . Just to listen to how a witness says she has been affected, risks giving greater compensation to better actors.

4.9. Tribunals put awards into bands; a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000. We regularly explain to unrepresented claimants that although they view what happened **to them** as hurtful, Tribunals deal with discrimination claims which involve sustained campaigns of a highly unpleasant nature over many years. This was at best two incidents on 21 and 25 December

4.10. We tried in vain to get the claimant to separate how she was hurt by what was said to her on 21 and 25 December 2019 from how she felt about Ms Hewison generally and the unfairness she perceived in Ms McCarron's "investigation". Ms Hewison's statement she would not support her any more made matters worse. The comments she made to Ms McCarron about her work were not seen by the claimant until disclosed in these proceedings and had no effect. Her unhappiness with events which are not unlawful under the EqA can form no basis for compensation.

4.11. A woman who has been a model, and proudly so, is bound to be hurt by any implication she is a "slut" or a prostitute. It reduced her to tears on 21 December. The best conclusion we can reach is that two isolated incidents caused the claimant considerable distress which did not last long. She claims £8800 but our best estimate of compensable injury is £3000. When we gave our brief oral judgment we neglected to mention interest which we award at the prescribed rate of 8% for a period of 16 months = £320.

**EMPLOYMENT JUDGE T. M. GARNON.**
**JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 19 APRIL 2021**