EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
(1) Mrs Ayesha Khan	**v**	**(1) AY Trading Ltd**
(2) Miss Aakifah Ali		**(2) Mr Arif Hussein**
		(3) Mr Mossadeque Hossain

Heard at: Watford (by CVP) **On**: 1 July 2021

Before: Employment Judge George
Members: Mrs L Thompson
Mr C Surrey (all sitting fully remotely)

Appearances

For the Claimant: Mr D Howells, counsel
For the Respondent: Mr R Johns, counsel

JUDGMENT

1. On reconsideration by the Tribunal and by consent, the judgment pronounced orally 28 March 2021 that the first respondent should pay to the second claimant 4 weeks' pay in relation to their failure to provide her with a statement of terms and conditions of employment is revoked.

2. The first and second respondents are to pay to the first claimant compensation for injury to feelings caused by the act of victimisation dated 2 July 2018 of £2,503.67 including interest. The first and second respondents are jointly and severally liable to pay this award.

3. It is not just and equitable for there to be an uplift of that compensation under s.207A of the Trades Union and Labour Relations Consolidation Act 1992.

4. The first respondent is to pay to the first claimant the agreed sum of £55.67 in respect of holiday accrued but not taken at the date of termination of employment.

5. The total award to the first claimant is £2,559.34.

6. The first and second respondents are to pay to the second claimant compensation for injury to feelings of £15,037.81 including interest. The first and second respondents are jointly and severally liable to pay this award.

7. No separate award of compensation in respect of personal injury or aggravated damages claimed by the second claimant is made.

8. The first and second respondents are jointly and severally liable to pay to the second claimant compensation for the financial losses flowing from the constructive dismissal due to sexual harassment and harassment related to religion of £5,742.68 including interest which is calculated as follows:

Notice Pay	468.00	
Financial loss from 28.8.2018 to 1.1.2019	4,212.00	
Subtotal	4,680.00	4,680.00
Interest @ 8% from 23.10.2018 to 23.8.2021		1062.68
Total		**5,742.68**

9. The total of the compensation to the second claimant caused by unlawful harassment is £20,780.49 to which an uplift of 10% for an unreasonable failure to comply with the ACAS Code of Conduct relating to grievances is applied making the total of £22,858.54.

10. The first respondent is to pay to the second claimant £549.66 in respect of unauthorised deductions from wages:

    a. The agreed sum of £299.66 in relation to holiday pay accrued but not taken at termination of employment;

    b. £250 deducted from her wages on 7 September 2018 (paragraph 10 of the judgment sent to the parties on 2 June 2021).

11. The total to be paid to the second claimant is £23,408.20.

12. The claimants' application for orders that the respondents pay their costs is dismissed.

13. All claims against the third respondent were dismissed by the judgment sent to the parties on 2 June 2021.

REASONS

1. In our reserved liability judgment which was sent to the parties on 2 June 2021 we upheld the following claims,

   a. The first claimant's allegation of victimisation in relation to the second respondent's letter to her solicitors dated 2 July 2018;

   b. The first claimant's claim of unauthorised deduction from wages in respect of holiday pay accrued but not taken on termination of employment;

   c. The second claimant's claims of sexual harassment, in part;

   d. The second claimant's claims of harassment related to religion, in part;

   e. The second claimant's claim that she was constructively dismissed when she resigned in response, at least in part, because of the acts of sexual harassment and harassment related to religion;

   f. The second claimant's claim of unauthorised deduction from wages of £250 which the first respondent alleged to have been justified by her failure to work a notice period;

   g. The second claimant's claim or unauthorised deduction from wages in respect of holiday pay accrued but not taken on termination of employment.

2. During the course of the remedy hearing to assess compensation for the above, the parties were able to agree the amount remaining due to the claimants in respect of annual leave accrued but not take at the effective date of termination. As a result we are able to order the first respondent to pay to the first claimant the sum of £55.67 unauthorised deduction from and to pay the second claimant the sum of £299.66 as unauthorised deduction from wages.

3. The claimants had updated their schedules of loss and, setting aside the above figures for unpaid holiday pay the first claimant's claims were as follows:

   a. Compensation for injury to feelings at the lower end of the middle Vento bracket of £8,600.

   b. 25% uplift for failure to follow the ACAS code.

   c. Interest.

4. The second claimant's claims, in addition to that for unpaid holiday pay were as follows:

   a. Loss of notice pay in the sum of £468.00;

   b. Financial loss caused by the dismissal of £4,212.00;

   c. Loss of statutory rights in the sum of £300;

   d. Unauthorised deduction from wages in the sum of £250;

   e. Compensation for injury to feelings at the top end of the middle Vento bracket in the sum of £25,700;

   f. Aggravated damages in the sum of £20,000;

   g. Damages for personal injury in the sum of £3,000;

   h. 25% uplift for failure to follow the ACAS code;

   i. Interest.

5. Therefore, the issues for us to determine on the basis of submissions alone (evidence relevant to the remedies issues having been adduced during the hearing between 11 and 18 January 2021) were as follows:

   a. What compensation, if any, for injury to feelings should be awarded to the first claimant?

   b. Is it just and equitable that her compensation should be subject to an uplift under s.207A of the Trade Unions and Labour Relations (Consolidation) Act 1992 (hereafter TULR(C)A) and, if so, of what percent?

   c. What compensation, if any, should the second claimant be awarded for psychological injury and/or injury to feelings?

   d. Should the second claimant be awarded aggravated damages and, if so, in what sum?

   e. What financial loss was caused by the second claimant's constructive dismissal and what, if anything, should be awarded for loss of notice pay, loss of income and loss of statutory rights?

   f. Is it just and equitable that the second claimant's compensation should be subject to an uplift under s.207A of the TULR(C)A and, if so, of what percent?

   g. The calculation of interest would follow from our conclusions on the above.

6. As well as the claimants' updated schedules of loss, we had the benefit of a claimants' skeleton argument by Mr Howells (hereafter referred to as the CSA)

and the respondents' skeleton argument by Mr Johns (hereafter referred to as the RSA). These also addressed the parties' respective submissions on the claimants' application for an order that the respondents' pay their legal costs incurred in relation to the claim. There, the issues for us to decide were:

a. Had the respondents acted vexatiously, abusively or otherwise unreasonably in conducting the proceedings, within the meaning of r.76(1)(a) of the ET Rules of Procedure 2013?

b. Did the grounds of response have no reasonable prospects of success within the means of r.76(1)(b)?

c. If so, should they be ordered to pay some or all of the costs of bringing the claims?

Law relevant to the issues

7. The law in relation to injury to feelings can be stated fairly briefly. In HM Prison Service v Johnson [1997] ICR 275 EAT it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

8. We also remind ourselves of the cases of MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

9. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

10. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published

Presidential Guidance by which the Vento bands are updated annually. Based upon the date on which the present claim was presented, the applicable bands are

a. Upwards of £25,700 for the most serious cases;

b. Between £8,600 and £25,700 for serious cases not meriting an award in the highest band;

c. Between £900 and £8,600 for less serious cases, such as an isolated or one-off act of discrimination.

11. The second claimant argues that hers is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: Armitage, Marsden and HM Prison Service, Johnson [1997] I.R.L.R. 162 EAT. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.
12. Where the victim of unlawful discrimination or harassment can show that psychiatric or physical injury can be attributed to the unlawful act the employment tribunal has jurisdiction to award compensation: Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481, CA. The question is whether a direct causal link between the unlawful act and the loss can be made out.
13. Relevant sections of the TUPR(C)A are ss.207 and 207A.

"207.— Effect of failure to comply with Code.
(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.
(2) In any proceedings before an [employment tribunal][1] or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
(3) In any proceedings before a court or [employment tribunal][1] or the Central Arbitration Committee any Code of Practice issued under this Chapter by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

207A Effect of failure to comply with Code: adjustment of awards
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
> …
> (4) In subsections (2) and (3), *"relevant Code of Practice"* means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

14. Schedule A2 to TULR(C)A has the effect that all Park 5 Equality Act 2010 (hereafter the EQA) claims and claims of unlawful detriment and dismissal because of a protected disclosure are claims which may, potentially, engage s.207A TULR(C)A.

15. The jurisdiction for a Tribunal to award costs is found in rule 76 of the Employment Tribunal Rules of Procedure 2013 (hereafter referred to as the Rules of Procedure). So far as is relevant, rule 76 reads as follows:

> "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.
>
> (2) A tribunal may also make such an order where the party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of party."

16. By rule 78 (1), the Tribunal may order the paying party to pay a specified amount not exceeding £20,000 or the whole or a specified part of the costs of the receiving party, to be determined by way of detailed assessment. In the present case the claimants apply for an order that the first and second respondents pay the costs which they explain that they jointly have incurred in the sum of £68,428.83 plus VAT or £82,114.60.

17. There are therefore two stages to determining a costs application. First the Tribunal must consider whether the grounds for making a costs order in rule 76(1) exist and secondly, if they do, then the Tribunal must consider whether or not to make one. In deciding whether or not to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay: rule 84 Rules of Procedure. The Tribunal has an open discretion whether or not to take means into account but if it declines to do so, having been asked to consider the paying party's financial circumstances, it should explain its decision: Herry v Dudley MBC [2017] I.C.R. 610 EAT.

18. When deciding whether or not the litigant's conduct of the proceedings has been unreasonable, the words of the rule are the starting point, remembering that, in

the employment tribunal, a costs award is the exception, rather than the rule. As Mummery LJ said in Barnsley MBC v Yerrakalva [2012] I.R.L.R. 78 CA at para.41,

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above [from Mummery LJ's judgment in McPherson v BNP Paribas [2004] EWCA Civ 586] was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

Findings of fact and conclusions on the issues

19. We start with our findings in respect of injury to feelings suffered by the first claimant, Mrs Khan. We focus upon evidence of the upset suffered as a result of the single unlawful act alleged by her which we have found to be proved namely by the first and second respondents threatening to introduce into evidence in employment tribunal proceedings material which, it was threatened, would lead to a fine and/or criminal proceedings for tax avoidance being brought against her husband.

20. This threat was contained within the letter sent by the second respondent on behalf of the first in response to Mrs Khan's solicitor's letter (DB page 180). This is argued by counsel for the claimant to be a serious act because the intention was to prevent tribunal proceedings (see paragraphs 5 and following of the CSA). It was accepted that the incident does not fall into the top Vento band, but argued that that is principally because the threat was ineffective. The Tribunal was invited to make an award of £8,600 plus interest, which is the bottom of the middle Vento band. It was also suggested that a separate way of looking at it would be to make an award of aggravated damages, as well as an award for compensation for injury to feelings within the lower Vento bracket because of what is alleged to be the high-handed approach by the respondents.

21. On the other hand, it is argued by Mr Johns that this was a single one-off act which could be properly compensated by an award at the bottom of the lower Vento band of £1000. This submission was made was on the basis that it was an apparently good faith intention to raise with the Tribunal conduct which the respondent believed to be improper. As Mr Howells says, this is inconsistent with Mr Arif Hussein's oral evidence where he effectively said that he didn't know anything about the tax affairs of the first claimant's husband. The statement was therefore baseless supposition.

22. There was little evidence before us of the impact upon the first claimant of this particular incident. It is a one-off act, in the sense that it is a single letter although it contained a number of threatening remarks. One such remark we have found to be victimisation and in our view the gravamen of it is that it is an attempt by the second respondent to head off Tribunal proceedings. We refer to our findings at the liability stage, particularly at paragraphs 158 and 159. Our finding was that this was the intention of the employer and although the attempt to threaten the first claimant did not succeed, receiving that letter must have been of great concern to her.

23. Our sense, based upon her oral evidence, is that her greatest sense of grievance about her treatment was connected with the act of dismissal in the relatively casual circumstances of it taking place in a coffee shop, and with the untrue aspersions cast upon her performance as alleged reasons for dismissal. We have reminded ourselves of paragraph 7 in her witness statement in which she does refer to the whole of this particular letter. Nevertheless, we think that the impact of this threat in the letter of 3 October 2018 was comparatively small. We find that the letter would have angered and alarmed Mrs Khan, even though she was not dissuaded from enforcing her rights. The impact of the incident would be reflected by compensation in the lower Vento band and we have decided to award £2000 for the one incident that happened on 3 October 2018. The calculation of interest due at the rate of 8% for the period from 2 July 2018 to 23 August 2021 (the date of this judgment) is £503.67.

24. The claim for holiday pay accrued but not taken on termination of employment has been agreed in the sum of £55.67.

25. It is argued on behalf of the first claimant that there should be a 25% uplift on compensation awarded to her under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter referred to as the TULR(C)A). In respect of the first claimant, Mr Howells argued that the decision to dismiss her had breached the ACAS code of practice on Disciplinary & Grievance Procedures (2015) paragraphs 4 in particular by failing to carry out any necessary investigations to establish the facts and allow a companion at a formal meeting; paragraph 9 which required that sufficient information should be notified in writing; paragraph 13 to 17 which provided more detail about the right to be accompanied. We accept that, in effect, none of that had been carried out in relation to the dismissal of Mrs Khan who did not have sufficient qualifying service to bring a so-called “ordinary” unfair dismissal claim.

26. Mr Howells argued that the natural reading of section 207A was that if the case involved proceedings within Schedule A2 (and the complaint of victimisation as well as the unsuccessful complaint of whistleblowing dismissal are) then if the claim concerns a matter to which the Code of Practice applied (and it was argued the claim had concerned such a matter even though the dismissal aspect was unsuccessful) then the power for the Tribunal to increase compensation arose if there was an unreasonable failure to comply with the code even if the claimant had been unsuccessful in that aspect of the claim to which the code related.

27. The Respondent argued that the only sensible way to read s.207A of TULR(C)A was that it applied to awards in relation to the matter which triggered those grounds.

28. We find that we do not need to make a decision about whether s.207A of TULR(C)A is capable of being interpreted in the way argued for by Mr Howells, because we are quite sure that it is not just and equitable to put an uplift on an award made in respect of an unlawful act that is unrelated to any action which was in breach of the relevant code. In saying that we are fully aware that for a respondent to follow a process such as the one followed in this case for an employee who did have qualifying service would almost inevitably lead to a finding of unfair dismissal if only on procedural grounds. However, that would be because it would be relevant to the question of whether it is fair or unfair in all the circumstances to dismiss such an employee: s.98(4) of the Employment Rights Act 1996. S.207 of the TULR(C)A makes clear that failure to comply with the code does not of itself render someone liable to proceedings.

29. Although it is urged upon us that awarding an uplift to the first claimant allows justice to be done in the present case and that the she might be under compensated for the actions of the respondents we reject that for the simple reason that it is not for us to step in to provide a remedy which has not been provided for by Parliament. Mrs Khan has had the misfortune to have been dismissed in a way that failed to comply with a fair process as recommended by ACAS but which was not, of itself, unlawful. It does not seem to us to be equitable to increase compensation for an unrelated matter despite any feelings of indignation we may have at the manner in which she was treated.

30. Turning to the second claimant, she has claimed separate sums for injury to feelings, personal injury (psychiatric injury), and aggravated damages.

31. In relation to the evidence of the personal injury claim, we have taken into account the evidence to which we were directed in paragraph 17(b) of the CSA, and in particular the medical notes at DB page 152 to 159. It is clear to us from a careful reading of those notes that the second claimant had been in contact with her GP because of poor mental health before the acts which we have found to be unlawful. Our conclusion is therefore, that although the medical evidence does show a significant and tangible exacerbation, the actions of the respondents did not create a discrete psychiatric injury but rather exacerbate an existing one.

32. Taking that into account and the type of injury relied on in terms of panic attacks, insomnia, depression and an unwillingness to go about her normal activities, such as going to the gym, our view is that in order to avoid overcompensating the claimant the appropriate thing to do is to reflect these elements of injury in an increased injury to feelings award.

33. Our findings are that immediate effect of the sexual harassment in May and June 2017 was that Miss Ali was deeply upset by SZ's conduct. She was a young Muslim woman with conservative beliefs and, in particular in the June incident, she had been subjected to intrusive and unwelcome comments and touching that

she referred to as feeling “slimy”. The fact that she was upset at the time seems to us to have been born out LM’s response in waiting to walk home with her.

34. It is also supported by the medical evidence at DB page 152. This shows that, on 12 September 2018, she reported to her GP, some three months after the incident, that she was suffering sleep disturbance, was struggling to concentrate and she referred in her history to the sexual harassment. She was prescribed medication and we see from DB page 154 that 18 months later she was still suffering the effects. It is recorded that in February 2019 she was scared to go to the gym on her own and was undergoing counselling.

35. There was an impact upon her education of the poor mental health that she was suffering as a result of these actions and ultimately she had to repeat a year. We reminded ourselves of the evidence given by Miss Ali in cross examination in that she had to retake the year at university. There was a reference to harassment which we found to include a reference to this incident in her letter of resignation that DB page 160 but, it appears that Miss Ali was fully recovered at the time of the final hearing.

36. The immediate impact on her of the religious harassment can be best identified from the relevant What’sApp Messages and emails in the second week of July 2018. On 11 July 2018 page 78 she described herself as having been rather hurt and upset by Mr Mohammed Hussein’s statements and that she did not feel safe working with him in the restaurant. We remind ourselves of the response on 12 July 2018 and the meeting on 24 July 2018. The set up for that meeting is in correspondence at page 209 and the second claimant describes herself as feeling considerably alarmed every time she sees a WhatsApp message. No doubt this was in part because of the second respondent’s response to her complaints in relation to holiday pay and not solely in relation to his handling of her complaint about his father’s religious harassment. But it seems to us to be clear that Miss Ali was considerably alarmed when receiving communications from her employer in this period at least in part because his immediate response to her complaint of religious harassment had been to say that he might need to refer her to the police. Much of this correspondence is unprofessional and intimidating.

37. We think it is right that we should take into account that part of the reason for her resignation was the above conduct that we have found to be unlawful. Therefore to the extent that her feelings have been injured as a result of losing that job she should be compensated for that loss. We remind ourselves of paragraphs 145 to 198 of the liability judgement. The unlawful conduct on 7 May 2018, 6 June and the period of early July relating to the religious harassment and Mr Hussein’s handling of it was part of the reason for her resignation on 14 August 2018 even though the immediate trigger was the mistake in payments. This seems to us to be a continuing course of conduct extending over four months culminating in the loss of her job. She was a student and it is relevant that this was not a career but no doubt it was a convenient source of income to support her through her studies. The length of the effect on her can be traced through her medical records and we find that it lasted for some 18 months in total.

38. Taking those findings into account we think that an award in the middle bracket would be appropriate. The comparison cases put forward by Mr Howell we do not find to be of particular because every case is very fact dependent. We take into account the value of money in the real world and think that an award just below the halfway point of the middle bracket is appropriate. We have decided to award £12,000 for injury to feelings for all heads of discrimination and the element of exacerbated mental ill health which she has suffered.

39. We turn to the claim for a separate award of aggravated damages. Some of the matters relied on in the CSA to support this claim amounts to the same conduct as one of the unlawful acts for which the claimant has been compensated in relation to her actual injury to feelings. In paragraph 23 of the CSA, Mr Howells argues that the second respondent's reaction (the 'investigation' as he puts it) to Miss Ali's complaint about his father's conduct compounded the original wrong – however paragraph 8 of the judgment sent to the parties on 2 June 2021 makes clear that Mr Arif Hussein's reaction was found itself to be harassment for which Miss Ali is to be compensated by an award for injury to feelings. That therefore does not seem to be something which should properly be reflected as an aggravating circumstance. We consider that we need to ask ourselves whether there is anything separate to the discriminatory act which is particularly high-handed or oppressive.

40. Paragraph 24 of the CSA sets out allegedly aggravating factors. One of the second claimant's complaints does not accord with our recollection of the evidence. There was an investigation of the complaint of sexual harassment (of which the first respondent was unaware prior to the Tribunal claim) and a statement was taken from SZ. It is true that it is argued on behalf of the second claimant that it was inaccurate and untrue and did not correspond in some material respects with the oral evidence which he was willing to give. However, we are not satisfied that the second respondent knowingly put forward a witness statement containing untruths. There were some differences between his evidence and that of the second respondent (and we're thinking here of the second respondent's evidence that further allegations were made to him about Mrs Khan being rude in relation to him and his father had been relayed to him by SZ which the latter seemed to have no recollection of at all). This does not seem to us to be a case in which by the respondent seeking to rely upon evidence of the former assistant manager which we have disbelieved the first respondents are guilty of aggravating behaviour.

41. We think there is weight in the submission at paragraph 24(d) that the respondents did not carry out any proper search for documents. This is part of the reason why we considered that their explanation, in particular, of the alleged minute of the meeting at which the decision was made to dismiss Mrs Khan should be rejected. That has been the consequence of their actions in relation to disclosure - they were cross-examined and their credibility was adversely affected. We do not think that, qualitatively, the behaviour is of a kind which would aggravate the offence caused by the original incident and we do not see evidence of that presented by the claimant.

42. We award interest on the compensation for injury to feelings calculated at the rate of 8% per annum. The acts for which compensation has been awarded spanned the period 7 May to 14 August 2018. The midpoint of that period is 26 June 2018 and we calculate interest on £12,000 @ 8% from then until 23 August 2021 to be £3,037.81. The award of compensation for injury to feelings, including interest, is therefore £15,037.81.

43. Turning to the money claims we have been taken to the payslip and DB page 187 in respect of the second claimant and are satisfied that she was not paid in respect of notice pay. DB page 126 makes clear that she was contractually entitled to two weeks' notice and we award the sum sought . We have already found that she suffered an unauthorised deduction of £250. The holiday pay has been agreed in the sum of £299.66.

44. The second claimant claims financial loss caused by her constructive dismissal for the period from the end of the notice period on 28 August 2018 to 1 January 2019 when she stopped looking for work. It alleged by the respondent that there has been a failure on her part to mitigate her loss. We accept the evidence put forward by the claimant and given the limited amount of time that she had available for her search, her competing obligations as a university student and state of mind, we reject the allegation that she failed to act as a reasonable person would in relation to her search for alternative employment. We award £4212 in respect of loss of earnings flowing from the constructive dismissal which was, in part, caused by the unlawful acts.

45. We do not award statutory rights compensation because the claimant had not acquired statutory rights at the time of her dismissal beyond the right to one week's notice and we, therefore, do not think it just and equitable to compensate her for the loss of them. Interest is calculated at 8% from the midpoint between the date of dismissal and the 1 January 2019 which is when the loss ceased.

46. The financial loss caused by the constructive dismissal is therefore

Notice Pay	468.00	
Financial loss from 28.8.2018 to 1.1.2019	4,212.00	
Subtotal	4,680.00	4,680.00
Interest @ 8% from 23.10.2018 to 23.8.2021		1062.68
Total		**5,742.68**

47. We turn them to the question of ACAS uplift in relation to the second claimant. The respondent realistically accepts that the second claimant's complaint about Mr Mohammed Hussein should be regarded as a grievance and that paragraph 8 of the liability judgment is likely to lead to a finding of a breach of the ACAS

code in relation to the grievance procedure. There was no investigation of this complaint. There was no formal meeting to consider her concerns, whether one at which she was told she could be accompanied or otherwise. We also accept that on 15 June 2018 she brought a grievance about failure to pay her when she took holiday: see DB page 63.

48. The letter of 2 July 2018 at DB page 72 in response to her complaints about holiday pay was aggressive and rude and includes the statement that Miss Ali will not immediately be getting a promotion and pay rise which had been contemplated. However, if one reads the detail of it, the third paragraph from the end sets out the first respondent's version of events in relation to what was due by way of holiday pay and give a response to her complaint about that. There has been some investigation and Mr Hussein appears to accept that it needed looking into. Despite the tenor of the communication we do take into account that the letter did respond to her grievance about holiday pay. Although there was no meeting about it, in circumstances where he was looking into it on the papers we do not think that that was an unreasonable failure. The fact that the response given is now agreed to be inaccurate does not mean that there was a breach of the Code.

49. However the matter concerning Mr Mohammed Hussein is different. There was a failure to investigate the second claimant's grievance in respect of that. One could not fairly describe the meeting of 24 July 2018 as a formal meeting although a formal meeting should have been conducted. From Mr Hussein's Jr's point of view the meeting was intended to "clear the air" or draw a line under the recent past and move on. There was not an intension to engage with the claimant's concerns about how she had been spoken to by his father and find a solution to her concerns about that. We think that this was an unreasonable failure to comply with the ACAS Grievance Code and but not a complete failure to do so. Therefore some uplift is just and equitable but not the maximum of 25%. We are conscious that we've made a single award for injury to feelings in respect of more than one type of harassment, not all of which was the subject of the grievance. Taking a broad brush approach we think it right to moderate any uplift to take account of that and have decided that a 10% uplift would be appropriate.

50. That uplift will be applied on both the compensation for financial loss and the compensation for injury to feelings because the grievance concerned a matter which was one of the reasons for the second claimant's resignation.

51. The claimants claim costs under rule 76 on the basis which is set out in paragraphs 33 and following of the CSA, namely that the respondent acted vexatious, abusively or otherwise unreasonably in conducting the proceedings and in advancing a response which had no reasonable prospects of success.

52. It is fair to say that we found that SZ was not a reliable witness. However we did not find that Mr Arif Hussein was aware that he was telling untruths. We therefore do not think that it was unreasonable conduct by the first respondent or the second respondent to seek to rely upon SZ's evidence. We have not found that there was collusion between the witnesses in this respect.

53. It is also alleged that it was unreasonable conduct to give untruthful accounts of the reasons for which the first claimant was sent on training (paragraph 34(b) of the CSA). It is not uncommon in cases where there has been not the slightest vestige of proper process for a respondent to seek to bolster an account of the dismissal given after the event by matters running up to it to provide some support to it. It is not every reliance upon an account found to have been untrue that amounts to unreasonable conduct and we do not see anything in respect of the respondents' attempted defence of Mrs Khan's dismissal claim that amounts to unreasonable conduct as that term has been explained in the authorities. We are also mindful that her claim of unfair dismissal was based upon a claim that the reason or the principal reason for the dismissal was that she had made a protected disclosure and she was in fact unable to prove that she had communicated any information that qualified for protection, not because we disbelieved her but because her evidence did not support that allegation.

54. It is true that had Mr Hussein Senior's activities in the restaurant been considered in detail at an early stage it may have been apparent that his involvement in the restaurant in the specific authorised area of banking meant that he was likely to have been present in the restaurant in connection with authorised activities. On the other hand, we accepted the respondent's argument that Mr Hussein snr was not an employee. Mr Hussein Jr was open when questioned about his father's activities although it is true that the claimants had disclosed a number of communications that put them in a strong position in that regard. All of this is not unusual in cases seen regularly in the Employment Tribunal. We do not see that, without more, there is anything unreasonable for a respondent to seek to sustain a defence that they were not vicariously liable for the actions of a person that was ultimately unsuccessful in one respect.

55. We have considered with care the allegation that there was unreasonable conduct of the proceedings by the respondents failing to do a proper search for relevant documents. The claimant's disclosed a lot of WhatsApp messages. They needed to do so in order to prove their case in relation to the position of Mr Hussein senior and also other incidental allegations such as the allegation against the first claimant that she had been racially abusive towards Mr Hossein. By contrast, the respondents only disclosed screenshots from phones which showed a selective part of their exchanges. There was not full and frank disclosure of all WhatsApp messages between Mr Arif Hussein and Mr Tony Hossain. The explanation for why there was only one set of management meeting minutes lacked credibility. No real attempt had been made to give full disclosure of AH's communications with the HR adviser.

56. The consequence to the claimants was that they had to do more to prove their case. A clear example of that is that they disclosed all of their text messages to show that there had been no deleted message between the first claimant and TH.

57. In general, we think that the fact that we have disbelieved the respondent and their evidence is not the same as unreasonable conduct and even though, as we have found, they did not undertake a proper and diligent search for relevant

documents, the consequences to the respondent were that we drew adverse inferences about their credibility from the absence of documents which we accepted one might reasonably expect to exist. In our view, the deficiency was not so manifestly unreasonable that we should find it to amount to unreasonable conduct of the proceedings.

I confirm that this is our Reserved Judgment with reasons in case number 3332155/2018, 3334703/2018, 3334337/2018 and 3334999/2018 and that I have approved the Judgment for promulgation.

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Employment Judge George

Date: …23 August 2021 ……..

Sent to the parties on: .....

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For the Tribunal Office