EMPLOYMENT TRIBUNALS

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**: 11 to 15 and 18 January 2021 (public hearing by CVP), 19 January 2021 (deliberation in chambers) and 28 March 2021 (judgment)

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: Ms A Chute, counsel

JUDGMENT

1. The claims of direct discrimination on grounds of sexual orientation and harassment related to sexual orientation are dismissed on withdrawal.

2. The first and second respondents victimised the first claimant contrary to s.27 of the Equality Act 2010 by threatening to introduce into evidence in tribunal proceedings material which, it was threatened, would lead to a fine and/or criminal proceedings for tax avoidance being brought against the first claimant's husband.

3. Save as set out above, the first claimant's claim of automatically unfair dismissal contrary to s.103A of the Employment Rights Act 1996, unlawful detriment on grounds of protected disclosure contrary to s.47B of the Employment Rights Act 1996 and victimisation contrary to s.27 of the EQA are dismissed.

4. The first respondent subjected the second claimant to sexual harassment contrary to s.26(2) of the EQA by Mr Szoke

a. touching her in a way which made her feel uncomfortable on 7 May 2018 and

b. on 6 June 2018, holding her arms in a tight grip and refusing to release them and saying words to the effect “I will close up early and you can take your clothes off and do a strip show for me”.

5. By that same conduct, the first respondent subjected the second claimant to harassment related to sex contrary to s.26(1) of the EQA.

6. The first respondent subjected the second claimant to harassment related to religion by

a. a statement on 11 July 2018 by Mr Mohammed Hussein to the effect that Wahabism was necessarily linked to extremism and that those beliefs were “the cause for the terrorism that is happening in the world”.

7. The first respondent is liable for the acts of Mr Hussein snr. who was an agent within the meaning of s.110(1)(a) of the EQA.

8. The first respondent subjected the second claimant to harassment related to religion by

a. The second respondent’s What’sApp message dated 12 July 2017 which stated that the second claimant appeared to be against people who speak out against terrorism or extremism;

b. A failure by the second respondent to take any proper steps to deal with the second claimant’s complaints of harassment, responding to those complaints by words to the effect that she should not take it personally including at a meeting and that she should do as management told her on 24 July 2018.

9. The second claimant resigned in response to a repudiatory breach of contract of her employment by the first respondent.

10. The first respondent made an unauthorised deduction from the second claimant’s wages of £250 on 7 September 2018.

11. The terms of the contracts as to holiday entitlement between the first respondent and the first claimant and between the first respondent and the second claimant provided for a holiday year which ran from 1 January to 31 December.

12. On termination of employment, the first and second claimants respectively were entitled to be paid in respect of any entitlement to annual leave which had accrued and had not been taken between 1 January 2018 and their respective termination dates in accordance with reg.14 of the WTR 1998. We will hear further submissions on whether any award needs to be made in respect of this.

13. The second claimant's claims of direct discrimination contrary to s.13 EQA on grounds of sex, race and religion are dismissed.

14. Save as set out above, the second claimant's claims of harassment contrary to s.26 EQA are dismissed.

15. The employer's contract claim in Case No: 3332155/2018 is rejected under rule 12 of the Employment Tribunal Rules of Procedure 2013 because the Tribunal does not have jurisdiction to consider it.

16. It seems to the Tribunal that there is a reasonable prospect of the original judgment that the first respondent 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 in accordance with s.1 of the ERA being varied or revoked on the basis that it was made under a mistake of law because the power to make an award under s.38 of the Employment Act 2002 only arises if the employer is in breach of the duty under s.1 of the ERA 1996 at the time when the proceedings were begun. That judgement will be reconsidered at the remedies hearing already listed for 24 September 2021.

REASONS

1. In this hearing, which was heard by CVP between 11 to 15 and 18 January 2021 (with the tribunal meeting on 19 January 2021 in order to reach their decision), we have had the benefit of a bundle of documents of 378 pages (which included some inserted pages). Page numbers in that bundle are referred to in these reasons as DBp.1 to 378 or as the case may be. Documents in the separate bundle of claim forms, responses and Tribunal orders are referred to in these reasons as TCBp.1 to 203.

2. We heard evidence from the two claimants, Mrs Khan and Miss Ali, who also called two witnesses to give supporting evidence: Linda Metolli and Salma Dahir. They are hereafter referred to as LM and SD and no disrespect is intended thereby. The second respondent, Mr Hussain, (the sole director of the first respondent company) and the third respondent, Mr Hossain, (the general manager of the restaurant run by the first respondent and a respondent only to the claims brought by Mrs Khan) gave evidence on behalf of the company, AY Trading, as did Zoltan Szoke, who was formerly the assistant manager at the restaurant. Messrs Hussein, Hossain and Szoke had each prepared separate witness statements dealing with the claims of Mrs Khan and Miss Ali so, although there were a total of seven witnesses, there were 10 statements in all. The respondents' witnesses are frequently referred to in these reasons as AH, TH and ZS and the claimants as AK and AA. Again, no disrespect is meant thereby. Mr Mohammed Hussein is referred to as Mr Hussein snr. to distinguish him from his son.

3. All witnesses gave evidence by CVP, Mr Szoke from Romania, where he is now living. There were some challenges with the technology, and we took account of that and of the fact that Mr Szoke was giving evidence in his third language. However, we were satisfied that all witnesses could hear and understand the questions and that we were able to hear and understand their evidence. As we explain in paragraph 12 below, when Mr Szoke came to give evidence, he needed time to read his statement (which was written in English) and to have it explained to him by the respondent's solicitors but assured us after taking that time that he did understand what it said. No request had been made for an interpreter either at or before the hearing.

4. The separate claims of the two claimants (who are sisters) were consolidated on 11 June 2019 (TCB p.141). The same individuals gave evidence relevant to each of the claims which overlap in time and it has doubtless been convenient and proportionate for them to be heard together, but, to a large extent, they arise out of separate incidents.

5. Following her dismissal on 10 June 2018, and a period of conciliation which lasted from 23 July 2018 to 6 September 2018 (TCB p.94) in relation to AY Trading, Mrs Khan presented a claim on 3 October 2018 (see TCB p.135 which was confirmed by Employment Judge Lewis on 21 May 2019). By that claim (see TCB p.1) she complained of being subjected to detriments and automatically unfair dismissal contrary to s.47B and 103A of the Employment Rights Act 1996 (hereafter the ERA), dismissal as an act of victimisation contrary to s.27 of the Equality Act 2010 (hereafter the EQA), and post-employment victimisation. She joined AH, TH, and ZS as individual respondents to her claims but sought to rely upon the same EC certificate for the individual respondents so those claims were rejected by the Tribunal. The individual respondents were joined as co-respondents on 21 May 2019 (TCB p.139). The first claimant also included complaints of failure to pay holiday pay. She did not have qualifying service to bring a claim of unfair dismissal contrary to s.98 of the ERA. The respondents defended the claim by a response entered on 20 December 2018 (TCB p.68) with the particulars of resistance of AY Trading and AH being found at TCB p.75 and that of TH being found at TCB p.79. The proceedings as against ZS were dismissed on 1 April 2020 (TCB p.150).

6. Following her resignation on 14 August 2018, Miss Ali – who was initially acting in person - presented three claim forms. In the first, following an initial period of conciliation lasted between 27 June 2018 and 23 July 2018 (TCBp37 – although there were others subsequently) she presented a claim on 19 August 2018 (TCB p.24) in which she complained against AY Trading of unfair dismissal, discrimination on grounds of religion or belief, underpayment of wages and failure to pay holiday pay. AY Tradings' defence to the first claim form was presented on 1 October 2018 (TCB p.81) in which they allege that Miss Ali resigned in breach of contract by not giving 2 weeks' notice and indicated an intention to bring an employer's contract claim (TCB p.85). This was only

noticed by the Tribunal after submissions, during deliberations and judgment writing (see paragraph xx9 AND 10 below). To judge by the correspondence on the Tribunal file, it does not appear to have been accepted by the Tribunal at the time that the Response was accepted.

7. Following a period of conciliation between 12 September 2018 and 12 October 2018 (TCB p.98) Miss Ali brought a second claim, received on 11 November 2018 (TCB p.38) in which she complained of sexual orientation discrimination and harassment (although the facts alleged are those which form the basis of her claim of sexual harassment and direct sex discrimination) against AY Trading and ZS. The sexual orientation discrimination has, by this judgment, been dismissed on withdrawal. The response to that claim is at TCB p.91 and points out that, although all of the incidents relied upon pre-date 19 August 2018, she makes no mention of them in her first claim form. By her third claim form (TCB p.53), presented on 25 November 2018 against AY Trading alone, which refers to a different EC Certificate number which does not appear to be among those in the bundle, she complained of constructive and wrongful dismissal and that she was a victim of sexual harassment (TCB p.59). By the time of the third claim form, she was represented by the same firm of solicitors who represent her sister. Like her sister, she did not have sufficient qualifying service to bring a claim of so-called "ordinary" unfair dismissal.

8. Mrs Khan's claim was case managed by Employment Judge Lewis on 21 May 2019 when he adjourned it to the same date as had been scheduled for the first preliminary hearing of Miss Ali's case (TCB p.135) and joined the individual named respondents (see paragraphs 14 & 15 of his order sent to the parties on 23 May 2019). The outline of Mrs Khan's claim was set out in paragraph 8 to 13 of EJ Lewis's order and we do not repeat it here. At the resumed hearing on 11 June 2019, Employment Judge Smail consolidated the four claims and Miss Ali was given leave to amend her claim to incorporate the document at TCB p.104 which was a comprehensive statement of her discrimination allegations. The issues were stated to be those set out in the Annexe to EJ Smail's order which is found at TCB p.144 to 146A. Those are agreed by the parties before us to be those which we need to consider, save that it was confirmed in closing submissions that Miss Ali no longer relied upon the protected characteristic of sexual orientation. We have reference to that Agreed List of Issues which is not set out within this judgment to avoid unnecessary repetition.

9. Oral judgment on all matters in dispute on the List of Issues with reasons were given at the resumed hearing on 28 March 2021, which had originally been listed as a provisional remedies hearing and written reasons requested by the respondents. In preparing the written reasons the following matters have come to the attention of the Tribunal:

    a. The judgment at paragraph 8 above, when delivered orally, was worded as though it was made jointly and severally against the first

and second respondents. In preparing the written reasons it has come to the Tribunal's attention that Miss Ali brought her claims of harassment related to religion only against the first respondent and therefore that judgment is made only against the company. In the Agreed List of Issues (TCBp.146A para.15) her claim is only against the first and fourth respondents so the Tribunal was not concerned with a claim of harassment against the second respondent personally.

b. When the Tribunal delivered oral judgment, it ordered 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 in accordance with s.1 of the ERA. It seems to the Tribunal that there is a reasonable prospect of the original decision that the first respondent 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 in accordance with s.1 of the ERA being varied or revoked on the basis that it was made under a mistake of law because the power to make an award under s.38 of the Employment Act 2002 only arises if the employer is in breach of the duty under s.1 of the ERA 1996 at the time when the proceedings were begun (see paras. 35 & 36 below).

c. At the hearing on 28 March 2021, the Tribunal pointed out to the parties that TCB page 85 section 7 indicated that the first respondent had expressed a desire to make an employer's contract claim against the first claimant relating to their allegation that she was in breach of contract by not working 2 weeks' notice. The List of Issues had been agreed at the hearing on 11 June 2019 based upon a draft by Mr Howells who helpfully, and candidly, volunteered that he had not noticed that an employer's contract claim was indicated on the face of the ET3 in Case No: 3332155/2018. Mrs Chute was without instructions on the matter although she equally candidly accepted that the parties had confirmed at the start of the final hearing that there was an agreed list of issues and that did not refer to an employer's contract claim. We did not then canvas with the parties whether the claim for unpaid holiday pay was made as a claim of unauthorised deduction of wages only because, if it was, then the right of the employer to bring a contract claim under art.4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 does not arise.

10. The Tribunal made case management orders on 28 March 2021 for the first respondent to clarify the position by 12 April 2021 and for the first claimant to respond. Unfortunately, when the written record of those orders was sent out by the Tribunal, it was originally sent to the wrong parties and was only sent to the claimants and respondents on 29 April 2021 (when the Tribunal chased compliance with the orders) and again on 4 May 2021 (when it was discovered that the original order had been misdirected). The respondent confirmed on 21 May 2021 that it did not

intent to pursue the employer's contract claim. In any event, it seems to the Tribunal that the original claim by Miss Ali did not include a claim under Art.3 of the Extension of Jurisdiction Order 1994 and therefore the correct approach is to reject the employer's contract claim under rule 12 of the Employment Tribunal Rules of Procedure 2013 as one which the Tribunal does not have jurisdiction to consider.

The Law

The Law relating to protected disclosure detriment or dismissal claims

11. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and is made by the employee in one of the circumstances provided for in s.43C ERA. In the present case, the first claimant relies upon 3 communications made or alleged to have been made either directly to her employer or to the manager or assistant manager of the restaurant. Such communications, if made, would fall within s.43C ERA, disclosure to employer or other responsible person.

12. Section 43B(1), as amended with effect from 25 June 2013, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

13. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 Sales LJ rejected the view that there was a rigid dichotomy between communication of information and the making of an allegation, as had sometimes been thought; that was not what had been intended by the legislation. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker

making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [Nurmohammed], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

14. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief. Similarly, we need to ask ourselves whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

15. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment. Those paragraphs can be summarized as follows:

    a. The Tribunal has to ask, first, whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and secondly whether, if so, that belief was reasonable.

    b. The second element in that exercise requires the Tribunal to recognize that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

    c. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking but only that that view is not as such determinative.

    d. The necessary belief on the part of the worker is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters.

    e. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

f. The essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

16. If the worker has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as material, s.47B provides,

"47B.— Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

…

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of [Part X])."

17. It is clear that s.47B(2) only excludes a claim against the employer based upon dismissal (which would be brought under s.103A) – a claim against a co-worker for the act of dismissal for which they are responsible can be brought in reliance upon s.47(1A) for subjecting the employee to the detriment of dismissal: Timis v Osipov [2019] I.C.R. 655 CA. Furthermore, s.47B potentially applies to detrimental treatment that occurs after employment has ended: Woodward v Abbey National plc (No.1) [2006] ICR 1436, CA.

18. By s.48(1A) of the ERA, a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of s.47B.

19. Section 103A, so far as is relevant, provides that:

"An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

20. This involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

21. The legal burden of proving the principal reason for the dismissal is on the employer although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

"… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …

57

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58

Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59

The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

22. As can be seen from the quotations from the relevant sections, the test of causation is different when one is considering unlawful detriment contrary

to s.47B ERA to that applicable to automatically unfair dismissal contrary to s.103A ERA**.** Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] I.R.L.R. 64 CA.

The Law relating to Equality Act 2010 claims for discrimination, harassment and victimisation

23. For the purposes of the claims under considering in these cases, the relevant sections of the Equality Act 2010 include the following,

"13 Direct discrimination

(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.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

26 Harassment

(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).

…
(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.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

…
(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…
(4) An employer (A) must not victimise an employee of A's (B)—
(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…
40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—
(a) who is an employee of A's;

…

> **109 Liability of employers and principals**
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
>
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
>
> …
> **110 Liability of employees and agents**
>
> (1) A person (A) contravenes this section if—
> (a) A is an employee or agent,
>
> (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be)."

24. It is clear that the concept of agency applicable to claims that an employer is liable for the acts of its agent under s.109(2) of the EQA is, essentially, the common law concept: Kemeh v Ministry of Defence [2014] IRLR 377 CA. Where the relationship of agency exists, the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do: Unite the Union v Nailard [2019] I.C.R 28; CA. Express authority is given by express words, but it may be possible to imply actual authority from the conduct of the parties and the circumstances of the case.

25. By reason of s.212(1) the definition of detriment for the purposes of s.39(2)(d) and s.39(4)(d) does not include conduct which amounts to harassment – at least so far as complaints based upon the protected characteristics of sex and religion or complaints of victimisation are concerned. It is therefore sensible to first consider whether the complaints of harassment are made out because, if a detrimental act which has been proven to have occurred is found to be unlawful harassment then it cannot also amount to direct discrimination, by reason of s.212(1) of the EQA.

26. By reason of s.108 EQA (as interpreted in Rowstock Ltd v Jessemey [2014] I.R.L.R. 368; [2014] I.C.R. 550, CA), a person may not victimise another if the victimisation arises out of and is closely connected to a relationship which used to exist between them and the conduct would, if it had occurred during the relationship, contravene the Act.

27. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

28. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

29. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...
>
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned."

30. The requirement in s.26 EQA that the unwanted conduct be related to the relevant protected characteristic is a broader test than is required by the s.13 EQA definition of direct discrimination where the less favourable treatment must be on grounds of the protected characteristic. Context is all important, particularly when the conduct complained of is verbal, but conduct which cannot be said to be "because of" a particular protected characteristic may, nonetheless, be related to it. The Employment Tribunal must focus on the evidence as a whole and the perception of the person who made the remark (nor, indeed, of the complainant) as to whether it was "related to" the protected characteristic is not decisive. A recent analysis of the meaning of "related to" within s.26 is found in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] I.R.L.R. 495 EAT where HH Judge Auerbach said this, at paragraphs 24 to 25:

> "… the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question.
>
> Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

31. When deciding whether or not the claimant suffered victimisation the tribunal first needs to decide whether or not he did a protected act. It is not necessary, in order for an allegation that a person has contravened the EQA, for that allegation to be well-founded. Indeed, by reason of s.27(3), even if the allegation is false protection from victimisation is available provided that the allegation is not made in bad faith.

32. Next the tribunal needs to go on to consider whether he suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did. The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL is of relevance in considering what is meant by the requirement that the act complained of be done "because of" a protected act (as set out in s.27(1) EQA, although in Khan the House of Lords was considering the phrase in the context of the then Race Relations Act 1976). Lord Nicholls said this about the test for whether the alleged discriminator acted because of a protected act, at paragraph 29 of the report,

> "What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

33. Furthermore, the act of victimisation may be committed if the reason for the employer's action was that they believed that the employee may do a protected act (s.27(1)(b) of the EQA).

The Law relating to Holiday Pay claims and the right to statement of terms and conditions

34. By section 1 of the ERA, an employer is obliged to provide to a worker or employee a written statement within one month of them starting employment. This written statement must contain the particulars set out in ss.1(3) and (4) ERA. If, after that statement has been provided, there is a change to any of the particulars which are required to be included in that

statement then, by s.4 ERA, the employer is obliged to provide a written statement to the worker or employee containing particulars of the change at the earliest opportunity and, in any event, not later than one month after the change in question.

35. These rights are enforced through s.38 of the Employment Act 2002 which provides,

> **"38 Failure to give statement of employment particulars etc.**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5. [As an aside, by para.1 of Schedule 5 these include s.23 of the ERA and s.120 of the Equality Act 2010.]
>
> (2) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the [worker][2] under section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change) …,
>
> the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (3) If in the case of proceedings to which this section applies—
> (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,
>
> the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.
>
> (4) In subsections (2) and (3)—
> (a) references to the minimum amount are to an amount equal to two weeks' pay, and
>
> (b) references to the higher amount are to an amount equal to four weeks' pay.
>
> (5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
>
> …."

36. It can be seen that the jurisdiction to make an award under s.38 of the Employment Act 2002 only arises if the employer is in breach of the

obligation to provide a s.1 or s.4 ERA statement at the time when the proceedings were begun.

37. The right not to suffer unauthorised deductions is also provided for in the ERA as follows,

> **"13.— Right not to suffer unauthorised deductions.**
>
> (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.
>
> (2) In this section *"relevant provision"* , in relation to a worker's contract, means a provision of the contract comprised—
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> …
> **14.— Excepted deductions.**
>
> (1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
> (a) an overpayment of wages, or
>
> (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
>
> made (for any reason) by the employer to the worker.
>
> …
> **23.— Complaints to [employment tribunals].**
>
> (1) A worker may present a complaint to an [employment tribunal] —
> (a) that his employer has made a deduction from his wages in contravention of

section 13

…
(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received."

36. The statutory right to paid annual leave and additional annual leave is found in regs.13 and 13A of the Working Time Regulations 1998 (hereafter referred to as the WTR). Regulation 14 of the WTR provides for the situation where an employer's employment ends at a time when they have accrued more paid annual and additional annual leave than they have taken.

"13.— Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins–
(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply–
(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.
…
(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)][4] equal to the proportion of that leave year remaining on the date on which his employment begins.

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–
(a) [subject to the exception in paragraphs (10) and (11),][1] it may only be taken in the leave year in respect of which it is due, and
(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

13A.— Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph

[1] Which applies where it was not practicable to take leave due to coronavirus.

(1) is—…
(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—
(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

14.— Compensation related to entitlement to leave

(1) [Paragraphs (1) to (4) of this regulation apply where–]
(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–
(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

$(A \times B) - C$
where–

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];
B is the proportion of the worker's leave year which expired before the termination date, and
C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

15.— Dates on which leave is taken

(1) A worker may take leave to which he is entitled under [regulation 13] [and regulation 13A] on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

…

15A.— Leave during the first year of employment

(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13[or regulation 13A] is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2) [or (2A)], as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.

(…

(2A) Except where paragraph (2) applies, for the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and regulation 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.

…

16.— Payment in respect of periods of leave

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13[and regulation 13A], at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].

(3) The provisions referred to in paragraph (2) shall apply–
(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; [...]

(d) as if the references to sections 227 and 228 did not apply [;]
[
(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—
(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—
(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—
(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.

(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker."

38. We apologise for quoting so extensively from the WTR 1998. Rather than quote equally extensively from Part II Chapter XIV of the ERA 1996, sections 221 to 229 of the ERA 1996 set out how to calculate a weeks' pay for the purposes of that Act. Reg.16 WTR 1998 applies those sections, with certain modifications, to the calculation of the paid due to a worker for each week of paid leave. For workers whose remuneration in normal working hours varies with the amount of work done in the period, by s.221(3) ERA, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate payable in respect of a period of twelve weeks ending with the calculation date. Reg.16(3)(e) WTR 1998 amends that for the purposes of calculating the rate of a week's pay for a week of leave so that account is taken of the previous 52 weeks' remuneration or, if the worker has not been employed for 52 weeks, the number of complete weeks for which they have been employed. In other words, an average of the remuneration paid over the whole of the employment (if less than 52 weeks) or over the previous 52 weeks should be calculated and the worker paid that during their leave.

Findings of Fact

39. The standard of proof that we apply when making our findings of fact is that of the balance of probabilities. We took into account all of the evidence presented to us, both documentary and oral. We do not record all of the evidence in these reasons but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

40. Mrs Khan commenced employment as a front of house staff at Pepe's Restaurant, which is operated by AY Trading on 12 December 2016 (DB p.161). There is a disputed issue of fact as to whether or not she was promoted to supervisor prior to her dismissal. Her effective date of termination was 10 June 2018. Miss Ali commenced employment in the restaurant as front of house staff on 15 May 2017 and on 14 August 2018 she resigned in circumstances which she alleges to be constructive dismissal.

41. The relevant incidents material to the claims by the two claimants overlap in time as can be seen from the following abbreviated chronology.

Date	**Incident**	**DB Page:**
12.12.16	AK starts employment with R1	161
15.05.17	AA starts employment with R1	
29.01.18	ZS sends AA a text (DB p.56) which she alleges to be sexual harassment or direct sex discrimination	56
24.02.18	Staff meeting in the restaurant	106
19.03.18	AK attends training at Head Office of the franchisor	11 refers
24.04.18	AA asks TH for annual leave during May	59
07.05.18	According to AA, ZS behaves inappropriately	AA para.8
14.05.18 to 27.05.18	AK was on holiday between these dates	
16.05.18	Start of Ramadan	
25.05.18	Approximate date of exchange between AK and TH which he alleges amounted to racial harassment of him on grounds of national origins	TH para. 13/AK para.16
01.06.18	Text message AA to TH about holiday pay	61
05.06.18	According to AH, TH complains about behaviour of AK and there was an alleged meeting between AH, TH and ZS (the alleged minutes of this meeting are disputed by the claimants)	179
05.06.18	Alleged oral protected disclosure by AK to ZS about cash in hand payments	
06.06.18	AH consults his HR advisor. According to AH, he	176

Date	Incident	DB Page:
	decides to dismiss on this date	
06.06.18	Alleged sexual harassment of AA by ZS	AA para.6
07.06.18	AA telephones the CAB for advice about alleged unpaid holiday pay from May 2018	
07.06.18	Alleged oral protected disclosure by AK to TH about cash in hand payments and protected act by AK to TH informing him about ZS conduct to AA.	
08.06.18	TH invites AK to meeting	50
10.06.18	TH dismisses AK on notice	171
15.06.18	AA writes to R1's registered office and to the franchisor about unpaid holiday pay	62
17 & 18.6.18	Eid festival	
20.06.18	AA tells her GP that she was touched and spoken to inappropriately at work.	152
21.06.18	Meeting between AA and TH about the letter at DB p.62	216
21.06.18	AK's solicitors write to R1	179A
22.06.18	AA contacts ACAS	TCB p.97
02.07.18	Letter from AH for R1 to AK's solicitors	180
02.07.18	AH for R1 to AA about her holiday pay and her contact with ACAS	72
11.07.18	AA given draft contract by TH with letter dated 02.07.18 from R1/AH to AA	206, 76 refers
11.07.18	Conversation between AA and Mohamed Hussein, AH's father	
12.07.18	AA texts to TH with a complaint of religious discrimination about Mr Hussein snr's alleged comment	73
12.07.18	AH to AA What's App messages about her earlier text to TH	78
15.07.18	AH to AA message asking for a meeting the following day	78
16.7.18 to 22.07.18	Emails between AH and AA making arrangements for a meeting	208 - 211
23.07.18	EC Cert issued to AA	37
24.07.18	Meeting between AH and AA	
26.07.18	Shift at which AA alleges she was given the "supervisor's shirt" to wear	
30.07.18	Alternatively, on this date it was announced that C2 was to be a trainee supervisor	217
13.8.18	AA receives payslip and text to TH asking for an	91

Date	Incident	DB Page:
	explanation of the rate of pay	
13.08.18	TH texts back saying that the pay increase will be reflected in next pay	93
14.8.18	AA resigns with immediate effect to ZS. AH texts to apologise for mistake in rate of pay, says she must work her notice or he will need to deduct the cost of cover	78

42. That being the material chronological framework, we go on to make findings about the contentious incidents relied upon by the claimants, respectively.

29 January 2018 (issue 11(a)

43. It is on this date that Miss Ali had texted ZS to say that she was running a little late and apologised. He said "o.k." and then texted back "luv ya". (DB page 56). This is alleged to have been direct sex discrimination (issue 13(a)(iii), sexual harassment and/or harassment related to sex (issue 13(b)(i) and (ii).

44. The first time Miss Ali complained about this text in writing was in the claim form on 11 November 2018, some 10 months later (TCB p.44). She says that she had informed one work colleague. In other words, in her 11 November 2018 claim form she first stated that the incident had happened and alleged that she had made a contemporaneous complaint. Therefore, the ET3 in that claim was the respondents' first opportunity to respond. AH, the second respondent, entered the response and in paragraph 6 and 7 (TCB p.92) he describes interviewing ZS on 14 December 2018. ZS's response was said to be that his first language is not English; he would not use such language and does not recall sending the text but no longer had access to his phone form that period. Further "*he believes that he had sent the text (which is denied) would be to his wife and sent by accident*" (para.7). He "*has recently gotten married and had a baby*" (para.6). ZS left R1's employment in the first 3 months of 2019 so he would still have been employed by R1 at the time of this interview.

45. In our view, there are two inconsistencies between this first account and his oral evidence. First, he told us that he got married in 2017 – from the vantage point of December 2019 (or even the date of the text) we do not consider you could reasonably describe that as recent. Secondly, when asked about the possibility of it having been sent to his wife, his oral evidence was that he doesn't communicate with his wife in English because his wife is Hungarian like him. These inconsistencies give us the impression that someone, either AH or ZS, was putting a story in the ET3 which they thought would be a plausible excuse rather taking care to be accurate in the record of an interview.

46. This discrepancy could not be explained by ZS not giving evidence in his first language – the evidence that he did not communicate in English with

his wife was particularly hard to explain except by a conclusion that the first explanation put forward by R1 was not credible. Prior to starting cross-examination, there was a break in the hearing in order that the respondent's solicitors could ensure that ZS had read his statement or that it had been read to him in order that he could attest to its truth, which he did without qualification. He did not always immediately understand the questions put to him but when they were repeated or rephrased it seemed to us that he was able to understand them. His witness statement contains at paragraph 6 the statement "*it is more than likely than not a mistake when I was meaning to respond to a text message from my now wife*". On the basis of his oral evidence, this statement simply cannot have been true.

47. This gives us cause for concern about the credibility of his witness statement generally. He had put his name to it and had been given time to ensure that he understood it. Despite that, he contradicted himself and it seems to us that he was willing to say his witness statement was true when it contained something he either didn't understand (but was not worried that he didn't understand) or knew to be clearly untrue. We therefore reject his explanation for it. It is argued to have been an overture of increasing intimacy.

48. Our view is that this was an unusually familiar thing to say to a conservative Muslim woman with whom he was not particularly friendly particularly given his position as the assistant manager of the restaurant where she worked. There is no evidence that Miss Ali complained to anyone at the time other than her sister, if that. She says in her statement (para.8) that she felt uncomfortable but no more than that.

<u>24 February 2018</u>

49. The staff meeting which took place on this date needed further consideration for the following reasons. Miss Ali and SD said that they reported ZS's conduct towards them to their supervisor and it was Mrs Khan's contention that she was appointed supervisor and ZS was promoted at that meeting. It was also relevant to the respondents' evidence about the extent to which they were happy with Mrs Khan's performance and the credibility of their evidence that, 4 months later, performance was a reason for her dismissal.

50. The witness statements of SD (WBp.26 at para.1) and LM (WBp.30 at para.8) deal with their respective understanding of what was discussed. In contrast to SD (who confirmed Mrs Khan's account), LM doesn't say in so many words that it was announced at that meeting that there was a promotion for ZS and Mrs Khan but she does describe Mrs Khan as being the supervisor.

51. Mrs Khan's own statement account is at WBp.12 at para.24. It came across strongly to us that she came out of the meeting thinking she was a supervisor. We accept that the staff were told that, in the absence of TH or ZS, they should go to her as she was more senior. She seems to have taken that to mean that she was promoted to a supervisor.

52. So far as the position of ZS is concerned, Mrs Khan says "*Tony declared himself as the manager, Zoltan assistant manager and me, Ayesha, as a supervisor.*" None of the witnesses interpreted that as being a change to TH's position and we conclude that ZS was not appointed the assistant manager only at that point. However, Mrs Khan had started after him, having been employed by the previous manager. SD also started after ZS. We can believe that the formal title "assistant manager" was not used of ZS until that meeting.

53. TH said the aim of the meeting had been to clarify the lines of communication so that the staff knew who to go to. He accepted that he communicated to the staff that if he wasn't there ZS should be the point of contact. If neither of them there, questions should be directed to Mrs Khan. There was an agenda for this meeting circulated on the "Pepe's Winning Team) What'sApp group (page 106). Point 5 referred to communication with each other and Point 9 to responsibility and accountability.

54. Mrs Khan's evidence was that she had been given a payrise the following month and that this was a reflection of her progression. In reality, Mrs Khan wasn't given a payrise as that term would generally be understood, although it seemed to be common ground that the management referred to it a payrise. There is no written evidence of process followed by which to increase her pay; there was no statement of change of terms and conditions.

55. AH's evidence was that Mrs Khan had been given the pay rise in December 2017 (WB p.54 para.6). His explanation of the reason for giving it then was that that was when he decided on it. Looking at her payslips, for the week ending 27.12.17 her rate of pay was £7.50 per hour (DBp.13). The following pay period (which is page DB p.137), her rate of pay is still £7.50 per hour. It is increased to £7.75 per hour for the payroll date of 23 March 2018 (DB p.136), the first complete pay period after the staff meeting, and then to £7.83 per hour for the payroll date 20 April 2018 (DBp.135). The rate is increased by £0.25 per hour later than AH claims to have intended to increase her rate of pay and then again to the new national minimum wage.

56. Our conclusion on what happened at the February staff meeting is that Mrs Khan wasn't put in a formal supervisory role but was held out as first amongst equals. What it told her about the respondents' attitude towards her was approval of how she was working. The respondents' evidence was that being publicly described as more senior or having more experience and being given the so-called payrise was to encourage her generally; an attempt to incentivise. Our view is that it would make no sense to show approval to someone who was not doing a good job and to prefer them over those who were doing a good job. It seems to us that either she was working well or this was intended to give her more responsibility. We consider that this action was inconsistent with a genuinely held view at that time (late February 2018) that her behaviour was so much of a problem that she may not have an future in the company. As we say above, the so-called payrise was in fact giving her the statutory minimum wage a little bit

earlier than she would have been entitled to it by law. In reality, she was given a relatively token extra amount for a month. We do accept that Mrs Khan wasn't being promoted into a vacancy left by ZS's promotion.

57. We have considered the evidence about the training course on 19 March 2018. To the extent that the respondents have suggested that the purpose of this course was to correct flaws or deficiencies in Mrs Khan's performance, that was not born out by the evidence. This seemed to us to have been more in the nature of developmental training. It was consistent with her wanting to work extra hours or hours only on specific days and TH's evidence that, in order to be able to do so, she needed to be willing to work on different stations.

58. We find that, at the staff meeting on the 24 February 2018, the other staff were encouraged to see Mrs Khan as someone to go to. There are text exchanges showing TH asking whether Mrs Khan could "*run the shift tomorrow*" but those date from both before and after February 2018. They show that he was willing to trust her to run the shift but not a formal change in responsibility on 24 February 2018. At DBp.46 there is a text telling Mrs Khan *"you are running the shift*" (26 February 2018). Two weeks later, on 11 March 2018, there is an exchange the gist of which we consider to mean that, when she didn't respond immediately to him asking whether she could work on Saturday evening, he said that if you're going to be the manager supervisor I need you to work some of the weekends in the month. That does not suggest to us that she had been promoted yet and that it would have come with different responsibilities.

59. We have considered the documentary evidence concerned with complaints about conduct to which we have been taken by the respondents and they are directed to all of the staff. So far as the documentary evidence is concern, Mrs Khan was not singled out or individually criticized for phone use or abuse of the staff meal policy.

7 May 2018

60. This is the date on which, according to Miss Ali (WB19 para.8) there was an incident in which ZS "*started touching me from behind in way I didn't feel comfortable*". She then refers to the 29 January 2018 text and says that she informed a "*work colleague*" but she means her sister. The paragraph starts by saying that there "*had been several incidents before this*" – that is to say before the incident of 6 June described in paragraphs 6 and 7 – but then describes that of 7 May and the text.

61. In oral evidence. Miss Ali said there had been a few incidents before 7 May 2018 which was why she said "*several incidents*" but only mentions two. She said that she had listed in her claim form (TCB p.44) only the ones she could date. In her "chronology" at TCBp.104 – which were effectively treated as particulars of her claim – she states at para.3 that "*7 May 2018 I noticed the assistant's manager Zoltan's behaviour towards me started to becoming inappropriate*" and "*everytime we would be on shift he would start touching me*". There is therefore a contrast in her accounts in that in oral

evidence she said that there were a few incidents before 7 May and her chronology of events when setting out her allegations in which she says that ZS's behaviour changed on 7 May.

62. The respondents also question why the allegations of sexual harassment were not mentioned in her first claim form (TCBp.24) if she had resigned in response to them when that claim is about unfair dismissal. This is something which calls for explanation.

63. We also consider Mrs Khan's statement evidence about the allegations against ZS. The statement put forward for this hearing (WB p.2), which is dated 18 July 2018, doesn't mention being told by her sister that she had suffered sexual harassment. In her particulars of claim (TCBp.16 para.2 presented on 3 October 2018) she relies upon having told TH that her sister had been sexually harassed as a protected act. It is not clear to us whether the respondents received that claim form or Miss Ali's which raised these allegations (presented on 11 November 2018) first. At DBp. 179U, the letter from Mrs Khan's solicitors prior to issuing proceedings does not include a reference to the alleged incident or to a victimization claim. In our view, had the allegations against ZS been mentioned in that letter, Mrs Khan would not, as was argued on her behalf, be making a complaint on behalf of her sister. If she thought that she had been dismissed because she had drawn to TH's attention the sexual harassment of her sister then why did she not mention that in her own complaint? We can see from the correspondence that Mrs Khan's statement in these proceedings was first written and sent to the respondent on 19 July 2018, before the issue of proceedings. However, it has not been updated to cover all of the issues we have to consider in this hearing. We remind ourselves that, at the time she made her statement, her sister was still employed by R1 and so was ZS.

64. ZS denies the allegations saying that at no point did he act inappropriately towards the claimant (WBp.51 para.7). He says that it would not have been possible for such an incident to have taken place in the work environment without witnesses.

5 to 7 June 2018

65. Several events are said to have taken place on 5 and 6 June 2018. The respondent alleges that it was on 5 June that the meeting was held at which it was decided to dismiss Mrs Khan. It is her case that, to ZS on 5 June and then to TH on 7 June she spoke about cash-in-hand payments being made to restaurant employees and delivery drivers. Miss Ali's case is that there was an incident of alleged sexual harassment of her by ZS on 6 June 2018 which she reported to her sister who, in turn, alleges that she informed TH about it the following day.

66. In 2018, the holy month of Ramadan started on around 16 May 2018. The immediate context to the events of 5 June include that, on 3 June, TH forwarded Mrs Khan's complaint about the hours she had been rostered to work to AH (DBp.176). He comments at 23.09 "*Just to let you kbow (sic).*

But I will deal with it." Then at 23.11 he says "*Boss, it's a nightmare boss … I told you. Now she is texting me none stop*." AH's response is to direct TH to tell Mrs Khan that it is his decision that the shift is not needed but that more hours can be given on another day. TH accepts that. This exchange records that TH is under pressure because of Mrs Khan but not that he's about to break because of being put under pressure by Mrs Khan's complaints about her hours.

67. To judge by the text sent by AH to his adviser on 6 June 2018 (DBp.176) we conclude that something happened between the 3 June and the 6 June which hardened the position.

68. The respondents' evidence is that there was a meeting on 5 June 2018 which is minuted in a document at DB p.179. All three of the respondents' witnesses gave evidence about this meeting. TH's oral evidence was, in our view, clear and unequivocal that the decision to dismiss Mrs Khan was taken during the meeting which happened on 5 June 2018.

69. AH and TH's evidence was that this meeting must have taken place at around about 5 o'clock – at about the change of shift. They both gave evidence that they would have regular three-way management meetings between the two of them and ZS. The practice was that AH would come into the restaurant and, depending upon their shifts and the exact time either TH would stay later for the meeting or ZS would arrive early for his shift to attend it.

70. Mrs Khan claims that she made a protected disclosure to ZS on 5 June 2018. Our finding is that ZS was on the late shift that day. Any management meeting would have been before he went on shift and therefore any conversation between Mrs Khan and ZS would have taken place after the meeting, if it happened.

71. We consider whether there was a meeting between AH, TH and SZ at all on 5 June 2018. There is no evidence of a text setting up the meeting despite having DBp.176, the text exchange between AH and TH on 3 June – the screenshot of which is cut off in the middle of a screen.

72. We do not think that DBp.179 is a reliable record of what was discussed at any meeting which did take place. There was shifting and inconsistent evidence from AH about his practice about creating records of the meetings. Our view of his evidence in cross examination about whether regular minutes were taken, how, whether they retained and why they are not available was that it was not a genuine explanation of a practice which existed at the time. We are of the view that, in general, AH did not make reasonable, proportionate and diligent attempts to find relevant documents which were relevant to the issues. He claimed to have given away his computer and lost records of management meetings and then that sometimes he made notes which he made no attempt to save. We reject this evidence and do not think that DBp.179 is a contemporaneous minute of what was discussed at a meeting on 5 June 2018. Clearly, AH's credibility and reliability as a witness in general is damaged by having

sought to rely upon this document which we do not think was a contemporaneous record and has probably been created for the purposes of the Tribunal hearing. We therefore look more closely at any other supporting evidence.

73. We have concluded that, simply because DBp.179 is not a reliable contemporaneous record of what was discussed, it does not follow that the meeting did not happen. We accept that the exchange on DBp.176 on 6 June between 13.35 and 13.46 between AH and his HR advisor was about Mrs Khan. We think that it is more likely than not that there was a meeting between TH, AH and ZS the day before AH made that contact as we explain more fully below.

74. There has been complete disclosure by Mrs Khan of all What'sApp messages between her and TH at DB p.1 to 50. We consider the Times and dates of texts between them about the hours she had been allocated during Ramadan. It is common ground that the restaurant is less busy during Ramadan for the understandable reason that many of their usual clientele observe a fast during the hours of daylight in that period. AH's practice was to give TH, as manager, a staff budget based on the takings or projected takings and it was the manager's responsibility has to keep the staff costs within that budget. Therefore, his budget is less during the month of Ramadan.

75. Mrs Khan's contracted hours were a minimum of 10 hours per week (despite what she says in her text on DBp.33 – see DBp.162). Although Ramadan is expected to be a quieter trading period, the staff, from their perspective, would still need a regular income. It is clear that Mrs Khan wanted to make up her hours; see DB p.21 a text dated 20 May 2018 in which she complains that the previous week she had had 17 hours and asked for 27 hours that week. In his response, TH explains the limitations he is operating under and that he is doing his best to distribute the hours – "*We all are losing hours. Bare with us this week. As we are expecting busy next week. I am trying my best to distribute hours but I have to look after business."*

76. We can see from the text on DBp.24 that TH tried to accommodate Mrs Khan's hospital appointment. She had limitations on her availability and accepted in cross-examination that she had said she was only available to work Tuesdays and Wednesdays. The usual practice was to allocate her shifts which gave her 25 hours over 2 days. She did not accept in cross-examination that TH was trying to be fair to other employees at a difficult time and said she did not understand why he had given her hours to somebody else. We are not persuaded that that was what had happened because the actual numbers of shifts available were reduced for reasons which seem to us to be understandable and business related. We find that in setting the rostered hours during this period TH was working within the limitations that Mrs Khan had on the times or days when she was available to work and where she would work within the restaurant.

77. On around 25 May 2018 there was a verbal exchange which is later complained to amount to racial abuse of TH by Mrs Khan. It is common ground that the driver, Shaidul, had taken a cash payment from a delivery which included a £50 note. Mohammed Hussein, Arif Hussein's father, did the banking of cash for the business. Mrs Khan's oral evidence was that

"Mr Mohammed had seen the £50 note while [the driver was] giving it to me and said why did you take this from the driver. I said that he had taken the payment to put in the till. He said he had got issues with the £50 note and I don't want you to take [it]. [He] stormed off. [I] got a phone call within 30 minutes or 20 minutes from Tony [who asked] "How do you know that it was Shaidul taking the £50 note" and I said that Mohammed saw me given that. I was saying [this] and he started saying "This is not Pakistan" and I was taken aback by this comment. I said "This is not Pakistan but I assure you that this is not Bangladesh". Tony had said "Ayesha this is not Pakistan" and I said "I can assure you that this is not Bangladesh". I continued that "I am born and bred British. I have only been to Pakistan. Why did you bring Pakistan into this?". He slammed the phone down on me."

78. TH's consistent evidence was that the comment "*This is not Bangladesh*" was communicated in a text during the period in Ramadan when he described Mrs Khan as continually texting to his mobile. There is no evidence in the What'sApp messages of a deleted message having been omitted during the relevant period.

79. We accept the claimant's version of events regarding this incident because it has detail and a context to explain how the statement came to be said. Her account is also consistent with the text which she received from TH (DBp.28).

80. On the basis of those findings, her statement does not, in our view, amount to abuse by Mrs Khan of TH on grounds of his ethnicity or national origins. Given that he apologised for his part in the incident (DBp.28 on 25 May 2018 times at 15:12), it wasn't reasonable for TH to present that as being abuse of him on grounds of ethnicity or national origin. Furthermore, it was a like for like response to Mrs Khan being challenged about accepting a large denomination banknote.

81. The counterpoint to the text exchange between TH and AH about Mrs Khan on 3 June which is found at DBp.176 is a long text exchange between Mrs Khan and TH on the same day between DBpp. 30 and 42. The whole exchange is timed at 22.40. Our impression, reading those texts, is that Mrs Khan was angry and didn't accept TH's explanation that he had to balance the needs of the business with the interests of the staff. See, in particular, his text at the top of DBp.41. She said in the texts that she thinks it's personal which seems to us also be have been reflected in her oral evidence. She was texting TH during his working hours. She doesn't now seem to accept that her lack of flexibility (although for understandable reasons from her perspective) caused her manager difficulties in allocating her more hours. The exchange ended with him saying that he will try to

allocate her 25 hours on 2 days but could not promise. TH forwarded that text to AH approximately 30 minutes later on the same day.

82. We see from a text on DBp.42 that the next day TH told Mrs Khan that he was allocating her that week the hours of Tuesday from 12 noon to 23.00 and Wednesday 10.00 to 22.00. However, he made clear that he could not promise the same in the future and that 25 hours would need to be over 3 or 4 days. We accept his evidence that he needed fewer people in the restaurant when it was quiet and if he could allocate a member of staff to the shift who could do more than one job then that helped him with the competing objectives which he was trying to juggle. TH's position makes business sense. Mrs Khan sought in her response to argue for Monday to Friday 10 till 15.00 (DB p.44) – which she described as her original hours although her contract is not prescriptive. However, she also said that she could not work on weekends or Friday. The concluding texts on 4 June suggest that Mrs Khan is happy with her hours for the week but wants her original hours for the future. "*We will work it out no worries*" is the final text from TH.

83. We therefore find on the basis of the text evidence that TH dealt with the situation by giving Mrs Khan what she has asked for in the instant week, but tried to set down a marker that that might not be possible for the following week. The sign off "*no worries*" suggests that he expected it to be possible to reach a compromise.

84. We have concluded that DBp. 176 and 177 are reliable documents in the sense that both are genuine text exchanges on the one hand, between the HR advisor and AH on 6 June 2016 and on the other between TH and AH on 3, 6 and 7 June 2018. The texts disclosed do not give the full context for the exchange displayed but the document is reliable to the extent that it shows that there were those exchanges at those times and dates.

85. What AH says in his text on 6 June to his HR adviser is "*We have an employee who has been working for less than 2 years. They are causing some issues and we would like to end there (sic) employment. Are we able just to give them 2 weeks notice (as defined in their contract)*?"

86. It seems to us that the wording of that text is consistent with the decision to dismiss Mrs Khan having already been made and inconsistent with there not yet having been a decision. Otherwise, the response to the HR advisor's offer to draft the dismissal letter would have been quite different. AH declines the offer of the HR advisor to draft the letter but asks for advice about the content. He doesn't say that he does not know whether it will be needed or not. In response to the offer of a template he gives a "thumbs up" emoji.

87. Furthermore, AH also texted TH on 6 June 2018 at 13.36 before texting the HR advisor in order to verify Mrs Khan's start date (DBp.177). At 13.38 he texted the HR advisor and their conversation lasted until 13:46. Then DBp.177 shows that at 13.55 on 6 June 2018 AH texted TH and said "I

spoke to my HR expert and we just need to dismiss Ayesha". He tells TH to leave the letter to him. On the basis of that documentary evidence we're satisfied that the decision to dismiss had probably been made prior to the text from AH to TH timed at 13:36 on 6 June 2018.

88. Given the supporting texts, even though we do not think that DBp.179 is a reliable document either as to what it purports to be or as to what happened at the meeting which it purports to record, we accept that there probably was a meeting about Mrs Khan's employment between AH, TH, and ZS on 5 June 2018 between the end of TH's shift and the start of ZS's at around about 5 pm.

89. We then go on to consider what was discussed at that meeting, when was the decision made to dismiss Mrs Khan and what was the reason for that decision. TH's evidence was in direct contradiction to his statement evidence at para.15 and was as follows,

"When we had the weekly meeting we discussed her - all about it. I informed [AH] about all the things. I have informed [AH] and he make the decision and he said he will provide me the letter. We had the meeting and then he said that he will provide this letter for dismissal."

90. AH's oral evidence was that he had been reluctant to dismiss Mrs Khan and said that he had done so,

"on the behest of [TH] and [ZS] who said that they couldn't take it anymore. I liked [AK] – they kept me up to date with her performance. I hate dismissing people. I feel that people need to be given a second chance. They said it was either her or them – they couldn't take it anymore. I sought my HR advisor's advice on what my options were. My preference was second chance but they told me that they couldn't take the verbal abuse any more and the text abuse."

91. His reference to verbal abuse is to the comment that "*this isn't Bangladesh*" which, as we set out above, was not something about which TH could reasonably complain given that he had apologised for his part in the exchange. Contrary to his oral evidence, AHdidn't seek options. The question he asked of his HR advisor was whether he could dismiss the employee summarily or "*do I need to follow a procedure*". The conclusion we draw from the somewhat conflicting evidence on this point is that, as TH said in evidence, it was at the meeting on 5 June 2018 that AH decided to dismiss Mrs Khan. We reject AH's oral evidence that his preference at the end of that meeting was to go through a disciplinary process which was contrary to the clear evidence of TH and ZS.

92. We therefore conclude that anything said to ZS on 5 June 2018 must have been communicated after 5 pm and after the management meeting on 5 June because that was when he was on shift. This is the conversation in which it is said that Mrs Khan communicated information which tended to show that a criminal offence was being committed "namely tax avoidance

and benefit fraud, and/or that persons were failing to comply with their legal obligations in respect of tax, national insurance and benefits." (TCB p.21 to 22 para.29).

93. What was the information which is said to have been disclosed? Mrs Khan's witness statement (WBp.10 para.17) gives no details about what is alleged to have been communicated. Mrs Khan adopted TCBp.16 para.11 in evidence where she says that she spoke to ZS "about cash in hand payments being made by the restaurant to delivery drivers and certain of its staff". He confirmed in evidence that she had mentioned the topic. Mrs Khan did not state with any specificity what she had said. Her oral evidence was that it had taken place around the end of the day; around 9.30 pm to 10.00 pm.

94. One might read the letter from Mrs Khan's solicitors, which is also alleged to have been a protected disclosure (DBp.179U), charitably as saying that Mrs Khan told ZS that drivers were being paid cash in hand and not declaring this to the HM Revenue & Customs. The reason why we say that that would be a charitable interpretation is that the letter actually alleges that Mrs Khan realised that this was happening, approach ZS on 5 June 2018 and "informed him of this", communicating information that drivers might be avoiding paying tax on income. However, when Mrs Khan herself gave evidence, she said that she queried the payment of cash to the drivers and asked why it was, what cash goes in and out. The allegation made in the solicitor's letter that she told ZS that the drivers were not declaring income to HM Revenue & Customs is not repeated in either statement or oral evidence by Mrs Khan and it was not accepted by ZS. Our conclusion is that there is no evidence before us that this statement was made and we reject any claim that it was.

95. ZS's evidence about this suggested that initially he did not understand the question because when first asked whether the sisters (plural) had spoken to him about cash in hand payments he responded that they had never done so. He corrected himself to say,

"Yes – […] she speak about cash in hand but I didn't say anything. She asked about the cash - how is working? What paying? What cash is going outside? I didn't say anything about this. Is not allowed to say anything about this. Only the manager is allowed to say cash in hand payments."

96. Our conclusions about what happened at the management meeting on 5 June and when it was mean that the likelihood is that any disclosure of information made on 5 June 2018 (which is the first date upon which it is said one was made) was after the decision to dismiss Mrs Khan had been made. However, the height of the evidence about the conversation between Mrs Khan and ZS about cash in hand payments on 5 June is that she spoke about it and asked questions about it but the first claimant has not shown that she communicated information on that date beyond a reference to the drivers receiving cash-in-hand payments which, of itself, is insufficient to tend to show that either the crime of tax avoidance or benefit fraud was being committed or that any civil legal obligations in relation to tax, national

insurance or benefits were being breached. That is how this communication is said to amount to a qualifying disclosure under s.43B.

97. So far as Miss Ali's allegations about 6 June 2018 are concerned, we found LM to be a credible witness. ZS's statement evidence was substantially undermined by his evidence about when he married and that he does not communicate with his wife in English. We find that these inconsistencies in his evidence had a damaging effect on his credibility overall.

98. By contrast, the evidence of LM and Miss Ali were generally consistent with each other and we accept their account about the incident of 6 June 2018. Miss Ali's evidence in para.6 of WBp.18 is that ZS "*held her arms in a very inappropriate and uncomfortable way refusing to let go*" and said "*I will close up early and you can take your clothes off and do a stripshow for me*".

99. LM covered the incident in her para.22 WBp.33. Against the background of a general discussion about relationships in which ZS asked Miss Ali whether she had attempted to kiss anyone – which LM describes as an inappropriate conversation (para.22) she sets out her account of ZS "*grasping [Miss Ali's] wrists*" (para.23) and telling him to "*let go of her*". LM she answered the questions asked of her readily. The context she gives makes the whole account more plausible.

100. Both LM and Miss Ali related that the former waited for the younger woman so that they could walk back together. They live in the same block. We note that the roster (DBp.179R) is said to show that LM finished at 23.00 and Miss Ali was scheduled to finish at 22.00. It may be that their accounts are wrong about who waited for whom. This does not seem to us to be a significant discrepancy when the evidence before us was that the printed rosters were amended from time to time. LM was very clear that she waited and, so far as it is material, we accept that evidence.

101. We have considered carefully whether the fact that, despite bringing a claim about constructive dismissal, Miss Ali did not complain of these alleged facts until her second claim undermines her account. Her explanation is that she had understood the advice from ACAS to be that the allegations against ZS needed to be in a different claim.

102. We give weight to a record from Miss Ali's GP (DB p.152) which evidences a telephone consultation on 20 June 2018 where she stated that "*she wished to discuss her job as the manager had made some inappropriate comments to her and touched her in a way she feels is inappropriate*". Her full GP notes show that entry at DB p.157 where we see that she was advised that if she considers that her employer has discriminated against her or broken the law she should see the police or "*seek support from similar services*". Set against that evidence of a near contemporaneous confidential report to her female GP, our view is that the failure to include this claim in her first complaint or to raise it with TH directly does not undermine the credibility of Miss Ali. We find that the 6 June incident described by Ms Metolli and Miss Ali happened broadly as alleged and that, following a conversation about relationships in which he asked Miss Ali

whether she had ever attempted to kiss someone, ZS did hold her arms in a tight grip and refused to release them and said words to her to the effect "*I will close up early and you can take your clothes off and do a strip show for me*".

103. Miss Ali's account of 7 May 2018 is credible in the context. We accept her evidence of that incident and find that ZS touched her from behind in a way which made her feel uncomfortable. SD also says that she experienced this behaviour from ZS (WB p.26 para.2). We make no specific findings on the behaviour SD alleges about her own treatment as we do not need to do so in order to make findings on the issues in the present case. However, in general, we also found SD to be a credible witness.

104. The first claimant's account of the alleged disclosure of information to TH on 7 June 2018 was as short on specific content as her account of the statements to ZS on 5 June 2018. She adopted paragraph 14 on TCBp.18 in supplemental evidence and said that she had started her shift at around noon and she had mentioned the cash-in-hand payments and sexual harassment of her sister to TH. He denied that the conversation had taken place in his Grounds of Resistance (TCBp.79 para.4) and asserted that the first time he had become aware of the contentions that the claimant had made a protected disclosure had been through the letter from her solicitors. This denial was repeated in his witness statement (WBp.63 para.24). In oral evidence he was unable to remember the 7 June 2018 in any detail, he could not remember whether he was on shift between 11 am and 6 pm as alleged or whether Mohammed Hussein was present although he repeated that no such conversation had taken place.

105. We have found that Mrs Khan spoke to ZS about cash-in-hand payments. We think it more likely than not that she also spoke to TH about cash in hand payments on around 7 June 2018. TH had little clear recollection of it. The only evidence of any detail is that of Mrs Khan but our conclusion, based upon the evidence before us, is that when she did so it was not in any more detail than the statements she made to ZS.

106. We think it very likely that Miss Ali would discuss the behaviour of ZS, which made her feel uncomfortable and which she perceived to be sexual harassment claim with her sister. They live together. Miss Ali said that she felt comfortable talking about the incident to a woman.

107. We then consider whether this report went any further than Mrs Khan. We are not satisfied on the balance of probabilities that she did make that complaint. There are some statements by Mrs Khan which we do not consider to be wholly reliable. Our view of the evidence is that she was not formally appointed to be a supervisor on 24 February 2018. To the extent that Miss Ali says that she reported the behaviour to management that is an exaggeration of her sister's position.

108. There is also the point that there is no reference in the letter from her solicitors dated 21 June 2018 to the alleged protected act in reporting ZS's

behaviour to TH. There was also inconsistent evidence about whether earlier complaints had been made about the previous alleged conduct. SD said orally that she spoke to Mrs Khan who must have spoken to TH because he contacted her. However, her written statement does not say that (WBp.26 para.2).

109. We think it significant that when Miss Ali complained about Mohammed Hussein's comments, TH took on board the need to do something about it (DBpp.75 & 76). Although we think that Mrs Khan probably did tell TH about Ms Dahir's complaint, we do not accept Mrs Khan's explanations for not relying upon her report relating to her sister in her solicitor's letter of 21 June 2018. When he was informed of a problem, it seems that TH acted on the report. We have concluded that, on the balance of probabilities, Mrs Khan did not tell TH about her sister's report of the incident on 6 June 2018 or the previous incident on 7 May 2018. Whether that was to do with Ms Dahir's younger age at the time of the alleged incident or for some other reason, our conclusion is that Mrs Khan did mention Ms Dahir's complaint to TH at some earlier stage but did not mention her sister's account of the 6 June 2018. Furthermore, there was no adverse consequence to Mrs Khan following her report to TH of Ms Dahir's complaint. There is no reference to these incidents in the texts at all, even obliquely.

Dismissal of Mrs Khan

110. Mrs Khan was dismissed when she was handed a letter by TH on 10 June 2018 at a meeting in Costa Coffee which had been arranged two days previously without giving any warning or indication what the meeting was to be for (see DBp.50 where it is merely referred to as an "important meeting"). The dismissal letter (DBp.171) puts forward performance as the reason for dismissal which is said to be on notice although it continues "*the company would also accept if you wish to terminate your employment with immediate effect*." There is no documentary evidence at all to support the reasons put forward by the respondent as the reasons for dismissal either performance - as set out in the dismissal letter, or those referred to in paragraph 6 of TH's statement - customer complaints or harassment of TH.

111. We accept that that TH was finding Mrs Khan difficult to manage. The conclusion we draw from his oral evidence, backed up by the texts at DBpp.32 to 44 are that he was, to put it colloquially, fed up with her because he was trying to help her and she was complaining. He found it difficult to do his job to allocate hours during a period of reduced trade. Mrs Khan had a perfectly reasonable expectation to have reasonable and regular hours, but TH was genuinely struggling to manage the staff allocation and the budget. He comes across through these texts as someone trying their best to do right by everybody.

112. Our conclusion is that TH probably did tell AH about the "*this isn't Bangladesh*" comment but not about the whole context. AH just took TH's word for a complaint about a comment which was alleged by the latter to have been abusive on grounds of ethnicity and nationality and did not even think about investigating the allegation, as he clearly should have done if he

was intending to take it into account against her. In our view, it is a high-risk strategy for a director to put such implicit faith in what he is being told by his managers. We've found that any statements about cash-in-hand (referred to in issue 1 and 2(a)) were not expressed in a way which included any specific information that suggested wrongdoing. We've found that Mrs Khan did not tell TH about the behaviour of ZS towards her sister in an incident which, in any event, happened after the date on which the decision had been made to dismiss her.

113. It is clear that the employer in this case did not approach the decision to dismiss in the way we would expect from a fair and competent manager. It is absolutely clear that, had Mrs Khan had qualifying service and on the evidence we have heard, she would have had a strong argument that she was unfairly dismissed.

114. Exactly what was in the mind of AH when he made the decision to dismiss is difficult to infer. His statement evidence claims that ZS a reported that Mrs Khan had been rude towards him and his father but ZS seemed to have no recollection of that. Our findings are that the decision was made on 5 June 2018. What we do consider is that AH's attitude was that his managers have value, but the employees have no value and so if they pressured him to get rid of an employee he bowed to that pressure. This is a risky attitude to take. The tenor of correspondence with both claimants in responding to their complaints suggests a knee jerk reaction that the complaints are not well founded which is not how a responsible employer behaves.

115. It is quite possible that, at the meeting on 5 June 2018, TH and/or ZS complained to AH about Mrs Khan's conduct and performance, which complaints were not, for the most part, objectively substantiated and were not investigated by AH. However, the timing of the decision means that any report by Mrs Khan to ZS or TH about the cash-in-hand payments was not a factor in the decision to dismiss.

116. To conclude the findings in relation to Mrs Khan's claim, her solicitors wrote on her behalf on 21 June 2018 (DB.p.179A). The subject heading is "Unfair Dismissal Claim" but there are a number of complaints included in the letter, including that she was dismissed on grounds of protected disclosure. One is that

"*in December 2017 our client was promoted from front of house staff to a supervisor role. Her hourly rate was increased from £7.50pm to £7.80ph. Our client took over the supervisor role from Mr Zoltan who had been promoted to assistant manager …. Our client subsequently found out that when Mr Zoltan was employed as a supervisor he was being paid £8.00 per hour. When our client took this matter up with Tony his response to her was "a woman should never challenge a man*".

Further on in the letter it is said "*Our client also believes she was discriminated in relation to her pay due to her being a woman. When she raised her ominal pay increase being less than the previous supervisor*

Zoltan, Tonys comments was direct discrimination that our client was not of equal status to her male counterpart (Zoltan).”

117. AH replied on 2 July 2018 in terms set out on DBp.180. He defended the procedural steps taken by the company and referred to repeated warnings of performance, none of which were evidenced or substantiated before us. He accused Mrs Khan of “*racist remarks due to [TH’s] ethnic background*” – allegations which we have found to be a mischaracterisation of the event in question. In a paragraph responding to the allegations of protected disclosure, AH states that

“*it is likely that your client’s husband has been paid in cash and she has used this knowledge in the hope that AY Trading also follows these practices. We do not and if forced to take this to tribunal we will be making this argument, and this may prove uncomfortable and potentially costly for her husband (in terms if (sic) fines and potential criminal proceedings for avoidance of tax).*”

He denied inequality in pay.

Comments by Mohammed Hussein on 11 July 2018

118. Text messages from Miss Ali to TH at DBpp. 73 to 76 record a written complaint by Miss Ali which contains her account of what Mr Hussein snr said, which we accept. We have not heard from Mr Hussein snr. We find that, as it is set out in those texts, on 11 July 2018, Mr Hussein snr had a “*dig about Wahabism and (wahabi) extremism*.” Miss Ali reports that this is not the first time it has happened and continues

“*you need to take action of this discrimination that’s taken place in the workplace by the owners father. I don’t feel safe when Mohammed’s there anymore he’s always giving snarky and rude remarks. I don’t want my shift pattern to be affected or changed by this. I want this matter to be dealt with please I can’t tolerate it anymore.*”

119. TH asks for details and Miss Ali replies (DBp.76) that Mohammed Hussein said that Nawaz Sharif (then prime minister of Pakistan) “*was brainwashed by the wahabi influence and wahabism. Knowing fully that I am wahabi*”. We find that the essence of her complaint is that by what he said, Mr Hussein snr was linking Wahabism with extremism. In her witness statement (WBp.20 para.11) Miss Ali’s account is that “*the manager approached me talking about the news*” and began discussing Mr Sharif’s “*arrest and corruption*” when Mr Hussein snr.

“*who was not part of the conversation, interrupted the conversation and said it was due to Saudi Arabia. The Saudi and Wahabi’s influence and brainwashed him. He went onto say that Saudi Arabia is the cause of extremism and terrorism and are responsible for the terror attacks that are going on in the world and walked off*.”

120. In his witness statement, TH does not describe the incident itself, although Miss Ali claims that he was there, merely describing his communication with Miss Ali about it (see WBp.48 para.9 and 10). Miss Ali complained that he did not investigate her allegation but he said on DBp.75 that he would pass the message on to AH. Realistically we do not think he could have done anything further. The complaint was about the owner and director's father. He was right to pass the complaint up the chain of command.

121. Part of the respondents' defence to this allegation is that neither Mr Hussein snr nor AH knew that Miss Ali was Wahabi. Miss Ali's evidence was that this could and would have been deduced from a previous conversation between her and Mr Mohammed Hussein prior to Eid (which fell on 17 & 18 June 2018) that she followed Saudi Arabia's declaration about when Eid would fall.

122. AH's evidence was that she would not have been realised to be Wahabi because she did not behave towards working with the opposite sex as they would presume a Wahabi young woman would. She did not say in evidence before us that she had actually told AH or Mr Mohammed Hussein that she was Wahabi. We accept that they may not have consciously realised that she was.

123. In the List of Issues, Miss Ali self-identified as being a Sunni Muslim and an adherent of the Salafi reform breach of Islam. Her oral evidence was that there was no difference between Salafi and Wahabism which were the "same branch" and both fell under conservative Sunni Islam.

124. AH explained his understanding to be that Wahabism was a specific Saudi sect of Islam, a Saudi Arabian version of Salafi Islam which he described as a militant strain which says that one can go to war with anyone who does not accept their interpretation. It was suggested to AH that he and his father felt animosity towards Wahabism which he denied, saying that he and his father felt animosity to people who kill others. He volunteered that there was an element of Wahabism that was extremist and said that there was a well established link between Wahabism and terrorism.

125. As to Mohammed Hussein's position with AY Trading, there was no evidence that he was an employee. Mr Hussein's statement evidence (WBp.41 para.19) was that his father "*enjoys visiting the restaurant and having conversations with Tony about politics and other areas which he is passionate about*". However, in oral evidence he was taken to a number of messages (on DBpp.96 and 97) indicating in the first place that his father was on the Pepes Winning Team What'sApp group. He was shown to be involved in arranging for the repair of broken glass above the till (DBp.97) and asked if the quotation is O.K. which AH sanctions. On 5 January 2018 (DBp.99) he relayed a message about a workman rearranging his visit. On 15 January he appeared to be getting involved in the removal of a poster about an expired promotion (DBp.100).

126. AH stated orally that his father performed some administrative tasks for AY Trading and, since he lived round the corner from the restaurant, he was

asked to do the day-to-day banking. It was the latter which AHdescribes as being "*the role I had asked him to do*." It seemed to us that AHwas happy that his father was occupied in that way and, no doubt, that he had someone he trusted to bank the takings. The instruction to carry out the banking would require Mr Hussein snr to visit the restaurant to remove the cash and, it seems, he involved himself in a number of jobs relating to the restaurant with his son's knowledge. His son's approval of this enlargement of his father's role can be inferred from his sanction of Mohammed Hussein taking the frame above the grill to the glazier (DBp.97).

127. Miss Ali met with Arif Hussein on 24 July 2018 in order to discuss all of her outstanding complaints. She did not actually explain in so many words about her allegations of sexual harassment. She might have been trying to summon up the courage to do so but it is clear that she did not mention her experiences with ZS.

128. Arif Hussein's reaction to being sent Miss Ali's complaint about his father's comments by TH can be seen from the text to Miss Ali at DBp.78 times at 17.14. Since he was forwarded her text, he can clearly see that she regards what was said as being "*racial abuse towards my religion*". We read Mr Hussein's response as saying that if you object to criticism of Wahabism you are against people speaking out "*against terrorism and religious extremism*". He continues "*If you are asking someone to stop speaking out against such matters that is something that I would need to report to the police*." He then asks her what she is uncomfortable about, to which there is no response. Three days later he states "*you have not responded to my message. Given the recent breakdown in communication between yourself and your employer we need to discuss these matters*."

129. As well as these matters, on Miss Ali's account of the meeting of 24 July 2018 at WBp.22 para.18, she and AHdiscussed her complaints about shortfall in holiday pay. Miss Ali had first queried whether she had been paid her full holiday pay entitlement on 1 June 2018 when she raised it with TH who said that he would ask Arif Hussein (DBp.61).

130. On 7 June 2018 she contacted the CAB and then, 2 weeks after she had first raised the issue, she wrote to R1 directed towards the registered address but also to the Head Office of the franchisee setting out the schedule (DBp.63) which had been provided to her by the CAB about her holiday pay entitlement for the two weeks commencing 14 May 2018 based upon the information she gave to them. In summary her complaint was that she had only been paid for one of the two weeks' she was on leave and thought that she should have been paid for both.

131. We find that the reason why Miss Ali sent her letter to the franchisee's Head Office was that she wasn't getting an answer quickly enough from the company or her manager. In our view, if an employee has grounds for thinking that they have not been paid for one out of the two weeks they have been on leave and that that is an error, they are entitled to a quicker response than Miss Ali received. To say that she was damaging the

company by those actions was provocative. She was, in our view, just trying to enforce her rights. When there was still no response, she contacted ACAS who contacted A Y Trading.

132. The response from Arif Hussein to these steps was intemperate. On 2 July 2018 he wrote (DB p.72) to say that he was appalled by her behaviour and that, prior to her complaints, "*Tony had highlighted you for a promotion and a payrise to £8. However due to this recent episode this will not be happening until we are sure that you are able to work for the best interests of the business*." He calculated that she had accrued 69 hours of holiday of which she had been paid 55 hours so there were 14 hours remaining which he expressed himself willing to pay in settlement of the matter and said "*If you insist on taking this to the tribunal there is no possibility or recovering any more. It is also likely that your pay out will be reduced due to your abuse of the tribunal process. I will also be requesting costs so it is likely that you will be out of pocket significantly."* Without passing comment on the likelihood that the respondent would be able to carry out these threats, this seems to us to have been a strong reaction. It appears from Miss Ali's statement (WBp.21 para.14) that she received this letter in the post on 12 July 2018 along with the draft contract.

133. At the same time Miss Ali was been given a copy of a draft contract which should have been provided within one month of commencement of employment in accordance with s.1 of the ERA (DBp.206 dated 2 July 2018 but received by Miss Ali on 12 July 2018). The draft contract is at DBp.122. On 12 July 2018 (DBp.76), Miss Ali told TH that she was still reading it, did not agree with some of the clauses and wanted to read the employee handbook before signing anything. She was told that the handbook was in the store and that, as a standard contract, no changes could be made to the contract (DBp.77).

134. Those standard terms include, in relation to holidays (DBp.124), that the holiday year runs from 1 January to 31 December, that accrued annual holiday cannot be carried over from one holiday year to the next and that "*if on termination of employment you have taken more annual holiday than you have accrued in that holiday year, an appropriate deduction will be made from your final pay*."

135. On Miss Ali's account holiday pay was discussed during the meeting with AHon 24 July 2018 and he said that he was "pissed off" that she had written to the franchisor's Head Office. With regard to her complaint about his father's comments, he told her he had spoken to his father about it, that she should not take it personally and that she didn't look like a Wahabi (WBp.22 para.18). Mr Hussein's account was that he had told his father not to speak to her about such matters again.

136. We also refer to DBpp. 85 to 90 which are emails between Miss Ali and Mr Hussein. These show that on 16 July 2018 (DBp.86) AHemailed Miss Ali setting out what he says will be discussed. This include "*an impression that you are working against the company and my concerns that you have an*

intention to damage the company". This seems to us must be a reference to her sending her complaint about holiday pay to Head Office.

137. She was alleged to have taken unapproved leave. If one looks at DBp.79, it is clear that TH approved her 15 July 2018 request for leave to complete her university placement saying that she would not be able to work the following week. He says that it is inconvenient but that he will try to cover this week. Then 25 minutes later, TH tells Miss Ali that this is unapproved leave. TH and AH agreed that in between those texts they had spoken to each other and decided that they would crack down on Miss Ali taking leave. They didn't have to agree to that leave because of the short notice but they seem to have presumed that Miss Ali was starting to cause trouble because her sister has been dismissed.

138. The 16 July 2018 invite email also states that AH wishes to discuss Miss Ali taking sick leave and not providing a doctors note. Our collective experience is that it is not possible to get a GP's note for absence of less than 7 days. There is no requirement in the respondent's policy that employees need to provide one in the case of a single day's absence. It seems to us to be unreasonable for AH to have criticised Miss Ali for that matter.

139. The last point to be discussed is said to be "concerning comments you have made over extremism". This is not, in our view, a fair characterisation of what she had said: she hadn't made comments about extremism but had criticised AH's father for making comments about Wahabism.

140. The act of AH which is complained of in relation to the meeting of 24 July 2018 is whether he failed to take any proper steps to deal with the complaints about religious discrimination and harassment against Mr Hussein snr.. His way of dealing with those complaints seems to us to have been to roll them into this meeting which is used to make complaints about Miss Ali. He has not dealt with the issues objectively or thoroughly and has not dealt with the complaint about his father as a stand-alone issue. He seems to us to have been trying to put all the blame on the second claimant for the deterioriating situation in relations between employee and employer. He was not dealing with her complaint about his father's comments as a discrete issue which suggests a certain lack of seriousness. He was concentrating on his own fears and not her complaints.

141. The next matter upon which we are asked to make specific findings are the alleged comments set out in issue 11.(g) said to have been said by AHon 24 July 2018. The allegation that he said that Miss Ali should not take steps to do anything which was "*not damage the business*" is supported by the 16 July 2018 email (DBp.84) and Miss Ali's account to that effect is at (WB p.23 para 19). We find that words to this effect were said.

142. We've considered the exchange at page 89: an email from Miss Ali dated 17 July and the reply from AHdated 21 July 2018. It seems to us that by this response, AHwent on the attack saying that if she declines the meeting he

would regard it as a breakdown of communication and she would be likely to lose her job. He did not respond to her complaint about religious discrimination but threatened her with disciplinary matters over matters, all of which we consider to have been unfair allegations because they were either unreasonable complaints (the taking of unapproved leave which was initially approved and sick leave which she did not need to provide a GP's note for) or turning her complaints about underpayment of holiday pay and what she regards as discriminatory comments into matters of concern for him.

143. In our view, his response exacerbated the problem. He threatened disciplinary action. He told her that he was concerned about her comments over extremism in response to her objection to being subjected to comments which (on her account to him) equated all Wahabis to terrorists. In Miss Ali's statement (WBp.23 para.19) she alleges that he said at the meeting on 24 July 2018 that she should do what the management directs and not take things personally. We find that that probably was said. Such a statement is consistent with the correspondence at DBp.90 sent by email on 21 July 2018 before the meeting saying that she needs to work as part of the team and "*That means you must work under the direction management. This sudden aggression towards the business and managers must cease*." Although AH says that the meeting will be constructive if Miss Ali wants to "*come with an open mind*" it seems to us that he himself had anything but an open mind. He was not open to the prospect that her complaints might be justified.

144. Two days after the meeting on 24 July 2018 there was a shift when, according to Miss Ali, she was given the white shirt to denote she was a supervisor and told by TH that he would speak to AH for a £0.50 per hour pay rise. On 30 July 2018 (DBp.217) it was announced that Miss Ali and another colleague were promoted to Trainee Supervisors.

145. Miss Ali's resignation letter is at DB p.160. It is dated 14 August 2018. In it she mentions 4 things:

    a. Payment of incorrect wages on Monday 13 August 2018;
    b. Not treated equally in the work environment compared with her fellow (female) trainee supervisor;
    c. Victim of bullying and harassment.
    d. She says that she would like her outstanding holiday pay correctly calculated.
    e. She also refers to a "toxic environment where I have been targeted for many months".

146. We find that Miss Ali resigned in response to the error in her wages in the payslip dated 13 August 2018 but that all of the reasons listed in DBp.160 were effective causes of her resignation. We note that para.23 of her witness statement says that she "*could no longer tolerate working in a toxic environment*".

147. As to the first of these, there is a message on DB page 91 dated Monday 13 August 2018 in which Miss Ali queries why her wages appear to have gone up and back down again. The relevant payslip is at DB page 141. It appears to show that in the tax period 19 she was paid 33.55 hours at £7.38 per hour and 22.50 hours at £7.83 per hour. AH seems to have accepted that there was an error (DB page 78 dated after the resignation on 14.08.2018) where he apologises "*that there was a mistake*". She didn't receive assurances about it. TH response is page 93 where he said that her wages would be set to £7.83 from the next payment.

148. The respondents' argument in relation to the contract is that from the meeting on 24 July 2018 the evidence suggests that there were no further questions about its terms and therefore, it is argued, Miss Ali worked under its terms and bound by them thereafter. She had no further protest after 24 July 2018, not even against the clause authorising claw back in relation to holiday pay, which she had previously said she was unhappy about.

149. Our conclusion on this is that after the meeting on 24 July 2018 the second claimant by her conduct accepted the terms of the written contract which were given to her on 11 July 2018. There was no further protest after 24 July 2018. Miss Ali received pay for the tax periods 17 & 19 (DBp.141). She continued to attend work and accepted the announcement that she was to be a trainee supervisor. On balance our view is that she was working under the new contract from 24 July 2018 onwards.

Conclusions on the Issues

150. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

151. Issues 1, 2 and 4. The conversations between Mrs Khan and ZS on 5 June 2018 (issue 1) and between Mrs Khan and TH on 7 June 2018 (issue 2) did not, we find, involve any disclosures by Mrs Khan of information with sufficient specific detail to amount to a disclosure of information – let alone one which, in her reasonable belief tended to show breach of s.43B(1)(a) & (b) ERA which is the wrongdoing alleged (TCB p.21 & 22 para.29). Mrs Khan's evidence did not explain what, according to her, she told the management – our impression is that she was asking questions rather than disclosing information. To the extent that she was asking questions about why individuals received cash-in-hand, that, of itself, fell far short of involving an exchange of factual information which disclosed wrongdoing. There is nothing inherent in the payment of cash for goods or services which implies wrongdoing. We heard quite a lot of evidence directed to whether or not there was a failure of proper accounting process in the first respondent's business but that was inconclusive and not directed to the central question of what Mrs Khan said on 5 and 7 June. She did not make protected disclosures on those dates.

152. In relation to issues 3 and 4 and the pre-action letter dated 26 June 2018, it is alleged that this letter is protected because the solicitors, on Mrs Khan's behalf set out facts which tended to show that she had been dismissed in breach of s.103A of the ERA and that there had been a breach of the sex equality clause. Whether or not there is sufficient factual content in the letter to tend to show that, in our view this letter was clearly an outline of her case as the solicitors understood it be at the time. Our conclusion is that this is not a protected disclosure because it was not reasonably believed to be made in the public interest and solely concerns the personal interest of Mrs Khan.

153. In relation to issue 5, our finding is that Mrs Khan did not speak to TH on 7 June 2018 about her sister's allegation of sexual harassment by ZS. There was no protected act on this date nor was there a protected disclosure.

154. However, the letter from her solicitors dated 26 June 2018 (at DBp.179U) included a complaint that she did not receive equal pay as a supervisor when promoted to that role when ZS was promoted to assistant manager (see paragraphs 116 above). This is not a claim which has been pursued and our findings are that ZS was not promoted on that date and nor was Mrs Khan, formally. However, we can accept that the formal title "assistant manager" was not used of ZS until that meeting (paragraph 52 above) and that Mrs Khan came out of the meeting believing that she was a supervisor (paragraph 51). The letter from Mrs Khan's solicitors is, we conclude, a protected act within s.27(2) EQA because it includes an allegation that there was a breach of the sex equality clause implied into her contract by s.66 EQA: s.27(5) EQA makes clear that such an allegation falls within s.27(2)(d).

155. As to issues 6, 7 and 8, our findings are that the treatment of Mrs Khan was certainly unfair as that word would be generally understood but she did not have the statutory right not to be unfairly dismissed under s.95 ERA. She had not make a protected disclosure and therefore her dismissal cannot either be an unlawful detriment for which the individual named respondents are liable under s.47B of the ERA nor an automatically unfair dismissal for which the first respondent is liable under s.103A of the ERA. Her claims for detriment and dismissal on grounds of protected disclosure are dismissed.

156. As to issue 9(b), as with issues 6, 7 and 8, our conclusion is that the first claimant did not make any protected disclosures and therefore this allegation is dismissed.

157. As to issue 9(a), it is alleged that the respondents' letter at DBp. 180 was an act of post-employment victimisation because the first claimant had done a protected act. It is put in the List of Issues in this way, not that it was victimisation because the first respondent, through the second respondence, believed that Mrs Khan would do a protected act.

158. We are of the view that, as a response to Mrs Khan's solicitors' letter before action the letter dated 2 July 2018 (DBp.180) was sufficiently closely connected with the employment relationship to potentially fall within s.108

EQA. Having heard AH on this point and reading this letter, our conclusion is that he wrote in those terms because of the allegations raised in the solicitors' letter in order to try to forestall an Employment Tribunal claim. It seems to us that AH threatened Mrs Khan with potential exposure of her husband because of what solicitors instructed on her behalf had alleged in order to try to stop any proceedings going ahead.

159. Although the reference to that particular threat to involve her husband in any Tribunal proceedings is in the paragraph concerned with alleged whistleblowing, it seems to us that the reason for Mr Hussein's response cannot reasonably be sub-divided into the different allegations raised by Mrs Khan. We are satisfied that part of the reason for the threat to make public allegations against Mrs Khan's husband was that she had complained of a failure to pay her equal pay. We conclude that the first and second respondents victimised the first claimant by threatening to introduce into evidence in tribunal proceedings material which it was threatened would lead to a fine and/or criminal proceedings for tax avoidance being brought against the first claimant's husband. No such argument has been put before us, there is no evidence of any wrongdoing by Mrs Khan's husband at all and there was nothing requiring AH to raising the matter in outlining his response to the allegations; it was not a necessary part of his defence. Indeed, reading the letter at DBp.180, the threat appears to be based upon supposition.

160. We cover issues related to holiday pay separately below in connection with both claimants.

161. In relation to issues 11(a) to (g), we have found that those acts happened as alleged.

162. Issues 12(a) to (c) are statements of facts which are not disputed.

163. We consider Issue 13(b) before Issue 13(a) because s.212(1) of the EQA provides that "detriment" – such as within s.39(2)(d) of the EQA – does not include conduct which amounts to harassment and therefore, if we find that a particular act was unlawful harassment we do not need additionally to go on to consider whether it was direct discrimination.

164. As we say in paragraph 48 above, for ZS to text "*luv ya*" to a conservative Muslim woman who was junior to him as the assistant manager was unusually familiar. We have rejected his explanation for sending the text, but it is merely argued on behalf of Miss Ali to be an "overture of increasing intimacy". It seems to us to have been an isolated incident which could not reasonably be regarded as conduct of a sexual nature; it is a phrase sometimes used between friends, unusually familiar in these circumstances, but not sexual. We take full account of Miss Ali's account of being made to feel uncomfortable but, in our view, this text could not be said to have had the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her as that test has been explained in the relevant authorities. The second claimant's perception was merely that it made her confused and uncomfortable and, in

all the circumstances, we do not think that this text had the purpose or effect of unlawful harassment. For both those reasons, the claim of harassment related to sex and of sexual harassment under s.26(2) EQA based upon this act is dismissed.

165. We therefore go on to consider Issue 13(a)(iii) in relation to Issue 11(a). Was the sending of that text direct sex discrimination? We need to consider whether the claimant has proved facts from which it could be inferred, in the absence of any explanation that this was a detrimental act and amounted to less favourable treatment than a male hypothetical comparator would have received and was done on grounds of Miss Ali's sex. Our conclusion is that this does not amount to a detriment in relation to the Miss Ali's employment because there is nothing particularly offensive about it. An unusually familiar comment in the circumstances, it nonetheless does not seem to us to be sufficiently serious for it to be said that the reasonable employee would consider themselves to have been disadvantaged by it. It was not part of continuing course of conduct. There was a substantial passage time between that text and the other incidents of which the second claimant complains. Furthermore, despite there being effectively no explanation of the text form the respondent, we do not think that the claimant has satisfied the burden of proof of showing facts from which less favourable treatment or unlawful grounds in relation to this issue.

166. Issues 11.b and c are also alleged to have been sex related harassment contrary to s.26(1) and unlawful conduct of a sexual nature contrary to s.26(2). Our findings accept Miss Ali's description of the incident on 7 May as being that he "*started touching me from behind in a way I didn't feel comfortable*". In her mind there was something uncomfortable about it in a sexual way – he was invading her privacy. Given what happened in the later incident, and the fact that this was in person rather than by text, we consider her feelings of uncomfortableness do satisfy the test of harassment and there was something sexual about the conduct. We comment that the 7 May incident was a less serious incident than some seen by the Tribunal and less serious than the 6 June incident. It could reasonably be described as within the "humiliating or intimidating" part of the definition, taking into account Miss Ali's reasonable perception of what happened. We do not think that the conduct was intentional harassment.

167. As to the 6 June incident, this we find to have been contrary to s.26(2) EQA. The context of the earlier discussion about relationships, the later comment about performing a strip show clearly give a sexual overtone to the conduct of holding her hands and not letting go. We find this incident to have had the harassing effect but not to have been done with the intent of harassing Miss Ali. The effect upon Miss Ali was attested to by Ms Mettoli, who was sufficiently concerned to walk home with her. She was sufficiently discomfited by what had happened to raise it with her GP. This incident we also consider could reasonably be regarded as violating Miss Ali's dignity.

168. We have concluded that both incidents (7 May and 6 June 2018) amounted to sex related harassment contrary to s.26(1). It is clear that the conduct

was related to sex by very similar reasoning to that which leads to the conclusion that it was sexual conduct.

169. The definition of detriment within s.212(1) EQA means that this conduct cannot additionally amount to unlawful discrimination contrary to s.39(1)(d) EQA. Therefore, there is no need for us to consider whether the incidents of 7 May and 6 June 2018 were additionally direct discrimination since the two concepts are mutually exclusive. The claims of direct sex discrimination are therefore dismissed.

170. Turning to issue 14. There is no evidence that Mr Hussein senior was an employee of the first respondent.

171. We apply the common law definition of agent when considering whether or not he was an agent within the meaning of s.110(1) of the EQA. The first respondent is responsible Mr Hussein snr's actions if he is in the restaurant for the purposes of his delegated authority and carries out the tasks which he is delegated to do in a discriminatory way.

172. We find that Mr Hussein snr. did have delegated authority from his son, the director of the first respondent, because he was specifically asked to do the banking. He took on other responsibilities that AH concurred in his father adopting. The son was happy that his father was occupied in that way. It is therefore more likely than not, and we find it to be the case, that he was present in the restaurant on 11 July 2018 for the purposes of carrying out the task which he had been delegated to do by the director of first respondent.

173. Our detailed findings about what was said on 11 July 2018 are set out in paragraphs 118 and 119 and we have regard to but do not repeat them. The essence is that Mr Hussein snr made a "*dig abut Wahabism and (wahabi) extremism*" and specifically commented that the Prime Minister of Pakistan had been brainwashed by Wahabism. The statement made by Mr Hussein snr does suggest that all Wahabis are the same, that Wahabism is necessarily linked to extremism and that those beliefs "*are the cause for the terrorism that is happening in the world*". It is difficult in the absence of Mr Hussein snr's evidence to make a judgment about whether it was a careless, thoughtless remark or whether there was any intention behind it. However it is clear to us that the comment had the effect of harassment as defined in the section, to judge by Miss Ali's immediate reaction.

174. The offensive element is about religion not about race. The fact that the comments arose out of a discussion about the news or politics in Pakistan and concerned the Pakistani prime minister provides the context to the comments. However, Mr Hussein snr. went on to say that "*Saudi Arabia is the cause of extremism and terrorism and are responsible for the terror attacks that are going on in the world*". Given the link made between Saudi Arabia and Wahabism by Mr Hussein, that comment was related to religion – not merely to the actions of a nation state. Nor, given what we have found was said, can it fairly be said that the comment was limited to a condemnation of those who espouse terrorism; it seems to us that by what

he said, Mr Hussein snr. was equating Wahabis to extremism to terrorism without distinction and without qualification. Wahabism is accepted by the respondents to be a sect of Islam; AH described it as a Saudi Arabian version of Salafi Islam. Miss Ali described it as the same branch of Sunni Islam. We have heard no expert evidence about this – both parties agreeing that it was unnecessary - but, for present purposes, on the basis of both accounts, conduct which relates to Wahabism also relates to religion.

175. On the basis of our findings of fact, the comments were bound to be offensive. The way the first claimant's case was put by her representative was that it was a case of a hostile environment rather than that of violating her dignity case. We have considered what Miss Ali said about how the comment made her feel. There is no really serious challenge to the evidence that Miss Ali felt uncomfortable and found the comment deeply offensive. We remind ourselves that the perception of the claimant is not determinative of whether conduct can reasonably be regarded as harassment. This seems to us to potentially be relevant to a conversation which arose out of criticism of a politician and where the alleged or presumed actions of a nation state are being criticized. We are satisfied that by what he said, Mr Hussein snr was equating Wahabis to extremists to terrorists and, in our view, it is reasonable for comments which appear to make that link to have the harassing effect.

176. It is no defence to a harassment claim that that either father or son did not know that Miss Ali was a Wahabi. It would be relevant to whether she had suffered direct discrimination on grounds of religion. In any event, there evidence that both father and son knew that Miss Ali is a Sunni Muslim who follows Saudi Arabia's teachings about Islam Given our findings above about the way in which the comment which was made was linked to Miss Ali's religion, we do not need to make a conclusion between the contrasting positions taken by the second claimant and the respondents about exactly where Wahabism fits within the branches of Islam. We find that issue 11(d) is made out as an allegation of harassment related to religion contrary to s.26(1) EQA but not as an allegation of harassment related to race.

177. As to issues 11. (e), we do not think that there was more that TH could reasonably have done about the complaint. It was not, therefore, reasonable for any lack of direct action to have the harassing effect and the claims of harassment fail in relation to that act. Similarly, there are no grounds from which we could conclude that TH would have dealt differently with a complaint by someone who was not a Sunni Muslim and the complaint of direct discrimination based upon issue 11(e) fails.

178. As to Issues 11 (f) and (g). We consider those allegations to be made out as a matter of fact. AH's response to Miss Ali's complaints was to accuse her of extremism and attempting to damage the business rather than to engage with the legitimacy of those complaints.

179. Issues 13(a) and (b): by those actions (i.e. Issues 11 (f) and (g)), did AH subject Miss Ali to harassment related to religion? For the same reasons as we set out before, we do not think that these relate to race: the offensive

element in the original comments by Mr Hussein snr. related to religion and not to race.

180. The List of Issues cross-refers internally in a way which can be difficult to follow. In cross referring at issue 13 to both issue 11 and 12 it is alleged not only that the second respondent subjected the second claimant to harassment and discrimination by

    a. Failing to take any proper steps to deal with the complaint of religious harassment made at the meeting on 24 July 2018 (issue. 11.(f));

    b. Saying words to the effect that the C2 should not take it personally, and should do as management directs at that meeting on 24 July 2018 (issue 11(g));

    but also by

    c. Sending a letter dated 12 July 2018 (which may be an error and meant to be a reference to the letter of 2 July 2018 – issue 12(a); (DBp.72);

    d. Sending a What's App message stating that C2 appeared to be against people who speak out against terrorism or extremism – Issue 12(b); (DBp.78).

    e. Failure to permit C2 to be accompanied to the meeting of 24 July – Issue 12(c).

181. We are not asked to consider whether Mr Hussein's text message of 15.7 or emails of 16 July are religious harassment.

182. We take those events chronologically.

183. As to the letter referred to in issue 12(a), the only potentially relevant letter is that of 2 July 2018 (page DB72). It was written before the incident with Mr Hussein snr on 11 July (although received by Miss Ali on 12 July 2018) has no connection whatever with religion.

184. We have to ensure that we consider, in relation to each of the other 4 matters, whether the satisfy the statutory test for harassment (unwanted conduct which has the harassing effect) and whether they were related to religion.

185. We are of the view that the 12 July 2018 What's App Timed 17:14 DBp.78 is religious harassment contrary to s.26(1). By it AH warns Miss Ali to be "*careful about making comments above. It seems that you are against people that speak out against terrorism and religious extremism. If you are asking someone to stop speaking out against such matters that is something that I would need to report to the police*." This is before there

has been any attempt to investigate her complaint or to understand her position about why the comment was offensive in relation to her religion.

186. We accept that Miss Ali was extremely upset by this What'sApp message. When AH wrote by email to her on 16 July 2018 (DBp.211) complaining that she has been ignoring his What'sApp messages her reply includes that "*The messages you sent to me via WhatsApp made me feel unsafe therefore I didn't want to respond to you. Prioritising my safety and well-being I chose not to respond to your message. As it caused me distress and emotional stress. You took the message I sent to Tony out of context. … you was confident with making assumptions of your own and being rather rude and threatening towards me*." There is no doubt in our minds that the What'sApp message of 12 July 2021 created an intimidating, hostile, degrading, humiliating or offensive environment for Miss Ali, in light of that email.

187. We do take into account, as part of the relevant circumstances, Mr Hussein's concern about the misuse of religious beliefs as justification for violence. Put that way, his concern is not at all unreasonable. However, what Miss Ali was complaining about was that Mr Hussein snr. seemed to her to equate her religion with extremism. AH's response suggests to us that he was making the same judgment.

188. Moving onto the meeting of the 24 July 2018, the starting point is that the Tribunal has accepted that the remarks by Mr Hussein snr. was harassment related to religion. Miss Ali's response to those remarks is to complain about "racial abuse towards my religion". In response to her complaint, she gets hostility when she wanted her complaint to be dealt with. That is itself unwanted conduct. Then, in the meeting of 24 July 2018 there is no further investigation of the complaint and, it is clear that Miss Ali was very anxious about the meeting: see DBp.209 where she complains of feeling as though she is a victim of bullying when AH should be "*dealing and discussing the main issues I contacted Tony about*". We do not consider that the refusal to allow her to be accompanied could reasonably be regarded as a separate act of religious harassment although it probably contributed to her feelings of insecurity.

189. We consider that the responses (and lack of response to the complaint) by AH are related to religion for 2 reasons. The hostile response and the lack of proper steps taken to deal with the complaints in the meeting of 24 July 2021 is related to religion in way which is parasitic on the comment by Mr Hussein snr.

190. We consider this to be the case, even where Mr Arif Hussein's response to the complaints of abuse towards Miss Ali's religion had non-religious content. Given that he is responding to her complaints of religious harassment, on the facts of the present case it is not necessary for Miss Ali to establish that every act relied upon must itself have religious content.

191. Secondly, the very content of the initial text response is a statement that a complaint about Wahabism is tantamount to a defence of terrorism. That

was the effect of his message to her. This is plainly something related to the religious beliefs of the second claimant, who is Wahabi. The invitation to the meeting which took place on 24 July 2018 (DBp.86) included the statement that Miss Ali's "*concerning comments … over extremism*" were to be discussed. At the meeting itself, it does not appear that the matter was discussed beyond AH advising Miss Ali not to take it personally. It is clear that she was known by the second respondent to be Wahabi by that time; he is said to have said "*you don't look Wahabi*" and, given that that was his view, we accept that that was probably said in the meeting on 24 July 2019.

192. Essentially, AH responded to a complaint of harassment related to religion by advising his employee not to take it personally and that she did not appear to belong to the religious group about which the offensive comment had been made. We accept that this exacerbated the offensive environment in which Miss Ali had to work and was intimidating for her and that was reasonable in all the circumstances.

193. We accept that there is a less direct connection between Mr Arif Hussein's actions at the 24 July 2018 and Wahabism than between his father's remarks and Wahabism. However, our conclusion is that the failure in the meeting on 24 July 2018 to take any proper steps to deal with the complaint (issue 11(f)) and the comments that she should not take the abuse personally (issue 11(g)) were none-the-less related to religion for reasons set out, in particular, in paragraphs 189 to 191 above. The matters set out in issue 11(g) occurred at the meeting on 24 July 2018 and are also made out but do not add to the seriousness of the incident – issues 11(f) and (g) are part and parcel of the one incident, in our view.

194. Where the allegations of harassment related to religion are made out, we do not need to go on to consider whether the acts were, alternatively, direct discrimination related to religion.

195. There are three allegations which were not found to be harassment related to religion: issues 11(e), 12(a) and (c). We dismiss the complaints of direct discrimination on grounds of religion in relation to these matters. As to Issue 11(e), there is no basis for concluding that TH would have responded any differently to a complaint made about Mr Mohammed Hussein by someone who did not share Miss Ali's religion. We do not think that a case of less favourable treatment is made out in relation to issue 11(e). As to Issue 12(a), the letter at DBp.72 (dated 2 July 2018 but received on 12 July 2018) is a wholly unreasonable response to the complaints by Miss Ali about underpayment of holiday pay but there are no grounds for thinking that AH would have dealt differently with someone in materially the same situation who did not share Miss Ali's religion. As to issue 12(c), we have considered the email exchanges at DBpp.208 – 212 and particularly note the comment by AH that it is to be an internal meeting. Although we can understand why Miss Ali wanted to have a witness, it seems to us that the dominant reason for AH refusing was that it was to be an internal meeting and there are no grounds for considering that he would have treated anyone

else in materially the same situation any differently. The claim of direct religious discrimination is dismissed.

196. Miss Ali presented her claims only against her employer, AY Trading Limited and ZS. The proceedings were dismissed against him on 1 April 2020 and therefore, the remaining matter to consider under Issue 15 is 15(a), whether the first respondent is liable by operation of s.109 of the 2010 Act. We find that Mr Mohammed Hussein was an agent of the first respondent within the meaning of s.109 of the EQA and AH is a director of the first respondent. It has not be contended that he is neither an employee nor an agent of the first respondent. The company is therefore liable for the acts of Messrs Hussein snr. and jnr. under s.109 EQA. The finding of unlawful harassment is made only against the first respondent since the second respondent to the consolidated claim was not a respondent to the second claimant's claim. The question of joint and several liability of R1 and R2 for the latter's unlawful acts towards the second claimant was not specified to be an issue in the List of Issues (paragraph 15 at TCBp.146A).

197. We go on to consider whether the first respondent repudiated the second claimant's contract of employment. The matters relied upon by the second claimant as cumulatively amounting to a breach of the implied term of mutual trust and confidence are (see paragraph 51(h)) of Mr Howells' closing note on behalf of the claimants):

    a. The sexual harassment by ZS;

    b. The absence of any response to complaints of them by the first respondent;

    c. The comments made by Mr Hussein snr;

    d. AH own actions in response to Miss Ali's complaints about his father's comments;

    e. The response to the complaints about underpaid holiday pay; and

    f. The insinuation that Miss Ali had falsely reported an injury.

198. As to the alleged absence of a response to complaints about sexual harassment, we have found that it was not reported to management so there was no failure in relation to that. It seems to us that the remaining matters (with the exception of the insinuation of falsely reporting an injury) do amount to a repudiatory breach of the implied term of mutual trust and confidence. They all pre-date the meeting on 24 July 2018, following which Miss Ali continued to work and was promoted. She resigned in response to the error in her wages in the payslip dated 13 August 2018 citing a number of reasons in DBp.160. Those include alleging that she has been the victim of harassment and bullying, not being given the same supervisor authorisation and access as the colleague appointed trainee supervisor at

the same time as herself and the failure to pay correct wages. She also refers to a "toxic environment where I have been targeted for many months".

199. We accept that the references to "harassment and bullying" and the "toxic environment" are references to the conduct of ZS, Mr Mohammed Hussein and AH which we have found to be sexual harassment/harassment related to sex and harassment related to religion respectively. We conclude that those were part of the reason why Miss Ali resigned.

200. Failing to pay correct wages is capable of being a repudiatory breach in itself. We are certainly satisfied that it could contribute something to a repudiatory breach of contract. Although the respondent has not positively argued that there was affirmation, we have weighed that as a consideration. To the extent that that is a concern it seems to us that the error regarding her wages of August 2018 (particularly given the difficulties she had had in relation to the holiday pay) would revived the repudiatory breach and entitle her to rely upon the earlier acts.

201. Our finding is that she was, at the time of her constructive dismissal working under the terms of the written contract. Therefore her express terms as to the holiday year were that it commenced on 1 January. The same term applied to the first and second claimants.

202. It is argued on behalf of both claimants that accrued leave should have carried over at the end of the year when it was not taken such that on termination of employment they were entitled to be paid not just the balance of the annual leave accrued but not taken in the current year but anything carried over from previous years. It was not suggested that they had either been prevented from taking leave in the previous leave year by, for example, long term sickness or maternity leave.

203. Essentially what is being argued by the claimants is that it is unclear what holiday they had taken or been paid for prior to the final leave year – which we have found started on 1 January 2018. Discussions were taking place between the parties during the hearing in order to seek to reach agreement on the applicable figures, subject to our decision on whether Miss Ali was bound by the written contract and whether holiday entitlement could carry over or not. So far as we have been told, there was no conclusion to those discussions and so we were invited to decide the points of principle only.

204. Mr Howells' argument on behalf of the claimants was that, as employees working casual or variable hours employee there was necessarily a difficulty in identifying whether in respect of any particular period in which they were not working that was annual leave (under reg.13 or 13A WTR 1998) or a period during which not rostered or between shifts. There was an uncertainty whether a request for fewer shifts in a particular week should be regarded as request for holiday. He argued that the practice approved by ACAS was to compute the amount of holiday pay the employee should get during leave by applying a formula. This was what the CAB had done when setting out the holiday pay claim for Miss Ali at DBp.63.

205. Further, he argued, at the end of the holiday year the employee has worked certain number of hours and accrued a certain amount of leave which they were entitled to take. They may have been paid some holiday pay in weeks when they did not work, or when they were not rostered. The employer had a responsibility to ensure that the employee took the holiday. For that reason, he argued, that if there is a difference between the leave accrued and the paid leave taken, the employee will have a money claim which is actionable at the end of that year and could go to the County Court and sue for the balance as an action in contract. He argued that the fact that Reg.13(9) WTR 1998 says that the worker is not allowed to carry over leave does not mean that the cause of action which employee had for the arrears of payment is extinguished by the finishing of the previous holiday year.

206. Miss Ali's contract (which was, we find, applicable at the date of termination of employment) is at DBp.122. Mrs Khan's at DBp.161. Prior to the introduction of the contract, Miss Ali was bound by the terms of WTR 1998 as it was prior to the amendments relating to the coronavirus pandemic.

207. It is important, when considering the WTR 1998 provisions concerning annual leave and additional annual leave, to remember that there are two rights: the right to leave and the right to be paid for leave.

208. There was no detailed evidence before us about the amount of leave taken by either claimant during their employment, apart from the evidence about leave taken by Miss Ali during 2018. Some payment of holiday pay is evidenced in the payslips. It is not apparently said by either claimant – with the exception of Miss Ali's complaint about the weeks commencing 14 May 2018 and 21 May 2018 (DB p.63) – that they took paid leave in a particular week and were not paid for it.

209. In our view, the circumstances in which an employee is entitled to compensation related to entitlement to leave accrued but not taken are limited to those reg.14 WTR 1998. This only applies where on termination of employment there is holiday which has been accrued but not taken.

210. Regulation 13 WTR 1998 states that annual leave may only be taken in the leave year in respect of which it is due (reg.13(9)(a)) and may not be replaced by a payment in lieu except where the worker's employment is terminated (reg.13(9)(b)). The reg.13A provisions for additional annual leave are slightly different in that additional annual leave may be carried over where a relevant agreement provides for it (reg.13A(7)). However, it may not be replaced by a payment in lieu except where the employment is terminated or other circumstances arise which are not relevant to the present case (reg.13A(6)).

211. During the first year, a worker is limited in the amount of leave which may be taken to that which has already accrued under the contract (reg.15A(1)). That limit does not apply under the regulations in the subsequent years and reg.16 sets out the way in which pay for a weeks' leave should be calculated. It appears that this was what the CAB sought to do in the calculation included by Miss Ali in her letter although, according to

reg.16(3)(e) WTR 1998, they should have used the previous 52 weeks wages and not the previous 12 weeks for the calculation.

212. Under reg.30 WTR 1998, the worker can present a complaint to the Tribunal about being unable to exercise his right to annual leave or additional leave; about not being paid for a period of leave and about not being paid in full for leave accrued but not taken at the end of employment. In the absence of a claim that there has been a failure to pay what is due under reg.16(1) WTR 1998, it seems to us that, at the end of the leave year there is no entitlement either under regulations or under the contract to an immediate cash payment and therefore no breach of contract or unauthorised deduction from wages for failing to pay such.

213. The calculation of holiday pay to which the claimants entitled to on termination is that set out in reg.14 of the WTR 1998. The final holiday year started on 1 January 2018.

214. As to the £250 deduction, we find that there was a contractual right to make deductions from the final pay including for error or overpayment and holiday or time off in lieu taken but not yet accrued. It is also said to include "*the costs of damages or losses attributable to your negligence of dishonesty*…" (DBp.123). That would not, of itself, mean that any deduction made in purported exercise of that right were authorised. In relation to the £250 deducted from Miss Ali's final pay packet AH has provided no evidence that there was any additional expense incurred by the business. He said engaging temporary staff for the period of the second claimant's notice would cost £500 – there is no evidence to support that figure. Then he said it was £350. Essentially it seems to us that the figure of £250 was plucked out of the air and is unrelated to any actual expense of the respondent. The £250 was an unauthorised deduction from her wages. We recognise that when calculating the holiday pay, if any, which remains due the sum deducted should not be double counted.

215. When delivering oral judgment it was accepted that, if the second claimant was successful in any of her claims, some award would be made for the breach of the section 1 ERA obligation to provide a statement of terms and conditions within a month of commencement of employment. Mrs Chute argued that the award should only be 2 weeks because the statement was issued when they realised. We weighed in the balance that the respondent didn't issue a notice of changes when there was the alleged payrise to Mrs Khan, as they should have done under s.4 ERA. Although we hoped that processes had improved since the period in question we considered that the failure to issue a contract to the second claimant at the start of her employment to be Reflective of their attitude towards employment obligations generally and exercised our discretion to award 4 weeks.

216. However, in preparing the written reasons we have been reminded of the wording of s.38(3)(b) of the Employment Act 2002 which provides that there are two preconditions to the tribunal increasing any award of compensation by reason of a failure to provide a statement of employment particulars.

The first is that the claimant should have been successful in a claim under one of the jurisdictions listed in Schedule 5 to the EA 2002. The second is that the employer should be in breach of the duty to provide a statement of employment particulars at the time the proceedings were begun. In the case of Miss Ali, the statement of particulars was provided to her by way of draft contract on 11 July 2018 before her first proceedings were commenced. It therefore seems to us that the power to increase the award does not arise and we propose to reconsider that part of our judgment.

I confirm that these are our Judgment and Written Reasons in the case of Case No: 3332155/2018, 3334703/2018, 3334337/2018, and 3334999/2018 Khan & anr. v AY Trading Ltd and ors and that I have signed the Judgment(s)/Orders by electronic signature.

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Employment Judge George

Date: …28 May 2021 ……..

Sent to the parties on: .....

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For the Tribunal Office