**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101376/2020**

**Final Hearing Held by Cloud Video Platform on 7 June 2021, with deliberation day on 8 June 2021**

**Employment Judge A Kemp**
**Tribunal Member D Calderwood**
**Tribunal Member R Dearle**

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| **Ms H Cassidy** | **Claimant**<br>**Represented by:**<br>**Mrs D Cassidy**<br>**Mother** |
| **The Daimler Foundation Ltd** | **Respondent**<br>**Represented by:**<br>**Ms P Crossan**<br>**Accounts Administrator** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The unanimous decision of the Tribunal is that:**

**(i) The claim of direct discrimination on the protected characteristic of the age of the claimant by the first respondent under section 13 of the Equality Act 2010 succeeds**

**(ii) The claim of harassment under section 26 of the Equality Act does not succeed and is dismissed**

**(iii) The Tribunal awards the claimant the sum of TWO THOUSAND EIGHT HUNDRED POUNDS (£2,800.00) payable by the respondent as compensation.**

## REASONS

### Introduction

1. This was a Final Hearing on the claims made by the claimant. She was represented by her mother. The respondent was represented by Ms Crossan, who is employed by it as its Accounts Administrator.

2. There had been two Preliminary Hearings on 30 July 2020 and 14 October 2020, and case management orders were made on 14 December 2020. The hearing took place by cloud video platform remotely in accordance with the orders made.

3. The hearing was conducted successfully, with the parties, representatives and witnesses attending and being able to be seen and heard, as well as being able themselves to see and hear. The Tribunal was satisfied that the arrangements for the Final Hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence it heard.

### Issues

4. The Tribunal identified the following issues for determination, and raised them with the parties at the commencement of the hearing. They confirmed their agreement. The list of issues is:

   (i) Did the first respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 ("the Act") in her dismissal because of her age?

   (ii) If so, has the respondent shown that that was a proportionate means of achieving a legitimate aim?

   (iii) Did the first respondent harass the claimant under section 26 of the Act because of the claimant's age or sex?

   (iv) If either claim is successful, to what remedy is the claimant entitled? The claimant only claimed injury to feelings.

**Evidence**

5. Evidence was given by the claimant first, followed by her witness Ms Chelsey Alexander. Written witness statements had been tendered for them. Mr Malcolm Easy was the sole witness to give oral evidence for the respondent. He had provided an email to the respondent which was tendered in place of his witness statement. The respondent had also tendered written witness statements from a number of other witnesses, none of whom were called to give evidence. It was explained that they had intended to call Mr Stuart McEwen but he was in hospital.

6. At the commencement of the hearing the Judge explained that although a party was entitled to tender written witness evidence it could not be subject to questions from the Tribunal or the other party, and what weight if any to give to that evidence was a matter that the Tribunal would decide.

7. The Judge also explained to the representatives how the hearing would be conducted, about asking non-leading questions in examination in chief, about cross examination covering evidence disputed or which the witness could comment on which had not been covered in his or her own evidence, and about re-examination being limited to issues raised in cross examination or by the Tribunal's own questions. He explained about making submissions.

8. Mr Easy had left the employment of the respondent and was resident in France. Initially the respondent had not been able to contact him to give his evidence when that stage was reached, but after two adjournments to allow them to try again they were successful, and he gave his evidence remotely.

9. The parties had not prepared a Bundle of Documents, and in the course of evidence reference was made to two timesheets for the claimant.

10. The evidence was concluded towards the end of the first day, and the second day was utilised for the Tribunal's deliberation. The decision it reached was unanimous.

**Facts**

11. The Tribunal found the following facts, material to the case before it, to have been established:

12. The claimant is Miss Hazel Cassidy. She is a schoolgirl whose date of birth is 10 November 2005.

13. The respondent is The Daimler Foundation Limited. It is a charity. It operates an Equestrian Centre at which it has a café and restaurant.

14. The claimant was employed by the respondent as a waitress on a part-time basis on 9 December 2019. She worked for four hours that day, between 10am and 2pm.

15. She had been interviewed for the role when she was 14 years of age in late November 2019. She had provided her age when applying for the role electronically. The interview was held by the respondent's chef. After it she was informed that she had been successful, and asked to complete a starters form with details including her date of birth, National Insurance Number, and bank details. She was told that the first shift would be a form of trial.

16. The claimant's first day of work was 7 December 2019. She was shown what to do by Mr Malcolm Easy the respondent's front of house manager. He had been employed by them from October 2019. He showed her how to use the till, which required a code to access it. The claimant waited on tables, cleaned them, tidied dishes, worked on the till, loaded and unloaded the dishwasher, re-stocked items from the stockroom, and assisted generally. At the end of the shift Mr Easy said something to the effect that he was pleased with her work. She understood that she had passed the trial period, and would work on Saturdays between 10am and 2pm and possibly other shifts when required.

17. Her second day of work was 14 December 2019. It was again from 10am to 2pm. She was warned by Mr Stuart McEwen that if the owner put his arm round her shoulder she should just walk away. That comment made her feel uncomfortable. She did not report it to her family or to the

respondent, but did mention it later to Ms Chelsey Alexander who works in the office where her mother works. The claimant often attended there after school to wait for her mother.

18. The claimant was later taking an order at the till when she was approached by Ms Penelope Dines, the partner of the owner. She was told that she should not be on the till and was given two plates to deliver to a table. She asked for the details of the table and did so. She was not upset at that. Later in the day Mr Easy said that she and another member of staff could leave early, as it was not busy. The Centre is in a remote location without public transport access. She had to wait to be collected. Whilst she did so she cleaned cutlery.

19. On 20 December 2019 the claimant attended the offices where her mother worked, and sat next to Ms Alexander. Whilst they looked at a screen Mr Easy telephoned the claimant. He said he had enjoyed working with her however she could not continue to work there as the accountant said that she was too young for health and safety reasons. He said that she had not done anything wrong but that the accountant said that she could not work there. Ms Alexander heard the material parts of that call.

20. The claimant was shocked by that call, which she had not been expecting. She was upset by it, and distressed. It had been her first employment, and she had been enjoying it.

21. The claimant commenced early conciliation in relation to the respondent on 21 December 2019, the Certificate was dated 7 January 2020 and the Claim Form was presented to the Tribunal on 6 March 2020.

**Submissions for claimant**

22. The following is a very basic summary. Mrs Cassidy argued that the evidence of the claimant and Ms Alexander should be accepted. She argued that the evidence of Mr Easy should be rejected. She suggested that the claims for direct discrimination and harassment had been made out, and sought an award for injury to feelings.

**Submissions for respondent**

23. The following again is a basic summary of the submission. Ms Crossan argued that the evidence from Mr Easy should be accepted, that age had not been a reason for dismissal as he said, and that the claim for harassment was unbelievable. It had not been reported to her mother or a colleague. Mr Easy had let her down about her employment ending as she was no longer needed.

**Law**

24. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

*(i) Statute*

25. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that age and sex are each a protected characteristic.

26. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

27. Section 23 of the Act provides

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of sections 13, 14 and 19 there must be no material difference between the circumstances relating to each case…."

28. Section 26 of the Act provides:

> "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.

(5) The relevant protected characteristics are—

age**……..**

sex”

29. Section 39 of the Act provides:

“**39 Employees and applicants**

An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B

(d) by subjecting B to any other detriment.”

30. Section 136 of the Act provides:

“**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

31. Section 212 of the Act defines “substantial” as “more than minor or trivial.”

32. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive 97/80/EC***

*(ii) Case law*

*(a) Direct discrimination*

33. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

34. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the 'ground' or 'grounds' for the treatment complained of. ……
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative

> discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

35. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

**Less Favourable Treatment**

36. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He or she must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

**Comparator**

37. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded

the claimant on the prescribed ground was less favourable than afforded to another.

38. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

39. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

**Substantial, not the only or main, reason**

40. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: It referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts

had a significant influence on the outcome, discrimination is made out."

41. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

42. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

> "5
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> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
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> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the

> primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

**Harassment**

43. The terms of the statute are reasonably clear but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

44. Paragraph 7.9 of the Equality Code of Practice states that it should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. In ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** it was held that whether or not there is harassment must be considered in the light of all the circumstances. But it is not enough only to point to the relevant characteristic as the background of the events or to pray in aid commonly held views***: UNITE the Union v Nailard [2018] IRLR 730*** and ***Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495***

45. The Equality and Human Rights Commission's Code of Practice states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal

circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended. Elias LJ in ***Land Registry v Grant [201]1 IRLR 748*** focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said

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

46. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson [2017] IRLR 340***) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (***Bakkali v Greater Manchester 2018 IRLR 906***). Relates to is not the same test as "because of".

**Burden of proof**

47. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or harassment, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*****.**

48. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

49. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage.

50. The rationale for the two stage approach was identified by Advocate General Mengozzi in ***Meister v Speech Design Carrier Systems GmbH*****, *[2014] All ER (EC) 231***, as follows:

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim … A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions."

51. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn was confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352***. As the Court of Appeal also confirmed in that case, unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***. Elias LJ summarised the position with regard to the two stages of the analysis as follows:

> "First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged

> discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

52. That case has been appealed to the Supreme Court. Argument has been heard but the Judgment of the court is not yet issued.

53. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

*(iii) Remedy*

54. Compensation is considered under section 124, which refers in turn to section 119, of the Act. The sole head of loss claimed in this case is for injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
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> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
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> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

55. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of

the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

56. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases.

57. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2019, the Vento bands include a lower band of £900 to £8,800, a middle band of £8,800 to £26,300 and a higher band of £26,300 to £44,000.

58. Interest can be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

**Discussion**

59. The present case is an unusual one, in that the claimant was employed for two days only for what was a Saturday job, when a 14 year old schoolgirl. She argued that she was dismissed because of her age in breach of section 13 of the 2010 Act, and was subject to harassment under section 26.

60. It is for the claimant to establish a prima facie case under section 136. If she does not, her claim for direct discrimination will fail. There were a number of issues in dispute. One was what was said to her when Mr Easy telephoned her on 22 December 2019 to inform her that her employment had ended. Both the claimant and Ms Alexander said that he had referred to her age, that the accountant had said that she was too young for health and safety reasons. He denied that, and said that he had told her that the role was too severe, and too stressful, and that she was not able to cope with the severity of the job. Initially he had said that he had “sat her down”. Later he said that that had been by telephone.

61. The Tribunal concluded that it was far more likely that Mr Easy had said something to the effect that the claimant was too young for the role, and that the accountant had said that it was for health and safety reasons. The claimant gave her evidence clearly, candidly, and calmly, whilst still someone who is very young to be appearing before an Employment Tribunal as both witness and claimant. The Tribunal considered her to be a credible and reliable witness. It also considered Ms Alexander a credible and reliable witness. She worked with the claimant's mother, and happened to be sitting directly beside the claimant when the call from Mr Easy arrived. She gave evidence of remembering what he said in relation to being too young, and corroborated the claimant's evidence.

62. The Tribunal did not consider that Mr Easy was likely to be correct in his recollection. There were a number of issues of fact where his evidence was not consistent with other evidence. That included his saying initially that he had sat the claimant down to tell her about not continuing in employment. When it was put to him in cross examination that he had said that he strongly denied having done so, but that was noted by the Judge as having been his initial evidence. That changed after the respondent's representative asked him a leading question about a telephone call. He said that he had worked with the clamant three or four times, when the evidence was clear that it was twice. He said that he could not remember any incident involving Penelope Dines, but that incident had been pled by the respondent in its Response Form. He said that he alone decided dismissal, whereas the Response Form stated that both Mr Easy and Miss Dines considered that there should be a dismissal. He did not recall what his access code for the tills was, although that had been put to the claimant in cross examination. He denied giving the claimant his access code for the till, where an access code was necessary to use it, and she clearly had been using the till. It appeared to the Tribunal more likely that Mr Easy had shown the claimant how to use the till and given her the code to access it as she claimed. He said that he had told the claimant to go home, but we accepted the claimant's evidence that that was not an instruction but an invitation, and in any event in his evidence he appeared not to appreciate that the Centre was in a rural location without public transport, and that

she would have to wait to be collected. He said that he had sent both the claimant and another waitress home on 14 December 2019 early, not because it was quiet as the claimant said, but because it was busy. That appeared to the Tribunal to be contrary to common sense. If the café and restaurant was busy, one would expect to need staff to service customers, not to send them home. It was also contrary to the terms of the Response Form which stated that it was quiet. The claimant had been doing work in cleaning cutlery which benefitted the respondent, and it is not credible to suggest that her doing so was in some way not following an instruction, as he appeared to wish to claim.

63. Mr Easy had said that he had not initially known the claimant's age and had been told that by Ms Crossan, but it was obvious to the Tribunal that the claimant was a young girl, and that would have been more obvious to Mr Easy in December 2019 when she had relatively recently turned 14. The Tribunal did not regard his evidence on not knowing her age as credible. It also did not consider that his evidence of her becoming unduly stressed was credible. That was entirely contrary to the manner in which the claimant gave her evidence, which was in a calm, measured and entirely appropriate manner, without any hint of her being stressed even when subject to some fairly detailed questioning in cross examination.

64. Finally and importantly the Response Form did not state that the reason given to the claimant was that the role was too stressful for her, as was claimed in evidence by Mr Easy as the first reason for the decision to end her employment. Nor did he refer to that in his email dated 15 October 2020 which the respondent tendered as his witness statement. His email gave as reasons the claimant not being able to respond to high demand as required, and having difficulty with following direction. There was however no evidence of high demand, and the evidence that the Tribunal considered more reliable was that it was quiet, as the respondent itself had pled in its Response.

65. In general terms therefore the Tribunal accepted the evidence of the claimant and her witness as being credible and reliable, and did not accept the evidence of Mr Easy where that was different from theirs. It did also

consider the written statements tendered. The only one of direct relevance was from Mr Stuart McEwen. He was now in hospital, and said that he did not recall giving the claimant any warning as to the behaviour of one of the owners. That is an issue addressed below. His evidence did not directly address the point as to the reason for the dismissal. The written statements were not therefore considered to be of any weight for the issues in the case.

66. It appeared to the Tribunal that the claimant had established a prima facie case that her age was at least a factor, to the extent of being more than trivial or minor, in the decision to end her employment. That was so specifically as there had been a reference to her age being "too young" at the time she was informed that her employment was ending, being the dismissal. It was a case akin to that of ***Nagarajan***, with discrimination inherent in the act of dismissal given those words used. That then meant that the burden shifted under section 136. It fell to the respondent to prove that the reason for dismissal was in no way, beyond that which was trivial or minor, because of her age. The Tribunal did not consider that the respondent had met that burden. It did not consider the evidence of Mr Easy to be reliable for the reasons given above. The respondent had not called either Miss Dines, who was said to have been involved in an incident on 16 December 2019 and also decided on dismissal. Nor did it call Ms Crossan who was the Accountant Mr Easy said that he had spoken to, and accepted that he had done that in his evidence. The evidence from Mr Easy was to the effect that he was too busy to train new part-time staff stating that it was certainly not useful for him to have someone not doing the job that required to be done, and that the other member of part-time staff Sarah, also a relatively young woman, was also not useful when the premises were busy. That evidence indicated that he was not enamoured of employing staff as young as the claimant or Sarah, and that their age was a factor in ending employment for the claimant.

67. Age does not need to be the only reason for the dismissal, nor the principal reason, but only one that is above the trivial or minor. The respondent has not proved that age was not such a factor, beyond the minor or trivial.

68. The respondent did not seek to justify a decision to dismiss in which age was a factor. It did not lead any evidence of that, and it was not a part of the submission. It had set its case on the basis that age was not mentioned by Mr Easy and not a part of the decision itself. That argument having been rejected, and there being no evidence on which to base a finding under section 13(2) of the Act as to objective justification, the claim of direct discrimination succeeds.

69. In respect of the claim of harassment, the Tribunal did not consider that the evidence met the statutory test. The claimant had not exaggerated her evidence as to her reaction to being warned as to what may happen, and said that it had made her uncomfortable. She did not report it to anyone, save to Ms Alexander, and it appears to have been mentioned more in the passing than as an issue of materiality at that time. The Tribunal considered that the evidence amounted to the kind of minor upset that is referred to in authority as not being sufficient. We can however see why a mother of a 14 year old girl would be concerned at such a comment being made, but however inappropriate it was to say to such a person (albeit that it was not recollected by Mr McEwen from the terms of his written statement) it did not amount in law to harassment and that claim is dismissed.

70. The Tribunal considered the issue of remedy. There was evidence from the claimant and Ms Alexander of the claimant being shocked, upset and distressed by the intimation of her dismissal. The Tribunal considered that this was a case towards the lower end of the first band of ***Vento,*** as subsequently amended, in which the range is £900 to £8,800. The level of upset was not immaterial, and involved a then 14 year old girl. There was a dismissal. The Tribunal took these factors into account, and decided that the appropriate award for injury to feelings was £2,500. Interest is due on that, and the amount of that is calculated to be for the period from dismissal on 22 December 2019 to the anticipated date of payment being a total of 18 months. The interest calculation in accordance with the statutory provision referred to above is £300, being 8% per annum for the period of loss, starting with the date of dismissal and ending with the anticipated date for payment, a period of eighteen months.

**Conclusion**

71. In light of the findings made above, the Tribunal finds in favour of the claimant on the claim for direct discrimination under section 13 of the 2010 Act, and awards a total of £2,800. It dismisses the Claim so far as made under section 26 of the Equality Act 2010.

Employment Judge: Sandy Kemp
Date of Judgment: 10 June 2021
Entered in register: 25 June 2021
and copied to parties