



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100699/2019

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Held in Glasgow on 4 November 2019

**Employment Judge R Gall
Members Mrs J Ward and Mr W Muir**

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Miss H Truesdale

**Claimant
In Person**

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Ace Resurfacing Ltd

**First Respondent
No appearance and
No representation**

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Gordon Quate

**Second Respondent
Not present and
Not represented**

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Q&H Construction Ltd

**Third Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

(1) The claimant was harassed in terms of Section 26 of the Equality Act 2010 by the actions of the second respondent, Mr Quate. Harassment extend over the period August 2018 to January 2019. It caused upset and distress, injury to feelings, to the claimant.

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E.T. Z4 (WR)

(2) In respect of the period from August 2018 until mid-November 2018 an award of compensation is made. The award is made against the second and third and respondents. They are found jointly and severally liable to the claimant and are ordered jointly and severally to pay to her in respect of her injury to feelings the sum of £2,500. Interest at 8% is applicable from 15 August 2018 until 15 November 2019. Interest payable jointly and severally, in addition to £2,500 is £250

(3) In respect of the period from mid-November 2018 until termination of employment of the claimant in January 2019 an award of compensation is made. The award is made against the first and second and respondents. They are found jointly and severally liable to the claimant and are ordered jointly and severally to pay to her in respect of her injury to feelings the sum of £4,500. Interest at 8% is applicable from 15 November 2018 until 15 November 2019. Interest payable jointly and severally, in addition to £4,500 is £360.

(4) Due to the claimant's employment with the first respondents ending in circumstances which render it an unfair constructive dismissal in terms of SectK r 39 of the Equality Act 2010, compensation is ordered to be paid by the first respondents to the claimant. That compensation comprises loss of salary of £4,700. The first respondents are ordered to pay that amount to the claimant. It consists of salary for January, £2,000, ongoing loss of salary for February, March and April, £1,800, and 50% of salary for May, June and July, £900.

(5) The first respondents did not supply to the claimant a statement of employment particulars. There being no exceptional circumstances rendering an award unjust or inequitable and award of the minimum amount is made. That is two weeks' pay, the sum of £1,000. The first respondents are ordered to pay that amount to the claimant.

REASONS

1. This case called for hearing at Glasgow on 4 November 2019. It had been set down for 5 days. At the time when the case was due to start the claimant was present together with her witnesses. There was however no appearance by any of the respondents. The respondents comprise two limited companies and an individual, Mr Quate. Mr Quate is the main owner and director of the respondent companies. He had appeared on his own behalf and also on behalf of the respondents at previous case management Preliminary Hearings.

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2. Given that there was no appearance for the respondents at 10 AM, the Clerk to the Tribunal checked the details on file and telephoned the mobile telephone number provided by Mr Quate when he completed form ET3 for all the respondents. The call was not answered. There was a voicemail facility. The Clerk left a voicemail referring to the hearing in this case which was about to commence and requesting that a return call be made with any explanation or comment which the respondents wished to provide. The Clerk carried out, over the next 20 minutes, checks to ensure that any call received was noted, that any email received was noted and also that any appearance by or on behalf of the respondents at the offices or in the waiting rooms of the Employment Tribunal was something of which she was aware.

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3. By 10:20 AM there been no contact from the respondents by telephone or email and no appearance in the Tribunal building. In those circumstances the Tribunal took the view that it should convene and commence the case. Evidence was taken during the entire day of 4 November. On checking with the claimant, she confirmed that she had had no contact from Mr Quate or any other party on behalf of the respondents in the lead up to the hearing. There was no contact during that day from the respondents whether by email, telephone or by way of personal appearance at the Tribunal offices.

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4. The Tribunal heard evidence from the claimant. She lodged a bundle of documents. It also heard evidence from Mr Gillespie, a former colleague of the claimant when she worked with Q & H Construction Limited. The Tribunal

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also heard evidence from Mr Hamill, partner of the claimant, and Ms Brannan, daughter of the claimant.

5. In this judgment the first respondent, Ace Resurfacing Limited is referred to as "Ace". The second respondent, Gordon Quate, is referred to as Mr Quate.
- 5 The third respondent, Q & H Construction Limited is referred to as "Q & H".

Findings In fact

6. The following are the relevant and essential facts as admitted or proved.

Background

- 10 7. The claimant first met Mr Quate when she and her 2 children went on holiday to Tenerife in June 2017.
8. At that point the claimant worked with Virgin Media. She was a quality coach and team leader. Mr Quate said to her that if she was interested in working with his companies she should contact him to arrange an interview. She did that on her return from holiday. She did not however receive a reply. Rather than pursue the possibility of a job with Mr Quate and his companies she decided to stay in her then employment.
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9. In May or June 2018, the claimant's employment circumstances changed. Her job became uncertain. There was a possibility of salary reduction. She recalled the conversation she had had with Mr Quate and decided to text him to see if the possibility of a job might exist.
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10. As a result of that contact an interview was arranged. Mr Quate attended that together with two others, Shona and Andy. Some 20 minutes after the claimant returned home from the interview Mr Quate telephoned her and said that Andy would be in touch to confirm that she was being offered a job. The company with whom she would be working was Q & H. Her salary was to be £24,000 per annum. That compared favourably with her then salary of £17,000 per annum. She commenced employment on 24 June 2018.
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Claimant's working time with Q&H

11. Q & H was a small company. In addition to the claimant, those working with Q & H were Mr Quate, Shona Campbell, Andy Hamilton and 6 ground workers. The claimant was initially a planner and coordinator. She would
5 schedule jobs for Q & H. She then moved into the financial side of the business. Initially she worked from home. In around August 2018 Q & H moved Shona, the claimant and Andy into an office in Kirkintilloch. Mr Quate was initially there now and again. From around mid August 2019 however and thereafter he was in the office most days. The office was one large room
10 where all 4 people sat.

12. Mr Quate ran the companies, both Q & H and Ace. He made the decisions. He also carried out work for the companies on a day to day basis. He was, in effect, the managing director of those companies. Andy Rigby had a financial
involvement in the companies, the claimant understood. He was not how ever
15 involved in the running of the companies and was not a director of them.

Pre-employment text exchange

13. The claimant and Mr Quate exchanged texts in the period between the claimant's job with Q & H being confirmed and prior to her starting employment. The claimant was to visit Inverness where Q & H had work. This
20 was with a view to gaining a better understanding of the work situation.

14. A copy of texts exchanged between Mr Quate and the claimant on 14 June 2018 appeared at pages 2 and 3 of the bundle. In those texts, the claimant explained that she could go to Inverness on a particular day. She said that Mr Quate should let her know the time for the trip on Monday and that she would
25 be ready. Mr Quate replied in the following terms: -

"No probs if your (sic) up for a bit of messing your (sic) welcome to join me in Edinburgh might be Glasgow tonight??"

15. The following exchange occurred, the text from the claimant being the first one which appears: -

"Sorry Gordon, I'll have to decline your offer, keep it business lol"

"It was business"

"Sony Gordon, a (sic) must have got the wrong end of the stick don't a (sic) feel stupid now lol"

5 *"So you can let your hair down. It might be my company but you don't work to me (sic) that's why I have managers lol"*

Mr Quate then added *"That (sic) ma girl you up for it then show me what you are really made of lol"*

10 16. The claimant spoke with her partner during and at the conclusion of this exchange. She was concerned that Mr Quate might be looking to have a relationship with her beyond working boundaries. She and her partner both had concerns on that ground. Given the reference by Mr Quate to his comment being business related however, the claimant and her partner gave Mr Quate the benefit of the doubt.

15 *Events during employment*

17. In July 2018 the claimant, Andy and Shona went to Inverness with Mr Quate. They were joined for dinner by Paul Rigby, whose brother was involved at one point in the company, Q & H. They met with Hannah, who was the project manager for the company with whom Q & H worked, KN. The claimant, 20 Hannah and Andy left the gathering at about 9 PM and went back to their hotel. On the way back the claimant spoke to Andy about the messages she had received from Mr Quate. Andy said that she, Hannah and Shona should keep their doors locked that night as Mr Quate was having some drinks and became a predator in those circumstances.

25 18. in August 2018 Mr Quate was in the office on a regular basis. He made various comments as to relationships. He expressed the view that it was not unnatural to cheat on a partner and was not a big deal. He said that humans were mammals and that various animals did this. He said that different religions encouraged a number of partners. The claimant found this conversation

difficult to cope with. She said to him that what he was saying was not something with which she agreed. She said that she did not regard it as being right. She made it clear that she was not interested in that type of approach and that she had a partner with whom she was perfectly happy. At various times however Mr Quate over the next few weeks returned to the conversation. He made comments saying that it was only sex at the end of the day and did not mean that the people involved loved each other. It did not mean that the people involved did not love someone else. The claimant felt uncomfortable. Shona laughed and shook her head saying to Mr Quate that she thought it was ridiculous to think along those lines.

19. On other occasions Mr Quate made comments saying that he had regularly cheated on his wife but that she did not know and did not have a clue about that. He would comment on women who appeared in the office saying things such as he *"liked the ass on her"* or asking *"did you see the tits on that one?"*

20. Although the claimant was uncomfortable with comments of this nature, she did not say anything about that to Mr Quate. She was conscious that Mr Quate was in control of the company and was fearful as to losing her job. She had obtained an increase in salary from the job which she previously held and had come to rely on the salary she now received from Q & H. She coped by trying to blank out the remarks which Mr Quate made and by not involving herself in the conversations.

21. In early October 2018 Shona left employment with Q & H. Mr Gillespie was then asked by Mr Quate to carry out work for Q & H to assist with the planning of jobs. He worked on a self-employed basis. He previously worked with Q & H and returned to work with them after Mr Quate had undertaken to resolve an employment dispute with him and make payment to Mr Gillespie of sums due to him.

22. At some point during the first 2 weeks of November 2014 the claimant was going to be going to Inverness with Mr Quate and others. In the lead up to that visit, texts were exchanged between Mr Quate and the claimant. The claimant wished to work at home on 13 November. She texted Mr Quate

asking whether he would mind if she did that. A copy of that text, together with Mr Quate's reply, appeared at page 8 of the bundle. In response to the claimant's enquiry Mr Quate replied: -

"That's fine. Mind no nooxy in working time ioT"

- 5 23. The claimant regarded this as inappropriate and indeed irrelevant. She could not understand why Mr Quate had made this reference in those terms.
24. Mr Quate announced on 14 November at Inverness that he was "*pulling the plug*" on Q & H. He said that it had been trading whilst insolvent or was at risk of doing that. He said that he was commencing a new company, Ace. He said to the claimant that she had nothing to worry about. She would be carrying out the same role for the new company. The new company would have no debts. He said that this would all be discussed when they returned from Inverness.
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25. During the visit to Inverness, N'r Quate was in the yard with the ground workers. Equipment was being organised to be removed. No hotel had been booked for overnight accommodation. The claimant was now to do this. She asked Mr Quate which hotel he wished to book. He said it was the same hotel as the others were staying. He then said "*mind and book a double room for us*". The claimant did not regard that as an appropriate remark. There was laughter from the other workers. Nothing else was said about the room. The claimant booked two separate rooms for herself and Mr Quate.
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26. There was a vehicle brought down from Inverness which required to be returned to the company from which it had been hired. Mr Gillespie was to drive that vehicle to the hirer. The claimant would follow in her car and, after depositing the vehicle back with the hirer, would then give Mr Gillespie a lift back to work.
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27. The claimant was in the yard outside the office getting ready to leave to go to the hirer's office. Mr Quate was on the telephone. It became clear to the claimant that he was speaking to the person in the company to whom the vehicle was to be returned. Mr Quate said to that person that he would know
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who Helen (the claimant) was when he saw her and that he would recognise her by her blonde hair and big tits. He then laughed. The claimant did not respond. She walked to the car.

5 28. Soon after this, the claimant and Mr Quate, who were both smokers, were outside the office having a cigarette. Mr Quate said to the claimant that Mr Rigby had said to him that he had noticed that Mr Quate and the claimant got on quite well. Mr Quate went on to say to the claimant that Mr Rigby had said to him *7 bet you are shagging her when no one else is there, behind a locked door.* Mr Quate said that he would not tell Mr Rigby anything anyway. The claimant was very upset although she did not show that to Mr Quate. She just shook her head.

15 29. The claimant stopped going outside for cigarette breaks if Mr Quate was to be outside. She took that step after she and Mr Quate had been outside for a cigarette break on a further occasion, given what Mr Quate had said to her on that occasion. Mr Quate had said that he and his wife had booked a hotel room in Edinburgh and had both taken Viagra. He said to the claimant that they were up all night having rough and hard sex and that his wife had been bleeding. The claimant walked back into the office at that point.

20 30. The claimant was becoming increasingly upset by the type of remarks which were being made. There was no manager however to whom she could go to report this issue or to ask that something be done about it. She remained concerned about confronting Mr Quate himself about his behaviour and asking him to desist as she was worried about her employment position and the loss of money from the job. This was particularly so as Christmas was now only a few weeks away.

30 31. The claimant did however tell her partner as events occurred. Her partner was aware therefore from what the claimant said to him of the comments being made. He was also aware of the texts which were being sent to the claimant. He and the claimant's daughter could see an impact on the claimant as detailed below.

32. Q & H ceased operations around the middle of November 2018. The claimant was involved at that time and rebranding any paperwork so that it became paperwork for Ace rather than Q & H.

Ace

5 33. Having initially said to the claimant that he would discuss her employment position with Ace with her on return from Inverness, Mr Quate did speak with the claimant. He said to her that nothing would change. She would however have extra work to do. Her salary would therefore increase to £30,000 per annum. She received from Mr Quate through the post a P45 relative to her
10 employment with Q & H. A copy of that P45 appeared pages 9 and 10 of the bundle. It showed the last date of the claimant's employment with Q & H as being 31 October 2018. In fact, the claimant's employment continued for some two weeks after that.

15 34. The claimant did not ever receive a contract of employment with Ace. She did not receive a statement of main terms and conditions of employment with Ace. The discussion with Mr Quate saw him raise the possibility that the claimant would become self-employed. Mr Quate said that if she did that she could claim expenses such as fuel and a laptop as tax deductible. She could also reclaim VAT. The claimant said that she did not have a clue as to how being
20 self-employed worked. She had never been self-employed. She subsequently spoke with Mr Gillespie who was present in the office and who she knew to be self-employed. Mr Gillespie asked whether she would operate through a limited company. He said to her that while there were some advantages in being self-employed she would clearly need to think carefully before
25 becoming self-employed. The claimant spoke once more to Mr Quate on this point. She explained her concerns. Mr Quate said to her not to worry and that when the time came, if she was to become self-employed he would help her with this. The claimant thought no more about it. Had she decided to become self-employed she would have further discussed that with Mr Quate and would
30 also have considered the position with Mr Gillespie whose advice she trusted. She did not do that.

35. The claimant received payment after mid-November at the rate of £2000 net per month. The bank statement at page 7 of the bundle confirms that. This was consistent with payment to her of a gross salary of £30,000 per annum. Had that been paid to her gross, as she anticipated it would have been if she had become self-employed, she would have received £2500 per month. The claimant did not ever prepare or submit invoices to Ace. She was never asked to provide invoices until after she had left employment with Ace. Due to cash flow issues the claimant received money for her salary from different sources. She was not paid for the month of December 2018 initially. She subsequently received payment of salary to the extent of £2000, receiving £400 from Mrs Quate's account on 4 January and £1600 from Mr Quate's account on 14 January.
36. The tasks carried out by the claimant for Ace were as directed by Mr Quate. She required to seek his consent if she wished time off to rearrange her working hours. Texts produced at pages 14 and 15 of the bundle illustrate the claimant seeking direction from Mr Quate as to how to spend her time given that work was quiet. They show Mr Quate saying that she should take the day off. They also show the claimant seeking a delayed commencement for arrival at work one day as she was taking her Papa to the doctor for a medical appointment.
37. The claimant had an Ace email account with the same domain name as that used by Mr Quate for his email. That domain name was ace-tar.co.uk. The claimant sent emails from that account on behalf of Ace. The emails were personalised with the name of the company and its logo. A copy of such an email appeared at page 16 of the bundle. The claimant used a laptop. That was provided by Q & H initially and was then used, along with other materials, by Ace.
38. On 14 December 2018 Mr Quate sent a text to the claimant. A copy of the texts exchanged appeared at page 12 of the bundle. At 12:02 AM Mr Quate wrote: -

"Can you get away Monday night I have a room booked for us and a wee swally your call"

39. The claimant did not comment on that text when replying at 10:40 1 AM. There was no follow-up text from Mr Quate.

5 *Resignation of the claimant*

40. The claimant had not received payment for December. She was very concerned about that. Ace ceased working for the holiday period.

41. At 9:29 PM on 1 January the claimant received a text from Mr Quate. There had been no previous texts during the course of that day and indeed after 17
10 December 2018. The text of 1 January read: -

"I know you love Tam but I would love to fuck you. Cheeky as I have not paid you but true. Only being honest "

42. The claimant replied: -

*"Gordon that is seriously never ever going to happen. Tam knows about these
15 messages and it's going to start causing a problem me working with you, can we keep things Just business"*

43. The following morning at 3:07 AM the claimant received a further text from Mr Quate. Mr Quate wrote: -

"I agree Helen me Just being a dick with a drink in me. I've had a laugh. "

- 20 44. Some hours later at 4:44 PM the claimant replied saying: -

"Is everything okay for wages tomorrow?"

45. The claimant was both angry and upset with the text which she had received from Mr Quate on 1 January. Her partner was equally annoyed. She regarded the text as wholly inappropriate. She did not see that she could work with Mr
25 Quate given both his earlier conduct and the content of the text of 1 January.

46. The claimant therefore wrote to Ace tendering her resignation. In response to that Mr Quate sent an email to her on 7 January 2019. A copy of that email appeared at page 17 of the bundle. The email read: -

5 *"Hi Helen to say I am stunned at you taking this stance is an understatement, there is been 1 txt (sic) that was sent to you without me knowing as I explained I also stated that the lad that sent it would come to the office and apologise. As for sexual harassment I am lost, I thought we all got on really well even when my wife was in the office granted we had a bit of banter but it nothing more (sic) than that. I don't want to jeopardise our friendship over this as I*
10 *keep saying your great (sic) at what you do and if ace does well it would all because of you (sic) and I will never forget that. I would love you to be a part this company (sic) going forward Helen as I know the financial rewards will be great for you, me and our family's (sic), so could we just put a line under this let me get you paid then we can discuss the future. As I said with the hard*
15 *work you put into it you should be a part of it."*

47. The claimant did not withdraw her resignation. She left employment with Ace. She received payment of monies due to her, being £2000, in course of January 2019.

Claim Presentation

20 48. The claim was presented to the Employment Tribunal on 27 January 2019. The claimant give notification to ACAS in terms of the Early Conciliation procedure on 11 January 2019. The Early Conciliation Certificate was issued by ACAS on 23 January 2019.

Claimant's employment after termination of employment with Ace

25 49. In the lead up to her resignation and prior to receipt of the text of 1 January from Mr Quate, the claimant had been looking for alternative employment. She did not however find a suitable alternative job paid at a rate she considered necessary for her to change employment by leaving Ace. On receipt of the text of 1 January however she regarded herself as having no

option but to resign and to follow up on potential employment opportunities known to her, as well as look more particularly for employment.

50. The claimant was successful in obtaining an interview with Scottish Hydro and with Sky. The jobs there involved working in a call centre. She also spoke
5 around this time with Hannah who she had met on various occasions and who worked for KN, the company with whom Ace did business. When Hannah became aware that the claimant was looking for alternative employment an offer of employment from KN resulted. The claimant commenced employment with KN on 28 January 2019.
- 10 51. The claimant therefore had one month without income. Her salary with KN is £20,500 per annum. She receives £1400 per month net. That compares with £2000 net per month which she was receiving from Ace. She therefore has an ongoing loss of £600 per month.

Impact of behavior

- 15 52. The claimant was very upset by Mr Quate's behaviour towards her. That behaviour was unwanted on her part. She did not wear provocative clothing. She did not encourage any dialogue of the type which Mr Quate had with her both by text, by remarks made in the office and in conversation.
- 20 53. There were days when the claimant came home crying. She became very quiet and inward looking. She became self absorbed. She doubted herself and wondered what she had done to result in these comments being made. She was upset and annoyed with herself that she did not feel able to ask Mr Quate to stop the comments and texts. She became irritable with her partner and with her daughter. They thought that they had done something wrong.
- 25 54. Sadly the claimant had been subjected to sexual abuse at an earlier age. The comments made by Mr Quate brought back memories for her. She had received counselling and cognitive behaviour therapy to help her deal as best she could with the abuse she had suffered. She used some of the techniques which she had learned at that time to cope with the comments made by Mr
30 Quate and the texts sent by him. She did not attend her GP for any treatment.

She did a lot of cleaning in the house, something which she knew she was inclined to do as a means of distracting herself in a stressful situation. She managed to keep going to work and to cope to large extent by showing resilience and by adoption of coping strategies. There was, nevertheless, a noticeable impact on her happiness and on her interaction with close family members. She was upset and troubled by Mr Quate's behaviour.

55. The claimant continues to be affected by the comments made. She becomes upset when she thinks back to the time when the comments were made. There are days when in her current work when she breaks down crying. She will sometimes make mistakes as she feels stressed when thinking about what has happened when she worked with Q & H and Ace. She continues to be upset when at home with her partner.

The Issues

56. The issues for the Tribunal were:-
- a. whether the conduct of Mr Quate was actionable with a claim lying potentially against Q & H, Ace and Mr Quate personally.
 - b. whether there was any issue of time-bar in relation to any claim which might be competent as against Q & H.
 - c. whether the status of the claimant when working with Ace was such as to enable her to bring a claim under the Equality Act 2010 ("the 2010 Act").
 - d. what compensation would be awarded in the event of success on the part of the claimant. In addition, the question of whether any award was made on a joint and several basis required to be determined by the Tribunal.
 - e. whether an award was to be made in terms of Section 38 of the Employment Act 2002 due to there being no statement of employment particulars having supplied to the claimant by the first respondents.

Applicable law

57. Employment is defined in Section 83(2) of the 2010 Act as meaning employment under a contract of employment, contract of apprenticeship or a contract personally to do work. A claim may therefore be brought by someone other than an employee.
58. In terms of Section 109 of the 2010 Act anything done by a person in course of their employment must be treated as being done by the employer.
59. In terms of Section 110 of the 2010 Act where someone is an employee or agent and does something which by virtue of Section 109 is treated as having been done by the employer or principal and where what is done is actionable then there is a contravention by the person who does the act resulting in personal liability on their part.
60. An award of compensation may be made on a joint and several basis where more than one respondent is found liable. Whilst it may be appropriate to apportion liability, where an employer is liable by reason of the actions of an employee, joint and several liability involving “full” liability for the employee as the “perpetrator” is potentially appropriate.
61. Where there is more than one respondent, an award can be made on a joint and several basis. If that occurs and an employer and employee are jointly liable, the view of the Employment Appeal Tribunal (“EAT”) is that there is, on ordinary principles, no basis for apportionment between the employer and employee. This is confirmed in its decision in *London Borough of Hackney v Sivanandan and others* 2011 ICR 1374. That approach was endorsed in the Court of Appeal in that case, the citation being 2013 ICR 672.
62. A claim under the 2010 Act must be brought within 3 months of the date when the act on which it is founded is taken place. Conduct extending over a period is treated as being done at the end of that period. If the claim is not presented to the Employment Tribunal within 3 months then time can be extended if the Tribunal considers that just and equitable. These provisions are contained in Section 123 of the 2010 Act.

63. In terms of Section 124 of the 2010 Act an Employment Tribunal may make a declaration as to rights of the claimant and respondent, may order the respondent to pay compensation to the claimant and may make an appropriate recommendation.
- 5 64. The amount of compensation which a Tribunal may award is to be set with regard to the cases of *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318 and *Da'Bell v NSPCC* 2010 IRLR 19. The Tribunal should also keep in mind the Presidential Guidance issued on 23 March 2018, the guidance relevant to this case, where the claim was presented on 27
10 January 2019. That guidance reflects the position in respect of claims presented on or after 6 April 2018 as involving a lower band of compensation of £900-£8600 for less serious cases. Those figures are said to include the 10% uplift detailed in *Simmons v Castle* 2012 EWCA Civ 1039. A Tribunal is to set out reasons why the 10% uplift referred to in *Simmons* does not apply
15 if, in its view, it is not applicable in any particular case.
65. Interest is payable on awards made in respect of injury to feelings. The relevant provisions are contained in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In an injury to feelings award, the relevant date from which interest is to run is, in normal terms, to
20 be the date on which the act of discrimination complained of occurs. Interest ceases to be applicable on the day when the Employment Tribunal calculates the amount of interest. This is in terms of Regulation 6 (1) (a). Regulation 6 (3) authorises an Employment Tribunal to use a different period for calculation of interest if there would be "*serious injustice*" if other dates were not used.
- 25 66. An award of compensation is to be compensatory rather than punitive.
67. The discriminator must take the victim as he finds her. Even if the victim is unusually sensitive or susceptible and a higher level of damage is sustained than otherwise might be the case, the discriminator is liable for the full extent of the loss or injury if it flows from the act of discrimination.
- 30 68. The cases of *Cadogan Hotel Partners Limited v Ozog* 2014 UKEAT/0001/1 4 and *Komeng v Creative Support Limited* UKEAT/0275/1 8 confirm that what

the Tribunal has to focus upon is the injury suffered by the claimant rather than the gravity of the acts of the respondents. That is also underlined in *Essa v Lang* 2004 IRLR 313. If therefore a claimant is resilient and manages to cope better than a different claimant might have, the injury suffered and compensation awarded require to be viewed in light of that fact.

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69. In assessing compensation payable, an Employment Tribunal is able to reduce any award it might otherwise make. It might do this, for example, if it viewed the claimants actions as having either caused in part or having aggravated the effects of discrimination. This is a power equivalent, in effect, to finding that there has been contributory conduct. The concept that a claimant may have contributed to discriminatory conduct is, however, a difficult one to regard as apposite. It would require a clear and somewhat unusual set of circumstances for it to be properly considered as applicable, it is anticipated.

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70. The terms of Section 26 of the 2010 Act set out what constitutes harassment. It is unwanted conduct related to a relevant protected characteristic where the conduct has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the recipient. Unwanted conduct of a sexual nature also constitutes harassment.

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71. In determining whether the conduct has the effect mentioned, a Tribunal has to take into account the perception of the recipient, the other circumstances of the case and whether it is reasonable for conduct to have that effect.

72. The relevant protected characteristic in this case was sex.

73. Section 39 of the 2010 Act provides that a claim may be brought to an Employment Tribunal in relation to dismissal which is discriminatory act. Dismissal in terms of Section 39 includes constructive dismissal. That is specified in Section 39 (7). There is reference there to termination of employment by the employee in circumstances where the employee is entitled because of conduct of the employer to terminate the employment without

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notice. There is no requirement for there to have been a qualifying period of employment before such a claim can be brought to an Employment Tribunal.

74. Section 38 of the Employment Act 2002 states that where there has been a failure to provide an employee with a statement of employment particulars, as is required in terms of Section 1 of the Employment Rights Act 1996 then consequences follow. Those are that where an award is made by the Tribunal in a claim in a jurisdiction referred to in Schedule 5 to that Act, compensation is to be awarded to the claimant. The only circumstance where that is not to occur is where the Tribunal considers that exceptional circumstances exist, leading the Tribunal to conclude that the making of an award would be unjust or inequitable. The award is to be the minimum amount (two weeks' pay) or, if it is regarded as just and equitable, the higher amount (four weeks' pay).

Submissions

75. The claimant said that she should be awarded compensation. The comments made to her had not been appropriate. Similarly the texts which she had received not been appropriate. She had tried to ignore them. They had got worse and had been more severe. There was no denying that the texts had been sent.
76. There had been an impact on the claimant and on her family. Family life is not the same. She had doubted herself. Her partner and daughter had thought that they had done something wrong because she was flying off the handle and was quiet. This was not her fault. She wished to draw matters to a close and believed that the claim should be successful. She said that the support of her partner and daughter had been crucial.
77. She had resigned due to the text of 1 January in particular. The behaviour had been intolerable. She had suffered loss due to resignation given the salary she was receiving in her new job.

Discussion and decision

78. In a case such as this, although there is no appearance by the respondents, a Tribunal requires to hear evidence and to be satisfied that facts are proved which confirmed to the satisfaction of the Tribunal that discrimination is taken
5 place. In a disputed case there are provisions as to the burden of proof shifting. In this instance however there was no appearance by the respondents and therefore no explanation tendered by way of evidence as to why no contravention of the 2010 Act had occurred. It is however appropriate to raise with the claimant at the hearing the line of defence advanced on the
10 pleadings in this type of scenario. The Tribunal did this, putting to the claimant the position of the respondents as that had been set out in form ET3, in the agenda return prior to the case management preliminary hearing and also as mentioned by the respondent at the case management preliminary hearing.

Status of the claimant

15 79. One of the arguments advanced by the respondents was that the claimant was self-employed.

80. The Tribunal accepted evidence from the claimant and from Mr Gillespie that there had been discussion between Mr Quate and the claimant as to the claimant possibly becoming self-employed. This was at the time when her
20 employment with Q & H ended and the working relationship with Ace began. That was in mid November 2018.

81. Nothing was documented after this point. The evidence from the claimant was that she had been very hesitant about potentially becoming self-employed. She had not agreed to that. She discussed the possibility with Mr Gillespie
25 who himself operated on a self-employed basis. Mr Gillespie confirmed that that discussion with the claimant had occurred and that she had not, at that point, been inclined to become self-employed. He was of the view that had the claimant been seriously considering becoming self-employed at a later point, she would have spoken to him to seek further comments and advice
30 from him. She did not do that. The Tribunal accepted that evidence. It also accepted the claimant's evidence that her discussion with Mr Quate about

becoming self-employed did not proceed to a conclusion, the point being left open.

5 82. The evidence supported there being a working relationship between Ace and the claimant such that she was not self-employed. From the texts, and from her own evidence, she required to seek consent of Mr Quate to a later starting time than normal. She sought direction from Mr Quate as to what she should be doing by way of work. He gave her that direction and authorised her to have time off on one occasion documented in text. She could not therefore “come and go” as she pleased. The claimant had an email address with the domain name operated by Ace. The logo of Ace appeared on her emails. 10 There was no suggestion that she was able to substitute anyone to cover her duties.

15 83. She had been employed by Q & H. Her evidence was that, unless she had agreed to become self-employed with Mr Quate, things were to continue as previously. That would have been on an employed basis therefore. The only difference was that her salary was to be increased. That point was specifically mentioned by Mr Quate. He did not talk of invoices being submitted by the claimant or about the claimant accounting for her own tax. She did not in fact submit invoices nor did she account for her own tax. The amount paid to the claimant was £2000 per month net. That is consistent with a gross salary of 20 £30,000. Those salary arrangements are consistent with employment. The first time reference was made to invoices was after the claimant had terminated her employment. In the email at page 18 of the bundle Mr Quate asks the claimant for invoices so that he could get the outstanding balance due to her paid. The claimant did not ever supply any invoices. Payment of 25 £2000 was made to her in January.

30 84. The Tribunal was entirely satisfied that the working relationship between the claimant and Ace was such that she was an employee of Ace. If it was wrong in that, there was certainly a contract such that she was personally to work for Ace.

Time limit

85. Some incidents referred to occurred more than 3 months prior to presentation of the claim to the Tribunal. Insofar as it might appear to be the case that time-bar applied, the Tribunal was satisfied that this was not so. It took that view on the basis that each of these incidents involved Mr Quate, with the nature of the incidents being very similar. In the view of the Tribunal there was conduct extending over a period. In relation to Q & H that conduct ended in mid-November 2018. The claim was presented in January 2019 was therefore brought in time. There was no such potential issue of time-bar in relation to claims relative to events which had occurred during the claimant's employment with Ace.

Incidents of harassment

86. The Tribunal regarded the claimant as credible and reliable. She gave clear evidence about the events she described and in particular the behaviour of Mr Quate. Some of that evidence was substantiated by the texts produced. The claimant's daughter, and in particular her partner, were able to speak to the claimant informing them of events and, in the case of her partner, showing him the texts. The Tribunal accepted the claimant's partner and daughter as credible. They gave evidence on very limited matters. Similarly, Mr Gillespie was credible and reliable in the view of the Tribunal. His evidence was also on quite limited matters.

87. In the defence as pled, the respondents referred to the claimant as also having made comments and discussed sexual scenarios. Those points were raised with the claimant. She was convincing in her denial of that having been the case. She said that she had considered her own behaviour as she struggled to understand why Mr Quate was making the comments which he was. She had also considered the way in which she dressed, reflecting upon whether that might have encouraged Mr Quate in any way to make or to continue making his comments. She was clear that neither her behaviour, remarks or dress were unusual or suggestive or would have provided any basis on which Mr Quate might have thought that comments of the type he

was making were wanted or were acceptable. The claimant's partner gave evidence of the claimant discussing those points with him and confirmed that he was of the same view as was the claimant.

5 88. In determining whether harassment has occurred the Tribunal has to consider whether the conduct was unwarranted. It readily so concluded. It also has to consider whether the conduct is, viewed subjectively and objectively, such that it constitutes harassment. It has therefore to consider the perception of the claimant and whether it is reasonable for the conduct to have the effect detailed in Section 26 of the 2010 Act. The conduct must have, relevant in this case, the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

10 89. The perception of the claimant was that the conduct had the effect detailed. The Tribunal had little difficulty in readily concluding that it was reasonable for the conduct to have had that effect. The remarks and texts, in particular that sent on 1 January, were clearly in the category of creating an offensive environment for the claimant. They might also reasonably be viewed as creating a degrading and humiliating environment for her.

15 90. In their defence as pled, the respondents sought to have these exchanges regarded as "*banter*". In the circumstances of the case and looking to the remarks made and absence of engagement in remarks of this type by the claimant, the Tribunal did not regard the behaviour of Mr Quate as falling into the category of "*banter*".

20 91. In its assessment, the Tribunal was conscious that the claimant had not taken exception to the comments made. This absence of objection was clearly something which distressed the claimant at the time and has caused distress since the events. Her view is that she should have raised these matters and asked that Mr Quate ceased the behaviour. She explained that she was, at the time, uncertain of how to cope and was very conscious that Mr Quate was the person in control of the company by whom she was employed, whether Q & H or Ace. Mr Rigby had no involvement in the running of the business. There was no other management employee or director to whom she could turn. She

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was being paid a salary upon which she relied and one which she did not believe she could obtain in alternative employment. In the later part of 2018 when events happened, Christmas was approaching and money pressures were therefore greater.

- 5 92. In light of the explanation given, the Tribunal did not take from the absence of objection, any acceptance of the behaviour by the claimant or any implication that she had in fact either welcomed it or joined in with conversations of the type she described. There were, in support of absence of participation by the claimant in this type of behaviour, no texts from the claimant initiating, joining
10 in or encouraging Mr Quate in the type of remarks he was making.

Liability

93. This was a case in which liability of the employer and of the perpetrator as employee (as that term is defined in the 2010 Act) existed in terms of Sections 109 and 110 of the 2010 Act. All the acts were those of Mr Quate, the person
15 in control of the respondents.

94. Some of those acts occurred in the period when the claimant was employed by Q & H. The remainder occurred when the claimant was employed by Ace. It is appropriate to ascribe a value to compensation for the respective periods involved.

- 20 95. Insofar as a claim lies for harassment, the Tribunal considered it was entirely appropriate to make the award of compensation on a joint and several basis against the employer and Mr Quate.

96. The claim of constructive unfair dismissal which arises due to the breach of contract being an act of discrimination, lies only against the employer at that
25 point, Ace.

Impact

97. There was evidence of impact of the behaviour of Mr Quate upon the claimant. From her own evidence and that of her partner and daughter, she became far more withdrawn than previously. She was upset from time to time. Both the

claimant's partner and her daughter were concerned that something was wrong with the claimant and that it might be that she had a problem with either or both of them. She became self absorbed and doubted herself. She continues to be upset from time to time, in particular about the fact that, although understandable in the circumstances, she did not object to the behaviour of Mr Quate when it occurred.

98. The claimant has coping strategies for difficult times, acquired from an earlier period of real difficulty in her life. She applied those. She did not feel the need to seek medical intervention of any type or to consult her GP or any other medical practitioner. She managed to keep attending work. She continues to attend her new employment, although becomes upset from time to time when thinking about events which formed the basis of this case. Clearly her partner and daughter have supported her through this time.

Compensation - Injury to feelings

99. In the period between August 2018 and mid November 2018 when the claimant was employed by Q & H the comments detailed above were made by Mr Quate. He sent the text on 13 November as set out above. These comments and that text were harassment in the view of the Tribunal.

100. As to compensation to the claimant in respect of those comments, the assessment of the Tribunal was that the appropriate figure was £2500. This lies within the lower band of *Vento*. It is a figure reached by the Tribunal having regard to the nature of the comments and to the impact upon the claimant as described by her. The Tribunal has sought to make an award which reflects the unacceptable behaviour of Mr Quate and which is compensatory looking to the claimant's evidence as to impact.

101. The finding is made on a joint and several basis. Interest is appropriately awarded from mid-August 2018. The tribunal selecting 15 August as that date. Interest at 8% for the period until 15 November is £250.

102. Comments made by Mr Quate had more impact in the weeks when the claimant was employed by Ace. There was in particular the comment made

in the yard as to how the claimant would be recognised. Ultimately the content of the text sent on 1 January was the most upsetting to the claimant. Her evidence so stated and indeed she resigned due mainly to the content of that text.

5 103. Again looking to the impact as described by the claimant, and taking account of the factors mentioned above, the Tribunal assessed compensation in relation to this period of harassment in the sum of £4500.

104. The harassment started in mid-November 2018. Interest therefore on that amount for a year at the appropriate rate is £360. This finding is also made
10 on a joint and several basis.

Loss of earnings

105. An award is made against Ace in respect of the loss of earnings of the claimant due to what might be labelled the discriminatory dismissal.

15 106. The claimant was not paid during January 2019. She had made attempts to find alternative employment. She had taken reasonable efforts to mitigate her loss by making those attempts. Her loss in January was £2000. That sum is awarded to her.

20 107. The claimant obtained work with KN. She commenced work at the end of January 2019. Although she is paid less in that role than she was paid by Ace, the Tribunal was satisfied that she had attempted to seek other employment and had opted for a job which suited her and which paid her the best level of remuneration available from the jobs for which she had applied. Her income from Ace had been £2000 per month, net. Her income from KN is £1400 per month, net. There is therefore an ongoing loss of £600 per month.

25 108. The Tribunal considered the period of time for which it was appropriate to award that loss. It was conscious that the claimant was looking around for alternative employment prior to her resignation. To a degree, that was prompted by the behaviour of Mr Quate. There was also however a lot of uncertainty as to the financial stability and longevity of Ace. The previous
30 employer of the claimant, Q & H had ceased trading. Mr Gillespie was no

longer associated with either of the companies. Other employees had been dismissed or had left. It seemed highly probable that Ace would cease as a business or would require to bring employment of the claimant to an end within a relatively short period in the assessment of the Tribunal.

5 109. The Tribunal regarded it as just and equitable to award compensation by way
of loss of earnings for a period of 3 months, February March and April. It
considered that it was almost certain that the claimant would be in
employment for that period with Ace. It considered that there was a realistic
possibility that the claimant would either be dismissed or would leave Ace at
10 some point during the subsequent 3 months, May, June and July. It therefore
determined that it was appropriate and just and equitable to award 50% of the
loss of earnings during that time. In the view of the Tribunal it was just and
equitable that compensation cease in respect of any period thereafter.

15 110. Compensation is therefore awarded in respect of January in the sum of
£2000. The extent of loss in the subsequent 3 months is £600 per month,
providing a total of £1800. The extent of loss as assessed by the tribunal for
the subsequent 3 months, applying 50% reduction assessing the percentage
probability of employment ending, is £900. An award is therefore made
against Ace in the sum of £2700. The combined award for loss of salary from
20 January to July is therefore £4,700

Absence of statement of employment particulars

111. There was no statement of employment particular provided by Ace to the
claimant. There are no exceptional circumstances which make an award
under Section 38 of the Employment Act 2002 unjust or inequitable.

25 112. It is not considered that circumstances were before the Tribunal which make
it just and equitable to increase the award to the higher amount.
Compensation is therefore award to the claimant under Section 38 of the
Employment Act 2002 of two weeks' pay. That award is made against Ace
and amounts to £1000.

Conclusion

113. The respondents are ordered to pay the amounts as detailed, the element in respect of injury to feelings being awarded on a joint and several basis, that in respect of financial loss and under Section 38 of the Employment Act 2002
5 being awarded against Ace.

Employment Judge: R Gall
Date of Judgment: 15 November 2019
Entered in register: 15 November 2019
10 and copied to parties

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