EMPLOYMENT TRIBUNALS

Claimant: H

Respondent: G

Heard at: **Bristol** **On:** **11, 12 and 13 October 2021**

Before: **Employment Judge Livesey**
Mrs D England
Ms L Simpson

Representation
Claimant: In person
Respondent: Mr M Jackson, counsel

JUDGMENT

1. The Anonymisation Order of 1 May 2020 is varied by consent to the extent that Judgments and Orders in these proceedings will include the case number.

2. The Claimant's complaint of unlawful deductions from wages is dismissed.

3. The Claimant's complaints of unfair dismissal and breach of contract succeed and those of direct discrimination on the grounds of sex and harassment succeed in part and she is awarded compensation in the total sum of £27,610.62, calculated as follows;
   (i) Unfair dismissal;
      (a) Basic award; £2,024.00
      (b) Compensatory award; £350.00

   (ii) Discrimination and harassment;
      (a) Injury to feelings; £18,000.00
      (b) Other losses; Nil
      (c) Interest; £5,212.62

   (iii) Breach of contract; £2,024.00

4. The recoupment provisions do not apply in these circumstances.

REASONS

1. The claim

1.1 By a Claim Form dated 19 October 2018, the Claimant brought complaints of unfair dismissal, discrimination on the grounds of sex, breach of contract relating to notice and unlawful deductions from wages.

1.2 The complaint of unfair dismissal was originally brought under both ss. 98 and 103A (public interest disclosure), but that alternative claim was dismissed upon withdrawal on 23 July 2019.

1.3 The claim was originally brought against two respondents. The claim against the Second Respondent, Post Office Ltd, was dismissed upon withdrawal on 31 January 2019.

2. The evidence

2.1 The Tribunal heard oral evidence from the Claimant and the Respondent. A number of additional written witness statements were provided. The Claimant provided statements from former colleagues; Ms M, Ms C, Mr S, Ms S1 and Ms S2, and the Respondent provided a statement from his accountant, Mr. P, all of whose identities were protected to ensure compliance with the orders under rule 50.

2.2 The following documents were produced during the course of the hearing;

R1; Hearing bundle (documents);
R1; Bundle of Tribunal documents and orders;
R3; Respondent's counsel's Skeleton Argument on jurisdictional issues;
R4; Respondent's counsel's Skeleton Argument on liability;
C1; Emails and attachments which were disclosed on the morning of the second day of the hearing by the Claimant.

3. The hearing

4.1 The case had been made the subject of restricted reporting and anonymisation orders under rule 50 covering the claim number, the identity of the Claimant and the Respondent and their workplace (R2, pages 73-6). The parties agreed by consent for the orders to be amended to exclude the case number.

4.2 Various issues of disclosure arose during the hearing. They were dealt with by consent, but only a few extra documents were produced into evidence (C1).

4. Relevant background

4.1 The claim had a long and rather convoluted history. There had been six Preliminary Hearings (3 May, 23 July and 6 November 2019 and 25 February, 20 April and 15 May 2020). It had also been listed for a full

merits hearing on four occasions (in November 2019, February 2020, December 2020 and this hearing).

4.2 At the Preliminary Hearing which took place on 23 July 2019, Employment Judge Midgley found that the claims had been issued out of time but extensions were granted under the relevant statutory provisions to enable them to proceed (R2, page 51, paragraph 29.1). He also confirmed that the Claimant had been the Respondent's employee, a matter which had been conceded at an earlier hearing before Employment Judge Housego (see R2, page 42, paragraph 3.2 and page 48, paragraph 7), and that she had been dismissed (R2, page 48, paragraph 13).

4.3 It was also relevant that there has been a fact finding hearing in the family court on 15 January 2019 before HHJ Wildblood QC. The Judge addressed seven allegations of violence allegedly perpetrated by the Respondent against the Claimant between December 2011 and 23 March 2018 in a domestic setting, six of which were found to have been proved. The relevance of those findings and the Judgment has been addressed below.

5. The issues

5.1 Employment Judge Bax comprehensively recorded the issues for determination in the case in his Case Management Summary of 15 May 2020 (R2, pages 64-6, paragraphs 40-7). They were re-visited with the parties at the start of the hearing.

5.2 Unfair dismissal; the Respondent argued that the Claimant had been dismissed for some other substantial reason, although the ultimate reason put forward in closing submissions changed from that recorded by Employment Judge Bax (mutual termination by consent). Mr Jackson conceded that no fair procedure had been followed but argued that a dismissal would have occurred in any event (the *Polkey* point).

5.3 Harassment; the Claimant pursued six allegations of harassment between May 2012 and May 2018 (R2, pages 64-5, paragraph 41.1.1-41.1.6). She also pursued a further specific allegation of sexual harassment (paragraph 42.1.1).

5.4 Direct discrimination; in the alternative, the Claimant argued that the allegations of harassment constituted direct discrimination under s. 13. She also argued that her dismissal was an act of direct discrimination.

5.5 Notice; the Respondent conceded that the Claimant had been dismissed without notice at the start of the hearing.

5.6 Wages; this claim had been identified within the Case Summary of 23 July 2019 as relating to one week's wages (R2, page 49, paragraphs 19 and 20). The Claimant confirmed that that was the case at the start of the hearing also.

6. Preliminary issues

6.1 Two preliminary issues were addressed at the start of the hearing.

6.2 The first concerned the allegation of sexual harassment recorded at paragraph 42.1.1 of Employment Judge Bax's Case Management Summary (R2, page 65). The Respondent contended that the allegation occurred other than within an employment setting and ought not to have been the subject of this claim.

6.3 Having heard argument from both sides, it was clear to us that the incident had occurred at home (see paragraph 3 (h) of the Claimant's witness statement) and it was the same allegation as that which was addressed by HHJ Wildlood QC between paragraphs 13 to 19 of his Judgment (R1, pages 20-2), albeit that it had been misdated. The Claimant accepted during her submissions that the assault "*was not from the employment relationship.*"

6.4 Mr Jackson produced a lengthy Skeleton Argument on the issue (R3), the points in which were, perhaps, more succinctly addressed through the application of s. 40 of the Equality Act;

> "*An employer (A) must not, in relation to employment by A, harass a person (B)..*"

The simple point was that the assault, which arose in a purely domestic setting, had not occurred 'in relation to employment'. The Tribunal agreed and the allegation was dismissed *as* an allegation, but that decision did not prevent the Claimant relying upon it as background evidence.

6.5 The second preliminary issue concerned the extent to which the Respondent could have challenged the findings reached by HHJ Wildblood QC. Mr Jackson only sought to cross-examine the Claimant upon the matter referred to above (the allegation of sexual assault which she relied upon as background evidence). The Judge nevertheless considered that he may have been estopped from doing so by the operation of the doctrine of issue estoppel.

6.6 Issue estoppel generally acted to prevent a party from seeking to pursue a claim which was dependent upon the same facts which had been the subject of earlier litigation between the parties. For the earlier determination to bind the subsequent tribunal, it ought to have been a necessary ingredient of the cause of action in the previous proceedings (*Arnold-v-Nat West Bank* [1991] 2 AC 93, HL, following *Thoday-v-Thoday* [1964] P 181, CA), although that test had been applied fairly liberally in some of the subsequent decisions.

6.7 The Tribunal read the relevant parts of *IDS* on *Employment Tribunals Practice and Procedure,* paragraphs 2.115-119 to the parties. The Judge particularly highlighted the cases of *Soteriou-v-Ultrachem* [2004] IRLR 870 and *Deman-v-The AUT* EAT 142/03. The thrust of the Respondent's submissions was that the findings made by HHJ Wildblood QC had not been a necessary ingredient to the child arrangements order which was ultimately made under s. 8 of the Children Act 1989. He relied upon the decision of *The Sennar* [1985] 2 All Er 104, particularly at paragraph f, page 106;

"*To make available an issue estoppel to a defendant to an action brought against him in an English court on a cause of action to which the plaintiff alleges a particular set of facts give rise, the defendant must show (1) that the same set of facts has previously been relied on as constituting a cause of action in proceedings brought by that plaintiff against that defendant in a foreign court of competent jurisdiction and (2) that a final judgment has been given by that foreign court in those proceedings.*"

6.8 The case before HHJ Wilblood QC concerned proceedings under s. 8 which, under Practice Direction 12J of the Family Procedure Rules, specifically required the court to have close regard to any findings of coercion, abuse or violence when making such an order (see paragraphs 35 to 37 in particular). That was clearly why the fact finding hearing had taken place. An issue estoppel therefore arose because the findings made by the Judge had been a necessary ingredient to the making of the child arrangements order under the Children Act. Mr Jackson could not therefore seek to challenge the findings in respect of exactly the same factual matter which the Claimant relied upon as background evidence to support her claims. *The Sennar* appeared to have been a decision which related specifically to foreign judgments but the test within Lord Diplock's judgment had been met; the facts asserted in the family case had supported the cause of action brought and a final judgment on those issues had been given.

7. The facts

Introduction

7.1 The following factual findings were reached on the balance of probabilities. The Tribunal attempted to restrict its findings to matters which were relevant to a determination of the issues. Page numbers within each relevant divider have been cited below in square brackets and relate to the contents of the bundle R1, unless otherwise stated.

7.2 The Respondent leased a post office from Royal Mail and held the position of Sub-Postmaster. A retail shop was also run within the premises and he also ran a separate property portfolio.

7.3 The Claimant, his wife, was employed on a full-time basis, although she was only ever paid for 16 hours work. She initially worked as a clerk from 21 August 2006, but effectively managed the Post Office from 2013. The Respondent had stepped away from active management of the business in 2013 for four years as a result of illness.

7.4 The Claimant had been provided with a contract at the start of her employment [F1]. Her role as manager was to oversee the day-to-day management of the Post Office's procedures, to train staff, to order stock and to arrange the staff rotas.

7.5 The Claimant and the Respondent had met in 2005 and had married in July 2010. Their children had been born in 2008 and 2009. HHJ Wildblood QC described the Claimant is having a "*volatile and voluble side*" (paragraph 2) [B16]. He described the Respondent as follows;

> "*Having seen the father and read the case and heard the evidence, I find that within this relationship he was controlling, coercive and strong in his opinions. I find that he has a quick temper and at times during the marriage became enraged with the mother.*" (paragraph 3 [B16])

He found that the Respondent had slapped the Claimant (paragraphs 7 and 12), threatened to kill her (paragraph 8), grabbed her and caused her to fall to the floor (paragraph 10), physically and sexually assaulted her (paragraph 19) and pushed a drill against her arm and injured her (paragraph 20).

7.6 It was important to note that the former matrimonial home was a different and discreet property from the business premises.

Evidence

7.7 The allegations in the case were primarily addressed through the evidence of the parties, the only witnesses who gave oral evidence and were cross-examined.

7.8 The Claimant's evidence, however, was strikingly supported by some written witness statements; female employees who claimed to have been shouted out and belittled in front of others by the Respondent and other employees who heard and saw the Claimant treated in the way which she described, at least to some extent [A1-9 and A15-6]. It was notable that another male employee did not complain of having received the same treatment himself (Mr S [A5-6]), although he did witness some of the Respondent's treatment of the Claimant and his misogynistic demeanour towards women generally. There were also reviews from customers from the Yell.com website which echoed some of the other evidence [G25-7]. The Respondent appeared to discount them on the basis that he thought that he had attracted 'ire' in the local community because of his ethnicity (paragraph 8 of his witness statement [A20]).

7.9 The Claimant herself was cross examined on the basis that she was dishonest. There were two primary lines of cross-examination; that she had dishonestly put people onto the payroll who were not employees simply so that they could gain benefits ('EG' and 'ZP' [H2-3], [H15] and C1). Secondly, it was alleged that she had assisted in the use of one or more of the Respondent's rental properties to enable others to gain benefits [H19, 31 and 76].

7.10 We found the Claimant's accounts about her ignorance and lack of involvement in benefits claims allegedly perpetrated through the Respondent's properties to have been credible. The Respondent's evidence of such appeared thin. Her account of her ignorance about the payment of EG and ZP through the payroll was, however, less convincing. But that allegation cut both ways because we could equally not accept that the Respondent had been ignorant of the payments since they appeared to have gone through the books and he received emails enclosing payslips to them (C1).

7.11 Crucially, however, on the central allegations, we found the Claimant's evidence compelling. She had a memory which reflected the age of many of the allegations. Her accounts were corroborated by the written witness

statement, but not in a way which created suspicion. They did not, for example, repeat the allegations made by the Claimant precisely. She also did not over-egg or exaggerate her case. For example, she downplayed the force that had been used in the first allegation of harassment.

7.12 On the other hand, the Respondent was evasive when he gave evidence; he had to be asked to answer simple, direct questions in a straightforward manner more than once. We had four specific concerns about his evidence;

(i) Having stated that he had never struck his wife, he did not dispute the accuracy of the police log which contained his clear admission to that effect [G13] or HHJ Wildblood QC's recitation of it at paragraph 10 of his judgment [B19]. He simply said that he could not remember what he had told the police. We found that part of his evidence to have been most unsatisfactory;

(ii) Having said that, during a series of illnesses between 2013 and 2017, he did not have any dealings with the business, he later said that he had been to the accountant with his wife on two or three occasions during that time and that he may also have signed employee contracts;

(iii) He had, in our judgment, clearly attempted to accuse the Claimant of having been involved in the loss of £9,000 from the business (paragraph 13 of his witness statement [A18]) but, when cross-examined about it, he shied away from the allegation and even wanted to withdraw it entirely;

(iv) He was asked about the written witness evidence from other employees which the Claimant had produced. He could not explain their evidence, stating that he considered that they had all left amicably. He alleged that their accounts must have been 'suggested' to them by the Claimant, an allegation that was never put to her in cross-examination.

<u>Allegations</u>

7.13 We dealt with the allegations of harassment within paragraph 41 of the Case Summary of 15 May 2020 in turn (R1, pages 64-5);

1. The Respondent struck the Claimant in the face at work in May 2012;

   The Claimant said that she remembered the date because the Respondent had been arrested around that time and made the subject of bail conditions. She said there had been an argument at home which had continued at work. The incident had occurred near the counters but the contact had been more of a push than a slap or strike. The Respondent flatly denied the allegation.

   On the basis of the evidence which we heard and in the context of the other evidence to which we had been referred, we concluded that the incident probably occurred as alleged by the Claimant;

2. The Respondent pushed the Claimant to the side and shouted at her in March 2018;

The Claimant could not say whether her colleague, Ms S2, had been present at the time. Otherwise, she reiterated the account in her witness statement.

Again, we accepted her evidence on that issue despite the Respondent's further denial;

3. The Respondent aggressively asked the Claimant to move from her chair when serving an Eastern European or black customer in March 2018;

   The Claimant's case was that the conduct had arisen from the Respondent's jealous and controlling conduct. She considered that he believed that other ethnicities preferred blonde women, like her. She had previous experience of his jealousy in that respect. She recounted how he had said '*move from the chair*' in an aggressive manner but she did not allege that he had said anything in relation to the ethnicity of the customer, which would have been overheard.

   Again, we found that the event occurred. We also found that the Claimant's assumption about the Respondent's motivation, knowing him as she did, was credible;

4. The Respondent frequently apologised to customers for the Claimant stating that she was blonde and stupid, in February and March 2018;

   The Claimant alleged that such comments were repeatedly dropped into conversation. Again, we accepted her evidence in that respect;

5. On 20 March, the Claimant received a text message from a colleague to the effect that the Respondent no longer wanted her to attend work;

   There was no doubt that she was dismissed as described as a result of Employment Judge Midgley's findings;

6. After the end of her employment, during May 2018, the Respondent told customers that she was no longer worked at the Post Office because she was having an affair with a neighbour;

   This information came from Ms S1 [A9]. The evidence was, however, somewhat vague; it was not clear whether she had witnessed the Respondent informing customers to that effect herself or whether it was second hand reported hearsay. We considered that the quality of the evidence made a finding that it had probably happened unsafe.

Dismissal

7.14 On 20 March 2018, the Respondent accepted that he had instructed Ms S2 to send the following message to the Claimant. The message is quoted in a form slightly amended from that shown in the Case Summary of 23 July 2019 (R2, page 48) as a result of the Tribunal seeing the original message;

"*Hi M* [full name abridged], M [full name abridged] *has asked me to tell u not come in tomorrow or until further notice I'm really sorry I have being put in this position I thought u 2 had sorted things* XXX"

Employment Judge Midgley found that to have been a dismissal which had been intended as such (R2, page 48, paragraph 13).

Subsequent events

7.15 On 23 March 2018, the Claimant was assaulted again at home (paragraphs 20 to 22 of HHJ Wilblood QC's judgment [B22-3]). That precipitated a police complaint and social services' involvement. The Claimant was arrested and bailed. The Claimant obtained an anti-molestation order against him in April 2018. She filed for divorce and obtained a decree nisi on 17 August 2018.

7.16 The Respondent was suspended by the Post Office and had his contract terminated in June 2018.

8. Conclusions

Unfair dismissal

8.1 Although the reason relied upon by the Respondent for dismissal was ultimately different in closing submissions from that originally suggested to Employment Judge Bax, the Tribunal nevertheless accepted that it could have been, and probably was, the fair reason for dismissal in this case; 'the ending of a professional relationship which was so closely connected to a personal one' (see R4, paragraphs 20-22).

8.2 It was accepted that the dismissal had been unfair under s. 98 (4) in that no procedure or process of any sort had been followed.

Harassment; legal principles

8.3 Under s. 26, not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17). Conduct was 'related to' a protected characteristic if, in context, sufficient nexus was demonstrated between the characteristic and the conduct (*Warby-v-Wunda Group* EAT 0434/11). It was accepted that conduct 'associated with' a protected characteristic would have been covered (see the citation from *Harvey on Industrial Relations and Employment Law* within paragraph 2 of the Respondent's Skeleton Argument, R4).

8.4 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564, the mixed objective/subjective approach. A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

8.5 It was important to remember that the words in the statute imported

treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Harassment; conclusions

8.6 We re-visited each of the allegations within paragraph 41.1 of the Case Management Summary on 15 May 2020 (R2, pages 64-5);

1. We had determined that the allegation had occurred as alleged by the Claimant. It related to her employment within the meaning of s. 40. The Respondent did not challenge that point.

   The Respondent's main argument was that the allegation had not 'related to' the protected characteristic of sex.

   The Respondent was a man who had been married to this female Claimant. In the marriage, he had been coercive, controlling and subjugating. This allegation of harassment was a demonstration of further conduct of that type. There was no evidence that he had exhibited similar conduct to men generally. Female employees complained of similar treatment experienced by them. The only male employee who had provided a statement, Mr S, had complained of no similar treatment himself, but he had described the Respondent as having demonstrated a high-handed, misogynistic approach to women. The Tribunal therefore concluded that this allegation related to sex.

   The Respondent argued that that approach was wrong. Mr Jackson cited an example of a bisexual person (paragraphs 4-5 of his Skeleton Argument, R4). We did not consider that example to have been helpful as it was not factually similar to the parties' positions.

   The act complained of had the prohibited purpose or effect and therefore constituted harassment under s. 26;

2. This allegation fell to be dealt with in the same way;

3. This allegation also constituted harassment, perhaps more so because we accepted the Claimant's belief that it had, at least in part, related to the Respondent's jealousy over her possible relationship with people of opposite sex;

4. The Respondent did not challenge the fact that this allegation related to sex. All other element of the test were met;

5. The Tribunal did not consider that the Claimant's dismissal had been an act of harassment. It did not fall into the same category, character or species of conduct reserved for acts covered by s. 26 (see *Grant* above);

6. This allegation had not been proved and was dismissed.

Direct discrimination; legal principles

8.7 The remaining claim which fell to be dealt with under s. 13 of the act was that of dismissal (R2, page 66, paragraph 43.1.1).

8.8 The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

8.9 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of her sex, because of her sex.

8.10 Following the recent clarity provided from the case of *Royal Mail-v-Efobi* [2021] UKSC 33, it was important that a tribunal did not draw inferences from a *lack* of an explanation for the treatment from the Respondent. The Respondent's explanation was only examined, if provided, once the burden of proof had shifted.

8.11 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

Direct discrimination; conclusions

8.12 The real question here, as the Respondent's counsel correctly pointed out,

was the reason for the Claimant's dismissal. The Claimant said in evidence that she believed that she was being punished, although she was not clear what for. The Respondent argued that the most likely finding was that the Claimant's dismissal had been because of their failed relationship. As such, it had not been a dismissal because of her sex, but because of relationship breakdown. Mr Jackson relied upon the decisions in *Martin-v-Lancehawk* UKEAT/0525/03 and *B-v-A* [2007] IRLR 576, especially at paragraph 7 and 24. He asserted that the correct comparator was a homosexual male.

8.13 Mr Jackson's arguments were compelling and the Tribunal gave them a lot of thought. We had, however, found that much of the Respondent's treatment of the Claimant had related to sex under s. 26. We drew an inference that her dismissal had also been, at least in part, influenced or tainted by the fact of her sex. We drew that inference from the findings made under s. 26, the evidence of the treatment of other female staff and the experience of the other male member of staff, as referred to above.

8.14 The burden of proof therefore shifted to the Respondent for him to demonstrate a non-prohibited reason for the conduct complained of, the dismissal.

8.15 At the end of his evidence the Tribunal asked the Respondent why he dismissed the Claimant. He initially said that he had not done so, an answer which was plainly inconsistent with previous findings. He was given another chance. He then said that he had had to dismiss her because of his bail conditions, which included the requirement not to have been within 100m of her. Those conditions were, however, only imposed following his arrest on 23 March, whereas the Claimant had received her text message of dismissal three days earlier, on the 20th. His explanation therefore simply did not work. The inference was not rebutted and the Respondent did not discharge the burden upon him.

8.16 In respect of cases of *Martin* and *B-v-A*, this was not just a failed relationship case. This was a Respondent who had demonstrated a particular demeanour and animus towards women generally and the Claimant in particular. We considered that the dismissal was partly due to the nature of the Respondent's relationship with the Claimant, but he did not rebut the inference that it was also materially influenced by sex. The protected characteristic had been an effective part of the dismissal which, following *Barton-v-Investec*, as recently approved in *Efobi* above, was a prohibited cause. It was effective and significant and more than trivial. Accordingly, the complaint of direct discrimination relating to dismissal also succeeded.

Breach of contract (notice)

8.17 This claim was conceded.

Unlawful deductions from wages

8.18 This claim failed and was dismissed. The Claimant was dismissed on 20 March 2018 and had been paid up to that date.

9. Remedy

9.1 The Tribunal heard further evidence from the Claimant and submissions from both parties on a number of issues relating to remedy as it addressed each item in the Schedule of Loss [C1-4].

Unfair dismissal; basic award

9.2 This was agreed in the sum claimed, £2,024.

Unfair dismissal; compensatory award

9.3 A figure of £350 was agreed for loss of statutory rights.

9.4 The Respondent argued, under the principles of *Polkey*, that the Claimant would have been dismissed in any event as a result of the imposition of bail conditions upon him on or about 23 March 2018 or, at the latest, upon him losing the Post Office in June of that year.

9.5 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might have concluded that a fair of procedure would have delayed the dismissal, in which case compensation could have been tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

9.6 It was for the employer to adduce relevant evidence on that issue, although a tribunal had to have regards to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may well have been circumstances when the nature of the evidence was such as to make a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not have been reluctant to undertake an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

9.7 For *Polkey* to have operated at all, the Tribunal had to be satisfied that the Claimant would have been dismissed fairly on either of the occasions suggested by the Respondent. Mr Jackson submitted that the Respondent would not have been able to dismiss her himself, nor would he have been able to instruct others to do so, without breaching his bail conditions which prevented either direct or indirect contact. He nevertheless argued that that ought not to preclude him from running a *Polkey* argument.

9.8 In relation to the first date proposed by the Respondent, on or about 23 March, the Tribunal noted that the Claimant had been assaulted in 2012 and the Respondent had been arrested and subjected to bail conditions. Her employment had continued whilst we stepped away from the business then. Similarly, when he had been ill between 2013 and 2017, he stepped away again. We considered that there was no obvious reason why a bail condition preventing contact in March 2018 would have brought the Claimant's employment to an end then, given that that was what had

occurred earlier.

9.9 As to the second date proposed by the Respondent, if the Claimant had been in work when a new Sub-Postmaster had been appointed in June 2018, the Tribunal again saw no reason why her employment would have ended then. More likely, she would have been transferred to the new enterprise under TUPE or her skills and knowledge would have been retained in some other way.

9.10 Further and in any event, if the Claimant had been dismissed on either occasion, there was no evidence upon which we could have concluded that that dismissal was likely to have been fair. The Respondent gave no evidence about his understanding of principles of good industrial practice. Mr Jackson argued that *Polkey* ought not to have been prevented from applying because the Respondent could not have followed the ACAS or any other fair procedures because of his bail conditions. Not only, in our judgment, was it unlikely that he would have done so, even if he could have, but the argument was extremely unattractive. Effectively, he was attempting to benefit from the imposition of bail conditions following his arrest for matters which were found to have been proved by HHJ Wildblood QC on 23 March 2018. Under s. 123, the Tribunal had to award compensation which was just and equitable in all of the circumstances. To approach the calculation as Mr Jackson wanted us to would have been to have ignored that fundamental principle.

9.11 Nevertheless, there was a more significant difficulty. The Claimant had become ill very soon after her dismissal and within her notice period, so much so that she was unable to work until September 2021. Her mental health was subsequently treated by her GP with medication and counselling. There was, however, no evidence as to its cause [D24].

9.12 The Tribunal took time to explain the legal position to the Claimant, with which Mr Jackson agreed; the Respondent sought to argue that the Claimant's loss of earnings ended upon the supervening medical event, her inability to work as a result of her mental health. The Claimant could counter that argument if she was able to demonstrate that her ill-health had been caused by the circumstances of her dismissal. Not only was the Claimant very keen to conclude all matters at the hearing without a postponement in order to secure medical evidence to that effect, but she also recognised that it was unlikely that she would have been able to demonstrate that her ill-health had been caused by that matter, as opposed to the protracted domestic abuse over the previous months and years. She therefore did not pursue her past loss of earnings claim. Had she pursued it, it was also likely that there would have been a significant amount of recoupment as a result of her receipt of benefits.

9.13 The Claimant had also claimed two years of future loss of earnings in her Schedule. Having recovered sufficiently to have been able to return to work in September 2021, she was working as a self-employed beautician, having obtained qualifications in 2019 and 2020. Although she did not consider her business to have been successful so far, she estimated that she had seen 5 to 6 clients per week and was charging between £25 and £40 per session, £125-£240. There had been personal issues which had hampered her profitability which, she hoped, would have been resolved

soon.

9.14 On the basis that the Claimant had earned £184/week with the Respondent, the Tribunal did not consider that a future loss award was merited on the basis of the evidence which it heard. The Claimant's earnings were already close to, if not beyond, their pre-dismissal level and there was every expectation that a further increase could have been reasonably expected.

9.15 The Claimant also abandoned her claim for pension loss. The loss appeared to be small, was unproved and, if further evidence was to have been produced, it was likely that a postponement would have been required, which she did not want.

9.16 An uplift under s. 207A of TULRCA was not appropriate given that the Claimant had been dismissed for some other substantial reason, not conduct or capability (see *Holmes-v-Qinetiq* [2016] ICR 1016).

Breach of contract (Notice)

9.17 The sum for breach of contract was agreed as having been £2,024.

Harassment, direct discrimination and interest

9.18 In light of the Tribunal's other findings, the only remaining award in respect of the complaints of harassment and discrimination related to injury to feelings and interest.

9.19 The Tribunal considered the original bands of awards set by the case of *Vento-v-Chief Constable of West Yorkshire Police* [2003] IRLR 102 CA, as uplifted by the case of *Da'Bell-v-NSPCC* [2010] IRLR 19 EAT and *Simmons-v-Castle* [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation; *Beckford-v-Southwark LBC* [2016] IRLR and *King-v-Sash Window Workshop Ltd* [2015] IRLR 348 and, more recently, *De Souza-v-Vinci Construction (UK) Ltd* EWCA Civ 879). Most importantly, we considered the Presidential Guidance that was issued on 5 September 2017 which was updated in March 2018 and which had been applicable when the claim was issued. It specified the following bands; £900-£8,600 in respect of less serious cases including, for example, cases in which there had been one-off acts of discrimination, £8,600-£25,700 for cases which did not merit an award the upper band, and £25,700-£42,900 for the most serious cases where there had been a lengthy campaign of discriminatory harassment which had had a profound effect on the victim.

9.20 When reaching a figure for injury to feelings, we remained aware that the award that we made had to be compensatory and just to both parties. It should have been neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. We also tried to bear in mind the value in everyday life of the particular sum that we chose to award, particularly in the context of the Claimant's salary. We had an eye on the range of awards made in personal injury cases, although we did not find that yardstick particularly useful in this case. We also took account of the severity of the treatment, it's length and the extent to which it affected other aspects of the Claimant's life.

9.21 We had to be careful to avoid compensating the Claimant for matters arising out of her domestic relationship with her husband. We focused only upon the causes of action pursued within the proceedings which had succeeded. Although she had not produced medical or other evidence which might have demonstrated the causative impact of her dismissal and treatment at work upon her subsequent mental health, we had little difficulty in accepting that it had not been insignificant. She told us in evidence that that she had felt belittled and worthless and that comments, such as the references to her as a 'stupid blonde', caused her to question her abilities, both at work and when she went to college to gain the skills which she now used in her beauty business. She said that she had struggled to move on.

9.22 The Respondent contended for an award at the top of the lower *Vento* bracket. We considered that an award in the middle bracket was justified. This was a serious case involving some sustained conduct. Although the allegations, taken together, did not constitute a 'campaign', it was certainly not one of the least significant cases of its type justifying an award within the lower bracket. The right award for injury to feelings was one of £18,000.

9.23 As to interest, the individual allegations of harassment and discrimination occurred between May 2012 and May 2018. Mr Jackson proposed a calculation date from 1 March 2018, given that the majority of the allegations post-dated that point. It was agreed. Interest was therefore calculated at 8% as £5,212.62.

Employment Judge Livesey
Date 14 October 2021

Judgment & reasons sent to parties: 28 October 2021

FOR THE TRIBUNAL OFFICE