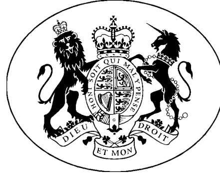

EMPLOYMENT TRIBUNALS

Claimant: Ms K Papadopoulou

Respondent: Essential Site Skills Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 19, 20 and 21 April 2022

Before: Employment Judge Brewer
Ms J Bonser
Mr C Goldson

Representation

Claimant: In person
Respondent: Ms E Evans-Jarvis, Solicitor

JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's claim of direct race discrimination was made out of time and is dismissed.
2. The claimant's claim of harassment related to race was made out of time and is dismissed.
3. The claimant's claim for breach of contract succeeds and the respondent shall pay damages to the claimant in the net sum of £8,690.40.

REASONS

Introduction

1. This case came before a full employment tribunal to be heard over three days dealing with the claimant's claims of direct race discrimination, harassment related to race and unauthorised deductions from wages/breach of contract.

2. The claimant represented herself and the respondent was represented by Ms Evans-Jarvis, Solicitor.

3. We had an agreed bundle of documents running to 452 pages and we had written witness statements from the claimant, Gareth Davies, former Director and CEO, Catherine Storer, Director and CEO, Nick Yoxall, Director and David Straw, Head of Finance. In the event the respondent decided not to call Mr Straw and therefore the Tribunal have given his witness statement such weight as is appropriate given that he was not present to be cross examined.

4. Given that the claimant was a litigant in person we outlined the procedure we would be following and gave her some guidance on cross examination. In the event we concluded the evidence on the first day of the hearing. We heard the parties' submissions on the morning of day two of the hearing subsequent to which the tribunal deliberated and reached a conclusion and we delivered judgement on day three of the hearing.

Issues

5. At a case management hearing on 25 March 2022 the parties agreed the following as the issues in this case:

   Time limits

   a. was the claimant's claim of race discrimination and/or harassment made within the time limit in section 123 of the Equality Act 2010?
   b. was the claimant's claim for unauthorised deductions from wages or breach of contract made within the time limit in section 23 of the Employment Rights Act 1996 or article 7 of the Employment Tribunals Extension of Jurisdiction Order 1994?

   Race discrimination

   a. did the respondent make derogatory comments in emails on 24 April 2018?
   b. if so was that less favourable treatment?
   c. if so, was that because of race?
   d. did the treatment amount to a detriment?

   Harassment related to race

   a. did the respondent make derogatory comments in emails on 24 April 2018?
   b. if so, was that unwanted conduct?
   c. did it relate to race?
   d. did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   e. if not, did it have that effect?

Unauthorised deductions

a. Did the respondent:

   i. fail to pay wages to the claimant in September and October 2020?
   ii. fail to pay to the claimant the sum of £5,000 and if so, was that a failure to pay wages within the meaning of section 27 Employment Rights Act 1996?

Breach of contract

a. Did this claim arise or was it outstanding when the claimant's employment ended?

b. Did the respondent:

   i. fail to pay wages to the claimant in September and October 2020?
   ii. fail to pay to the claimant the sum of £5,000 and if so, was that a failure to pay wages within the meaning of section 27 Employment Rights Act 1996?

c. If so, was that a breach of contract?

Date of termination

6. It follows from the agreed issues and the evidence that we are also required to make a finding as to what was the date of termination of the claimant's employment

Law

Direct race discrimination

7. Section 13(1) of the Equality Act 2010 states as follows:

   13 Direct discrimination

   (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

8. In relation to direct discrimination, for present purposes the following are the key principles.

9. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

10. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

11. The burden of proof is set out in section 136 Equality Act 2010. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

12. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, *absent* any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

13. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. race) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

Harassment related to race

14. The relevant parts of Section 28 of the Equality Act 2010 are as follows:

> ***26 Harassment***
>
> *(1) A person (A) harasses another (B) if—*
>
> > *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> >
> > *(b) the conduct has the purpose or effect of—*
> >
> > > *(i) violating B's dignity, or*
> > >
> > > *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> > *(a) the perception of B;*
> >
> > *(b) the other circumstances of the case;*
> >
> > *(c) whether it is reasonable for the conduct to have that effect.*

15. In relation to harassment, for present purposes the following are the key principles.

16. There are three essential elements of a harassment claim under S.26(1):

    a. unwanted conduct;
    b. that has the proscribed purpose or effect; and
    c. which relates to a relevant protected characteristic.

17. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT (a case relating to a claim for racial harassment brought under the Race Relations Act 1976 (RRA)). Nevertheless, he acknowledged that in some cases there will be considerable overlap between the components of the definition — for example, the question whether the conduct complained of was unwanted may overlap with the question whether it created an adverse environment for the employee. An employment tribunal that does not deal with each element separately will not make an error of law for that reason alone — **Ukeh v Ministry of Defence** EAT 0225/14.

18. In relation to unwanted conduct, the Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that this can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions (see, for example, **Marcella and anor v Herbert T Forrest Ltd and anor** ET Case No.2408664/09 below and Owens v Euro Quality Coatings Ltd and ors ET Case No.1600238/15, in which an employer's failure to remove a picture of a swastika for some weeks amounted to unwanted conduct).

19. The following have all been held to constitute unwanted conduct:

    a. office gossip — **Nixon v Ross Coates Solicitors and anor** EAT 0108/10;
    b. nicknaming a French employee 'Inspector Clouseau' — **Basile v Royal College of General Practitioners and ors** ET Case No.2204568/10; and
    c. a drip feed of comments relating to the claimant's Irish nationality, including being dubbed 'Irish', comments about terrorism and bomb making, and mimicry of his accent — **Sherlock v Barbon Insurance Group Ltd** ET Case No.2601755/11.

20. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used. In **Cam v Matrix Service Development and Training Ltd** EAT 0302/12 an employment tribunal had erred by failing to find whether or not the alleged harasser had used the expression 'white trash', given that he denied doing so.

21. In **Reed and anor v Stedman (above) and Insitu Cleaning Co Ltd v Heads** (above) (both decided before the statutory harassment provisions came into force) the EAT held that the word ‘unwanted’ is essentially the same as ‘unwelcome’ or ‘uninvited’. This is confirmed by the EHRC Employment Code (see para 7.8). The EAT in **Thomas Sanderson Blinds Ltd v English** EAT 0316/10 pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is ‘unwanted’ should largely be assessed subjectively, i.e. from the employee’s point of view. This could possibly become an issue where employee B is alleging that he or she has suffered harassment by virtue of having witnessed harassment suffered by employee C. Depending upon the circumstances, the employer might be able to argue that although the treatment was unwanted by C it did not affect B and therefore was not unwanted conduct so far as B was concerned.

22. In relation to violating dignity, there are few cases examining precisely what this means. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: ‘Not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended’. Mr Justice Langstaff, then President of the EAT, affirmed this view in **Betsi Cadwaladr University Health Board v Hughes and ors** EAT 0179/13.

23. In relation to creating an intimidating, hostile, degrading, humiliating or offensive environment, some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. (However, he noted that tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.) Langstaff P also pointed out that the relevant word here is ‘environment’, which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

24. The meaning of the term ‘environment’ was considered in **Pemberton v Inwood** 2017 ICR 929, EAT, where P, a Church of England priest, was refused a licence that would allow him to take up a position as a hospital chaplain because he had entered into a same-sex marriage against the Church’s doctrines. The EAT upheld the tribunal’s decision that this was not unlawful discrimination or harassment, because a religious occupational requirement exception applied. But the EAT also noted that the tribunal had apparently failed to engage with the question whether the decision not to grant the licence and its communication created an ‘environment’. P argued that this could be inferred from the tribunal’s findings that the refusal obviously caused him stress, would have been humiliating and degrading for someone in his position, and was a

stunning blow. However, the EAT found it hard to see that the tribunal had shown how it found that the requisite environment was thereby created.

Discrimination/Harassment time limits

25. By section 123(1) of the Equality Act 2010 a complaint of discrimination may not be brought after (a) the end of a period of three months starting with the date of the act to which the complaint relates ("the primary time limit") or (b) within such other period as the employment tribunal thinks just and equitable: the latter alternative is commonly referred to as the tribunal granting an extension.

26. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

> *'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*

27. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **section 33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

    a. the length of, and reasons for, the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the extent to which the party sued has cooperated with any requests for information;
    d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

28. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the list referred to in Keeble, a tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA, **Adadeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

Unauthorised deductions from wages

29. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

    'An employer shall not make a deduction from wages of a worker employed by him.'

30. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

31. In order to bring an unauthorised deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. a contract of employment (defined as a 'contract of service or apprenticeship'), or

    b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

32. Section 27(1) ERA defines 'wages' as:

    'any sums payable to the worker in connection with his employment'

33. This includes:

    'any fee, bonus, commission, holiday pay or other emolument referable to the employment'

    (section 27(1)(a) ERA).

34. These may be payable under the contract 'or otherwise'.

35. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

36. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — see **Greg May (Carpet Fitters and**

Contractors) Ltd v Dring 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Breach of contract

37. A breach of a contract occurs when a party fails to fulfil an obligation imposed by the terms of the contract, or indicates, by words or conduct, that the party does not intend to honour an essential term or terms of the contract when the time for performance arrives. The former is an actual breach, the latter an anticipatory breach.

38. The contractual jurisdiction of Employment Tribunals is governed by section 3 of the Employment Tribunals Act 1996 together with the 1994 Order (see above). For a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following:

    a. damages for breach of a contract of employment or any other contract connected with employment
    b. the recovery of a sum due under such a contract, or
    c. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

39. The EAT had to consider whether a claim was 'outstanding' on the termination of the employee's employment from another angle in **Peninsula Business Services Ltd v Sweeney** 2004 IRLR 49, EAT. There S was employed as a sales executive and was entitled to commission on sales. Under the terms of the commission scheme, commission on a sale made by an executive became payable in the month after the customer had paid 25 per cent of the fee. The commission only became payable, however, if the executive was still in the company's employ at the end of that month. S resigned in July 2001 and brought a tribunal claim for around £21,000 commission on sales that had not generated a commission payment before the termination date.

40. The EAT held that the employment tribunal did not have jurisdiction to hear the employee's claim for the payment of commission on sales which he had achieved during his employment but which, under the terms of the contractual commission agreement he had signed, did not fall due for payment until after the date of the termination of his employment. A claim will only be 'outstanding' within the meaning of Article 3 of the 1994 Order if it is in the nature of a claim which, as at the date of termination, was immediately enforceable but remained unsatisfied.

41. A particular question which arises in this case is whether, if there is found to be a contract between the parties as asserted by the claimant, the tribunal has jurisdiction to hear it because it is a contract in connection with the employment.

42. As set out above, proceedings may be brought in an employment tribunal under section 3 of the Employment Tribunals Act 1996, and article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994 in respect of a

claim for damages for breach of a contract of employment 'or other contract connected with employment' provided that such claim 'arises or is outstanding on the termination of the employee's employment'. In **Rock-It Cargo Ltd v Green** [1997] IRLR 581, EAT, a valid settlement agreement had been made *before* the end of the employee's employment providing, inter alia, for a lump sum to be paid to the employee on the last day of her employment. The money was not paid, the employers alleging that the employee had breached a confidentiality clause in the agreement. The employee then sought payment of the sum by bringing a contract claim in an employment tribunal. On the issue as to whether the tribunal had jurisdiction to entertain such a claim, the EAT upheld the tribunal's decision that it did have jurisdiction and rejected the employer's contention that settlement agreements were *only* enforceable in the civil courts. Kirkwood J stated that the agreement in this case was:

> *'an agreement as to the terms upon which Mrs Green's employment was to be brought to an end and is quite plainly connected with that contract of employment'.*

43. As it was conceded that it was a claim outstanding on the termination of the employment, the agreement was held to be properly enforceable as a contract claim within the meaning of section 3(2) Employment Tribunals Act 1996 and article 3 of the 1994 Order.

Date of termination of employment

44. There is in some cases a distinction between the date of termination for common law purposes and what is termed the effective date of termination (EDT) for statutory purposes.

45. The tribunal has been granted jurisdiction to hear what is effectively a common law claim for breach of contract and therefore in respect of the claimant's claim for breach of contract we are concerned with termination date for that purpose.

46. However, in respect of the claimant's claims for discrimination and harassment, given that those are statutory claims, we were concerned with the EDT.

47. In many cases the date of termination for common law purposes and the EDT for statutory purposes are the same but that is not necessarily the case for reasons which we do not need to go into in this case.

Findings of fact

48. We make the following findings of fact (references below to page numbers are to pages in the agreed bundle unless otherwise stated).

49. The respondent is a company involved in the training industry. The claimant commenced her employment on 1 May 2017. There is a dispute as to the date her employment terminated.

50. The claimant was employed as a project manager. Her line manager was Mr Nick Yoxall who, from March 2020 was also a director of the respondent

company but not a shareholder. At the material times there were three shareholders in the company being Catherine Storer, Stuart Goodman and Gareth Davies. All three shareholders were also company directors although on the evidence we heard it would appear that Mr Goodman did not play an active role in the business, or if he did, he was not involved in any of the matters to which this case relates.

51. Catherine Storer and Gareth Davies both held the title of chief executive officer (CEO) and Catherine Storer appears to have had responsibility for HR matters although we were told that Mr Yoxall was also involved in HR. Mr Davies had responsibility for sales

52. Until the date the claimant left the respondent, she had a good working and social relationship with Catherine Storer. It was also noted that the claimant and Mr Davies were and remain in a relationship and the claimant was described as Mr Davies' fiancé.

53. On 24 April 2018 there was a short exchange of emails between the claimant, Catherine Storer and Nick Yoxall [128/127]. The subject matter of the thread of emails, which was started by Mr Yoxall, was "Bloody Greeks" and it is that which the claimant says amounted to either direct discrimination because of her nationality, which is Greek, or harassment related to nationality.

54. At some point around the beginning of June 2020 the claimant expressed the wish to leave the respondent. She had discussions with her partner, Mr Davies and he in turn discussed the matter with Ms Storer. Prior to 17 June 2020 the terms upon which the claimant would leave were agreed. It is a matter of considerable dispute as to first, what those terms were, and second, whether an agreement amounting to an enforceable contract covering those terms was entered into.

55. On 15 June 2020 the claimant had a meeting with Ms Storer at which she discussed her reasons for leaving the business and discussed certain payments which the claimant says were agreed although, as we have said, that remains a matter of dispute.

56. The claimant and Ms Storer exchanged WhatsApp messages on 17 April 2020 [412] which, amongst other things, discussed how a payment of £5,000 would be made by the respondent to the claimant. The claimant was keen for the payment to be made in June and July 2020 and says that would be preferable rather than her having to "wait until" being paid "at the end of October". It would seem that Ms Storer was sympathetic to this because she took the matter up with the then head of finance Mr Straw.

57. Later on17 April 2020 Ms Storer sent a WhatsApp message to the claimant to say:

> *"If we pay it now you will be taxed on it, if we pay it in October we can put it as a redundancy payment and you won't be taxed..."*

58. The "it" being referred to is the £5,000 payment [412]. Ms Storer also arranged for Mr Straw to telephone the claimant to discuss the payment.

59. The claimant hand delivered a resignation letter to Mr Yoxall dated 15 June 2020. it appears at [227] and is in the following terms:

> *"Dear Nick*
>
> *Please accept this as my formal resignation as project manager at essential site skills. My last day of work will be 1 July 2020. I am grateful for all your support during my time here and appreciate the opportunities and development that you and essential site skills have given me. It has been a great three years working with you and the team.*
>
> *Please let me know how I can support during the transition period in my final weeks. I wish you and all the team all the success for the future…"*

60. The claimant received pay for June 2020 on 29 June 2020 [443]. The claimant also received her normal pay for July 2020, paid on 30 July 2020 [445]. The claimant was also paid for August 2020, on 28 August 2020 [442].

61. In September 2020 Mr Yoxall discovered what he believed to be the fact that the claimant had been incorrectly paid for July and August 2020 and he instructed Mr Straw to ensure that the claimant was paid nothing further. Mr Straw implemented Mr Yoxall's instruction.

62. The claimant's P45 states that the claimant's leaving date was 31 August 2020 [451].

63. The claimant commenced early conciliation on 19 October 2020, and she received her early conciliation certificate on 6 November 2020. The claimant presented her claims to the tribunal on 17 November 2020.

Discussion and conclusions

Race discrimination/harassment

64. We deal first with the question of the time limits in respect of the claims for direct discrimination and harassment.

65. The claimant did not suggest that she was ignorant of her rights to make a claim nor ignorant of anytime limits in respect of any such claim. The claimant was asked expressly why it would be just and equitable to extend time in respect of claims which were out of time in July 2018 and her response was essentially that at the time, that is in 2018, she decided not to make a claim because she simply wanted to get on with her career, she had a good working relationship with Catherine Storer, and we have found as a fact that that continued essentially until the litigation started in this case and essentially that she did not want to cause a fuss as she put it.

66. We consider that the claimant's evidence amounts to no more than that as she was making a claim for unpaid money she decided to add in the race discrimination/harassment claim.

67. The claimant is clearly intelligent and could have, had she wished, sought advice on bringing claims for discrimination and harassment in time. The delay in bringing the claim is substantial, being significantly more than two years. As we have found, the reasons for the delay were entirely of the claimant's own design. It was an express decision not to make a claim at the time the emails were received for the reasons stated by the claimant. Given the delay, there is bound to be an impact on the cogency of the evidence although that is not necessarily a significant factor given that the senders of the emails concerned are involved in this case and the emails are in the bundle. But the respondent's defence, which is essentially that the emails evidence no more than office banter, would require other evidence presumably from others in the office at the time, and given what has happened in relation to business in the last two years, including a downturn in many businesses, redundancies, furlough and indeed simply the passage of time we do consider that there would be an evidential difficulty for the respondent to respond to the claimant's claims.

68. It is true of course that if we do not exercise our just and equitable jurisdiction the claimant will not be able to bring her claims of discrimination or harassment, but there is a public interest in the enforcement of time limits and given that the burden is on the claimant to show why it would be just and equitable to extend time, and given what she has said about that, the claimant has not persuaded the tribunal that it would be just and equitable to extend time in her favour to allow the claims of direct discrimination and harassment to proceed and in the circumstances those claims are dismissed.

Unauthorised deductions//breach of contract

69. We turn then to the claim for certain payments.

70. The claimant's case is that during her employment she had entered into an agreement with the respondent that she would cease work on 1 July 2020 but she would continue to be employed during July, August, September, and October 2020. Her employment would cease on 31 October 2020, and she would then be paid a net payment of £5,000. The claimant says that she was paid for July and August but not thereafter and she was not paid the £5,000. The claimant says that this failure to pay her amounts either to unauthorised deductions from wages or a breach of contract.

71. The respondent's case is that there was no agreement and in short, they do not owe the claimant any money.

72. The first question we have asked ourselves is whether the parties entered into an agreement at all. The second question is if so, what were the terms of that agreement?

73. The Tribunal did not find any of the witnesses particularly credible in relation to much of their evidence but in general we found the evidence of Mr Storer the least credible of all. Ms Storer started her cross examination by effectively saying that she had had no discussions about the termination of the claimant's employment. When pressed, she accepted that she had had discussions with Mr Davies, and she said that what she had meant was that she had not had discussions with the claimant. The WhatsApp messages at [412] suggest

otherwise. The content of the claimant's message on 17 June 2020 at 14:29 to Ms Storer very strongly suggests that the claimant spent some time on 15 June 2020 with Ms Storer setting out why she was leaving the business. The claimant also said in her message that she would like to receive “the” £5,000 in two tranches in June and July rather than wait until October. The use of the word “the” in relation to the lump sum clearly indicates that the claimant understood that Ms Storer would know what she was talking about and that there was no ambiguity about what had been agreed to be paid.

74. Ms Storer's message in response is not to question what the claimant means by the £5,000 payment, nor why there is a reference to payment in July, nor why there is any reference to any payment in the claimant’s October pay.

75. The Tribunal's conclusion is that Ms Storer was well aware that the claimant and the respondent had agreed precisely as the claimant says, that she would remain employed until the end of October, be paid during the period July to October 2020, and then receive the £5,000 lump sum.

76. Ms Storer also said in her oral evidence that an agreement had been made between Mr Davies and the claimant but that he had not agreed that with Mr Yoxall, the claimant’s line manager, and given the difficult trading situation, such a deal should have been agreed by all of the shareholders.

77. However, there was no evidence before us that Mr Davies, if he did reach an agreement on his own with the claimant, required shareholder approval and there is nothing in the Companies Act 2006 to suggest that a director is required to get shareholder approval for what amounts to an agreement about the termination of an employee’s employment. Further, there is no suggestion, no evidence and it formed no part of the respondent’s case, that Mr Davies did not have express or implied authority to enter into such an agreement on behalf of the respondent. It is no answer to that to say that he was the claimant's fiancé and therefore had an interest in the deal being done with her. We had no evidence about the financial arrangements between Mr Davies and the claimant and there was no evidence that he benefited personally from the deal done with the claimant.

78. We find that Ms Storer was well aware of the agreement between the respondent and the claimant, and that Mr Yoxall was expressly excluded from involvement in the agreement, which explains why, when he discovered the claimant had been paid for July and August 2020, he put a stop to further payments. He reasonably concluded that an error had been made. It also explains why the leaving date in the claimant’s P45 is said to have been 31 August 2020 since that was the last date for which the claimant received pay.

79. We find on all the evidence before us that there was an enforceable contract between the respondent and the claimant, the terms of which were that the claimant would leave work on 1 July 2020, she would then be on what was effectively gardening leave until 31 October 2020, she would receive her normal pay during the period of garden leave and on termination of her employment would receive a net payment of £5,000. That agreement was entered into prior to Monday 15 June 2020, the day upon which the claimant had her discussion

with Ms Storer. The offer was the proposal to allow the claimant to go on gardening leave and then to pay her a lump sum. It is irrelevant who's suggestion this was. The fact is only the respondent could make an offer of those terms even if they were suggested by the claimant. The consideration from the respondent was allowing the claimant to be paid whilst not working and to pay the £5,000 lump sum. The consideration from the claimant was her agreement not to pursue, through legal proceedings, the issue of what she saw as the breakdown of her relationship with Mr Yoxall. The claimant's acceptance of the offer is evidenced by her conduct which is to say she left work on 1 July 2020 and did not raise the issue of the relationship breakdown until the respondent, she says, breached the agreement.

80. On 17 June 2020 the claimant asked to amend the agreement so that she would receive the lump sum earlier, but the agreement was not amended because Mr Straw advised that if she was paid the £5,000 during June and July it would be taxed, and the reason he gave that advice is quite clearly because in that period the claimant was to remain employed and therefore the sum could not be paid free of tax. This also explains the reference to the possibility of treating the £5,000 payment as a redundancy payment (see WhatsApp message from Catherine Storer on 17 June 2020 at 15:28 [412]) at the end of October because at that point the claimant would cease to be in employment. Given that this was Mr Straw's suggestion, it is clear that he too was aware of the agreement that had been entered into.

81. Given that we have found that there was an agreement in the terms set out above, the next question is whether that was an employment contract or a contract in connection with employment. To that end we refer to the case of **Rock-It Cargo Ltd v Green** (above). Although that case dealt with a settlement agreement under the Employment Rights Act 1996, we consider that the principle is equally applicable to what we may refer to as a common law settlement agreement as is the case here. The parties entered into a contract dealing with the orderly termination of the claimant's employment and what payments were to be made in respect of that, and we see no reason why, given that the agreement was made during the claimant's employment, that agreement should not be justiciable under the Employment Tribunals Act and the 1994 Order.

82. In relation to the date of termination we consider that the matter is straightforward. The claimant and the respondent had an agreement that the claimant's employment would terminate on 31 October 2020. There is no evidence that either the claimant or the respondent brought the employment to and end prior to that date. The only potential evidence of an earlier termination date is the P45. But as we heard, that is automatically generated and was no doubt automatically generated once Mr Straw had acted upon Mr Yoxall's instruction that the claimant should receive no further pay. We do not criticise Mr Yoxall for giving that instruction because, as we have said, he was clearly unaware of the agreement that had been reached between the claimant and the respondent. We do not know why Mr Straw did not raise the matter of the agreement with Mr Yoxall nor why he did not take it up with Ms Storer or indeed Mr Davies.

83. Therefore, we find unanimously that contrary to the agreement reached between the parties, the respondent failed to pay the claimant her normal pay for September and October 2020, and in so failing mace unauthorised deductions from wages and acted in breach of contract, and failed to pay her the agreed net sum of £5,000 on 31 October 2020, and in so failing acted in breach of contract and accordingly we give judgement in favour of the claimant.

Remedy

84. The respondent shall pay to the claimant damages in the net sum of £8,690.40 and the respondent shall either account for tax on that sum or alternatively ensure that the correct grossed up sum is paid to the claimant should she have to account for tax on the whole or any part of it.

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Employment Judge Brewer

Date: 21 April 2022

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