EMPLOYMENT TRIBUNALS

Claimant: Miss A Tariq

Respondents:
1. Smart NYD Ltd, trading as New York Diner
2. Mr Mojahid Hussain
3. Ms Shabnam Khan

Heard at: Manchester **On** 30 January 2023 (in person)
31 January and 1-3 February 2023 (CVP)
30 March 2023 (in the absence of the parties)

Before: Employment Judge Horne

Members: Ms V Worthington
Mr D Mockford

REPRESENTATION:

Claimant: In person
Respondents
1. Mr Hussain, director
2. In person
3. In person

RESERVED JUDGMENT

Majority decision

By a majority (the employment judge dissenting), the tribunal concluded that the claimant did not have a disability within the meaning of section 6 of the EqA.

Unanimous decisions

The following decisions were made unanimously by the tribunal:

1. The claim against Smart NYD Ltd is struck out on the ground that it is not actively pursued.

2. The claim against Mr Hussain and Ms Khan is not struck out.

3. Mr Hussain and Ms Khan jointly victimised the claimant by dismissing her and thereby jointly contravened section 110 of the Equality Act 2010 ("EqA").

4. The respondents did not discriminate against the claimant because of her age, by:

   (a) Failing to pay her the National Minimum Wage (LFT3)

   (b) Making deductions from her wages for missed items from food orders (LFT4) or

   (c) Dismissing her (LFT5).

5. The tribunal does not have jurisdiction to consider the following complaints:

   (a) that the respondents discriminated against the claimant because of her age by making her work 11-hour shifts (LFT1)

   (b) that the respondents discriminated against her because of her age by not allowing her to take breaks (LFT2) and

   (c) that the respondents indirectly discriminated against the claimant.

   This is because the complaints were presented after the expiry of the statutory time limit and it is not just and equitable for the time limit to be further extended.

6. If the tribunal had jurisdiction to consider complaints LFT1 and LFT2, it would have dismissed those complaints on the ground that the respondents did not discriminate against the claimant because of her age.

7. If the tribunal had jurisdiction to consider the complaint of indirect discrimination, it would have dismissed that complaint on the ground that the respondents did not indirectly discriminate against the claimant.

<u>Decisions not yet made</u>

8. The tribunal has not yet determined the claimant's remedy.

9. The tribunal has not yet determined whether the claimant's complaint of harassment related to disability is well founded or not. This is because the tribunal has not yet determined the issue of whether Ms Khan's conduct was related to disability in circumstances where the claimant was not herself disabled.

10. Those issues will be determined at a further hearing.

REASONS

Introduction

1. The claimant was employed by Smart NYD Limited (SNYDL) for a period of a few months in 2019. Her job was to stand behind the counter at the New York Diner in Manchester and serve customers. Her precise dates of employment are in dispute, along with much else. During the time the claimant worked for the company, Ms Shabnam Khan was employed by the same company as a manager and Mr Mojahid Hussain was also an employee of the company. His brother, Mr Shazad Hussain was the director and majority shareholder until 14 October 2020 when Mojahid Hussain replaced him both as shareholder and director.

2. In very short summary, the claimant alleges that she was exploited because of her young age and dismissed for reporting sexual harassment at work. After her employment ended, she raised a grievance, to which Ms Khan responded in terms that the claimant perceived as harassment in relation to her alleged mental health disability.

Parties, complaints and issues

3. The claimant notified ACAS of her prospective claim on 3 December 2019 and a certificate was issued to her on the same day. She presented her claim form to the tribunal on 4 December 2019. The only respondent named on the claim form was SNYDL. Her claim form raised complaints which included:

   3.1. Victimisation by dismissal within the meaning of section 27 of the Equality Act 2010 ("EqA"), and contrary to section 39(4)(c) of EqA.

   3.2. Direct discrimination because of age, within the meaning of section 13 of EqA and in contravention of section 39(2) of EqA;

   3.3. Indirect age discrimination, within the meaning of section 19 of EqA; and in contravention of section 39(2) of EqA; and

   3.4. Harassment related to disability after the end of an employment relationship, within the meaning of section 26 of EqA and in contravention of sections 40 and 108(2) of EqA.

4. The claim form also raised complaints of automatically-unfair dismissal and unauthorised deductions from wages. In a judgment sent to the parties on 28 June 2021, Employment Judge Slater dismissed those complaints, together with one complaint of harassment, on the ground that the tribunal did not have jurisdiction to consider them.

5. In the same judgment, Employment Judge Slater decided:

   > "It is just and equitable to consider the following discrimination complaints out of time to the extent that the acts formed part of a continuing act of discrimination ending with the dismissal or shortly before the dismissal. These allegations are as follows:

(1) A complaint of victimisation, that the claimant was dismissed because she raised allegations of sexual harassment;

(2) The following complaints of direct age discrimination:

(a) making the claimant work 11 hours a day;

(b) in relation to the taking of breaks;

(c) in relation to deductions from wages when the claimant had forgotten items in the customers' orders;

(d) in relation to being paid less than the National Minimum Wage for

her age whereas another employee, Peter, was paid more than the National Minimum Wage applicable to his age; and

(e) in relation to dismissal.

(3) A complaint of indirect age discrimination, the provision, criterion or practice being that of having to throw out intoxicated customers and deal with violent and aggressive customers on her own.

7. These complaints will proceed to a final hearing together with the complaint of harassment relating to Ms Khan's email of 2 December 2019 which was presented in time. It will be for the Tribunal at the final hearing to determine whether the acts of discrimination earlier than the effective date of termination, or shortly before that date, formed part of a continuing act of discrimination ending with something on the effective date of termination or shortly before that date, and, if not, to decide whether it would be just and equitable to allow those earlier complaints to be considered out of time."

6. The claimant subsequently applied to add Mr Hussain and Ms Khan as respondents. The essential reason for the claimant's application was that, by that time, there was a proposal to strike SNYDL off from the register of companies. Her application was granted by Employment Judge Ross at a preliminary hearing on 27 October 2022. Written confirmation of that decision was set out in a case management order (CMO) sent to the parties on 1 November 2022.

7. Annexed to the same CMO was a helpful list of the issues that the tribunal would have to determine at the final hearing. The list reads as follows:

"Time Limits

1. Were the acts of discrimination which occurred earlier than the effective date of termination of employment part of a continuing act, with an act of discrimination occurring at the effective date of termination or shortly before that date?

2. If not, is it just and equitable in all the circumstances to extend time to consider those complaints?

Disability

3. Was the claimant a disabled person within the meaning of section 6 Equality Act 2010 by reason of the impairment of anxiety and depression?

4. If not, does the claimant need to show that she was a disabled person within the meaning of section 6 Equality Act 2010 to bring a claim for disability related harassment?

Harassment related to disability (section 26 Equality Act 2010 and section 108)

5. Was anything in Ms Khan's letter of 2 December 2019 unwanted conduct?

6. Was it related to disability?

7. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In an effect case the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

8. Was it harassment which arose out of and was closely connected with the employment relationship which used to exist between the claimant and the respondents, and was it conduct which, if it had occurred during the relationship, would have contravened the Equality Act 2010?

Direct age discrimination (section 13 Equality Act 2010)

9. The claimant's age at the relevant time was 16 and she compares herself with older people.

10. What are the facts in relation to the following allegations?

    (1) ["LFT1"] Making the claimant work 11 hours in a day;

    (2) ["LFT2"] Not allowing the claimant to take breaks;

    (3) ["LFT3"] Making deductions from the claimant's wages when she had forgotten items in customers' orders;

    (4) ["LFT4"] Paying the claimant less than the National Minimum Wage for her age whereas PX was paid more than the National Minimum Wage for his age;

    (5) ["LFT5"] Dismissing the claimant (the claimant's assets that an older employee who had complained of sexual harassment would not have been dismissed).

11. Did the claimant reasonably see the above treatment as detriment?

12. If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone older in the same material circumstances was or would have been treated? The claimant

says she was treated worse than PX. Alternatively, the claimant relies on a hypothetical comparator.

13. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of age?

14. If so, have the respondents shown that there was no less favourable treatment because of age?

15. Was the treatment a proportionate means of achieving a legitimate aim? What was the legitimate aim?

16. The Tribunal will decide in particular:

    (1) Were the aims legitimate and of a public interest nature?

    (2) Was the treatment an appropriate and reasonably necessary way to achieve those aims?

    (3) Could something less discriminatory have been done instead?

    (4) How should the needs of the claimant and the respondent be balanced?

Indirect age discrimination (section 19 Equality Act 2010)

17. A PCP is a provision, criterion or practice. Did the respondents have the following PCPs:

    (1) A requirement for employees, on their own, to throw out intoxicated customers and deal with violent and aggressive customers?

    (2) Did the respondents apply this PCP to the claimant?

    (3) Did the respondents apply any such PCP to older people, or would they have done so?

    (4) Did the PCP put people of the claimant's age group at a particular disadvantage when compared with older people?

    (5) Did the PCP put the claimant at that disadvantage?

    (6) Was the PCP a proportionate means of achieving a legitimate aim? What was the legitimate aim? The Tribunal will decide in particular:

        (i) Was the PCP an appropriate and reasonably necessary way to achieve those aims?

(ii) Could something less discriminatory have been done instead?

(iii) How should the needs of the claimant and the respondents be balanced?

Victimisation (section 27 Equality Act 2010)

18. Did the claimant do a protected act by raising allegations of sexual harassment with the respondents? What did she say, to whom and when?

19. If yes, has the claimant proven facts from which the Tribunal could conclude that she was dismissed because she did a protected act or because the respondents believed the claimant had done or might do a protected act?

20. If yes, have the respondents shown that there was no contravention of section 27?"

8. Although not expressly stated in the list of issues, it was plain that the claimant's case was that the respondents were personally liable to the claimant for contraventions of section 110 of EqA. Our understanding was that:

8.1. Both respondents were alleged to have contravened section 110 by jointly discriminating against the claimant because of her age,

8.2. Both respondents were alleged to have contravened section 110 by jointly applying a discriminatory PCP to her,

8.3. Both respondents were alleged to have jointly victimised the claimant by dismissing her in contravention of section 110,

8.4. Ms Khan alone was alleged to have harassed the claimant in contravention of section 108. That section applied to her on the ground that her conduct would have contravened section 110 if she had done it during the period of the employment relationship.

9. Neither respondent suggested that they were not acting in the course of their employment.

10. Although there were stark disputes about how and why the claimant had been treated, neither respondent sought to avoid liability on the ground that it was the other respondent who had discriminated against or victimised the claimant.

11. At the start of the final hearing, the claimant informed the tribunal that she was not pursuing any of her complaints against SNYDL.

12. Some of the facts of the case might have supported an argument that the tribunal should withhold a remedy from the claimant on the ground that her contract had been illegally performed. The respondents did not ask us to withhold a remedy on that ground. We briefly considered whether we might do so on our own initiative, but decided that this was not an appropriate case to withhold a remedy. Since there was no dispute between the parties in relation to that issue (which they did not raise), we have not explained how we applied the law to the facts in order to determine it.

The hearing

13. The first day of the hearing took place in the tribunal room. We altered the layout because the claimant's mother asked for adjustments to be made for her own mental health.

14. Largely because of industrial action in schools and on the railways, the remainder of the hearing took place on a remote video platform.

15. The parties each represented themselves. Each of them told us that this case had affected their mental health. This created challenges for the management of the hearing. We put in place the following measures to try to make the hearing accessible to all of them:

    15.1. We took regular breaks, including unscheduled breaks if a party became upset

    15.2. We allowed additional time for the parties to consider documents and prepare their closing arguments and

    15.3. During cross-examination, the employment judge frequently intervened to make questions easier to answer.

16. The parties had not been able to reach agreement about the contents of the bundle in advance of the hearing. The respondents brought their own "New Yorker Bundle" to the hearing, but they did not bring sufficient copies with them. We required the respondents to make additional copies while we read other documents in the case.

The strike-out applications

17. The claimant and respondent made reciprocal strike-out applications We heard the parties' submissions on both applications at the start of the final hearing,

18. Broadly speaking, the claimant's strike-out application was based on the respondents' alleged unreasonable conduct in attempting to cause SNYDL to be dissolved, so as to defeat her claim against her former employer. The respondents argued that the company ceased trading because the New York Diner business had been sold. To counter that argument, the claimant said that the closure of the business was not genuine, because Mr Hussain and Ms Khan had opened a new fast-food restaurant. The claimant also alleged that Mr Hussain had acted unreasonably at previous hearings by falsely stating that the New York Diner had ceased trading, and had failed to communicate with the claimant, for example, by giving her information necessary to trace witnesses.

19. We refused that application and gave oral reasons at the time. The claimant asked for written reasons for our decision to postpone consideration of the respondents' strike-out application (although she agreed to retract that request until she had seen our decision on the strike-out application itself). She did not ask for written reasons for the refusal of her own strike-out application.

20. The respondents' essential strike-out ground was based on the claimant allegedly making an untrue statement in her claim form. The statement was:

> "another lady closed our early conciliation case on our request and gave us a reference number for tribunal and explained that the tribunal will consider late cases as long as there are extenuating circumstances; which I do have - due to mine and my mums illnesses

(At the time I didn't feel comfortable going to citizen's advice, due to heightened anxiety and panic attacks and my mum couldn't come with me due to her illness), neither of us could call up either me due to my anxiety and my mum due to her depression…)"

21. The respondents' argument was that other evidence in the case demonstrated that the statement was false. In particular, the claimant had:

    21.1. used laughing emojis in text messages;

    21.2. planned to go to Exeter with her sister; and

    21.3. started a new job on 18 August 2019.

22. This merited striking out the claim, they said, because:

    22.1. the claimant had unreasonably misled ACAS into issuing an early conciliation certificate; and

    22.2. the claimant had unreasonably misled Employment Judge Slater into extending the statutory time limit.

23. Having heard those submissions, we decided that we would not strike out the claim before we considered all the evidence in the case.

Evidence and submissions

24. We considered the following documents:

    24.1. The claimant's bundle, which we read, cover to cover;

    24.2. The claimant's strike-out bundle of 20 pages;

    24.3. The respondents' "New Yorker Bundle", which we also read in full; and

    24.4. Screenshots of a message exchange with ZM and of an e-mail exchange on 1 January 2019, both of which the claimant e-mailed to the tribunal on the 4th day of the hearing.

25. The individual parties each gave oral evidence on her own behalf. Each of them confirmed the truth of written statements they had made, then answered questions.

26. We did not find the oral evidence of any of the parties reliable enough to take at face value. We tended to place more reliance on it if it was consistent with contemporaneous SMS, WhatsApp and SnapChat messages or time-stamped photographs, or undisputed documents such as general practitioner and college records.

27. We took into account that all parties were telling us that this case had taken its toll on their mental health. We accepted that all parties' mental health had been affected to some extent. It did not cause us to prefer one party's evidence over another's.

28. The respondents asked us to bear in mind, when assessing the reliability of their oral evidence, that they had not had as long to prepare as the claimant had done. There was no agreed bundle. The respondents blamed the claimant for the parties' failure to agree its contents. We rejected this argument. Our reasons for disbelieving parts of the respondents' evidence was largely due to the inconsistency between their oral evidence and their own documents, and due to inconsistency between their oral evidence and documents (such as Ms Khan's

WhatsApp message exchanges with the claimant and ZA's message to Mr Hussain) which they have had for many months. The dispute over the bundle consisted largely of the parties' objections to documents that the other party wanted to include.

29. The claimant's mother attended on the first day of the hearing. She asked for various adjustments to be made on account of her mental health. The claimant did not call her as a witness. Her evidence would undoubtedly have been relevant to the date of dismissal and whether the dismissal was motivated by the claimants alleged protected act. The claimant explanation for not calling her mother was that her mother had mental health problems of her own. We did not make any finding about this, but we did not think it was safe to draw any inference adverse to the claimant from her failure to call her mother to give evidence.

Facts

<u>The respondents</u>

30. The New York Diner was owned by SNYDL. Shazad Hussain was the director and majority shareholder. His brother, Mojahid Hussain, was also employed by the company. He is known as "Mo", but we will refer to him as "Mr Hussain". We do not know his precise role, but he was involved in the running of the New York Diner prior to taking over ownership and becoming director on 14 October 2020.

31. Ms Khan is known as "Sam". She was employed by SNYDL as a manager at the diner.

<u>The diner</u>

32. The New York Diner was a fast-food restaurant in the centre of Manchester. It had a seating area for customers who wished to eat their food on the premises, and also provided takeaway food, including orders from food delivery companies.

33. Customers on the premises who wished to order food would go to the counter. There they would be served by a member of the front-of-house staff.

34. There was a relatively high turnover of front-of-house staff. Typically, they were aged between 16 and their early twenties. One member of front-of-house staff, known to the claimant as Amman, was in his late twenties.

35. The layout of the diner has taken on some significance in this case. At one end of the counter was a low door that could be opened to gain access to the area behind, which was for staff only. It was clear to customers that they were not allowed beyond the counter. A person walking straight on through the doorway would almost immediately be in the kitchen. If they turned sharp right, they would be behind the counter. The doorway had a low gate, forming a physical barrier to anyone wanting to get access to the staff-only area. At some point that gate was removed. There was a dispute about whether that door was in place at the time the claimant was working there. We were unable to resolve that dispute. The oral evidence on the point was unreliable – partly due to the passage of time – and there were no contemporaneous photographs to help us.

36. One of the chefs at the diner a man who was about 35 years old. We will call him PX. The parties knew his first name, but none of them could tell us his family name.

37. PX was the eldest member of staff working at the diner.

The claimant

38. The claimant was born on 30 July 2022.

39. In 2013, the claimant went to her doctor, giving a history of an overdose of iron tablets. She was aged 10 at the time. The tablets were for her diagnosed condition of anaemia. According to the record, the overdose was accidental.

40. On 16 November 2017, the claimant went to her doctor again. She gave a history of low mood. She had felt low for some years, but had been managing. She returned a fortnight later, saying she was feeling brighter. On both occasions, she discussed some issues between her mother and father and the problems in their relationship. She was not prescribed any medication. She did not tell her doctor that she had any particular difficulty in carrying out any normal day-to-day activities. If she did have any difficulty with day-to-day life during her period of low mood, that difficulty was short-lived.

41. In September 2018, the claimant began studying for her A-Levels at her local College. Her attendance was recorded and average attendance calculated, month by month. Her monthly attendance gradually decreased over the autumn term from 94% in September to 73% in December. The College did not intervene during that term.

42. By the start of her A-level course, the claimant's parents had separated. The claimant lived with her mother. Her sister was away at university. The claimant's mother expected her to contribute to the family finances. So it was that, at the age of 16, the claimant looked for her first job. She searched on the Indeed website and discovered that the New York Diner in Manchester was recruiting front-of-house staff.

The claimant starts work at the New York Diner

43. On 1 January 2019, the claimant emailed the New York Diner via Indeed, indicating her availability for work. She stated that she would be able to work 5 to 11pm shifts, Monday to Thursday, and all day at weekends if needed.

44. At some point in January 2019, the claimant attended an interview with Ms Khan. She offered employment, subject to a probationary period. There is a dispute about precisely when this happened, but we did not find it necessary to resolve that dispute.

Shifts and breaks

45. The claimant was notified of her shifts in advance. Ms Khan provided the shift information to her by WhatsApp message, usually once a week.

46. Some weekends, including her first shift, the claimant worked for 11 hours. We have looked at the exchanges of messages between the claimant and Ms Khan during her employment. These messages were free and frank, as we explain in more detail under the heading, "Performance management". We could not find any example of the claimant asking to work shorter shifts and being refused. She had indicated her availability to work all day at weekends. Nor was there any example in the texts of Ms Khan putting the claimant under any pressure to work 11 hours.

47. The claimant told us that the way Ms Khan spoke to her at the diner was different from the way the texts appeared. We found this part of the claimant's oral evidence to be unreliable. This was partly because the WhatsApp messages

covered a variety of subjects and took the form of a free-flowing conversation. It seemed unlikely to us that the oral conversations would be much different. We also found reliability to be affected by a lack of clear examples. The passage of time appeared to have made it harder for the parties to remember any particular conversation that they had had. That difficulty was exacerbated by the delay between the claimant's period of employment and the presentation of her claim.

48. The claimant took at least some breaks. A WhatsApp message exchange between the claimant and Ms Khan on 9 March 2019 shows the claimant being allowed to take a break. One of the things she did during her breaks was to eat food from the diner which she purchased with a staff discount. We could not find any evidence in the WhatsApp messages of the claimant saying that her break times were inadequate. Still less could we find any evidence of breaks being refused.

49. The absence of messages does not necessarily mean that the claimant was always allowed to take breaks. (The claimant was not allowed to use her phone at work. If she wanted to take a break, she would be unlikely to text Ms Khan to ask for it. She is more likely to have asked someone who was there with her behind the counter.) But we could not recall any oral evidence of any specific occasion when the claimant had made such a request and been refused. We could not rely on generalised assertions about not being allowed to take breaks. The only one that appeared to be common ground was that an employee was only allowed a full 20-minute break if their shift was six hours or more. The parties disagreed about the extent to which front-of-house staff were allowed smoke breaks and food and drink breaks. These disputes were particularly difficult to resolve because of the lack of detail and partly because of the length of time that had elapsed between the claimant's employment and the claimant presenting her claim.

<u>Payment of wages</u>

50. With two exceptions towards the end of the claimant's employment, she was always paid in cash. The money was left for her underneath the telephone behind the counter. She was not given pay slips. Her name was not notified to HM Revenue and Customs. Mr Hussain and his brother considered it too expensive to put new employees on the payroll until they had completed their probationary period. Ms Khan knew that this was their view. Our finding is that the expense that they wanted to avoid was not just the administrative cost of setting up a payroll. It was the expense of paying employer's and employee's national insurance, possibly income tax, and the National Minimum Wage.

51. No national insurance was ever paid on the claimant's wages.

52. The claimant was not given a written contract or statement of terms of employment. In reaching this finding, we have accepted the claimant's evidence and rejected the respondents' evidence that such a document was given to the claimant on 9 February 2019. We think it highly unlikely that the respondents would have wanted to provide the claimant with a statement of terms confirming her entitlement to the national minimum wage, or to have kept records that would prove the existence of employees who were being concealed from HMRC. The claimant's account is also consistent with a message that she sent to a friend at work, ZA, on 4 April 2019. In her message, the claimant told ZA that there was "no proof I worked there". At the time of sending the message, the claimant is

unlikely to have been aware of its significance. The message shows that the claimant believed that there was no written record of her being employed at all. She is unlikely to have believed that if she had been given a contract of employment or statutory statement of terms.

53. The claimant did not at that time know the significance of being paid in cash. She did not know that HMRC had not been informed as a means of saving money.

54. At the start of the claimant's employment, the National Minimum Wage for a worker of her age was £4.20 per hour. The minimum wage increased to £4.35 in April 2019.

55. The wages that were actually paid to the claimant were £3.40 to £3.50 per hour. We prefer the claimant's evidence that this is how much she was paid. This is for the following reasons:

    55.1. In an exchange of messages beginning at 22.59 on 14 February 2019, the claimant queried her pay of £90.00. In response, Ms Khan provided a breakdown of the hours of work for which the £90.00 had been due. The total added up to 26 and a half hours' work.

    55.2. In March 2019, the claimant sent a WhatsApp message to Ms Khan asking when she would be paid £4.00 per hour. That message clearly showed that the claimant believed she was being paid less than £4.00 per hour.

    55.3. The claimant messaged Ms Khan in June 2013 (see below) stating that she had been paid £3.50 per hour.

    55.4. Ms Khan attempted to explain away the WhatsApp messages by saying that she and the claimant had agreed to misrepresent the claimant's true wages so that the claimant's mother would not know how much the claimant was really being paid. According to Ms Khan, the subterfuge included deliberately understating the claimant's wages in text messages in case the claimant's mother checked the claimant's phone. This arrangement was allegedly made at the claimant's request, so that the claimant could keep more of what she had earned and contribute less towards the family. This explanation appeared to us to be unlikely. Even assuming that the claimant and Ms Khan had agreed to plant a false text message, it would not have needed to have been nearly as elaborate as the exchange of messages that actually took place. Moreover, if the request for payment at £4.00 per hour was part of an agreed plan to understate the claimant's wages, we would have expected Ms Khan to have replied in some way. We therefore did not accept Ms Khan's evidence that the claimant was being paid the National Minimum Wage.

56. There is no evidence that any of the other front-of-house staff were paid more than £3.50 per hour.

57. PX was paid £10.00 per hour. We have not seen any pay records for him. Our finding is based on the claimant's evidence of what PX told her.

58. The National Living Wage for a person over 25 from April 2019 was £8.21.

College attendance – remainder of the academic year

59. From January 2019, the claimant's attendance at college, which had already started to slip, declined sharply. Her average attendance at college in January 2019 was 39%.

60. On 21 January 2019, when the claimant did not attend college; the college rang her home and spoke to her mother. According to the College's records, which we accept as accurate, the claimant's mother said that the claimant had been ready to go to college, but then had had a panic attack. Her mother speculated that the panic attack had possibly been due to anxiety, as her sister had left after a visit.

61. The claimant's attendance improved a little the following month. It remained about 60% for February to April, then dipped to 48% in May and up to 69% in June 2019.

62. On 27 February 2019 someone at the College made the following note: "Aliyah has missed three days over the past week, one of which was because of a funeral, she has struggled to come in this week due to anxiety of returning after the half term holiday. She said she used to look forward to coming into college but now gets upset at the thought of attending. Aliyah said that there are a few friends that she has fallen out with but still sees around college which is also making her feel anxious about coming in. She did however say that this was not a big issue and she feels like she can cope with this herself."

63. Entries were made in the College records in March 2019 expressing concern over the claimant's poor attendance, adding that she was behind with her work.

64. On 14 March 2019, the claimant texted Ms Khan to say, "I am skipping college because I can't be asked today so I'm heading to Manchester now so any time you need me really". By "can't be asked", we are sure that the claimant meant that she could not be bothered.

Performance management

65. On or about 24 January 2019, Ms Khan told the claimant that she did not want to continue her employment any longer because of negative feedback from a colleague called Sarrah. The claimant asked for another chance and Mrs Khan agreed.

66. Ms Khan kept an Incident Book. It consisted of a single bound notebook. She used it to record incidents where employees had underperformed or where their conduct was a matter for concern. We accept that the incident book was genuine. It appeared to correlate with things that the claimant accepts she did wrong. It also contains multiple entries relating to other employees mixed with those relating to the claimant. It would be hard retrospectively to concoct entries relating to the claimant without fabricating the entire book.

67. Ms Khan noted each incident with a record of the month or year in which it happened. She did not state the precise date.

68. The first entries relating to the claimant were dated February 2019. They started with a note that there was a cash shortage in the till which had occurred whilst the claimant was on shift. The next entry stated, correctly, that the claimant had attended work without a uniform. The claimant's explanation, as noted in the incident book, was that her uniform was in the wash. She was informed that she would receive a warning if it happened again.

69. There was a handful of concerns about the claimant noted each month, February to April 2019. Performance concerns included:

    69.1. She was warned for using her mobile phone at work;

    69.2. A note was made in the incident book that she had failed to give pizzas to a delivery driver;

    69.3. On more than one occasion she attended work without the correct uniform;

    69.4. She did not attend work for one shift, saying that she had been involved in a car accident; and

    69.5. She did not take a "buzzer" back from a dine-in customer. When the buzzer was discovered missing, the cost was deducted from her wages.

70. During this time, the claimant and Ms Khan continued to communicate using WhatsApp. The tone of Ms Khan's messages was supportive. Here is a sample of typical exchanges:

    70.1. On 14 February 2019 was typical of the sort of conversation they would have. The claimant apologised for not getting much done. Ms Khan told the claimant, "no, don't be silly as long as customers were happy, I'm OK [praying emoji] xx". When the claimant thanked her, Ms Khan replied, "You're welcome hun xx have a nice night xx".

    70.2. On 2 March 2019 the claimant apologised for a mistake. The claimant had accidentally caused the wrong food order to be given to Just Eat, the food delivery business. She had initially said that the mistake had been made by someone else, but owned up to it in her message to Ms Khan. In reply, Ms Khan messaged, "Hey Aliyah its fine stop panicking we all make mistakes, you don't need to apologise you are a great person and you do work really well, I like you so don't worry you are still young and I fully understand when mistakes are made that's why I will always speak calmly to you rather than have a go so don't worry hun its normal and thanks for letting me know, have a nice night and see you on Tuesday keep up the good work".

    70.3. In a further conversation on 23 March 2019, the claimant explained why she had been using her mobile phone whilst at work, and also stated her intention to improve the cleanliness of the serving area. Ms Khan replied, "Hey Aliyah, you should have just told me that you needed to go on your phone for personal reasons we would have understood, [it's] just that if other workers see that they will do it, I can then tell other staff … and don't worry you are still my best worker, ["blowing a kiss" emoji] and am happy and feel at ease when you're on. … keep up the good work thanks and speak to you tomorrow hun have a nice night".

    70.4. On 5 April 2019, when the claimant confirmed she had done the mopping, Ms Khan replied (with added emojis) "told you you're superwoman".

71. From time to time, Ms Khan spoke to the claimant's mother, using the claimant's mother's mobile phone. We do not know exactly how this initially came about. We did not find the evidence from any party to be particularly reliable. We are sure, though, that the initiative in starting these conversations must have come from the claimant (by providing Ms Khan with his mother's mobile phone number) or by the claimant's mother (by telephoning Ms Khan). Ms Khan did not speak to

PX's mother. (PX, it will be remembered, was the 35-year-old chef.) This is unsurprising. Neither PX nor his mother had initiated such a conversation.

PX, ZA and the allegation of sexual assault

72. In March 2019, PX informed Mr Hussain that the claimant was not paying for her food when putting it through the system. The CCTV was checked and shown to the claimant. On seeing the footage, she started crying and said she forgot to pay for her food. The claimant was given a warning and a note was made in the Incident Book.

73. At some point between 1 January 2019 and 7 March 2019, a male colleague started working at the diner. We will call him "ZA". He and the claimant got on well.

74. On 7 March 2019, at 4.15pm, Mr Hussain informed ZA that his employment was being terminated.

75. Shortly after being dismissed, ZA had a SnapChat conversation with the claimant. It continued into 8 March 2019. During the course of the conversation:

    75.1. The claimant revealed to ZA that PX had sexually harassed her and sexually assaulted her.

    75.2. ZA suggested to the claimant that she "make a list of everything he has done and said".

    75.3. The claimant then sent ZA a long message, which included:

    > "Ok so every day I work he always asks me to suck his dick then when I tell him to stop he's like I'm only talking. He said we should have sex in the middle of the water fountain so everyone can take a video of it. When I'm squatting down to put trays way or get something from the shelves he goes yeah like this position and he started making the thrusting motion towards my head. When I went into the office to get burger sauce he goes quick get in and tries to pull my pants down. When I was refilling the mop bucket he goes good there's no cameras here you start touching me. …He keeps pinching me. He makes sex jokes about me and you and there was this new chef training and you made sex jokes about me and him too. He makes jokes about touching my nipples. I was mopping the floor and put the mop in the bucket and it tilted towards the floor and then he kept putting it in between my legs. He always tells me he's got a big dick and I should suck it and it will pay me. Every time he said or did any of it I'd laugh cuz I was nervous and scared and didn't know what to do...

76. We did not make a finding about whether or not PX had behaved towards the claimant in precisely the way the claimant described in her Snap. We did find, however, that the claimant did not make this story up. Her allegations about PX's conduct were made in good faith.

77. ZA forwarded the claimant's Snap to Mr Hussain at 12.37pm on 8 March 2019. Mr Hussain replied "thanks" at 2.46pm.

78. There is a dispute about what Mr Hussain did with this information. We will return to that dispute in due course.

79. On 31 March 2019, the claimant sent Ms Khan a long WhatsApp message. It started with an apology for forgetting to include a pizza with a delivery, but went on to complain about various aspects of PX's behaviour. The claimant accused PX of shouting, including forgetting chips with orders and checking his phone on gambling websites. She added that this was unfair "because of the way he sexually acted towards me in the past".

80. Ms Khan replied the following morning, saying "Hi Aliyah wow such a long message I was not aware of any of this, anyway I will speak to you about it later on today give me a call when you've finished school thanks xx".

81. Later that day the claimant and Ms Khan had a telephone conversation and, in that conversation, Ms Khan asked the claimant about the allegation of sexual behaviour mentioned in the text message. That much is common ground.

82. There is a conflict of evidence about what happened next;

    82.1. The claimant says that she described PX's sexual assault and Ms Khan said, "that is the way [PX] is, he is from the Czech Republic, he puts his arms around people, he has done it to me".

    82.2. Ms Khan's version is that the claimant said "just saying", and "it is just my message it has come across like that, it's nothing it's nothing."

<u>Did the claimant disclaim any harassment?</u>

83. We are now in a position to make a highly contentious finding of fact. The respondents say that the claimant signed a declaration that she had not been sexually harassed at all by PX. The declaration appears in a bound book, similar to the Incident Book, but with the words, "Managers Report Book" on the cover. There is no evidence of any other pages from the book that could help to test the reliability of the page on which the respondents rely. The text is in Ms Khan's handwriting. It reads:

    "March 2019 Manager Report

    I Aliah Tariq am happy to declare that no sexual harassment took place at New Yorker diner. I had a conversation with [ZA] who took it out of context. I sat with Sam and Mo as we went through the CCTV and I am happy to sign this statement. And I'm happy to continue working at New Yorker diner."

84. The claimant says that she never signed this document and the purported signature that it bears must have been fabricated.

85. We prefer the claimant's evidence. This is because:

    85.1. We do not think it likely that the claimant would have signed a declaration that ZA had taken what she said out of context. The detailed description that the claimant had given to ZA was completely unambiguous. There was no context that could have given it a different meaning.

    85.2. The claimant did not just tell ZA about the harassment. She also confided in her sister.

    85.3. The claimant maintained her account that PX had behaved sexually towards her in a text message to Ms Khan on 31 March 2019. That would be an odd thing for her to do if she had recently signed a declaration that no sexual harassment taken place.

85.4. Mr Hussain gave unreliable evidence about when he looked at the CCTV footage. In his oral evidence he told us that he received ZA's message late at night spent the night watching the CCTV footage. But we know from the Snapchat exchange between ZA and the claimant that this cannot have happened. ZA sent the claimant's long Snap to Mr Hussain shortly after midday on 8 March 2019 and Mr Hussain acknowledged it at 2.36 that afternoon.

85.5. Mr Hussain also gave inconsistent evidence about what CCTV footage he watched. In a statement he typed for the purposes of the tribunal proceedings, he said that he had viewed the CCTV based on the dates and times given to him by "the third party", by which he meant ZA. We have seen the complete message exchange between ZA and Mr Hussain and know that ZA did not give Mr Hussain any dates or times. Mr Hussain then told us that he had checked the CCTV for the period of time during which ZA had been working at the diner. There was nothing in the information given to Mr Hussain by ZA that would suggest that the harassment had happened whilst ZA was working there.

85.6. Mr Hussain's evidence is also inconsistent with what Ms Khan wrote in her subsequent letter of 2 December 2019, which was that the first thing Mr Hussain did on receipt of ZA's message was to confront PX.

85.7. The oral evidence of Mr Hussain to us was that, prior to sitting with the claimant and Ms Khan to show the CCTV footage, he had an earlier conversation with the claimant during which she said that there had been no sexual harassment and what she told Mr Ali must have been taken out of context. If that earlier conversation had happened, we doubt very much that Mr Hussain and Ms Khan would have sat down with the claimant to watch CCTV footage of nothing happening. Even if it had been (irrationally) limited to the time when ZA worked at the diner, the footage would have taken many hours to play. It is unlikely in our view that Mr Hussain and Ms Khan would have sat with the claimant for so long.

85.8. Ms Khan's reply to the claimant's 31 March 2019 text included, “I was not aware of any of this”. If Ms Khan had sat with the claimant, watched CCTV footage, and then signed the claimant's disclaimer statement, Ms Khan would have been well aware of the claimant having previously said that PX had acted sexually towards her.

85.9. To our minds, Ms Khan's version of the 31 March 2019 telephone call is striking, not just for what was said, but for what was not said. At no point in the conversation did Ms Khan remind the claimant of the disclaimer statement that she had supposedly signed. Had the claimant signed that statement, and then repeated the allegation to Ms Khan on 31 March, an obvious retort would have been for Ms Khan to say, “But you have already made a statement to say this didn't happen!” Ms Khan's omission to say that lends support to our finding that the claimant never signed such a declaration.

85.10. Ms Khan also failed to mention the claimant's supposed declaration when speaking to the claimant's mother on 10 June 2019 (see below).

86. What actually happened, we find, is that Mr Hussain spoke to PX and then spoke to the claimant. No notes were taken of either conversation. Mr Hussain told the claimant that he had got PX to apologise. Nothing more was done about it. The

claimant did not escalate it any further because she thought that Mr Hussain and PX were friends. The respondents thought that the situation had blown over.

Aggressive customer

87. On the evening of Saturday, 6 April 2019, the claimant was behind the counter when a male customer demanded a refund. The claimant telephoned Ms Khan. There appears to be a dispute about what was said in that conversation. The claimant says that Ms Khan told her to deal with the customer. Ms Khan says that she advised the claimant to ask PX to deal with him. We did not find it easy to resolve the dispute, in part, because the passage of time is likely to have affected the parties' memories. Despite that difficulty, we are satisfied that Ms Khan did not ask the claimant to remove the customer physically. It seems unlikely to us that Ms Khan would give such an instruction, when everybody agrees that the previous advice had been to fetch PX. The claimant sent a WhatsApp message to Ms Khan describing what was happening, and proposing "to tell him no refund". At some point, either before or after the telephone call, the customer became aggressive. The claimant did what she had previously been advised to do. She went to the kitchen and asked PX to deal with the customer, which he did. We do not know if there was any physical contact between the customer and PX. Nor could we make a finding about whether the claimant had to interact with the customer at any point after he became aggressive. On this question we found the oral evidence to be unreliable. At any rate, the police attended, and the customer eventually left. There was no physical contact between the customer and the claimant.

Was there a dismissal in April or May 2019?

88. We now turn to a stark dispute of fact about when and how the claimant's employment ended.

89. The respondents' case is that a meeting took place on Friday 26 April 2019 during which the claimant was informed she was being dismissed with one week's notice. They rely on a letter allegedly given to her on Saturday 27 April 2019. The letter, apparently signed by Ms Khan, states:

> "Further to our meeting of 26 April 2019, I regretfully confirm that your employment with us is terminated with affect from 4 May 2019, with immediate effect."

90. The claimant says that the letter is a fabrication. It was never given to her, she says, and the meeting of the previous day never took place.

91. We prefer the claimant's evidence on this point. The claimant was not dismissed orally or by letter in April or May 2019. Here are our reasons:

    91.1. The WhatsApp messages between Ms Khan and the claimant show that the claimant expected to work and was expected to work on 5 May 2019. This was the day after the expiry of the notice purportedly given in the letter.

    91.2. Ms Khan offered the claimant a full week of shifts on 25 April 2019. She told us that, by the time she offered those shifts, she already knew of the decision to terminate the claimant's employment. We think it unlikely that the claimant would have been offered any further shifts if a decision had already been made to dismiss her for poor performance.

91.3. Mrs Khan explained that she nonetheless had to offer the shifts because the claimant was entitled to period of notice. But, according to the respondents, the claimant was on a zero-hours contract. She had no right to work shifts during her notice period. When this was pointed out to Ms Khan, she said that she offered the claimant more shifts because she was struggling to find staff to cover the work. If that was the explanation, we would have expected to see some evidence of Ms Khan trying to recruit a replacement around that time to cover the staff shortage. If the decision to dismiss the claimant really had been made by 25 April 2019, the respondent would know that the staff shortage was about to get worse.

91.4. There Is evidence to suggest the claimant was still working in the diner after 4 May 2019. The claimant was photographed behind the counter on 25 May 2019. Two days later, she sent an SMS text message to Ms Khan saying that there was no Wi-Fi in the diner. Four days after that, the claimant bought a meal from the diner using a staff discount.

91.5. SNYDL continued to pay the claimant. On 5 June 2019, a deposit of £75.00 was made into the claimant's mother's bank account. Ms Khan's explanation for this is that it was to pay for Eid clothes (the month of Ramadan spanning May and June that year), but we think it unlikely that Ms Khan would have made the claimant such a gift if she had dismissed her for poor performance.

91.6. A further payment was made to the claimant's mother's account on 14 June 2021. The WhatsApp exchanges at the time indicated that this was for unpaid wages, less deductions that had been made for items such as a missing pizza. We do not understand why Ms Khan would have waited until 14 June 2021 to pay the claimant's wages if the claimant's last day of employment had been 4 May 2021.

91.7. Despite the friendly tone of the WhatsApp messages throughout the claimant's employment, there were no messages between 27 April 2019 and 5 May 2019 referring to the claimant being about to leave, or suggesting that 4 or 5 May 2019 would be her last day at work.

91.8. Ms Khan told us that the reason why there were no such messages was because the claimant had pleaded with her to pretend to her mother that she was still working at the diner, and to maintain that pretence over WhatsApp in case the claimant's mother looked at her phone. This is similar to Ms Khan's explanation for the text messages apparently showing the claimant earning less than the National Minimum Wage. We rejected that explanation, for the reasons we gave in paragraph 55.4, and we reject this one, too.

91.9. The claimant also messaged her sister on 13 June 2021 saying, "just got fired from work". It is unlikely that the claimant would have wanted to deceive her sister about her dates of employment. We know from other messages that the claimant confided in her sister about the sexual harassment from PX.

<u>The involvement of the claimant's mother</u>

92. On or about 10 June 2019, the claimant told her mother that she had been sexually harassed by PX at work. The gist of what the claimant told her mother was substantially the same as what she had told ZA.

93. The claimant’s mother immediately sent a message to Ms Khan, who telephoned her back.

94. We have not seen the claimant's mother's message and have no direct evidence of what she and Ms Khan said to each other over the telephone. We can, however, piece it together from messages that the claimant sent to her friend and her sister on 10 and 11 June 2019.

95. The claimant’s mother was furious. We know this because, after the claimant's mother had sent her initial message to Ms Khan, the claimant sent a Snap saying,

> "my mum messaged Sam about [PX] there’s gonna be beef my mum was pisseddddddd [laughing emojis]”.

96. She also texted her sister:

> “my mum just messaged my manager cause I told her what that guy did to me at work and she got so triggered”.

97. The claimant's mother told Ms Khan that PX had sexually assaulted the claimant. Ms Khan said to the claimant's mother that the claimant had not told Ms Khan about it. She said that the claimant need not worry as PX had now left. She did not mention that the claimant had supposedly signed a statement denying that any sexual harassment had taken place. We make this finding because, after the conversation, the claimant’s mother discussed it with the claimant, following which the claimant texted:

> “hopefully yeah she was pissed at Sam and Sam called her and was like oh Aliah never told me blah blah”.

<u>Dismissal</u>

98. On 13 June 2019, Ms Khan informed the claimant’s mother that the claimant was being dismissed as she was “not a good worker”. She did not tell her that her employment had terminated 6 weeks previously.

99. Starting at 2.50pm, the claimant’s mother sent WhatsApp messages to Ms Khan asking for payment of the claimant’s wages. There was a discussion of various deductions that Ms Khan was proposing to make. The claimant’s mother asked the claimant for her point of view before sending an explanation to Ms Khan.

100. The claimant was not happy. She posted a message on social media with a quote from the Prophet Mohammed. The gist of the quote was that a man should be paid his wages before his sweat dries.

101. Nothing in the texts from the claimant’s mother suggested that the claimant’s dismissal had been several weeks ago. They appeared to relate to a recent development.

102. At 3.09pm that day, the claimant sent a WhatsApp message to her sister saying, “Just got fired from work”.

103. We found that the decision to dismiss the claimant was made jointly by Ms Khan and Mr Hussain.

    103.1. Ms Khan was responsible for day-to-day management of front of house staff. She informed the claimant’s mother that the claimant was dismissed. She wrote the letter (which we found was not genuine) purporting to dismiss the claimant in April 2019.

103.2. Mr Hussain later became the director. He was closely involved in the running of the business in 2019 and had personally dismissed ZA. Ms Khan's oral evidence was that the decision to dismiss the claimant was "a management decision, it was the directors' decision".

<u>The claimant's health and college attendance June-December 2021</u>

104. On 13 June 2019, or shortly before that date, the claimant spoke to Mr Baynham, a practitioner at the mental health charity, MIND. In his report dated 13 June 2019, Mr Baynham noted that the claimant had "cut her wrists with the point of a compass". The claimant told Mr Baynham of her "states of high anxiety and worry". Mr Baynham was sufficiently concerned to share this information with the claimant's general practitioner.

105. On 1 July 2019 the claimant was discharged by Healthy Minds because she had not attended an appointment.

106. On 19 August 2019 the claimant saw Dr Rashid at her GP practice. She told Dr Rashid that she had been oversleeping for more than twelve months and complained of tiredness. She mentioned the recent stress of her exams which, by that time, had finished. No medication was prescribed.

107. In August 2019, the claimant started a new part-time job. Her new employer allowed her to go into a back room when she felt so tired she needed a break.

108. The claimant re-took Year 12 at college, starting in September 2019. We were not given her attendance figures. We have, however, been shown a note in the College records dated 18 December 2019. According to that note, the claimant's attendance was "dangerously low".

109. The claimant was referred for a further Healthy Minds appointment. The date of the appointment was 22 October 2021. The claimant did not attend and she was discharged again.

110. On 11 March 2020 the claimant consulted her GP again. She told the doctor that she had a history of anxiety and panic attacks since she was 14.

<u>Pre-claim correspondence and alleged harassment</u>

111. On 4 November 2019, the claimant wrote to Ms Khan and Mr Hussain, raising a grievance. Her letter asserted that she had been dismissed because her mother had tried to discuss the alleged sexual harassment of the claimant by PX. She also complained about being paid less than the National Minimum Wage, unfair deductions from her wages, alleged racist language from Ms Khan, and various ways in which she claimed to have been unfairly treated.

112. The letter stated:

> "the sexual assault that happens to me by PX has affected my mental health a lot. I already suffer from anxiety and depression and the abuse has just added to it so bad that I began self-harming again and missing college due to my anxiety making me feel so physically sick I couldn't even get out of bed to go..."

113. Ms Khan replied on 2 December 2019. Her letter read, relevantly:

> "I am extremely concerned his Asians against staff members and various other false claims made by yourself...

> In response to the sexual harassment against [PX]. I can verify no sexual harassment has ever taken during your employment at New Yorker Diner. Truth of the matter is you made false allegations against PX because he pulled management on 2 March 2019 of you regularly purchasing food without paying... "

The letter relayed ZA's disclosure of the harassment to Mr Hussain and continued:

> "Mo took the appropriate steps by firstly confronting [PX] who denied any knowledge of your alleged allegation. Mo then checked all the cameras for the previous 10 days including the days ZA had mentioned and Mo found no evidence of any contact between you and PX... you said ZA was lying therefore the matter is not taken any further... The entire incident was recorded in the company incident book.
>
> I would also like to mention the stressful issues I personally had to encounter deal with on a daily basis relating to your mental state. I was very concerned when you discussed your personal issues relating to self-harm also [a serious accusation against members of the claimant's family] which you stated related to the self-harm you would inflict on yourself...
>
> I believe you have psychological problems....
>
> I would like to clarify the dates of your employment/termination,... your employment was terminated early May 2019. Your accusation being paid below minimum wage is absolutely ridiculous. It is your request to inform your mother that you are getting paid slightly less than minimum wage, you convinced me into believing your mother was taking all your wages from you especially when your mother messaged me a couple of times to put all your wages into her account therefore I lied for you which I deeply regret now.
>
> ...
>
> The actual reason for your dismissal was because the tills always showing low during your shifts also you were warned on numerous occasions for not wearing your uniform at work. You are constantly advised to stay off the phone during work which were ignored.... The reason I called your mother was because I had already dismissed you early May 2019, again it was your plan for me to ring your mother in June 2019, and again you convinced me to lie for you and not mention the real reason you were dismissed, you were scared she was going to be angry therefore I agreed to help you.
>
> ...
>
> I believe you have severe psychological problems and you definitely need professional help.
>
> ...
>
> I have no alternative but to get in touch with social services as I feel uncomfortable knowing you require some form of help. Your self-harming is very concerning and I feel you are having personal issues at home hence why you have started to self-harm again.
>
> If you continue to pursue these false allegations, I will be looking to seek legal action."

114. The claimant was very upset to receive this letter. She thought it was an attempt to scare her so that she would give up her grievance. She regarded Ms Khan's allegations as "gaslighting". They were, she believed, an attempt to put forward a false narrative about her dismissal and the way in which her allegations about PX had been handled. Worse still, from the claimant's point of view, Ms Khan was seeking to discredit the claimant's contrary account as being due to the claimant's "psychological problems". The version that Ms Khan was trying to discredit was the version that we have found to have been substantially true.

Relevant law

Direct discrimination

115. Section 13(1) of EqA provides that 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.

116. Age is a protected characteristic.

117. Section 23(1) of EqA provides, relevantly,

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

118. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

119. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

Indirect discrimination

120. Section 19 of EqA provides, relevantly:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it put, or would put, B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

121. Saving cost can be legitimate when combined with some other legitimate aim.

122. In order to test proportionality, the tribunal must balance the discriminatory effect of the PCP against the importance of the aim: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

Disability

123. Section 6 of EqA provides, relevantly:

(1) A person (P) has a disability if- (a) P has a physical … impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

…

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

124. According to section 212(1) EqA, "substantial" means "more than minor or trivial".

125. Schedule 1 to EqA supplements section 6. Relevant extracts are:

2. Long-term effects

(1) The effect of an impairment is long-term if … (b) it is likely to last for at least 12 months…

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

…

5. (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment…

PART 2 - GUIDANCE

10. Preliminary

This Part of this Schedule applies in relation to guidance referred to in section 6(5).

…

12. Adjudicating bodies

(1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

126. The relevant guidance is to be found in the Secretary of State's *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011).* The following passages appear to be helpful:

> …
>
> **Meaning of "likely"**
>
> C3. The meaning of "likely" is relevant when determining
>
> - whether an impairment has a long-term effect …
> - whether an impairment has a recurring effect…
>
> In these contexts, 'likely', should be interpreted as meaning that it could well happen.
>
> C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood…
>
> …

127. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4. That is not to say, however, that the things that the claimant can do are completely irrelevant; they may shed some light on the extent of any difficulty in carrying out the activities upon which the claimant relies.

128. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.

129. An adverse effect which is more than minor or trivial satisfies the definition of "substantial", even if the person's ability to do the activity in question is still within the range of normal differences amongst ordinary people. To the extent that paragraph B1 of the Guidance is inconsistent with section 212 of EqA, it is the statutory definition that must prevail: *Elliott v. Dorset County Council* UKEAT 0197/20.

130. When considering whether or not the effects of an impairment were likely (at any given point in time) to last for 12 months, the tribunal must decide that issue in the light of the circumstances as they were at the time in question. It is not open to the tribunal to take account of events that have taken place subsequently: *SCA Packaging v. Boyle* [2009] UKHL 1056, applied in *All Answers Ltd v. W* [2021] EWCA Civ 606.

Harassment

131. Section 26 of EqA relevantly provides:

> (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.

132. Subsection (5) names disability among the relevant protected characteristics.

133. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

134. In *Pemberton v. Inwood* [2018] EWCA Civ 564, Underhill LJ gave the following guidance in relation to section 26:

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

135. A person (B) may be harassed in relation to disability even if B is not actually disabled within the statutory meaning.

136. The EHRC *Code of Practice on Employment* gives the following examples amongst others:

- "The worker may be wrongly perceived as having a particular protected characteristic.

  Example: A Sikh worker wears a turban to work. His manager wrongly assumes his Muslim and subject him to Islamophobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The work is known not to have a protected characteristic but nevertheless is subjected to harassment related to that characteristic.

  Example: "A worker is subjected to homophobic banter and name-calling, even though his colleagues know he is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation."

137. A person (A) perceives another person (B) to have a disability if A believes in the existence of facts, which if the law were correctly applied to them, would mean that B met the statutory test of disability: see *Chief Constable of Norfolk v. Coffey* [2019] EWCA Civ 1061.

Victimisation

138. Section 27 of EqA defines victimisation. Relevantly, the definition reads:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because **–**
>
> (a) B does a protected act; or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act-
>
> …
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) …making a false allegation… is not a protected act if that …allegation is made…in bad faith.

139. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980] ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

140. As in direct discrimination cases, tribunals hearing victimisation complaints are encouraged to adopt the "reason why" test (*Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065. Victimisation may occur sub-consciously as well as consciously.

Burden of proof

141. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

142. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

143. We are bound by at least two Court of Appeal authorities to hold that the initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913 and *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18. The Supreme Court has recently heard an appeal against the Court of Appeal's decision in *Efobi.* Judgment on that appeal is currently awaited.

144. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Time limits

145. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination in the field of work] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

146. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

147. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

148. When deciding whether a series of alleged discriminatory acts amounted to conduct extending over a period, the tribunal must take account only those acts which actually contravened EqA. It is an error to conclude that the period was extended by conduct which is alleged to have been discriminatory, but was not in fact discriminatory: *South Western Ambulance Service NHS Trust v. King* UKEAT 0056/19.

149. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

150. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

151. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

151.1. the length of and reasons for the delay;

151.2. the effect of the delay on the cogency of the evidence;

151.3. the steps which the claimant took to obtain legal advice;

151.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

151.5. the extent to which the respondent has complied with requests for further information.

152. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

Striking out

153. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing and dealing with cases in ways that are proportionate to the importance and complexity of the issues.

154. Rule 37 provides, so far as is relevant:

> (1) At any stage of the proceedings…. on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-
>
> (a) that it … has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been … unreasonable…;
>
> …
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> …

155. In *Blockbuster Entertainment Ltd v. James* [2006] EWCA Civ 684, at paragraph 5, Sedley LJ said this:

> [The power to strike out a claim is] a Draconic power not to be readily exercised. It comes into being if as in the judgement of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these conditions are fulfilled it becomes necessary to consider whether even so, striking out is a proportionate response..."

156. Where a tribunal is considering striking out a claim or response for a party's unreasonable conduct, it must follow four steps:

156.1. First, it must ask itself whether the party has not just behaved unreasonably, but has conducted the proceedings unreasonably.

156.2. Second, it must decide whether or not the conduct was deliberate and persistent or so serious that it would be an affront to the tribunal to allow the party to continue to pursue their case. Unless the conduct falls into those categories, the tribunal must decide whether or not a fair hearing is still possible. If a fair hearing is still possible, the claim or response should not be struck out.

156.3. Third, even where a fair hearing is no longer possible, the tribunal must consider whether striking out is a proportionate sanction, or whether some lesser remedy is appropriate.

156.4. Fourth, in the case of a response being struck out, the tribunal should consider whether it would be appropriate to allow the respondent to contest certain issues, such as the claimant's remedy.

(See *Bolch v. Chipman* [2004] IRLR 140.)

157. A party is not to be deprived of their right to a proper trial as a penalty for disobedience of rules relating to disclosure, even if such disobedience amounts to contempt for or defiance of the court, if that object of the rules is ultimately secured. But where a litigant's conduct amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled and bound to refuse to allow that litigant to take further part in the proceedings and, where appropriate, to determine the proceedings against that party: *Arrow Nominees Inc v. Blackledge* [2000] 2 BCLC 167, CA.

158. One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and determining the issues in the usual way: *Masood v. Zahoor* [2009] EWCA Civ 650.

Conclusions – striking out the claim

159. Our conclusion on the strike-out application was unanimous.

160. We do not believe that we have the power to strike out the claim. The claimant did not act unreasonably by writing what she did in her claim form. She was not lying in the passage quoted by the respondents. The fact that she had used laughing emojis in her message of 10 June 2019 does not mean that she was well enough to speak to the CAB or ACAS in the autumn of 2019. Nor could we draw that conclusion from the fact that she started a new job in August 2019. As the claimant explained to us, it is one thing to go to work, but it is another thing altogether to tell a stranger about a sexual assault that happened in a previous job. The claimant showed a desire to go to Exeter in June 2019, but, if anything, that is more consistent with a desire to escape from her dispute with the respondent than with a desire to engage with it by speaking to CAB or ACAS.

161. Even if we had found that the claimant had unreasonably stated an untruth in this part of her claim form, we would not have exercised our discretion to strike out the claim. This is because:

161.1. The tribunal still has jurisdiction to deal with the claim. Employment Judge Slater decided that it was just and equitable for the time limit to be extended in relation to the complaint about the claimant's dismissal. We are bound by that decision. The respondents argue that the claimant misled Employment Judge Slater into reaching that conclusion by lying in her claim form. But even if that is correct, the respondents' remedy would have been to apply for Employment Judge Slater to reconsider her judgment.

161.2. In any case, striking out the claim would not help to achieve the overriding objective. We have heard the evidence and the parties' submissions about the claim on its merits. If the claimant had lied in her claim form, a far more proportionate step would have been to take account of any untruths in her claim form when assessing the reliability of her evidence overall.

Our approach to the statutory time limit

162. Our first consideration is the statutory time limit. By the judgment of Employment Judge Slater, the time limit has already been extended for anything "occurring at the effective date of termination or shortly before that date". What we have to decide, in respect of each of the allegations of direct age discrimination, is whether it was done (or has to be treated under section 123 of EqA as having been done) at the effective date of termination or shortly beforehand.

163. The "effective date of termination" is a statutory term derived from the Employment Rights Act 1996. It does not appear in EqA. Nonetheless, what we take EJ Slater to have meant by the effective date of termination is the date on which the respondent terminated the claimant's contract of employment.

164. Our finding at paragraphs 91 and 98 compel the conclusion that the claimant's contract of employment was terminated on 13 June 2019.

165. That leaves open the question of what "shortly before that date" means. When interpreting what EJ Slater meant by that phrase, we bear in mind that nothing of significance is alleged to have happened between 5 May 2019 and 10 June 2019, other than the claimant demonstrably being behind the counter at the diner, raising the lack of WiFi, buying discounted food and having money deposited into her bank account. We also have to bear in mind that the claimant's total period of employment was less than 5 months, so EJ Slater must have had in mind a period significantly shorter than that. In that context, we take "shortly before" 13 June 2019 to mean 10, 11 or 12 June 2019.

166. We were unable to find any example of the claimant working an 11-hour day (LFT1) on or after 10 June 2019. Unless LFT1 is taken together with some other discriminatory act, it cannot have extended over a period ending on or after that date. The claimant would need a further extension of the statutory time limit.

167. We could not find any example of the claimant not being allowed to take a break (LFT2) on or after 10 June 2019. Unless LFT2 is taken together with some other discriminatory act, it cannot have extended over a period ending on or after that date. Again, the claimant would need a further extension of time.

168. LFT3 is an allegation about deductions from wages. Deductions were made from the claimant's final pay, which must have included at least some wages properly payable at the termination of her employment on 13 June 2019. If this latest deduction amounted to direct age discrimination, no further extension of time would be necessary.

169. The claimant was not paid the National Minimum Wage at any time during her employment. We assume in the claimant's favour that, if her rate of pay amounted to direct age discrimination (as alleged in LFT4), that state of affairs continued throughout her employment. No further extension of time would be needed.

170. The claimant also complains that her dismissal (LFT5) was discriminatory. No further extension of time is needed for that.

171. The complaint of indirect discrimination is about having to throw out customers single-handedly and having to deal with violent and aggressive customers. The only example we could find of an incident of that kind was the one we describe in paragraph 87. That happened on 6 April 2019. There was no evidence of the PCP being applied to the claimant at any subsequent date.

Unless the application of the PCP on 6 April 2019 is taken together with another alleged contravention of EqA, the time limit would run from that date and the claimant would need a further extension of the time limit.

172. Our approach to the time limit issues is as follows:

172.1. First, we determine the complaints of harassment and victimisation on their merits. These two complaints are no longer affected by the statutory time limit. Unless they are well-founded, they cannot be taken into account in deciding whether conduct (in particular LFT1 or LFT2 and indirect discrimination) extended over a period.

172.2. Second, we determine whether LFT3, LFT4 and LFT5 amounted to contraventions of EqA. Time has already been extended for these complaints. If these complaints do not succeed, then they could not be taken into account in determining whether LFT1 or LFT2, or indirect discrimination, was conduct extending over a period.

172.3. Third, we return to any of the well-founded complaints of harassment and victimisation, to determine whether LFT1 or LFT2 or indirect discrimination was conduct extending over a period which included that harassment or victimisation.

172.4. If not, we ask, fourth, whether it would be just and equitable to allow a further extension to the statutory time limit in respect of LFT1 and LFT2.

172.5. We also did our best to decide (fifth) whether LFT1 and LFT2 succeed on their merits, in case our decision on time limits is found to be wrong.

Majority conclusion – claimant not disabled

173. There was one decision on which we could not agree. Our non-legal members concluded that the claimant did not meet the statutory test of disability at the relevant time. Our employment judge considered that the statutory test was satisfied.

174. Before setting out our respective reasoning on the point of dispute, it is worth setting out the findings upon which we were unanimous.

175. We started by assuming that it was necessary for the claimant to show that she was disabled in order to succeed in a complaint of harassment related to disability. (Whether that assumption is correct or not depends on the answer to Issue number (4) which we have not yet addressed. That issue is set out more fully at paragraph 7 above.)

176. Working on that assumption, the point in time at which the claimant's disability mattered was the date of the alleged harassment. That was 2 December 2019, when Ms Khan sent her e-mail.

177. We agreed that the only day-to-day activity that appeared to have been affected prior to December 2019 was her attendance at college.

178. We agreed that the claimant did not do well in the day-to-day activity of attending college. Her attendance steadily declined during the autumn of 2018, markedly declined in January 2019, and only climbed back to 69% in June 2019. By 18 December 2019, her attendance was "dangerously low". That assessment must have reflected missed attendance prior to 2 December 2019 as well as missed attendance afterwards.

179. Our majority concluded, however, that the claimant's poor college attendance was not the adverse effect of an impairment. The reasoning of the majority was as follows:

179.1. Although on a number of points we preferred the claimant's evidence over that of the respondents, that did not mean that we found the claimant's evidence to be reliable enough to take at face value generally. Where we did prefer the claimant's evidence to the respondent's evidence, it was generally because of weaknesses in the respondent's evidence and the fact that the claimant had provided supporting evidence.

179.2. The claimant had other reasons for not going to college. Her attendance worsened once she had started working for the respondents. That suggests that she was choosing other things to do, such as going to work.

179.3. The claimant's GP records prior to 2019 did not show any substantial adverse effect of an impairment on the claimant's ability to carry out normal day-to-day activities. The overdose of anaemia tablets could have been for any reason and the records themselves suggested it was an accident. The claimant had experienced low mood for some years in her early teens, but she did not take medication and no particular aspects of day-to-day life appear to have been affected. Her visit to her GP in 2017 appears to have been prompted by a specific reaction to an adverse life event, namely the breakdown in her parents' relationship.

179.4. It was common ground that the claimant had informed Ms Khan that she had self-harmed and had told her MIND counsellor that she was thinking of self-harming. (There was a dispute about whether the claimant had actually showed Ms Khan her scars, but we did not resolve that dispute.) This did not show that the claimant actually had self-harmed. She might, for example, have mentioned self-harm in order to deflect attention from poor performance at work.

179.5. Our majority was concerned that the claimant had failed to attend her Healthy Minds appointments on two occasions. If her anxiety was an impairment that had an adverse effect on her ability to go to college, the majority members would have expected her to keep those appointments.

179.6. Although the claimant and her mother had mentioned panic attacks to her college, this was not reliable evidence. She knew that the college was monitoring her attendance and needed to provide an excuse. Her true reasons for missing college, our majority thought, were more tellingly revealed in her "can't be asked" text of 14 March 2019.

179.7. After her employment ended, the claimant told her GP that she had been oversleeping for twelve months and was tired, but she could have been oversleeping for reasons entirely unconnected with an impairment. In the experience of our majority members, it is unremarkable for a healthy teenager to oversleep regularly.

179.8. It was noteworthy, in the majority members' view, that the claimant was not prescribed any medication during the relevant period.

Minority conclusion – claimant was disabled

180. Our employment judge concluded that the claimant did have a disability within the statutory meaning. His reasons for disagreeing with the majority were:

180.1. The claimant's difficulty in attending college was the effect of the impairment of anxiety. At age 14, she had previously been low enough in mood to want to go and see her doctor. She and her mother separately informed the College on two occasions that her failure to attend was due to anxiety. This was at a time when the claimant could not have foreseen that her reason for not attending college might be relevant to an employment tribunal claim. The claimant told Ms Khan during her employment that she had self-harmed. Shortly before 13 July 2019, she also told her MIND counsellor that she had cut her wrists. Her propensity to harm herself was real. It was an indicator that her levels of anxiety were sufficiently unhealthy to amount to an impairment. Another indicator was that the claimant told her doctor in July 2019 that she had been oversleeping for 12 months and was tired.

180.2. The fact that the claimant did not attend two Healthy Minds appointments suggests – in the respondents' favour – that the claimant did not take her mental health sufficiently seriously to prioritise keeping those appointments. But that argument is largely neutralised by two contrary considerations. One is that the claimant's non-attendance at those appointments might itself have been the effect of her impairment. The second is that the appointments followed a referral by the claimant's general practitioner, who, our employment judge assumes, would not make such a referral unless they believed there was some kind of problem with the claimant's mental health.

180.3. There may well have been times when the claimant did not attend college for reasons other than the effects of her impairment, but that did not mean that the claimant's difficulty with attending college was not the effect of an impairment.

180.4. In the employment judge's view, the adverse effect of the claimant's impairment was more than minor or trivial. She missed over a third of her lessons.

180.5. By 2 December 2019, the claimant had had the substantial adverse effect of that impairment for 12 months. It was more than 12 months since the claimant's college attendance had started to decline. If the employment judge was wrong about that, he would in any case conclude that the substantial adverse effect was likely to last for 12 months. The beginning of December 2019 was ten months since the claimant had first given anxiety as a reason for not attending college. The claimant had not had treatment for her anxiety. It was highly likely that the effect of the impairment would continue for at least another two months.

Conclusions - harassment

181. All our remaining conclusions were unanimous.

182. We concluded that, had the claimant been disabled on 2 December 2019, her complaint of harassment would have been well founded.

183. Ms Khan's comments about the claimant's mental health and psychological problems were unwanted.

184. If the claimant was disabled, the comments were clearly related to that disability.

185. That leaves open the question of whether the comments were related to disability despite (on the majority's findings) the claimant not actually being disabled. We will decide this question at the next hearing.

186. The claimant believed that Ms Khan's letter created an intimidating and offensive environment for her. As she saw it, the letter was an attempt to scare her into withdrawing her grievance, by making untrue assertions about what had happened and hurtfully suggesting that the claimant's contrary account was due to her psychological problems.

187. The claimant's belief was reasonable. She was correct to interpret Ms Khan's letter as trying to intimidate her by creating a false narrative of what happened during the claimant's employment and implying that the claimant's version of events was the product of her psychological problems when, in fact, it was substantially true. The claimant described it as "gaslighting". Whilst that is an overused word, it is a reasonable description of what Ms Khan was doing here.

188. The letter would therefore amount to harassment had the claimant met the statutory definition of disability.

189. Ms Khan's conduct was in the course of her employment as a manager of SNYDL. Her actions would have to be treated as having done by SNYDL. If she harassed the claimant, she would personally contravene section 110 of EqA.

190. There was a close connection between the harassment and the employment relationship. It was a direct response to the claimant's grievance about her employment. The thing that would make Ms Khan's comments amount to harassment in the first place would be the link between supposed concern for the claimant's mental health and Ms Khan's untrue version of what had happened whilst the claimant was employed.

191. It follows from the above analysis that there is one question left to be determined:

> **Was Ms Khan's letter of 2 December 2019 related to disability in circumstances where the claimant has been found not to have had the protected characteristic of disability?**

192. If it was, the tribunal will find that Ms Khan contravened section 108 by harassing the claimant. If not, the harassment complaint will be dismissed.

193. Whether or not Ms Khan's letter amounted to harassment within the meaning of section 26 of EqA, we are satisfied that it was an isolated event. Whilst it was closely connected with the employment relationship, it was not connected with the alleged age discrimination. It cannot be said to have been the continuation of any age-discriminatory state of affairs that existed during the claimant's employment. This is because:

    193.1. It allegedly related to the protected characteristic of disability, not age (although we do not regard this factor as determinative by itself);

    193.2. It was a response to a new and separate development in the relationship between the claimant and the respondents, namely the claimant submitting her grievance; and

    193.3. There had been a gap of nearly 6 months since the end of the claimant's employment.

Conclusions - victimisation

194. The claimant did the following protected acts:

194.1. alleging to ZA on 8 March 2019 that PX had sexually harassed her;

194.2. impliedly alleging to Ms Khan on 31 March 2019 that PX had sexually harassed her; and

194.3. alleging to her mother on 10 June 2019 that PX had sexually harassed her, and causing her mother to make the same allegation to Ms Khan.

195. We are satisfied that the claimant did not make any of these allegations in bad faith.

196. It is not in dispute that the claimant was dismissed, or that her dismissal was detrimental to her.

197. We have already recorded our finding that Mr Hussain and Ms Khan jointly decided to dismiss the claimant.

198. We have next considered the reason why they decided to dismiss her. Was it because the claimant had done the protected acts?

199. In our view, the claimant has proved facts from which the tribunal could reach that conclusion. These facts are:

199.1. The respondent's concoction of the claimant statement in which she supposedly denied that sexual harassment had taken place.

199.2. The timing of the claimant's dismissal, being only three days after the claimant's mother had telephoned Ms Khan. The intervention of the claimant's mother was, in our view, an alarming development for the respondents. Up to that point, both times that the claimant had mentioned being sexually harassed by PX, the respondents had been able to brush it aside by saying that PX had apologised, or that was just the way he was because of his nationality. Once the claimant's mother had become involved, it must have been clear to the respondents that the claimant was not going to let them forget about the harassment.

199.3. the efforts by the respondents to pretend that the claimant had been dismissed six weeks earlier than she was actually dismissed.

200. Finally, we asked ourselves whether the respondents had proved that the claimant protected acts had not motivated their decision to dismiss the claimant. The respondents have not overcome that burden. Whilst there is genuine evidence of concerns on Ms Khan's part about the claimant's performance during her employment, and some evidence that those concerns were well founded, performance concerns alone do not explain why the claimant was dismissed. Despite problems being noted in the incident book from time to time, Ms Khan regularly messaged the claimant to say how much she was valued. The reliability of the respondents' evidence about the reason for dismissal is fundamentally undermined by the fact that they manufactured a dismissal letter to make the claimant's dismissal look like it had happened six weeks earlier.

201. We therefore find that the respondents jointly victimised the claimant by dismissing her.

Conclusions – direct age discrimination

LFT3 – Deductions from wages

202. Deductions were made from the claimant's wages when she had forgotten to include items in a customer's order. The specific example we found was the deduction from the claimant's final pay to cover the cost of a missing pizza.

203. The deduction was not authorised. Were this a claim against SNYDL for unauthorised deduction from wages, SNYDL would have no answer to it. But that is not what we have to decide. Our task is, initially, to decide whether the claimant has proved facts from which we could conclude that Ms Khan's and Mr Hussain's decision to make the deduction was motivated by the claimant's age.

204. There were no examples of older members of front-of-house staff missing orders and keeping their full wages.

205. The claimant drew our attention, in particular, to the following facts:

205.1. The claimant was not paid the National Minimum Wage and PX was paid at least the National Minimum Wage.

205.2. PX did not have deductions made from his wages.

205.3. Ms Khan would speak to the claimant's mother about the claimant's employment, but did not speak to PX's mother about PX's employment.

206. We could not conclude from these facts that the deductions were influenced by the claimant's age. Nor could we reach such a conclusion from the other facts of the case. As we explain below, the reason for the claimant being paid £3.50 per hour was not the claimant's age. It was because she worked as one of the front-of-house staff. PX did not have deductions made from his wages for missing items in a food order, but it was not his role to give food to the customer. He would not be in a position to give a customers an incomplete food order. So far as different treatment in speaking to employees' mothers is concerned, the obvious explanation for the difference is that the claimant or her mother initiated the conversation, whereas PX did not. It had nothing to do with age.

207. LFT3 was not direct discrimination. That part of the claim is dismissed.

LFT4 – National Minimum Wage

208. The claimant was not paid the National Minimum Wage for any age.

209. PX was paid more than the National Living Wage for a person of his age, or of any age.

210. There is no evidence that any of the other front-of-house staff were paid the National Minimum Wage.

211. We are satisfied that the reason why the claimant was paid less than the National Minimum Wage was not her age. It was because she was a member of front-of-house staff. The respondents had enough front-of-house staff who were prepared to work for low wages. They did not pay the National Minimum Wage because they thought they could get away with it by concealing employment records from HMRC. The comparison with PX is not helpful. He was a trained chef. His circumstances were materially different from those of the claimant.

212. We have asked ourselves whether being front-of-house staff was really a proxy for being in a particular age group. It was not. One of the front-of-house staff, Amman, was in his late twenties. They were all younger than PX, but they also had completely different roles to him.

213. We have taken into account the other facts on which the claimant relied as shifting the burden (see LFT3), but for the reasons we have given, they do not enable the tribunal to reach any conclusion of age discrimination.

214. There were no facts from which we could conclude that the claimant's age was a motivating factor for not paying her the National Minimum Wage.

215. The complaint of LFT4 is therefore dismissed.

LFT5 - dismissal

216. We have already found that the claimant was dismissed because she had complained of sexual harassment. What we must now do is consider whether the dismissal was also motivated by the claimant's age.

217. We could not find any facts from which we could reach that conclusion. There is nothing to suggest that an older person who had repeatedly complained of sexual harassment, and got a member of her family involved, would not also have been dismissed.

218. We therefore dismissed the complaint based on LFT5.

LFT1 – 11-hour shifts

When was the act done?

219. In our view, the alleged requirement to work 11-hour shifts, if it was discriminatory at all, was isolated from any other contravention of EqA that could be reckoned towards any conduct extending over a period. LFT3-5 cannot affect the statutory time limit for LFT1 because those acts did not contravene EqA. LFT1 was not part of the same state of affairs as the alleged harassment (see paragraph 0). Nor can it be combined with the victimisation in the assessment of any period of conduct. We reach this conclusion because:

219.1. The victimisation was unrelated to the protected characteristic of age (although this factor was not determinative by itself);

219.2. The detrimental act constituting victimisation was entirely different from the alleged less favourable treatment of being made to work 11-hour shifts; and

219.3. There was no evidence of any 11-hour shift worked after 5 May 2019.

220. LFT1 must therefore be treated as having been done prior to the period "shortly before" the effective date of termination. The claimant needs a further extension of time of one month.

Not just and equitable to extend time limit

221. We have had regard to claimant's reason for delaying presenting her claim as found by EJ Slater. This was, in EJ Slater's words:

> "(1) The claimant was very young at the time, being 16 years of age;
>
> (2) She was ignorant of her rights;
>
> (3) Although she did have access to the internet which could easily produce answers to questions about employment rights, I accept that

she was hampered in taking any action in looking into her rights by the depression she was suffering at the time;

(4) Once alerted to her rights, the claimant took action swiftly. She took the action she understood she had been advised to take by the Citizens Advice Bureau of writing to the respondent, and then presented her claim swiftly after the respondent's reply to her grievance letter."

222. One thing that EJ Slater did not take into account, however, was any specific disadvantage to the respondents that would be caused by extending time for LFT1. We are in a position to assess that disadvantage now. It is considerable. The disadvantage makes it unjust and inequitable to extend the time limit. We have already recorded our view that the oral evidence was unreliable and that the claimant's delay in presenting the claim was a contributing factor. That disadvantage could be alleviated if we concentrated purely on the documentary evidence. But if we did that, it would still not be just and equitable to extend the time limit, because the claimant would be left with a complaint that could not succeed on its facts. The text messages show the claimant working at least one 11-hour shifts, but do not suggest that she was "made" to work any shift of that length.

223. We do not, therefore, have jurisdiction to consider LFT1.

Complaint on its merits

224. If our conclusion on the time limit is held to have been wrong, we would need to consider the substantive issues in relation to LFT1. Our conclusion would have been:

224.1. So far as we were able to make findings, the alleged treatment did not happen. The claimant was given the opportunity to work 11 hour shifts if she wanted them, and did work some 11-hour shifts, but she was not "made" to do so. See our findings at paragraph 46.

224.2. In case it is thought that we have taken an unduly narrow view of LFT1, we have also considered the respondent's motivation for giving the claimant 11-hour shifts to work. We could not find any facts from which we could conclude that the claimant's age influenced Ms Khan's decision that the claimant's shift should be 11 hours long. The claimant reminded us that, as a young worker, she should not have been working more than 8 hours per day. That is correct: see regulation 5A of the Working Time Regulations 1998. But the existence of that obligation does not help us to conclude that the claimant's young age motivated Ms Khan to make her shifts longer. It is an argument for saying that the claimant's shifts were 11 hours long *despite* her age, not because of it.

<u>LFT2 – Not allowing the claimant to take breaks</u>

When was the act done?

225. We find that any alleged failure to allow the claimant to take breaks must be treated as having been done by 5 May 2019, that is to say, more than "shortly" before the effective date of termination. This is for the same reasons as we have given for LFT1. The claimant needs a further extension of time. The necessary extension period is five weeks.

Not just and equitable to extend time

226. A further extension of one month would not be just and equitable. Broadly our reasoning is the same as for LFT1. Shorn of the clash of evidence (which is harder to resolve because of the delay in presenting the claim), the claimant's case rests on text messages that do not support her case.

227. We therefore do not have jurisdiction to consider LFT2.

Complaint on its merits

228. If pushed to make a finding about whether the claimant was allowed to take breaks, we would find that she was allowed to take them. See our findings at paragraph 47. This means that the alleged treatment did not happen.

229. In any case, the claimant did not prove any facts from which we could conclude that her age motivated any decision not to allow her to take breaks. None of the other staff, of any age, were allowed a full 20 minute break if their shift was less than 6 hours. There is some evidence that PX, who was older, got away with spending time on non-work activities during his shift: see the claimant's text of 31 March 2019. But the fact that he was a trained chef in a different role makes the comparison with PX meaningless for the purposes of direct discrimination. His circumstances were materially different from those of the claimant.

Conclusions – indirect discrimination

<u>Time limit</u>

When was the indirect discrimination done?

230. As we have already found, the PCP was not applied to the claimant after 6 April 2019. Unless the application of the PCP was part of the state of affairs encompassing some other contravention of EqA, the claimant would require a further extension of time of approximately two months before the tribunal could have jurisdiction to consider her complaint.

231. For the same reasons that we have given in relation to LFT1 and LFT2, we find the complaint of indirect discrimination to be isolated from the victimisation and alleged harassment. LFT3-5 cannot help the claimant with regard to the statutory time limit, because they did not amount to contraventions of EqA. For good measure, we would add that, even if the complaints about LFT 3-5 were well founded, they were separate from the alleged indirect discrimination, which was of an entirely different nature. They would not affect the date from which the time limit for indirect discrimination began to run.

Not just and equitable to extend time

232. In our view, it is not just and equitable to extend the time limit.

233. Again, we took into account the reasons for delay given by EJ Slater. But against this consideration we had to balance the effect of the delay on the reliability of the evidence. One topic on which the evidence was unreliable was the precise chain of events on 6 April 2019. At what point did the customer start to become aggressive? Did the aggression turn to any physical violence? At what point in the escalating situation was the claimant required to deal with that customer? Did the claimant fetch PX as soon as the customer became aggressive, or was there a period of time when the claimant was left to deal with

him on her own? Another factual dispute which we thought would be relevant to the indirect discrimination complaint was whether or not there was any physical barrier, such as a gate, making it more difficult for customers to gain access to the area behind the counter. It had been there at some point, but was later removed. The parties could not agree on whether it was in place on 6 April 2019 or not, and there were no photographs to help us. We were left with the parties' recollections which had faded over time.

Complaint on its merits

234. The alleged PCP was:

> A requirement for employees, on their own, to throw out intoxicated customers and deal with violent and aggressive customers.

235. The claimant was never required to throw out any customer on her own. That part of the alleged PCP was never applied to the claimant.

236. We were unable to make any finding that the claimant was ever required to deal with a violent customer. If there was such a PCP, it was not applied to the claimant either.

237. There was a requirement that employees speak to customers who could be drunk and had the potential to become aggressive. (The respondents say that there was no PCP of having to serve intoxicated customers, because the diner did not have an alcohol licence. That argument is nonsense. The New York Diner was a fast-food restaurant that was open until 11pm at weekends. It was entirely predictable that some customers might have recently left a pub or bar and be drunk.)

238. If the employee was front-of-house, she (or he) was expected to speak to the customer on her (or his) own. That expectation persisted until the customer became aggressive, at which point the employee was required to stop trying to deal with the situation on her own. They were expected to seek help from a chef instead.

239. That PCP was applied to the claimant on 6 April 2019, when she was required to deal, initially on her own, with a customer who wanted a refund and then became aggressive.

240. We tried to evaluate the disadvantage that that PCP would cause to people of the claimant's age when compared to older people. None of the parties addressed us on the appropriate pool for comparison. We decided that the pool would be all people aged 35 and under. Nobody working at the diner was over that age. We could not think of any particular reason why a smaller group (such as people working at the New York Diner) would affect the analysis of disadvantage.

241. There was no direct evidence that people of the claimant's age would find it harder to deal with potentially aggressive or intoxicated customers. We were, however, prepared to take judicial notice of the fact that a person in their thirties is likely to have acquired more experience than a teenager of talking to intoxicated people, of dealing with situations of potential conflict, and of serving demanding customers. A person in their thirties would, in general, be less likely to feel physically intimidated in circumstances where an aggressive customer was physically able to reach them.

242. Requiring employees on their own to deal with intoxicated and potentially aggressive customers was a means of (a) achieving the aim of enabling the diner to serve customers late in the evening in a city centre and (b) saving expense by avoiding the need for multiple employees doing the same job. Those aims are legitimate in our opinion.

243. The question of whether the PCP was proportionate is not straightforward, because the facts were so difficult to find. The disputed facts are relevant to the balancing act that the tribunal has to carry out. The more intoxicated and aggressive the customer, and the longer the employee was expected to deal with the customer before fetching a chef, the greater the disadvantage that the PCP would cause to younger, inexperienced, members of staff, and the less likely that the PCP would be proportionate. Conversely, if an employee had the opportunity to fetch a chef at the slightest sign of aggression, the disadvantage would be minimal. Likewise, if there was a physical barrier at the counter (about which we could not find the facts), the disadvantage in the form of physical intimidation would also be less, and therefore easier to justify.

244. If pushed, we would find that the respondent has proved that the PCP was proportionate. Employing additional staff would be expensive. For a city-centre fast-food outlet, the aim of being able to open late in the evening was important. The disadvantage to younger people was reduced by the availability of PX in the kitchen, only a few steps away.

245. We would therefore dismiss the indirect discrimination complaint on its merits.

Next steps

246. If the parties cannot reach agreement about the claimant's remedy, it will have to be determined at a hearing.

247. At the same hearing, the tribunal will also decide whether the complaint of harassment related to disability is well-founded or not. This will depend on Issue (4), namely whether Ms Khan's conduct was related to disability in circumstances where our majority has found that the claimant was not herself disabled.

Employment Judge Horne
Date: 16 May 2023

SENT TO THE PARTIES ON
19 May 2023

FOR THE TRIBUNAL OFFICE