EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102133/2022

Held in the Dundee Tribunal on 17, 18 October 2022 and 6-9 March, 24-27 April and 4-6 September and (deliberations in chambers) on 7 September 2023

Employment Judge L Murphy
Tribunal Member M McAllister
Tribunal Member J McCullagh

Ms A Vial	**Claimant** **Represented by:** **Ms S Ossei,** **Lay Representative** **(Cousin)**
Mr S Alsafar	**Respondent** **Represented by:** **Mr Hoyle,** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

Preliminary Jurisdictional Issues

(i) It is just and equitable to extend the time limit in which to lodge the claims under the Equality Act 2010 (EA) in relation to all complaints brought by the claimant. The claim will, therefore, proceed.

(ii) Ruby Mubariq was, at all material times, an employee of the respondent.

(iii) Shada Alsafar was not an employee of the respondent at the material times with which the complaints are concerned. The respondent is not

vicariously liable for the acts of Shada Alsafar under section 109(1) of the EA.

The Afro-Beats allegation (end November 2021)

(iv) The claimant's complaints of harassment related to race and sex in relation to the allegation at the end of November 2021 ('the Afro-Beats Allegation') are not well founded and are dismissed.

(v) The claimant's complaints of direct race and sex discrimination in relation to the Afro-Beats Allegation are not well founded and are dismissed.

The First Wig Allegation (c.7pm on 5 December 2021)

(vi) The claimant's complaint of harassment related to race in relation to the allegation that on 5 December 2021 at around 7 – 8 pm, the respondent and Ruby Mubariq repeatedly asked the claimant to remove her wig ('the First Wig Allegation') is well founded and succeeds. The respondent unlawfully subjected the claimant to harassment related to race in this regard contrary to section 26 of the Equality Act 2010 ('the EA').

(vii) The claimant's complaint of harassment related to race in relation to the First Wig Allegation insofar as it relates to the conduct of Shada Alsafar does not succeed and is dismissed.

(viii) The claimant's complaint of direct race discrimination in relation to the First Wig Allegation is not well founded and is dismissed.

(ix) The claimant's complaints of harassment related to sex and direct sex discrimination in relation to the First Wig Allegation are not well founded and are dismissed.

The Second Wig Allegation (c.10.30 -11pm, 5 December 2021)

(x) The claimant's complaint of harassment related to race in relation to the allegation that on 5 December 2021 at around 10.30 – 11 pm, the respondent attempted to remove the claimant's wig ('the Second Wig Allegation') is well founded and succeeds. The respondent unlawfully

subjected the claimant to harassment related to race in this regard contrary to section 26 of the Equality Act 2010 ('the EA').

(xi) The claimant's complaint of direct race discrimination in relation to the Second Wig Allegation is not well founded and is dismissed.

(xii) The claimant's complaints of harassment related to sex and direct sex discrimination in relation to the Second Wig Allegation are not well founded and are dismissed.

Constructive Dismissal contrary to the EA (section 26 and 40)

(xiii) The respondent subjected the claimant to harassment related to race by 'constructively' dismissing her pursuant to sections 26 and 40 of the EA, the claimant being entitled because of the respondent's conduct, to terminate the employment without notice.

Compensation and failure to provide written statement

(xiv) The respondent is ordered to pay to the claimant compensation in the sum of **SIXTEEN THOUSAND SEVEN HUNDRED AND FIFTY-THREE POUNDS AND THIRTEEN PENCE (£16,753.13).** This sum includes an uplift of £275. When the proceedings were begun, the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to four weeks' gross pay. In accordance with section 38 of the Employment Act 2002, compensation for the prohibited conduct under the EA has, therefore, been increased by four weeks' gross pay (TWO HUNDRED AND SEVENTY-FIVE POUNDS (£275)).

REASONS

Introduction

1. The claimant is British born of Caucasian and Black (African) biracial heritage. She complains of harassment related to race under section 26 and direct race discrimination under section 13 of the Equality Act 2010

("EA"). She further complains of harassment related to sex under section 26 and direct sex discrimination under section 13 of the EA. The claimant worked as a waitress at the respondent's restaurant from 15 October to 10 December 2021. Her complaints centre on alleged incidents on a date at the end of November 2021 (the Afrobeats Allegation) and two alleged incidents on 5 December 2021 (the First Wig Allegation and the Second Wig Allegation). The respondent denies the allegations in their entirety.

2. At a substantive preliminary hearing on 18 October 2021 on the identity of the claimant's employer, the Tribunal heard evidence from the claimant, the claimant's co-worker Amanda Heath, and the respondent. At the final hearing across diets in March, April and September 2022, the Tribunal heard evidence from the claimant, the claimant's friend, Lyn Sibanda, the respondent, the respondent's wife and the claimant's co-worker, Shada Alsafar, and other co-workers, Ruby Mubariq and Yasser Aljabouri. A joint inventory of productions running to 90 pages was lodged for use at both hearings. A number of additions were permitted to those productions at both hearings. The respondent and Shada Alsafar required the services of an interpreter at the hearings and we express our gratitude to the Arabic interpreters, Mr Sabbagh and Ms Jabrain, who assisted.

Procedural History

3. This case has a considerable procedural history. It is explained in five previous written Case Management Orders ('CMOs') prepared following each PH and each diet of the final hearing, and various other interlocutory directions. Mr Hoyle has raised an issue about the time permitted for his submission and, for this reason, some of the background and procedure is briefly narrated.

4. Following two preliminary hearings (PHs) on case management, the case was listed for a 2-day final hearing in October 2022.

5. The respondent avers, following amendments, that the claimant, Ruby Mubariq and Shada Alsafar were employed by a limited company, Mazaj Dundee Limited. The proposed final hearing on 17 October was converted to a substantive preliminary hearing on the question of the identity of the claimant's employer (only) as the amendment regarding the others had

not yet been sought. It was found that the claimant was employed by the respondent.

6. The claimant disputes Ms R Mubariq and Mrs S Alsafar were employed by Mazaj Dundee Limited and maintains they were employed by the respondent. She has confirmed, however, that, in the event the Tribunal found to the contrary, she does not maintain that the respondent was vicariously liable for any acts or omissions by them which contravened the EA on any alternative basis.

7. At the PH on case management on 19 October 2022, it was decided that the case would be listed for a 4-day final hearing, in recognition of the additional preliminary issues to be determined and the additional time necessitated by the involvement of an interpreter. This was held as an in-person hearing in the Dundee Tribunal on 6-9 March 2023. The hearing was not concluded in the time allocated due to circumstances narrated in the CMO dated 11 March 2023. The claimant gave her evidence in chief on 6 March and the morning of 7 March 2023.

8. The claimant's cross-examination commenced in the afternoon of 7 March 2023. After approximately thirty minutes of questioning, the evidence of the respondent's witness, R Mubariq was interposed and completed on that afternoon. The interposing of Ms Mubariq's evidence was permitted pursuant to an application by the respondent's representative, based on Ms Mubariq's work commitments that week. At the time of granting the application, the Tribunal believed there would be ample time to conclude the claimant's evidence, and indeed that of her witnesses, in the March diet. However, the hearing was then unexpectedly adjourned on 8 and 9 March 2023 due to Mr Hoyle's non-attendance due to his ill-health.

9. A further four-day diet was listed from 24 to 27 April 2023 with the intention of concluding the case in its entirety. This took place as a hybrid hearing, with the respondent and the interpreter attending in person. The claimant, her representative and the respondent's representative (all of whom live south of the border) participated remotely by video link.

10. The claimant was cross-examined by Mr Hoyle for a further four days during the April diet, with sitting time also expended on other applications

by Mr Hoyle, all as narrated in the CMO dated 19 May 2023, prepared following that diet. One of the claimant's proposed witnesses, Amanda Heath, attended the Dundee Tribunal for the diets in October 22 and March 23. She gave evidence in the substantive PH on the identity of the employer but was not called to give evidence at the final hearing diet in March 2023 due to a lack of time. Ms Ossei advised that Ms Heath declined to attend subsequent diets, apparently citing the financial implications of further time off work, having taken a number of days off work in March without being called. No witness order was sought for Ms Heath and she did not give evidence at the final hearing.

Case management related to the hearing of parties' oral submissions

11. After the failure to conclude the hearing in the April diet, the Tribunal was keen (as it had been at the end of the previous diets) that the case would be concluded at the following diet. The proceedings have been protracted by numerous case management applications brought during the Tribunal's sitting time. The case was listed for a generous allocation of a further six days on 4-8 and 11 September 2023 with the intention of avoiding it going part heard again.

12. On 2 May 2023, a direction was given which included the following paragraph.

> 11. *In light of the delays and the numerous hearing diets in this case, the Tribunal has identified a provisional timetable for hearing the remainder of the case with the aim of ensuring the hearing is concluded at the next diet without further delay. The timetable should also assist in setting the expectations of witnesses, though witnesses should be made aware of the need for flexibility. Parties are expected to cooperate in observing the timetable. Any comments on the timetable must be provided by* ***12 May 2023.*** *Unless the Tribunal decides otherwise, the timetable is likely to be:*

13. There was then set out a draft timetable in tabular form. It envisaged Lyn Sibanda's and the respondent's evidence would be concluded by lunch time on Day 3; Yasser Aljabouri's evidence would be heard by lunch time on Day 4; and Shada Alsafar's evidence would be finished on day 5, save for any re-examination. On Day 6, 1.5 hours each would be allocated to the claimant and respondent for submissions.

14. When that direction was given, the timetable provided generous allocations for the remaining evidence and submissions in order to ensure that the case would conclude within the next diet. We had regard to (1) the extra time associated with the use of an interpreter; (2) the requirement for even handedness, having regard to the lengthy allocation of time which the respondent's representative had been permitted for cross-examination of the claimant at an earlier stage in the proceedings when no timetabling constraints had been imposed; and (3) a history and pattern in the case of sitting time being expended on significant numbers of case management applications, which, in previous diets, had eaten substantially into the time available for hearing evidence. We had in mind that, if this pattern continued, the generous time allocations would mean there would still be sufficient flex in the timetable to ensure the hearing concluded in the 6 days.

15. The hearing reconvened on 4 September 2023. Once again, it was held using a hybrid format with the panel, the respondent and the interpreter attending in person and the other participants joining by video link. Despite some delays to the start time in the mornings of 4 and 5 September as a result of the interpreter's late arrival and occasional connectivity and sound problems, the hearing progressed at a much healthier pace than the timetable proposed in the May direction had anticipated. There were few, if any, interruptions for case management applications.

16. Ms Sibanda's evidence was concluded in its entirety by 12 pm on 4 September and the respondent's evidence was concluded by 12pm on 5 September. The timetable was, therefore, by this stage substantially superseded. Shada Alsafar's evidence concluded by 2.20pm on 5 September, about two and a half days earlier than the timetable envisaged.

17. On Tuesday 5 September, Mr Hoyle addressed the Tribunal on the matter of the timings for the rest of the hearing. He noted that progress had been better than expected and advised he expected to be relatively brief with the remaining witness(es). He advised his firm had asked if he could cover a Wages Act hearing on Thursday 7 September and inquired whether the case might be concluded by then so he might commit to doing so. He asked, in this context, about whether the parties would be expected to be available during the Tribunal's deliberations with a view to the delivery of an oral judgment. We did not commit to confirming the hearing would be finished on Wednesday 6 September but informed the parties that we would not be delivering an oral judgment in the case but would reserve our decision. We told parties we expected to hear submissions the following day (Wednesday, 6 September 2023) and asked them to prepare on that basis. We encouraged them to have regard to the List of Issues in their preparation.

18. On Wednesday 6 September 2023, the last witness (Mr Aljabouri) concluded his evidence by around 12.40pm. Ms Ossei requested an extended lunch break of 1.5 hours to gather her thoughts and prepare to give her oral submission. Mr Hoyle was asked if he had any difficulty with Ms Ossei's application. He did not. He made two applications of his own.

19. Firstly, he opined that Ms Ossei's cross examination of the respondent had veered far from the list of issues such that he wished Ms Vial to give her submission first. Ms Vial objected to this proposal. She said she would prefer not to. She said words to the effect that the procedure had previously been altered to accommodate the respondent's request to deviate from the normal procedure to the prejudice of the claimant. The Tribunal understood that she was referring to the interposing of Ms Mubariq's evidence during the claimant's cross-examination which led to the claimant being left on oath for an extended period when the case went part heard in March and which Ms Ossei and the claimant also considered caused later problems with the availability of her witness Amanda Heath at subsequent diets.

20. Secondly, Mr Hoyle told the Tribunal that one of his colleagues was in intensive care and that his firm was trying to cover their work. He referred

again to the Wages Act hearing on Thursday 7 September and advised he was being asked whether he could commit to covering it. He advised that he anticipated his submissions would take between 30 and 40 minutes. He advised he was keen to go back to his firm and say he could handle the case the following day.

21. It was confirmed that, given all the evidence in the case was concluded, we anticipated that the submissions would be concluded that afternoon, which would free Mr Hoyle to participate in the other hearing the following day. The Tribunal agreed to Ms Ossei's application for an extended lunch adjournment from 12.45 to 2.15pm, in the absence of any objection. We advised we would consider during the beak the issue raised about the order of submissions and emphasised we were keen that the order should not become a disproportionate issue of contention as there should be no prejudice to either party as a result of the order in which submissions were held.

22. During the lunch adjournment we considered the applications. We determined that there would be no prejudice to Ms Ossei if she were to give her submission first, particularly given the claimant has the initial burden and Ms Ossei would have a right of reply, as Mr Hoyle had pointed out.

23. We decided it would be proportionate to timetable the submissions to ensure they would be completed in the time available that afternoon. This was partly bearing in mind Mr Hoyle's preference that the hearing be concluded on Wednesday 6th September so that he could attend another hearing the next day but it was mainly because we considered submissions could be properly and proportionately be dealt with in the time available that afternoon. In making this assessment, we had regard to the relatively short factual matrix of the case and the fact that the evidence, in the event, was considerably shorter than the original timetable contemplated. Concluding the hearing that day would also mean the following listed day could be used for the Tribunal's deliberations which we felt would be a proportionate approach and an efficient use of the Tribunal's resources.

24. Timetabling the submissions had the benefit that there could be no question of either party being squeezed for time by a lengthier submission from the party to go first, and likewise would ensure that Ms Ossei would not be prejudiced by going first, something she had expressed concern about. The panel considered the appropriate timetable and had regard to Mr Hoyle's estimate that his submission would take 30-40 minutes. Having regard to the time available, we considered it proportionate to allocate 45 minutes each to the parties, leaving ten minutes for Ms Ossei to give a reply should she so wish.

25. After the adjournment I informed the parties of the decision to timetable submissions and set out the schedule, allocating the representatives 45 minutes each with a ten-minute right of reply for Ms Ossei, which would take us to 4pm. Neither party protested nor objected to this schedule.

26. Ms Ossei finished her submission slightly earlier than her forty-five minutes. Mr Hoyle, therefore, started his submission slightly before his allocated time**.** Around fifteen minutes into his submission, Mr Hoyle requested that the interpreter cease to translate which would allow him to speed up and told the Tribunal he had agreed this with his client beforehand and that the respondent was agreeable. Given a history of previous concerns having been asserted by the respondent's representative in this case about what was and was not understood by the respondent, we were reluctant to agree to this proposal. However, the interpreter was willing to take notes of Mr Hoyle's submission and to translate them for the respondent at the conclusion of the hearing, and, on that basis, Mr Hoyle was permitted to proceed for the remaining 30 minutes without pausing for translation.

27. At 3.50pm Mr Hoyle was still speaking and I told him that his time was up but that he could have another minute or so if he wished to add some final thoughts. Mr Hoyle said that he hadn't finished and that he intended to deal with a transcript of a voice note which had been admitted in evidence in the case and with 'things said by the claimant'. He requested a further five minutes to do so.

28. This request was declined, pursuant to Rule 45 of the ET Rules 2013, in circumstances where we were concerned this would not be, or be seen to be, an even-handed approach. It would give an appearance of unfairness to the claimant's representative who had stuck to the time constraint and may have edited down her submission in order to do so. Ms Ossei had also required to pause throughout her submission for translation to take place which had not been the case for the majority of Mr Hoyle's submission. Granting Mr Hoyle's request, as well as giving him a time advantage, would squeeze any time available for Ms Ossei to give a (translated) reply to his submission.

29. When fixing the timetable, we had taken into account Mr Hoyle's suggestion that he would take 30-40 minutes and that the timetabling had been decided upon against the backdrop of his own request that the hearing be concluded that day to enable him to commit to attend a different hearing the following day. In all the circumstances, we were not persuaded the overriding objective would be served by permitting Mr Hoyle more time. He had commented extensively on the evidence in the case. He had addressed us on the law and on his view of the witnesses and had provided a commentary on the claimant's pleadings, FBPs and Schedule of Loss.

30. He had not addressed us on the preliminary issue on time bar. However, on 7 March 2023, following the conclusion of the claimant's evidence-in-chief, Mr Hoyle had made a strike out application in relation to the claim, the basis of which was that the claim was time barred. The Tribunal had previously ordered that this issue would be reserved but we heard Mr Hoyle at that time on the issue. We, therefore, had the benefit of his submissions in that regard. He had not cross-examined the claimant on the issue of time bar since addressing us in March on the subject of time bar nor had he subsequently led any material evidence from the respondent on the issue which might warrant an update to his earlier submission.

31. In those circumstances, it was not considered that there would be any material disadvantage to the respondent in refusing Mr Hoyle additional time but there was a significant concern that doing so would not be, and

would not be seen to be, even-handed from the claimant's perspective. We had given Ms Ossei assurances that the claimant would not be prejudiced by the order of submissions. In the event, Ms Ossei did not wish to make a reply to Mr Hoyle's submission, and the hearing concluded then around 4pm.

32. At 4.15 pm, Mr Hoyle emailed the Tribunal. He attached the previous direction of 2 May 2022 and referred to the previous allocation of 1.5 hours to each party for submissions. He suggested that the original timetable stood and that his client was concerned about 'the fairness of the process and this latest decision'.

33. We deliberated over whether any further action was appropriate in light of Mr Hoyle's correspondence, and we concluded it was not for the reasons set out above. We were satisfied that it was clear when submissions began on 6 September 2023 that the previously proposed timetable had been superseded and that the time allocation for submissions had been varied without objection from either party. The direction sent on 2 May 2023 was qualified by the words: "*Unless the Tribunal decides otherwise, the timetable is likely to be …"* We had decided otherwise, and the new timetable was clearly communicated to parties. We remained of the view that 45 minutes was a proportionate length of time for submissions in the case.

Issues to be decided

34. EJ Sangster in her Case Management Order dated 29 August 2022 identified a list of issues which was later supplemented by the additional issues identified in the Tribunal's CMO dated 19 October 2022 and refined in light of further clarifications by the claimant in response to that Order. The updated and comprehensive list of issues in the case is as follows:

Time bar

(i) Early conciliation with the correct respondent was notified to ACAS on 12 April 2022. The EC Certificate was issued on that date. The ET1 was treated as accepted on 3 May 2022 following a reconsideration judgment by EJ Robison. Given

the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 January 2022 may not have been brought in time.

(ii) Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
2. If not, was there conduct extending over a period?
3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    i. Why were the complaints not made to the Tribunal in time?
    ii. In any event, is it just and equitable in all the circumstances to extend time?

Employment status of Ruby and Shada

(iii) Were Ruby Mubariq and Shada Alsafar employed by the respondent or were they employed by Mazaj Dundee Ltd?

Harassment (related to race and / or sex)

(iv) Did the respondent engage in unwanted conduct, namely:

i. At the end of November 2021, did two of the respondent's alleged employees (Ruby and Shada) ask the claimant to dance when a genre of music 'Afro beats' was playing;

ii. On 5 December 2021, did the respondent and three of his alleged employees (Ruby, Shada and another individual) repeatedly ask the claimant to remove her wig;

iii. On 5 December 2021, did the respondent attempt to remove the claimant's wig; and/or

iv. Did the respondent constructively dismiss the claimant?

(v) If so, was this related to race or sex?

(vi) Did the conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Direct discrimination (race and/or sex)

(vii) Did the respondent subject the claimant to the following treatment?

i. At the end of November 2021, did two of the respondent's alleged employees (Ruby and Shada) ask the claimant to dance when a genre of music 'Afro beats' was playing;

ii. On 5 December 2021, did the respondent and three of his alleged employees (Ruby, Shada and another individual) repeatedly ask the claimant to remove her wig;

iii. On 5 December 2021, did the respondent attempt to remove the claimant's wig; and/or

iv. Did the respondent constructively dismiss the claimant?

(viii) If so, was that treatment 'less favourable treatment', i.e., did the respondent treat the claimant less favourably than they treated, or would have treated, others ("comparators") in not materially different circumstances?

(ix) If so, was this because of race or sex?

Findings in Fact

35. The following facts, and any further facts found in the 'discussion and decision' section, are found to be proved on the balance of probabilities.

Findings in fact relevant to time bar

36. In October 2021, the claimant was a university student, studying in Dundee. She was, at that time, 18 years old and had held one previous job in a coffee shop in her hometown of Northampton. The claimant is biracial and has Caucasian heritage and Black (West African) heritage from Ghana. She identifies as Black. She is a UK national and was born in England.

37. The claimant was employed by the respondent from 15 October 2021 until she resigned on 10 December 2021.

38. The claimant obtained her employment after spotting an advert in the window of a restaurant called Mazaj Arabic Charcoal Grill, indicating they were looking for staff. She entered with her CV. She gave it to the respondent, who introduced himself as Sadeq. He did not provide his surname. At the time when the claimant entered the premises in October 2021, the restaurant was not yet trading but the respondent was preparing for the opening of the establishment.

39. The respondent is a native Arabic speaker from Iraq. He came to the UK and has lived in Dundee since 1994. He is able to communicate fairly well in basic English, including about work-related matters, but cannot understand more technical or advanced language. He does not read or write in English with any proficiency (but is literate in his native Arabic). Nevertheless, he was able to communicate with staff on a work WhatsApp group about basic work matters such as rotas.

40. The respondent telephoned the claimant subsequently and asked her to come in. She began employment as a waitress at the restaurant on 15 October 2021. She was not provided with a contract of employment or statement of employment particulars. She was not provided with any other employment-related documentation such as a handbook. She never received a pay slip from the respondent. She never received a P45 from

the respondent. She never received an email from the respondent. She never learned the respondent's surname while her employment continued.

41. Shortly after her employment ended, on 14 December 2021, the claimant emailed the respondent, using an address supplied to her by a colleague. The full content of that email is produced at paragraph **112** below. She described her email as a formal grievance and, as well as detailing her complaints and asking for a response, she asked the respondent to provide her with a copy of her contract of employment. He did not do so. He did not answer her email. After receipt, it was translated for him by Yasser Aljabouri, who worked at the restaurant as a manager. The respondent threw it away and did not reply.

42. The claimant's cousin, Sacha Ossei, sought to assist the claimant in relation to the matter, and later to represent her in the tribunal proceedings when these were lodged. The claimant had confided in Ms Ossei, who is a few years older than the claimant, regarding events at work shortly after the events in question. Ms Ossei has no legal qualifications or experience of employment tribunal procedure and was not being paid or expecting payment from the claimant in connection with her assistance or representation. The claimant likewise had no experience of employment tribunal proceedings.

43. In or around January 2022, the claimant or Ms Ossei sent a letter to the restaurant's postal address in the same or similar terms to the claimant's email dated 14 December 2021. The respondent did not respond. She or her representative then sent a further copy of the same correspondence to the respondent by recorded delivery post on 7 February 2022.

44. Around this time, the claimant and her representative came to appreciate there was a time limit for bringing any complaint to an Employment Tribunal. By 13 February 2023, no response had been received to the claimant's latest correspondence to the respondent. The claimant's representative contacted ACAS on this date. The ACAS advisor suggested that they could initiate the process with the information they had and amend it as necessary at a later date if it was incorrect.

45. The claimant inferred (erroneously as it turned out) that the respondent's second name was Mazaj because the restaurant where she worked for him was called Mazaj Arabic Charcoal Grill. She initiated Early Conciliation through ACAS on 13 February 2022 and notified ACAS that the name of the prospective respondent was Sadiq Mazaj. The claimant provided ACAS with the incorrect name. Neither she nor Ms Ossei knew it to be incorrect at the time, but they were uncertain in the absence of confirmation. She provided a correct contact number for the respondent. An ACAS Early Conciliation Certificate was issued showing the prospective respondent as Sadiq Mazaj on 28 March 2022, with EC reference number R119184/22/58.

46. In the period between 28 March 2022 and 12 April 2022, the claimant and / or her representative made online investigations to try to determine the respondent's full name. By viewing Facebook postings, they discovered his surname was, in fact, Alsafar.

47. On 12 April 2022, the claimant initiated a further EC process through ACAS. She provided the correct name of the respondent to the ACAS case handler. The ACAS case handler advised her that, as she had provided the correct contact number for the respondent, they had already attempted conciliation with him. ACAS issued a further Early Conciliation Certificate on the same date (12 April 2022) with reference R145002/22/11.

48. On 15 April 2022, the claimant presented a claim to the Employment Tribunal via an online form. The allegations which her complaints concern are alleged to have taken place at the end of November 2021 and on 5 December 2021. She named the prospective respondent as Sadeq Alsafar in box 2.1 of the ET1 form. In box 2.3, she ticked the box to say she had an ACAS early conciliation certificate and she gave the reference R119184/22/58. This was the reference of the EC Certificate issued on 28 March 2022, naming the prospective respondent as Sadiq Mazaj. At section 15 of the ET1 form, she added the following further information: "*The previous certificate has the correct date (within the 3 months) however this certificate has the correct name spelling as the first one did not R145002/22/11*".

49. On 21 April 2022, the Tribunal wrote to the claimant, confirming that the ET1 had been rejected because the name on the ET1 did not match the name on the ACAS certificate.

50. The rejection of the claim presented 15 April was reconsidered on 3 May 2023 and the ET1 was treated as having been received on 3 May 2022.

51. At no time during the period of her employment or the period thereafter discussed above was the claimant or her representative aware of the existence of a company named Mazaj Dundee Limited. They first became aware of this in October 2022, when Mr Hoyle raised the matter and suggested that the claimant and others were, in reality, employed by this company.

Findings in facts relevant to identity of the employer of R Mubariq and Shada Alsafar

52. The respondent did not assert in his original ET3 response which he lodged on 1 June 2022 that he did not employ the claimant or that he did not employ Ruby Mubariq or Shada Alsafar. It was not until the hearing on the 18th October that Mr Hoyle asserted he was not the employer of Shada Alsafar and R Mubariq. There had been two PHs on case management in July and August.

53. In October 2022, the respondent was permitted to amend to aver that the R Mubariq and S Alsafar were employed by Mazaj Dundee Ltd.

54. The respondent is the director and sole shareholder of Mazaj Dundee Ltd which was incorporated on 19 March 2021, a number of months before the restaurant opened for business. The company is incorporated in Scotland.

55. Ruby Mubariq knew the respondent before she began working at the respondent's restaurant. Ms Mubariq began working at the restaurant soon after the claimant. The exact length of time Ms Mubariq and the respondent had known each other is unclear but Ms Mubariq described in one message having 'known them [the respondent and his wife] for a while'. From the context of the message to the claimant, the clear implication was that she had known them longer than the claimant, and

we find on balance she had known them before she started working at the restaurant and before the claimant had begun employment there in October 2021. We find on balance that she had known them for more than just a month or two before that. Ms Mubariq knew both the respondent and his wife, Shada Alsafar, outside work. Ms Mubariq was a fellow Arabic speaker (from Yemen) and the three were members of the Arabic speaking community in Dundee.

56. Ms Mubariq approached the respondent when he was opening a restaurant about a job and he told her he would take her on 'as a favour' to help her with work experience, as she put it, 'to move on with her life'. She needed management experience to improve her job prospects. She worked as a floor manager from around November 2021 and remained working at the restaurant at the time when the claimant's employment ended on 10 December 2021. Ms Mubariq told the claimant around the time she started that she was a family friend of Sadeq and that she was doing him a favour, coming in to help out.

57. Ms Mubariq believed she was employed by the respondent throughout. He paid her cash in hand. She received no payslips. She believed the restaurant was the respondent's own place. The respondent did not tell Ms Mubariq he was contracting with her on behalf of a limited company, named or otherwise.

58. As Ms Mubariq understood the staff structure, the management was a team rather than specific positions. She believed her co-worker, Yasser Aljabouri was there 'to help out'. She believed that, as floor manager, she was the point of contact for waiting staff, including the claimant, for any work-related issues. The respondent told staff in or about December 2021 that R Mubariq would be managing the floor or words to that effect. He did not tell the staff that she was there to get work experience.

59. R Mubariq understood her duties to extend to the restaurant floor but not to the finances of the operation or to the kitchen or to matters like the CCTV cameras operating in the restaurant.

60. She worked hours according to rotas prepared by the respondent or by Yasser Aljabouri. These were posted by the respondent on a WhatsApp

group which he put the rota on and on which he posted using his mobile phone. She was paid in cash by the respondent according to the hours worked. At some stage not long after the claimant's employment ended, Ms Mubariq also ceased working at the restaurant. She left to pursue another management job opportunity.

61. The respondent asked Ms Mubariq to wear trousers and a shirt when at work but did not supply these. Subject to this, she was generally allowed to dress as she wished as long as it was appropriate. She was asked to keep her hair and nails clean as she was dealing with food.

62. Shada Alsafar is the respondent's wife. She too is of Iraqi origin and a native Arabic speaker. She came to the UK 19 years ago and has some grasp of spoken English, having taken some lessons many years ago but her English is limited and she is less proficient than her husband.

63. Ms Alsafar worked at the restaurant as a chef from 3 November 2021 when the restaurant opened and throughout the period of the claimant's employment with the respondent. Ms Alsafar was aware of the existence of the limited company Mazaj Dundee Limited which her husband had set up in March 2021. She was aware because her husband had told her at the time. Although the respondent was the sole director and shareholder of the limited company, Mrs Alsafar very much regarded the venture as a family business. When she began working at the restaurant, she believed she was employed by Mazaj Dundee Limited. She knew that her wages were paid from the bank account of the limited company.

64. Mrs Alsafar was not provided with a written contract or statement of employment particulars. No payslips were produced to the Tribunal for Mrs Alsafar.

65. Mrs Alsafar regularly worked in the kitchen throughout the restaurant's opening hours. She was paid for her work but we are unable to make findings regarding the rate of her pay or the frequency or mechanics of the payments, having heard no evidence on these matters.

Findings of facts relating to the Afrobeats Allegation

66. The restaurant had a small but fairly diverse staff of between 10 and 20 workers at the material times. These included workers of Arabic origin from Iraq, Palestine and Yemen, white Scottish workers, Argentinian workers, Indian workers and a (white) South African worker, as well as the claimant.

67. The claimant was the only individual working in the restaurant at the material time who was biracial and who had Black African heritage. The claimant was asked from time to time by her colleagues and occasionally also by customers what race she was and where her family was from. She was asked on two occasions by Shada Alsafar where her family was from. On each occasion when she was questioned about this, the claimant explained her family was West African, from Ghana. It was known among the respondent's small staff that the claimant was biracial and had African heritage. It was known by the respondent, by his wife and by Ruby Mubariq.

68. One day in late November 2021, the claimant was working a late shift. At around 5pm music was playing in the restaurant. Normally the restaurant played Arabic music, though occasionally other genres of music were played. On this particular occasion, a different genre was playing. Ms Mubariq is familiar with the Afrobeats genre and, at least at the time of these events, liked the genre. She had put on a song called Jerusalema by Master KG, a South African DJ. This song was from the Afrobeats genre and had gone viral on Tik Tok and other social media platforms for its associated dance routine, performed in the Artist's video by Black African dancers.

69. The claimant, at the time, felt she enjoyed a good relationship with Ruby and Shada. She hadn't worked with them for terribly long but she spoke to them reasonably often at work. She felt they had a friendly, sometimes jokey, relationship – both between Ruby and Shada and between them and the claimant.

70. Ruby Mubariq and Shada Alsafar were dancing and having fun, cleaning up to the music. They invited the claimant to join in. Ruby asked the

claimant to dance. Shada said words to the effect '*Oh dance to this music. This is your people's music'*.

71. The claimant, a fairly quiet individual, was discomfited at the idea of dancing in the restaurant with colleagues and customers present. She had never danced at work before. The claimant laughed it off. She said '*No, I don't feel comfortable dancing like that while I'm working*'. Ruby and Shada continued to encourage the claimant to dance.

72. The claimant is not a particular fan of the Afrobeats genre. She didn't want to dance. She knew there were specific dance steps associated with the song but she didn't know the dance. Although Ruby and Shada were dancing, they didn't know the steps. The claimant felt embarrassed and felt there was an expectation on her that she would know the dance. The pair were laughing and dancing and the claimant extricated herself by laughing it off herself.

73. The claimant didn't complain to Ruby or Shada about the incident or to anybody at the respondent in the immediate aftermath of this incident. She didn't inform any of her colleagues, friends or family about concerns over the incident at the time took place. She continued working for the respondent after the incident and didn't mention it in the days that followed until events on 5 December prompted her to reflect on this incident and to raise it in a subsequent email to the respondent dated 14 December 2022 (see paragraph **112** below).

The First Wig Allegation

74. The claimant's natural hair has the appearance and texture of Black Afro hair. At the material time, it was relatively long and, in its natural state, was voluminous. Throughout her employment, the claimant wore her hair braided under a wig. The hair on the wig was a similar colour to her natural hair colour. The wig hair was curly, but the wig curls were more relaxed and substantially much less voluminous than the claimant's natural hair. The claimant wore her hair braided under this particular wig when at work throughout the whole period of her employment with the respondent. She owned other wigs, but she never wore a different wig or hairstyle to her work. She secured the wig by sticking it to her head.

75. Black women often wear wigs. We accept that this is widely known, at least in the UK. Hairdressing for Black women is a particular specialism. At the material time, the claimant had discussed with her friend, Lyn Sibanda, who is also Black, the lack of hairdressers and of products available in the area designed for Black women's hair. The claimant and Ms Sibanda and, we accept, Black women generally in the UK, regarded wearing braids under a wig or wearing cornrows or locs as a 'protective style', meaning a style to help protect the natural Afro hair from damage and breakage, including damage caused by it becoming brittle in cold weather.

76. On 5 December 2021, the claimant was at work. Early in the evening, she was standing behind the bar, cleaning glasses. The restaurant was relatively quiet, before the rush of the dinner service. Ruby Mubariq and Shada Alsafar were there. They were chatting to each other in Arabic. Ms Mubariq turned to the claimant and said to her (in English) words along the lines: "We were just gossiping about your hair and whether or not it's real."

77. The claimant replied, "No, it's not.". Ms Mubariq and Mrs Alsafar appeared shocked by this and Mrs Alsafar said words along the lines, "But I complimented you on your hair, and you said thank you". The claimant said something like "Yeah, I didn't know what else to say". She felt awkward. Ruby asked the claimant a question along the lines, 'Why did you accept a compliment on your hair if it's not your own?'

78. At around this point, the respondent came and joined them on the other side of the bar. Ruby and / or Shada told him that the claimant's hair was not real. The respondent acted surprised. He said words along the lines, "Oh, you're wearing a wig? Why are you wearing a wig?"

79. The claimant felt flustered and deeply uncomfortable. She had not experienced someone asking her this question before. She explained it was because of the cold weather and because of her hair type. She said she wore the wig to cover and protect her hair from the cold. She told them that her hair was braided underneath it.

80. The respondent said: “Oh? Take it off!”. The claimant said “no.” The respondent repeatedly asked the claimant to take it off. The claimant again said no, and that she didn’t want to. Ruby and Shada also asked her to take it off.

81. The claimant felt embarrassed and confused. She felt singled out and isolated by the conversation. She moved away from them. She felt deeply uncomfortable. Not long after this interaction, the dinner service started and the restaurant filled up with diners. The claimant was busy waitressing from that point until much later in her shift.

The Second Wig Allegation

82. At the end of the same evening between around 10 and 10.30pm, the claimant was clearing up. She was mopping the floor in the restaurant. The kitchen had already been cleaned and shut down. The kitchen staff had already left. Any who were waiting for colleagues were waiting outside. This included Shada Alsafar, who was outside waiting for her husband, the respondent. The claimant’s colleague, Morell, a fellow waitress, was mopping behind the bar.

83. The respondent and the manager, Yasser Aljabouri, were still inside. The respondent was standing at the door. Yasser was sitting in a booth next to the door. The respondent wanted to get everything finished and get the restaurant emptied and locked up. He was trying to hurry the remaining staff, including the claimant, out the door.

84. The claimant went downstairs to get her belongings from the security room. She came back up with her things and was heading towards the door. Yasser was still sitting in the booth to the right-hand side of the main exit and the respondent was standing in front of the door, blocking it. As the claimant tried to pass him out the door, the respondent stopped her and said words to the effect: “No one’s here. Take off your wig.”

85. The claimant took a step back from him as he then tried to reach over and grab the wig and pull it off her head. He was smiling. He grabbed strands on the top and pulled. The claimant held on to the wig and tried to adjust it to cover her hair. The claimant moved backwards from him, saying

words like “no, no, I don’t want to. It’s stuck on!” The claimant was distressed. She felt humiliated and that her personal boundaries had been violated. She went over to Yasser who was still in the booth and said words to the effect: “What part of London are you from that this is acceptable, that you’ve never seen a person of colour wearing a wig before?” Yasser replied that he was from West London and said “I don’t get involved in all of that” or similar words.

86. The claimant then stood outside to leave. She still felt deeply upset by the incident. She waited for Morell because they both walked in the same direction after their shifts. She asked Morell where she was at the time and if she had seen what happened. Morell said she didn’t really see but she thought she had heard them. The claimant and Morell then walked together until their journeys took separate directions as Morell headed for the bus station and the claimant headed home.

87. The claimant called her sister that evening and told her about the incident. When she got back, she decided to visit her friend, Lyn Sibanda. Ms Sibanda was also a university student in Dundee at the material time. She was also living away from her hometown and stayed in student accommodation near the claimant’s. They had met at the beginning of the academic year and lived in separate blocks. She and the claimant regularly hung out together. That night, the claimant told Lyn Sibanda about what had happened at work at the end of her shift. The claimant was very upset and confused by what had happened. She was trying to justify and come up with excuses for what the respondent had done. Ms Sibanda was concerned to hear about the incident and suggested that the claimant report the matter to the police as she regarded it as an assault. The claimant decided not to do so.

Events between 5 December and the claimant’s resignation on 10 December 2021

88. The claimant was worried that she was on the rota to work the following day. She did not want to go back into work after the incidents that day but the restaurant was understaffed with the claimant and Morell due to waitress on the floor so she knew if she didn’t attend her colleagues would

suffer. The claimant attended work on 6 December 2021. She worked 12pm to 4pm. Ruby Mubariq was also working that day. The claimant had limited interactions with Ms Mubariq during the shift and those which took place were limited to work-related exchanges. She kept to herself. She felt extremely anxious throughout the shift, worrying that the subject of her hair might come back up. She felt very uncomfortable being in the same room as the respondent.

89. After her shift on 6 December 2021 at 7.20pm, the claimant sent a message to Ruby Mubariq. It read:

> *Sorry Ruby I don't think I can work tomorrow x*

90. Ms Mubariq acknowledged this message a few hours later.

91. In the meantime, on 6 December 2021 at around 9pm, the claimant posted on a group chat which she was on with her colleague, Amanda Heath and another colleague called Marine. Amanda Heath worked in the restaurant. She also began employment there in October 2021. She worked there for longer than the claimant with her employment ending around April 2022. Amanda Heath knew the respondent from having worked together as colleagues for a previous employer, Meza Grill. She was a more experienced and more senior waitress. She was treated like an unofficial floor manager at the respondent's restaurant.

92. The claimant posted the following text:

> *So I'm speaking with my sisters about it now but like*
>
> *Yesterday they were talking about my hair in Arabic and ruby was just like that's a wig right*
>
> *And they were all talking about it at the bar and whatever and then Sadeq was like take it off or whatever*
>
> *Then a couple of hours later when we were leaving he like blocked the door and was like laughing and asking me to take my wig off and then he tried to pull it off basically* :|

93. After some responses from colleagues the claimant posted further messages at just after 9.15pm:

We need to have lunch again before I go home so I can tell you in person but

Not even sure I want to go back because :|

94. At some stage on 6 December 2021, the claimant sent a voice note to the group chat with Amanda and Marine**,** in the following terms, so far as material:

I'm gonna send a voice note, because it's probably the quickest way for me to explain what happened…I was behind the bar and so was Ruby and shada and… I'm forgetting her name right now but you know the other woman who works in the kitchen. They were just kind of just talking Arabic and Ruby was like, "i'm not going to lie we are gossiping about you. We are arguing about whether or not that's your real hair". I was like, "no it's not" because it's not. They were like, "oh ha ha I didn't know I can't believe it's a wig like", talking about like I was deceiving them somehow. She was like, "when I complimented you and your hair you said thank you". I was like, "yeah I did because it's a normal thing to say". Sadeq came over to the bar because it was kind of dead … He was like, "oh, that's a wig I can't believe it, I can't believe it". I was like, "yeah it is". The conversation already made me kind of uncomfortable …. So he was like, "take it off what's underneath?" I was like, "my hair is underneath." He was like, "take it off. Take it off." And I was like, "I'm not going to do that it's braided. Like I don't want to." He was like, "well why would you wear one?" I was like kinda, "because I want to." I was kind of like giving vague explanations like the cold weather and whatever…and then I just kind of walked off, they were kind of just like joking you know they were laughing like, "oh my god I can't believe it, take it off" and I was like, "no" …

After that, it was a couple of hours later, we had to leave. I was on shift with, it was me Ruby and Morell. We were basically tidying up and it was almost 10 pm. ... I had finished mopping the floor and Morell was mopping behind the bar, I had asked her later on. As I was trying to go out I ran down stairs it was like dark. Then they

were like, "come on, let's go let's go let's go", you know when they are rushing you out ... I walked up and Sadeq was in front of the door, you know in the booth, Yasser was sitting in the corner there. And Sadeq was in front of the door and obviously that's where I'm trying to leave … So yeah and he was in front of the door, like, "take off your wig take it off" and I was like, "no, I don't want to." And he was like, "no no just take it off take it off take it off." I was like, "no" and he kind of like grabbed the strands on top of my head and like pulled it, trying to get it off and I was moving backwards like, "no no I don't want to I don't want to," and he was like, "why not?" and I was like, "it's it's stuck on. Don't do that." He was like, "oh, is it stuck on permanently?" I was like, you know, "I take it off when I want to like sometimes" and then I turned to Yasser, saying, "what part of London are you from like that this is acceptable?" … He was like "oh, I'm from west London. I'm not interested in that kind of stuff." And so I like kind of sidestepped Sadeq and got out like through the like the little gap that he'd left on the side. I like called Morell to come over and by that point Morell had come over and I called her to come leave with me. I messaged her after that, she was like, she said she heard him telling me to take it off but she didn't see him yank it. I guess because she was behind the bar she wasn't paying attention but like that's what I mean like what can I say that isn't just my word against theirs?

95. Ms Heath sent a text message on the chat at 9.19pm:

Defo on the lunch

I'm seriously gonna have words with ruby about this behaviour not naming any names or anything but just that she needs to watch what she's saying because it's hurting feelings

96. The claimant responded:

I mean please do because I don't even know what to do about it within the company like I can't see anyone taking it seriously

97. Ms Heath replied:

For sure I'll speak to her on Thursday when I'm in because this isn't on.

98. There was some further messaging on the evening of 6th December on the subject. Ms Heath posted:

I'll speak to ruby first off and see if she's willing to speak to Sadeq because that is chain of command but I don't really know how this goes either I'll have a think on it

You're off til Saturday anyway so I'll talk to them first before we do anything else.

99. In the early hours of 7 December, the claimant posted again on the group chat:

Exactly I'm glad you guys understand I'll wait until Thursday for now but I'm not sure I can even continue working there after like

There's no way sadeq won't be weird after a complaint.

But Yh I'd love to go to much [sic] with you guys I leave on the 17th but I'm good before then x

100. On Thursday 9th December 2021, Ms Heath had a discussion with Ms Mubariq about the matters the claimant had told her about. Ms Heath messaged the claimant to update her:

Okay so I had a chat with ruby and it looks like she's already heard about it from Morell but she's gonna give you a message probably tomorrow so she can work to get this all sorted in the best way possible xx

101. Later that day, the claimant received a message from Ruby at around 10.30pm. She wrote "*Hey how are you?*" and posted a smiley face below her message.

102. The claimant felt brushed off by this message and that her complaint was not taken seriously. She replied at 1.08 am on the morning of Friday 10 December. She said:

I'm not very well right now

I asked Amanda for the company email did she mention it at all?

103. Later that morning at around 10 am, Ms Mubariq replied:

Company email??

Whenever you are free call me please

104. The claimant answered around 5 minutes later:

I would be more comfortable speaking over text, and yes could I please have the email address for Mazaj?

105. At 10.15 am that day (Friday 10 December 2021), Ruby replied:

What I wanted to talk to you about is not work related lol

Regarding the email I will check for you and send you

106. At 10.26 am Ms Mubariq posted the following message:

Regarding the matter Amanda spoke to me about, I had a chat with sadeq and he apologized and said he is comfortable with us so he was kidding around didn't mean to make you feel bad.

He now realizes it had been inappropriate for him to continue joking when you didn't feel comfortable. Such a thing wouldn't happen specially kitchen staff joking with us.

Personally I don't mind the joke with all as I have known them for a while but I understand that other people may feel uncomfortable

So please don't feel worried or unhappy and if you ever feel not right about something speak up so people understand your point of view

I personally just want everyone to be happy at work and feel comfortable to talk to myself about any problems as I will try my best to help.

I would prefer to hear you part from you first. Xx

107. The claimant felt dissatisfied with the response and felt she needed to resign. She did not feel her complaint was being taken sufficiently

seriously and she did not feel comfortable at the idea of continuing to work there. She replied around 25 minutes later at 10:51 am on 10 December:

> *Honestly Ruby I don't think I'll be returning to work anymore, I apologise for the short notice but I don't feel comfortable coming in anymore. Did Amanda tell you he tried to remove my wig? He may have felt it was a joke but I don't think that is appropriate in any context. Please take this as my formal notice. I should like the company email as soon as possible thanks.*

108. Ruby Mubariq replied at 23:33:

> *Do whatever you see right. X*

Events after the claimant's employment terminated on 10 December 2021

109. At the time her employment terminated, the claimant worked variable hours for the respondent. Her average weekly wage across her employment was £68.75 (net).

110. After resigning the claimant felt anxious and worried. She was due to travel home for the Christmas holidays. She was worried about money and how she would meet her student expenses and she was aware she would have to look for another job when she returned to Dundee after Christmas.

111. On 12 December 2021, the claimant was provided with the respondent's business email address by a colleague.

112. On 14 December 2021, the claimant sent the following email to the respondent. The subject heading was 'Formal Grievance'

> *Mazaj Arabic Charcoal Grill Restaurant*
> *48-4 Reform Str*
> *Dundee*
> *DD1 1RX*
>
> *Dear Sadeq*
>
> *Please accept this letter as a formal grievance.*
>
> *On Sunday 5th of December I attended work as normal.*

As a follow up to an extremely awkward conversation I encountered with a few other colleagues, you laughed and smiled and asked me whether I was wearing a wig. I have reason to believe you already knew the answer as the other colleagues had asked me the same question moments before. You asked me to take off my wig during the shift.

You also asked me:

Why I wear all a wig

What is underneath

Why can't I take it off

Although I was not obligated to answer these highly personal questions I did, uncomfortably. I walked away as it was not a constructive nor appropriate conversation for the workplace.

At the end of the shift when it was time for me to leave, you insisted again that I take the wig off, you made it hard for me to leave by standing too close to me and blocking the exit. You then pulled my hair without my consent in attempts to do something I had told you I did not want to do; take my wig off.

The Equality Act 2010 (the Act) says that I am protected against harassment at work related to my protected characteristic of race.

I did not feel respected by you and my personal boundaries as a young woman were violated. I felt humiliated as you asked and tried to take it off in front of other members of staff. You placed your curiosity above my dignity.

I expect professionalism from colleagues, especially from a senior such as yourself, however the manner in which you conducted yourself violated my rights as an employee and as a result I no longer feel comfortable offering my services here. You have actively caused me to feel ashamed of the protective styling methods I use for my hair. Where I was not before, I am more self-conscious about my hair.

Apart from the incident described above there have been several inappropriate comments made by other staff members.

For example, when a music genre associated with people of African descent played in the background, requests were made for me to "dance" as this was "my kind of music". The culture of the workplace is toxic and I should be free from discrimination, harassment and assault of any degree. This has not been the case. I cannot be expected to work in a place that is detrimental to my mental well-being. In the same way you cannot conduct yourself the way you did with no form of remedial action to the level of offence you have caused me and my associates.

As much as I have enjoyed the food and a few relationships I have formed at Mazaj, I do not feel safe working in an environment like this. Please consider this a reaction to your actions specifically on Sunday and I look forward to an adequate response from yourselves within 7 days. Please also provide me with a copy of my contract.

Thankyou

113. The claimant received no response and re-sent the content of the email by post, once in January 2022, and again on 13 February 2022 without a response, all as narrated above (see paragraphs **41** to **43**). Mr Aljabouri printed and translated the email to the respondent at the time, but the respondent, who was busy working over the grill at the time, threw it away or instructed Mr Aljabouri to do so.

114. On the date in question, the respondent had CCTV cameras operational in the restaurant, including a camera or cameras with coverage of the exit where the incident at closing took place. The respondent did not retrieve footage from the operator before the recordings were routinely wiped around 30 days later.

115. The claimant returned to Dundee to attend University in January 2022. She became withdrawn after the events at work with the respondent. She stopped going out to socialize. She stopped wearing wigs. She felt more

self-conscious about her hair. She felt anxious about bumping into ex-colleagues.

116. For a few years before moving to Dundee, the claimant had experienced difficulties with anxiety for which she had received therapy on and off until September 2021. After the events in December 2021, the claimant noticed a deterioration in her mental well-being. She became extremely anxious. She felt anxiety whenever she walked past the respondent's restaurant which is on a busy street in Dundee. She felt anxious about the possibility of getting a job and working somewhere where she would again be in a minority ethnic group.

117. The claimant did not seek professional medical support or treatment in connection with her symptoms in this period. She confided in and sought comfort from friends and family members.

118. Between January and May 2022, the claimant looked for multiple jobs in Dundee without success. She submitted multiple applications on indeed for customer service roles. She progressed to 3 interviews but was not successful.

119. In April she considered withdrawing from her course at Abertay University and in May she made the decision to do so. She wanted to move to a more culturally diverse location where she would feel less isolated. She discontinued her student flat in May 2022. She left Dundee in May 2022. She formalized her withdrawal from her course during the summer break in August 2022.

Submissions

120. Both Ms Ossei and Mr Hoyle gave an oral submission. Those submissions are summarised within the 'Observations on the evidence' section (in the case of submissions relating to evidential matters or issues of fact) or, in the case of submission about the law or its application, within the relevant section of the 'Discussion and decision' part of the judgment.

Observations on the evidence

The claimant

121. Ms Ossei and Mr Hoyle addressed us on various aspects of the claimant's evidence and how it should be assessed. Their submissions on her evidence regarding particular allegations are discussed below.

122. Ms Ossei observed that the claimant had endured 4.5 days of questioning during cross-examination and she argued the questions were inappropriate at times, concerning, for example, the practicality of the claimant's natural hair. She submitted the claimant was credible and consistent and, before the final incident in December, there was no evidence that she had any prior intention to be problematic after starting her new job. She said that much emphasis had been placed on details such as the claimant's natural inclination to take notes or her manner of speech in her voicenote and in the text and WhatsApp messages produced to the Tribunal. There was also focus on her decision not to inform the police about the incident. These things, she said, were explained by the claimant's calm temperament and her confusion about the event in relation to which she was seeking clarity.

123. Ms Ossei argued that the narrative put forward that the claimant's mental state was the problem in the evidence of the respondent was distasteful and unrealistic. The claimant's mental health was, she said, a private matter, and not necessarily something her friends and colleagues were aware of.

124. Mr Hoyle cited an Employment Tribunal decision in which reasons were published on 8 August 2023. He quoted the EJ in **Rodgers v MOD** 1806784/2021 & Anr who had said of the claimant in that case, "*it is in keeping with the somewhat emotive and perhaps hyperbolic form of language that she is prone to and therefore we … accept that she did use that phrase*." He quoted from another paragraph where the Employment Judge referred to the claimant's "*hypersensitivity after the event in seeking to impute ill motives and extract any reference potentially made in relation to her sex from which she might construct a claim*".

125. He asserted the claimant, who was living away from home for the first time, was lonely and isolated. He asserted that she was 'socially awkward'. He refered to her having been treated for anxiety and having received

counselling before the alleged incidents. He said there was evidence she felt Dundee was not diverse enough and felt uneasy walking the street when, according to Mr Hoyle, "we know it is a welcoming place".

126. We did not find Mr Hoyle's reference to the ET decision in **Rodgers v MOD** of assistance. The passage quoted concerned the assessment by another first instance tribunal of the evidence of a particular witness in that case who had no involvement in these proceedings. We saw no parallels between the Tribunal's characterization of that witness's evidence in **Rodgers** and that of the claimant in the present proceedings.

127. We found the claimant to be honest and straightforward in her account of matters. Far from being emotive or prone to hyperbole, we found her composed and measured in her evidence. We did not accept Mr Hoyle's characterization of the claimant as 'lonely' and 'socially awkward'. We did not consider that the claimant's previous treatment for anxiety symptoms had any material bearing on the quality of her evidence or her credibility or reliability. We found her evidence to be consistent both with the evidence she gave at different hearing diets and with what she said in the contemporaneous voice note and WhatsApp messages. Her evidence was also very substantially consistent with Lyn Sibanda's account of what she recalled the claimant telling her on the night of the incident and with the pleadings in the ET1 and FBPs.

128. Understandably perhaps, Mr Hoyle sought in his cross examination to make much of any inconsistencies or perceived inconsistencies between the claimant's evidence and her written case and between her account and that of Lyn Sibanda. On reviewing the evidence, we found many of these alleged inconsistencies to be without substance and those which did exist to be minor in nature, and entirely explicable with reference to the time gap of between 15 and 20 months between the events and the evidence being given.

129. We found the claimant to be a credible and reliable witness. This was a case involving a sharp conflict in the facts. The respondent denied all the allegations in their entirety. We preferred the evidence of the claimant, on

the balance of probabilities, to that of the respondent and the respondent witnesses.

Lynn Sibanda

130. Mr Hoyle said he found Ms Sibanda to be wholly credible and 'not coached'. He suggested that we had never heard about the claimant and Lyn Sibanda having a conversation after the events on 5 December 2021. That is inaccurate. The claimant explained in her evidence in chief in March 2022 that she spoke to Ms Sibanda after the events.

131. We found Ms Sibanda to be a credible witness. We found her to be straightforward in answering the questions put to her and not prone to exaggeration or embellishment.

The respondent

132. The respondent was physically present at the Tribunal at the hearings in October, March, April and September. He was assisted by an Arabic interpreter throughout and the interperer was present in person at all diets of the final hearing. He gave his evidence at the September 2023 diet.

133. Ms Ossei submitted that the respondent's account was filled with inconsistencies and backtracking. With respect to evidence he gave that the claimant's grievance email dated 14 December sought an apology, she pointed out it contained no such request. She asserted the respondent knew well what he did was wrong and that, as the business owner, he also knew that all proof was under his control. His account regarding the CCTV footage added further confusion, according to Ms Ossei. She contended that the Alsafars' pride in their restaurant and reputation had taken priority over valuing their employees. She said they understood that their reputation would be impacted if they admitted their involvement in the incidents.

134. We found that the respondent did not answer questions directly but was often evasive or inclined to deflect from the question. There were inconsistencies within his evidence and between his evidence and that the evidence of other witnesses (including other respondent witnesses). For example, he suggested that he was not aware that the claimant had

alleged the incident until 2 months later (when CCTV footage had been destroyed), but later in his evidence he confirmed that he had received the claimant's grievances. He said only when he received the documents about attending court, did he consider CCTV. His evidence was inconsistent with Mr Aljabouri's who said the respondent suggested checking the CCTV on receipt of the grievance. His evidence was inconsistent with Ms Mubariq's with respect to whether the latter had any relationship with the respondent's wife outside of work, and with respect to whether and how well he knew Ms Mubariq before her employment.

135. We did not find the respondent's evidence to be convincing and preferred the claimant's account on matters of dispute.

Ruby Mubariq

136. Ms Ossei disputed Ms Mubariq's credibility. She referred to the apology message which Ms Mubariq told the Tribunal she had fabricated but suggested it may instead have come to fruition after a conversation between Ms Mubariq and the respondent. Mr Hoyle suggested that Ms Mubariq's evidence that she was employed by the respondent indicated she 'wasn't coached'.

137. We found Ms Mubariq less than forthcoming and reluctant to answer questions in a straightforward, natural manner. Most troubling, however, was, as Ms Ossei pointed out, a particular feature of her evidence which was inherently improbable.

138. Ms Mubariq accepted that she wrote the text message on 10 December 2021 to the claimant in which she said, among other things: "*Amanda spoke to me … I had a chat with sadeq about it and he apologised and said he was comfortable with us so he was kidding around … he now realises it was inappropriate for him to continue joking when you didn't feel comfortable…Personally I don't mind the joke with all as I have known them for a while* …".

139. Her evidence to the Tribunal was that the content of that message was not true. In fact, she said, she hadn't spoken to the respondent about the allegation and he hadn't apologised or said that he realised it was

inappropriate. When asked by one of the members whether she believed the claimant's allegation, knowing the respondent's personality, her evidence was that she did not. Yet her account to the Tribunal had been that she messaged the claimant in the terms she did because she sympathised with the claimant and wanted to help her, without having heard Sadeq's side at all "to come to a middle ground" then "come to sadeq to apologise to her". She said it was "my way to get them to talk". This did not sit easily with her later suggestion that she disbelieved the claimant's allegation. We found Ms Mubariq's evidence that she did not tell the respondent about the allegations implausible in light of the message she sent the claimant and in light of the relationship she had with him and his wife.

140. We preferred the claimant's account of the matter to that of Ms Mubariq in relation to disputed matters.

Shada Alsafar

141. We found that Mrs Alsafar also seemed reticent to answer questions in a candid and direct way. She was lacking in detail in response to straightforward questions. For example, Ms Ossei questioned her about whether she was issued a contract of employment. Mrs Alsafar initially said yes, then challenged the relevance of the question. Ms Ossei then asked again whether she was given a contract physically and Mrs Alsafar said words to the effect: "it is our restaurant and we work in our business." Ms Ossei repeated her question once more and, this time, Mrs Alsafar said no, there was no work contract. There were inconsistencies too between Mrs Alsafar's evidence and that given by Mrs Mubariq in relation to their relationship.

142. We preferred the claimant's account to that of Mrs Alsafar on disputed matters.

Yasser Aljabouri

143. We found that Mr Aljabouri was less than forthcoming and inclined not to answer questions in a straightforward way.

144. There were also significant inconsistencies in his account. For example, he said he first became aware of the Second Wig Allegation when the 'first trial started' when he had to come to Dundee for 3 days. However, he had already given evidence that he received the claimant's grievance letters and had translated them for the respondent. Those set out the allegation.

145. He said at the start of his cross examination, words along the lines "when we got the letters, Sadeq asked me to check the camera, check who was working." Later, after a comfort beak requested by the respondent, Ms Ossei asked Mr Aljabouri more about checking the CCTV and Mr Aljabouri appeared to change his evidence. He said they did not check CCTV because they did not get the letters until 3 months later. He subsequently denied having mentioned CCTV in his earlier evidence.

146. We preferred the claimant's evidence to that of Mr Aljabouri on disputed matters .

Evidence relating to First Wig Allegation

147. With respect to the 5th December allegations, Ms Ossei noted that all employees listed in the allegation had been present on that date.

148. Mr Hoyle made a number of assertions about what had or had not been said during the claimant's evidence in chief and about what had or had not been put to the respondent's witnesses during cross examination.

149. He referred to the claimant's averment that she attempted to briefly explain that she was wearing a wig, a protective style of hair and asserted it didn't feature in the claimant's own evidence. He also asserted we'd heard no evidence on the claimant's averment that she answered the highly personal questions then quickly walked away. He referred to the claimant's averment that colleagues repeatedly asked her to remove her wig despite her declining and said that was not the claimant's case. He said we had not heard evidence of staff gossiping in Arabic or that Sadeq had come along and joined in. Having consulted our notes, we are satisfied that Mr Hoyle's assertions are mistaken. The claimant gave evidence in chief on all of these aspects of the First Wig Allegation at the diet in March 2023.

150. Mr Hoyle suggested that the First Wig Allegation was not put to the respondent at all. He said the only incident put to the respondent was the incident by the door. During the proceedings, the respondent was present and had the transcript of a voice note translated for him on at least two occasions which set out the claimant's account of the First Wig Allegation (as well as the Second Wig Allegation). Mr Hoyle asked the respondent about whether he asked the claimant whether she wore a wig. The respondent denied it. He put to him that the claimant said that in the evening, Ruby and Shada had asked her about wearing a wig. The respondent denied it. He said it wasn't in front of him. He denied knowing the claimant wore a wig and maintained he believed it was her natural hair. Mr Hoyle put to him that he said take it off and the repondent denied this.

151. In cross examination, Ms Ossei put to the repondent that the claimant had no reason to make up the allegations. Mr Alsafar replied "Nothing happened from the allegations she mentioned". Later, Ms Ossei asked the respondent whether he said to the claimant 'why do you wear a wig?' At another point in cross examination, she put it to the respondent that he repeatedly asked the claimant to remove her wig and asked him whether he denied these claims. Towards the end of her cross-examination, Ms Ossei put it that the respondent was not telling the truth and that the allegations did happen.

152. The voicenote was also played to Ms Mubariq during her evidence in chief in the March '23 diet and the transcript was additionally later put to her. Ms Mubariq was asked by Mr Hoyle to comment on the allegations in the voice note. She denied any conversation about the claimant's hair. She was again referred to the transcript of the voicenote by one of the panel members, and asked what parts she would say were accurate. She replied that none of it was. Though Ms Ossei did not repeat the allegations again by putting the voice note contents a third time, it was clear from the tenor of her questioning during cross-examination that the claimant maintained the allegations.

153. We are satisfied that the respondent and the respondent's witnesses were made aware of the allegations in relation to the First Wig incident; that they were given ample opportunity to comment on the allegations and that they

did so; and that it was clear from Ms Ossei's cross examination that their denials were not accepted by the claimant.

Second Wig Allegation

154. Ms Ossei said there were consistent elements to the evidence such as the whereabouts of the respondent at the end of the shift. She said, and that CCTV footage ought to have been available.

155. Mr Hoyle suggested that, although Ms Ossei cross-examined the respondent's witnesses at length, she barely put her case. He said she didn't directly accuse the respondent of laying hands or on his motives for doing so. Mr Hoyle put to the respondent in chief that he placed his hand on her head and pulled at her wig which the respondent denied. Ms Ossei also put to him that the allegation was he forcefully attempted to remove the wig and asked whether he denied the claims. Towards the end of her cross-examination, Ms Ossei put it that the respondent was not telling the truth and that the allegations did happen. She sought to explore with the respondent a racial dimension when she asked whether he would have asked a woman in a hijab to see underneath it or a white woman. She asked the respondent if he considered himself racist. Again, we are satisfied the respondent was clear on what the allegations were and had ample opportunity to respond to them.

156. Mr Hoyle asserted Ms Sibanda was the first person the claimant spoke to on 5 December having left work, other than Amanda Heath and Morell. He said Ms Sibanda was 'adamant' the claimant told her that the respondent and Mr Aljabouri approached herbefore the incident. He said the claimant said, instead, that she approached them at their location. Mr Hoyle contended that the fact that, as he would have it, there were two accounts of the incident, meant that neither was to be believed.

157. Ms Sibanda said twice that the claimant told her she'd been cornered by her employer who had tried to remove her wig. She said she had the impression there were two people from her employer there and one of them attempted to remove the wig. She then said both approached and one attempted to remove her wig while the other watched. Mr Hoyle asked if the claimant had said they approached together and Ms Sibanda said

the claimant didn't explicitly say. Ms Sibanda also later pointed out when Mr Hoyle asked for specific words the claimant had said that this conversation was two years ago and she wasn't going to remember specific words.

158. The claimant said she walked towards the door where the respondent was after collecting her stuff from downstairs. We do not accept that Ms Sibanda's different understanding of who approached whom holds the significance asserted by Mr Hoyle. It might be natural for her to to have formed an impression that the claimant was approached from the description of being 'cornered'. It might also be natural that neither the claimant nor Ms Sibanda would, at the time, have given great focus to details like who walked towards whom, as to the respondent laying his hands of the claimant to try to remove her wig.

159. Mr Hoyle said that in the FBPs the claimant asserted that the Second Wig Allegation took place when the other colleagues were not around but he said the claimant now says that Mr Aljabouri was there and that it was in plain view of Morell and that Shada Alsafar was also there.

160. The FBPs said: "*Sadeq continued to ask when the other colleagues were not around and attempted to take it off himself*". Our understanding of this part of the FBPs is that 'the other colleagues' being referred to were Ruby and Shada, who were alleged to have been present during the First Wig Allegation. It had been averred on page 44 that Sadeq repeatedly asked the claimant 'Why can't you take it off?' in the presence of Ruby and Shada.

161. It was not the claimant's evidence that Shada was present inside the restaurant during the Second Wig Allegation at closing time. With respect to Morell, she said she asked Morell after the event where Morell was when she went downstairs to get her stuff and that Morell told her she was mopping behind the bar. The claimant said Morell told her she didn't see the incident but thought she might have heard it.

162. Mr Hoyle suggested the claimant departed from her pleaded case by now saying there was more than one attempt to remove the wig. We do not accept this is a departure. The FBPs are silent on how many times it

happened. In the ET1 says '*in attempts* [plural] *to do something I had told him I did not want to do: take my wig off*'. The grievance dated 14 December included similar wording.

Relevant Law

Time Bar

163. Section 123 of the EA deals with time limits for bringing discrimination and harassment claims and provides:

"s.123 ***Time limits***

(1) subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of three 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."

164. Where a complaint is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (**Roberson v Bexley Community Centre** [2003] IRLR 434). Parliament has chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (**Adeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.)

165. S.140B of the EA provides for an extension to the three-month time limit in certain circumstances. In effect, s140B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'Day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry

of the statutory time limit. Where a limitation period has already expired before the conciliation commences, there is no extension (**Pearce v Bank of America Merrill Lynch** UKEAT/0067/19).

Employment status / Identity of Employer

166. Section 109 renders an employer liable for anything done by a person in the course of their employment with that employer, whether or not with the employer's knowledge or approval.

> *s.109* ***Liability of employers and principals***
> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
> *(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
> *…*

167. McBryde observes that Scots law "*as a general rule decides questions of contractual … intention objectively*." (The Law of Contract in Scotland, 3rd edition, para 5-02). He cites the dicta of Lord Denning in **Storer v Manchester CC** [1974] WLR 1403 at 1408.

> *"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."*

168. McBryde also acknowledges that problems can arise in deciding who the parties to the contract are. "*The problem is at its most acute when one of the parties acts in a way which makes it obscure whether the party is contracting as an individual, or as an agent or principal, or on behalf of a partnership or company or on behalf of several companies*" (at 5-87).

169. As a general rule, the agent acting within his authority who discloses both his representative capacity and the name of his principal will successfully form a direct contract between principal and third party. An agent can contract on the basis that he engages himself and not the principal in a direct contractual relationship with a third party (The Law of Agency in Scotland) SULI 1st Ed (para 14-18). Where an agent fails to disclose both his representative capacity and (inevitably) the identity of the principal, the agent is liable under the contract. Where the third party later becomes aware of the previously undisclosed principal, the third party may treat the agent as liable in contract or the subsequently emerged principal (*ibid* 12-25).

170. The following principles have been identified by the EAT as relevant to the issue of identifying whether a person A is employed by B or C in **Clark v Harney Westwood & Riegels & ors UKEAT/0018/20/BA and others**:

a. Where the only relevant material is documentary, the question whether A is employed by B or C is a question of law;

b. However where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence.

c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will require to inquire whether that agreement truly reflects the intentions of the parties.

d. In determining whether B or C is the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed; and

e. Documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. It would be a rare case

where a document about which a party had no knowledge could contain persuasive evidence of the intention of that party.

Harassment

171. Section 26 of EA deals with harassment and is in the following terms, so far as material:

> ***26 Harassment***
>
> *(1) A person A harasses another (B) if –*
>
> *(a) A engages in unwanted 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.*
>
> …

172. Section 136 of EA deals with the burden of proof. It is set out in full in paragraph **183** below under the heading 'Direct discrimination', where the provisions are discussed more fully. Although the provisions are most commonly invoked in relation to direct discrimination complaints, they are equally applicable to harassment complaints and indeed apply to any proceedings relating to a contravention of the EA.

173. Section 212 of the EA provides, in effect, that the prohibited conduct of harassment and direct discrimination are mutually exclusive. "Detriment" is a necessary ingredient of discrimination for the purposes of section 39, absent the other types of harm listed in s.39(2)(a) to (c). Section 212 provides that 'detriment' does not include conduct which amounts to harassment. It follows that if any conduct is found by the Tribunal to

constitute harassment pursuant to section 26 of EA, that same conduct cannot also be found to have amounted to direct discrimination for the purposes of section 13 of the Act, having regard to the terms of sections 39 and 212 of EA (see, e.g. **Jarrett v Essex County Council** UKEAT/0045/15, **Hargreaves v Evolve Housing and Support** [2022] EAT 122).

Direct discrimination

174. Section 13 of the EA is concerned with direct discrimination and provides as follows:

> *"**13 Direct discrimination***
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

175. Section 9 EA deals with the protected characteristic of race. It provides:

> *"**9 Race***
> *Race includes*
> *(a) colour*
> *(b) nationality;*
> *(c) ethnic or national origins."*

176. According to section 23 EA, "on a comparison for the purposes of section 13, … there must be no material difference between the circumstances relating to each case". The relevant "circumstances" are those factors which the respondent has taken into account in deciding to treat the claimant as it did, with the exception of the element of race (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11). A person can be an appropriate comparator even if the situations compared are not precisely the same (**Hewage v Grampian Health Board** [2012] UKSC 37). The claimant does not need to point to an actual comparator at all and may rely only on a hypothetical comparison.

177. Very little direct discrimination today is overt and it can be necessary to look for indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally

was not, affected by racial bias (**Anya v University of Oxford** [2001] IRLT 377, CA). Sometimes evidence is led of so-called 'evidential comparators'. These are actual comparators but whose material circumstances in some way differ from those of the claimant. Their evidential value is variable and is inevitably weakened by differences in material circumstances from the claimant's (**Shamoon**).

178. For a direct race discrimination complaint to succeed, it must be found that any less favourable treatment was because of the claimant's race, though the discriminatory reason need not be the sole or even the principal reason for the respondent's treatment. In **JP Morgan Europe Ltd v Chweidan** [2011] IRLR 673, CA, LJ Elias summarised the position as follows:

> *"5 … This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial - must be the claimant's disability. …"*

179. Section 39(2) of EA (reproduced at para **187** below) provides among other matters that an employer must not discriminate against an employee as to the terms on which employment is offered or the way in which he affords access to training or other benefits, or by dismissing him or subjecting him to 'any other detriment'. The EA, therefore, reproduced the pre-existing law, by retaining a requirement for an element of detriment in any discrimination claim (which does not concern terms of employment, access to benefits or dismissal).

180. 'Detriment' is not defined in the legislation, save that it is said to exclude conduct amounting to harassment. A claimant seeking to establish a 'detriment' needs to show that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work (**Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)** [2003] UKHL 11.

181. The dicta of Peter Gibson LJ in **Jiad v Byford** [2003] IRLR 232), CA is that 'detriment' is to be given a wide meaning and it means no more than to put under a disadvantage. Although a trivial disadvantage would not suffice, it is not necessary to find some physical or economic

consequence. ACAS describes detriment as describing 'damage, harm or loss'.

182. In **De Souza v Automobile Association** [1986] IRLR 103, CA, a Black employee overheard her manager refer to her using a derogatory racial slur. The Court of Appeal upheld the Tribunal's finding that there had not been a 'detriment'. Lord Justice May held that a racial insult is not by itself enough to be a detriment within section 4(2)(c) of RRA 1976 (which was the predecessor of section 39 (2) (d) of the EA), even if it caused the employee distress.

183. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

> "**136 Burden of proof**
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
> *…*
> *(6) A reference to the court includes a reference to—*
>
> *(a) an employment tribunal;*
> *…"*

184. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination (or harassment), it will be for the respondent to show a non-discriminatory explanation.

185. There are two stages. Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination (or harassment). This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination or harassment (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should

take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to prove those facts. The respondent's explanation is to be left out of account in applying Stage 1. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden and progress to Stage 2. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed un unlawful act of discrimination. 'Something more' is required (**Madarassy**).

186. Direct evidence of direct discrimination is rare. Depending on the facts and circumstances, various types of evidence have been found by tribunals to have supplied that 'something more' which has allowed an inference of discrimination to be drawn.

Section 39: Discriminatory dismissals

187. Section 39 of the EA, so far as relevant, is in the following terms:

> *39.* ***Employees and applicants***
> *(1) …*
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
> *(a) as to B's terms of employment;*
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c) by dismissing B;*
> *(d) by subjecting B to any other detriment.*
> *(3) … (6)*
> *(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—*
> *(a) …*

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

…

188. Section 40 of the EA, so far as relevant, provides:

40. Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

…

189. In **Driscoll v (1) V & P Global Limited and (2) Varela** EA-2020-000876LA and EA-2020-000877LA, the EAT confirmed that a constructive dismissal is capable of amounting to harassment within the meaning of section 26 of the EA. In a case where a pleaded act of harassment includes constructive dismissal, a Tribunal needs to determine the losses which flow from those of the pleaded acts of harassment (including constructive dismissal) which it finds to be established. Even if the alleged constructive dismissal is itself not found to have constituted an act of harassment, the Tribunal will need to consider whether it operated to break the chain of causation for losses flowing from any earlier acts of harassment which it finds to be established (para 94).

Discrimination / Harassment – Compensation

190. Where there is a breach of the EA, compensation is considered under s.124 which refers in turn to section 119. That section includes provision for injury to feelings. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (**Komeng v Creative Support Ltd** UKEAT/0275/18/JOJ). For an injury to feelings award to be made, it is not required that the claimant's injured feelings are caused by his knowledge that he has been discriminated against. The EAT in **Taylor v XLN Telecom Ltd** [2010] IRLR 49 held that the calculation of the remedy for discrimination is the same as in other torts, and that knowledge of the discriminator's motives was not necessary for recovery of injury to feelings. The EAT observed, however, that the distress and

humiliation suffered by a claimant will generally be greater where the discrimination has been overt or the claimant appreciates at the time that the motivation was discriminatory.

191. The eggshell skull principle of delict applies in cases of unlawful discrimination and harassment. A discriminator or harrasser must take their victim as they find them. Provided there is a causal link between the losses and the prohibited act, the employer must meet them (**Olayemi v Athena Medical Centre and Another** [2016] ICR 1074). It is no defence for a respondent to show that a claimant would not have suffered as she did but for a vulnerability to a pre-existing condition.

192. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the explanation that the top band should be awarded in the most serious cases, such as a lengthy campaign of harassment; the middle band should be used for serious cases not meriting the highest band; and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

193. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested guidance be provided by the President of Employment Tribunals as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint presidential guidance updating the **Vento** bands for awards for injury to feelings. In respect of claims presented **on or after 6 April 2022**, the Vento bands include a **lower** band of **£990 - £9,900**; a **middle** band of **£9,900 - £29,600**; and a **higher** band of **£29,600 - £49,300**.

194. An award may also be made for financial losses sustained as a result of discrimination. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (**Wisbey v Commissioner**

of the City of London Police [2021] EWCA Civ 650). The aim is to put the claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler** [1998] IRLR 23).

195. The question is "what would have occurred if there had been no discriminatory dismissal… If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss" (**Abbey National plc and anr v Chagger** [2010] ICR 397).

196. There is a duty of mitigation, namely to take reasonable steps to keep losses sustained by a dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof where a failure to mitigate is asserted (**Ministry of Defence v Hunt and ors** [1996] ICR 554). It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably.

197. The Tribunal may include interest on the sums awarded and should consider whether to do so without the need for any application by a party in the proceedings. If it does so, it shall apply a prescribed rate. The rate of interest in Scotland is prescribed by legislation and is currently 8% (The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996).

Discussion and Decision

Time bar

198. The acts said to be discrimination / harassment took place at the end of November and on 5 December 2021. The claimant's employment ended on 10 December 2021.

199. The normal three-month time limit for the Afrobeats Allegation expired at the end of February 2022. The normal three-month time limit for the First and Second Wig Allegations expired on 4 March 2022. If the Afrobeats Allegation did not form part of continuing conduct with the First and

Second Wig Allegations, the claimant required to initiate Early Conciliation with ACAS before the end of February in relation to that allegation in order to 'stop the clock' under section 140B(3) of the EA. She required to initiate EC by 4 March 2022 in relation to the two Wig allegations to 'stop the clock'.

200. Although she did so on 13 February 2022, long before either time limit expired, the respondent's name was not correctly intimated to ACAS before the EC certificate was issued on 28 March. Early Conciliation naming the respondent correctly was initiated on 12 April 2022. As this date was after the expiry of the normal time limit, this later one-day period of conciliation did not operate to 'stop the clock' (**Pearce v Bank of America Merrill Lynch**). The claimant then lodged her ET1 on 15 April 2022 but it was ultimately treated as accepted on 3 May 2022 following a reconsideration. The 3rd May was just over two months after the normal time limit expired for the Afrobeats complaint and just under two months after the normal time limit expired for the First and Second Wig complaints.

201. Therefore, in relation to all complaints under section 13 and section 26 of EA, regardless of whether the alleged acts amounted to 'conduct extending over a period' for the purposes of section 123(3)(a) of EA, the ET1 was treated as presented outside the 'normal' three-month time limit.

Submissions on Time Bar

202. As explained above, the respondent's representative did not address us on time bar at the hearing in September but we had the benefit of Mr Hoyle's submissions on that issue, given on 7 March 2023.

203. He submitted that, on the basis of the evidence, the Tribunal had no jurisdiction to hear the claimant's complaint. He said that the claimant was 'a passenger in the matter' which we understood to be an insinuation that her representative had driven the process at the time. He referred to the claimant's evidence about the possibility of submitting with incorrect information and amending at a later date. He referred to her evidence about doing some digging and bringing a claim on 15 May 2022 against her chosen respondent – a period of some 18 days later. We understand that Mr Hoyle meant 15 April 2022 when he said '15 May' and that the '18

days later', was a reference to the gap between the date of the first Early Conciliation certificate (28 March 2022) and the lodging of the ET1 (15 April 2022).

204. Mr Hoyle said the claimant was represented by someone with a familial relationship. He said he did not understand the basis of this representation. He pointed out that Ms Ossei was herself the director of a company and suggested she was aware that Mazaj Dundee Limited was on Companies House. Mr Hoyle made these submissions long after it had been held by the Tribunal that the claimant was not employed by Mazaj Dundee Limited but was employed by the respondent and long after written reasons for that oral decision had also been sought by him and provided.

205. He said there was no good reason for Ms Ossei to have delayed in bringing the claim until it was outside the normal three-month time limit, and it would not be just and equitable to extend time. He said the claim was lodged knowing that it was incorrect and that it had been accepted by the Employment Judge on 3 May 2022 without a further hearing. That acceptance, said Mr Hoyle, did not override the fact that the claimant's representative knowingly put forward information they knew to be incorrect. This was different, he said, to lodging a claim then subsequently realising the information in it was incorrect. Mr Hoyle said she didn't seek to remedy the situation as soon as practicable and indeed didn't do so until the claim was rejected.

206. He suggested that the Tribunal may already have formed a view as to the strength of the case, his implication being that he considered it weak. In these circumstances, we ought not to assess it just and equitable to extend time and should consider saving expense for his client.

207. On the question of time bar, Ms Ossei pointed to the difficulty the claimant faced in obtaining any formal contract from the respondent expanding on the claimant's terms and confirming who her employer was. Had that been communicated when sought, she submitted time bar would not have been an issue.

Is it just and equitable to extend the time limit in relation to all or any of the complaints brought by the claimant?

208. The relevant facts are set out in some detail at paragraphs **36** to **51**. Well before the time limit expired, the claimant's representative had taken steps to acquaint herself with the nature of that time limit. Efforts had been made to obtain a contract of employment to clarify the respondent's name. Early Conciliation had been initiated based on such details as were available on 13 February 2023 over two weeks before the time limit was due to expire. Neither the claimant nor her representative had any knowledge of the existence of Mazaj Dundee Limited, and that company is not relevant, in any event.

209. There was no evidence before us that either the claimant or Ms Ossei had knowingly submitted a claim with incorrect information. The ET1 claim form named the respondent correctly as Sadeq Alsafar. It included the previous EC Certificate reference but also provided at section 15 the latest EC certificate reference for the correctly named respondent and explained the reasons for quoting the earlier certificate number earlier in the form.

210. It was at the initiation of the ACAS Early Conciliation process on 13 February 2022 that the prospective respondent was incorrectly identified. The claimant had misspelled the respondent's first name as 'Sadiq' as opposed to 'Sadeq' and she had guessed his second name as Mazaj because the restaurant where she worked for him was called Mazaj Charcoal Grill. This turned out to be wrong. However, we don't accept the claimant or her representative had knowingly initiated Early Conciliation with incorrect information. She initiated the process with information which she had attempted but not managed to confirm with the respondent. She had asked for a copy of her contract of employment, which would identify the parties, on 4 December 2021, and by letters sent in January 2022 and on 7 February 2022.

211. We considered all relevant factors to determine whether it would be just and equitable to extend time to 19 November 2019 to allow the claims to proceed.

212. Factors which weighed against extending time and granting an extension included:-

(i) Time limits are designed to ensure compliance with the principle of legal certainty.

(ii) There was a delay of around two months beyond the end of the normal time limit before the Tribunal claim was treated as accepted.

(iii) After the claimant learned of the correct name of the respondent and obtained an EC certificate in that name, there was a delay of three further days (between 12 and 15 April 2022) before the claimant lodged the ET1 online.

(iv) The disadvantage to the respondent is significant in that an extension means the claims against him will be judicially determined.

213. However, having carefully considered all relevant matters, the following factors weighed more heavily in our deliberations:

(i) that the claimant had not been provided with a statement of particulars of employment during her employment (in breach of Part I of ERA) which might have properly identified the respondent, avoiding wrong name being provided initially to ACAS and the resultant failure to ‘stop the clock’.

(ii) The claimant had not been provided with payslips (in beach of Part I of ERA) or any other documentation which might have properly identified the respondent to her, avoiding the issues which led to the lateness.

(iii) The claimant corresponded with the respondent on 3 occasions before the time limit expired to request a copy of her contract of employment which would clarify the respondent’s identity. The correspondence was received and ignored.

(iv) The claimant and / or her representative took steps to understand the relevant time limit and to initiate Early Conciliation based on such information as they had available.

(v) In the absence of engagement from the respondent the claimant diligently took other steps to investigate the position and successfully identified the respondent through social media sources between 28 March and 12 April 2023;

(vi) that the claimant set out transparently in the ET1 ultimately presented on 15 April 2022 (around a month and a half after the normal time limit) both EC reference numbers and explained that the earlier one referred to a certificate which had the wrong name spelling;

(vii) that the claimant raised an internal grievance which was her preferred route to resolution and which remained unanswered when the normal time limit expired;

(viii) that the respondent was on notice of the claimant's concerns at an earlier stage than when the claim was accepted on 3 May 2022. The respondent received her grievance in December but also had notice of the ACAS Early Conciliation which began on 13 February 2022, some weeks before the time limit expired.

(ix) that there is no evidence before us that the cogency of the evidence has been substantially affected by the two-month delay. It is fair to acknowledge that, aside from the delay in lodging the complaint, there have more considerable delays in the progress of this case generally for which the claimant has not been responsible.

(x) that the disadvantage to the claimant if the extension is refused is substantial in that she will be deprived of the opportunity to litigate the complaints under section 13 and 26 of the EA and to have these judicially determined.

214. We conclude that, on the facts and circumstances of this case, it would be just and equitable to extend the time for receiving all of the claimant's complaints to 3 May 2022.

Employment status of R Mubariq and S Alasafar

Submissions

215. With regard to the question of the identiy of R Mubariq's employer, Ms Ossei noted Ms Mubariq's evidence was that the respondent employed her. She acknowledged Mrs Alsafar had confirmed an awareness of the company Mazaj Dundee Limited due to her familial relationship with the respondent. The existence of the company was not, said Ms Ossei, within the knowledge of all the employees.

216. Mr Hoyle noted that section 40 of the EA (dealing with liability for third party harassment) was repealed in October 2013. He said any complaints against employees of Mazaj Dundee Limited could not succeed. He cited **Conteh v Parking Partners Limited** [2011] 341, EAT.

217. Mr Hoyle said R Mubariq told the Tribunal she was employed by the respondent, whereas the respondent said he employed no one. He said Mr Aljabouri's evidence was consistent with Ms Mubariq approaching and applying and being interviewed by a manager of the business and, according to Mr Hoyle, what followed was that she became an employee of the business. Had Ms Mubariq been coached by the respondent, he said she wouldn't have given the wrong impression she'd been employed by the respondent. The actual employer, he said, was indeed the limited company.

R Mubariq's employer

218. No written agreement was drawn up to reflect the terms of the relationship between Ruby Mubariq and her employer, either at the outset of the employment or at all. Identifying the parties to the contract is a mixed question of fact and law. The Tribunal is entitled to and indeed must inquire as to what happened between the parties in discerning objectively the intention.

219. We require to return to first principles on the formation of contracts. It is clear that a legally binding contract of service existed. That has not been disputed. The respondent's averred position in the amended ET3 is that Ruby Mubariq was at all material times an employee of Mazaj Dundee Limited. Ms Mubariq agreed to perform waitressing and management duties in exchange for wages. She did so for a period between 6 weeks and two months.

220. The contract was agreed verbally between Ms Mubariq and the respondent. There was no evidence either from Ms Mubariq or from the respondent that the respondent told Ms Mubariq that he was contracting with her on behalf of another entity called Mazaj Dundee Limited (or any other entity).

221. Ms Mubariq believed that the respondent was the owner of the restaurant, and we heard no evidence from this witness or from the respondent that he ever told her otherwise. The only evidence led on this by the respondent was the respondent's response to Mr Hoyle's question: "Did you personally employ anyone" to which the respondent answered with the bald assertion "all workers were working for Mazaj Dundee Limited". There was no evidence before us regarding how Ms Mubariq might be aware of this contracting party. Her own evidence to the Tribunal was that she was employed by Mr Alsafar and paid in cash by him.

222. We have found that the respondent did not tell Ms Mubariq he was contracting with her on behalf of a limited company, named or otherwise. Nor did he give her a written contract or payslips which might have led her to infer the company's existence.

223. We have had regard to all the other relevant acts and deeds of the parties in determining whether it was objectively inferable from these that the intention was to create contractual relations between Ms Mubariq and the respondent or indeed between her and Mazaj Dundee Ltd.

224. Ms Mubariq's evidence was that she approached him, and he offered her the work to help her with management experience 'as a favour'. Ms Ossei referred to evidence given by the claimant that Ms Mubariq told the claimant she was doing the respondent a favour. She asked the

respondent whether he was aware Ruby was doing him a favour. He was clear in response. He said: "*She got paid. What's the favour*?" We readily find that there was an agreement to provide work in exchange for wages involving a mutuality of obligation. Ms Mubariq required to attend and work hours in accordance with a rota for which she was paid in cash.

225. While at work, she took instruction on her duties and indeed on the limits of her authority. She dressed for work in accordance with the expectations put upon her. She was subject to the respondent's supervision and control to a degree commensurate with a staff member with management responsibilities.

226. The acts and deeds of the respondent were consistent with the analysis that he, Sadeq Alsafar, personally employed Ms Mubariq. These acts ranged from his initial offer to employ her, his provision to her of shifts on a rota using the work WhatsApp group he created for this purpose, his payment of her in cash, the absence of any reference to his position as a director of a limited company and his failure to name Mazaj Dundee Ltd as a company on behalf of which he was pursuing contractual relations with her. Ms Mubariq's experience in many of these respects were similar to that of the claimant and of Amanda Heath who gave evidence at the preliminary hearing on the claimant's employment status.

227. Ms Mubariq and the respondent seamlessly and consistently acted throughout the relationship as if the employer was the respondent and no other entity. We find that the contract of service was made between the respondent and Ms Mubariq. We accept that the respondent operated a limited company, but he did not inform her that it would be employing her. He did not make his representative capacity as a director of that company known, nor suggest that any engagement of Ms Mubariq was on behalf of an unnamed company.

228. In the circumstances, based on all the relevant evidence, we find the intention of the parties, as inferred from their outward expressions and their actings was that the respondent entered into a contract of employment with Ruby Mubariq and remained party to that contract at all material times. There was no evidence which undermined this analysis or

raised a significant doubt as to the intention of the claimant and respondent or the identity of the contracting parties.

229. We recognise that, as McBryde observed, it can be difficult to identify the contracting parties where one of the parties acts in a way which makes it obscure whether he is contracting as an individual or as an agent on behalf of a company. In reality, this was not such a case. There was nothing in the respondent's words or deeds at the formation, during the subsistence of the employment, or for a considerable period after its termination to indicate an intention by the respondent to contract in a representative capacity on behalf of Mazaj Dundee Ltd.

Shada Alsafar

230. As with Ruby Mubariq, no written agreement was drawn up to reflect the terms of the relationship between Shada Alsafar and her employer, either at the outset of the employment or at all. It is again, therefore, necessary to inquire as to what happened between the parties in discerning objectively the intention.

231. Again, it is not disputed by the respondent that a legally binding contract of service existed. The respondent's averred position in the amended ET3 is that Shada Alsafar was at all material times an employee of Mazaj Dundee Limited.

232. We have before us scant evidence about how the contract of employment was formed in Shada's case. We accept that she came to work as a chef at the restaurant and that she knew she was paid from the business bank account of the limited company Mazaj Dundee Limited. We accept also that Mrs Alsafar, as the respondent's wife, had been aware of this company's existence since its inception. There was no evidence before us that Mrs Alsafar was told explicitly that the respondent was employing her in a representative capacity on behalf of Mazaj Dundee Limited. Nevertheless, we understand that the respondent invites us to find that this was implied.

233. We heard no detail from Mr or Mrs Alsafar regarding what was said before she started about the terms under which Mrs Alsafar would work or of any

discussions on matters like her hours, her duties, or her pay arrangements. Ms Ossei attempted to extract more detail about how the role was acquired. When she asked Mrs Alsafar how she knew who her employer was, Mrs Alsafar replied: '*It's our family business. We opened it together*.'

234. We accepted that Mrs Alsafar subjectively believed she was employed by Mazaj Dundee Limited. The respondent similarly asserted this was the position, so far as he was concerned. We heard little objective evidence of the words or deeds which led to this apparent shared understanding. We accept that Mrs Alsafar's belief may have been formed based on assumption and implication from the wider circumstances, namely her knowledge that they were opening a restaurant business and her knowledge that a limited company had been set up in that connection. This was not explained in terms by Mrs Alsafar to the Tribunal, but might be inferred from such evidence as she was given by her in cross examination.

235. Given the dearth of objective evidence of acts and deeds which might shed light on the intentions of the actors and so identify the contracting parties, we had regard to the burden of proof.

236. The burden of proving that Mrs Alsafar was employed by the respondent, and not Mazaj Dundee limited, sits with the claimant. The claimant has, at least, the initial burden of proving facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the direct discrimination and or harassment provisions (sections 13 and 26).

237. It seems to us that this burden extends to include proof of the preliminary question of employment status of an alleged perpetrator where it is claimed that an employer has liability for acts by that individual under section 109 of the EA (Liability of Employers and principals). Therefore, to succeed in her claim that the respondent was liable for things done by Shada Alsafar, the claimant has, at least the initial, burden of proving a *prima facie* case that Mrs Alsafar was indeed an employee of the respondent in his capacity as an individual.

238. We weighed the evidence on the issue and concluded that the claimant has not discharged that initial burden. There was insufficient objective evidence before us to find, even on a *prima facie* basis, that the employment relationship was between the respondent and Mrs Alsafar. It is unnecessary for us to make a finding about whether Mazaj Dundee Limited was Mrs Alsafar's employer.

239. The claimant has previously confirmed in response to the October 2022 Order that she does not maintain that the respondent was vicariously liable for the actions of Mrs Alsafar on any other basis than that of an employment relationship.

240. Any findings in fact relating to the conduct of Shada Alsafar, therefore, are relevant only as background to the conduct of the respondent and Ruby Mubariq which has been found established.

The Afrobeats Allegation (end November 2021)

241. We have found that an incident took place at the end of November 2021 where Ruby and Shada invited the claimant to dance when an Afrobeats tune was playing. We have further found that Shada Alsafar said words to the effect: '*Oh dance to this music. This is your people's music.*'

242. As to whether there was a racial element associated with the conduct, Ms Ossei observed that, although Ms Mubariq was present, it was only the claimant who was singled out to dance. The treatment, she said, was not based on the claimant as an individual but on assumptions about her race. She referred to the case of **R v Immigration Officer at Prague Airport** [2004] UKHL 55, a decision in which Baroness Hale noted that racial stereotyping was discrimination even if the stereotype had some truth to it. Ms Ossei argued that harassment related to race and sex was strongly suggested as the claimant was the target of unfavourable conduct.

243. Mr Hoyle referred to the legislative provisions on harassment in section 26 of the EA. He cited **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336. He referred to the EAT's observations in that case that '*Not every racially slanted adverse comment or or conduct may constitute the*

violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particulary if it should have been clear that any offense was unintended. Whilst it is very important that employers and Tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in every unfortunate phrase.'

244. He referred to this dicta in the context of the Afrobeats Allegation.

Discussions and decision: Afrobeats Allegation

Harassment related to race

Was this unwanted conduct related to race?

245. We begin by considering whether the conduct engaged in was unwanted conduct and whether it related to race for the purposes of section 26(1)(a) of EA.

246. We readily accept that when Shada Alsafar said words to the effect '*Oh dance to this music. This is your people's music',* this was related to the claimant's race. She knew the claimant had African heritage. The song is an Afrobeats song of international renown. We are in no doubt that the reference to 'your people' was a reference to African people or people of Black African heritage. However, for the reasons set out above, the respondent is not liable for the conduct of Shada Alsafar as his employee.

247. The focus is, therefore, on whether Ruby Mubariq's conduct on the occasion in question was related to the claimant's race. Ms Mubariq was present when Shada spoke these words to the claimant. She, along with Shada, encouraged the claimant to dance. There was no evidence that Ms Mubariq had ever invited the claimant to dance to other music played in the restaurant. She was aware the claimant had African heritage. She had never seen the claimant dance before at work. Ms Mubariq was familiar with and a fan of the Afrobeats genre. Ms Mubariq had a managerial role in relation to the claimant and she heard Shada say 'this is your people's music' without making any intervention. After hearing these words, she too continued to encourage the claimant to dance. We

accept on balance that the conduct of Ms Mubariq, in inviting the claimant to dance to this particular Afrobeats song and in continuing to encourage her to do so, on hearing Shada's, was 'related to' the claimant's race.

248. We also find the conduct was unwanted. Ms Mubariq's invitation to dance was not welcomed by the claimant. It took place in a restaurant while she was on shift; they were not in a bar or nightclub. It was not an exchange that the claimant initiated or encouraged but one from which she sought to extricate herself.

Did the conduct have the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

249. Section 26(4) requires that we take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have had the effect.

250. We remind ourselves again that the conduct to be analysed is that specifically of Ms Mubariq. The wider context of her conduct, including Shada Alsafar's involvement in the interaction is relevant, but it is Ms Mubariq's conduct which falls to be assessed against the requirements of section 26(1)(b).

251. Ms Ossei cited the case of **R v The Immigration Officer at Prague Airport**. That was an immigration case concerned with the lawfulness of procedures adopted by the British authorities and applied to the appellants at Prague Airport in 2001. The appellants were 'would-be' asylum seekers who were refused entry in line with an agreement which had been made between the UK and Czech governments of the day intended to stem the flow of asylum seekers. In the House of Lords decision, Baroness Hale discussed the question of whether the treatment was direct discrimination for the purposes of the Race Relations Act 1976 (a predecessor of the EA). The issue was not concerned with harassment which is a different species of prohibited conduct with a different legislative test. The harassment provisions do not require inquiry into how a comprator would be treated.

252. When it comes to harassment, we are not persuaded that an inference of stereotyping will in all circumstances bring unwanted conduct within the ambit of unlawful harassment for the purposes of section 26. If such is Ms Ossei's contention, we don't agree that the **Prague Airport** case supports that proposition. Each of the elements of the test in section 26(b) must yet be satisfied.

253. It is clear that they will not automatically or inevitably be so simply because of an element of stereotyping in the conduct from the EAT's observations in **Richmond Pharmacology v Dhaliwal**, cited to us by Mr Hoyle. '*Not every racially slanted adverse comment or or conduct may constitute the violation of a person's dignity.'* That case involved a stereotyping comment by an employer to a female employee of Indian ethnicity. The employer was found to have said*: "We will probably bump into one another unless you are married off in India".* On the facts there, the ET found in the employee's favour on harassment and the Employment Appeal Tribunal ultimately ruled that there was no error of law in the ET's decision. However, it was clear that this did not inevitably flow from the racially slanted and stereotyping nature of the comment. Importantly, the Tribunal had addressed the key elements of the legislative test in section 26(1)(b) and the EAT commented that '*although the facts might have been close to the borderline … the tribunal had clearly considered the case most conscientiously*.'

254. We require to decide whether the unwanted conduct went so far as having the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

255. We consider first whether the invitation and encouragement to dance by Ruby had that subjective effect on the claimant.

256. We have accepted, and found as a fact, that the claimant was discomfited at the idea of dancing in the restaurant with colleagues and customers present. We have also found that she felt embarrassed by the suggestion and felt an expectation upon her that she would know the dance to the track which had become a dance craze.

257. We did not accept, as was put to her, that she was someone who was hypersensitive or who went looking for conflict or for reasons to feel insulted. We did not find her to be prone to hyperbole. The claimant herself did not describe her feelings, in relation to the Afrobeats incident in strong or emotional language. She did not use words like, or synonymous with, 'humiliating, degrading or offensive' in relation to this incident, though she did mention feeling targeted. She was, however, clear that subsequent events on 5 December 2021 had a greater impact upon her and that the later incidents had prompted her to discuss those experiences with friends, colleagues and family in a way that this earlier incident had not.

258. We accept it was natural, perhaps, that after the later events, the claimant would reflect upon the Afrobeats incident and be inclined to frame it in light of those later experiences. Nevertheless, her evidence of the Afrobeats interaction did not hint of embellishment. She said she laughed the incident off, and moved away. Our strong impression is that she would have dismissed the matter without further comment had it not been for events the following week. The tenor of her evidence about the Afrobeats incident was that her embarassment stemmed from the idea of dancing at her work in a public place which would not be in her nature, as well as from not knowing the dance steps. We did not get a sense that, from the claimant's perspective, it went so far as a violation of dignity or a feeling of humiliation or intimidation or the like at the time it took place.

259. On balance, we are not satisfied that the claimant's discomfiture and embarassment, though genuinely experienced, went so far as a violation of her dignity or that she perceived the environment created at the time to be intimidating, humiliating, degrading or offensive.

260. It remains, however, to be considered whether Ruby Mubariq's unwanted conduct towards the claimant had that purpose, even if it did not have that effect. We have had regard to all of the circumstances. Ms Mubariq was herself dancing at the time and she and Shada were smiling at the claimant. The relationship had been friendly and sometimes jokey and the claimant did not give an impression that the character of this intertaction was intended to be other than friendly and lighthearted. Though the

claimant descibed the pair laughing, she did not suggest in her evidence that they seemed to be laughing at her.

261. We agree that Ruby's apparent association of the music with the claimant and her williness to go along with Shada Alsafar's reference to 'your people' was clumsy and stereotyping. Shada's remark was also ignorant, in circumstances where the music came from a different country and a different part of the continent to the claimant's family. We also emphasize that a similar interaction may well fall on the other side of the line with just small differences of circumstances. For example, if Ruby and Shada had not been dancing themselves, or if their encouragement to the claimant to dance had been unsmiling or with an element of mocking, then we may have come to a different conclusion.

262. However, taking all of the circumstances into account, on the facts, found, we are not persuaded that Ms Mubariq's purpose in inviting and encouraging the claimant to dance to the Jerusalema song was to violate her dignity or to create an intimidating, hostile, degrading, humilating or offensive environment for the claimant.

263. Therefore, the claimant's complaint of harassment related to race arising from the Afrobeats Allegation does not succeed and is dismissed.

Afrobeats Allegation: Harassment related to sex

264. Having found that the unwanted conduct did not meet the test in section 26(1)(b), it is unnecessary to consider whether the conduct alternatively related to sex. In the absence of a finding that the conduct had the purpose or effect of violating the claimant's dignity or creating an environment of the sort proscribed, the claimant's complaint of harassment related to sex arising from the Afrobeats Allegation cannot succeed and is dismissed.

Afrobeats Allegation: direct race or sex discrimination?

265. The claimant makes alternative complaints that the Afrobeats Allegation amounted to direct race and / or sex discrimination.

266. In order to succeed in either discrimination complaint, the claimant must show less favourable treatment because of the proteced charactetistic. It

is necessary, too, that she establishes the presence of a 'detriment' (section 39(2)(d), EA).

267. We remind outselves that, to establish a detriment, it is not necessary to show any physical or economic consequence of the act. What is necessary is to find that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work.

268. The act in question again, is specifically Ruby's conduct. While we are mindful that 'detriment' is to be given a wide meaning (**Jiad**), we do not accept that the conduct in question, as straightforwardly and moderately described in the claimant's evidence was sufficiently significant to amount to a detriment for the purposes of section 39.

269. As discussed above, we do not doubt the claimant experienced a degree of discomfiture at being asked to dance in her workplace and that she had no desire to do so. We accept too that it was reasonable that she should not wish to do so, while on duty as a waitress. We are mindful also that Ruby had managerial responsibility for the claimant and that she heard Shada's words about 'your people' without intervention. Nevertheless, we also think it is relevant that the claimant extricated herself from the situation with relative ease and that she did not describe any perception of hostility, mocking or malice in the interaction.

270. We found the question to be finely balanced. However, on balance, concluded that, having regard to all of the circumstances, Ruby's conduct on the occasion in question was not such that a reasonable employee would perceive themselves disadvantaged in the circumstances they thereafter had to work (**De Souza**). The relatively fleeting embarrassment and discomfiture the claimant experienced did not create the required disadvantage and so were not sufficient to found a 'detriment', as required by section 39(2)(d) of the EA.

271. Having so found, it is not necessary to decide whether the claimant's treatment was less favourable treatment because of her race or sex, since neither complaint can succeed in the absence of a detriment having been established. The case of **Prague Airport**, cited by Ms Ossei, is

distinguishable on the basis that it was clear in that case that the treatment in question was both less favourable and a detriment.

First Wig Allegation

272. We have found that on 5 December 2021 in the early evening, an exchange took place at the bar when Ruby and Shada admitted to gossiping (in Arabic) about the claimant's hair then asked her whether it was real. We have found they asked her why and that the claimant explained it was a protective style because of her hair type to protect from damage from the cold. We have found the respondent then joined them and asked the claimant to remove her wig, as too did Ruby and Shada. It is, therefore necessary to consider whether this conduct (so far as it was perpetrated by the respondent and Ruby) contravened section 26 or section 13 of the EA.

First Wig Allegation: Harassement related to race?

Submissions

273. Mr Hoyle and Ms Ossei made a number of submissions which were relevant both to the First Wig Allegation and the Second Wig Allegation. These allegations are similar in nature with the later event following on from the earlier incident. We set out their submissions in this section. They are not repeated in the section on the Second Wig Allegation though their additional relevance to that allegation is acknowledged by the Tribunal. Neither Ms Ossei nor Mr Hoyle made a strict delineation between their submissions on whether the conduct 'related to' race for the purposes of section 26 of EA and whether it was 'because of' race for the purposes of the section 13 complaint. We include in this section their submissions citing the 'because of' test, given that might be said to be subsumed by the wider 'related to' test.

274. Addressing us on the relationship between the First and Second Wig Allegations and the protected characteristic of race, Ms Ossei queried whether the same interest would have been present in the case of eyelash extensions. Across all races, she asserted the texture of eyelashes is the same such that a natural lash does not indicate a person's race. She said

a situation involving a staff member with lash extensions would not have been handled in the same way by the respondent. There would not have been the same interest. It was the unfamiliarity of the natural hair of a black person that led the claimant to be targeted, in Ms Ossei's submission. With respect to the respondent's statement that he did not believe in racism, Ms Ossei invited the Tribunal to consider the possibility of unconscious bias.

275. With respect to the assertion in the claimant's FBPs that the First Wig allegation was racially motivated because 'wigs are a widely known protective style for black women'. Mr Hoyle opined that we had heard no proper evidence on that. He noted the claimant had six wigs of different styles. He referred to Ms Sibanda's evidence that the claimant owned around 6 wigs that she was aware of. He posed the question why the claimant wore wigs and asserted the answer was that this was for fashion and appearance, and nothing more.

276. At another point in his submission, he asserted the claimant wore wigs to protect her hair from heat styling associated with straightening it out. He said there was no evidence the claimant had said to anyone "I'm a black woman and I have black hair I've damaged repeatedly by putting in an unnatural style." It was not credible, said Mr Hoyle, that this was motivated by racism.

277. He referred to a picture which had been produced by the claimant of her hair in its natural style and Mr Hoyle suggested that style was 'impractical in a restaurant with open flames.' Mr Hoyle went on to assert that the claimant's longer natural hair from the photo (in an Afro style) would have taken 'considerable maintenance and styling'. Anyone can wear a wig for any reason, he said.

278. He went on to refer to hypothetical comparators. He questioned who they were and how they were treated. He asserted the claimant's discomfort was magnified because of her isolation. He asserted she had failed to demonstrate how someone of another race would have been treated. He said that curiosity was not racism. At another point in his submission,

however, Mr Hoyle asserted that the claimant replaced Afro hair with an Afro wig and so, according to Mr Hoyle, there would be no curiosity.

279. Mr Hoyle referred to the FBPs (p.44) and the claimant's assertion that wigs were known to be worn by women of colour as a 'protective style'. He said it was the first time he'd heard of a protective style in his 51 years. He said it was not commonly known or understood and that he had found no cases where this had been raised as an issue in any court. The case, he said, was based on impression and innuendo.

280. Mr Hoyle read the claimant's statement in he FBPs "*We cannot know the true reason behind the conduct but we believe it may have been …(1) They did not like black people and were making fun of her (2) …desire to see someone remove a wig (…worn due to race) (3) curiosity of what hair looked like beneath (race related*)." He criticised the claimant for bringing a claim on the strength of her mere belief about the motivation. Likewise, he referred to the FBPs regarding the Second Wig Allegationand noted the claimant's answer that she said this was less favourable treatment because of her race because 'had a wig been worn by someone of the Caucasian race, we are not sure the level of interest in seeing the hair underneath would be there.' If they're not sure, said Mr Hoyle, it can't be discrimination.

281. Mr Hoyle set store by the fact that, at the time, the claimant did not impute the action as racially motivated when she first discussed the matter with Ms Sibanda. He suggested their follow up discussion of three other racial incidents in Dundee was where the idea of motivation by race came first. It was not, he said, the claimant's initial thought. The hostile environment must flow from the incident, he said.

Was this unwanted conduct related to race?

282. We begin by considering whether the conduct engaged in was unwanted conduct and whether it related to race for the purposes of section 26(1)(a) of EA.

283. We readily accept the conduct in question was unwanted. Ms Mubariq initiated the conversation with the claimant with no encourgagement from

the claimant to open the subject. She had been chatting in Arabic to Mrs Alsafar and said to the claimant: “We were just gossiping about your hair and whether or not it’s real.”

284. When the claimant answered the question straightforwardly that her hair was not real, this served only to incease their interest and questioning. The respondent joined in. The claimant did not encourage them with the discussion. She was brief in her answering and gave an explanation that she wore a wig to protect her hair from the cold. She described feeling awkward, flustered, embarassed and confused with reference to the incident during her evidence.

285. We are satisfied the conduct of Ms Mubariq and Mr Alsafar was neither solicited not desired by the claimant

‘Related to race’?

286. We considered the submissions. We did not find the criticisms of the claimant for bringing complaints on the strength of motives she supposed in the absence of actual knowledge to be. That is commonly the scenario in direct discrimination and harassment complaints, given that very little discrimination in modern times is overt. Nor did we find that the question of whether the claimant characterised the conduct as race discrimination immediately after the event particularly illuminating. We heard evidence she spent some time trying to process and rationalise the events and that ultimately she concluded a connection with race, within a relatively short period of the incident. In any case, her subjective view of whether the conduct related to race, though relevant, is not determinative of the question we have to decide.

287. We understood Ms Ossei’s contention, in making her eyelash comparison, to be that it was the difference in appearance in Black people’s hair compared to that of other races that sparked the curiosity of Ruby and the respondent.

288. For a complaint of harassment, it is not necessary that the conduct be ‘on the grounds of’ the protected characteristic, but only that it is ‘related to’ that characteristic (in line with the Directive). It is not necessary to

construct a comparison with a real or hypothetical comparator. The intention of the actors in question is relevant to but not determinative of the question; we must apply an objective test in deciding whether the acts related to the protected characteristic of race.

289. We have had regard to the whole factual background to decide the question objectively. It was known by the actors that the claimant was biracial and that she had African heritage. That African heritage had been alluded to a week or so before during the Afrobeats incident by Shada Alsafar in front of Ruby Mubariq.

290. We accept that the reason why Ruby Mubariq was gossiping with Shada Alsafar on the day in question about whether the claimant's hair was real was because they knew the claimant was biracial with African heritage and they knew that her hairstyle did not look like typical Afro hair. There was no evidence of any other reason for them to query whether the claimant's hair was real or not.

291. When the respondent joined them and asked why the claimant was wearing a wig, the claimant explained she wore the wig to cover and protect her hair from the cold. She told them that her hair was braided underneath it. When she explained her hair was braided, the respondent asked her to take it off and Ruby Mubari also joined him in asking this.

292. We accepted the evidence taken of the claimant and Ms Sibanda to the effect that, typically, Black women wear wigs to protect their hair, including from cold weather. We accepted that the claimant's experience is that the cold weather is or is perceived to be very bad for her hair. We have found that she told the respondent and Ms Mubariq at the time that protection of her hair type from the cold was why she had chosen to wear a wig. We equally accept that there is an aesthetic aspect to the claimant's hairstyle choices and wig choices. The claimant has never denied this.

293. However, we did not find Mr Hoyle's focus on the appearance of the claimant's natural hair or her reasons for her styling choices to be of particular assistance in deciding the question before us. What we require to decide is whether the respondent and Ruby's conduct related to the claimant's race. Whatever the claimant's particular blend of personal

motivations for choosing to wear a wig to work, we accept, on balance, that the reason Ms Mubariq was prompted to speculate about whether her hair was real was because Ms Mubariq knew the claimant was biracial with African heritage and the claimant's hairstyle at work was not in a natural Afro style.

294. The respondent then first called upon the claimant to remove her wig after she told the group her real hair was braided underneath. In the absence of any explanation put forward by the respondent or Ms Mubariq, we infer, on the balance of probabilities, that they were curious to see the appearance of the claimant's braided hair beneath. We accept that this curiosity led to repeated unwanted requests that she remove the wig to show them her hair below. Mr Hoyle says curiosity cannot be racism. We disagree, if such is his contention, that conduct involving curiosity cannot be conduct 'related to' race.

295. We are satisfied that the claimant discharged the initial burden of showing facts from which the Tribunal could decide, in the absence of any other explanation, that the conduct of Ruby and the respondent in asking the claimant to remove her wig was related to the claimant's race. We could reasonably and properly infer from the facts shown, that the intense curiosity and repeated requests to be shown what was under her wig related to the claimant's biracial background with Black African heritage and her disclosure at the time that her hair underneath was braided, a typical style for Black Afro hair.

296. The burden then shifts to the respondent to show an explanation of the conduct which is not related to race. The respondent has baldly denied the conduct and has established no other explanation, unrelated to race.

297. We, therefore, find that the conduct of Ruby and the respondent during the First Wig incident was both unwanted and related to the protected characteristic of race.

Did the conduct have the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

298. Section 26(4) requires that we take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have had the effect.

299. The claimant explained that at the time she felt awkward and flustered as well as embarassed and confused. She declined to remove the wig on more than one occasion and moved away from the group. The following day in the wake of this incident and the Second Wig Allegation, she described feeling anxious and worried at work that the topic of her hair would be brought up again. She felt uncomfortable to be in the same room with the respondent.

300. We accept that, whatever the respondent's or Ms Mubariq's purpose in behaving as they did during the First Wig incident, it had the effect of violating the claimant's dignity and of creating an environment for her which was hostile, degrading, inimidating and humiliating for her.

301. We also find, in all the circumstances of the case, that it was objectively reasonable that it did so. The respondent was the claimant's boss. Ruby Mubariq was her floor manager. They were both in a position of authority and power over the claimant. Their conduct demonstrated a salacious interest in the claimant's personal appearance which was wholly inappropriate. Repeatedly insisting that she remove her wig, in the face of her refusal, we readily accept violated her dignity and left her feeling intimidated in the respondent's presence at work.

302. We therefore find that the conduct of Ruby Mubariq and the respondent during the First Wig incident was harassment related to race, contrary to section 26 of the EA.

303. Having so found, it follows that this conduct cannot also amount to direct discrimination contrary to section 13 of the EA (because s.212 of the EA provides, that "detriment" does not include conduct which amounts to harassment.) The complaints that the First Wig Allegation amounted to direct race or sex discrimination contrary to section 13 of EA are not well founded and are dismissed.

First Wig Allegation: Harassment related to sex?

304. It, therefore, remains to be decided only whether the conduct in question was conduct 'related to' the protected characteristic of sex as well as race.

305. The claimant's case is that the First Wig Allegation relates to sex because she questions whether the same conduct would have transpired had the claimant been a male wearing a wig.

306. We remind outselves that it is not necessary to construct a comparator for a section 26 complaint or to show that the conduct was on the grounds of the protected characteristic. A claimant can assert a comparative disadvantage as the claimant has here, but that is not strictly required. It is enough that the conduct 'related to' that characteristic.

307. We applied the burden of proof provisions and asked ourselves first whether the claimant has established facts from which we could decide there had been harassment related to sex in the absence of any explanation by the respondent. We took into account at this stage the context and all relevant circumstances. We have found above in the context of harassment related to race that the unwanted conduct took place and that it violated the claimant's dignity.

308. However, we are not persuaded that sufficient facts have been established which would permit the Tribunal to properly draw an inference that a man with Black African heritage would have been differently treated in materially the same circumstances or that the conduct might otherwise be found objectively to have related to sex. There was scant or no evidence from which an inference could be drawn that a man would have been treated differently. There was no evidence, for example, about differences of treatment by the respondent or Ruby Mubariq of the claimant's female colleagues as compared to her male colleagues.

309. We accept the claimant's evidence that wigs are commonly worn by (specifically) women of colour. Nevertheless, we are not convinced that this of itself is sufficient to place the incident within the ambit of conduct which 'related to sex'. We appreciate that a comparator is not required and that those words import a potentially broad test but the connection or association with the protected characteristic cannot be so remote or

tenuous that it loses touch with of the legislation's intention which is to give effect to the principle of equality based on these characteristics.

310. We find, therefore, that the conduct involved in the First Wig Allegation was not conduct related to the protected charateristic of sex. The complaint that it amounted to harassment related to sex does not succeed and is dismissed.

The Second Wig Allegation: Harassment related to race?

Unwanted conduct?

311. We have found that at the restaurant closing time on Sunday 5 December 2021, the respondent blocked the claimant as she tried to pass to exit and said words to the effect: "No one's here. Take off your wig." We have found that he then reached over to grab the wig and pull it off her head. He grabbed strands on the top and pulled. We have found the claimant put her hand over the wig to secure it and moved backwards from saying words like "no, no, I don't want to. It's stuck on!"

312. We have no hesitation in finding this conduct was unwanted. There is no evidence the claimant did anything to encourage such an act by the respondent. On the contrary, he was well aware that she had repeatedly refused earlier in the shift when he and others had asked her to remove her wig.

Second Wig Allegation: 'Related to race'?

313. The parties' submissions on whether the wig allegations were related to or because of race are set out above at pargraphs **273** to **281**.

Submissions

Discussion - Related to race?

314. We remind outselves that the test is objective in deciding whether his acts related to the protected characteristic of race. The motivations of the respondent and the perception of the claimant are relevant but not necessarily determinative of the matter.

315. Earlier in the shift, the respondent had asked the claimant to remove her wig after she told the group her real hair was braided underneath (the First Wig Allegation). His repeated requests revealed a prurient curiosity about the claimant's appearance unerneath her wig. We have found that this act related to race for the reasons set out above.

316. We are satisfied that the claimant has discharged the initial burden of showing facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent's conduct during the Second Wig incident was similarly related to the claimant's race. We adopt the same reasoning as set out above in relation to the First Wig Allegation. The respondent's conduct in attempting for remove the wig was an extension and escalation of the earlier conduct. It is inferable from the facts shown, in the absence of any other explanation, that his intense curiosity and repeated requests to be shown what was under her wig was related to the claimant's biracial background with Black African heritage and her comment that her hair was braided underneath (a typical Afro style).

317. The burden therefore shifts to the respondent to show he did not contravene section 26. He baldly denied the conduct. He has not shown any non-race related reason for his actions, or indeed any explanation for placing his hands on the claimant despite her protests.

318. We therefore find that the respondent's conduct during the Second Wig incident was both unwanted and related to the protected characteristic of race.

Did the conduct have the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

319. Section 26(4) requires that we take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have had the effect.

320. The claimant explained that at the time she felt distressed, humiliated and that her personal boundaries had been violated. She spoke in the aftermath of the incident on the same day to Morell, to her sister and to Lyn Sibanda about the experience. She discussed the incident with her

colleagues on the group chat the next day. The following day she felt anxious and worried at work that the topic of her hair would be brought up again and uncomfortable to be in the same room with the respondent.

321. We accept that the respondent's conduct in behaving as he did during the Second Wig incident, had the effect of violating the claimant's dignity and of creating an environment for her which was hostile, degrading, inimidating and humiliating for her.

322. We also find, in all the circumstances of the case, that it was objectively reasonable that it did so. The respondent was in a position of authority and power over her. He took unwelcome physical action to try to touch grab at her wig to remove it, despite her alarm and protests. We readily accept that on an objective view of this behaviour, it would violate an employee's dignity and create an environment that was intimidating and humiliating.

323. We therefore find that the conduct of the respondent during the Second Wig incident was harassment related to race, contrary to section 26 of the EA.

324. Having so found, it follows that this conduct cannot also amount to direct discrimination contrary to section 13 of the EA. The complaints that the Second Wig Allegation amounted to direct race or sex discrimination contrary to section 13 of EA are not well founded and are dismissed.

Second Wig Allegation: Harassment related to sex?

325. It remains to be decided whether the conduct in question was conduct 'related to' the protected characteristic of sex as well as race. We have found that the claimant did not discharge the initial burden of showing facts from which the Tribunal could properly decide that the First Wig Allegation related to sex. We understand the claimant's case is the same or similar in relation to the Second Wig Allegation. She argues it relates to sex because she questions whether the same conduct would have transpired had the claimant been a male wearing a wig.

326. We adopt materially the same reasoning in finding that the claimant has not discharged the initial burden in showing that the Second Wig incident was conducted related to sex. There are not facts established from which

we could decide there had been harassment related to sex in the absence of any explanation by the respondent. We took into account at this stage the context and all relevant circumstances.

327. Once again, however, we are not persuaded that sufficient facts have been established which would permit the Tribunal to properly draw an inference that a man with Black African heritage would have been differently treated in materially the same circumstances or that the conduct might otherwise be found to have 'related to' sex. There was scant or no evidence from which such an inference could be drawn.

328. As before, we accept the claimant's evidence that wigs are commonly worn by (specifically) women of colour but are not satisfied that this of itself is sufficient to place the incident within the ambit of conduct which 'related to sex'.

329. We find, therefore, that the conduct involved in the Second Wig Allegation was not conduct related to the protected charateristic of sex. The complaint that it amounted to harassment related to sex does not succeed and is dismissed.

Constructive dismissal: Section 39 of the EA

330. Ms Ossei submitted the claimant was [constructively] dismissed because of actions that came about because of her protected characteristics. She cited the **Law Society v Bahl** [2003] IRLR 640 as authority for the proposition that the discriminatory reason need not be the sole or principal reason for the conduct but it is enough that it is a contributory cause.

331. We are satisfied that the claimant resigned on 10 December 2021 in response to the First and Second Wig incidents on 5 December 2021 (which we have found to be harassment related to race) and in response to her concern that the matter was not being treated sufficiently seriously but being brushed off as a joke.

332. On the evening of the 9th December after being informed of the claimant's concerns by A Heath, Ms Mubariq had sent the claimant a breezy message '*Hey how are you*?" followed by a smiley face emoji. On 10 December, shortly before the claimant confirmed her resignation,

Ms Mubariq sent a message which referred to an apology from the respondent but also referred to him "kidding around" and twice later referred to the matter as 'joking or a joke'. She said "personally I don't mind the joke".

333. We are also satisfied that, cumulatively, these acts were so fundamental as to go to the root of the employment contract and relationship of trust and confidence which ought to have existed between the claimant and her employer. This had the purpose or effect of undermining that relationship and cumulatively constituted a repudiatlory breach. There was no proper cause for the conduct. With respect to the messaging which took place after the incidents, we consider it relevant to have regard to the fact that that Ruby Mubariq was the claimant's manager and that she was herself implicated in the events about which the claimant had complained via Amanda Heath. Her somewhat blithe messages to the claimant on 9 and 10 December 2021, read against that backdrop, were apt to contribute with the earlier conduct to a violation of the claimant's dignity. We are satisfied that it did so and that, viewed in the overall context, including Ms Mubariq's personal involvement in the First Wig incident, it related to race.

334. We, therefore, find that the constructive dismissal of the claimant on 10 December 2021 itself amounted to harassment for the purposes of section 26 of the EA.

335. We add that, if we had not found the claimant's constructive dismissal to be contrary to section 26 of EA, we would, in any event, have found that the claimant's economic losses flowed from the conduct on 5 December 2021 and that the chain of causation was not interrupted by her constructive dismissal.

Compensation: Loss of Earnings

336. The duty to mitigate is not onerous and is to take reasonable steps to mitigate the loss. After the termination of her employment, the claimant took reasonable steps towards obtaining part time employment to support (or partially support) her during her studies in Dundee between January and May 2022.

337. The onus to show a mitigation failure is on the respondent and it must show on the balance of probabilities that the claimant acted unreasonably in failing to take a step. The respondent has not shown that the claimant unreasonably failed to take a step which it would have been reasonable for her to take.

338. We therefore do not find that the claimant has failed in her duty to mitigate her losses in the period from 10 December 2021 to 11 May 2022.

339. As to the period of loss, the claimant seeks 25 weeks' loss. We have calculated the period until the claimant moved back home as 21.5 weeks. We have not awarded loss in the period thereafter when the claimant left Dundee as we have heard no evidence about the claimant's financial situation in this period or her efforts to mitigate loss after leaving Dundee. We therefore award loss of earnings in the sum of £68.75 x 21.5 = **£1,478.13**.

Injury to feelings

340. With respect to injury to feelings, the claimant seeks £15,000 to £20,000. The **Vento** bands for claim presented after 6 April 2022 (as the claimant's was) were £990 to £9,900 (lower) £9,900 to £29,600 (middle) and £29,600 to £49,300 (upper band). The sum she seeks is therefore in the bottom half of the middle band.

341. With respect to the claimant's Schedule of Loss, Mr Hoyle observed that, before working for the respondent, the claimant was mentally vulnerable and hyper-sensitive and was undertaking therapy sessions for anxiety. He said she was socially isolated with a small circle of friends and concerned that one of them may bear some kind of ill feeling towards her. In Mr Hoyle's submission, she wanted to move to a more culturally diverse university. He said that "anything would set off her anxiety and that she was open to any suggestion".

342. Mr Hoyle referred to the claimant's statement in her Schedule of Loss that her wig served 'to protect her natural hair from heat damage and to steer attention and conversations away from her voluminous curls." He said the claimant was able to wear her hair how she wanted and asserted we've

seen the claimant at the Tribunal only with her natural hair. (As it happens, this is incorrect). He suggested that the photo produced of the voluminous curls must have taken considerable effort to style it into that particular style. He said it was a choice and that 'an unusually large hairstyle like that' will attract comment or indeed compliments.

343. Whether the respondent and the others at the restaurant understood the reason for the wearing of the wig or not, according to Mr Hoyle, they exacerbated a pre-existing problem for the claimant. The claimant, he noted was, according to her Schedule, already a vulnerable person before the incident.

344. We were not persuaded that Mr Hoyle's submissions with respect to the claimant's disposition were either factually accurate or, in any event, that they furthered the respondent's cause. His suggestion that 'anything would set off [the claimant's] anxiety and that she was open to any suggestion' had no foundation in evidence. Nor do we accept there was evidence to sustain his description of her as 'hyper-sensitive'. It is true that the claimant disclosed she had previously struggled with anxiety for which she had received therapy "on and off". What is not clear to us is how that was suggested to undermine her Schedule of Loss, or the sums claimed in it for injury to feelings.

345. The eggshell skull principle of delict applies. Provided there is a causal link between the losses and the prohibited act, the employer must meet them and it is no defence to suggest the claimant would not have suffered as she did but for a vulnerability to a pre-existing condition. We accept the claimant's evidence that her anxiety became far worse after the incident. There is a dearth of evidence to sustain an argument, if such is Mr Hoyle's proposition, that the loss is divisible because of the contribution of other stressors.

346. Mr Hoyle alluded to evidence given by the claimant's witness, Lyn Sibanda, under cross examination where she mentioned that the claimant had mentioned previously feeling isolated because of a concern about whether she was liked by another individual in their friendship circle. We do not accept there is any basis on which to find this materially contributed

to the claimant's anxiety in the aftermath of the respondent's unlawful conduct. We accept the claimant's anxiety materially increased following that conduct on 5 December. We accept that after the incidents she became withdrawn and stopped going out which had not been the case before, whatever concerns the claimant may have entertained about an individual in her relatively new social circle of students.

347. It was also new that the claimant became more self conscious about her hair and less inclined to wear wigs and we are satisfied that a material cause was the unlawful acts of the respondent. Mr Hoyle commented that the claimant could wear her hair how she wanted. We have discussed above at paragraph **292** that we accept that the claimant had a variety of reasons for choosing to wear wigs and for her particular choice of wigs in the period before the incident. We also accept that she increasingly chose not to wear them after the incident and that the events of the 5th December 2021 were a material cause of this reluctance.

348. We are unclear as to the relevance, but for completeness, we add that we accept the claimant's evidence that the photo at p.56 in the bundle was of the claimant with her natural hair. Mr Hoyle's assertion that it "must have taken considerable effort to style it into that particular style" had no basis in evidence. We found his statement that "an unusually large hairstyle like that" was "a choice" to be troubling and unsupported by any evidence heard in these proceedings.

349. We further accept that the claimant's anxiety about bumping into former colleagues or about walking past the respondent's restaurant were caused by the responent's harassment of her and not some other unrelated friendship issue with someobody who never worked there.

350. We focused on the actual injury suffered. We reminded ourselves that the prohibited acts that have been found to contravene the EA were the incidents concerning her wig, both of which took place on 5 December 2021, and the constructive dismissal, following upon messages received from R Mubariq.

351. We accepted that at the time of the first Wig Allegation the claimant felt flustered and embarrassed. Following the Second Wig Allegation, she felt

distressed, humiliated and deeply upset. Following receipt of Ruby's messages, she felt brushed aside, and that the matter was treated as a joke. We also took into account that the claimant's upset and anxiety did not dissipate quickly but persisted and indeed worsened over the ensuing period. While we fully accepted the authenticity of the claimant's evidence regarding her increased anxiety, we noted in assessing quantum that this did not prompt her to require medical attention or lead to any diagnosed clinical psychiatric injury. Taking all relevant factors into account, we determined that this case falls in the bottom third of the middle **Vento** band and we award the sum of **£15,000** in respect of injury to feelings.

Interest

352. Neither party addressed the issue of interest in their submissions. We considered whether we should use our discretion to award interest on the claimant's losses and injury to feelings award. We have discretion as to whether to award interest but if we choose to award it, we are constrained to do so at the prescribed rate of 8%.

353. We decided not to award interest in this case. It is within judicial knowledge that the Bank of England base rate in December 2021 was 0.25%, increasing to 1% in May 2022, to 3% by November 2022 and to 5% by June 2023. Although rates have been improving for savers, if the claimant had been in receipt of the compensation at the time she incurred the losses and the injury to feelings, and if she had been able to invest it, it is unlikely she would have achieved a return of 8% on the monies or anything close to that rate. This is certainly so throughout 2022 when the base rate did not get above 3.5%. Though rates have been higher in 2023, they remain some way below 8%.

354. We reminded ourselves that the aim is to put the claimant in the position, so far as is reasonable, that she would have been had the discriminatory act not occurred (**Wheeler**). We considered that to award interest on the sums would not be proportionate and would place the claimant in a better position (financially) than she would have been if the discrimination had not occurred. No interest is included on either element of the compensation.

Failure to provide written statement of particulars

355. It was not disputed that the respondent failed to give the claimant a statement of her employment particulars in compliance with his obligations under section 1 of ERA and failed to provide compliant statements of changes thereafter. It is not disputed that on 15 April 2022 when the proceedings were begun, it remained the case that no such statement had been provided. Under section 38(3) of that Act, the Tribunal must increase the award by the minimum amount of two weeks' pay and may increase the award by four weeks' pay (4 x £68.75 = **£275**).

356. We award four weeks' pay by way of an increase. The claimant requested a contract of her employment on not one but three occasions before proceedings commenced and the respondent had ample opportunity to rectify the omission before these proceedings were begun.

357. The total compensation awarded is, therefore, **£16,753.13**. This breaks down as £1,478.13 compensation for loss of earnings + £15,000 injury to feelings + £275 increase for failure to provide particulars.

Employment Judge: **L Murphy**
Date of Judgment: **10 October 2023**
Date sent to parties: **11 October 2023**