EMPLOYMENT TRIBUNALS

Claimant: **Ms F Athif**

Respondents: **(1) Mr M J Lallmohamud**
(2) Spice E17 Ltd

Heard at: **East London Hearing Centre**

On: **7, 8 September and 12 October 2023**

Before: **Employment Judge Jones**
Members: **Ms T Jansen**
Ms C Whitehouse

Representation
Claimant: in person
1st Respondent: no attendance. Written representations
2nd Respondent: no attendance and no representations

JUDGMENT

Liability

1. The Claimant was employed by the 2nd Respondent.

2. The complaint of indirect sex discrimination against both Respondents succeeds.

3. The complaint of harassment related to sex succeeds against the 1st Respondent.

4. The complaint of a failure to provide written terms and conditions of employment succeeds.

5. The 2nd Respondent unlawfully deducted the Claimant's wages.

6. The Claimant is entitled to a remedy for her successful claims.

Remedy

7. The Respondents are ordered to pay the following to the Claimant:

Injury to feelings 10,000.00

Interest	1,857.12
Holiday pay	17.82
Statement of terms and conditions of employment	534.60
Total	**£15,409.54**
Preparation Time Order	**£1,056.00**

8. The Respondents are ordered to pay the Claimant the sum of **£16,465.54** as her total remedy for her successful claim.

REASONS

1. This was a complaint of sex discrimination and harassment. The Claimant also brought complaints of a failure to pay holiday pay, and failure to provide written terms and conditions of employment, contrary to section 1 Employment Rights Act 1996 and Respondent defended the claim.

The Hearing

2. This matter was listed for a two-day hearing beginning 7 September 2023. The Respondents failed to attend the hearing. At 1.41AM on 7 September, the 1st Respondent wrote to the Tribunal to say that he had a 9:00 AM appointment with a dermatologist and that he would like the hearing to be re-scheduled. The Tribunal wrote to the 1st Respondent at 10.37AM informing him that it proposed to proceed with the hearing but would adjourn until 1:00 PM to allow him and his witnesses to attend. The Tribunal proceeded with the hearing at 1PM.

3. The Tribunal heard nothing further from the Respondents until the morning of 8 September. The 1st Respondent's letter sent to the Tribunal at 11.45AM on 7 September was not given to the Tribunal until 9.52AM on 8 September. The Tribunal noted the 1st Respondent's fuller explanation of his reasons for his attendance at hospital and his renewed application for the matter to be relisted.

4. The Tribunal considered the further application, the Claimant's representations on the matter and the further information provided by the 1st Respondent; and decided to reconsider its decision of the previous day, 7 September. The Tribunal decided to adjourn the hearing to give the Respondents an opportunity to attend at another time. The Tribunal informed the Claimant of its decision and wrote to the Respondents to inform them that the hearing would be adjourned to 12 and 13 October. The Respondents were informed that the Tribunal will proceed with the hearing on those dates. The Tribunal also informed the Respondents that evidence should be sent to the Tribunal of the following: - the 1st Respondent's attendance at Whipps Cross Hospital on 7 September, his diagnosis and detail of the treatment he received on 7 September and any treatment

scheduled for 8 September which prevented him from attending the hearing on that day.

5. The Tribunal also notified the Respondents that their witnesses needed to attend on 12 October and that the 1st Respondent would be able to cross-examine the Claimant at the resumed hearing and present his case.

6. At 16.48 on 8 September, the 1st Respondent wrote to the Tribunal to confirm receipt of the Tribunal's letter explaining the above. He confirmed that he would be able to attend the hearing dates in October. He also stated that the 2nd Respondent would also attend.

7. The 1st Respondent sent a copy of the text message he received from his GP's surgery notifying him of the appointment at the hospital on 7 September at 9AM. This had already been provided to the Tribunal on 7 September and was not the information that he was ordered to provide.

8. On 12 October 2023, the Tribunal was presented with an email from the 1st Respondent dated 9 October, which was attached to a medical certificate. The email had been sent at 21.09 on 9 October and stated that the 1st Respondent would be unable attend court due to a health condition that was causing him alarming distress and that he was also on very high medication does. The medical certificate stated that the 1st Respondent had been assessed by his GP on 5 October and that he was certified as unwell and unable to work between 5 October and 19 October because of bilateral feet pain. It stated that he was on a high dose of medication. The Tribunal was not given any details of the medication or any information as to what that meant in terms of the 1st Respondent's ability to defend the claim. The 1st Respondent did not ask for the hearing to be adjourned. There was no attendance or appearance from the 2nd Respondent, despite the 1st Respondent's assurances in his letter dated 8 October.

9. The Tribunal carefully considered this new information. There was no information as to why, if this was a matter related to the 1st Respondent' feet, he could not attend a CVP hearing from home. The Tribunal noted that the Claimant had been aware of the new dates for the resumed hearing since 18 September, had seen his GP on 5 October, but only sent this information to the Tribunal on the evening of 9 October after hours, a few days before the hearing. There has been a delay in the provision of this information to the Tribunal, following the GP's diagnosis. The Claimant had not asked the Tribunal to adjourn/postpone the hearing.

10. The Tribunal also considered that this claim had been brought in July 2021 and the Claimant has attended every hearing and complied with all court orders. She produced the bundle of documents and her witness statements as ordered. There have been previous adjournments/postponements in this case of hearings listed on 4 May 2022, 21 July 2022 and 23 September 2022, caused by the 1st Respondent's practice in this litigation of applying late on the evening or early in the morning before a hearing for an adjournment or postponement because of ill-health or otherwise. The Tribunal noted that despite the 1st Respondent's promise, there was no

appearance or communication from anyone on behalf of the 2nd Respondent.

11. The Tribunal considered the overriding objective and decided to proceed with the hearing. The Tribunal wrote to the 1st Respondent on the morning on 12 October to notify him of its decision to proceed with the hearing. The Tribunal waited to see if the 1st Respondent would attend. As he did not attend and no one attended from the 2nd Respondent, the Tribunal proceeded with the hearing.

Evidence

12. The Tribunal had a bundle of documents and signed witness statements from the 1st Respondent, his mother, Nooroon N. Lallmohamud, who was also a director at the 2nd Respondent; his sister, Farzana Codabaccus; Kenia Fonseca, who stated that she was a cleaner at the 2nd Respondent; and Malina Vintour and Davia Daukantaite; who stated that they worked at the 2nd Respondent. The Tribunal did not have live evidence from the Respondents.

13. The Claimant gave live evidence to the Tribunal. She also produced a witness statement and a bundle of documents.

14. The Tribunal considered all the evidence in this case, both written and live. The Tribunal made the following findings of fact from the evidence in the hearing. The Tribunal did not draw conclusions on all the evidence but focussed on the evidence necessary and relevant to the issues in the case and credibility, since there are direct conflicts of evidence in this case.

15. The list of issues in the case was drawn up by EJ Shore at the preliminary hearing on 25 January 2023. The Claimant and 1st Respondent were present at that hearing and agreed to the list of issues. A record of that hearing was sent to the parties on 3 February 2023. The Tribunal will refer to the list of issues in the judgment section of these reasons.

16. Full written reasons are produced because the 1st Respondent was absent from the hearing and because they were requested by the Claimant on 12 October.

Findings of fact

17. The Tribunal finds that the Claimant and Mr Lallmohamud, the 1st Respondent, were friends and that they had been in an on and off intimate relationship in the early 200s. By 2019 they were no longer in contact. The Claimant also knew Mrs Lallmohamud as they were both on an academic course together. It is likely that this was how the Claimant was introduced to the family.

18. In her evidence, Mrs Lallmohamud referred to the Claimant being dishonest. She attached a text message conversation between her and the Claimant in 2019, in which the Claimant confirmed that she had lied to Mrs Lalllmohamud. We find it likely that the Claimant confirmed that she lied to

Mrs Lallmohamud when she denied that she was having an intimate relationship with the 1st Respondent. Mrs Lallmohamud did not refer to anything else as evidence of the Claimant being dishonest.

19. The Claimant knew that the 1st Respondent and Mrs Lallmohamud, his mother, owned and ran a restaurant/takeaway business, as she had visited him there. The 1st Respondent and his mother are company directors of the 2nd Respondent.

20. In April 2021, the Claimant approached the 1st Respondent to ask whether there was any possibility of her working at the restaurant. He told her that there was no work available. However, on 10 June, he sent the Claimant a WhatsApp text message asking whether she was able to work in the shop, between 5 and 11pm. The Claimant did not initially respond as she was not sure that this was a real offer of work. On 12 June, after a few more messages between them, the 1st Respondent asked her what days she could do. The Claimant responded to tell him that she was already employed at 14 hours a week and would be doing some extra hours for the next 4 weeks. They then had a discussion on the phone about her working at the 2nd Respondent.

21. In their discussion which took place both over the phone and through messages, they agreed that the Claimant would work at the Respondent from Monday to Friday, between 5 and 11pm. She would be paid at the London Minimum Wage, which at the time was £8.91 per hour. The job was that of kitchen porter. We find it unlikely that there was any agreement that the Claimant would be responsible for her own tax and National Insurance payments.

22. They arranged for the Claimant to come to the 2nd Respondent with her papers so that they could be copied, and she could start work. The Claimant went to the restaurant on 14 June 2021. She arrived at the restaurant at about 4.15pm. Among her papers was a sheet of paper on which was written her National Insurance number and her UTR number. The Claimant had a UTR number because she had previously done cleaning work in the construction industry and for that work, she needed to submit self-assessment forms tax purposes to HMRC. The Claimant also had a CIS number. She submitted tax returns for the financial years 2020/2021, 2021/2022 for her work in the construction industry.

23. At the time the Claimant was employed by a company called Churchill doing 14 hours per week as a cleaner.

24. On 14 June, when the Claimant went to the restaurant, she spoke to the 1st Respondent and his mother, who was also a director of the 2nd Respondent. They discussed a written contract of employment, and the 1st Respondent told the Claimant that he would organise one for her in due course. We find it unlikely that the Claimant signed or agreed to the completion of the self-employed contractor/freelancer document that the Respondent provided in its bundle of documents, either on that day or any other day. It is likely that the whole document was completed by one person as it is written in the same handwriting. It was only signed by the 1st Respondent and Mrs

Noroon Lallmohamud. There is no place for the self-employed contractor/freelancer to sign to confirm their agreement. It was not signed by the Claimant. It is likely that the Claimant saw this document for the first time when she received the Respondent's bundle for this hearing.

25. On that first afternoon, the 1st Respondent showed the Claimant around the kitchen and explained the tasks to her. That was the extent of her training. After she was shown around the kitchen, the Claimant remained at the restaurant and worked the rest of the shift. The Respondents provided the Claimant with the tools necessary to do the duties of a kitchen porter, such as mops and buckets and cleaning solutions.

26. We therefore find that the Claimant worked a shift on 14 June 2021. The 1st Respondent showed the Claimant the salad counter and told her that she had to keep a check on the cucumbers and tomatoes and make sure that there was always some in there. He showed her where the dishes were stacked so that she would know where to put the dishes that she washed. The Claimant had to wash dishes, pots and pans. The food was cooked during the day. The Claimant referred to a male chef and the Respondent disputed that it had a male chef. It was not clear to the Tribunal whether they were both correct but referring to different periods of time. The Claimant had to wash the pots and pans left by the chef who prepared food in the morning. She also had to clean the air fryer.

27. The 1st Respondent told the Claimant that if she completed some duties by 9pm, she could have a break. She would break at 9 or 9.15PM and then resume work by 9.15PM or 9.30PM. We find it likely that after her break the Claimant would continue to wash dishes if needed and go around the shop to see if she needed to do anything else before the restaurant closed. She would have to do some sweeping and cleaning toilets and other areas. We did not have live evidence from any of the Respondent's witnesses. We find that the above is likely to be an accurate record of what the Claimant did on her first day and that she did similar duties over the 4 days that she worked for the Respondents.

28. We find it unlikely that she cleaned the toilets after the first shift. We considered the witness statements provided by the Respondents. We find it likely that Ms Codabaccus assisted the Claimant occasionally with her tasks as she knew her from when the Claimant was the 1st Respondent's friend. Ms Codabaccus went to the restaurant after she finished working at her job as the manager of a care home, to offer assistance to the business, as it was her family's business. The Claimant never met Ms Daukantaite and understands that she does not know any English. Ms Daukantaite's witness statement is written in English. Ms Vinatoru is likely to be mistaken as she suggested that the Claimant was an agency worker. It is unlikely that she or any of the other witnesses would know the detail of the relationship between the Claimant and the Respondents. These witnesses refer to kitchen duties, which the Claimant told us that she did. We had no evidence from the 1st Respondent about this. We find it likely that these witnesses, if their unchallenged evidence is accepted, are likely to have worked different shifts from the Claimant and may even had been absent at the time that the Claimant worked for the Respondent since she only worked

there for a short time. Ms Fonseca's shifts were apparently from 10.30pm to 2am, which means that she would have seen the Claimant as she left the premises. The Claimant was not introduced to these women, as colleagues and she did not know them. Ms Vinatoru confirmed that she was there when the Claimant left at around 11.40PM. Ms Daukantaite referred to working on food preparation but whereas the Claimant had to peel potatoes, onions and clean the feathers of chickens, Ms Daukantiate focussed on the cut salad and preparing orders. In her statement, the Claimant confirmed that she had been told to ensure that the cut salad was always stocked but in practice, it did not require her attention during most of the shifts.

29. It is likely that on the first day, 14 June, the Claimant told the 1st Respondent that it would be helpful if she had a written statement of terms and conditions which confirmed that she worked there and the payments that she would be getting. The 1st Respondent agreed to this, but it was never provided to her.

30. At the end of that first shift on 14 June, the 1st Respondent asked the Claimant how she felt about the job. The Claimant stated that the job was unlikely to be for her as the workload was too much. The 1st Respondent asked the Claimant if she could continue to work for another week until he found someone else to take her place. She told him that she would have to walk to the bus stop at the end of her shift and that after midnight the road to her house when she gets off the bus is quiet and deserted. She told him that she felt that it was unsafe for her as a woman on her own. The Claimant had not been physically assaulted by people on the street, but she told him that it was common for the drunk men or drug users on the street to harass her with sexual comments, which made her feel unsafe.

31. It is likely that on 14 June 2021, the Claimant worked until sometime between 11.30 and midnight. The Claimant provided the Tribunal with a printout of her journey times as logged through her Oyster card, which confirmed that she boarded her bus home at just after midnight, at 00.12hours. The restaurant is located about 5 mins walk away from the bus stop. Although the 1st Respondent in his statement challenged that this means that she came straight from work to the bus stop, we find it likely that the Claimant worked up until shortly before she arrived at the bus stop and that, given her stated concern about going home alone late at night, she went straight to the bus stop from the restaurant. The 1st Respondent was aware of her concerns as they had already discussed it as set out above. This is also confirmed by the WhatsApp messages between them at 00.38 that day on page 78 of the electronic bundle in which he thanked her for working so late and wished her a safe journey home. The Claimant messaged him a few moments later to confirm that she had arrived safely home.

32. Although the agreement between the Claimant and the Respondents had been that she would end her shifts at 11pm, the restaurant was usually not closed until at least 11.20PM, which meant that the Claimant was not able to leave any earlier. The 1st Respondent told the Claimant that he could not close the restaurant any earlier because he would lose business as there were customers at the restaurant at that time. After the last customer left the restaurant, the Claimant had to wash the remaining dishes, sweep, mop

the floor and initially, clean the shop toilet. The Claimant came to work about 30 minutes early on 15 and 16 June, hoping this would allow her to leave on time, but that did not happen.

33. On, 15 June, the 1st Respondent helped her wash pots and while doing so, asked her whether she would reconsider her decision to leave. He assured her that with time she would be able to do things faster and it would be easier. The Claimant told him that if she had some assistance and the workload was okay, she would continue with the job. Later that shift, the Claimant was asked to peel a sack of onions and then a big bag of potatoes. Ms Codabaccus came to the 2nd Respondent that evening and washed the stove. She spoke to the Claimant and told her that she was helping her to do her work. The Claimant was not able to take a break during that shift as when she asked the 1st Respondent if she could, he responded by telling her that there were dishes to be washed.

34. The Claimant was not allowed to leave work at 11pm that evening. She recalled that she started sweeping the floor at 11.20PM, once the dishes were done. During the shift, the 1st Respondent told the Claimant that she was no longer required to clean the toilets. Mrs Lallmohamud packed some food for the Claimant to take with her. The Oyster card printout shows that the Claimant boarded the bus at 23.52 that evening.

35. On 16 June, the Claimant arrived early at work, hoping to complete her shift early. She was told that she worked too slowly and that she had not swept or mopped the floor correctly on the previous evening. In addition to the 1st Respondent, both Ms Codabaccus and Mrs Lallmohamud both told her off about the way that she worked or that they had to help her. They repeatedly told her that she was too slow. The Claimant was told to pick up all the potatoes off the floor from a bag of potatoes that the 1st Respondent dropped. She was then told to clean a bucket of chicken, including removing feathers. She then washed dishes and assisted in retrieving items from the fridge and taking them to the kitchen for those preparing dishes, as the restaurant was busy. The Claimant was not able to take a break during the shift.

36. During the shift the 1st Respondent made her a milkshake but when she stopped to drink some of it, he accused her of wasting time. When she was asked later on during the shift by Ms Codabaccus and Mrs Lallmohamud why she had not drunk the milkshake, the 1st Respondent stated that she should be able to drink it in 5 minutes while working. They laughed at her and told her that she was still stupid after all these years.

37. 0n 16 June, the Claimant was not allowed to leave the restaurant until she had scrubbed the walls, cleaned the stove, cleaned the chicken frying machine and mopped the floor. It is likely that during the shift, the Claimant told the 1st Respondent that she wanted to talk to him about the job. The Oyster card printout shows that she boarded the bus at 23.39 that evening.

38. After the shift, when she got home, the Claimant sent the 1st Respondent a copy of a letter confirming her National Insurance number. She asked whether he wanted to see the original and he stated that he did not as the

copy was sufficient to see the NI number. She also messaged him to say that she still wanted to talk to her boss. It is likely that she meant that she wanted to talk to him as her boss and not as her friend. He messaged her at 1am asking her what she wanted to discuss. The Claimant did not feel that it was appropriate to discuss all that she wanted to say through text messages, so she put it all into a grievance letter which she sent him by WhatsApp and email on the following morning.

39. The letter was in the form of a grievance, although it was not titled as such. In it the Claimant referred to the following:

(1) She asked to be allowed to leave work at 11.20pm at the latest, especially if she starts her shifts 15 – 30 minutes early.

(2) She asked the Respondents to use a task card, with allocated times on it for her to complete tasks as this would help both them and her to manage the workload.

(3) She asked the 1st Respondent to confirm that she would get a 15-minute break at 9PM, as agreed. She stated that she would be back to work at 9.15.

(4) She asked that the Respondent stop telling her repeatedly during the shift that she should *'be quick'* as it did not help, as she was already working at full speed. She stated that as she had already agreed to accept the minimum wage, she was not going to complain about the pay but that the Respondents should agree that it was the lowest wage in London and therefore, if what she was able to do was not acceptable, that was the best that she could offer.

(5) She asked the Respondents to stop offering her food during the shift as she was not able eat/drink it. She asked to be allowed to get on with her job and that she should not be told by anyone that they are doing her job. She told the 1st Respondent that if he thought that she was not able to do the job, the Respondents could always find someone else.

40. She ended the letter by telling the 1st Respondent that if he thought that the expectations set out in the letter was unreasonable, she was happy to continue in the job for a week, as they had discussed at the end of the first shift, to give him time to find someone else.

41. It is likely that she was hopeful that the Respondents would keep to the expectations that she set out in this letter, for the rest of her time there. She was setting out how she wanted to be treated. When he read the letter, the 1st Respondent's only response in a written message to the Claimant was that she did not need to write such a formal letter.

42. He did not dispute anything that she said in her letter. Instead, he sought to explain why the Respondent kept telling her to *'be quick'* during the shift. He also stated that he and Mrs Lallmohamud work longer hours than her

and that she should spare a thought for them. He confirmed that he was looking for someone else and that he was grateful that in the meantime, she was helping the business. It is likely that in saying this he was accepting her offer that she would work for a week while he finds someone else.

43. The Claimant worked on 17 June. She brought rubber washing up gloves with her to work that day. There is a dispute between the parties about what happened at the end of the shift on 17 June. The Claimant alleges that she was physically assaulted by the 1st Respondent and made to leave the restaurant and that she told him that she would not be coming back. In his witness statement, the 1st Respondent denied that he had assaulted the Claimant and pointed to the fact that the police did not start a criminal case against him as proof. We find it likely that the existence of CCTV in the restaurant was discussed at the preliminary hearing on 25 January 2023 and EJ Shore advised the 1st Respondent that he would have to produce CCTV footage from the time of the assault to the Tribunal as part of his defence of the claim. Although he agreed to do so, no CCTV has been produced and the Respondents have given no explanation for the failure to produce it.

44. On balance, we find it likely that the Claimant was given a break during the shift and that she cleaned chicken and washed pots and pans. She also cleaned the stove and washed and dried the sink so that the 1st Respondent could use it to apply spices to the chicken. The Claimant was due to work an early shift the following morning at her other job with Churchill. She told the 1st Respondent about that when she arrived at work. She told him that she needed to leave work on time so she could get some sleep as she needed to be up at 4am to get to her early shift with Churchill on time.

45. At 11PM, when she saw that there was a huge pile of washing up, she knew that she would not be able to complete the tasks she had to do, within the next half hour. She still had to sweep and mop the floor. She reminded the 1st Respondent that she needed to leave on time that night. He said that she could not leave before completing her tasks. When she reminded him about what she had said earlier about leaving on time he told her *'Get the hell out of my shop!'* The Claimant picked up her bag to leave. The 1st Respondent came up to her and grabbed her and held her by the neck against a wall and asked her if she were coming back to work that Friday, she told him that she would only do so if he wanted her to. He asked her again *'are you coming on Friday or not?'* The Claimant replied, *'only if you want me to'*. The 1st Respondent replied *'Fine. Sweep the floor and go'* and let her go. The Claimant complied as she felt that the 1st Respondent was angry, and she felt intimidated by him.

46. While she was sweeping the floor, he stated '*Don't you dare sweep my floor like that!'* We find it likely that it was at this point that the 1st Respondent pushed the Claimant so that she fell to the floor and bruised her knee. It is likely that when she fell on the floor, she screamed as Mrs Lallmohamud came to where they were and asked what had happened. The Claimant told her that the 1st Respondent had pushed her. He told his mother that the Claimant was lying and that he had not done anything to her. The Claimant told her that she was alright. At this point, it is likely that the 1st

Respondent screamed at the Claimant '*Get out! Get the hell out of my shop!'* The Claimant went to the back of the shop and picked up her bag again and tried to reach the washing up gloves which she had brought to work with her that day. It is likely that it was at this point that the 1st Respondent pushed her so that she fell against a metal cage/shelves, which likely caused the bruise on her arm that we can see in the photos provided by the Claimant. The Claimant fell on the floor. The 1st Respondent helped her up. He held her against a wall and asked her again if he was coming to work that Friday. When the Claimant said that she was not, he told her to '*Get out just get out!'* She usually left the restaurant by the back door. When she went to leave that way, he told her to leave the business by walking out through the restaurant so that everyone could see her leave. He said *'Leave from the front. There is CCTV there. So everyone can see that you left safe from here'*. The Claimant did as she was told. On her way out the Claimant said to the 1st Respondent, but without turning around *'Fuck you'*. The 1st Respondent was likely to be angered by this as he came and kicked her from behind. As she turned around, she saw Mrs Lallmohamud holding on to the 1st Respondent. After she left, Mrs Lallmohamud called the Claimant from a number that she did not recognise and asked her if she was okay.

47. The Claimant said that she was and asked to be paid her wages for the 4 shifts that she had worked. Mrs Lallmohamud told the Claimant that she would be paid but the Claimant was not paid until much later. The printout from the Claimant's Oyster card shows that she boarded the bus home at 23.25 that evening.

48. The Respondent's dispute this account of what happened. The 1st Respondent and Mrs Lallmohamud's response to this part of the claim is that the Claimant got the bruise on her arm in an altercation with her partner. We find that on 11 June, the Claimant confided in the 1st Respondent that she had had an argument with her partner and that in the course of that argument, her phone broke. We saw the messages. The Claimant said *'I just had a fight with someone and got my phone shattered. I am sleeping now. Have to wake up at 4am for a 12 hour shift'.* The 1st Respondent replied on the following day to say that he hoped that she had a good and relaxing shift. It is likely that she also spoke about this altercation with Mrs Lallmohamud during the week. It is also likely that this is what the Respondents are referring to.

49. On balance, we prefer the Claimant's version of events and find it likely that, at the end of her shift on 17 June the 1st Respondent assaulted the Claimant as described.

50. On 18 June, the Claimant sent photos of the bruises on her left arm along with her bank account details to Mrs Lallmohamud on Instagram. Along with the photo she stated the following:

> *'my neck is ok now… but the pain in my hand is getting worse. It pains inside the bones*
> *……*

I was thinking since it is not much pay and just 4 days you can transfer to my account' (The Claimant then set out her bank account and sort code numbers).

certain parts of my back also hurt as I was slammed against the wall a few times but I can't see over there'

51. If the bruises had nothing to do with the Respondents, we would have expected Mrs Lallmohamud to have responded to ask the Claimant why she was sending her a photo of her bruise as they had already spoken about it the previous week. Mrs Lallmohamud did not ask the Claimant why she had linked the bruises to her request to be paid. Mrs Lallmohamud did not respond to the Claimant's message on Instagram.

52. Also on 18 June, the Claimant reported the incident to the police. She had been advised to report it by a colleague at her other job. The Claimant reported this as a crime and was given a crime number. The Claimant gave the police a statement and the police advised her to go to the hospital for a check-up. As a result of her report, the police visited the 2nd Respondent restaurant business and spoke to the 1st Respondent. The police did not bring any prosecution against the 1st Respondent as a result of this incident. However, on 2 July, the police wrote to the Claimant to inform her that they were putting a safety measure on her address called a *'special scheme'* which meant that any 999 calls from her address would be treated as urgent. The police clearly considered that there was a reason to do this.

53. The discharge letter from the Accident & Emergency Department at Guys and St Thomas' department dated 18 June was in the bundle. It recorded that the Claimant had attended the hospital that day complaining of pain in her shoulder, arm, elbow, wrist and hand. She had a bruise on her upper arm. The Claimant reported to the hospital that she had been assaulted by her boss the previous day and that the police were aware of it. The medical staff noted that there was a large bruise over her left shoulder, a bruise on her left forearm and scratches on her left and right wrists.

54. The Claimant's evidence was that she had nightmares after the incident. She consulted her GP and was provided with a sick note which is in the bundle of documents. He certified her as unable to work for at least three weeks and referred her to therapy. The referral was to Newham Talking Therapies because of her disturbed sleep and because her self-esteem and confidence were severely affected by the incident on 17 June. The Tribunal had a copy of a letter dated 2 July 2021, in which they confirmed that her GP had referred her to them and that she was assessed as showing symptoms of low mood which was impacting her general functioning. The Claimant's depression and anxiety scores were included in the letter. On 29 June 2021 she scored 24 on the depression questionnaire, where any score between 20 – 27 is considered severe depression. She also scored 16 on the Generalised Anxiety Disorder questionnaire, where any score over 15 is considered to be severe anxiety. The Claimant was offered the opportunity to have group therapy, which she accepted.

55. The Claimant attended therapy from 14 July 2021 – 2 September 2021. The Claimant found the therapy helpful.

56. In his Response to the claim, the 1st Respondent stated that the Claimant left because he threatened to report her to immigration. We find this unlikely for the following reasons: the Claimant was at the same time, also employed by Churchill who would have done all the necessary checks to ensure that she had the right to work in the UK before employing her, as they are legally obliged to do. The Claimant was registered with HMRC and had a UTR number. She also had a National Insurance number. On 14 June, the 1st Respondent took copies of all her papers proving that she right to work in the UK. It is likely that he was satisfied that she had the right to work in the UK which is why he allowed her to start working that day. The Claimant denies that at this time, there were any restrictions on her right to work in the UK. Her evidence was that she had the right to work in the UK for over a year before she began working for the Respondent and that this was not the reason why she left the Respondent's job after the evening shift on 17 June 2021. She left because of the way in which the 1st Respondent treated her in this shift.

57. The Claimant was sent a cheque for the sum of £214.08 which was payment for 4 shifts at the National Minimum Wage rate.

58. The Claimant produced a report from the Office of National Statistics dated 25 May 2022 titled, *'Perceptions of Personal Safety and Experiences of Harassment, Great Britain. 16 February to 13 March 2022'.* This was a report produced from the Opinions and Lifestyle Survey with data collected between February and March 2022, which compared similarly with data collected a year earlier.

59. The data showed that:

    a. People felt less safe walking alone in all settings after dark than during the day; with women feeling less safe than men in all settings after dark.
    b. Disabled people felt less safe in all settings than non-disabled people.
    c. More women (27%) than men (16%) reported they had experienced at least one form of harassment in the previous 12 months.

60. The survey also canvassed how safe people felt using public transport. The data showed that people felt less safe using public transport after dark than during the day and that women aged 16 – 34 years (which includes the Claimant), felt that most unsafe of any age and sex group using public transport alone after dark.

Law

Employee status

61. The question for the Tribunal was whether the Claimant was an employee, a worker or self-employed.

62. If she was a worker, then the Tribunal would have jurisdiction to hear her complaints of discrimination and failure to pay holiday pay. If she was an employee, the Tribunal would have jurisdiction to hear all her complaints, including the complaint that the Respondents failed to provide her with written terms and conditions of employment. If she was self-employed, the Tribunal would not have jurisdiction to hear any of her complaints and her claim would be dismissed.

63. The Respondents disputed that the Claimant was an employee. In his response, the 1st Respondent stated that the Claimant was self-employed because she had a UTR number and that she was responsible for paying her own tax and National insurance.

64. In determining the Claimant's status, the Tribunal had regard to the following law:

65. Section 230 of the Employment Rights Act 1996 (ERA). That section defines an "employee" and 'worker' as follows:

(1) in this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act 'worker' means an individual who has entered into or works under –

(a) A contract of employment, or

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

66. In the case of *Readymix Concrete South East Ltd v the Ministry of Pensions and National Insurance* 1968 2 QB 497 (which was approved in the cases of *Hall (Inspector of Taxes) v Lorimer* [1994] IRLR 171 and *Autoclenz Ltd v Belcher and Others* [2011] UKSC 41) McKenna J posed the following 3 questions to help determine whether a contract of employment exists:

1 Did the worker agree to provide his own work or skill in return for remuneration? (Limited or occasional delegation may not be inconsistent)

2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

3 Were there any other factors inconsistent with the existence of a contract of service?

67. In the case of *Carmichael v National Power Plc* [2000] IRLR 43 Lord Irving of Lairg referred to an "irreducible minimum" of factors, being control, mutual obligation and obligation of personal service as being necessary to creating a contract of service.

68. The presence of the irreducible minima does not make the relationship one of employer and employee but without all three elements such a relationship would not exist. A tribunal would consider all the other aspects of the relationship, for example:

1 Can the claimant send a substitute and if so, who does the employer pay, the claimant or the substitute?

2 The length of time the relationship has subsisted, a long period of time can suggest parties' intention to make the relationship permanent and more likely that a contract of service is implied *(Franks v Reuters Ltd* [2003] IRLR 423)

3 is the claimant integrated into the employer's business?

4 is the claimant in business on his own account, running his own business, taking a financial risk, providing his own capital? Who provides equipment?

69. There needs to be a contract, which can be set out in a written document or verbally agreed, which can be implied from the parties' conduct.

70. Sufficient control is required. This can be different if the person is working as a specialist and did not require day to day instruction on how to do their job. The putative employer would have to have ultimate control i.e., the power to dismiss the worker, to define work and provide tools. Self-employed status could be demonstrated by worker having the freedom to choose the time, place and content of their work as well as their hours.

71. Mutuality of obligations means that the employer is obliged to provide the work with work and the worker was obliged to carry out that work.

72. If the Tribunal's assessment of all these factors leads it to conclude that the claimant was not an employee, then the next question is to assess whether she was a worker or self-employed.

73. A worker is someone who undertakes to do work personally. A right of substitution defeats both employee and worker status.

74. In the landmark case of *Uber v Aslam* [2021] IRLR 407, the Supreme Court held that the written agreements did not provide the appropriate starting point in applying the statutory definition of a *'worker'*. The task for the tribunals and courts was to determine whether the claimant fell within the definitions of a *'worker'* in the relevant statutory provisions so as to qualify

for the rights; irrespective of what had been contractually agreed. In short, the primary question was one of statutory and not contractual interpretation.

75. The Court stated that the general purpose of employment legislation is to protect vulnerable workers from being - paid too little for the work they did, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). It would be inconsistent with that purpose to treat the terms of a written contract as determinative of whether an individual fell within the definition of a *'worker'*. To do so would have reinstated the mischief which the legislation was enacted to prevent. It was the very fact that an employer was often in a position to dictate such contract terms and that the individual performing the work had little or no ability to influence those terms that gave rise to the need for statutory protection in the first place.

76. The tribunal must start with the statutory language. The ultimate question is whether the relevant statutory provisions construed purposively were intended to apply to this transaction. The tribunal must view the facts realistically.

77. The tax position while not decisive is a relevant consideration. If the claimant is fully self-employed it is likely that he would pay his own tax and national insurance. If he is employed, then the tribunal would expect to see tax and national insurance payments deducted from his gross wage and paid on his behalf to the authorities. The claimant would then be paid net pay. Various other arrangements between those two extremes are possible and would influence the conclusion on the claimant's status.

78. In respect of complaints of discrimination, Section 83(2) Equality Act 2010 defines employment as employment under a contract of employment, contract of apprenticeship or contract personally to do work, which could include workers.

79. In the Court of Appeal case of *Secretary of State for Justice v Windle & Arada* [2016] IRLR 628 the court emphasised a continuing requirement for mutuality of obligations even when applying the '*worker'* definition. The case concerned casual interpreters for Her Majesty's Courts and Tribunals Service seeking to claim race discrimination. Underhill LJ gave the judgment and stated that the extended discrimination definition is indeed on all fours with the '*worker'* definition and so the two are to be interpreted in the same way. The Court decided that there was no difference in law between the classic '*employee'* definition and the *'worker/discrimination law'* definition in relation to mutuality as it applies to both.

Indirect sex discrimination.

80. An employee/worker is protected from discrimination from the first day of employment.

81. Section 19 of the Equality Act 2010 refers. It states as follows:

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

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

a. A applies, or would apply, if to persons with whom B does not share the characteristic,

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

c. It puts, or would put, B at that disadvantage, and

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

82. The Claimant complains of harassment. The relevant law is as follows:

Harassment

83. The law on harassment is contained in section 27 Equality Act 2010:

"A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purposes or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

84. Section 27(4) states that in deciding whether conduct has the effect referred to in subsection (1)(b) set out above, 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.

85. The Tribunal was aware of the case of *Land Registry v Grant* [2011] EWCA Civ. 769 in which Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

86. In the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT stated that the conduct that is treated as violating a complainant's dignity is not so, merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. The Tribunal is obliged to take the complainant's perspective into account in making that assessment but must also consider the relevance of the intention of the alleged harasser in determining whether the conduct could reasonably be considered to violate a complainant's dignity.

87. It is also important where the language used by the alleged harasser is relied upon, to assess the words used in the context in which the use occurred.

88. The Respondents disputed that they had harassed the Claimant at all.

Burden of proof in discrimination complaints

89. The burden of proving a discrimination complaint rests on the employee/worker bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. This is addressed in section 136 of the Equality Act 2010 which states that:

"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 [but] if A is able to show that it did not contravene the provision then this would not apply."

90. In the case of *Laing v Manchester City Council* (EAT) ICR 1519 the EAT spelt out how the burden of proof provisions should work in practice:

"First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation can be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race."

91. In the same case tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out

above. In essence, the employee/worker must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a employee/worker has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc* [2007] IRLR 246).

92. In every case the tribunal has to determine the reason why the employee/worker was treated as she was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572: "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, then that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

93. As Elias J stated in the case of *Laing* in some cases it is still appropriate to go right to the heart of the question of whether or not the protected characteristic was the reason for the treatment.

"The focus of the tribunal's analysis must at all time be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'. Whilst ….it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error in law to fail to do so.

The right to employment particulars

94. Section 1 Employment Rights Act gives every employee the right to have a statement of employment particulars provided to them by their employer. The statement should provide details of the names of the employer and the worker/employee, the date on which the employment began, the remuneration and hours associated with the job and the job title. The statement should also set out the days of the week the employee/worker is required to work, any terms and conditions related to holidays, sick pay, other paid leave and entitlement to pension and any other benefits associated with the job. The statement should provide details of the notice required to terminate the contract, any probationary periods and any training entitlement provided by the employer.

Holiday pay

95. The Working Time Regulations 1998 gives every worker the right to paid holidays. The combination of Regulations 13 and 13A means that a worker is entitled to 5.6 weeks' annual leave in each leave year.

96. If a worker's employment is terminated during the course of their leave year and on termination, the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, the employer shall pay the worker in lieu of the leave.

Decision

97. In this section of the Reasons, the Tribunal applies the law set out above to the facts if found from the evidence, which is set out above. The Tribunal will be working from the list of issues set out in the record of the preliminary hearing on 25 January 2023.

Credibility

98. There were issues of credibility in this case. The Tribunal did not have the benefit of the 1st Respondent's live evidence as he chose not to attend the hearing. However, the Tribunal considered the written information that he provided, including the witness statements from his mother and his other employees. The Tribunal had the documents and live evidence from the Claimant. The Respondents submitted that the Claimant was dishonest and that she should not be believed and their evidence should be preferred. The point to the fact that the Claimant admits in her messages to Mrs Lallmohamud in 2019 that she lied, as proof of this. The Tribunal notes that the texts were unrelated to the Claimant working for the Respondent. The Claimant was apologetic to Mrs Lallmohamud, who she was close to at the time, that she had not been candid with her when she denied having an intimate relationship with the 1st Respondent. The Respondents did not refer to any other matter in their submission that the Claimant's evidence was unreliable.

99. The 1st Respondent stated in his witness statement that the Claimant ceased working for the 2nd Respondent because he threatened to report her to immigration. We find it unlikely that the Claimant had any concerns about being reported to the Home Office. We note that the Claimant remains in the UK to date and was employed at the time by Churchill as a cleaner on a contract of 14 hours per week. The Respondent checked her right to work in the UK on 14 June and was satisfied that she had that right.

100. The Claimant has been consistent in this case. The evidence she gave at the hearing was the same as in her witness statement and in her claim form.

101. Taking all the evidence into consideration, it is this Tribunal's judgment that where there is a conflict of evidence between the parties, we have preferred the Claimant's evidence as we found her to be credible.

102. The list of issues begins at paragraph 52 of EJ Shore's preliminary hearing minutes.

Issue 1.Employment Status

Issue 1.1 - Was the Claimant an employee of the second Respondent within the meaning of section 230 Employment Rights Act 1996?

103. We did not have a written agreement between the parties to consider. We did have the Claimant's live evidence, her witness statement and the Respondents' witness statements.

104. The Claimant attended work at 4.30 on most of the four days she worked for the Respondent, intending to complete her duties by 11PM, as agreed. She agreed that it was her choice to attend work early and that the agreement with the Respondent was that she work from 5 – 11PM, Monday to Friday. By the 16 June, she confirmed in writing that she was prepared to work until 11.20PM to complete her tasks. The contract between the parties was that she would work from 5PM to 11PM. In the WhatsApp messages, before she started, the 1st Respondent told her that the job was from 9am to 5pm. The job was that of kitchen porter. The Claimant was provided with the tools that she would use to do the job such as mop and bucket and dish soap and sponges. The Claimant brought her own gloves on the last day that she worked.

105. The Claimant did not set her own time or decide on her duties.

106. The Claimant was not in business for herself in the job that she did for the Respondent. The Claimant did have a UTR number, but she did not use it with the Respondent. We accept the Claimant's explanation that she had the UTR number for other work that she had done previously in construction and which she might do again. It is entirely possible and within the law for a person to be employed in one job, while working on a self-employed basis elsewhere.

107. There was mutuality of obligations here. The Claimant was not allowed to leave the restaurant until she completed all the tasks set for her by the 1st Respondent. She had to ask the 1st Respondent to allow her to take a break. Even though it was agreed that she would get a 15-minute break during the shift, she was not always allowed to take it. She could not simply take a break when she felt that she needed it, as a self-employed person would be able to do. Once she attended at the restaurant, the 2nd Respondent was obliged to and did give her work to do. She was also expected to return to work on the following day. The Respondents decided what the Claimant would do. The Claimant had no control over what her tasks were and even after she asked to be given a task card, the Respondent failed to provide her with one and simply expected her to do as she was told.

108. During her time working for the 2nd Respondent, the Claimant was given potatoes to peel and dishes and pots and pans to wash. She was told to sweep the floor. She was also told that she could not leave until the 1st Respondent said so. She was even told that she was sweeping the floor incorrectly. The 1st Respondent had a particular way in which he wanted her to sweep the floor. If she were self-employed, she would be able to set

her own hours. The Claimant was not allowed to send a substitute to do her work. When the 1st Respondent or Ms Codabaccus assisted her by washing a pot or cleaning the stove, they told her that they were helping her with *her* job.

109. Considering all the above, it is our judgment that the Claimant was employed by the 2nd Respondent to work as a kitchen porter and that she started that employment on 14 June 2021. The Claimant was the 2nd Respondent's employee. The employment came to an end on 17 June 2021.

1.2 – Was the Claimant an employee of the second Respondent within the meaning of section 83 of the Equality Act 2010?

110. It is this Tribunal's judgment, based on the same facts referred to at issue 1.1 above, that the Claimant was controlled by the 1st Respondent, that she was not working in business on her own account in relation to the work that she did for the Respondents; and that there was mutuality of obligations between them. The Claimant worked for the 2nd Respondent under a contract personally to do work.

111. It is therefore our judgment that the Claimant was an employee within the meaning of section 83 of the Equality Act 2010.

112. We now move on to assess the Claimant's complaints of discrimination.

Issue 2 - Indirect discrimination – section 19 Equality Act

113. 2.1 - The Claimant relies on the PCP (provision, criterion or practice) of a requirement for staff to work after 11PM. It is our judgment that the Respondents had a practice of requiring staff to work after 11PM.

2.2– Did the Respondents apply the PCP to the Claimant?

114. It is our judgment that every night that she worked at the 2nd Respondent, the Claimant finished her work between 11.30PM and midnight, apart from 17 June when she left the restaurant at about 11.20PM; after being told to leave by the 1st Respondent. This would usually happen because firstly, the Claimant had many tasks to complete, which she was unable to do within the time, and secondly, although she had been told that the job was from 5PM to 11PM, because the Respondent accepted orders and allowed customers to order food such that they would still be eating at 11PM, it was not possible for the Claimant, to finish by 11PM. As the kitchen porter, the Claimant had the job of cleaning up after the customers had left.

115. It is therefore our judgment that the PCP was applied to the Claimant.

2.3 – Did the 1st Respondent apply the PCP to men or would he have done so?

116. The witness evidence from the Respondent's witnesses confirms that they also finished late. Ms Fonseca stated in her statement that she completed

her shifts at 2am and Ms Vinatoru confirmed that she was there when the Claimant left. This all confirms that they were all working after 11pm.

117. It is therefore our judgment that the Respondent operated a PCP that all staff were required to work after 11pm.

118. It is our judgment that this PCP was applied to the Claimant and to the other members of staff working at the 2nd Respondent. The Claimant believes that the Respondent had a chef who worked there in the morning. We did not have sufficient information to be able to make a judgment on the hours worked by the chef, or any of the chef's details. However, on each of the days that she worked for the 2nd Respondent, when the Claimant left work on 14, 15, 16 or 17 June, 1st Respondent and Mrs Lallmohamud were still at work. In his text message to her after he received her letter dated 16 June, the 1st Respondent confirmed that he and Mrs Lallmohamud usually worked 12 hours at the restaurant.

119. It is therefore our judgment that the Respondents operated a PCP of requiring staff to work after 11PM and that this requirement or practice, was applied to both male and female staff.

2.4 – Did the PCP put women at a particular disadvantage when compared with men, in that it is not safe for women to walk alone at that time, and the Claimant would be harassed by drunk men and drug users? Did the PCP put the Claimant at a disadvantage?

120. The Claimant provided evidence which shows that around this time in 2021, a higher proportion of women compared to men felt unsafe using public transport after dark and a higher proportion of women than men felt unsafe walking alone in all settings after dark. A higher proportion of women perceived danger to themselves when walking late at night, compared to men. The Claimant spoke to the 1st Respondent about this on the first night, that she worked for the 2nd Respondent. She was scared of walking home after she got off the bus and of being harassed by drunks and drug addicts, after her shift actually ended. The 1st Respondent was therefore aware of her concerns about the time. It is our judgment that he heard her, which was why he messaged her later that night to check that she had returned home safe and well. The Claimant messaged him to confirm that she had got home safely.

121. The statistics the Claimant provided show that more women than men reported feeling unsafe and that they had experienced at least one form of harassment in the previous 12 months. The report also confirmed that women aged 16 – 34, the age group that the Claimant fitted into, felt the most unsafe of any age and sex group using public transport alone after dark.

122. The Claimant's evidence was that she believed that she was more vulnerable to being harassed by drunk men and men under the influence of drugs, when walking home late at night. On her first night, she spoke to the Respondent about this. The evidence of the Oyster card printout and the Claimant showed that the Respondents never kept to the agreed finish time

of 11PM. Even the Claimant's offer in her letter of 16 June to finish at 11.20 was not adhered to.

123. The Claimant was put at a disadvantage as she would have felt unsafe while she walked home after her shift, which would have caused her stress and anxiety.

2.6 -was the PCP a proportionate means of achieving a legitimate aim? What do the Respondents say their aims were?

2.7 - The Tribunal will decide in particular:

2.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;

2.7.2 could something else less discriminatory have been done instead;

2.7.3 how should the needs of the Claimant and the second Respondent have been balanced?

124. We did not have the Respondents' evidence as to why it operated this PCP, especially with the Claimant, when it had been agreed between them at the start that her shifts would be from 5PM – 11PM. She told him at the end of the first shift that she was afraid of walking home late and that she wanted to stick to the agreed finish time of 11PM. When she wrote to the Respondents on 16 June, she indicated that she was prepared to stay up to 11.20PM but she did not agree to stay any later.

125. Was this appropriate and reasonably necessary? The 1st Respondent told the Claimant that he could not close the restaurant when there were people who wanted to come in late at night to eat. The Respondents are running a business. Although not stated, the Tribunal assumes that the 2nd Respondent's legitimate aim would be to run a profitable business. This would be a legitimate aim. However, that does not mean that operating this PCP was a necessary way to achieve the legitimate business need of running a profitable business.

126. We do not know whether the people who come into the restaurant at 11PM were paying customers or whether they were the 1st Respondent's friends and whether the Restaurant needed to be open after 11PM to achieve the legitimate aim of being successful. We were not provided with any evidence to show that the business done at the end of the evening made the restaurant profitable. Even if it was, it is our judgment that this PCP did not need to be applied to the Claimant in order to achieve it.

127. Even if the business done at the end of the day made it the most profitable part of the day, we did not have evidence from which we could conclude that the application of the PCP was an appropriate and reasonable way for the 2nd Respondent to achieve its aims.

128. One way of balancing the parties' needs could have been for the Respondent to pay for a taxi to take the Claimant home at the end of her

shift or for him as a man or another male employee to do the kitchen porter role, after the restaurant closed. Another could be for the Respondents to have engaged an agency person to clean up after the last customer had left or engaged someone older than the Claimant to complete the tasks. The Respondents never explored with the Claimant whether there was anything else that could have been done to achieve their legitimate aim of running a profitable business. There was no evidence that any thought was given to how the legitimate aim could be achieved at the same time as allowing the Claimant to leave on time.

129. It is our judgment that something less discriminatory could have been done and still allow the Respondents' business to achieve its legitimate aim of being a profitable business, if that was the applicable legitimate aim.

130. The application of the PCP of requiring staff to work after 11PM was applied to the Claimant and to all staff. This PCP put women at a disadvantage and put the Claimant at a disadvantage. This was so even though the 1st Respondent's mother and other female employees were able to stay later than 11.20PM and did not have any issue with that. The law does not require every woman's experience to be the same. The statistics and the Claimant's evidence showed us that the application of the PCP had disparate impact on women in comparison to men. We did not have evidence on which we could conclude that this was an appropriate and reasonably necessary way to achieve the legitimate aim of running a successful restaurant, even if this was the Respondent's legitimate aim.

131. The complaint of indirect sex discrimination succeeds.

3. - Harassment

3.1 Did the 1st Respondent do the following things:

3.1.1. Acted in an intimidating manner by coming too close to the Claimant when she tried to complain about working conditions.

132. We had insufficient evidence to be able to make a judgment on this complaint.

3.1.2 *Responded to the Claimant's complaint about not being given a break by saying 'what happened to you? Are you on your periods of something?'*

133. We had insufficient evidence to be able to make a judgment on this complaint. The 1st Respondent confirmed in his witness statement that he did ask the Claimant to hurry up, but we did not have enough evidence to be able to make a judgment on whether or not he said as is alleged.

3.1.3 Assaulted the Claimant on 17 June 2021. It is alleged that the 1st Respondent:

3.1.3.1 Stopped the Claimant leaving work on time and said that she could only leave after she swept the floor;

3.1.3.2 Whilst the Claimant was sweeping the floor, said 'Don't you dare sweep the floor like that!' and pushed the Claimant to the floor; and

3.1.3.3. Assaulted the Claimant further when she tried to leave work

134. The Respondents referred the Tribunal to the WhatsApp/text messages between the Claimant and the 1st Respondent on 11 June as evidence of the Claimant having a physical altercation with her partner and that any bruises in the photograph sent to his mother on Instagram came from that incident. He denied that he assaulted her. It is our judgment, that it is unlikely that there was a physical altercation on 11 June. The reference in the text message to a '*fight'* is not necessarily to a physical fight and no reference was made in the message to any physical injuries.

135. It is unlikely that on 11 June, the 1st Respondent understood the Claimant to be referring to a physical altercation as he did not ask after the Claimant's health or whether she needed any assistance. At the time, they were friends and if she had been hurt, we would have expected him to show some concern for her. He did not respond until the following day because he did not understand from her message that she had been hurt. The only damage she referred to in the message was that her phone was shattered. It is our judgment that the 1st Respondent and Mrs Lallmohamud have used the Claimant's private incident on 11 June and extrapolated that to fit the events that occurred at the restaurant between the Claimant and the 1st Respondent, on the evening of 17 June. We had no evidence that the incidents were related.

136. In this Tribunal's judgment, it is more likely that the bruises that the Claimant photographed and sent to Mrs Lallmohamud on the morning of 18 June had been caused by the 1st Respondent, the previous evening and that this was why she sent them with her bank details and a request for her wages.

137. There was no query from Mrs Lallmohamud on receipt as she understood that they were related and that the Claimant's bruises had been caused earlier that night by the 1st Respondent.

138. We find on balance that it is likely that the Claimant's version of events on 17 June is what happened. It is therefore our judgment that on 17 June 2021, the Claimant was assaulted by the 1st Respondent by firstly being pushed to the floor when she did not sweep the floor in a way that he wished; secondly, by him shoving her into the metal cage when she said that she was not coming back to work, thirdly, by holding her by the neck and fourthly, by him kicking her after she said *'Fuck you'* to him as she was leaving the restaurant.

139. This was assault and was also harassment by the 1st Respondent. It is our judgment that the Claimant was treated in a hostile, intimidatory and violent manner by the 1st Respondent on 17 June 2021. The Claimant was made to feel unsafe. She did not expect and should not expect to be treated in this way at work. It is our judgment that this treatment was unwanted.

140. It is our judgment that the 1st Respondent treated the Claimant in a way that was degrading, intimidating, offensive and humiliating for her. The 1st Respondent was most likely angry at the Claimant and showed a total disregard for the Claimant and for her physical person. The treatment was made worse as the Claimant was treated in this way by someone she knew and trusted. The 1st Respondent intended to harass the Claimant and even if he did not, it was reasonable that this treatment resulted in her feeling intimidated, humiliated and degraded.

141. It is our judgment that this treatment was related to the Claimant's sex.

142. It is our judgment that the 1st Respondent would not have treated a man in this way.

143. It is our judgment that the Respondent harassed the Claimant as alleged – and her complaint of harassment relevant to her sex succeeds.

144. The Tribunal considered the following law in determining the remedy due to the Claimant for her successful discrimination complaints.

145. The Claimant succeeded in her complaints of harassment and of indirect sex discrimination.

Law on remedy for a successful complaint of discrimination

146. Section 124 of the Equality Act 2010 refers. The remedies a tribunal can award in a successful discrimination complaint are as follows:

    i) To give a declaration on the rights of the complainant and the respondent regarding matters to which the complaint relates;

    ii) An order for compensation to the complainant - which can include payments under the headings of injury to feelings, aggravated damages and for pain, suffering and loss of amenity (personal injury) and interest;

    iii) Make an appropriate recommendation – of steps that the employer must take within specified period to obviate or reduce the effect on the complainant or any other person of any matter to which the proceedings relate.

147. Where the tribunal has found indirect discrimination under s19 EA 2010, and where the tribunal is satisfied that the provision, criteria or practice was not applied with the intention of discriminating against the claimant, the tribunal must consider making either a declaration or a recommendation before it awards compensation (see s124(4) and (5) EA 2010).

Injury to feelings

148. The matters compensated for by an award for injury to feelings encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear,

grief, anguish, humiliation, unhappiness, stress and depression (see *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102). In deciding whether to award compensation for injury to feelings, it is enough that those feelings in the complainant arose from the employer's treatment of them as found in the successful discrimination complaint.

149. The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento* the court set bands within which they held that most tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, in Presidential Guidance. The Guidance has been updated annually so that awards for injury to feelings in exceptional cases for the year beginning March 2021 could be over £45,600. In cases of the most serious kind, the injury to feelings award would normally lie between £27,400 – £45,600. In the middle band, in less serious cases the award would be between £9,100 - £27,400; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 to £9,100.

150. Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The wrongdoer takes the risk that the wronged may be very much affected by an act of harassment because of their character and psychological temperament. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313 and *Olayemi v Athena Medical Centre* [2016] ICR 1074*, EAT*).

151. In making an award for ITF a tribunal needs to be aware of the leading cases in determining how much to award. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

152. In *Alexander v Home Office* [1988] IRLR 190 *CA*, it was said that:

"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should not be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life.'

153. The EAT in *AA Solicitors Limited Trading as AA solicitors and another v Majid* UKEAT/0217/15/JOJ stated that they did not consider that analogies drawn from personal injury awards applying the Judicial College Guidelines were helpful when considering injury to feelings resulting from discrimination. They stated:

> *'in this jurisdiction, the governing authorities are Vento and the subsequent cases in which it has been updated and developed… [they] represent bespoke guidance tailored to this jurisdiction and this particular type of statutory tort, which is normally committed … by the doing of deliberate rather than merely negligent acts.'*

154. That court also said that

> *'while consistency is desirable, in future cases there is no need for employment tribunals to await guidance from the EAT or any other higher court, as far as adjusting the bands to take account of inflation is concerned. If there is cogent evidence before an employment tribunal of the rate of change in the value of money then a reasonable Tribunal acting on that evidence would be entitled without error of law to act on that evidence by adjusting the band ranges and any award of injury to feelings accordingly, as happens in personal injury cases….'*

155. The following cases are taken from *Harvey on Industrial Relations and Employment Law* and provided some guidance to the Tribunal since neither party referred to caselaw or made submissions about which band of Vento they considered the injury to feelings award should fall, if the Claimant were to be successful in her complaints. Given the level of harassment and that the Claimant was physically assaulted by the 1st Respondent, it is this Tribunal's judgment that her remedy for injury to feelings should fall within either the upper or middle band of *Vento* even though it was a single incident.

<u>Relevant cases of middle and higher band race discrimination cases.</u>

156. In the case of *Mr M. M. Ahmed v (1) The Embassy of the State of Qatar; (2) Mr Abdullah Ali Al-Ansari;* 20 June 2019. The claimant was awarded the sum of £8,000 for his injury to feelings. The facts can be summarised as follows: -

> The claimant, A, a then 73-year-old night security officer of Somali heritage and black skin colour was subjected to discriminatory treatment by the Second Respondent as the medical attaché and head of the first respondent's medical centre. The second respondent pushed A calling him 'abd' (which the tribunal understood to translate as 'black slave') before dismissing him partly because of his race.
>
> The claimant did not suffer a protracted or an ongoing campaign of race discrimination or harassment. He was however abused explicitly

> once, and he was dismissed partly because of his race. A suffered upset and insomnia. He experienced pain from the push and was prescribed tramadol for a month which he took with sleeping pills and was referred for physiotherapy. Taking these factors into account but noting that A was prone to exaggeration, that A's sleeplessness and certainly his medication ceased after a month and there were no notable signs of psychological distress beyond sleeplessness, an award of £8,000 was appropriate. An award of £6,000 was also made for aggravated damages and £10,500 for injury to health (psychiatric injury, £4,500; injury to shoulder; cost of treatment, £1,500).

157. The Tribunal noted that this case was heard some time ago and that the rates of inflation has to be taken into account on a 2019 award.

158. In the case of *Oluwole v North East Security and Investigation Services Ltd*, Newcastle-upon-Tyne Employment Tribunal, (Case No 2512468/05) (*20 April 2006, unreported*); the claimant was awarded the sum of £10,000 for injury to feelings and also given an award of £5,000 for aggravated damages. The facts can be summarised as follows: -

> *The claimant, a security guard, was racially discriminated against from the time of his dismissal, on 29 September 2005. Serious and defamatory reasons for his dismissal were concocted, including that he had made expensive telephone calls to Nigeria and that he had accessed pornography. He was made the scapegoat for complaints by a client about the security services provided. He was denied access to his pay and lies were told about that.*

159. In the case of *Olayemi v Aspers (Stratford City) Limited* (Case No 3200825/17) *(27 June 2018, unreported)*, the claimant was awarded the sum of £10,000 for injury to feelings. The facts can be summarised as follows: -

> The claimant's dismissal from his post as a security guard in a casino was found to amount to direct race discrimination – his complaints that the extension of his probationary period and not being afforded access to a training course amounted to discrimination were dismissed. The claimant was said to have 'inevitably suffered a sense of injury to himself and his sense of wellbeing' as a result of the discrimination, and this affected his ability to sleep, and he suffered some headaches. His injury to feelings did not however impair his ability to look for work or take up work. The ET found that the appropriate award was within the second Vento band, but at the lower end of that band and awarded £10,000.

160. We considered the case of *Base Childrenswear Ltd v Otshudi UKEAT/0267/18 (28 February 2019, unreported)*, in which the claimant was awarded £16,000 for injury to feelings; £3,000 for personal injury and £4,000 as aggravated damages.

> The claimant worked for three months as a photographer for the respondent. She had invested time and money studying for, and developing, her career. Having obtained a job in her chosen vocation she justifiably expected to remain in her employment for the foreseeable future, with a reasonable prospect of a pay rise to reflect her hard work. The claimant was dismissed in a manner described by the tribunal as being 'out of the blue'. She challenged this and was given a patently false reason (redundancy) for why her employment was being terminated. When she sought to challenge this reason, she was subjected to a degree of managerial intimidation that she manifestly found upsetting. Shortly before the ET hearing, the respondent changed the nature of its case and argued essentially that the claimant had committed theft; it put this case to her in cross-examination. The claimant was depressed for a period of around three months. The respondent challenged the award of £24,000 by way of non-pecuniary losses which had been awarded.
>
> In relation to the award of £16,000 injury to feelings award for the act of dismissal, the EAT rejected an argument that any 'one off act' must fall within Vento band 1 and stated that *'the question is what effect the discriminatory act had on the claimant'.*
>
> The EAT did accept that there was some overlap between the £5,000 the ET awarded by way of aggravated damages – given because of the employer's failure to offer any appeal or comply with its grievance procedure – and the 25% uplift to pecuniary losses it had awarded for non-compliance with ACAS procedures and therefore reduced this sum to £4,000.

161. In the case of *Mr Paul Bianca-Samou v Imperial College Healthcare NHS Trust* (Reading) (Case No 3313341/2019) (3 December 2021, unreported), the claimant was awarded £17,150 as injury to feelings. Mr Bianca-Samou, was directly discriminated against on the grounds of his race by the respondent's refusal to allow him to undertake a specialist portfolio (a professional qualification). After the liability hearing and some four years later than he would have done so but for the discrimination, BS was placed onto the specialist portfolio.

> The refusal had left BS feeling *'rejected, betrayed and abandoned'* and *'ignored regardless of his efforts'*. He suffered with sleep difficulties, palpitations, chronic fatigue, migraines and loss of appetite. For periods of time following the discrimination, the claimant was unfit for work due to work-related stress, in receipt of anti-depressants, and dependent on the support of talking therapy and his GP.
>
> For the purposes of the 'Vento Bands', the incident was not a *'one off act'* as the claimant had raised the question of a specialist portfolio a number of times and the respondent's refusal had persisted over two years.
>
> The tribunal's award of £17,500 for injury to feelings was mid-way into the middle band of the Vento Guidelines, was determined by reason of the discrimination being more than a one-off act, taking account of any injury to health and following

an assessment of proportionality – the tribunal reflecting that the award represented roughly six months' salary.

162. In the case of *Davies v Department for Work and Pensions* (Liverpool) (Case No 2100847/2011) (*31 July 2012, unreported*), the claimant was awarded the sum of £18,000 for injury to feelings, aggravated damages of £10,000; compensation for personal injury and the tribunal made recommendations upon the claimant's request. The facts can be summarised as follows: -

> The claimant was the subject of race discrimination by association, harassment and victimisation. She received extremely unpleasant, depressing and upsetting notes from a racist colleague. That was bad enough, but the reaction of middle and senior management caused much of the damage. The way in which they dealt with her during 3 months at work and then a further 2 months when she was away from work ill with stress was inept and ensured that they lost a valued and valuable employee. The claimant's life had not been completely ruined, but the events did have an extremely serious effect upon her. The treatment fell squarely at the top of the middle *Vento* band or at the bottom of the highest band (as adjusted).

163. The last case we considered was *Ms S Khan v SN Estates Property Services Ltd* (London Central) (Case no 2207611/2017) (18 February 2019, unreported), in which the claimant was awarded the sum of £27,000 for injury to feelings and aggravated damages of £10,000.

The claimant succeeded in ten claims of race discrimination and harassment including many 'paki' comments about herself and her fiancé including that people of her race were 'stingy' and 'retards', a comment of 'paki bitch' (also held to be sex harassment) and constructive dismissal amounting to race discrimination.

The tribunal concluded that this was not a case about sending jokes; it was offensive and insulting harassment directed at the claimant personally and towards members of her family and her fiancé. The second respondent did not direct his comments at the claimant in a joking manner, but in an aggressive and intimidatory manner. The discriminatory harassment was particularly serious, offensive, aggressive, threatening and intimidating. It merited an award at the lower end of the upper range, namely £27,000. In addition to that and the aggravated damages, the claimant was also compensated with damages for personal injury in the form of psychiatric injury.

164. A tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We can consider it whether or not a party has asked us to do so. The interest is calculated as simple interest which accrues daily. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For

non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation. The tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

165. The Tribunal applied the law to the facts above to make the following judgment on the remedy due to the Claimant.

4. Remedy for discrimination

4.1 Should the Tribunal make a recommendation that the 1st Respondent take steps to reduce any adverse effect on the Claimant?

166. The Claimant is no longer employed by the Respondent. The Claimant has not asked for any recommendations to be made. It is this Tribunal's judgment that recommendations are not appropriate in this case.

4.2 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

167. The Claimant suffered injury to feelings as a result of the way she was treated by the Respondents. The Claimant trusted the Respondents as she knew them and had previously had good relationships with the whole family. She had not been out of touch with the 1st Respondent until 2019, but there had been nothing that we were told of that would lead her to expect to be treated in this way. It was a shock to her.

168. The Claimant trusted the 1st Respondent and Mrs Lallmohamud and told them of an altercation that she had with her partner and that it resulted in her phone being broken. The 1st Respondent and Mrs Lallmohamud then used that as a way to deflect from the violence and physical way in which he treated her.

169. The Claimant felt intimidated, harassed and degraded by the way she was treated by the Respondents.

170. The 1st Respondent breached the Claimant's trust in him as a friend and as an employer. He hurt her physically and emotionally.

171. The Claimant gave clear evidence on the way in which the discrimination and particularly the harassment affected her. Her sleep was disturbed. She went to the GP and was referred for counselling as she was experiencing low mood and anxiety. Her depression and anxiety scores were at the severe end of the spectrum. The Claimant attended counselling and benefited from it. The harassment had a long lasting effect on the Claimant, which is why she referred herself to her GP.

172. It is this Tribunal's judgment that the level of injury to feelings should be in the middle band of Vento because of the severity of the assault. The middle band of Vento at the time of this incident was set between £9,100 - £27,400.

173. In considering what would be an appropriate and just level of injury to feelings, we considered that the Claimant's employment with the 2nd Respondent had been short. The harassment was all part of one incident on 17 June. However, the Claimant was harassed by one of the 2nd Respondent's directors and someone who was an acquaintance/friend of the Claimant. In addition, there was no remorse shown.

174. Taking account of all the above, it is this Tribunal's judgment that the Claimant will be awarded the sum of **£10,000** as her remedy for her injury to feelings.

175. The Claimant is also entitled to interest on her injury to feelings at the rate of 8%.

176. Interest at the rate of 8% over the period 14 June 2021 – 12 October 2023 = 848 days. 848 x £10,000 = £800. £800/365 gives a daily rate of £2.19. £2.19 x 848 = **£1857.12**

4.3 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

177. If the Respondents had an issue with the Claimant's performance, they could have taken that up with the Claimant. They did not do so in any organised way. They kept telling her that she was slow but that would not have been in compliance with the ACAS Code of Practice.

178. The Claimant did try to engage the Respondent in a discussion about her terms and conditions when she wrote the letter which she sent to the 1st Respondent by electronic message on 16 June but there was no discussion.

4.5 Did the Respondents or Claimant unreasonably fail to comply?

The 1st Respondent failed to respond in writing and simply stated that she did not need to write such a formal letter. He proposed that she continue for a week, which would allow him to get someone else. The Claimant agreed to that.

There is no order of compensation for failure to comply with the ACAS Code of Practice.

5 – Holiday Pay (Working Time Regulations 1998)

5.1Did the Respondent fail to pay the Claimant for 1.9 hours of annual leave the Claimant had accrued but not taken when their employment ended?

179. It is our judgment that the Claimant was paid her outstanding wages before the claim was issued. However, she was not paid her holiday pay.

5.2 If yes, how much should the 2nd Respondent pay the Claimant?

180. It is this Tribunal's judgment that the Claimant's entitlement was to two hours pay. £8.91 (national minimum wage at the time) per hour x 2 = **£17.82**.

6– *section 38 Employment Act 2002 - Written terms and conditions of employment*

2.3 When these proceedings were begun, was the 2nd Respondent in breach of its duty to give the Clamant a written statement of employment particulars or of a change to those particulars?

181. It is this Tribunal's judgment that although they discussed written terms and conditions at the first discussion about the job on 14 June, none were ever produced.

182. The Claimant was an employee and was entitled to have written terms and conditions of employment from her first day at the 2nd Respondent. She was never provided with that. This caused her worry and stress and she tried to set out some terms in her grievance letter to the Respondent which she sent him on 16 June. The Respondent never responded in writing and never produced written terms.

183. The Claimant's complaint succeeds.

2.4 if the Claimant succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

184. It is our judgment that the Claimant is entitled to her remedy for her successful complaint. The Respondents failed to provide any evidence of any exceptional circumstances that would make it unjust or inequitable for the Tribunal to make the minimum award of two weeks' pay.

185. It is this Tribunal's judgment that as this was a relatively short employment, the appropriate award would be two weeks' pay rather than four weeks' pay.

186. 2 weeks' pay – 6 hours per day (5PM to 11PM) x £8.91 x 5 days per week (Monday to Friday) x 2 weeks = **£534.60**

187. The Claimant is entitled to a total remedy of:

	£
Injury to feelings	10,000.00
Interest	1,857.12
Holiday pay	17.82
Statement of terms and conditions of employment	534.60

Total **£15,409.54**

Preparation Time Order - Law

188. The Claimant applied for a preparation time order. The Tribunal has power under Rules 75 and 76 of the Employment Tribunals Rules of Procedure 2013 to make a preparation time order in respect of the time she spent working on this case.

189. Rule 75 gives the Tribunal the power to make a preparation time order, which is an order that a party makes payment to another party in respect of the receiving party's preparation time while not legal represented. Preparation time means time spent by the receiving party in working on the case, except for time spent at any final hearing.

190. A Tribunal maty make a preparation time order and shall consider doing so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted; or any claim or response had no reasonable prospects of success; or where a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

191. A tribunal may also make a preparation time order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

192. The Claimant indicated in her schedule of loss and other documents that she sent to the Tribunal and the Respondents on 12 January 2022, that she intended to make an application for a preparation time order. The Respondents had notice of the application and had the opportunity to attend the Tribunal hearing to resist it. The Respondents also had the opportunity to write to the Tribunal to resist the application when they sent in their witness statements and bundle of documents.

Decision on application for preparation time order

193. The Tribunal had to decide whether the conditions set out above for the issue of a preparation time order existed in this case.

194. The Claimant did a lot of work preparing her case for hearing. The Claimant complied with the court orders.

195. The 1st Respondent caused three hearings in this case to be adjourned. The case was listed for hearing on 4 May 2022, 21 July and 22 September. On each occasion the application was made the night before the hearing. This caused the Tribunal and the Claimant inconvenience and wasted time. The 1st Respondent failed to attend today's hearing and it was unclear why that was.

196. The hearing on 8 September was adjourned to give the Respondents the opportunity to attend the hearing and defend the claim. The 1st Respondent was ordered to produce medical evidence to confirm that he had been at hospital all day on 7 September and was required to return again on 8 September. The 1st Respondent failed to do so. The 2nd Respondent did not appear at court and failed to send in any representations. This was a matter that arose out of an incident in 2021 and it has taken until now for it to be heard. The main reason for that is these adjournments. It is this Tribunal's judgment that the Respondents have conducted their defence of this claim unreasonably.

197. The 2nd Respondent's witnesses did not attend to give evidence and neither did the 1st Respondent. They had sent in documents but as there were conflicts of evidence in a number of instances in the case, it would have helpful for the Tribunal to have had that evidence. The 1st Respondent stated in his letter that the 2nd Respondent's representative would attend this hearing but no one has appeared for the 2nd Respondent and we have not had any correspondence explaining why. The Respondents have not taken this claim seriously and have conducted their response unreasonably.

198. The Claimant has had to take time off work to attend hearings or has to make time to do so. The Claimant has had to prepare documents and her witness statement as well as a bundle of documents for the hearing and has had to attend court on numerous occasions before her case could get to a final hearing.

199. The Respondents put forward a hopeless response to the claim. The Respondents' defence was that the Claimant was not an employee or a worker and that she was a liar. That was the substance of their response to the claim. In this Tribunal's judgment, the Respondents had not taken the claim seriously and properly addressed it.

200. It is this Tribunal's judgment that the Respondents' conducted their defence to this claim unreasonably and that they submitted a vexatious response to the claim.

201. It is this Tribunal's judgment that the conditions for making a preparation time order exist in this case. The Tribunal judges that it will make a preparation time order because the Respondents acted vexatiously and unreasonably in the way they defended this claim and in their response to it. The Respondents caused this matter to be adjourned on a number of occasions which meant that the Claimant had to wait 2 years for this matter to reach a conclusion. This was unreasonable and vexatious.

202. The Claimant did lots of work on this case. Not counting the time spent in the Tribunal hearing, the Claimant spent a total of 32 hours. This included time spent seeking advice from a solicitor, speaking to ACAS and completing ACAS forms, preparing and completing her ET1 form, preparing, compiling and indexing all copies of all supporting documents and evidence to send to the Respondents and the Tribunal. She spent some time writing to the Respondents.

203. The Tribunal will make a preparation time order in respect of the Claimant's time in preparing and bringing this case to the Tribunal. No order is made in respect of the time the Claimant is actually in court.

204. The rate for the preparation time order is £33per hour. The Tribunal orders the Respondent to pay a preparation time order of 32 hours at the rate of £33 per hour. The total of the preparation time order is £33 x 32 **= £1056.**

205. The Respondents must pay the Claimant the total sum of **£1056.00 + £15,409.54 = £16,465.54.**

206. The Claimant is entitled to a remedy of £16,465.54.

Employment Judge Jones
Dated: 27 November 2023