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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000146/2023

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Hearing held in Glasgow on 16 to 19 October 2023

Employment Judge R Mackay
Tribunal Member Ms M McAllister
Tribunal Member Mr R McPherson

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Ms V Abbas

**Claimant
In Person**

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ISS Facility Services Ltd

**Respondent
Represented by:
Ms M Bouffé, Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows:

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1. The claimant's claim of direct sex discrimination succeeds.
2. The claimant's sexual harassment claim as it relates to an incident on 27 March 2022 succeeds.
3. The claimant's remaining claims of harassment and her claims for unauthorised deduction from wages fail and are dismissed.
4. The respondent shall pay to the claimant the sum of **FIFTEEN THOUSAND POUNDS (£15,000)** as compensation for injury to feelings. Interest on this award shall be paid at the rate of eight per cent per annum. This shall run

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from 14 February 2019, the date on which the claimant commenced employment and the direct discrimination commenced, until the date of this judgment.

5. The respondent shall pay to the claimant the sum of **SEVEN HUNDRED AND SIXTEEN POUNDS AND TEN PENCE (£716.10)** as compensation for loss of earnings. Interest at the rate of eight per cent per annum is payable on this award from 7 October 2021, being the midpoint from the date of the discriminatory act and ending on the date of this judgment.

REASONS

Introduction

1. This is a claim of sex discrimination and unlawful deduction from wages. The claimant alleges that she suffered direct discrimination and harassment. She also claims that certain payments were deducted unlawfully from her wages. The respondent's defence includes a jurisdictional argument on time bar. This was reserved for the final hearing.
2. The claims are set out more fully in the agreed list of issues which follows. This was prepared following an earlier case management preliminary hearing (with some amendments agreed at the commencement of this hearing).
3. Parties co-operated in the production of a joint bundle of documents running to approximately 500 pages. The Tribunal also viewed CCTV footage of an incident which was central to the claimant's (successful) allegation of sexual harassment on 27 March 2022.
4. The claimant gave evidence on her own behalf. She did not call any other witnesses. For the respondent, evidence was heard from three managers, Mr Jonathon Williams, Mr John Atherton, and Ms Gwen Mackenzie.
5. During the course of the hearing, it became apparent that the issue of alleged harassment on 27 March 2022 had been reported by the claimant to the police. The Tribunal sought confirmation from the parties as to the current

status of any police investigations. No clear position emerged. The Tribunal arranged for contact to be made with the relevant police division seeking confirmation as to the current status of any investigation and whether it would be prudent for the Tribunal to delay its consideration of the matter (or issuing its judgment) pending any such ongoing investigations. No information was given and no request was made to delay the hearing or the judgment. The Tribunal accordingly considered it appropriate to hear the evidence and to issue this judgment.

Observations on the Evidence

6. The Tribunal found the claimant to be a credible and reliable witness. She was very clear in her account, was consistent, and did not seek to exaggerate or embellish her evidence.
7. As for the respondent's witnesses, the Tribunal was satisfied that they sought, in the main, to give their evidence in an open manner. On a number of the relevant issues, however, they had no direct involvement such that their evidence was second or third hand and, as such, less reliable. Moreover, they were on occasion unable to explain, or reluctant to accept, certain points relating the internal processes with which they were involved.
8. Any areas of conflict or unreliability in the evidence as they relate to the substance of the claims are covered in the Findings in Fact section which follows.

List of Issues

“Time Limits

9. ***Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010 (EqA). The Tribunal will decide:***
 - a. ***was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates? The respondent's position is that the claims before 11 November 2022 are out of time.***

- b. *if not, was there conduct extending over a period?*
- c. *if so, was the claim made to the Tribunal within three months (plus early conciliation) of the end of that period?*
- d. *if not, were the claims made within a further period that the Tribunal thinks is just and equitable. The Tribunal will decide:*
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- i. *why were the complaints not made in time?*
- ii. *in any event, is it just and equitable in all the circumstances to extend time?*

Direct Discrimination

- 10 10. *Was the claimant treated less favourably? The claimant relies on the allegation that on 14 February 2019, she was told by Jamie Morrall, regional manager, to use the disabled washroom as there was no women's washroom on site. The respondent concedes that this was a continuing act and thus in time.*
- 15 11. *Was this treatment because of the claimant's sex? The claimant asserts that it was.*
12. *Who are the comparators? The claimant has not named a comparator. Her position is that she was the only female employee at Tannochside Park. All her colleagues were male and had use of the men only toilet. They also used the disabled washroom.*
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Harassment related to sex

13. *Did the respondent do the following things?*
- a. *in October/November 2019, Derek Dunn, site supervisor, opened the claimant's locker without her permission and her belongings have been lost/stolen.*
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- b. *in November 2019, Jamie Morrall, regional manager, did not respond to the claimant's concern that she was hit by a kitchen wooden board which was poorly fitted.*
- c. *around May 2020, Derek Dunn said to the claimant that she was a "horrible person and not good for the job".*
- d. *on 20 November 2021, 7 May 2022, and January 2023, Jonathon Williams, regional security manager, failed to respond to the claimant's concern that they switched off water and air conditioning during the night-time in winter.*
- 10 e. *in March 2022, Qamar Shah, security relief officer, "bullied and harassed" the claimant, as set out in a written complaint submitted by her on 27 March 2022 at 10.43pm.*
- f. *Jonathon Williams failed to deal with the claimant's complaint made on 5 October 2022 regarding a chair which had been*
- 15 *provided to her in April 2022.*
- g. *if so, was that unwanted conduct?*
- h. *did it relate to sex?*
- i. *alternatively, was it of a sexual nature?*
- j. *did the conduct have the purpose of violating the claimant's*
- 20 *dignity or creating an intimidating hostile degrading humiliating or offensive environment for her?*
- k. *if not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?*

25 **Unauthorised deduction**

14. *Did the respondent make an unauthorised deduction from the claimant's wages and if so, how much was deducted?"*

15. The parties agreed that the claim for unlawful deduction from wages comprised the following:

- (1) A claim for payment for a shift said to have been worked but unpaid;
- (2) A claim for enhanced sick pay (in circumstances where only statutory sick pay was paid); and
- (3) A claim for holiday pay founded upon the claimant's assertion that the wrong number of weekly hours was used in the relevant calculations.

Findings in Fact

Background

10 16. The respondent is engaged in the provision of facilities management services. It is part of a global group of companies employing more than 500,000 people. It employs tens of thousands of people in the UK. One of its UK clients is Virgin Media O2 for whom it provides management services throughout the UK. One of its sites is at Tannochside Park in Uddingston.
15 The site operates as a data centre.

17. The claimant commenced employment on 14 February 2019. She is based at Tannochside Park. Her employment is ongoing. Her role was and is Security Officer. The role involves security and reception duties. The site has a small number of dedicated employees. Other engineers and
20 contractors visit from time to time. The numbers of external contractors vary depending on work being carried out at any time. For a large project, there may be around 20 contractors attending the site. The claimant had at all material times been the only female employee based at the site. The rest are male.

25 18. The relevant employees of the respondent at the site included Mr Derek Dunn, Security Site Supervisor. He is present at the site during dayshifts. Other security officers equivalent to the claimant are also employed covering 12 hour day and night shifts.

19. The claimant's immediate line manager was initially Mr Jamie Morrall, and latterly Jonathan Williams. They were responsible for a number of sites and visited Tannochside from time to time. Although Mr Dunn had the title of supervisor, he did not have management responsibility for the claimant or other security officers.
20. In addition to security personnel, the respondent employed engineering staff with responsibility for the site. The manager with day-to-day responsibility at the relevant times was Mr John Atherton.
21. For nightshift working, the respondent operates a centrally control room to which the claimant was able to report issues or seek guidance.
22. As part of its arrangements with its clients at the site, the respondent undertakes responsibility for the facilities used by its staff, reimbursing the clients for any associated costs.

Toilet Facilities

23. The toilet facilities at the site were a washroom for men and an accessible toilet. The men's washroom contained two urinals, two wash hand basins and one cubicle. The accessible toilet was a single cubicle. There was no separate female washroom. The accessible toilet contained a sanitary bin.
24. On commencing employment, the claimant asked her then manager, Mr Morrall, what she should do regarding toilet facilities. He responded to the effect that she could use any one.
25. During her probationary period, the claimant also worked at other sites including an office building and a college. Those had separate facilities for women. She began to verbally question the absence of women's facilities during that period.
26. In practice, the claimant was encouraged to use the accessible toilet and that is what she chose to do. She had a number of concerns about the toilet. First, whilst it was lockable from the inside, the lock was loose and it could be opened from the outside with a coin. Secondly, there was no sign on the

toilet to suggest that it was also a designated toilet for women and, thirdly, men routinely used the toilet. Before using the toilet, the claimant typically had to clean it before sitting down.

- 5 27. The claimant raised her concerns almost weekly when her manager visited the site. He routinely advised the claimant that he would “*sort out*” the issue.
- 10 28. In addition to raising the matter verbally with her manager, the claimant raised concerns with a health & safety employee of the respondent who was conducting a survey of the site. The claimant complained about the absence of a facility for women, and a failure to empty the sanitary bin. The failure to empty the bin was a repeated concern for the claimant.
- 15 29. The claimant first put her concerns in writing by email of 27 September 2019 to Mr Morrall. She described having found the accessible toilet in an unhygienic condition with urine traces on the toilet seat. She attached photographs.
- 20 30. She referred to her previous complaints including her complaint to the health & safety surveyor. In addition to the unhygienic condition of the facility, she questioned the absence of a toilet for women and the use of the accessible toilet by men (whom she did not understand to be disabled).
- 25 31. Mr Morrall responded by email of 30 September 2019. He undertook to speak to the building manager, Mr Atherton, at the earliest opportunity about making some physical alterations to the toilet including installing a locking mechanism (if practicable). He also undertook to speak to Mr Dunn about what he described as “*short term local arrangements*” including signage to mitigate against individuals leaving the toilet in an unsanitary state.
32. By email of 1 October 2019 to Mr Atherton, Mr Morrall asked for two points to be considered. First, making the accessible toilet a “*disabled/ladies’ toilet*”, and secondly, obtaining a quote to install a locking capability on the door so that it could be secured externally.

33. Mr Atherton responded later that day to the effect that he was not going to change the lock. He stated that "... *if they don't follow the rules, I'll ask them to supply their own portaloo and they will not be allowed to use our facilities.*" By "*they*", Mr Atherton was referring to external contractors and visitors to the site.
34. He also asked for a sign to be printed off and added to the door of the accessible toilet. The sign contained the word "*ladies*" and symbols denoting both accessible and women's toilet facilities.
35. Mr Dunn printed out the sign and attached it to the door with Sellotape. On occasion, the claimant found it on the floor. She would pick it up and re-attach it to the door.
36. By email of 9 November 2019, the claimant again raised concerns with Mr Morrall. Again, she attached photographs of the facility which described as being a "*mess*". She stated that only two men had been on site that day. She stated "*People do not respect lady and her privacey*" [*sic*].
37. By email of 16 November 2019 from Mr Morrall to the claimant, Mr Morrall advised that the accessible toilet would be locked and only unlocked for "*females/disabled individuals*". On 17 November 2019, he sent an email to the generic Tannochside security email address to the effect that the "*Ladies/Disabled Toilet*" would be locked and would be opened only upon request. He stated: "*This should significantly reduce the issue.*" No external lock was fitted at that time. This did not take place until February 2023.
38. By email of 4 May 2020, the claimant again raised concerns with Mr Morrall. In the context of a complaint about other things, the claimant referred to the absence of a washroom for women. She referred to having asked many times for the creation of a washroom for women but, she stated, "*No one care*" [*sic*]. She again referred to male staff using the toilet and leaving it in an unsanitary state. She also referred to male staff having broken the seat.

39. The claimant again discussed the matter with Mr Morrall. He again assured the claimant that he would look into the matter. The arrangements remained as before.
40. The claimant raised a grievance on 27 March 2022 alleging sexual harassment (as more fully set out below). As part of the grievance, the claimant made reference to the absence of a women's toilet, and the fact that she was required to use the accessible toilet which she described as being unclean. She referred to men still using it and making a mess such that she needed to clean it before she could use it.
41. As part of the grievance outcome dated 20 May 2022, the hearer, Ms Gwen Mackenzie, recommended that an instruction be issued to site that access to the facility be granted only by key and not through any other means.
42. The claimant appealed against the grievance outcome. In relation to the issue of toilet facilities, in the grievance outcome letter (dated 21 October 2022) the hearer of the appeal, Mr Atherton, stated: "*I agree with the original note from [Ms Mackenzie] that there is no evidence of individuals utilising the toilet in a way to bully or harass you.*" He went on to say: "*I will also ensure a keyed lock is fitted to the toilet of which the key will remain with security to limit its use.*" As noted above, this was not implemented until February 2023.
43. By email of 25 January 2023, the claimant emailed senior members of the respondent, copying her then manager, Mr Jonathon Williams. The claimant was at that time signed off from work. In the email, she repeated her concerns about the absence of a female facility, the use by men of the accessible facility and what she described as men "*abusing*" the facility such that she had to clean it before use.
44. By email of 30 January 2023, Mr Williams wrote to the claimant. He confirmed that a new lock had been fitted on the accessible toilet door with a key held by security. He stated that he had been assured that the lock could not be opened from the exterior side without the key. He also referred to a planned refurbishment of the toilet areas generally within the following 4 to 6 weeks.

45. The claimant returned to work on 6 June 2023. By that time, the external key lock had been fitted and the refurbishment of the facilities had been completed. The claimant is satisfied with the current arrangements and does not pursue her direct discrimination claim in relation to the period after the
5 installation of the key lock. Since the lock was fitted, the toilet is, in effect, only used by the claimant and any visiting females.

46. The claimant described the approach of the respondent as a failure to look after what she described as her basic female needs. On becoming absent from work in January 2023, the claimant attributed certain physical health
10 issues in part to the condition of the accessible toilet. The claimant's initial doctor's notes referred to an acute reaction to stress for the first three weeks. Latterly, the sick notes seen by the Tribunal referred to elbow pain.

Complaint about Locker in October 2019

47. In October 2019, an engineer required access to a part of the premises which
15 necessitated moving the staff lockers. In order to facilitate this, Mr Dunn opened each of the lockers and removed the personal items before the lockers themselves (which were contained in a single unit) were detached from the wall. One such locker was used by the claimant. Neither she nor any other employees were informed in advance that their lockers were to be
20 opened in their absence.

48. The claimant came into work to find her locker open. She identified a number of items which were missing.

49. By email of 29 October 2019, the claimant raised a complaint about the issue
25 with Mr Morrall. He responded to the effect that it had been necessary to move the lockers in order to give the engineers access to carry out their works. He told the claimant that the same thing would not happen again in the future.

Issue with Kitchen Board in November 2019

50. On 14 November 2019, the claimant was in the kitchen at the premises filling up a coffee machine. Underneath the machine was a wooden panel. The panel became detached and fell on the claimant's knee. The claimant
5 contacted the external control room. After enquiring as to whether she was fit to continue with her shift, she was advised to complete an incident report form.

51. By email of 14 November 2019, the claimant raised the issue with Mr Morrall. He looked into the issue and arranged for the panel to be screwed back in
10 place.

Comments around May 2020

52. In early May 2020, the claimant attended site. Mr Dunn was about to leave. They had a discussion about cleaning products. Mr Dunn made a comment to the effect that the claimant was a horrible person and not good at her job.
15 The claimant asked him to justify his comments. He indicated that other people had complained about her.

53. The claimant did not make a written complaint about this. By email of 4 May 2020, she complained to Mr Morrall about a number of matters. As part of that, she complained about Mr Morrall having said that her behaviour was not
20 good and that others had complained about her. The comments of Mr Dunn were not pursued further.

Issues with Air Conditioning and Hot Water

54. At various points during the course of the claimant's employment, she raised concerns about the functioning of heating/air conditioning and hot water
25 during night shifts.

55. By email dated 24 November 2021, the claimant complained to Mr Atherton. She described being frozen during the night shifts. She did not receive a response from him but spoke to another colleague. The heating was fixed after three to four days.

56. The claimant next complained by email of 7 May 2022. She referred to the hot water and reception heating not working.

57. By email later the following day, Mr Williams (by then her line manager) responded to the effect that he would contact Engineering to look into the issue.

58. The systems were once again repaired at that time.

59. In December 2022, the claimant and a male colleague who worked night shifts complained about the reception area being too cold. In January 2023 the claimant logged a complaint about a lack of hot water. She went off sick the following day. The boiler was ultimately replaced during her absence from work.

60. In her email of 25 January 2023, referred to above, the claimant linked the unclean toilet facilities with the lack of hot water which she felt compounded the problem and led to her going off sick.

15 *Alleged Sexual Harassment by Colleague on 27 March 2022*

61. On 27 March 2022, the claimant attended work to commence a night shift. She arrived at approximately 9.00pm.

62. A dispute arose as to what happened on her arrival. The claimant's account is that on swiping her pass to enter into the office through a glass door, Mr Shah was standing inside and made eye contact with her. He touched his private parts in front of her, rendering the outline visible through his trousers. The lights were on such that the claimant could see clearly through the door. Mr Shah then left without giving any handover or speaking to the claimant at all. Shortly thereafter, he came back and threw the office phone on the counter.

63. The claimant submitted an email of complaint later that evening, addressed to three managers of the respondent including Mr Williams. She provided her account of what happened. In relation to the alleged incident, she stated that Mr Shah "... holded [sic] his private parts and showed me through his

trousers.” She referred to wanting to report the matter to Police Scotland. She did so shortly thereafter.

64. In response to the email, Mr Williams noted that he was sorry that the claimant had had an experience at work which had made her feel distressed. He went on to state that he hoped she felt secure and safe. He advised that there was no need for her to venture outside of the building for the remainder of her shift.
65. The email of complaint led to a grievance procedure. The first stage was chaired by Ms Mackenzie; the second stage by Mr Atherton.
66. The Tribunal viewed CCTV footage of the incident. It showed the moment the claimant entered the building. For the relevant period, Mr Shah had his back to the camera. His hand was seen to move from his side to a position in front of his body. It was not possible to ascertain what he did with his hand when it was in that position. The CCTV otherwise supported the claimant’s contentions and, in particular, the fact that Mr Shah left immediately without any communication or handover. In addition, it supported her contention that he returned shortly thereafter and threw the phone on the desk, leading to what appeared to be a heated exchange between the two individuals.
67. The respondent’s position was that there was no evidence to support the allegation. The Tribunal did not hear from Mr Shah (who is still employed) himself. The respondent instead relied on the evidence of its grievance process to support its position.
68. Ms Mackenzie interviewed the claimant as part of the respondent’s grievance process on 27 April 2022. The claimant repeated her account. She stated that she was in shock and that she felt vulnerable and scared.
69. An interview took place with Mr Shah on 5 May 2022. He denied the allegation of inappropriate touching. He accused the claimant of using foul language to him including the words “*bloody bastard*”. He referred having spoken to a solicitor as the claimant had stated she was going to report him to the police.

70. Ms Mackenzie did not put Mr Shah's allegations to the claimant. The first she was aware of them was in preparation for this hearing. She gave evidence to the Tribunal that they were words she would not use and that if she had she would expect to be disciplined.
- 5 71. Ms Mackenzie communicated the outcome of the grievance by letter of 20 May 2022. In relation to the allegation in question, she stated that Mr Shah had strongly denied it. She went on to say that there was insufficient evidence to support it.
- 10 72. In her evidence before the Tribunal, Ms Mackenzie was asked about the apparent lack of any handover between Mr Shah and the claimant. She put this down to a failure on both sides to behave appropriately. Despite being asked on a number of occasions what she meant by the claimant behaving inappropriately, she was not able to advance any explanation. In relation to the allegation of the phone being thrown onto the desk, Ms Mackenzie characterised this as "*placing firmly*". She was not able to explain any meaningful difference between the two.
- 15 73. It appeared to the Tribunal that whilst the CCTV evidence on the central allegation was unclear, Ms Mackenzie's approach was to seek to find an explanation favourable to Mr Shah with a view to supporting her decision on the central allegation.
- 20 74. The claimant appealed against the outcome by letter dated 12 June 2022. This was not acknowledged until 4 August 2022 and a meeting took place with the claimant on 10 August 2022. Mr Atherton did not interview Mr Shah and did not put to the claimant Mr Shah's allegations against her.
- 25 75. In her email of appeal, the claimant stated that she was "*still in trauma and having nightmares*". She had difficulty sleeping and, as she put it, was "*forgetting to eat*". She had feelings of stress at the time.
76. The outcome of the grievance was not communicated until 21 October 2022. In relation to the central allegation, Mr Atherton stated that he could see no evidence of what was alleged.
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77. No meaningful explanations were given for the extensive delays in what was, essentially, a simple grievance process.

5 78. In reaching a conclusion as to whether the allegation was, on the evidence, well founded, the Tribunal had no hesitation in preferring the evidence of the claimant. She was clear and consistent throughout. It was not put to her that she was lying. It was put to her that she might have been mistaken given the reflections on the glass. Her evidence was persuasive that she could see quite clearly.

10 79. The evidence of the respondent, on the other hand, was second-hand. During the grievance process, which took an excessive amount of time to conclude, there appeared to be no meaningful attempt to analysis or test the evidence of the two individuals. There was a reliance on the absence of definitive proof from the CCTV footage without any assessment of whether the accounts of the two individuals concerned were otherwise supported by
15 the footage. The footage did, in other respects, support the claimant's position rather than that of Mr Shah. Instead of addressing that point, the participants in the internal grievance process sought to minimise or explain the actions of Mr Shah in ways that were not warranted.

20 80. The failure to put Mr Shah's allegations to the claimant was inexplicable and whilst the allegations were not directly used against the claimant, it did appear to have a bearing on Ms Mackenzie's assessment that there was fault on both sides.

25 81. Having assessed all of the evidence, therefore, the Tribunal was satisfied that the act alleged by the claimant did take place in the manner she described. It was also satisfied that the act had the adverse effect on the claimant in the ways outlined by her.

Issue with Office Chair in October 2022

82. In the late summer of 2022, the claimant raised an issue about the state of the chair in the reception area. The padding was torn and the arm was broken

exposing metal such that it caused discomfort. The claimant attributed elbow pain she suffered, in part, to the state of the chair.

83. By email of 30 August 2022, Mr Williams sent an email to a colleague asking for details of “*24 hour chairs*” that could be obtained. He went on to state:
5 “*Need another one for Tannochside as the current one is falling apart*”.

84. By email of 5 October 2022, the claimant emailed Mr Williams. She stated that she wanted to remind him about his “*promise*”. She sent a picture of the chair showing its damage. She stated that it was giving her pelvic and elbow pain. She went on to state: “*Could you please order new comfortable chair as we spoke [sic] on your visit.*”
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85. Mr Williams responded the same day to state that he had requested a quote for a replacement chair.

86. A quote had in fact been provided to Mr Williams on 8 September 2022. In an email to Mr Williams it was stated “*the cost to provide a chair for the security team at Tannochside will be £855*”.
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87. By email of 18 October 2022, Mr Williams emailed Mr Atherton. He forwarded on the quotation and stated that he should have forwarded it weeks ago. He stated that “*the 24 hour chair in reception at Tannochside has had its day and needs to go in a skip*”. He asked for approval for the replacement. Mr Atherton approved the purchase by email later the same day. The replacement chair was delivered on or around 8 November 2022.
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88. There was a conflict in the evidence between the claimant and Mr Williams as to whether the replacement chair was for the claimant alone (with another adequate chair being used by others) or whether one chair was used by all security staff. The claimant’s evidence was that there was a single chair. In
25 his evidence before the Tribunal, Mr Williams stated that there was one (adequate) chair used by other staff and the (broken) chair used only by the claimant. He went on to state that the new chair was a replacement only for the claimant’s use.

89. The Tribunal accepted the claimant's evidence that there was only ever one chair used by all security staff. That is consistent with all of the emails written by Mr Williams himself which referred to a single chair.

5 90. He could give no explanation as to why, if there was a perfectly acceptable chair, he would put the respondent's clients to the cost of purchasing a new one without making that clear. As noted above, the respondent had operational responsibility for facilities at the site, reimbursing any costs to their clients.

10 91. His only explanation was that everything he stated in his emails – which referred only to a single chair - was incorrect.

Unlawful Deduction from Wages

92. By email of 27 January 2023 to Mr Williams, the claimant complained that she had not been paid for a 12 hour shift on 15 December that year. Her gross pay per shift was £124, the net being £84.

15 93. The claimant accepted that she was subsequently paid £84. She questioned why she was not paid the gross amount. The £84 payment was made in the following tax year and no tax was deducted. The claimant accordingly, received the net amount.

20 94. The claimant was paid holiday pay based on an average of 54 hours per week. She claimed that this ought to have been based on a 56 hour average. She referred to the fact that the advertisement for the post referred to an average of 56 hours per week. The difference, the claimant said, amounted to approximately £367.

25 95. The respondent's position, which the Tribunal accepted, was that the claimant's contracted hours were 54 hours per week.

96. In relation to sick pay, the claimant claims that she should receive full pay in accordance with a company sick pay scheme. She was paid SSP only when absent due to sickness.

97. On commencing employment, the claimant received a statement of main terms of employment. For sick pay (and many other key elements of employment) reference is made to details contained in the “Employee Handbook”. The claimant did not receive any handbook. In a handbook produced by the respondent, said to apply to the claimant, payment for sickness is said to be SSP or company sick pay if there is an express term in the contract of employment.
98. The claimant produced an extract of a document which referred to an entitlement to company sick pay. Having regard to the nature of that document, the Tribunal was satisfied that it was the contract of employment of another employee. The practice of the respondent is to pay enhanced sick pay to salaried staff only, the claimant being hourly paid.

Relevant Law

Time Limits

99. Section 123(1) of EqA provides that a discrimination claim must be submitted before the end of “*the period of three months starting with the date of the act to which the complaint relates*”.
100. Time will be extended in accordance with the ACAS early conciliation procedures. Where a claim remains out of time, the period to consider a claim can be extended by such period as the Tribunal thinks just and equitable (Section 123(1)(b) and (2)(b) of EqA).
101. Where there is a course of discriminatory conduct, the time limit is referable to the end of the period of continuing conduct (Section 123(3)(a) EqA).
102. The Tribunal has discretion to decide whether acts should be grouped into a continuing act or whether they should be treated as unconnected (***Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 584***).
103. When considering what is just and equitable, the EAT in ***British Coal Corporation v Keeble [1997] IRLR 336*** and ***DPP v Marshall [1998] IRLR***

494 held that the Tribunal's discretion requires consideration of factors relevant to prejudice to each party including:

- The length and reasons for the delay;
- 5 • The extent to which the cogency of the evidence is likely to be affected by the delay;
- The extent to which the party sued had cooperated with any request for information;
- The point at which the claimant acted once they knew of the possibility of taking action; and
- 10 • The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

104. The Tribunal may take into account the merits of the claims (***Kumari v Greater Manchester Mental Health NHS Foundation Trust [2002] EAT 132***), and the emphasis should be on whether the delay has affected the ability of the Tribunal to conduct a fair hearing (***Marshall***).

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Direct Discrimination

105. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 EqA) including sex.

106. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

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107. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. Whether the treatment is detrimental should be assessed by considering if a reasonable worker might consider it to be detrimental in all of the

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circumstances (*Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*).

108. The recent decision of the EAT in *Earl Shilton Town Council v Miller [2023] EAT 5* deals with the provision of toilet facilities in the workplace. In the
5 scenario of women being provided with less favourable toilet facilities than men, the EAT held that the less favourable treatment was inherently due to sex such that there was no need to consider the mental processes of the discriminator (following the principle in *Regina (Coll) v Secretary of State for Justice [2017] UKSC 40*).

10 *Harassment*

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

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

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

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating
or offensive environment for B.

20 ...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

25 (c) whether it is reasonable for the conduct to have that effect.

Burden of Proof

110. Section 136(2) EqA provides that “If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the
5 contravention occurred.” Subsection (2) does not apply if A shows that A did not contravene the provisions.

111. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (***Igen v Wong***
10 ***[2005] ICR 935***).

112. It is for the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic (‘Stage 1’ prima facie case).

15 113. Having a protected characteristic and there being a difference in treatment is not sufficient (***Madarassy v Nomura International Plc [2007] ICR 867***). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of “something more”.

114. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if
20 it is satisfied that the reason for the less favourable treatment is fully adequate and cogent (***Laing v Manchester City Council ICR 1518***).

Unauthorised Deduction from Wages

115. It is unlawful for an employer to make a deduction from a worker’s wages unless (a) the deduction is required or authorised by statute or a provision in
25 the worker’s contract or (b) the worker has given their prior written consent to the deduction (Section 13 ERA).

116. The relevant definition of wages is contained in Section 27 ERA.

117. Section 13(3) ERA provides:

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part [of ERA] as a deduction made by the employer from the worker’s wages on that occasion”.

118. The term “properly payable” was considered in **New Century Cleaning Co Ltd v Church** [2000] IRLR 27 at paragraph 62:

“For wages to be “properly payable” by an employer, he must be rendered liable to pay, either under the contract of employment or in some other way”.

10 Submissions

119. Both parties made oral submissions which were considered by the Tribunal in reaching its decision. Given that the claimant was unrepresented, Ms Bouffé helpfully agreed to make her submissions first. Relevant aspects of the submissions are noted in the Decision section which follows.

15 Decision

120. The Tribunal first considered the question of time bar. This related to all of the harassment complaints with the exception of the concern about air conditioning/hot water in January 2023. It was accepted that the claim of direct discrimination and the claims for unauthorised deduction from wages were in time.

121. For the remaining harassment claims, the Tribunal first considered whether they amounted to conduct extending over a period, or whether they were unconnected. The Tribunal was satisfied that they were unconnected. They extend over an extensive period, often with significant gaps in between. Each of the alleged acts of harassment was a distinct issue unconnected with the others. The only exception is the complaint about heating/hot water, but that issue arose on three separate occasions ranging from November 2021 to January 2023. Each of those was a separate and distinct complaint.

122. For those reasons, the Tribunal considered it necessary to analyse whether each of the alleged acts of harassment should be allowed late on the basis that it was just and equitable to do so.
123. In relation to the first three allegations, the issue with the locker, the issue with the kitchen board and the comments of Mr Dunn in May 2022, the Tribunal decided that it was not just and equitable to extend the time limit. By the date of the hearing, each of the allegations was historic. Mr Morrall is no longer employed and although Mr Dunn is still employed, the quality of the evidence on these matters is likely to be hampered by the passage of time.
124. Whilst the Tribunal had sympathy with the claimant who did not have professional advice and was not aware of the time limits, she is clearly an employee who was able and willing to raise concerns in the workplace and she did not point to having made efforts to secure professional advice in order to pursue her claims at an earlier stage. Moreover, having heard the evidence, it was clear to the Tribunal that in each of these three acts, there was no apparent indication of the claimant's sex playing any factor in any of the issues. Whilst the Tribunal accepted that each might have the effect of creating an offensive environment for the claimant, there was nothing at all in her evidence to suggest that sex played any part at all in the issues.
125. On the fourth allegation, the concerns about hot water, the third act is in time. The Tribunal considered whether the earlier instances of deficiencies in the heating system should be construed as a continuing act and determined that they should not. The three instances were separated significantly in time and on each occasion, the issue was resolved. Moreover, as the Tribunal has found in relation to the allegation which is in time, there is no evidence whatsoever that the issues were in any way connected to the claimant's sex. The issues affected male employees equally.
126. Turning to the allegation of sexual harassment on 27 March 2022, the Tribunal had no hesitation in allowing this claim on the basis that it was just and equitable to consider it late. It is a relatively recent occurrence, having regard to certain of the others, and the respondent was not in any way

hampered from giving evidence on the matter. The alleged perpetrator is still employed (albeit he did not give evidence). Those who dealt with the internal grievance processes were able to speak to the issues on the basis of their own contemporaneous records and CCTV footage viewed by them. Moreover, the internal process conducted by the respondent took an inexplicably long time to conclude such that at its conclusion, the claim was only a small number of months later. There was no argument that a fair trial on the issue was not possible and to deny the claimant, who was unrepresented and had no professional advice, the right to have it heard would have been materially prejudicial to her.

127. Finally, the Tribunal considered the last allegation of harassment (as it related to the claimant's chair). Again, having regard to the claimant's unrepresented status and the relative proximity of the matter to the hearing and the ability of Mr Williams to give his evidence on the matter, the Tribunal considered it just and equitable to consider that allegation.

128. The Tribunal then assessed the substance of the three harassment allegations which it determined it could consider.

Concerns over Heating/Hot Water

129. It was clear to the Tribunal that creating a working environment where there was inadequate heating and/or hot water was offensive. It was clearly unwanted by the claimant and would be unwanted by any reasonable employee.

130. As to whether it related to sex, the Tribunal found no evidence to suggest that it did. The conditions were equally applicable to all employees. They related to deficiencies in the systems at the site rather than any deliberate act on the part of the respondent. The issue was raised not only by the claimant but by at least one male employee. The Tribunal did not, therefore, consider that there was any basis on which to shift the burden of proof on this allegation. If it did, it was satisfied with the respondent's account that the issue related to the systems in place and that when the complaint was made, the concerns

were resolved relatively swiftly and led to a replacement boiler being installed. This claim accordingly fails.

Alleged Sexual Harassment on 27 March 2022

- 5 131. Having regard to the findings of the Tribunal in relation to this issue, the Tribunal was satisfied that the complaint was well founded. There was a clear act of unwanted conduct (for which the respondent is vicariously liable). It was of a sexual nature and it had the purpose of violating the claimant's dignity as well as creating an intimidating and offensive environment for her. It clearly had that effect. There is no question that it was reasonable for the
10 conduct to have that effect and the Tribunal did not understand Ms Bouffé to suggest otherwise (assuming the Tribunal found that the act had taken place).
132. The claimant's concern about the matter was such that she raised the issue with the police. This claim succeeds.

Complaint regarding chair

- 15 133. The provision of an inadequate chair for employees working 12 hour shifts and sitting for much of the time, was clearly unwanted. It would be expected for any reasonable employee to see the matter in that way. As to whether it related to sex, the Tribunal found no connection whatsoever to the claimant's sex. It accepted her evidence that a single chair was used by all staff, male
20 and female, and that the provision of an inadequate chair unconnected to the claimant's sex. There was nothing in the evidence of the claimant to provide any linkage between the unwanted conduct and her sex. It was not, therefore, necessary to shift the burden of proof. Whilst the respondent can be criticised for not providing adequate facilities, and as noted the Tribunal
25 had some concerns about the evidence of Mr Williams on this point, the unwanted conduct had no relationship to sex such that the claim does not succeed.
134. The Tribunal went on to consider the remaining claims (which is accepted are in time).

Direct Discrimination

135. The Tribunal was satisfied, based on its findings, that this claim should succeed. There is abundant evidence that the claimant considered the facilities available to her to be detrimental. Having regard to the circumstances, and the nature of the concerns she had, it is clear that any reasonable person might have that view. The Tribunal went on to consider whether the facilities were less favourable than those available to men. The evidence is clear. There was no facility available to women only. Men had a facility available only to them.

136. The claimant was required to share a facility designated as an accessible toilet. It was available to men (whether disabled or not) and used routinely by them. The state of the facility was routinely such that the claimant required to clean it before use. There is no evidence that men were placed in a similar position. The fact that the lock could be opened from the outside with the use of a coin (and routinely was), gave rise to concerns over privacy. The issues were compounded by the failure regularly to empty the sanitary bin provided. Those were not issues for men using their facility.

137. The inadequacy of the facilities was recognised at an early stage of the claimant's employment by the respondent itself. At a very early stage, the suggestion of inserting a key lock was made as a means of addressing the concerns. This was recommended at various subsequent points during the claimant's employment. It was not implemented until February 2023. It was submitted on behalf of the respondent that there was a limit as to what they could do given that it was not their building. As noted, however, the respondent had day-to-day responsibility for the facilities and was able to make necessary changes, the costs of which were reimbursed. Mr Atherton at one point identified the use of portable toilets as a potential solution open to the respondent. This was not actioned either.

138. The steps taken at an earlier stage (including fixing a paper sign with tape) were inadequate and did not resolve the underlying detrimental treatment. The problems persisted for the claimant until she went off sick in January 2023.

5 139. Ms Bouffé sought to distinguish the circumstances of this case from those in *Miller*. Whilst the two cases have similarities and differences, looking at the position in the present case in the round, the Tribunal was satisfied that less favourable treatment was clearly established. Following *Miller*, the Tribunal did not consider it necessary to consider the mental processes of the
10 respondent as the treatment was inherently because of sex. Women were provided with inadequate toilet facilities in comparison with men. The facilities were inadequate for the claimant because she is a woman.

Unlawful Deduction from Wages

140. In relation to the unpaid shift, the claimant accepted that she was ultimately
15 paid for this albeit at the net rather than the gross amount. That was apparent from the relevant payslip. It appeared to the Tribunal that the absence of tax flowed from the payment being made in a new tax year. The claimant has, accordingly, suffered no loss.

141. In relation to holiday pay, on the basis of the information before the Tribunal,
20 the claimant's average hours are 54 per week. Holiday pay was calculated on the basis of that number of hours. The claimant's suggestion that the calculation ought to have been based on 56 hours was not entirely clear from her evidence. It appeared in part to relate from the fact that the advertisement for the post referred to an average of 56 hours per week. The Tribunal was
25 not, accordingly, satisfied that the claimant had proved any unlawful deduction as a result of this calculation.

142. The final element of the claimant's unlawful deduction from wages relates to an argument that she ought to have received full pay when sick instead of SSP only. The Tribunal was satisfied with the evidence of the respondent

that the claimant was not entitled to enhanced sick pay and this was available only to salaried employees.

143. As an aside, however, the Tribunal was very critical of the inadequate documentation provided to the claimant. The statement of particulars is deficient in a number of respects. Crucial elements of the claimant's entitlements are said to be contained in an employee handbook. No handbook was given to the claimant. The claimant did not raise a claim for a failure to comply with Section 1 of ERA. Had she done so, an award would have been due to her. The Tribunal was surprised that an organisation of the size and with the resources of the respondent would operate in this way.

Remedy

144. Having regard to the two claims in which the claimant has been successful, the Tribunal considered the appropriate award. In relation to injury to feelings, the claimant sought a figure of £18,000 (for all of her claims). Ms Bouffé suggested that an award at the lower end of the lowest **Vento** band – or no award at all - would be appropriate.

145. It was clear to the Tribunal that both relevant issues were serious and caused the claimant significant distress in the ways outlined above. The issues with the toilet facilities subsisted for a long time, and were repeatedly ignored by the respondent. They had a bearing on the claimant becoming absent from work (having been diagnosed with acute stress by her GP) and it is clear from all communications on the inadequate facilities that they were causing her distress and anxiety. The sexual harassment found to have taken place, whilst a one-off, was of a serious nature and had a significant impact on the claimant's wellbeing for some time. The deficiencies in the respondent's handling of the related grievance exacerbated the impact on the claimant.

146. Taking the two issues together, the Tribunal determined that an award of **FIFTEEN THOUSAND POUNDS (£15,000)** for injury to feelings should be made.

147. Interest on this award shall be paid at the rate of eight per cent per annum. This shall run from 14 February 2019, the date on which the first act commenced until the date of this judgment.

5 148. The claimant also sought compensation for loss of earnings. She claims the difference between the statutory sick pay received and full pay for the period 22 January 2023 to 5 June 2023. Her net pay is £914.80 per fortnight. SSP at the start of her sickness absence was £198.70 per fortnight. The difference per fortnight is, accordingly, £716.10.

10 149. The respondent's position was that no loss of earnings was due. Having regard to the reason for the claimant's initial absence, it is clear that this was in part to the issue over the toilet facilities. It was also in part due to the failure to provide hot water (which the Tribunal has found not to amount to sex discrimination). After the initial three weeks, the claimant's absence was due to elbow pain. Whilst the claimant attributed this to the deficiencies in the chair provided, and there may be some evidence for that, that issue was
15 again, not an act of sex discrimination. Considering the evidence as a whole, therefore, the Tribunal considered it appropriate to award loss of earnings for a period of two weeks amounting to **SEVEN HUNDRED AND SIXTEEN POUNDS AND TEN PENCE (£716.10)**.

20 150. Interest at the rate of eight per cent per annum is payable on this award from 7 October 2021, being the midpoint from the date of the discriminatory act and ending on the date of this judgment.

151. The two interest awards follow the guidance in the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996*.

5 **Employment Judge:** R MacKay
Date of Judgment: 5 December 2023
Entered in register: 11 December 2023
and copied to parties