EMPLOYMENT TRIBUNALS

Claimant: **A A**

Respondent: **B (R1) and C (R2)**

Heard at: **London South (Croydon) a hybrid hearing** **On: 4/12/2023 - 12/12/2023**

Before: **Employment Judge Wright**
Mr T Okitikpi
Mr D Stewart

Representation:

Claimant: **In person**

Respondent: **Mr T Welch - counsel**

An anonymisation Order under Rule 50(1) and (3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is in place in respect of the claimant, respondents and respondents' children.

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 12/12/2023 and further to the claimant's request for written reasons, these written reasons are provided.

WRITTEN REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) and the Employment Rights Act 1996 (ERA) are not well founded, they therefore fail and are dismissed. The Tribunal however declared that the claimant was not paid a week's notice pay upon termination and she is entitled to the gross sum of £780. The claim for holiday pay is not well-founded and is dismissed. The Tribunal does not have the jurisdiction over the claim for failure to autoenroll the claimant in accordance with the Pensions Act 2008.

2. There are Rule 50 Orders in place. There is an Anonymisation Order in place pursuant to Rule 50(1) and (3)(b) of the Employment Tribunal Rules of Procedure 2013 dated 20/11/2020 in respect of the claimant and respondents. There is also a Restricted Reporting Order in place dated 20/11/2023 in respect of the same parties. There is a Anonymisation Order in place in respect of the children of the respondents dated 18/5/2022.

3. The claimant presented a claim form on 31/8/2020 following a period of early conciliation which started on 15/7/2020 and ended on 25/8/2020 for R1 and which started on 16/7/2020 and ended on 16/8/2020 for R2. The claimant was employed by R1 as a Governess to R2's child (Child 1). Her employment commenced on the 1/3/2020 and terminated on 8/7/2020.

4. Case management hearings took place on 18/5/2021, 17/5/2022 and 18/5/2022 and 13/11/2023. There was an agreed list of issues.

5. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristic of sex (s.6). The prohibited conduct upon which she relies is: direct discrimination (s.13); harassment (s.26) and victimisation (s.27). The complaint is dismissal (s.39(2)(c)). The claimant relies upon the same six allegations for the prohibited conduct of direct discrimination (s.13 EQA), harassment related to sex/gender (s.26 EQA) and harassment of a sexual nature (s.26 (2)(a)). For the victimisation claim, she relies upon a protected act, which took place on the weekend of the 4/7/2020 to 5/7/2020. She cites three detriments, including her dismissal.

6. The claimant also claims holiday pay, notice pay and pension contributions which were not paid.

7. The Tribunal heard evidence from: the claimant and her former husband (although they were still married at the relevant time) DC. For the respondent it heard from: R1; R2; AS (R1's HR adviser, referred to in this judgment as HR); VD a housekeeper and NO a nanny for child 4 and 5.

8. The Tribunal's assessment of the witnesses was as follows. The claimant lacked credibility. She claimed for example, that she did not report R1 to the police at the time as she did not know what she was alleging was a criminal offence. The claimant has lived in the UK since 1992. This was put forcefully to her in cross-examination and she maintained neither she nor her husband knew what she was accusing R1 of amounted to a criminal offence. Such a statement not only lacks credibility; but amounts to incredibility. The claimant overstated and embellished simple matters which were evidenced. For example, R1 wrote a perfectly reasonable (but possibly ill-judged) text message to DC asking DC to contact him to discuss the claimant. It was not an intimidating message. That prompted the claimant to write to HR on 31/3/2022 in the following terms (the claimant's witness statement page 58):

> 'My ex husband [DC] will be at the Tribunal where the respondents' barrister will be able to question him. Stop intimidating the witnesses. The Tribunal will be informed of this.'

   DC was a poor witness. However, that may just have been that he was uncomfortable regarding the evidence he was giving.

9. In respect of the respondents' witnesses, R1 was credible and authentic. He accepted some matters which assisted the claimant's case. The remaining respondents' witnesses were less credible. The Tribunal felt that it was not being told the truth from both sides. Some of the defensiveness may however had been due to the nature of the allegations and the setting in which they took place (in R1 and R2's private residence). Certainly, there was interference with the witnesses from both sides and specifically by the claimant. Mr Welch invited the Tribunal and the Tribunal was prepared to consider and interpret the contemporaneous documents over oral testimony (Gestmin SGPS SA v Credit Suisse (UK) Ltd [2020] 1 C.L.C. 428). Furthermore and unusually, all parties had recorded telephone calls and meetings and transcripts were produced.

10. Two witnesses were under Orders to attend the hearing (AS and AF). They did not attend. The failure to attend has been reported for further action to be taken.

11. The Tribunal was assisted by a translator Mrs T Wallis for some of the witnesses.

12. There was a 761-page electronic bundle, with an additional 13-pages and a further 32-pages.

13. Submissions were heard and considered. Both parties provided written submissions.

14. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the evidence.

15. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Findings of fact

16. In January 2020 the claimant was interviewed by R2 and there followed an exchange of messages regarding the terms of employment. She started in her role on 1/3/2020. Things did not work out for the parties, and the claimant was summarily dismissed on the 8/7/2020, in a phone call during the evening. In reality, this is what this claim is about; the claimant cannot accept R1 terminated her employment.

17. It is important to remember what was happening in the UK in 2020. After the Chinese government had publicly confirmed human-to-human transmission of Covid-19 on 20/1/2020, the city of Wuhan was quarantined on the 23/1/2020. The WHO declared the virus to be a Public Health Emergency on 30/1/2020. The first death in the UK was recorded on 5/3/2020 and 147 people had tested positive for Covid-19 by the 6/3/2020 in England. On 9/3/2020 Italy implemented a nationwide quarantine in response to the outbreak. In the UK, on 16/3/2020 the Prime Minister said that non-essential travel and contact should stop. The first UK lockdown was announced on the 23/3/2020 and the lockdown measures legally came into force on the 26/3/2020. On the 10/5/2020 the Prime Minister said that people who cannot work from home should return to work, but avoid public transport. There was a phased re-opening of schools on 1/6/2020 and non-essential shops re-opened on the 15/6/2020. Restrictions in England were eased on 4/7/2020 with pubs, restaurants and hairdressers re-opening, however there was also a local lockdown in Leicester and parts of Leicestershire. Obviously other events followed, however, that is the relevant timeframe for the purposes of this claim.

18. The claimant's place of work was a private residence rented by the respondents, where they lived with their children. There were employees carrying out duties in the property. At the material time for example, besides the claimant, there was a housekeeper and at least three nannies. Other members of staff were mentioned, such as a driver and a tennis coach.

19. The first allegation (2.1.1, 3.1.1 and 4.1.1) is that on an unspecified date in April 2020 an incident took place (the claimant dates this around mid-April 2020, around the Easter holidays and she cites dates of 12/4/2020 or 19/4/2020) (witness statement paragraph 33). In her closing submissions, the claimant stated that she called her husband straight away after the incident. It would be expected, working back from the telephone call to her husband and in light of the dates the claimant has now suggested, that it would be possible for her to provide the exact date of the incident. Plus depending upon the exact date of the allegation, it may have been out of time and the vagueness regarding the date deflects from this.

20. It is the claimant's allegation that, in layman's terms, R1 sexually assaulted her in the kitchen. Her allegation is that R1 grabbed her from behind, thrust his body against hers and wrapped his arms around her chest area and touched her breasts. It is the claimant's case that the incident was witnessed by the housekeeper and AS a nanny. The claimant states that R2 was not in the kitchen/room.

21. R1 admits that, mistaking the claimant for R2, he approached her from behind and placed his hands on the claimant's shoulders. It was a brief touching and as soon as he realised his mistake, he removed his hands. He apologised several times and made a 'sorry' gesture (a praying sign) with his hands. R1 and R2 state that she (R2) was in the kitchen/room at the time. The Tribunal was asked to physically compare the claimant and R2 from behind and they are not dissimilar or obviously different if not particularly paying attention. They had similar hair colour and hair style. They are by no means identical, however, the Tribunal found that it was credible that there could be a fleeting element of mistaken identity.

22. The claimant first raised this incident (and three others) in an email to R1 dated 9/7/2020, which was sent following the termination of her employment (page 274). Upon receipt of the email, R1 contacted the police an hour later to report the 'crime' of a false allegation of sexual harassment (page 283). R1 was told that this was a civil matter, not a criminal one and to contact a lawyer. The police informed R1 that there was no criminal intent and the claimant was within her rights if she believed she had a case to report.

23. On 1/8/2020 the claimant wrote a witness statement for AS. The claimant said that she was talking to AS on the telephone and at the same time typed

up AS's witness statement; writing down what they had discussed. This was because AS did not have access to technology. She said that she met up with AS in London for her to sign the witness statement.

24. Mr Welch put it to the claimant and submitted that she wrote the witness statement for AS. The claimant denied this and repeated that she had typed up what AS told her.

25. The Tribunal finds that the claimant did write the witness statement attributed to AS.

26. The claimant's first summary of the event is set out in her email of 9/7/2020 (page 277):

> 'As I was standing in the kitchen making myself a tea, you quietly came to me from behind, grabbed me from behind with your body fully thrusted against mine and your arms wrapped around me in the chest area, fully touching my breasts. It all happened very quickly, I immediately forced my body away from yours, turned 180 degrees to face you. You were standing with a huge smile on your face. It was at this moment when you have noticed that there were two other ladies (my colleagues) standing in the corner of the room (the eve between the playroom and kitchen), both looking at you. practically with their mouths wide open, in disbelief of what they were witnessing.'

27. AS's witness statement is dated 1/8/2020 and it sets out:

> 'All of a sudden I saw [R1] walking into the kitchen from the hallway. He quietly came to [the claimant] from behind, grabbed her and pressed his body against hers, and his arms wrapped around [the claimant's] chest. [The claimant] was clearly startled and shrugged him off by twisting her arms and shoulders and turned to face him. [The claimant's] movement made [R1] turn in my direction. It was at this moment when he noticed me with my colleague standing in the eve between the playroom and the kitchen. That took him by surprise. We both looked at him bewildered. [The claimant] looked shocked, 100% shocked. And so were we.'

28. The claimant's claim was presented on 31/8/2020. Her allegation was put as (page 20):

> 'First incident happened mid April 2020. As I was standing in the kitchen making myself a tea, [R1] quietly came to me from behind, grabbed me from behind with his body fully thrusted against mine and his arms wrapped around me in the chest area, fully touching my breasts. It all happened very quickly, I immediately forced my body away from his, turned to face him. [R1] stood there with a huge smile on his face. It was at this moment when he noticed the presence of two other ladies (my colleagues) standing in the corner of the room (the eve between the playroom and kitchen), both looking at him. Once [R1] realised they saw what he did, he jumped away from me

> and placed his index finger to his mouth, in the universally known 'shush" or "be quiet" signal, so that no one would say anything.'

29. A Witness Order was granted on the 18/5/2022 for AS to attend this hearing. She was instructed to provide a written witness statement of her evidence, by reference to the list of issues. She produced a statement dated 12/6/2022 (for some reason, which is not clear, there are two versions of this statement, one comprising of 15-pages and one of 19-pages). AS said that the description in her 1/8/2020 witness statement was wrong and that she only witnessed matters from the back of R1. In breach of the Witness Order, AS did not attend the hearing to give evidence. As such, she was not cross-examined. Her evidence is at best unreliable and was discounted.

30. R1 admitted touching the claimant on her shoulder area. On balance and after considering the evidence, the Tribunal prefers R1's version of events and he was simply more credible than the claimant.

31. The Tribunal finds that the touching was not invited, was in error, however it was benign. There was no sexual element to it, it was not because of the claimant's gender or related to it. It was an inadvertent mistake.

32. The second allegation of direct sex discrimination, sex harassment and sexual harassment (2.1.2, 3.1.2 and 4.1.2) was dated as the beginning of May 2020. It related to R1 approaching the claimant from behind, putting his hands on her shoulders and pulling her towards him. This was said to have taken place in the pool area.

33. R1 denies this event took place and said there is no truth in this allegation.

34. The third allegation of direct sex discrimination, sex harassment and sexual harassment (2.1.3, 3.1.3 and 4.1.3) is said to have taken place around the end of May 2020. The allegation is that R1 grabbed the claimant from behind by her shoulders and placed his hands close to her neck. This was said to have taken place in the utility room.

35. Again, R1 denies this allegation.

36. The claimant gave very limited evidence in respect of these two allegations, just one paragraph about each in her witness statement (paragraphs 51 and 52).

37. What is noticeable about these allegations is the lack of corroboration. After the first incident, the claimant said she had confided in DC and he said she called him around lunchtime to tell him what had happened. There was no text message from the claimant to DC for example saying something along the lines of 'he's done it again' or 'it's happened again', or even to set out the

claimant's version of events. Many of the claimant's text messages were included in the bundle, such as those between herself and VD regarding food (page 143).

38. The claimant also said DC had told her to start to record matters. Yet, there is no contemporaneous evidence in respect of these two incidents.

39. The claimant's version of events is not accepted and it is considered she included them to bolster her case in respect of the first allegation.

40. The fourth allegation is that R1 filmed the claimant's chest in mid-May 2020 (2.1.4, 3.1.4 and 4.1.4). At the outset of the hearing, the claimant stated that the video which had been disclosed and of which there were stills in the bundle, was the wrong video. She said that the video disclosed was from May 2020 and not June 2020. The allegation however is dated in the list of issues, which were agreed at the preliminary hearing in May 2022. The bundle clearly identified the date of the stills from the video as 8/5/2020. The claimant had complied the bundle and had therefore included the stills from the video dated 8/5/2020. The claimant however did not pursue this allegation in respect of a video from June 2020 further.

41. The fifth allegation (2.1.5, 3.1.5 and 4.1.5) is that R1 regularly walked about the property wearing a knee length robe, 'with nothing underneath it and showing his genitals'. R1 admits he would walk around his home in a dressing gown or bath robe, but not that he had nothing on underneath it, or that his genitals were on show.

42. All the claimant had to say in regard to this in her evidence-in-chief was that 'there were occasions when [R1's] genitals were peaking out from under his robe' (witness statement paragraph 54). As submitted by Mr Welch, this is a very vague and unsubstantiated allegation. It lacks detail and specificity. Furthermore, R1 said and it is accepted, that he was wearing underwear underneath his bath robe.

43. The final allegation under all three forms of prohibited conduct is that the dismissal on 8/7/2020 was a act of discrimination (2.1.6, 3.1.6 and 4.1.6).

44. The respondents' advance a non-discriminatory explanation for the claimant's dismissal; namely she refused to work her contracted hours and there were concerns regarding her performance.

45. The claimant was contracted as a governess to R2's child working Thursdays to Sundays. Another governess worked Monday to Thursday; that governess then left.

46. On 4/6/2020 the claimant sent at text message to R1 (page 219):

> 'I proposed to [R2] that I will work from Monday to Friday, all days 9.30am to 9.30 pm apart from Fridays. On Fridays 9.30am to 4.30pm. Presumably from 1 September, but I can start earlier. Please discuss this proposed schedule with [R2], if it is confirmed, then it will be easier for me to be in control of all classes, mine and online, and also sports and so on.
>
> [R1] replied: Super, will discuss.'

47. This was followed up on the 19/6/2020 when the claimant sent a draft contract to R1 with a text message which read (page 222).

> 'Dear [R1] and [R2],
>
> At [R1's] request, I prepared two copies of our bilateral contract for your consideration. [R1] also asked me to arrange the meeting between the three of us to discuss the contract before the end of July 2020.
>
> Please, let me know of your corrections/changes, which you want to discuss with me before signing the contract, including proposed schedule/hours. I suggest to date this contract 1 August 2020.
>
> Please arrange the suitable for you day/time for our meeting to discuss and sign the contract.
>
> With regards
> [claimant]'

48. The claimant sent a further message to R2 on 19/6/2020 (page 223):

> 'Forgot to say, yesterday I spoke to [R1] about contract, especially since the new address and potentially new schedule, if agreed by all parties. [R1] asked me to prepare two copies for him and you, so both of you familiarise with the document and in the next couple of weeks and the three of us sat down and signed it, of course after edits or changes that you both would like to make. I am sending you the copy of the contract, which I sent to [R1]. I will give you the printed copies over the coming days.
>
> Dear [R1] and [R2],
>
> At [R1's] request, I prepared two copies of our bilateral contract for your consideration. [R1] also asked me to arrange the meeting between the three of us to discuss the contract before the end of July 2020.
>
> Please, let me know of your corrections/changes, which you want to discuss with me before signing the contract, including proposed schedule/hours. I suggest to date this contract 1 August 2020.
>
> Please arrange the suitable for you day/time for our meeting to discuss and sign the contract.

With regards
[claimant]'

49. The contract set out the working hours as Monday to Friday (page 225).

50. The claimant then sent a text message to R2 with a 'transitional' schedule on 30/6/2020 (page 235). This was intended to factor in a property move in mid-July 2020:

'Hi! I prepared a smooth transition to my new schedule in the coming weeks:
Thursday 2 July - Sunday 5 July
Thursday 9 July - Sunday 12 July
and then smoothly transiting to:
Thursday 16 July - Saturday 18 July
Then a break on Sunday 19 July and Monday 20 July,
Then I work from Tuesday 21 July to Friday 24 July
From 27 July I start new Monday to Friday schedule.

Please let me know regarding above transitional schedule, is all good, will it suit you?

[R2] replied: I am very busy now, but for the next week - definitely yes.'

51. The claimant then sent R1 a message on 2/7/2020 (page 236);

'[R1], I know you are very busy, that's why I am waiting when you will find 5 minutes for me.

I work from the end of January and the contract is unsigned. It is July now, let's sign it already. Honestly, I never worked without signed contract in all my 30 years living in England. I can't understand why we delayed it so, [E] signed it without delays. At the beginning [R2] asked me to wait a little bit, but five months passed, let's sign it before the move to [the new property]. By the way, it was a long time ago when I signed all the documents sent by your office - confidentiality, privacy. All signed but the contract is still unsigned. If there are no objections, tomorrow I will leave by the door to your room the updated contract with new place of work and new schedule, which was agreed with [R2]. …

Can you please look at it when you are available, and let me know regarding any edits, suggestions etc.

The contract starts 1 February 2020, as according to the contract: 'No previous employment counts as part of Employee's period of continuous employment.' Meaning the contract must be valid from the actual time I started to work, and not from the present day, this to avoid any interpretation of the 'continuous employment' or 'lack of it or a break in it.'

The move is on the [date] already, let's try to sign it before that day.

> The base of the contract was done by your office, I edited its appearance and on insistence of my lawyer, I added paragraph 23, otherwise this important paragraph was not in there.
>
> Thank you [R1]!
>
> [R1]: [claimant], definitely tomorrow!
>
> [claimant]: Thank you!'

52. The claimant then messaged R1 on the 4/7/2020 (page 238):

> '[R1], good morning. How are you? I forgot to say, I want once again to confirm the room in [the new property], in which I will be staying during my new 5 day schedule. The guest room next to [child 3's] room suits me perfectly (I already told [R2], as I understand she has no objections), however, in principal it could be any other room at your discretion, where I can keep my things. This is important to me, to share the bathroom with others is very inconvenient for me for number of reasons. I hope you will have no objections.
> Thanks!
>
> [R1]: [claimant], good evening! That room - OK, agreed, but not to 'keep' things there, as in your absence there will be another person staying there.
>
> [claimant]: Excellent, thank you [R1]! This makes my life easier. I will be taking my things with me, no problem.

53. There then followed a meeting between the respondents and the claimant on the 5/7/2020. The meeting was recorded and a transcript was provided to the Tribunal (pages 239-253). The proposed contract was discussed. The claimant had already said she needed to leave as she needed to go home to take her medication. The following exchange then took place (page 247):

> '[claimant]: Regarding the hours, at some point you will decide eventually whether you need me four days or four and half days a week.
>
> [R1]: We definitely need you on weekends.
>
> [claimant]: I will not be able to work on weekends, [R1].
>
> [R2] I think we should discuss this topic when you will be in better health.
>
> [claimant]: I just want to inform you of the situation. I can't control my life, it is what it is. My [DC/former husband] changed his work schedule. When I first accepted the position, when [the other governess] was still working, I had an option to change my schedule half and half to suit me, so I would have some weekends for myself, as I had them on Mondays and Tuesdays. She categorically did not agree to work on weekends. She said she didn't work on

> weekends and if she were to work on weekends she would have charged much more. At the time it suited me, because [DC] had these days off, but his schedule has changed. So I do not see him now at all.
>
> …
>
> Yes. So he now works having Fridays, Saturdays, Sundays - the usual weekend are now his free days. I must have my own family life, life itself, that's why. So my circumstances changed. I told this to [R2] of course. And at some moment [R2] said that she will manage herself on weekends. That's why I comfortably brought it in. You said that you will manage on weekends.
>
> [R2]: Well, maybe I said it once.'

54. The parties then moved on to discuss the claimant's commute to the new property and her request to stay overnight on occasions in a room with an *en-suite* bathroom. R1 then referenced the holidays in July and August and said again, it would be much better if the claimant could work weekends (page 252). The claimant was then asked if she could not work weekends during the holidays (by implication following on from the previous comments, this was referring to July and August) and she replied 'yes' (she could not work weekends during July and August).

55. The meeting ended with the exchange (page 253):

> '[R1]: Starting from September, understandably it will have to be schooling again and so on and so on. But till September there are two months.
>
> [R2]: I don't know in fact how about holidays and I didn't yet think about it. I maybe became too slow with my thinking at time, but with holidays a new reality started. And I am all in the house move, plus searching for new nannies. Let me estimate. On Thursday we will discuss.
>
> [claimant]: Okay. Agreed.
>
> [R1]: Okay [claimant], agreed. Thank you very much. Then you have your dates, and the documents.'

56. On the same date (5/7/2020), R1 had a discussion about the claimant's dog (although it is not clear when the conversation took place if however, the claimant left to go home after the meeting referred to above, then presumably this conversation was before the meeting). R1 was not happy that the claimant's dog had slept in one of his child's bed more than once. R1 was also not happy that the claimant was not taking responsibility for it (page 255).

57. R2's evidence was that the claimant had presented them with an ultimatum in respect of changing her working days; either for R1 to accept the claimant's proposal, with a schedule which did not suit the respondents; or to part ways

and for R1 to find a replacement for the claimant. R2 said that after discussions, they decided to part ways (witness statement paragraph 25).

58. R1's evidence was that things came to a crunch on 5/7/2020 when the claimant refused to work weekends (witness statement paragraph 12). He and R2 decided that things were not working out and to terminate the claimant's employment immediately and within the six month probationary period.

59. There was no six month probationary period set out in the contract which was provided to the claimant and which she signed on 26/2/2020 (page 159).

60. There was an employee handbook dated 6/10/2017, which did provide for a probationary period of six months (page 464). The claimant claimed she had been told one evening when the respondents returned from a evening out by R2 that she had passed her probationary period. This was on the 8/3/2020. The claimant also made reference to R1 knowing her probationary period officially ended on 25/3/2020 (witness statement paragraph 89). It is not clear what the date of 25/3/2020 correlated to; in respect of a start date of 1/3/2020, or even any other start date.

61. Based upon its assessment of the evidence, the Tribunal does not accept the claimant was told she had passed her probationary period on the 8/3/2020 (after her start date of the 1/3/2020). Furthermore, the respondents explained this date by referring to celebrating International Women's Day.

62. The claimant referenced a two month probationary period after an interview with R2 on 26/1/2020. The claimant said that R2 offered her a job on the spot and asked her to start the next day (27/1/2020), with a two month probationary period (witness statement paragraph 4). If that were correct, the two months would expire on 26/3/2020. It is not accepted however that the claimant either started work on the 27/1/2020 or that a two month probationary period was discussed.

63. R1 was the employer and his evidence was that all staff were on a six month probationary period. Even if it was the case the claimant was told she was on a two month probationary period, there was still nothing to prevent R1 from summarily dismissing her, irrespective of any probationary period on 8/7/2020.

64. The Tribunal finds that the claimant has misunderstood the contract which she signed. That contract provided for a notice period of two months upon completion of a probationary period (it is silent in respect of the probationary period itself) (page 157). The Tribunal finds that it is this reference to two months' notice and the reference to a probationary period, which has filtered into the claimant's mind that she was on a two month probationary period and

after the first two months had passed, she was entitled to two months' notice. Her interpretation was however incorrect.

65. That leads into another aspect of the claimant's credibility. The claimant was adamant that R2 had agreed to the change to her working hours. She said that any ambiguity referred to whether or not her working days would be four-day-per-week, four-and-a-half-days-per-week, or five-days-per week. The claimant said that it was all agreed and that her colleagues had been informed of the change to her working hours.

66. Just pausing there, it is contradictory to say that her working days had changed and been agreed; and that the only outstanding matter was the number of days. It cannot have been agreed if the parties were still to reach agreement over the exact number of days she would be working.

67. The claimant herself was using qualifying terms (the messages were all in the parties' first language, were translated and so there cannot have been any ambiguity over language) (taken from the exchanges set out above):

> Forgot to say, yesterday I spoke to [R1] about contract, … and potentially new schedule, if agreed by all parties. … so both of you familiarise with the document and in the next couple of weeks and the three of us sat down and signed it, of course after edits or changes that you both would like to make
>
> [R1] also asked me to arrange the meeting between the three of us to discuss the contract before the end of July 2020.
>
> Please, let me know of your corrections/changes, which you want to discuss with me before signing the contract, including proposed schedule/hours.
>
> Please arrange the suitable for you day/time for our meeting to discuss and sign the contract.
>
> I proposed to [R2] that I will work from Monday to Friday, all days 9.30am to 9.30 pm apart from Fridays. On Fridays 9.30am to 4.30pm. … Please discuss this proposed schedule with [R2]
>
> Please let me know regarding above transitional schedule
>
> Can you please look at it when you are available, and let me know regarding any edits, suggestions etc.

68. The Tribunal finds that the change to the working pattern which did not include weekends was not agreed. In fact once this became clear to the respondents at the meeting on 5/7/2020 (that the claimant was refusing to work weekends), this was a matter which subsequently and after the meeting, made R1 decide to terminate the contract. At the meeting, the respondents envisaged the claimant's employment continuing and that is evidenced by

them discussing the room where she would stay overnight at the new property and discussing working patterns in July, August and September.

69. The Tribunal therefore finds that the reason and the only reason for terminating the claimant's contract, was her refusal to work on weekends as per her contract. The respondents' considered the claimant's request and declined it. Then in view of the *fait accompli*[1] with which the respondents had been presented, coupled with other dissatisfactions; R1 decided to terminate her employment. The decision to terminate the claimant's contract was nothing whatsoever to do with the claimant's gender. She refused to work on weekends as per her contract, the respondents' considered the claimant's request to only work weekdays and declined it.

70. The claimant also complains of victimisation. The protected act she relies upon is that on either or both the 4/7/2020 and 5/7/2020 she discussed the proposed property move with AS (who is completely discredited as a witness). The phrase the claimant used in her evidence-in-chief is 'if [R1] tried anything again, I will take legal actions against him'. That is not a protected act for the purposes of s.27(2) EQA. In her claim form, the claimant did not plead what the protected act was; she listed the detriments (she referred to them as defamatory comments) (page 19).

71. The claimant did however in paragraph 91 of her witness statement refer to her dismissal resulting from the respondents wanting to protect themselves from her bringing a claim for sexual harassment. She referred to the same allegation in paragraph 95.

72. In the list of issues (5.2) the protected act is set out as:

> 5.2. The Protected Act relied upon by the Claimant is on 4 July and 5 July 2020 discussing the move to [the new property] with a colleague (who witnessed the first incident and knew about other incidents too) and that it was unlikely the First Respondent would act inappropriately at [the new property] because of its CCTV cameras. The Claimant also stated that she would take legal action if another incident occurred and was already considering taking legal action.

73. Notwithstanding that the list of issues is not a pleading; the protected act as set out does not fall within s.27(2) EQA.

74. Furthermore, even if the claimant had a discussion with AS in terms that it was a protected act; the claimant then has to show how it came to the attention of the respondents; such that they then decided to victimise the claimant. The claimant suggested that either her conversations with AS were recorded or overheard. She was not aware of any recording device herself,

[1] A thing already done and not reversible.

but said that a colleague had found a recording device in the kitchen. She does not suggest any other means for the respondents to become aware of her conversations with AS. Furthermore, the claimant knew R1 recorded himself and therefore he used recording devices to do so.

75. The claimant's suggestions are also undermined by the fact that in the meeting on the 5/7/2020, the Tribunal has found that the respondents intended her employment to continue. It was only after that meeting that the respondents decided to terminate the claimant's employment after further discussions. Had the respondents become aware of the claimant's conversations with AS and then decided to dismiss her as a result of that, the meeting would not have been conducted by them in the way that it was.

76. In the alterative, the Tribunal sets out its findings in respect of the three detriments the claimant relies upon.

77. Her dismissal on 8/7/2020 (5.3.1), the Tribunal repeats its findings in respect of the dismissal further to the other forms of prohibited conduct as set out above.

78. The second detriment is the respondents telling people, including R2's child that the claimant had made sexual advances towards R1 and the claimant had tried to poison the respondents (5.3.2).

79. There was no evidence of anyone saying the claimant had made sexual advances towards R1. If anything at all, this is likely to have been a misunderstanding that the claimant made allegations of sexual advances towards her, by R1 in her email of 9/7/2020 (page 274). R2 will of course have told her child the claimant had left and may have given an explanation. It is however inherently unlikely that she would inform a 10 year old child about any allegations of a sexual nature.

80. The Tribunal has seen evidence of gossip (some of it offensive and malicious) amongst members and former members of staff in the bundle. It finds that that was all it was; gossip amongst staff about their employer some of whom may have misinterpreted what the actual allegation was and against whom.

81. Although the poisoning allegation at first sounds implausible, the Tribunal was given an explanation for this from R2. The claimant had cooked for the family (this was not part of her role) and after her dismissal and her email making allegations against R1, it came to the respondents' attention that the claimant had brought some foodstuffs from home (a jar) and used that in her cooking. There was a container of food in the fridge which the claimant had cooked which R2 was going to have tested, in light of the fact the claimant had used her own produce; without permission. In the circumstances of this particular household, that was not an irrational position for R2 to take (Mr Welch

submits R2's concern may have had a degree of paranoia about it). The respondents' position in respect of testing the food is not linked to any protected act.

82. The last allegation is that the respondents procured the claimant's recruitment agency to blacklist her and prevented her from getting a job.

83. There was no evidence of this, other than the claimant's statement and this was not put to the respondents' witnesses. The claimant referred to her agent calling her to ask what had happened and that the respondents or their representatives had 'flagged her' (witness statement paragraph 98). This allegation lacks specificity and does not identify how she was prevented from getting another job.

84. The claimant brings three breach of contract claims (6.1.1, 6.1.2 and 6.1.3).

85. The first is for two months' notice pay. The claimant was not contractually entitled to two months' notice pay (see above). R1 conceded she was entitled to a week's notice pay under statute and invites the Tribunal to made a declaration that she is so entitled in the sum of £780 (a week's gross pay). R1 should have conceded this claim and made the payment to the claimant. The claimant is to account to HMRC in respect of any payment made.

86. The second claim is for holiday pay in the sum of £312.40. This claim has not been particularised or explained. The final payslip of 31/7/2020 stated there was a payment in lieu of holiday of £1,567.50 (page 354). The Tribunal does not understand this claim as advanced.

87. The final claim is for pension contributions of 3% as required under autoenrollment and the Pensions Act 2008. It is understood that R1 agreed the claimant was not autoenrolled and the payslips do not show any contribution from the claimant and do not show any employer's contribution to the autoenrolled pension. The Tribunal however does not have jurisdiction over this claim; it is a matter for the Pensions Regulator.

The Law

88. The ERA s.13 provides:

Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

89. The right to complain to the Tribunal is provided for in s.23 ERA:

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

90. S.13 EQA provides:

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

91. S.23 EQA provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

92. S.26 EQA provides:

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

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

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

(i) violating B's dignity, or

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

(2) … 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).

(3) …

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

(a) the perception of B;

(b) the other circumstances of the case;

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

93. In respect of violating a person's dignity: '[n]ot every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended' (Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT).

94. The EAT also observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence' (Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13).

95. S.27 EQA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.'

96. S. 123 EQA provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

97. S.136 EQA provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

98. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.

99. If a claimant establishes a prima facie case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

100. In respect of the vagueness of the allegations, it is important that to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

101. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, the House of Lords adopted Brightman LJ's definition of 'detriment' when he stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

Conclusions

102. The claimant was employed by R1. This was a slightly unusual arrangement in that it was R2's child the claimant was employed to act as a governess to. It would be expected and practical that it was R2 who had the day-to-day management of the claimant. In effect R2 was the claimant's line manager, however, R2 is not an employee of R1. R2 must therefore have been acting as an agent for R1 (s.109(2) EQA).

103. The only allegation for which R2 could therefore be liable is the dismissal itself.

104. On the balance of probabilities, the Tribunal concludes that R1 did briefly and mistakenly touch the claimant on her shoulders. It was a mistake and no more than that (allegations 2.1.1, 3.1.1 and 4.1.1). It was not because of her gender or related to her gender. It was not conduct of a sexual nature.

105. The Tribunal concludes that events comprising allegations 2.1.2, 3.1.2, 4.1.2, 2.1.3, 3.1.3 and 4.1.3 did not happen.

106. The claimant did not advance allegations 2.1.4, 3.1.4 and 4.1.4 other than to say the date of the video which she had referenced as May 2020 was in fact June 2020. If the date she had given was incorrect and if the video did not show what it was the claimant said it showed; she had plenty of time from the May 2022 preliminary hearing to the commencement of this hearing, to correct that.

107. The Tribunal concluded R1 did wear underwear underneath his bath robe and in any event, there was no specific evidence of R1 showing his genitals (2.1.5, 3.1.5 and 4.1.5).

108. The reason for the claimant's dismissal was the position she had taken in respect of no longer working weekends. The conclusion is that was the material reason for the decision to dismiss (2.1.6, 3.1.6, 4.1.6 and 5.3.1). It was nothing whatsoever to do with her gender or sex.

109. The Tribunal concluded that even if the claimant did a protected act on the 4/7/2020 or 5/7/2020, this did not come to the respondents' attention. They cannot therefore have subjected the claimant to a detriment.

110. Even so, R2 was entitled to tell her child the claimant had left R1's employ. Any allegation that the claimant had made sexual advances to R1 came from staff 'gossip'. R2's explanation in respect of the suggestion of poison was accepted (5.3.2).

111. The conclusion was that the third detriment (5.3.3) was vague and lack specificity.

112. The claimant is not entitled to two months' notice pay. This was based upon her misunderstanding of the contract. She was entitled to one week's notice pay of £780 gross.

113. The claimant's claim for holiday pay is not particularised and is not understood.

114. The Tribunal does not have jurisdiction over the failure to autoenroll the claimant contrary to the Pensions Act 2008.

115. For those reasons, the claimant's claims are not well-founded and are dismissed. Save that the Tribunal made a declaration that upon termination of employment, statutory notice in accordance with s.86 of the ERA was not paid to the claimant. She is entitled to the gross sum of £780.

116. At the conclusion of the hearing, Mr Welch indicated he wished to make a costs application on behalf of the respondents. A short break was taken and it was decided to adjourn at 11am until 1.30pm in order that the parties could have a discussion. They did so and during the adjournment, the Tribunal was informed that an agreement had been reached and it was subsequently confirmed that a binding agreement had been reached via Acas.

12 December 2023

Employment Judge Wright