EMPLOYMENT TRIBUNALS

Claimant: Molly Craigie

Respondent: East Anglia Home Improvements Limited

Heard at: **Watford (CVP)** **On: 24-27 June 2025**

Before: **Tribunal Judge Peer acting as an Employment Judge**

Representation:

Claimant: Mr. Francis Hoar, Counsel
Respondent: Mr. Ross Burrows, Counsel

RESERVED JUDGMENT

1. The complaint of victimisation is dismissed upon withdrawal.

2. The claimant was not an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 at the relevant time. The complaint of constructive dismissal is therefore dismissed because the Tribunal does not have jurisdiction to hear it.

3. The claimant was a worker within the meaning of section 230 of the Employment Rights Act 1996 at the relevant time.

4. The complaint of unauthorised deductions from wages is not well-founded and is dismissed.

5. The complaint in respect of holiday pay is well-founded. The respondent failed to pay the claimant in accordance with regulation 14(2) and/or 16(1) of the Working Time Regulations 1998.

6. The respondent shall pay the claimant **£4,775.92**. The claimant is responsible for paying any tax or National Insurance.

7. The claimant was an employee within the meaning of section 83 of the Equality Act 2010 at the relevant time.

8. The alleged discriminatory acts which occurred prior to 7 June 2023 are not part of a continuing course of conduct over a period which ended after

7 June 2023 and it is not just and equitable to extend time. The claim is therefore dismissed in relation to those alleged discriminatory acts.

9. The remaining complaints of sexual harassment are not well-founded and are dismissed.

REASONS

INTRODUCTION AND CLAIM

1. The claimant's engagement with the respondent commenced on 1 September 2022 and ended on 30 June 2023. After a period of early conciliation between 6 September 2023 and 18 October 2023, the claimant presented her claim form (with accompanying annex) on 14 November 2023. By way of her claim form, the claimant raised complaints of harassment, victimisation and alleged she was owed notice pay, holiday pay, arrears of pay and other payments.

2. The claimant was a saleswoman for the respondent, a double-glazing and home improvement company, and was responsible for visiting 'leads' (persons who had expressed an interest in double-glazing or home improvements) and seeking to confirm contracts. The claimant contends that she was an employee and was constructively dismissed by the respondent accepting their fundamental breach of contract by resigning. The respondent maintains that the claimant was a self-employed contractor and was neither an employee nor a worker and as such the Tribunal has no jurisdiction to entertain her claims.

HEARING

3. The hearing was a fully remote hearing by cloud video platform. Neither party objected to the hearing proceeding in this format. There were no material connection difficulties experienced during the hearing and the hearing proceeded effectively as a remote hearing.

4. In advance of the hearing, I was provided with a hearing bundle in two parts being a pdf of 89 pages and a pdf of 84 pages containing the claim form, response form, witness statements and documents related to the claimant's employment. At the start of the hearing, I was informed that there was a single pdf hearing bundle of 176 pages which included the claimant's witness statements and exhibits. It transpired that Claimant's Counsel had prepared on the basis of the two part bundle. Many of the pages in the 176 page bundle were feint font and difficult to read. In these circumstances references to the hearing bundle (HB) are to the manuscript page numbers on the pdf bundles used by the parties for consistency of reference.

5. The two part bundle contained an unsigned witness statement dated 5 September 2024 of Michael Ashley which had been served on and was understood by the Claimant to be Michael Ashley's statement for the hearing. However, the 176 page pdf contained a different signed statement of Michael Ashley dated 9 October 2024. Respondent's Counsel told the tribunal that the statement dated 9 October 2024 had been served on the claimant by way of service of the 176 page bundle although the inclusion of this statement had not

been highlighted to the claimant when this bundle was sent. Claimant's Counsel was pragmatic and did not contest service of the later statement of Michael Ashley although time necessarily had to be taken to ascertain the differences between the statements served by Michael Ashley in order that Claimant's Counsel could prepare and adapt cross-examination.

6. The 176 page pdf also contained a statement of an Iain Lewis dated 1 October 2024 which had not been served previously to provision of that bundle. Claimant's Counsel was not expecting this witness to be called and was not aware of the statement prior to the hearing nor was the witness referred to in a draft timetable prepared by the parties. Whilst Claimant's Counsel not unreasonably objected to calling Iain Lewis, in the event Mr Lewis was called and it was possible to accommodate this and for Claimant's Counsel to be in a position to address that witness. Mr Hoar's flexibility and pragmatism is noted in this regard.

7. I had an unsigned written statement from the Claimant understood to have been served on or around 20 September 2024. In all the circumstances, the respondent did not object to the form of this statement and flexibility was exercised in this regard. I observe that the claimant was acting as a litigant in person when she served her statement although she did have legal representation earlier in the proceedings. For the respondent, there were signed written statements from Mark Pywell (Regional Sales Director) dated 5 September 2024, Michael Ashley (Claimant's manager) dated 9 October 2024, Filipe Goncalves (Assistant Manager) dated 5 September 2024, Nimesh Patel (King's Lynn Branch Manager) dated 5 September 2024 and Iain Lewis dated 1 October 2024.

8. The claimant also affirmed with an oral statement of truth a document referred to as a remedies statement dated 18 June 2024.

9. I heard evidence from the claimant and the respondent's witnesses.

10. I heard submissions from Mr Hoar on behalf of the claimant and from Mr Burrows on behalf of the respondent. The claimant also provided an opening statement document.

11. At the start of the hearing, the respondent withdrew an application for strike out of the claimant's witness statement on the basis she had served it one week after the initial tribunal deadline.

12. On day one of the hearing, I heard an application for anonymisation from the claimant and gave oral decision and reasons refusing the application. At the end of day one of the hearing, the claimant withdrew her victimisation complaint and accordingly it was dismissed upon withdrawal.

13. On day two and three I heard evidence. The tribunal sat late on both day two and three to accommodate respondent witness availability and in order to hear the evidence.

14. I heard submissions on day four. I started deliberations on the afternoon of day four but there was insufficient time in the timetable to deliver any decision and accordingly, I reserved my decision.

ISSUES FOR DETERMINATION

Preliminary issue – application for an anonymisation order

15. EJ Warren directed that the claimant's application for anonymisation of her identity be considered at the outset of the final hearing.

16. I considered the claimant's written application, respondent's written reply and the oral submissions of the parties and case law they referred me to. I gave oral decision with reasons refusing to make any anonymisation order and it is convenient to record those reasons here.

17. The claimant applied for an order pursuant to rule 49(3)(b) of the Employment Tribunal Procedure Rules 2014 which provides: *"that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record; not applying for hearing to be held in private."*

18. The claimant also applied on the basis of entitlement under section 1 of the Sexual Offences (Amendment) Act 1992 (SOAA) on the basis that the claimant is entitled to such an order to apply for her lifetime having raised two allegations said to qualify being (i) an allegation of sexual assault against a customer of the respondent; and (ii) allegations of sexual harassment by employees of the respondent.

19. Section 11(1)(b) of the Employment Tribunals Act 1996 sets out that procedure rules may include provision: *"for cases involving allegations of sexual misconduct, enabling an Employment Tribunal on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal."*

20. The Claimant relies on an allegation which is set out in the Claimant's written application at paragraph 5 taken from her witness statement: "The matter can be and is put shortly. The Claimant alleges she was subjected to a sexual assault by a customer on 15th June 2023. The allegation is that, on that date: …*I attended an appointment with a single male occupant. Upon arrival the customer tried to grab me by the shoulders and kiss me, making me feel massively uncomfortable. Throughout the initial part of the appointment, the customer repeatedly threw his bank card at me, stating he wanted to sign a contract. The customer also asked at one point for me to expose my breasts, as well as repeatedly asking me out on a date*. (Witness Statement of the Claimant, Hearing Bundle p 145)."

21. The claimant relied on authority including that in **A v X [2019] IRLR 620**, Soole J in the EAT concluded the SOAA 1992 applied where there was no allegation in a criminal context. The respondent relies on the more recent authority of **Ajao v Commerzbank [2024] EAT 11** and that Kerr J concluded in that case that: *"an "allegation" in section 1(1) of the SOAA refers to a formal allegation, which does not need to be made by the victim, [but] made in the context of potential criminal proceedings, where a criminal charge may be brought. It does*

not include, without more, an allegation made in civil, family or tribunal proceedings of conduct that, if committed, would be one of the sexual offences covered by the SOAA. There was no suggestion in that case that the claimant (or anyone else) had ever made a formal allegation against the respondent of a sexual offence committed in the context of the criminal law."

22. Taking account of that recent authority and the circumstances put forwards by the claimant, I have concluded that the claimant is not entitled to the protection of section 1 of the SOAA 1992. There is no evidence, information or indication before me that the claimant has made any form of formal allegation in the criminal law context or raised the allegation other than in the context of these proceedings.

23. I turned to conduct a balancing exercise in order to weigh the competing rights concerned to consider whether any anonymisation order was required to protect the claimant's privacy given her allegations of sexual misconduct and private information.

24. I give full weight to open justice and Article 10 (Freedom of expression) of the European Convention on Human Rights (ECHR); freedom of expression is an inseparable part of the open justice principle. Open justice is a fundamental principle and the general rule is public hearings and decisions; identity /names are not irrelevant matters in this context. Any derogation is exceptional and the burden of establishing any derogation is on the person seeking the derogation and this must be done with clear and cogent evidence and when strictly necessary to secure the proper administration of justice. I was mindful that whether or not to derogate is not an exercise of a discretion on my part but that either grounds exist for the exceptional derogation or they do not. Any derogation must be necessary in the interests of justice.

25. Article 6 (Right to a fair trial) ECHR has relevance as it is the right for everyone to have a fair and public hearing with judgment pronounced publicly i.e. both the appellant and the respondent have that right subject to qualifications as provided for within article 6(1) including where in the interests of morals or protection of private life.

26. The claimant relies on Article 8 (Right to respect for private and family life) ECHR and in particular privacy. The claimant placed emphasis on reference to miscarriages and referred to prejudice in terms of panic attacks arising further to the alleged treatment suffered. There is no requirement for any supporting or corroborative documentary evidence but I noted that there was no medical evidence provided to support this harm or any particular detailed evidence. The claimant indicated that if anonymisation of identity as requested was not ordered, she would proceed with the hearing. In these circumstances, it was not entirely clear what was necessary and in the interests of justice about the anonymisation.

27. I noted that the case law in this area is clearly fact specific as to the particular article 8 factual matrices considered that either have or have not been found to warrant anonymisation of identity or other forms of restriction on publicity but is overall indicative of an approach which underlines the paramount importance of open justice and the limited and exceptional basis on which derogation is permissible. I considered a range of relevant factors.

28. I noted the relevance of the restrictions requested by the claimant and that these were not total in the sense that she did not request that the hearing be held in private but requested that her identity be anonymised in all documents including the decision which will go on the public register; non-parties to be prohibited from inspecting the register.

29. I noted that overall in light of the timing and the consideration of the application at this hearing there was no advance notice to third parties but that rule 49(4) allowed for others such as the press to apply to lift any order where there has been no reasonable opportunity to make representations before any order is made.

30. I considered that the allegations concerned sexual misconduct although I had concluded that the claimant did not have any right to anonymity in all the circumstances. I considered the nature of the allegations and the private information that the claimant sought to protect.

31. I considered the evidence available as to prejudice and whether it was cogent evidence that justice cannot be done without some restriction on publicity. I was not persuaded by the submission in relation to this. I acknowledged sensitive information with regard to miscarriages and that the case concerns allegations of sexual harassment but there was no real evidence of impact and prejudice or stigma around these matters before me other than the oral evidence which was not particularly detailed on these aspects. I am not clear why the claimant's identity remaining thwarts justice being done in her case. Whilst I acknowledge that she was not aware of the range of orders/applications she may make in this regard there is no indication that she was hesitant about raising her allegations through tribunal proceedings until very recently.

32. I considered that any such order was exceptional and that ordinarily embarrassment does not suffice and considered that any discomfort or even a degree of distress as regards ventilating certain matters will not suffice acknowledging that the claimant would prefer to retain privacy over information in particular regarding miscarriages.

33. Balancing what is requested against the open justice principle and giving full regard and weight to that and Article 10 against the Article 8 rights as identified and all the circumstances, I concluded that it is not necessary in the interests of justice to anonymise the claimant's identity and that those private life features relied upon do not outweigh open justice.

Substantive issues for determination

34. The substantive issues for determination are set out in the record of a case management hearing of 5 July 2024 before EJ Graham and were agreed between the parties prior to the hearing. As set out above, the claimant has withdrawn her complaint of victimisation.

35. The claimant brings complaints of constructive dismissal, sexual harassment, harassment related to sex, holiday pay and unauthorised deductions from wages. The respondent maintains that the claimant was self-employed and thus not entitled to bring any of her complaints whereas the claimant contends

that she was an employee and/or worker of the respondent. The issues for determination are as follows:

Employment Status

36. Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

37. Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010?

38. Was the Claimant a worker of the Respondent within the meaning of the section 230 of the Employment Rights Act 1996?

Time Limits

39. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 June 2023 may not have been brought in time.

40. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    40.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    40.2. If not, was there conduct extending over a period?

    40.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    40.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        40.4.1. Why were the complaints not made to the Tribunal in time?

        40.4.2. In any event, is it just and equitable in all the circumstances to extend time?

41. Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

    41.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of payment of wages from which the deduction was made?

    41.2. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

    41.3. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

42. Was the claim for unpaid accrued holiday pay (Regulation 14) made within the time limit in Regulation 30(2) Working Time Regulations 1998?

42.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

42.2. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

42.3. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Constructive dismissal

43. If the claimant was an employee, was she dismissed?

43.1. Did the Respondent do the following things:

43.1.1. In or around June 2023, removing the Claimant from her sale position and asking her to work in the call centre; and

43.1.2. All of the acts of harassment set out below.

43.2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

43.2.1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

43.2.2. Whether it had reasonably and proper cause for doing so.

43.3. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

43.4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Remedy for constructive dismissal

44. If the claimant was an employee, and if she was constructively dismissed, what was the Claimant's notice period? The Claimant agrees that it is one week.

45. Was the Claimant paid for that notice period?

46. If not, what damages is the Claimant entitled to?

Sexual harassment

47. Did the Respondent do the following things:

47.1. Filipe Goncalves (assistant sales and training manager) and other colleagues (including Matty) placed a wager who would sleep with the Claimant first. The Claimant says she was told about this by a colleague named Ian.

47.2. Regular comments about the Claimant's appearance, outfits she wore to work, including from Filipe Goncalves *"It's hard not to look at your arse when your skirt falls in all the right places"* as well as comments about the Claimant's bottom and how well her clothes would show off her figure. These comments were made twice a week on average.

47.3. Filipe Goncalves would often ask the Claimant about her sex life with her boyfriend and would often make crude jokes about the same — these comments were made after she started her engagement with the Respondent and were made several times a month.

47.4. Frequently telling the Claimant to take advantage of being female and actively encouraged her to flaunt herself and flirt with male customers she would visit in order to secure more sales. The comments were made by Filipe Goncalves and Michael Ashley (sale manager) consistently throughout her engagement.

47.5. Informing the Claimant on multiple occasions that the reason for her hire was because she would not intimidate elderly customers like male colleagues would and that she could flirt and seduce male customers in order to gain more sales. The Claimant says that this was said within two to three months of starting her engagement and the comments were made by Ian and Filipe Goncalves.

47.6. On 16 June 2023 the Claimant informed the Respondent of an incident the day before where she had attended a customer's home and he had tried to grab her and kiss her, asked her to expose her breasts and to go on a date with him, and tried to get her to go into the loft. The Claimant says she informed her employer as she was shaken and deeply upset however Filipe Goncalves found it amusing and told the Claimant that she should have exposed her breasts and that he would send her back out to secure more deals. The Claimant says that the comment was made in front of multiple co-workers.

47.7. On 21 June 2023, after being informed that the customer referred to at 47.6 above had cancelled his order, the Respondent required the Claimant to return to his house with Filipe Goncalves to speak to the customer. Following the discussion with the customer, the Claimant was in the car with Filipe Goncalves and he reprimanded her for the cancellation, told her that she was incapable of doing her job, and that she should have slept with the customer if necessary to secure a sale. The Claimant says that this caused her to suffer a panic attack and left her unable to drive home.

48. If so, was that unwanted conduct?

49. Was it of a sexual nature?

50. Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

51. 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.

Harassment related to sex (section 26(1))

52. Did the respondent do the following thing:

    52.1. On 16 March 2023 the Claimant informed the Respondent that she had sadly suffered a miscarriage of twins 9 months prior. The Claimant says that Filipe Goncalves informed her that it was really a blessing as he believed that she did not want children yet and would not have been able to cope, and he likened the miscarriage to when he was unable to see his children for six weeks following a divorce.

53. If so, was that unwanted conduct?

54. Did it relate to sex?

55. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

56. 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.

Remedy for discrimination

57. What financial losses has the discrimination caused the Claimant?

58. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

59. If not, for what period of loss should the Claimant be compensated?

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

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

62. Did the Respondent or the Claimant unreasonably fail to comply with it?

63. If so is it just and equitable to increase or decrease any award payable to the Claimant?

64. By what proportion, up to 25%?

65. Should interest be awarded? How much?

Holiday pay (Working Time Regulations 1998)

66. The Claimant says that worked for 1380 hours during her employment (40 hours per week for 34.5 weeks) and her hourly pay was £29.32 (gross pay of £40,457.97/1380) and as such is entitled to £5,453.03).

67. Did the respondent fail to pay the claimant for annual leave the claimant was entitled to due her employment status and had accrued but not taken when their employment ended?

Unauthorised deductions

68. The Claimant says that she was paid £200 a week and the Respondent failed to pay her for her last 8 days of work or for £1040 commission owed and claims the total amount of £1,360.

    68.1. If the Claimant was an employee/worker of the Respondent, were the wages paid to the Claimant in June 2023 less than the wages they should have been paid?

    68.2. Was any deduction required or authorised by statute?

    68.3. Was any deduction required or authorised by a written term of the contract?

    68.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

    68.5. Did the Claimant agree in writing to the deduction before it was made?

    68.6. How much is the Claimant owed?

FINDINGS

69. I considered all of the evidence before me and I found the following facts on a balance of probabilities. I have recorded the findings of fact that are relevant to the legal issues and so not everything that was referred to by the parties before me is recorded.

Respondent's business

70. The respondent sells home improvement products and services. As set out at paragraph 2 of Filipe Goncalves written statement, 'The type of work the respondent offered was manufacturing and installing new windows and doors as well as repairs to rooves and guttering (including general maintenance).

71. The respondent conducts its business by telephone canvassers cold calling people about potential home improvements and generating appointments or 'leads'. The respondent uses sales or field representatives ("reps") to attend appointments with a view to securing sales of the respondent's services and products.

72. At paragraph 4 of Filipe Goncalves written statement he explains that, 'Both the canvassers and the reps are heavily involved in "sales" and there are a number of requirements the operatives have to be aware of, to ensure they comply with the regulations as much as they need to build morale as their roles can be challenging at times when dealing with members of the public. It is critical the operatives know how the business operates, what the products are, how they will be installed, what the benefits are and overall be comfortable in what they are selling.'

Contract

73. The parties do not dispute that the claimant was a rep from 1 September 2022 to 30 June 2023 or that there was a contract in place between them. There was no written contract in evidence before me and as such there are no written contractual terms to consider.

Role and payment

74. The respondent's position is that reps are self-employed and are neither employees nor workers of the respondent. The respondent's grounds of resistance set out that the claimant did not have a contract of employment as she was not employed and she had autonomy as to when she worked and was not required to work exclusively for the respondent and was 'required to provide invoices in the form of a "percentage" of the commission earned from a sale. The invoices were paid in advance of the Respondent receiving payment from the customer.'

75. The claimant does not dispute that the intention at the outset was that she was to be engaged on a self-employed basis. In oral evidence, it was put to the claimant that at interview she was keen to join on a self-employed basis and that this was because she would have flexibility to work her own hours and she said, 'yes'. The claimant submits however that the reality of the relationship was that she was an employee.

76. There is no dispute that the claimant's role as a rep was to attend appointments and to sell the respondent's services and products to customers. The claimant does not dispute that she was paid on a commission basis and her evidence is that she was paid commission and received gross weekly amounts by BACS and that she never received any payslips. There was no documentary evidence before me of any commission claimed or received such as copy invoices, bank statements or such like.

77. Michael Ashley gave evidence that commission was paid on completion of the contract but that if there was any issue with the contract there was provision for clawback of commission advanced. He also said that new starters were paid £200 per week and the respondent took 50% of any commission until payment changed to a full commission basis. Michael Ashley said the switch to full commission was a choice made between management and the individual. The Claimant does not dispute this and refers to the initial 'safety blanket' wage in her written statement at paragraph 6 and that her recollection was that she moved to a full commission basis 'roughly 6 weeks after starting my role'. Michael Ashley explained that the respondent had to make sure the reps had learnt about the products before seeing the customers. The respondent had

multiple products and reps would start with learning the specs of the core products which were windows and doors.

78. The claimant's remedies statement sets out that the average gross monthly amount she received was £4,495.33 based on applying a divisor of 6 to the total amount she earnt for the final 6 months of the engagement and the period 1 January 2023 to 1 July 2023. The respondent did not challenge this amount or suggest it was not representative of the claimant's average gross monthly pay for this period. I find that for the first 6 weeks of the claimant's engagement, she earnt less given she was paid £200 a week with the respondent taking 50% of commission earnt.

79. Whilst the grounds of resistance refer to invoices, Mark Pywell explained in oral evidence that reps completed a commission form providing details of what had been sold and prices which correlated to the scale of commission which could be earnt between 1% and 17.5%. The form would then be handed in with the customer contract and signed off by him sitting in head office. He also said that it was possible for another rep to complete a form on someone's behalf but this was rare, as it was difficult to work out the commission, although there was no rule against this.

80. On the basis of the evidence given therefore, I find that the claimant was paid on a commission only basis rather than being paid for her time when on leads or otherwise. The claimant received commission by submitting the respondent's commission forms rather than, for example, invoices she generated. I further find that the claimant's earnings were subject to not only having leads but securing completed sales of the respondent's products and services off those leads. If a customer cancelled a contract, the grounds of resistance refer to the cancellation period as 14 days, commission was clawed back from reps.

81. I note that there is no dispute that the claimant was responsible for her own tax and I find that she was not paid in the manner an employee would expect to be paid namely via PAYE with the employer taking responsibility for payment of tax and national insurance. There was no real evidence available to me as to the claimant's status for tax purposes which whilst not determinative may be probative of status for employment law purposes. During submissions, the respondent made reference to the Glaziers Association and that HMRC considered most reps were self-employed for tax purposes but there was no documentary evidence before me regarding this.

Personal service and right to substitute

82. Paragraph 12 of the respondent's grounds of resistance sets out that the claimant was 'given availability of appointments so that she could attend when the customer has said they are available. If the Claimant did not want to go to an appointment she was not told to go to an appointment and the Claimant had autonomy to choose when she worked or not. Provided the representative had suitable training and was capable of completing effective work, the Claimant did not have to attend the appointments herself, she could allocate or nominate someone else.' Further that if the Claimant was not able to attend appointments, there were 'no implications or performance reviews.'

83. The respondent therefore submits that the claimant could substitute someone else to attend appointments. The respondent submits the claimant did not have to attend appointments herself such that she could substitute someone else whether she was unable or unwilling to attend any appointments provided that person was qualified and that this is inconsistent with personal performance or service.

84. There was no documentary or oral evidence explaining any particular procedures of the respondent as to how it might be demonstrated a person was qualified. The respondent's witnesses gave evidence about initial training to ensure reps understood the respondent's products before they went 'full commission' and that it was 'critical' reps knew how the business operated and the products. Given the reference to a safety blanket wage and the claimant's evidence that she went full commission after approximately 6 weeks, I find that it would take several weeks before a person was considered suitably trained to go out on leads.

85. Michael Ashley gave evidence that if the claimant was available there was a duty to give her appointments and the claimant had a duty to attend those appointments. When he was asked whether the claimant could send a friend to an appointment in her place, he said, 'if Molly wanted a friend to learn absolutely'. Michael Ashley gave evidence that he had never had a situation with the claimant where she didn't go to an appointment either because she was unable or unwilling.

86. I find that if the claimant accepted an appointment, she did not have any unfettered right to substitute another person to go that appointment in her place. Considering the evidence available, I find that any substitution by the claimant could only be of a person who was qualified on the basis that they had done sufficient learning or training with the respondent to know their products. I find that once the claimant accepted a lead and therefore to attend an appointment with a customer, she was to personally do the work.

Hours of work and control

87. The claimant contends that she was not free to work her own hours as she initially understood and that she was expected to be in the office at 9am every morning to undertake training unless allocated leads. Her written statement refers, 'I understood, within my role, that we were to arrive at the office for 9am, as evidenced in MC1, and were scheduled to work until 5pm, although we could be assigned a lead at any time during the day, the latest lead we typically sat was booked for 5pm. I was told I was to be in the office every morning for 9am, unless I was instructed to work from home, as evidenced in MC2'.

88. The respondent's position is that training or attendance at the office was not mandatory. Mark Pywell refers, in his written statement, to the respondent as 'simply a resource for them for leads' and Michael Ashley sets out at paragraph 2 of his written statement that, 'The office is a centre for them to work in and is seen as an attractive proposition for them so that they have the resources and support to achieve sales.' Filipe Goncalves written statement sets out at paragraph 7 that, 'A typical day would involve me running my training session for reps who wanted to join. I would start the day at a set time of 9am and conclude after about two hours. This was designed like that so that it did not

impact on the reps self-employed status where they would be geared up each day with appointments to attend customers homes and sell home improvements.'

89. I find there was training every day at 9am. In oral evidence the claimant agreed it was fair to describe the purpose of the training as to assist learning, raise morale and build reps up for the rest of the day. She agreed that the training was to benefit reps and said she, 'believed if attended training would sell a higher percentage of leads'. When it was put to the claimant that the training was not compulsory, she said this was not true as they were reprimanded if they did not attend training and also that they would be the last to receive leads for the day.

90. The grounds of resistance set out that 'appointments are handed to any self-employed representative who is available to complete the work at the time which has been scheduled; the representative is entitled to grow their own business as a result of the appointments they have taken, by returning with sales from customers. The representative…is entitled to grow a bank of customers as she wishes.'

91. Michael Ashley's evidence was that there was flexibility around whether or not reps attended the office in Kings Lynn. He explained that if an appointment was close to where a rep lived there would be no sense in them coming into the office or returning there afterwards especially when people might live up to an hour away. He said that the market was competitive and sometimes people sought multiple quotes and might expect a rep the same day or soon afterwards and appointments would be allocated to reps with open diaries. He also said that existing customers might have a relationship with a particular rep and ask for that rep to attend.

92. I find that being visible and attending training may well improve chances of being allocated leads when available and enhance the person's knowledge and skills; the claimant acknowledged this in evidence. I also find that leads close to a person's residence were likely to be allocated to them and this introduced flexibility in that reps might indicate availability but could be at home waiting for leads.

93. The claimant said she could only be at home when permitted and was told to be in the office every day for 9am. The claimant also refers to having to ask permission to take a break or go for lunch. The claimant also refers to having to ask permission for holiday and that she was not always able to attend regular chiropractor appointments as she was refused time off work. In support of this the claimant relies on documentary evidence as referenced at paragraphs 9 and 10 of her written statement. For reasons related to my findings above as to how the business was carried out and the coherence of the respondent's evidence in that regard, I do not accept there was a requirement to be in the office starting from 9am and throughout the day although acknowledge the office was there as a base and consider it more likely than not that it was broadly at the centre of the area covered by the respondent. I find that reps could base themselves at the office to be readier to attend a wider geographical spread of leads with ease than if they remained at home. In addition, the documentary evidence relied on by the claimant does not reliably support her contentions.

94. A screenshot of iMessage with a colleague, Dawid, labelled MC1 is highlighted to show a message sent by the claimant on 28 November 2022 – two months after the claimant started - which sets out, 'Don't be late tomorrow, talked with Mike he said he will be in early tomorrow, he told me not to be in later than 9, don't know sounded like he will check when people are coming in, I think not 100% sure'. This message is also at HB100 where the claimant continues 'Like why would he say that you know' and Dawid's reply 'Okay mate no worries. Thanks for the heads up.' MC2 is a screenshot of a message on 20 November 2022 from 'Micheal Ashely EAHI' highlighting 'Work from home tomorrow morning please as I'm in a bit later will get you out from there.' MC3 shows messages with Dawid from 26 June 2023 towards the end of the relationship and highlights the claimant asking Dawid, 'If you get a Starbucks will you get me one please', then a reply 'Ask the boss kid' with two laughing face emojis and then later the message 'Can't go get a drink' to which the claimant asks 'why' with two laughing face emojis and Dawid replies 'We going over everything'. There are other messages which were referred to during the hearing concerning food for lunch.

95. This evidence does not clearly support the contentions either that the claimant was required to be in the office at 9am and could only be at home when permitted or that she had to ask permission to leave the office to get food or take a break. MC1 is not independent documentary evidence and is the claimant's own report of a conversation with Michael Ashley. The conversation took place reasonably soon after the claimant started. Michael Ashley gave evidence that he did not recall this conversation. I acknowledge it gives the superficial impression that Michael Ashley was exercising a degree of control and supervision by checking when people were attending the office although equally, as the sales manager, he may have wanted awareness of who was attending training and building knowledge. I note this was close in time to the start of the claimant's engagement with the respondent and I have no clear date as to when the claimant was considered sufficiently knowledgeable to go 'full commission' started. The messages also indicate that attendance at 9am was either not taken particularly seriously or obligatory given the claimant was suggesting Dawid should get in to the office for 9am the following day because of her understanding that the sales manager would be there that day. If there was a clear requirement to attend at 9am, it is unclear why the claimant would question the reason for the sales manager communicating that she should be in for 9am. There is no dispute that training was available at that time and as set out above visibility was likely to result in leads.

96. MC2 is a message again sent reasonably soon after the claimant started and is not evidence of the claimant having to seek permission to work at home but presents as Michael Ashley referring to getting the claimant out on a lead from where she lived so suggesting she stay at home that morning rather than travel to Kings Lynn which is further consistent with his oral evidence.

97. In cross-examination, Michael Ashley agreed the last appointment was typically at 5pm and was taken to HB 128 (also MC2) and asked whether the claimant's message, 'I have an appointment tonight at 6:30 just to let you know, so if it possible to be done by then that would be amazing!:) dated 18 November 2022 indicated that the claimant needed approval to finish by 6.30. Michael Ashley referred to this as a 'courtesy' on the claimant's side and that where the

claimant's diary was open for the day, they would proactively try and supply appointments or opportunities for her on that day.

98. Michael Ashley was referred to a message from the claimant on 3 April 2023 noting that she had been on a waiting list with a chiropractor for 6 months and had just been told she could be fitted in the next day or the day after and 'I haven't booked anything yet as obviously wanted to check with you, I know Fil is obviously off and it's just me and laine. And I wanted to see if there was a day that would work better for you.' Michael Ashley's reply is, 'No problem I'm off today I'll speak to nim should be fine Graeme and karter are both working as well'. Shortly after the claimant replies, 'I've rearranged.' It was put in cross-examination that Michael Ashley did not reply to the effect of 'of course you are a free agent' but rather that he would need to check with 'nim'. Michael Ashley said that he had not been working that day and that if the claimant was available, it would be Nim who allocated any appointments so it would have been wrong to reply no problem.

99. It was put to Michael Ashley again that the claimant had to ask if she could go to a 7pm appointment and he agreed that was the case if the claimant had made themselves available and referred to this being more about her diary. He was referred to another 'no problem' reply in response to the claimant asking to book holiday 3 weeks in advance and it was put to him that this suggested approval was required as this wasn't on the day or likely to interfere with existing appointments. Michael Ashley gave evidence that whilst not impossible it was highly unlikely a fresh customer appointment would have been booked into the claimant's diary that far in advance although not impossible there could have been an appointment with an existing customer. Michael Ashley maintained that leave didn't need to be approved and he interpreted the messages as the claimant trying to be respectful around ensuring the respondent was aware of her availability.

100. I note that there was no documentary evidence before me of the appointment booking system or the claimant's 'diary' or as to any procedure for notifying availability or non-availability to attend appointments. The lack of any formal process means that the claimant's messages can arguably be interpreted either way. The claimant contends they demonstrate notification and request for permission or approval around either holidays or other time off. Michael Ashley's evidence was to the effect that the messages demonstrate more courtesy and common sense around whether the claimant might have a lead and as such prefer to book her personal appointment so as to preserve that lead and/or to be accommodating to the business on an understanding that only a certain number of reps were available and to set leave dates at a mutually convenient time or simply to indicate when she would not be available.

101. MC4 is a screenshot of messages between the claimant and Filipe Goncalves or 'Fill' on 28 November 2022 highlighting a request from the claimant, 'can I book some dates off please?' Fill's reply is '6th early finish is fine 9th 12th & 13th okay But on the 8th someone is already off so can't do that one'. Fill's refusal to accommodate the claimant being unavailable on a date 10 days after the request is problematic. Absent any other contextual information such as the claimant referring to dates where she has appointments booked in, it is difficult to construe Fill's reply as other than exercising a degree of control requiring the claimant to be available on that date. In cross-examination, Filipe

Goncalves was asked whether it was right that the claimant had to request holidays and his evidence was that they had to 'notify them' so they were 'aware which reps were available for appointments'. It was put to Filipe Goncalves that the refusal of the 8th December showed he was able to decline requests for holiday. Filipe Goncalves said that this was the 'agreement we always had if the reps numbers were low to keep as many available and working as possible'. In this context, 'can't do' could be read as consistent with a practice to keep sufficient reps available and a colloquial or informal indication in a conversation around availability and that from his side, the claimant indicating she was not available on that date didn't work for him. There was no real exploration with Filipe Goncalves as to what might have transpired if the claimant had insisted or notified that she was not available on 8th.

102. I find the evidence overall is consistent with the parties managing mutual availability and accommodating each other. The lack of formality works both ways and it is not evident that the claimant had less bargaining power in this arrangement. There was insufficient evidence available to demonstrate to the balance of probabilities that the claimant was subject to the degree of control that she had to request permission which could be withheld as to her availability.

103. The claimant relies on MC5 as demonstrating that she was refused time off work to attend chiropractor appointments which she had to attend regularly and was subject to cancellation fees. I note the message referred to above dated April 2023 refers to the claimant having been on a waiting list for the 6 months prior. The claimant says she has a slipped disc in her back. MC5 is a screenshot of an exchange of messages on 19 June 2023. The claimant is messaged, 'Just checking you'd still like the 9am appointment on Wednesday 21st?' The claimant has highlighted her reply 'Morning. I'm so sorry but I'm really struggling to get any time off work at the moment as we are really understaffed. I won't be able to make the appointment.' The reply is 'Never any problem.' This exchange of messages does not demonstrate the claimant having been refused time off to attend the appointment referred to and nor does it demonstrate the claimant was charged any cancellation fee for not attending. I note that there was no other contextual documentary evidence available to me – such as medical evidence - as to the necessity or frequency of these chiropractor appointments.

104. There was no documentary evidence supporting the suggestion that salespersons had to ask for permission to go to lunch or take a break. There was no written evidence before me at all to suggest any formality around work hours or breaks or times to take lunch. An exchange of messages between colleagues about picking up a coffee if one was going out or a proposal to go out or order food from a particular place does not reliably demonstrate to the relevant standard that permission was required to take lunch or a break. Dawid's message that he was going through something and as such he can't go to get a drink does not evidence that he had been refused permission or was required to ask. In my view, the brief message suggests he was occupied and was not going out and nothing more. It is not clear who 'boss kid' is supposed to be and that the messages were accompanied by many emojis does not indicate any real deference to hierarchy or frustration around this.

105. Based on the available evidence, I find that the claimant was not required to ask permission either to take breaks or to order or go out for lunch. I accept that attendance at training and visibility and presence in the King's Lynn office would likely result in allocation of leads particularly in relation to accessibility from that base. However, I find that the claimant had autonomy around when she indicated she was available to attend leads. I further find that the claimant had flexibility as to whether she attended the King's Lynn office and when she did so.

Working for others

106. In cross-examination it was put to the claimant that she could make her own leads and she said that she was not aware and 'we never did that'. It was put to her that no-one stopped her and she said, 'no-one made us aware that was a possibility'. The respondent refers to building a customer base. A lead or even customers requesting a particular rep from the respondent is different from a person working for a competitor or having their own 'client book'.

107. The claimant did not work for anyone else. The respondent submitted that there was no restriction on reps working for more than one company and reps could work for anyone. The respondent submitted that a lead might want products that the respondent did not make or provide. Michael Ashley was cross-examined about this and said that in doing door to door sales, a person might work for or have a relationship with another company that supplied a product the respondent did not supply or when the customer was outside an area covered by the respondent's office. He referred to the fact that the respondent did not do appointments on weekends or bank holidays and that the respondent would have no right to tell a rep they can't attend any such appointment.

108. However, Michael Ashley was not able to give any examples from his experience with the respondent of reps selling products for others or indicating in advance of engagement that they sold for other companies. However, Michael Ashley did not accept that the reality was that reps could only work for the respondent. He said, 'how answer that. I understand what you are saying in reality if someone wanted to work or cover appointments for another company. I personally never told the claimant she was not allowed to do that.' He did say that it would be unacceptable if the customer lead and data came from the respondent for a rep to agree with that customer a cheaper order for another company.

109. During the hearing, a 'new starter form' was provided. In oral evidence, the claimant referred to signing a document when she started. Michael Ashley gave evidence about a 'new starter form'. The respondent provided a copy during the hearing; the copy provided is not signed by the claimant but presents as completed by the claimant. I consider it is more likely than not that the purpose of this form was to obtain sufficient personal information to enable the respondent to make payments to the claimant. The respondent submitted that was the purpose of the form and the failure to provide it earlier was omission rather than deliberate.

110. The form contains personal information such as name, address and bank details of the claimant. Against 'Employment Start date dd/mm/yyyy' a date of

30 August 2022 is given. The form gives three options to choose from and the claimant has circled the option which informs that 'this is now their only job' rather than the option that 'they have another job' or 'this is their first job since last 6 April'. The claimant submitted that the references to 'employment' and 'job' provided support for the claimant's contention that she was an employee. The reference to employment is somewhat incongruous in a context where the respondent maintains that it has no employees and only has persons who are self-employed but I consider the language is not intended to connote any legal meaning in light of what I find to be the primary purpose of the form.

111. I find the options on the form relating to tax and benefits somewhat more incongruous given the respondent had no responsibility for tax. The respondent also submits that the claimant could work for others on the basis that this is an obvious feature of self-employment. The respondent therefore does not require information about whether a person has or has had other jobs or whether their only job is with the respondent.

112. There is no real evidence available to me that the claimant was either told she could not work for others or that she could. Whilst there was oral evidence suggesting that reps could work for others including competitors, this was a feature that only came out in any detail in oral evidence in circumstances where the evidence was also that on the ground there was no awareness that this was being done by anyone. There is no basis in the evidence available to me to find that this was an express term of the contract. It is also not an inevitable feature of all self-employed arrangements that a person works or is able to work for more than one other.

113. There is also a difference between an ability to work for others and working in a way that introduces conflict and competition between multiple clients. Michael Ashley's evidence was clear on this in that use of the respondent's data to generate sales for others would be unacceptable. The claimant submitted that the suggestion in evidence that the reps could use their sales skills to generate sales for competitors was incredible unless this was outside the area or region covered by the respondent. I take account of the lack of evidence of reps working for others coupled with the lack of any real documentary evidence to suggest this was customary in the sector. I cannot find that there was any implied term of the claimant's contract that she could freely work for others and competitors in the sector/region. I also find that when the claimant accepted a lead, the expectation was that she would use her skill to secure a sale for the respondent and the respondent would not countenance sales by the rep of other company's products or services during that appointment.

Kings' Lynn Office

114. There is no dispute that most of the reps were men and that during most of the claimant's engagement with the respondent she was the only female rep. The claimant refers to the environment as competitive. A competitive environment is not confined to a workplace dominated by men and a competitive environment in a workplace where the aim is to secure sales is not inherently a workplace where harassment occurs and as such I do not consider it problematic per se.

115. The claimant also refers to the environment as characterised by 'locker room chat', a phrase that is referred to in the Oxford English dictionary as derived from the US and connoting attitudes or behaviour associated with or considered typical of a men's locker room (changing room) especially being vulgar or coarse where men are not amongst women. Whilst this type of language may well be offensive, it does not follow that it will always amount to harassment even if I find it more likely than not that any such environment is not conducive to a professional working environment or inclusive of women. This description of the workplace is not accepted by the respondent.

116. The claimant contends that she was subject to sexual harassment throughout her engagement by Filipe Goncalves but also raises allegations of sexual harassment against Michael Ashley and Iain Lewis together with an allegation of harassment related to sex against Filipe Goncalves. As such the claimant contends there was a course of conduct and all her allegations are therefore made in time.

117. The respondent's case is that the claimant has made up her account and it was significant that allegations were raised when the claimant left and that there was no reason not to have drawn the respondent's attention to the behaviours she was experiencing earlier.

118. In her particulars of claim, the claimant sets out that on 20 June 2023, 'I had contacted my regional manager, Mark Pywell, for guidance due to the treatment I was experiencing, and also quite frankly because I was at breaking point. Upon discovering I had done this, Filipe told me if I ever contacted Mark again I would be fired immediately. I again was being threatened with dismissal for raising my concerns about the treatment I had received.' Although the paragraph immediately prior refers to the claimant having been threatened with dismissal if she ever told telephone canvassers she had attended an appointment for more than two hours, the preceding paragraphs refer to finding it difficult to challenge 'these behaviours' after a bullet point list of the claimant's allegations of harassment. I find it is a fair reading of the claim form that the claimant is setting out that she called Mark Pywell to discuss the conduct she alleges was harassment and thus contending that she had raised these matters with the respondent before leaving.

119. Paragraph 8 of Mark Pywell's statement sets out 'I had no contact with Mollie during her time as a representative, save for one phone call.' In oral evidence, he said that he had other contact with her in person when visiting from the head office but only one phone call which was the meaning of what he had set out in his statement. The only reason he had referred in his statement to the claimant falsifying commissions was because he understood he was required to address a particular call had with the claimant due to her claim. Paragraph 8 continues 'I was made aware of Mollie through Michael Ashley…spoke to me as he was concerned that Mollie had falsified commissions.' In cross-examination, Mark Pywell was asked if he was aware that this was a form completed on Molly's behalf. He acknowledged that he was aware of this but when asked why he had not mentioned this in his witness statement, he said that the reference was just to explain the reason the claimant had called him and that was the one time she had called him. At paragraph 13, Mark Pywell sets out that there was no discussion about anything to do with the working environment.

120. The claimant acknowledged under cross-examination and indeed a document setting out her recall of the call does not suggest otherwise that the call had not related to the harassment allegations she raises. The claimant says her call was related to her understanding that the respondent wanted her gone in a context where she says she was having meetings with Michael Ashley and Filipe Goncalves about her performance. The claimant accepts that during her last three months she wasn't making sales and as such her commission was down. Accordingly, the evidence at the hearing was inconsistent with the information in the particulars of claim. Whilst Mark Pywell's statement suggests he only had one interaction with the claimant and suggests she had falsified commissions, I consider he gave a reasonable explanation about this aspect of his written statement.

121. Given that Mark Pywell accepts he had a call with the claimant, it is odd that Nimesh Patel sets out in his written statement at paragraph 7 that 'I know that she has never spoken to Mark Pywell either.' It was put to him that he could not know that unless he had spoken to either the claimant or Mark Pywell about this as otherwise, he would not have that knowledge and as such it was assumption. Nimesh Patel did eventually acknowledge this in oral evidence but maintained that Mark Pywell would have called him if anyone had spoken to him. I consider the only possible explanation for this evidence is that Nimesh Patel understood that he was being asked about a call with Mark Pywell about allegations of harassment which he reasonably anticipated Mark Pywell would bring to his attention.

122. I find that the claimant did not speak to Mark Pywell about the treatment she was experiencing which she alleges was harassment and that it was not raised during her employment.

123. The respondent submits that Nimesh Patel's statement is characterised by the tendency to raise argument than set out facts known to him. For example, Nimesh Patel suggests that if the claimant's allegations about Filipe Goncalves and Michael Ashley were genuine, she would have raised a grievance or spoken with either him or Mark Pywell. The statement sets out at paragraph 4 that if the claimant had singled out Filipe Goncalves, Nimesh Patel would 'need to comment purely on Filipe standards and my knowledge on him'. The statement continues to refer to the claimant having made wider allegations against Michael Ashley and the branch before making points about the claimant not providing examples and that it is untrue there is a systemic cultural problem. The statement ends with the rhetorical question, 'Surely if this was the type of office I ran, I would have other complainants?'

124. There is therefore some merit in the claimant's submission that the respondent's witness statements are characterised by a tendency to argue rather than state facts and to include matters undermining the claimant such as the reference to falsifying commissions without also setting out awareness that she had not personally done so as the form had been completed by another rep. I note that if Nimesh Patel ran a deeply misogynistic office, women may well not feel willing to come forward to raise complaint about that with him and as such the absence of prior complaint does not provide a complete answer to whether or not the claimant's allegations are genuine. Nimesh Patel was asked why he had not commented on Filipe's standards but did not give any real

explanation about that and he does not provide any evidence therefore about Filipe's character. Whilst he was not always present in the office, it is difficult to reconcile Nimesh Patel's evidence that he never observed any problematic behaviours at all with the claimant's allegations of repeated inappropriate comments about her attire and other matters. It is possible he simply did not observe any or was not particularly observant.

125. Mark Pywell was also questioned about paragraph 3 of his written statement as he set out that, that 'there has never been a single other issue regarding quality of work, working conditions or unprofessional behaviours or cultures'. Mark Pywell gave oral evidence that an issue that arose with commission forms was people 'fiddling the figures' but he was resistant to accepting that this surely represented unprofessional conduct. Although I appreciate that as a senior manager who worked at head office, Mark Pywell was not routinely present where the claimant was based, I found Mark Pywell's resistance in evidence to acknowledging any type of difficulty in the workplace of concern. It was not clear to me why, when directly confronted with the idea that 'fiddling the figures' (his words) was surely unprofessional, he could not simply acknowledge this to be the case.

126. I note that the respondent raised with the claimant in cross-examination that she had an attitude problem and this of itself is a workplace behaviour issue.

127. When the claimant was asked if she had an attitude problem, she initially said she didn't understand. It was put to the claimant that she had an aggressive attitude and was obstructive and difficult to communicate with. The claimant replied, 'are you asking if I was aggressive or difficult' and when she was told yes, the claimant said 'no'. The claimant said that she was certainly not aggressive as a 20 or 21 year old to middle aged men and found it comical she would be asked that but she would stand her ground and make her point.

128. The claimant was referred to a voice message from March 2023 referring 'not fucking talk over me' (HB 106) and said speech at work would be very different from when talking freely with family and friends. In an exchange of messages with Dawid dated 12 April 2023 (HB 98), the claimant writes 'The reason I got 2 leads last week was for attitude problems in February' accompanied by four laughing face emojis. Dawid reply includes 'Well at least it all out and you can go back to doing your job' and the claimant replies 'Well I just went out and sold so he can suck that attitude problem' accompanied by more laughing face emojis. When Dawid asks about February, the claimant replies, 'Fuck knows mate.'

129. I find the impression given by some of the messages does indicate that the claimant's tone and language use could have been construed as aggressive if she expressed herself similarly in the office. In principle I accept that persons may use different registers in professional and personal contexts but that is different from finding certain expressions and word choices typical or commonly used by everyone outside a workplace. Having considered the content, I reasonably infer that the claimant had been made aware of a perceived attitude problem and did not take that seriously.

130. The claimant says she found it difficult to challenge the behaviours she alleges she experienced and I have reflected on this given the context in which

she maintains she could stand her ground. I fully acknowledge that there are types of behaviour such as sexual harassment which any person may find difficult to raise however assertive they may typically be. However, it remains the case that the claimant did not formally or informally raise these behaviours during her engagement with the respondent.

131. Mark Pywell gave oral evidence that there were no written or other policies of the respondent addressing discrimination or grievances and managers were not trained on discrimination. He said that everyone who worked with the respondent was self-employed. His evidence was that if anyone had a grievance they could go to managers, himself or the owners. The only policy referred to was one related to the old and vulnerable; this was asked for by the Glass and Glazing Federation. Mark Pywell stated in oral evidence that, 'after this incident all managers have to sign a policy to make them aware what they can and cannot say.' Asked whether this had therefore been a learning experience, Mark Pywell said, 'no not a learning experience, if someone makes things up to make sure we are covered'.

132. Mark Pywell gave evidence that he had previously had training about investigating grievances from a HR department in a different company in about 2014. Mark Pywell refers to investigating and that 'I have found no evidence to support the claims against Filipe Goncalves' at paragraph 11 of his statement although no details of the steps taken are set out. Mark Pywell was asked about investigation given his evidence was that he had not spoken to the claimant about matters related to the allegations of harassment. The claimant did not personally raise any grievance whilst working with the respondent about the behaviours the subject of her allegations.

133. The claimant submits that paragraph 11 provides another example of setting out argument rather than fact as it reads, 'this suggestion that a woman is told to flaunt herself to get customers is so peculiar, not only do I find it crude, but I would say it is said with a youthful inexperience of what a person would expect to see in a workplace if they were harassed, victimised or discriminated against.' The statement is oddly phrased in that it dismisses the idea that telling a woman to flaunt herself to get customers could be unwanted conduct related to sex or of a sexual nature. Mark Pywell does not give detail of what he would expect to see in a workplace if there was harassment or discrimination. Mark Pywell did not accept in evidence that he had not approached matters with an open mind and was pre-disposed to find against the claimant or that by not speaking with the claimant he had not conducted a full investigation. To the extent Mark Pywell looked into the allegations raised, I do not consider that he conducted any formal investigation and there is certainly no record of any process followed, persons interviewed or investigation report.

134. I find that both Mark Pywell and Nimesh Patel have limited experience of addressing and dealing with allegations of discrimination. I accept that they may not have faced any tribunal claims previously. However, whilst they may personally have not observed any problematic behaviours including in particular by Filipe Goncalves, I considered that the evidence that there were no difficulties or problems ever arising in a workplace with a changing population of reps coming and going whether as regards inappropriate comments or any other type of problem was implausible and gave the impression of complacency.

Comments

135. The claimant contends that she was subject to sexual harassment from the start and throughout her engagement with the respondent in the form of comments about her appearance twice a week on average (allegation 2), crude jokes about her sex life several times a month (allegation 3) and consistently encouraged to use her sex to make sales (allegations 4 and 5).

136. At paragraph 16 of her written statement, the claimant refers to being subjected to multiple and frequent comments from Filipe Goncalves about how she looked or what she was wearing and how it would show off her physique referring to exhibit MC17 and that 'Fill even went as far as to say, on one occasion "It's hard to not look at your arse when your skirt falls in all the right places." The claimant continues that these comments were 'often made in front of the entire office'. There is no evidence other than the claimant's oral evidence that she was subjected to these types of comments and with the frequency she alleges. The claimant only provides one concrete example of a comment she alleges was made to her and gives no information about the date on which this alleged comment was made. The claimant does not suggest it was made more recently as a reason it is the one comment she recalls. There is only one written reference of relevance which is a message from February 2023 in which comment being made about short skirts is referenced (MC17) although Dawid's reply is that he didn't notice this.

137. I note that many reps were attending training on a regular basis and the claimant has not produced any witnesses supporting her account that there were frequent comments of the type she alleges. I also note that reps were free to come and go from the office which was a base for them and refer to my findings above that they were not required to remain there.

138. When the claimant was asked if the one comment she had cited was, given she had stated 'went as far as', the worst or most extreme comment she had been subjected to, she did not accept this and said in relation to that comment, 'I guess this stuck out to me', although there are no other comments detailed or referred to that have stuck with the claimant and her references are in general and unspecified terms to comments about her attire. On the one hand, it might be considered inappropriate to comment about a person's attire at all although on the other hand comments about appropriate dress in a sales context could well be reasonable within a training context and to ensure a good impression of the respondent was presented through the reps to potential customers.

139. Given that the claimant relies on extensive messages with Dawid during her time with the respondent, it is odd that there is only one reference to Filipe Goncalves having referred to 'short skirts' in February 2023 (HB95) which Dawid had not noticed and very little and indeed virtually no reference to any other problematic behaviours as they allegedly occurred such as the stated crude jokes of which no real examples are provided.

140. The claimant accepted in evidence that the text messages and transcripts of voicemails presented were not complete but I consider the claimant must be taken to have produced those communications she has that she considers

support her case. The respondent says the transcripts are unverified. I note that the transcripts provided by the claimant and stated to be of her voice messages do not always present the claimant in a good light such as the inclusion of frequent swear words. The claimant submitted that the only point raised against the claimant was that she had given oral evidence that she never lied but been taken to a transcript of one of her own voicemails in which she referred to lying to Michael Ashley. The claimant submitted that a clear explanation had been given in oral evidence about this in that she might lie about menial things but never to a Judge or when it was serious.

141. The claimant's oral evidence that such lies are not problematic nonetheless indicates willingness to be proactively dishonest about matters which she subjectively considered were not of importance although I fully acknowledge that lying about certain potentially peripheral matters does not demonstrate that a person is not telling the truth about other matters. In circumstances where the claimant has produced a reasonable volume of messages sent during her employment demonstrating her willingness to communicate very informally and frankly with Dawid, I do consider it relevant and of significance that this evidence contains very limited indications of any contemporaneous complaint or reference to unwelcome comments or unwanted conduct when she says she received this throughout the engagement on a regular basis.

142. Given the lack of detail and that the allegations are general and unspecific although comments are said to have been received very frequently, it is difficult to assess the nature of any such comments particularly against the benchmark of the one alleged comment which stuck out to the claimant. The claimant identifies this comment being 'as far as' indicative of that comment standing out to her and being of the most extreme on her appearance. I accept that the claimant received this comment and found it unwelcome although there is no real evidence as to when this particular comment was made. For reasons referred to below consider it could not have been prior to December 2022. Given the claimant has been able to date other incidents including clarifying an alleged incident of harassment occurred in March 2023 rather than June 2023 and is clear that the wager comment being the other comment that stuck in her mind was in December 2022, I consider it more likely than not that this undated comment about her appearance occurred earlier in her engagement.

143. However, I considered that there was insufficient evidence of real detail to find that the claimant was subjected to frequent comments always and entirely of this nature during the entirety of her engagement with the respondent. I find it particularly significant that the claimant has not been able to detail comments made more recently and towards the end of her engagement even if she cannot recall everything that was said to her including comments she alleges were made in the early stages of her engagement which was approximately a year prior to the presentation of her claim.

144. I also take account of the feature which I refer to in more detail below that the claimant continued to ask Filipe Goncalves to accompany her on watches throughout her engagement with the respondent which is very difficult to reconcile with the allegations of sustained unwanted conduct of a sexual nature by him against her. I concluded that the conduct had not occurred as alleged in terms of the frequency alleged. In particular given the evidence in relation to the wager addressed below cannot find it was occurring prior to December

2022 as unwanted conduct. Therefore, I also find that the evidence does not demonstrate to the required standard that this formed part of conduct extending so as to fall in time.

Using sex to make sales

145. The claimant alleges she was told the reason for her hire was as she would not intimidate elderly customers and that she could flirt and flaunt with male customers to make sales. I consider it is neither implausible nor lacks credibility that there was a perception that a female rep might be less intimidating to elderly customers. I note that Mark Pywell referred to a code relating to vulnerable and elderly and clearly the respondent needed to ensure that potential customers were not being taken advantage of. It is possible that the claimant found any comments about this unwelcome in focussing on her sex rather than her merit in engaging with such customers or making such sales. However, it is difficult to understand how any such comments would have been made with the purpose or reasonably have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her given the circumstances including the context of attention to the code on sales to the elderly and vulnerable.

146. In relation to comments about use of her sex to make sales with male customers, I consider that such comments would be inherently unwanted conduct. The respondent submits that approaching sales in that manner would be ineffective especially in light of the cancellation period that all customers had. I considered the respondent's justification as to why it was unlikely comments were made to encourage the claimant to use her sex to make sales reasonable and plausible. The respondent's witnesses gave evidence that they were alive to the risk presented when attending appointments alone and that results were achieved through responsible sales techniques as this minimised cancellations.

147. Filipe Goncalves sets out at paragraph 18 of his written statement that, 'sex doesn't sell home improvements, but looking smart, professional, having good knowledge, high morals and values does as customers need to feel reassured, confident and trusting especially in the first meeting.'

148. Michael Ashley was asked if he told the claimant she was a good appointment as she could attend single male leads and elderly leads. Michael Ashley's evidence was that occasionally customers who had bad experiences and were anxious might ask for him directly or women but they would not take someone on just because they were female or male. When it was put to Michael Ashley that the claimant was told to use the fact she was female to flirt and flaunt with male customers, he said that he, 'had never heard that' and there was no 'conversation with myself or anyone else'.

149. Michael Ashley was challenged about the differences between the statement initially served and the one he wished to rely on for the hearing. In particular that after setting out, 'Mollie has said that I used to simply allow Filipe to be misogynistic' original paragraph 15 contained the sentence, 'Filipe is the last person to be misogynistic and I do not know why she wants to say this to another kind generous and good natured individual' but equivalent paragraph 13 had removed that sentence. Accordingly, the evidence relied on by Michael

Ashley at the hearing did not include any evidence about Filipe's character. Another removal was the sentence, 'In my view, there is no sexual discrimination, no victimisation and no harassment towards her in any way' from original paragraph 17 in equivalent paragraph 14. Michael Ashley was asked if the removal was because he did not want to sign a statement of truth with that. Michael Ashley gave evidence that he wanted to keep things simple to stuff he could prove and there were things he couldn't prove. Taken to the removed sentence at paragraph 13, it was put to Michael Ashley that he couldn't make that statement because Filipe Goncalves made comments about skirts. Michael Ashley said that had not happened in his presence and he can't say there was misogyny as he had not seen or witnessed that and that he had initially put what he felt given Filipe's character but considered wrong to say things had or hadn't been said if he was not there.

150. Michael Ashley gave evidence that the claimant had not complained to him about Filipe Goncalves' behaviour in terms of sexist comments or about skirts and he did not know about any wager. Referred to the one comment the claimant cites, Michael Ashley said that 'categorically not allow people to talk like that'. Michael Ashley said that he had never heard Filipe boasting about pushing his girlfriend and denied saying 'that's just Filipe being Filipe and he doesn't think before he speaks'. The claimant has provided a transcript of a voice message dated 16 January 2023 in which she refers to a conversation with Michael Ashley which includes Michael Ashley reportedly saying that he i.e. Filipe would never tell me that as he knows I wouldn't stand for it which is consistent with the oral evidence given by Michael Ashley. (HB 103)

151. I consider the circumstances of serving one unsigned statement and then serving another altered signed statement without highlighting that a different statement is being served when the bundle is sent are not ideal although before the tribunal each statement was available for and was subjected to comparison. I found Michael Ashley's explanation when challenged about this reasonable in that he did not want to make statements about matters which on reflection related to things alleged to have occurred which he had not seen. I consider this measured. I found Michael Ashley a credible witness. He acknowledged matters appropriately during his evidence and maintained his position about certain aspects when challenged; he answered the questions he was asked.

152. I considered the available evidence about whether the claimant was encouraged to flirt and flaunt herself to make sales. I accepted the respondent's evidence and explanations regarding this and found it was more likely than not that this practice was not encouraged. I concluded that there was insufficient evidence other than generalised and unspecific assertions to reach any secure findings about this having occurred on any particular occasion. I therefore also find that this could not form part of conduct extending so as to fall in time.

Wager

153. The claimant's particulars of claim set out that in December 2022, a colleague told her that Filipe Goncalves and another colleague had 'placed a wager between themselves as to who would sleep with me first'. The claimant's written statement refers to the colleague who told her about this wager as 'Iain' and at paragraph 12 that he 'disclosed to me that he was aware of a wager that had been placed, when I initially started working for the company. The wager

consisted of Fill, Matas (lead canvasser) and various other colleagues, betting on "who could bed me first". Iain explained that this bet was placed before they had got time to know me and realise, I was in a long-term committed relationship.' At paragraph 13 of her written statement, the claimant sets out that this comment, made by Ian, stuck with her during her entire time with the respondent 'as it was the first time I felt my colleagues, one of which was a member of management, sexualised me and singled me out, all down to my sex'.

154. The claimant was asked in cross-examination why she had not named Iain in her particulars of claim and she answered that she was 'concerned about getting Iain in trouble'. When the claimant was asked why she had referred to two colleagues in her particulars of claim but referred to there being other colleagues involved in her written statement, the claimant initially said that she didn't understand the question. It was suggested to the claimant that her memory may have been better when she did her claim form than when she prepared her written statement later. The claimant maintained that her memory was the same and that the reason was because she couldn't name the other colleagues involved. It was put to the claimant that the claim form reference to Filipe Goncalves and one other set out a different story from the suggestion in the written statement that many others were involved naming Matas. The claimant said that she didn't think it did look like a different story.

155. I did have some concerns about the differences between what was set out in the particulars of claim and the written statement and some of the answers given in evidence and the differences were not all explained by the claimant in oral evidence or by reference to the passage of time and difficulties of recall. I set out above the alteration from the particulars of claim that suggested the claimant had raised her allegations with Mark Pywell whereas her evidence before the tribunal had changed to be consistent with his version of the call. The claimant's written evidence that the comment about the wager was the first time she felt sexualised was in December 2022 is inconsistent with allegations that from the outset of her engagement she was subjected to comments of a sexual nature. The claimant understandably does not recall everything that was said to her but she has given very few details of comments made beyond a general description that they related to her appearance and dress in a context where she does refer to one comment that stuck with her and was the first time she felt sexualised.

156. Whilst Iain Lewis gave evidence, his written statement does not directly address the allegation against him that he told her she could seduce and flirt with male customers or the allegation that he told the claimant about the wager. Iain Lewis told the tribunal he had attended only to speak to Filipe's character and it would appear that his written statement was not prepared with any focus on the fact that there were allegations raised directly against him or factual matters that he could relevantly speak to even if to deny or set out that he could not, for example, recall telling the claimant about any such wager. There is some merit in the claimant's submission that the manner of preparation generally damaged credibility of the respondent's witnesses although this submission specifically referred to alteration of Michael Ashley's statement and the failure to disclose the new starter form. However, the respondent has also had to confront allegations that lack detail.

157. Filipe Goncalves denies that there was any such wager. At paragraph 15 of his statement he says, 'This is simply a lie and I deny it was said or took place.' I observe that claimant's oral evidence that she did not want to get Iain in trouble suggests that what she complains about is not him having made the comment to her even if the written statement refers to the comment and that it stuck in her mind but the understanding that there had been a wager made between two or more colleagues about her. The allegation is that a wager had been made and that she knew about this from December 2022. The claimant's evidence is that she was also told it was made before colleagues knew she was in a long-term relationship from which I reasonably infer that any wager did not subsist after colleagues were aware of the claimant's long-term relationship. There is no clear evidence as to when the claimant may have made colleagues aware of her long-term relationship although the claimant's information as to what Iain said to her suggests this was prior to December 2022.

158. The claimant's evidence is clear that this comment was made and it stuck with her and I accept this evidence; I find there is no reason not to find her credible as to this. There is no information or evidence to suggest that she directly confronted anyone about the wager or sought further information or even tried to ascertain whether the information given by Iain was true. I find that any such wager is unwanted conduct of a sexual nature although it is difficult to reach secure findings about whether and when this conduct was occurring and who it concerned other than that this was prior to or around December 2022.

159. Considering the evidence overall and assessing all the circumstances including taking account of my findings in relation to allegations 2,3,4 and 5, I have concluded that this incident did not form part of a course of conduct which extended into June 2023. I find that the wager is sufficiently discrete and different from the conversation that occurred on 16 March 2023 and the incidents thereafter such that even if Filipe Goncalves was involved in any wager, these incidents are not linked by his involvement so as to found a continuing campaign of harassment by him against the claimant.

Conversation on 16 March 2023

160. There is no dispute that a conversation took place on 16 March 2023 between the claimant and Filipe Goncalves after they had attended a lead together. I note that attending a lead together was not unusual. Filipe Goncalves gave evidence that his role alongside training would be to support the reps to secure sales and the claimant refers to asking Filipe Goncalves to go on 'watches' with her. The claimant accepted that the date she had given in her particulars of claim of 21 June 2023 for this conversation was not correct. The claimant accepts that she volunteered information about having suffered miscarriages which were playing on her mind as Mother's Day approached. The claimant says that Filipe Goncalves told her that this was 'a blessing in disguise as he did not believe that I wanted children right now, or that I would be able to cope if I did have them. He likened the situation to when he was unable to see his children for six weeks after his divorce.'

161. Filipe Goncalves evidence is that his response to the claimant's information about miscarriages was to share personal information he had not shared with anyone previously 'to reach out' to her. Filipe Goncalves evidence is that he

referred to an incident when he thought his own 18 month daughter had died as she had suffered a fit. He denied suggesting the claimant's loss was a blessing or that she could not cope with children.

162. The claimant was asked what she meant by referring in her particulars of claim to 'I informed EAHI' and whether she had told the respondent before speaking with Filipe Goncalves. The claimant said in evidence that there was general chit chat in the office previously. She then corrected this and said, 'not necessarily chit chat because of the information' and that when she referred to EAHI she meant the office she worked in and her colleagues and that yes, she had told her colleagues in the office. She agreed that the conversation with Filipe Goncalves was in the car after they had visited a customer together because she was struggling with sales. The claimant said that she was aware of the incident of near death fit but it was 'not my recollection' that this was brought up during the conversation on 16 March 2023. When the claimant was asked if she was looking for support by sharing the information, the claimant was equivocal saying 'not necessarily, potentially… just some understanding'.

163. The claimant accepts she was with Filipe Goncalves on this occasion as he was supporting her with a sale. The claimant accepts that towards the end of her time with the respondent she was struggling to sell the leads she was allocated. At paragraph 20 of her written statement, the claimant refers to asking several times for 'watches' – where a more experienced rep comes out and watches the appointment to help identify any issues - with Filipe Goncalves but this never materialised. I consider there is merit in the respondent's submission that the claimant's requests to accompany Filipe Goncalves undermine the credibility of her allegations of sustained harassment by him and was persuaded by this submission. I note my findings above regarding allegations 1-5. I consider that it is incongruous that the claimant would ask Filipe Goncalves in particular to accompany her in circumstances where the claimant says she had been subjected to repeated and frequent conduct amounting to sexual harassment by Filipe Goncalves.

164. It is also incongruous that the claimant would share personal information with a person who she says had been harassing her since the start of her engagement with the respondent or look to him for some understanding although the claimant's evidence was that she had freely shared the information with other colleagues so is taken to be reasonably comfortable with sharing this type of information in the office. I note that this is in the context of an office where she felt sexualised by her colleagues and subjected to repeated comments of a sexual nature arguably not an environment in which it might be expected she would freely share sensitive and private information about matters related to her as a woman.

165. The claimant sets out in her written statement that the conversation left her distraught and refers to MC21 (HB 159). It is plausible that a conversation about a traumatic personal event such as miscarriages would leave someone distraught and upset and I accept this was the case for the claimant. MC21 is the claimant's transcript of a voice message she says was sent to Dawid on 16 March 2023 referring to the conversation and that she was crying and that he had made the alleged comment about it being blessing in disguise followed by a comment that she didn't say anything but wanted to reference that he had no idea and a man could never comprehend what it felt like. I have some concerns

about the weight to place on the unverified transcripts of voice messages. I note that the respondent could have asked to listen to the voice messages and/or they could have been disclosed and made available to the tribunal. I refer to my comments above that they do not present the claimant unequivocally in a favourable light given some of the language use and I consider there is no basis to view them as entirely concocted. As evidence they are the claimant's own version recalling conversations albeit close in time to the alleged incidents. The 'blessing in disguise' comment clearly stuck with the claimant as having been made. It is difficult to assess the overall context and tone of the conversation which was clearly emotionally charged given the claimant was immersed in painful memories at the time of the conversation and when recounting it thereafter which is no criticism of the claimant.

166. The key difference between the claimant and Filipe's evidence is that he denies his response was to suggest opinion to the effect that it was a blessing in disguise and recalls the conversation as him disclosing information that was personal and sensitive to him which he considered was him being supportive in that context. The claimant did not deny awareness of the information Filipe said he had shared on this occasion but did not recall it having been shared on this occasion. To that extent, Filipe's evidence about sharing that information cannot be regarded as entirely made up to defend himself against the allegation. I find it likely that the claimant and Filipe each remember different aspects of the overall conversation. I also accept that Filipe engaged in that conversation was seeking to be supportive and to the extent he used words to the effect of 'blessing in disguise' this was made innocently without intent to offend.

167. I find that a comment to the effect that the claimant's miscarriages were a blessing is unwanted conduct related to sex. The claimant found this comment offensive and upsetting and not unreasonably so and I acknowledge that was her perception. The voice message indicates her emotional response centred on a man never being capable of understanding these circumstances. Given that Filipe asked how the claimant was when she presented as upset, was given information about miscarriages freely by the claimant and then, as he recalls, shared personal and sensitive information about an experience with his own child, I am persuaded that Filipe's purpose during this conversation was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. I consider the words were likely very clumsy and ill-chosen language.

168. The claimant's complaint about the conversation on 16 March 2023 is presented out of time unless it forms part of a continuing course of conduct. I find this conversation different in quality and context from the claimant's other allegations about repeated unsolicited comments and also discrete from and not linked to the later incidents complained of that occurred two months later which were triggered by third party action.

Incident on 16 June 2023

169. The respondent noted that in relation to an alleged assault by a customer on 15 June 2023, the claimant had taken no steps to raise this. The claimant had not complained to the police and there were no text messages or other evidence of communications about this. Whilst her explanation for not going to

the police was that her father, an ex-policeman, had told her she wouldn't be believed; 'morality' dictated that the matter was put on record in case it happened again.

170. The respondent acknowledged that the claimant had reacted in a deeply distressed way when questioned about the incident of alleged sexual assault but there were contradictions in her account. The written statement refers to 'he tried'. I note this was how the matter was presented for the purposes of the application for anonymisation. The allegation as recorded at the case management hearing was that 'he had tried to grab her and kiss her, asked her to expose her breasts and to go on a date with him, and tried to get her to go into the loft'. The claimant gave a somewhat different account in oral evidence stating that the customer had actually touched or grabbed her by the shoulders with two hands and tried to kiss her. I note that this is another example of the claimant's account shifting.

171. Whilst what occurred on 15 June 2023 is clearly relevant, it is important to be clear that the allegation concerns what the respondent did in response to what the respondent knew or was told about 15 June 2023.

172. The claimant contends that after telling the respondent what had happened in terms as set out in the allegation, Filipe Goncalves found it amusing and in front of multiple co-workers told her she should have exposed her breasts and that he would send her out to secure more deals. The particulars of claim refer to this as occurring on 15 June 2023 although the allegation as recorded at the case management hearing sets out that the respondent was informed the following day 16 June 2023. As in relation to her other allegations, the claimant has not put forward any colleague who witnessed this to give evidence to the tribunal.

173. Michael Ashley said that he had been made aware that the claimant had alleged she experienced a sexual assault on 15 June 2023 and he spontaneously said 'absolutely not' when asked if he had reason at all to disbelieve the allegation. However Michael Ashley's evidence was that at the time, his understanding was that this was a lead during which the claimant had received inappropriate comments and he was not aware that anything physical had occurred and that when she called about this she had been told to come away. He acknowledged that with hindsight it was a bad decision for the claimant to go back to the property although she did have someone with her. Michael Ashley said he had not spoken with the claimant directly and she had called Nimesh Patel at the time.

174. The claimant's own evidence is that she called Nimesh Patel on the day of the appointment. When she was asked if he had said for her to leave or something else, she said, 'Yes' and he said he would send another colleague but she didn't plan on staying. She accepted that no one had said she must stay. The claimant's written statement sets out that whilst the claimant acknowledged it was her decision to stay in the property, a factor was that she had not received any commission for a few weeks and was struggling financially. The claimant therefore chose to stay to secure the sale in a context where she says she was subjected to the treatment set out in the allegation. I accept the respondent's evidence that reps are not expected to remain in

situations where they do not consider themselves safe or place themselves in risky situations; the claimant acknowledges that she was not told to stay.

175. The claimant referred to evidence that colleagues were laughing at her the next day being that she had called her partner and why would she message her partner if they were not. The claimant said that she didn't want to go back and she went back because she was instructed to go back. MC24 (HB 162) shows a message between the claimant and Harry on 16 June 2023 where the claimant writes, 'Everyone at the office is laughing about yesterday and saying I should have sold walls and that they're going to send me back.' The reply is 'You ain't going back' to which the claimant replies, 'No I'm not I told them I'm not'. This is not evidence about what happened at the customer's house or what was said to the colleagues and the detail of that although it is evidence that whatever the claimant recounted or colleagues knew as to the incident provoked laughter which was clearly experienced as unwelcome by the claimant. I note that at the hearing the claimant gave evidence she experienced something different from what she had previously set out across her written claim and statement. The claimant's written statement sets out, 'Fill planned to send me back to the customers house, to secure more sales. Please see evidence of this in MC24.' The message with her boyfriend is also not evidence that either Michael Ashley or Filipe Goncalves in particular were saying that she had to go back at that stage. I note that the claimant does not share in her message with her boyfriend that she was being taunted by Filipe Goncalves.

176. This is the only allegation addressed in Iain Lewis' written statement which sets out in relation to the comment that, 'this did not happen in front of me' and that Iain Lewis' recall was that when the claimant came back, she was told that she should not have stayed and that she said she rushed the appointment to secure the sale. This is not inconsistent with the claimant's evidence as to the incident. Iain Lewis' statement refers to having been told about this allegation. This may explain why the statement does not address any other matters. In oral evidence, Iain Lewis said that he had attended to give evidence to speak to Filipe Goncalves' character. He sets out in the statement that Filipe Goncalves is 'kind, gentle and professional'. The statement gives a date of 15 June 2023 and in his oral evidence, Iain Lewis accepted he could not say whether his recall related to the incident with the alleged customer assault or another sale or the date. Iain Lewis said that he hadn't read any of the documents the claimant had provided and he had just offered to assist in any way he can. I considered that Iain Lewis' evidence was problematic in that he was not clear of the date of the incident he was giving evidence about and as such his evidence as to whether or not Filipe Goncalves said what he was alleged to have said was based on his general impression of Filipe Goncalves character. I do give some weight to Iain Lewis' evidence in that he attended to face cross-examination and to provide that evidence as to his impression of Filipe Goncalves' character.

177. Filipe Goncalves' evidence was that he heard about the appointment the day afterwards. He gave evidence that what he remembered was that the claimant was in the branch office telling everyone there what had occurred and that she felt uncomfortable and that the claimant had rung up Nimesh Patel during the appointment and he had given her the option to leave but she chose to proceed with the appointment. Filipe Goncalves denied that he had taunted the claimant in front of everyone.

178. There is no reference to what the claimant alleges occurred on 16 June 2023 in any of the messages produced with Dawid and as with other allegations of comments made by Filipe Goncalves in front of others, the claimant has not put forward any witnesses to the alleged comment. The message with Harry is the only message exchange with him that the claimant has produced. I refer to my findings above about using sex to make sales and that this would not be an effective sales technique. Although I note concerns with Iain Lewis' evidence, his evidence is that he did not hear any such comment from Filipe. Filipe Goncalves and Michael Ashley's evidence is that they genuinely believed the claimant had experienced no more than inappropriate comments at this stage. The evidence that the claimant freely shared all the details of what she says she had experienced before multiple colleagues when she found the incident left her shaken and was very distressing is incongruous and subsequently her account as to what occurred has altered in detail. As such the evidence is unclear as to what she did recount to colleagues although others recall that the extent of her experience was inappropriate comments.

179. I comment above about the message with Harry and I find it demonstrates that it is more likely than not that colleagues were laughing about whatever was recounted to them about the incident which does not present as an appropriate response if the claimant was sharing details as described in the allegation or even if she was sharing that during the appointment the customer had made inappropriate comments. I consider it likely that sharing details of inappropriate comments was more likely than not sharing details such as having been asked to expose her breasts or to go on a date which she has consistently referred to as part of what happened. Explaining that she had experienced those comments even if presented in a light-hearted manner – which is not in any event consonant with the claimant's account – ought not to incur mere amusement from colleagues. The claimant does not name all or any of these colleagues other than Filipe Goncalves and to that extent does not complain about their conduct.

180. I considered all the circumstances and evidence available. I concluded there was insufficient evidence to reliably find that the details entirely as set out in the allegation were shared and that having shared the details as set out in the allegation, the claimant was subjected to the alleged comments by Filipe Goncalves or that colleagues' laughter was invoked either by that comment or in response to the claimant giving an account entirely as set out in the allegation.

Call with Mark Pywell on 20 June 2023

181. On 20 June 2023, the claimant had a telephone conversation with Mark Pywell and I refer to my findings above regarding the content of that conversation. I note that during that conversation, the claimant did not refer to the incident which occurred on 15 June 2023 or the conduct she alleges occurred on 16 June 2023 or any of the alleged harassment. The focus was a concern that she might be let go due to her performance; she was struggling with sales and financially; she was looking for reassurance; and, as set out in her note of the call, that she really enjoyed her job as a rep.

182. Filipe Goncalves was asked about going with the claimant back to the property where the claimant had experienced the incident with the customer. Filipe Goncalves' evidence was that they had travelled in separate cars and the claimant had met him at the property and they had gone to try and save the deal. That the claimant travelled separately from Filipe Goncalves in her own car somewhat undermines her suggestion that she was forced into this scenario even if she would have preferred not to return and a repeat visit was unwelcome to her. Filipe Goncalves said he was instructed to go with the claimant as they knew there had been inappropriate comments. He said he couldn't recall who had asked him to go back with the claimant but it was to try and support her and to save the deal. As above, this is not an unusual response to circumstances where there are difficulties with a contract. The customer had cancelled the contract. Filipe Goncalves denied that he knew the claimant had experienced an assault at the property or that he had said she should go with him or told her that she should do whatever she could to save the sale.

183. It was put to Filipe Goncalves that both him and Michael Ashley no longer worked for the respondent and worked together at a different firm and they were therefore both giving evidence for a competitor. Filipe Goncalves said that it was important to clear his name and that he had enjoyed working with the reps but what he did was based on people trusting him.

184. Filipe Goncalves was asked if he had discussed the nature of the allegations before the hearing today and he said that he never thought he would be here and it was a long time ago and he didn't know the nature of the proceedings. It was put to him that he was lying and he knew perfectly well what was alleged. Filipe Goncalves said that he had glanced at the initial claim and was disgusted and it was lots of things he disagreed with.

185. During re-examination, Filipe Goncalves acknowledged that the claim form made it clear that more than inappropriate comments were being alleged to have occurred at the property but said that English wasn't his first language and cross-examined again on this new evidence on the basis this was an excuse given the provision of a detailed statement in English, he said he had lived in the UK since he was 6 years old but it took longer for him to read and digest English.

186. I cannot accept that Filipe Goncalves did not understand the allegations he was confronting. His written statement refers to reading the claim and it is not clear why he suggested in oral evidence that he had only glanced at it or introduced by way of explanation that English was not his first language when his statement addresses in detail the allegations made. The suggestion in oral evidence that he had only glanced at the particulars lacks credibility given his written statement addresses and denies each allegation including detail such as reference to one occasion when he pointed out paper on the claimant's skirt as she was about to go out and visit a customer. I found this somewhat damaging to his credibility. Filipe Goncalves also gave oral evidence that he was not aware the claimant alleged a sexual assault had occurred until this was mentioned at the hearing. I note that it is only having read the particulars closely and as presented in the application for anonymisation that it is apparent that

the oral evidence about being grabbed is different and akin to actual rather than attempted assault.

187. Filipe Goncalves maintained in oral evidence that he had genuinely thought at the time that it was just inappropriate comments and added that the customer was a 'piece of work' and that he had disliked him. As such, Filipe Goncalves evidence similar to that of Michael Ashley is not seeking to entirely reject that the claimant had a bad experience with this customer even though the respondent adopts the position in these proceedings that the claimant has made up her account. Michael Ashley gave evidence that he would have believed the claimant if she had recounted details pertaining to a physical assault. I accept their evidence that their understanding and knowledge at the time was that the claimant had been subjected to inappropriate comments.

188. I find that whilst the claimant did not want to return to the property and as such returning was unwanted, the claimant was not however forced to return to the property albeit she felt under financial pressure. I consider the claimant could have refused in the circumstances. I find the context in which the claimant returned to the property with Filipe Goncalves was related to sex in that it was to seek to secure a sale with a customer understood to be difficult and to have made inappropriate comments. Whilst I accept the respondent did not understand the incident to be entirely as described in the allegation or as referred to in oral evidence where physical contact was described, I consider the respondent had some awareness of those inappropriate comments being of a sexual nature.

189. Michael Ashley acknowledged during evidence that with hindsight and if the initial visit had been as the claimant now described, it was a poor decision to return to the property and further that the nature of the inappropriate comments ought to have been more carefully reflected upon. The circumstances include that the claimant had remained in the property for a period of time during the initial visit although told she was not required to remain and/or that someone could be sent to accompany her. Further, that this customer was understood to have made inappropriate comments. The claimant attended the property with Filipe Goncalves to support. At this time the claimant had separately been asking for support and to attend watches with Filipe Goncalves so it would not have been apparent that she would not wish to go out on leads with him for any reason. I find the purpose of the return visit was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and certainly not primarily as the key driver was making the sale and commission for the claimant.

190. The claimant's evidence is that her perception was that the effect was to violate her dignity and create an intimidating, hostile, degrading, humiliating or offensive environment for her given the treatment she alleges she experienced there previously. I find that it would be reasonable that conduct placing the claimant back with a customer with awareness of the treatment she alleged she experienced and as she described at the hearing to have that effect. However, I have accepted the evidence that Filipe Goncalves was not aware of the incident having occurred as now described by the claimant at the time. I take account of this together with all my findings above about the context and all the other circumstances of the case. I concluded that the return visit to the customer did not have the required effect.

Outstanding payments

191. The claimant says that on 22 June 2023 she was told she would be expected to work in the call centre for the weekly rate of £200 but was never paid for that work or for outstanding commission. The respondent submits that the claimant was offered the opportunity to make appointments on the phone as kindness because she was struggling to make sales and the claimant was overpaid because there were cancellations.

192. Michael Ashley gave evidence that he generally spoke with the claimant about property renovation and was aware that the claimant was struggling with sales and her anxiety and he was sympathetic to this. He considered that any conversations around performance were constructive criticism and that she had done extremely well and was very successful and that it was normal to 'hit a wall' and people could lose their enthusiasm for selling. He agreed that she needed support and she was asking for support through asking to go on watches with others including Filipe Goncalves.

193. The claimant sets out in her written statement that she has anxiety disorder and suffered panic attacks for which she was medicated. Although there is no supporting documentary evidence such as medical evidence as to the claimant having anxiety disorder and suffering panic attacks for which she was prescribed medication, I consider there is no reason not to accept this evidence and I also accept Michael Ashley's evidence that he was aware of this. Taking this together with the claimant's evidence that she was struggling to make sales at this point and struggling financially and that it is a reasonable explanation, I find that the claimant was offered to work with the canvassers as a supportive measure to give her work where she would be guaranteed some income.

194. On 30 June 2023, the claimant ended her engagement with the respondent. On 30 June 2023 (HB 102), Dawid messaged the claimant to ask 'How did it go hun? And did they pay you today?' and in reply the claimant writes, 'Yeah it was fine. They just said okay. …I got paid. They said I'll get my delayed install in August but we will see. Just got back from Howdens where I've signed all my forms and paperwork for Monday.' I find the claimant started in an employed role with Howdens shortly after leaving the respondent.

195. The claimant's written statement refers to exhibits MC26 and MC27 being messages requesting payment but that she was ignored. MC26 is a screenshot of messages between the claimant and Michael Ashley on 7 July 2023. The claimant informs that she was not paid for work in the call centre. The reply is that it is assumed this is due to a cancellation; the claimant replies this is outside the cancellation period; it is then stated that the cancellation period for roof renovations is up to fit; the claimant sends a thumbs up emoji. The claimant chases a confirmed reply on 8 July and is told 'it's your cancellation'. On 24 July 2023, the claimant messages to say that despite the '£840 cancellation, I am still expecting to get £520 from another contract'. I note that these messages do not demonstrate that the claimant was being ignored by Michael Ashley as he was replying to her messages. The messages also demonstrate the claimant accepting she was not due at least a portion of the commission claimed and that she was not requesting the £200.

196. On 2 August 2023, the claimant asked whether she would receive £520 on 4 August followed by a separate message that 'I will be seeking legal advise'.

MC27 is a screenshot of messages between the claimant and Mark Pywell on 4 August 2023. Again, I note this does not indicate the claimant was being ignored. Mark Pywell explains that she will paid any money due once her final order is installed but that there have been cancellations and under costings since leaving on which she had received advance commission and 'I will advise you once all your jobs are fitted how much you will be paid or how much you owe the company.' The claimant messages that 'I was made aware of one cancellation, a total of £840, which is why the balance now stands at £520, not £1360. I was owed £1,000 from a delayed install…I know …cancelled, as I say, which is why the total now stands at £520.' Mark Pywell then sets out that once a person has left commission is not advanced but only paid on job completion. Mark Pywell also sets out in reply to the claimant that if she is going to communicate through a legal team, they should send their correspondence to head office and he will await that.

197. The evidence as to whether the claimant is owed any commission is therefore limited but demonstrates that the claimant considered at the time she was due £520 commission and was aware of one cancellation. It is therefore very unclear why she claims a different amount including setting this out in her remedies statement as the amount claimed is inconsistent with the only documentary evidence available as to amounts of commission potentially due. The respondent suggests that reconciliation will indicate that the claimant having received advance commission on contracts which have subsequently cancelled owes the respondent monies. I consider that the available evidence is insufficient to demonstrate to the required standard that the claimant is owed the money claimed.

198. On 6 September 2023, the claimant contacted ACAS. Early conciliation ended on 18 October 2023. On 14 November 2023, the claimant presented her claim.

LAW

Employment Status

199. Section 230 of the Employment Rights Act 1996 provides as relevant:

> **230Employees, workers etc.**
> (1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
> (3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> (a)a contract of employment, or
> (b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
> and any reference to a worker's contract shall be construed accordingly.

(4)In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
(5)In this Act "employment"—
(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b)in relation to a worker, means employment under his contract;
and "employed" shall be construed accordingly.

200. Section 83 of the Equality Act 2010 provides as relevant:

83Interpretation and exceptions
(1)This section applies for the purposes of this Part.
(2)"Employment" means—
(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
(b)Crown employment;
(c)employment as a relevant member of the House of Commons staff;
(d)employment as a relevant member of the House of Lords staff.
(3)This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—
(a)references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;
(b)references to associated employers are to be ignored.
(4)A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.
…

201. There are three conditions which must be met for an employment relationship to exist as confirmed in Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] 2 QB 497:

201.1. An agreement that in consideration of remuneration a person will provide their own work and skill in performance of some service for the other.
201.2. An express or implied agreement that in performance of that service they will be subjected to the other's control in a sufficient degree to make that person 'master'.
201.3. That other provisions of the contract are consistent with it being a contract of service.

202. A contract exists if certain requirements are met which are: intention to create legal relations; offer; acceptance; consideration and sufficient certainty as to the terms. Contracts can be formed, varied and terminated through express agreement, whether in writing or orally. Contracts can also form and be varied by conduct such as, for example, where an employee is issued with a new contract and works under it so acceptance is implied even though the employee has not signed the contract. The test as to whether there is a contract in existence is objective. Contract terms are either express or implied. Express terms can be written (including by incorporation or express reference to another document) or oral. Implied terms can be implied by fact where the parties must have intended to include that term/s or by law or by custom. The overall factual matrix can be considered to determine the terms of a contract of employment including the subjective states of mind of the parties.

203. In determining the terms and conditions of a contract of employment, the starting point where there is a written contract is that the written contract is definitive. The exception is where the written document does not reflect the reality of the relationship or is a sham, Autoclenz Ltd v Belcher [2011] UKSC 41. In Autoclenz, the Supreme Court held that for a contract of employment to exist there had to be an irreducible and minimum of obligation on each side and that a right of substitution is inconsistent with employee status. The Supreme Court said 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'

204. In Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735 lack of mutuality of obligation (lap dancer and club where she worked) with neither an obligation to make work available or to undertake any work meant that the terms of any agreement between the parties did not amount to a contract of employment.

205. The role of the tribunal is to construe the contract not to deal with general policy considerations, Yorkshire Window Company Ltd v Parkes [2010] UKEAT/0484/09. When interpreting the contractual terms, the task is to identify and give effect to the agreement of the parties not the agreement the tribunal considers either party would have been wiser to enter into, Wood v Capita Insurance Services Ltd [2017] UKSC 24.

206. Paragraph 84 of Sir Terence Etherton MR's judgment in Pimlico Plumbers Limited v Smith [2017] ICR 657 addresses substitution:

> "Some of those cases are decisions of the Court of Appeal which are binding on us. Some of them are decisions of the Appeal Tribunal, which are not. In light of the cases and the language and objects of the relevant legislation I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services, is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend upon the precise contractual arrangement and in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of an example a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of an example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work whether or not that entails a particular procedure, will, subject to any exceptional facts be inconsistent with personal performance. Fifthly, again by way of an example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

207. In Uber BV & ors v Aslam & ors [2021] UKSC 5, it was held that the written documentation purporting to show drivers were independent contractors did not correspond to the reality of the working relationship and the drivers were working under a contract consistent with the statutory definition of 'worker'. The Supreme Court held that the Tribunal's task was one of statutory not contractual interpretation giving effect to the purpose of the legislation to protect those with little say over working arrangements. The Supreme Court endorsed the approach in Carmichael and anor v National Power plc [1999] UKHL 47 where there was no written agreement but 'casual as required basis' was stated in

correspondence and the approach to consider the language of the correspondence, how the relationship had operated and the parties evidence was upheld.

208. In considering worker status therefore, the practical reality of the relationship has to be considered as to whether the statutory definition is met but written terms remain potentially relevant as section 230(3) requires there to be a contract, Ter-Berg v Simply Smile Manor House Ltd & ors [2023] EAT 2.

Constructive/wrongful dismissal

209. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that employees may bring claims for breach of contract of employment before the Employment Tribunal for the recovery of damages.

Unauthorised deductions from wages

210. Section 13 of the Employment Rights Act 1996 ("the Act") gives workers the right not to suffer unauthorised deductions from their wages. Section 23 provides that the right is enforceable by way of complaint to the Tribunal. The claim must be presented before the end of a period of three months of the date of payment of the wages from which deduction was made, or within such further period as the tribunal considers reasonable where the tribunal is satisfied that it was not reasonably practicable to present the complaint before the end of the three month period. Section 27(1)(a) defines wages as including 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise'.

Holiday pay

211. Regulation 13 and 13A provide that a worker is entitled to annual leave of 5.6 weeks per year pro rated as applicable with 'worker' defined consistently with section 230 of the 1996 Act.

212. Regulation 14 of the Working Time Regulations 1998 provides that where a worker's employment is terminated part way through a leave year and the proportion of leave he has taken of that which he is entitled differs from the proportion of the leave year which has expired, the employer shall make him a payment in lieu.

213. Regulation 30 provides that complaint may be made to an Employment Tribunal before the end of a period of three months and if that is not reasonably practicable within such further period as the Tribunal considers reasonable.

Harassment

214. Section 26 of the Equality Act 2010 provides as relevant:

> **26Harassment**
> (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).
…
(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.
(5)The relevant protected characteristics are—

- …
- sex;
- ….

215. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 Lord Underhill then President of the EAT held that the Tribunal must address each of the three elements of the statutory test namely (i) unwanted conduct; (ii) the purpose or effect of the conduct; and (iii) the grounds for the conduct. And at paragraph 15 explained that:

> Thirdly, although the proviso in s-s. (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase "having regard to … the perception of that other person" was liable to cause confusion and to lead tribunals to apply a "subjective" test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

216. The EAT has held that 'unwanted conduct' equates to conduct that is unwelcome or uninvited by the employee in question although some conduct can be considered as inherently unwanted. This was held in Insitu Cleaning Co Ltd v Heads, 1995 IRLR 4, EAT, where the single comment 'hiya, big tits' was sufficiently serious to amount to sexual harassment, and more recently in Thomas Sanderson Blinds Ltd v English EAT 0316/10.

217. In Driskel v Peninsula Business Services Ltd and ors 2000 IRLR 151, EAT the EAT held that there was significance to the sex of the harasser and that the nature of the remarks by a male manager to a female employee that she attend

an interview in a short skirt and show cleavage was inherently unwanted conduct and the failure to complain at the time was not significant. The context can be important in deciding whether conduct was unwanted. In Thomas Sanderson, the engagement by the employee in the 'banter' and that he had written offensive articles meant he could not reasonably have found jokes about his sexuality violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

Time limits

218. A claim of discrimination must be brought within the time limit laid down by statute in order for the tribunal to have jurisdiction to consider the claim. Section 123 of the Equality Act 2010 ("the Act") provides as relevant:

> (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;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

219. These time limits are subject to extensions for early conciliation set out in the Act at section 207B and the Order at article 8B. These provide that the day a claimant contacts ACAS (Day A) and the day the certificate is received (Day B) are not counted. Further, if the ordinary 3 month time limit would but for extension expire during the period beginning with Day A and one month after Day B, the time limit is extended to expire at the end of that period. The tribunal is required to treat the time limit as expiring at the end of any extension.

220. In **Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686** the Court of Appeal, having reviewed the authorities, explained the approach to the test for whether there was conduct extending over a period at paragraph 52 as follows: *"The focus should be on the substance of the complaints ... was there an ongoing situation or a continuing state of affairs in which officers...were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'."* In **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548** the Court of Appeal affirmed the test as laid down in Hendricks.

221. In **Aziz v FDA [2010] EWCA Civ 304** the Court of Appeal also approving Hendricks set out at paragraph 33 that when considering whether separate incidents form part of an extending over a period: *"one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents."*

222. In **Miller and ors v Ministry of Justice and ors and another case EAT 0003/15** the principles relevant to the exercise of the just and equitable discretion were summarised by Mrs Justice Elisabeth Laing (as she then was) at paragraph 10 as follows:

> *"10. There are five points which are relevant to the issues in these appeals.*
> *i. The discretion to extend time is a wide one: **Robertson v Bexley Community Centre** [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.*
> *ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). …*
> *iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.*
> *iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (**DCA v Jones** [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).*
> *v. The ET may find the checklist of factors in section 33 of the **Limitation Act 1980** ("the 1980 Act") helpful (**British Coal Corporation v Keeble** [1997] IRLR 336 EAT; … This is not a requirement, however, and an ET will only err in law if it omits something significant: **Afolabi v Southwark London Borough Council** [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33."*

ANALYSIS AND CONCLUSIONS

223. I turn now to the application of the law to the facts I have found in this case.

Employee status within the meaning of section 230 Employment Rights Act

224. I refer to my findings above. There is no dispute that there was no written contract of employment. In so far as there were express oral terms, based on my findings there was payment on a commission only basis when the claimant's sales skills resulted in a sale of the respondent's products or services to a customer when the claimant had attended an appointment or 'lead'. I address below whether the claimant provided 'personal service'. Having regard to all my findings as to hours of work and control, I am not satisfied that the claimant was subject to any express or implied agreement or that the reality of the relationship was such that in performing that service they were subjected to the control of the respondent in a sufficient degree to make the respondent 'master' to use the terminology from the case law.

225. On that basis, it is not strictly necessary to consider whether other provisions of the contract, to the extent there are any other provisions that can be implied, are consistent with a contract of service. However, I am not satisfied that the evidence demonstrates any particular other provisions that can be implied or that the reality of the relationship was consistent with the contract being one of service.

226. Accordingly, I have concluded that the claimant did not have employee status within the meaning of section 230 of the Employment Rights Act 1996.

Worker status within the meaning of section 230 Employment Rights Act

Personal service

227. I refer to my findings above. I am satisfied that the claimant was required to provide personal service when she accepted a lead or appointment. The case law provides that there are circumstances where a fettered right of substitution is consistent with personal service.

228. There is no evidence that there was any express oral term as to substitution. Therefore, any contractual right can only be an implied term based on either fact or custom and as such arrived at on an assessment of the evidence available to me. There was no documentary evidence to suggest that there was any customary practice in the sector or the respondent as to substitution. The respondent's position is consistent with the fourth example in Pimlico but that is qualified.

229. In Yorkshire Windows , the EAT held that the issue is not about choice but whether there is a contractual obligation to personally supply services; the right to have a substitute does not necessarily mean there is no personal service obligation unless the right is unfettered. In the case there were findings that any substitute had to be one of the business' own salesmen that had been pre-approved on the basis that they had done enough training to allow them to go out (34, 87). In addition, leads were allocated the night before and as such once accepted there was an expectation that not taking up the lead could only be a decision related to inability. I note that Yorkshire Windows was concerned with contractual interpretation and was decided prior to Pimlico.

230. I refer to my findings above. I have assessed the practical reality of the relationship in line with the case law and as my task is one of assessing whether the statutory definition is met.

231. The organisation of the respondent's business in so far as explained in evidence was that in the main customers wanted appointments on the same day or at short notice and that leads were generally allocated on the day. Notably in evidence Michael Ashley did not say the claimant could send a friend or person as qualified as her to attend a lead/appointment but that she could certainly send her friend to be trained by the respondent. I note my finding that there was a period of at least several weeks before the respondent would consider a rep sufficiently qualified to attend leads on a full commission basis. As such once an appointment was accepted, if a need to substitute for any reason arose, substitution is necessarily confined to persons already trained by the respondent and familiar with the products such as existing reps.

232. The reason for the need for substitution presents as more likely to be due to inability than unwillingness given the typical on the day acceptance of an appointment. These circumstances are akin to those in Yorkshire Windows in that having accepted a lead, if a rep did not attend or take that lead up it was most likely only due to inability on the day. These circumstances clearly do not enable ready or realistic substitution by the claimant.

233. In all the circumstances, I am satisfied that to the extent there was any implied term of the contract as to substitution it was not inconsistent with a

requirement for personal service and that the practical reality of the relationship was fettered substitution consistent with personal service.

234. I have therefore concluded that the claimant was a worker within the meaning of the Employment Rights Act 1996 and also an employee within the meaning of the Equality Act 2010. Referring to my findings above, I have concluded that the claimant had this status when she had accepted a lead/appointment and during the provision of personal service to do that work.

Constructive dismissal/notice pay

235. Accordingly, the claimant cannot succeed with her constructive dismissal and notice pay claims as she does not have the requisite status to bring those claims and I hereby dismiss them.

236. However, the claimant can bring her claims for holiday pay, unauthorised deductions from wages and harassment.

237. I turn first to consider the claimant's claims for unauthorised deduction from wages.

Unauthorised deductions from wages

238. The Claimant says that the Respondent failed to pay her £200 for her last 8 days of work or for £1040 commission owed and claims the total amount of £1,360.

239. I refer to my findings and conclusions above regarding outstanding payments. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to any deduction from wages where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages. Section 27 provides that 'wages' includes any sums payable to the worker in connection with this employment including commission or other emolument referable to his employment whether payable under contract or otherwise.

240. Accordingly, I have concluded that the claim of unauthorised deductions from wages is not well-founded.

Holiday pay

241. I refer to my findings and conclusions that the claimant was a worker when she had accepted a lead/appointment and during the provision of personal service to do that work. Accordingly, the claimant was a worker meeting the definition in the Working Time Regulations 1998 for the purposes of her claim for holiday pay.

242. The claimant contends that the respondent failed to pay the claimant for annual leave to which she was entitled due her status and had accrued but not taken when her employment ended.

243. The claimant submitted a calculation after the hearing which calculated the amount due for holiday pay as £5,453.03 (186 x £29.32). The amount was arrived at as follows: the gov.uk holiday pay calculator gave 186 hours holiday entitlement for the period 1 September 2022 to 30 June 2023 on the basis of a 40 hour working week; the claimant worked for 9 months or 2/3 of 52 weeks,

e.g. 34.5 weeks; total hours worked were therefore 1380 (34.5 x 40); gross pay for the period was £40,457.97 (£4,495.33 x 9 months); and hourly pay £29.32 (£40,457.97/1380).

244. I have concluded based on the dates of the engagement that the claimant worked for the respondent between 1 September 2022 and 30 June 2023 and thus for a period of 10 months or 43 weeks. Regulation 14 (1) of the Working Time Regulations applies where the proportion taken of the leave to which the worker is entitled in the leave year under regulations 13(1) and 13A(1) differs from that to which the worker is entitled to. Regulation 14(2) provides that where the proportion taken is less than that expired the employer shall make a payment in lieu in accordance with 14(3). Regulation 14(3) provides that where there is no relevant agreement – and no such agreement has been identified to me – the payment due is a sum equal to the amount that would be due under regulation 16 in accordance with a particular formula as to the amount of leave due based on the proportion of the leave year worked. Regulation 16(1) provides that a worker is entitled to a week's pay in respect of each week of leave to which they are entitled under regulation 13 and 13A. Regulations 16(2) and (3) make further provision as to the calculation of weekly pay including as to the applicable reference period.

245. Regulation 30(1)(b) of the Working Time Regulations provides that complaint may be brought where an employer has failed to pay a worker the whole or part of any amount due to him under regulation 14(2). Regulation 30(5) provides that where on a complaint under (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) it shall order the employer to pay to the worker the amount which it finds to be due.

246. I reflected on the information available to me as to whether the amount due might be calculated given the statutory provisions. I refer to my finding that £4,495.33 represents the average gross monthly amount for the period from 1 January 2023 to 30 June 2023. As that period comprises 25 weeks, the average gross weekly amount for that period is £1,078.88 (£4,495.33 x 6/25). The claimant worked for 6 weeks on £200 plus 50% commission. I find that the average gross weekly amount can be calculated at £739.44 (£1,078.88/2 + £200) for that 6 week period. I find that for the 43 week period, the claimant can be calculated to have earnt a total of £44,355.20 (37 x £1,078.88 + 6 x £739.44). The average gross weekly amount for the 43 week period I therefore find to be £1,031.52 (£44,355.20/43) taking account of the reference period of complete weeks worked. As the claimant worked for 43 weeks, she was entitled to 4.63 weeks of leave (43/52 x 5.6). Therefore, I find that the amount due to the claimant is £4,775.92 (£1,031.52 x 4.63).

247. Accordingly, I concluded that the respondent shall pay the claimant the amount of £4,775.92.

Time limits

248. ACAS early conciliation started on 6 September 2023 and ended on 18 October 2023. The claimant presented her claim form on 14 November 2023. As such any complaints relating to alleged acts occurring before 7 June 2023 are presented outside the ordinary 3 month time limit.

249. The claimant contends that there was a continuing course of harassment which continued throughout her engagement and as such allegations (1) to (5) of sexual harassment and her allegation of harassment related to sex are brought in time.

250. The allegation of harassment related to sex relates to a conversation which occurred on 16 March 2023. I refer to my findings above and my conclusion that the conversation with Filipe Goncalves and the context in which it took place presents as sufficiently discrete and different from the other allegations related to repeated comments from colleagues including Filipe Goncalves that it does not form part of any continuing course of conduct. The allegation of harassment related to sex is therefore brought just under 3 months out of time. I note that the period of delay is almost the length of statutory period in which claims are expected to be presented.

251. The allegation of sexual harassment related to the wager, allegation (1), arose in December 2022. This allegation is therefore brought nearly 6 months out of time.

252. In relation to allegations (2) to (5) of sexual harassment, the claimant contends these alleged acts, which all concern comments by colleagues including Filipe Goncalves, continued throughout her engagement although she has provided only one real example of words said to have been used. Of real significance, the claimant provides no clear examples of statements made or words used after 7 June 2023. In relation to allegations (4) and (5), I have found that this conduct did not occur. In relation to allegation (1), I accepted the claimant's evidence that she was subjected to a single comment for which she was able to recall words used but the claimant has given no real evidence as to when that comment was made and the claimant does not maintain it was made after 7 June 2023. Otherwise, in light of the evidence available to me, I was not able to find that the conduct had occurred as alleged continuously throughout her engagement. These allegations in so far as I have found the alleged conduct occurred are brought out of time.

253. There was no clear, good or cogent reason before me as to why the claimant had delayed in bringing her claims. Whilst the bringing of an internal grievance is not of itself a reason to delay bringing any claim, I refer to my findings and conclusions above that the claimant did not raise complaint about the behaviours she alleges amount to harassment during her engagement. The claimant submits that she found it difficult to challenge these behaviours during her employment. I note that the context of the engagement was not one of employment with written or recognisable structures for complaints or internal grievances.

254. I note that the claimant considered the complaints were brought in time as they were part of a continuing course of conduct or were acts extending over a period with the last act falling in time. There is an indication that the claimant had some legal advice at the outset of proceedings and she was ably represented by Counsel at the hearing before me but she has acted in person for much of the proceedings. There was no real information before me as to the extent of her understanding or awareness of time limits at the relevant times.

255. I remind myself that the ordinary three month time limit for bringing claims is laid down in statute. I remind myself that therefore the exercise of discretion

to extend time to such other period as the tribunal thinks just and equitable is the exception rather than the rule.

256. I considered the balance of prejudice. I took account of the factor that allegations of discrimination are serious allegations and there are good public policy reasons for allowing them to be scrutinised by an independent and impartial tribunal which can hear all the evidence and make relevant findings of fact always bearing in mind that parliament has set a primary time limit. I noted the delay was of several months and a period of time equal or lengthier than the primary time limit and the reasons available to me as to the delay.

257. I noted that there is prejudice to the respondent in defending claims which would otherwise be out of time and are brought late. The circumstances include that the respondent's awareness of the alleged conduct arises after the engagement had ended and by way of early conciliation and the bringing of the claims. As some of the conduct is alleged to have occurred almost a year prior, there is forensic prejudice to the respondent given the impact of the passage of time on memories where the allegations mainly relate to alleged undocumented statements or comments in a context where the claimant has not given many particulars as to the alleged conduct beyond generalised references.

258. There is also no real information before me as to when the claimant understood that, separately from considering the alleged treatment unwelcome or unwanted, she had a legal cause of action. I considered that the claimant raised her challenge around the time she left the respondent to move to new employment. I noted the circumstances around this in that the claimant was struggling with the role and financially. I considered whether it was at this time she understood that earlier treatment was to be taken as discrimination although the claimant's evidence is that it was from December 2022 that she formed the view that her colleagues sexualised her in relation to one comment so I am hesitant to accept that any awareness or realisation as to the nature of the alleged treatment as wrong only arose around the time she left the respondent.

259. I also considered whether there were any personal circumstances that impacted on the timing of her claims or explained any delay. The claimant's anxiety was a condition indicated to have been present throughout her engagement as were the impact of her miscarriages albeit they had not impacted on her ability to be successful with sales at the outset of her engagement or when bringing her claim when she did shortly after she left the respondent.

260. I considered all these factors individually and cumulatively. Having taken account of everything including all the evidence and information available to me and the findings and conclusions above, on balance, I decided not to exercise discretion on a just and equitable basis to extend time for the claimant to bring her allegation of harassment related to sex and sexual harassment allegations (1) to (5).

Harassment related to sex

261. Accordingly, in relation to the allegations of conduct occurring before 7 June 2023 the tribunal does not have jurisdiction to determine whether any conduct

found to have occurred constitutes sexual harassment or harassment related to sex and they are dismissed.

Sexual harassment

262. The claimant's allegations of sexual harassment on 16 June 2023 and 21 June 2023 against Filipe Goncalves are presented in time.

263. The claimant contends that on 16 June 2023, the claimant informed the respondent that on 15 June 2023 a customer had tried to grab her and kiss her, asked her to expose her breasts and to go on a date with him, and tried to get her to go in the loft and that she was shaken and deeply upset but Filipe Goncalves found it amusing and told her she should have exposed her breasts and he would send her back out to secure more deals in front of multiple co-workers.

264. I consider it would be inherently unwanted conduct of a sexual nature to suggest a woman should expose her breasts to make sales in response to having been told she had been asked to expose her breasts by a customer and to find that amusing. I have found in relation to 16 June 2023 that laughing by colleagues occurred and that this was unwanted. I consider that if they had been told about the customer asking her to expose her breasts and go on a date with her and found this amusing, that would be unwanted conduct. I consider that behaviour laughing about an experience of a woman being asked to expose her breasts as if this was amusing is conduct of a sexual nature. However, I did not find that Filipe Goncalves had taunted the claimant about the incident on 15 June 2023 as described. I refer to my findings and conclusions above. I note my conclusions with regard to sales practice as not including using sex to make sales. Whilst I found that the claimant experienced being laughed at by her colleagues on 16 June 2023, I found the evidence available was not sufficient to demonstrate what was said to them about the incident or how the incident was framed by the claimant or that it was entirely as described in the allegation.

265. However, the respondent was aware that inappropriate comments had been made and as such it would appear that some degree of detail had been shared about what had occurred with the customer on 15 June 2023. Michael Ashley reflected in evidence that more attention might and probably should have been paid to those inappropriate comments. The claimant had called Nimesh Patel and whatever she had told him, he had suggested she leave and/or he would send someone out to accompany her. I have concluded that the respondent must have had some awareness of the nature of the inappropriate comments that had been made by the customer. Whilst I found the evidence did not reliably or sufficiently demonstrate what was said to colleagues by either Filipe or the claimant about the incident on 15 June 2023, I consider it more likely than not it included some detail as to the inappropriate comments and their nature.

266. In this context, I have reflected upon the purpose of the conduct. Whilst the reaction of laughter may have not been intended to violate the claimant's dignity or to create an intimidating, hostile, degrading and humiliating environment; the effect may have been. The claimant's perception was that being laughed at did have this effect. She was sufficiently upset to reach out to her boyfriend about this at the time and her perception was that whatever she was recounting to

her colleagues was not being taken seriously. I consider it reasonable for the conduct of being laughed at because you were asked to expose your breasts or go on a date when attending an appointment as a rep by colleagues who were male which trivialised the experience to have the effect of violating the claimant's dignity.

267. I have balanced this against all the other circumstances. The circumstances include that generally I have found a practice of using sex to make sales was not encouraged and that the claimant was told to leave or that someone would come to accompany her and reps were not to remain where they felt at risk. That Nimesh Patel, Michael Ashley and Filipe Goncalves were only aware of inappropriate comments and not as put in the allegation or what was described at the hearing. That I cannot securely find the claimant recounted to colleagues what occurred entirely as described in the allegation or how it was framed for them. That the claimant had remained at the appointment to conclude the sale with this customer who had been asking her to go on a date and expose her breasts and as such a sale had been made. That I have not found that Filipe Goncalves was taunting her so as to invoke any laughter. In all the circumstances, balancing the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading and humiliating environment, I have concluded that the conduct I have found occurred did not have the required effect.

268. Accordingly, I have concluded that the claimant was not subject to sexual harassment by the respondent on 16 June 2023 as alleged.

269. The claimant contends that on 21 June 2023, she was told the customer had cancelled the order and required to return to the house with Filipe Goncalves further to which she was reprimanded and told she should have slept with the customer if necessary to secure a sale causing her to suffer a panic attack.

270. I consider that forcing the claimant to return to the site of a sexual assault or attempted sexual assault or where the customer had subjected her to derogatory comments of a sexual nature about exposing her breasts is inherently unwanted conduct. I also find that it would be unwanted conduct to require her to return to a site where she had experienced any form of assault. I refer to all my findings and conclusions above. I have found that when the claimant returned to the property with Filipe Goncalves, the respondent understood that she had been subjected to inappropriate comments when she had attended the previous appointment with the customer. I also consider that the respondent had some awareness as to the nature of those inappropriate comments and that they were of a sexual nature. I have found that returning to the property was unwelcome to the claimant and unwanted conduct although I also found that the claimant could have refused to return to the property.

271. I have reflected carefully but I am not convinced that having the claimant return to the property with her manager, Filipe Goncalves, was conduct of a sexual nature even given the context bearing in mind that I accept what the respondent knew about what had happened was confined to inappropriate comments. I consider it was inappropriate, and Michael Ashley's evidence is consistent with this, for the claimant to go back to the property even with Filipe Goncalves and better handling may have been for others to have returned to

see if the sale could be secured and to address the fact that their rep had been subject to inappropriate comments. I refer to my findings and conclusions above. The driver for the return was to secure the sale and make commission for the claimant. Indeed, it is obvious that actions are mainly driven by the desire to make an effective sale not least when earnings are commission based. At that time, the claimant was asking for support as she was struggling financially and with sales and asking to attend watches with Filipe Goncalves.

272. For completeness, if that is wrong and the conduct of returning to the property with the claimant was both unwanted and of a sexual nature, I have considered the purpose and effect of the conduct.

273. I refer to my findings and conclusions above. I have found that the purpose of the visit was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. I have concluded the intention was innocent of the sense that return to the property would have that effect and was designed to be supportive with the driver being to secure the sale and commission for the claimant which is not consistent with any intention to humiliate or degrade her.

274. I acknowledge that the claimant's perception was that the effect of going back was to violate her dignity and to create an intimidating, hostile, degrading, humiliating or offensive environment for her. That perception is at least in part based on her experiences when she previously attended the property. Her evidence at the hearing was that she had been physically grabbed by the shoulders and the customer tried to kiss her. Whilst these actions in a context of friendship might be a greeting, the claimant's experience attending an unknown customer in a professional capacity as a rep when that customer was a single male and she was alone as a female was an entirely different context and was distressing and she was further subjected to derogatory comments about exposing her breasts and being asked to go on a date. Although the claimant continued with the appointment rather than leaving as reps were told to if they felt at any risk and as she was told when she called Nimesh Patel, she did so to secure the sale when she was struggling financially.

275. I have balanced this perception with the other circumstances of the case and whether it is reasonable for the conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. I refer to all my finding and conclusions above. I found that it would be reasonable for the conduct of placing the claimant back with the customer with awareness of the extent of the treatment she alleges she experienced to have that effect. However, the claimant did not return alone but with her manager, Filipe Goncalves. I have accepted the evidence that the respondent and Filipe Goncalves were not aware of the incident on 15 June 2023 having occurred entirely as described in the allegation by the claimant and as referred to in oral evidence before the tribunal at the time. Taking account of this and all the other circumstances of the case, I have concluded that the conduct that occurred on 21 June 2023 did not have the required effect.

276. Accordingly, I have concluded that the claimant was not subject to sexual harassment on 21 June 2023 as alleged.

Case No: 3313165/2023
Approved

Tribunal Judge Peer acting as an Employment Judge

Date 20 August 2025

JUDGMENT SENT TO THE PARTIES ON
21 August 2025
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FOR THE TRIBUNAL OFFICE

Notes

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