



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Audrey Pereira

**Respondent:** (1) Wellingtons Antiques Limited  
(2) John Michael Wellington

**Heard at:** Reading Employment Tribunal

**On:** 2-5 September 2024 (in person),  
7 and 22 January 2025 (private deliberations in chambers),  
31 January 2025 (delivery of oral judgment on liability, by video)

**Before:** Employment Judge Annand  
Ms Telfer  
Ms Brown

**Representation**

**Claimant:** Mr Van Heck, Counsel  
**Respondents:** Ms Millin, Counsel

## CORRECTED REASONS

An oral judgment and reasons, regarding liability, having been given to the parties at the hearing on 31 January 2025, and written reasons having been requested at the hearing in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

### Introduction

1. The Claimant was employed by the First Respondent, an Antiques business, as a part-time sales assistant. Her employment started in October 2021 and ended on 7 March 2023. The Claimant contacted Acas for early conciliation purposes regarding the Second Respondent, who is the owner of the First Respondent, on 24 February 2023 and the Early Conciliation certificate was issued on 15 March 2023. She contacted Acas for early conciliation purposes regarding the First Respondent on 30 March 2023 and the Early Conciliation certificate was issued on the same day.
2. On 14 April 2023, the Claimant submitted a Claim Form to the Employment Tribunal against the First and Second Respondent. She brought claims of

unauthorised deductions from wages, a failure to provide an itemised pay statement, failure to pay her holiday pay, breach of contract, part-time worker detriments, direct race discrimination, direct and indirect sex discrimination, harassment, victimisation and automatically unfair constructive dismissal on grounds of having made a protected disclosure.

3. In July 2023, the Respondents submitted a Response.
4. On 3 January 2024, a final hearing was listed at Reading Employment Tribunal from 2-5 September 2024.
5. On 29 January 2024, a preliminary hearing was held by Employment Judge Michell. At that hearing, the First Respondent agreed to pay the Claimant £4,671.04, which she was claiming as outstanding wages that she had not been paid. It was clarified that the Claimant was not pursuing a claim of automatically unfair constructive dismissal on grounds of having made a protected disclosure but was claiming automatically unfair constructive dismissal on grounds of having asserted a statutory right. Employment Judge Michell ordered the Claimant to provide Further and Better Particulars of Claim.
6. Following the preliminary hearing, a judgment was issued dismissing on withdrawal the Claimant's complaints of indirect sex discrimination and automatically unfair constructive dismissal on grounds of having made a protected disclosure.
7. There was a further preliminary hearing in April 2024 at which various case management orders were made.
8. On 2 September 2024, the parties attended the final hearing at Reading Employment Tribunal. They provided the Tribunal with two bundles. A main bundle running to 283 pages and the Claimant's Supplementary Bundle running to 247 pages. The Tribunal was also provided with four witness statements, one from the Claimant, and her witness, Mr Burr, and one from the Second Respondent and his witness, Ms Anya Feather. All of the witnesses gave oral evidence.
9. At the start of the hearing, both sides made applications. The Claimant applied to strike out the Respondent's Response. The Respondent applied to strike out the Claimant's claim and applied for the hearing to be postponed. All of those applications were rejected, and oral reasons were given for those decisions at the time. The Claimant has since requested written reasons for the Tribunal's refusal to strike out the Respondents' response. The reasons for that decision will be sent separately so as not to delay the provision of the written reasons for the decision on liability which the Respondents have requested urgently.
10. On the first day of the hearing, while the Respondent was considering its response to the Claimant's initial application, I produced a list of what I understood the Claimant's complaints to be, based on the Further and Better Particulars that had been provided. A List of Issues had not been agreed at either of the preliminary hearings and the parties had not agreed a List of Issues in advance of the hearing. I provided a copy of the list to counsel and

asked for their comments. They both agreed that the list was reflective of the Claimant's claims.

11. During the course of the hearing, the parties were able to agree the remaining parts of the Claimant's unauthorised deductions from wages claims and agree her claim for holiday pay. The First Respondent agreed to pay the Claimant £222.96 for wages she said she was owed for the period up to December 2022 and agreed to pay her £2,520 for the income she was owed from 1 January 2023 to 7 March 2023, which was for the period she was on garden leave. The First Respondent also agreed to pay the Claimant £689.20 for 8 days of statutory sick pay and £1,776 for holiday pay. Following the hearing, a judgment, made by consent, was sent to the parties on 27 November 2024. It required the First Respondent to pay the Claimant a total amount of £4,632.16.
12. As a result, the remaining claims, which the Tribunal had to decide at the final hearing, were:
  - a) A claim for breach of contract in respect of £2000 for a commission payment which the Claimant said she was owed.
  - b) A claim for breach of contract for the failure to pay employer pension contributions.
  - c) A claim for breach of contract in respect of the failure to pay the Claimant one week of notice pay.
  - d) Claims of direct race and sex discrimination.
  - e) Claims of harassment related to sex and race.
  - f) A claim of victimisation.
  - g) A claim of constructive automatically unfair dismissal for assertion of a statutory right.
  - h) A claim the Claimant was subjected to detriments because she was a part-time worker.
13. During the four-day listing, the Tribunal was able to hear the evidence and the parties' submissions, but the Tribunal did not have time to deliberate. It was intended that the Tribunal would meet to deliberate on 1 October, and the parties would attend the Tribunal for an oral judgment at 2pm on 2 October 2024. A provisional remedy was to be listed on 3 October 2024, and it was to be vacated if not required. Unfortunately, I was unwell in the first week of October, and all three days were postponed. The Tribunal then identified a day in November on which all three members of the panel were able to deliberate but again for reasons related to one of the Tribunal member's health, we were unable to meet on that day. The next day when all the Tribunal were able to meet was 7 January 2025. We deliberated on this day, and again on 22 January 2025 as more time was needed. A hearing was listed for 31 January 2025, to give an oral judgment and to then consider remedy if appropriate. At the hearing, on 31 January 2025, I apologised to the parties for the fact that they had to wait far longer than is ideal to hear the outcome of this case. Regrettably this was unavoidable. At the hearing, I gave an oral judgment on liability, and the Respondent requested written reasons.

**Findings of fact**

14. The Claimant was employed by the Respondent as a part time retail assistant. The Claimant is of South Asian ethnic origin. The First Respondent is a business which sells antiques from a shop located in Windsor. The business was set up in 2018. The Second Respondent is the owner of the First Respondent business.
15. The Second Respondent also has a jewellery business. The jewellery business was previously owned and run by his father, Mike Wellington, but was taken over by the Second Respondent. The jewellery business has two premises, one in Marlow and one in Wokingham.
16. The Respondents argued the two businesses are separate entities, although it was apparent that there was some considerable overlap in the manner in which they were run. For example, the Second Respondent accepted in his oral evidence that on occasion, he would pay the staff who worked in the antiques business from the bank account of the jewellery business. In addition, the Second Respondent confirmed that some of the members of staff, such as Kim Gosney, worked in the jewellery stores in Marlow and Wokingham and also worked in the antiques store in Windsor. The Second Respondent's sister-in-law, Ms Feather, gave evidence that she was employed by the antiques business, but that in 2021 she moved to work on the jewellery side, although until 2024, she continued to be paid by the antiques business. The Tribunal were also provided with a large number of rotas which showed a single rota for the three sites in Marlow, Wokingham, and Windsor. The rotas set out which member of staff was working in which location.
17. There was a disagreement between the parties about how the Claimant came to be offered employment with the First Respondent. The Claimant said she had an interview with the Second Respondent and Ms Feather in the First Respondent's premises in August 2021. She said the Second Respondent told her to contact his father, Mike Wellington, who after retiring from the jewellery business, worked in the Antiques shop. The Claimant said she contacted Mike Wellington, completed a number of trial shifts, and then was offered a role working three days per week from October 2021. The Second Respondent said in his witness statement that he telephoned the Antiques shop in January 2022 and was surprised when the Claimant answered the phone. He said he thought the Claimant did not start working for the First Respondent until January 2022.
18. The Tribunal found the Claimant started working for the First Respondent from around 20 October 2021. The Claimant started appearing on the rotas from this date. Initially her name was added to the rotas by hand but by the end of November 2021 she was being added to the typed versions of the rotas.
19. The Claimant said it was agreed with Mike Wellington that she would be paid £10 per hour and would be paid for 7 hours per day, so a total of £70 per day. The Claimant said the Second Respondent later tried to say she would only be paid £9 per hour. That was not a factual dispute that we needed to resolve

because the Claimant has now been paid for all the hours that she worked, and she has been paid at a rate of £10 per hour.

20. The Claimant said that when she was employed, she was reassured by the Second Respondent that it would “all be done properly”. She would be paid by way of PAYE, would be paid holiday pay, and she would be enrolled in a pension. This was disputed by the Respondents.
21. The Second Respondent’s evidence to the Tribunal was that the Claimant was not given a contract of employment because she was a probationer, and her probation period had been extended. He accepted that one of the First Respondent’s employees, Keshab Asharpatti, who was employed as a Master Jeweller, was offered a contract of employment. The Second Respondent’s evidence was that he gave Mr Asharpatti a contract of employment in 2019 and this was then not renewed, although Mr Asharpatti continued working for him after this period. The Second Respondent also set out in his witness statement that Mr Asharpatti did receive sick pay and holiday pay.
22. Throughout her employment, the Claimant was not paid by PAYE, and she was not given payslips. The Second Respondent did not have an explanation for this. He said in his witness statement that he would need to check with the accountant. The Second Respondent said in his oral evidence, when asked about what he discussed with the Claimant at the time that her employment started, that he said to her that the issue of her pay would be passed to the accountant and would be dealt with by him.
23. The Second Respondent denies that when the Claimant was first employed, he said she would be enrolled in a pension. He said in his witness statement that if she had stopped being a probationer then the issue of a pension would have been considered at that point.
24. The Tribunal accepted that when the Claimant was employed, she was told by the Second Respondent that her employment would “all be done properly”, that she would be paid via PAYE, paid holiday pay, and enrolled in a pension. The Second Respondent confirmed in his evidence that Ms Feather and Mr Asharpatti were paid by PAYE, so the Tribunal considered it was likely that the Second Respondent told the Claimant that she too would be paid by PAYE.
25. The Claimant set out in her witness statement that on 18 November 2021, the Second Respondent came into the Antique shop with Ms Feather. The Claimant said that she provided the Second Respondent with her bank details on this occasion. She said that during the conversation the Second Respondent then asked the Claimant some personal and intrusive questions. She said the Second Respondent said they were like family, asked her about her faith, said they were Catholics, and said she could trust him. She said he asked her why she wanted to work and what drove her so much in sales. The Claimant explained her family situation, her relationships and her financial situation. The Claimant said in her oral evidence that the Second Respondent asked her why she needed the money and asked about her husband. She said she needed sustainable employment, and commented this was challenging given her age and South Asian origin. The Claimant said that the

Second Respondent responded by saying, “blacks and gays have it worse”. The Claimant felt this invalidated her experience.

26. In his oral evidence, the Second Respondent denied having said “blacks and gays have it worse”. He said he had not asked her about her family or her finances but had asked her what made her enjoy sales. He said he could not recall if he asked her why she wanted to work.
27. The Tribunal found that the Second Respondent did ask the Claimant why she wanted to work, why she needed to earn money, and asked about her husband. The Tribunal accepted the Claimant’s version of events because in the Supplementary bundle of documents provided by the Claimant was a typed version of a diary. The Claimant’s evidence was she kept a diary at the time, and from that diary, she typed up the notes which appeared in the bundle, although she accepted that she had added some comments later. Some parts of the diary were in red, and some were in blue. The Tribunal noted that the Claimant had recorded in her diary that she was asked these questions by the Second Respondent on 18 November 2021.
28. On 3 December 2022, the Second Respondent and Ms Feather attended the Antiques shop again. The Claimant said on that occasion she was given what she described as ‘skeleton terms of employment’. The document related to matters such as the sales protocol, security, staffing and conduct, as well as other practical matters, but made no reference to pay. The Claimant said she asked about her pay and was told the matter was being dealt with by the First Respondent’s accountant, Jeff Hazelgrove. The Tribunal accepted this happened because this is consistent with the Second Respondent’s explanation in his witness statement, and his evidence to the Tribunal, which was that in his mind the issues relating to pay were being dealt with by the accountant.
29. The Claimant recorded in her diary that it was on 3 December 2021 when the Second Respondent said to her that “blacks and gays have it worse”. The Claimant wrote in her diary that she opened up to the Second Respondent and Ms Feather and explained she was desperate for work, but said it was difficult for her as a mature Asian to find work. She recorded in her diary that it was at this point that the Second Respondent said that “blacks and gays have it worse”. The Tribunal found that this comment was said by the Second Respondent on 3 December 2021, rather than on 18 November 2021 which was the date set out by the Claimant in her witness statement. The Tribunal accepted this happened on 3 December 2021 because the Claimant recorded it in her diary at the time.
30. The Tribunal noted that by this time, the Claimant had been employed for over a month and had not been paid.
31. In mid-December 2021, the Claimant was given a letter by Mike Wellington. She was asked to take a photo of it and send it to the accountant. It was a letter from HMRC addressed to Wellington Antiques Limited. It related to a failure to pay PAYE tax and national insurance contributions. This letter supported the Claimant’s case that at least some of the First Respondent’s other employees were paid by way of PAYE.

32. The Claimant worked up to December 2021 without having received a payment of wages. The Claimant recorded in her diary that she asked the Second Respondent about her pay on 24 December 2021, and he said it had been sorted, but no payment was received.
33. On 21 January 2022, the Claimant drove to the Wokingham branch of Wellington Jewellery to ask about her pay. The Claimant said she had a meeting with the Second Respondent who told her that there were some delays with HMRC. The Claimant said at this meeting the Second Respondent agreed she would work a minimum of three days per week and asked her to work more hours. The Claimant wrote in her witness statement that at this meeting, the Second Respondent also asked her to put together a business plan. The Second Respondent denied in his oral evidence that he had ever asked the Claimant to write a business plan, but the Tribunal found he had, because on 23 February 2022, the Second Respondent sent a text message to the Claimant in which he said he was very keen to meet with her next week “with her written plan we discussed” (p61).
34. In mid-February 2022, the Claimant was off work for six days as she was unwell. The Claimant said she was not paid sick pay for those days. On 14 February 2022, the Claimant sent a text message to Ms Feather saying she had returned to work on Thursday despite not being 100%. She said she had become ill again, and thought it was best if she took time to recover and return on the following Tuesday.
35. In February 2022, the Claimant worked increased hours in the Antiques shop, including working 5 days in the week of 28 February 2022. The Claimant said in her evidence she worked additional hours in February because the Second Respondent, Mike Wellington, and Ms Feather were away on holiday together.
36. By the end of February 2022, the Claimant had still not been paid any wages.
37. On 23 February 2022, the Claimant sent a text message to Ms Feather in which she explained she had sent a message to the Second Respondent setting out the days she had worked since October 2021. She wrote that she had been told she would be paid on 9 February 2022 but that she had not been and asked again to be paid.
38. On 1 March 2022, the Second Respondent and Ms Feather attended the Antiques store and gave the Claimant £1,300 in cash as a payment towards her wages. The Claimant said in her evidence she asked about an itemised pay slip, PAYE, NI, and the pension contributions, and the Second Respondent replied that it was being dealt with by HMRC and said the Claimant had “no right to a contract until he deemed ready.” The Second Respondent denied having said this in his oral evidence, but the Tribunal found this was said. It was consistent with his evidence that she was not entitled to a contract until she was no longer a probationer.
39. The Claimant says that when the Second Respondent paid her on 1 March 2022, he also said that he had conducted a background check and saw she was registered with Companies House. The Second Respondent denied he had said that he had done a background check on her but accepted he had

looked online and seen she was registered at Companies House. He explained he had done this because it was “a high-risk business”, by which the Tribunal understood he meant that he needed to trust his staff because they handled some high value goods.

40. On 1 March 2022, the Claimant sent a text message to the Second Respondent in which she thanked him for the part payment of her salary and said she would “prepare a little proposal as requested for you” (p61). The Tribunal noted that although the Claimant had been paid some of her wages on this date, there was still a shortfall in what she was owed.
41. Over the following months, the Claimant received some payments for her wages. However, she was paid different amounts on different dates. She was not given pay slips, and she continued to have a shortfall. The Claimant was not enrolled in a pension scheme, and she was not paid by PAYE.
42. On 11 May 2022, Ms Feather sent the Claimant a text message in which she asked the Claimant if she had taken tax and national insurance into consideration. The Claimant responded stating that she did not think that she had reached the threshold for tax and noted that there was £2,000 outstanding for her pay up to the end of April and asked to be paid.
43. The Claimant wrote in her witness statement that she found out in May 2022 that Mr Asharpatti was being paid monthly, was registered with HMRC, and had a contract of employment. She says he showed her his contract. The Second Respondent said in his oral evidence that although he was not fully sure he thought Mr Asharpatti and Ms Feather were paid monthly and paid by PAYE.
44. The Claimant’s evidence was that Ms Feather, and another two White British employees, Kim Gosney and Sharon Curtis, were paid monthly and on PAYE, whereas herself and Laney were not. The Claimant said that Laney, who worked part-time for the Jewellery business, described herself as being of Gypsy origin. The Claimant’s evidence was that she knew from speaking to Laney that she was also paid sporadically, randomly, or not at all.
45. The Claimant’s evidence was also that those who worked full time were paid £80 per day, whereas she, who was part-time, was paid £70 per day. The Claimant’s evidence, which was not disputed by the Respondents was that she was very good at sales, and brought in more revenue than her colleagues, and yet was still paid less.
46. In his witness statement, the Second Respondent confirmed that Ms Gosney and Mr Curtis were paid a pension but noted they were full time whereas the Claimant was part-time and still a probationer. He also set out that Ms Gosney and Ms Curtis were employed by Wellington Jewellers rather than Wellington Antiques. He also noted in his witness statement that he believed they would both have received payslip and been paid by PAYE but that would need to be checked with the accountant.
47. In respect of Laney, the Second Respondent stated in his witness statement that he could not recall a time when she was paid late or had been underpaid. He said he thought she was paid by bank transfer but there may have been



some isolated cash payments if there had been an unforeseen issue which had resulted in the late payment of salaries.

48. On 21 June 2022, there was a discussion about a sales target between the Claimant and the Second Respondent. The Claimant said she was set the target of selling £12,000 worth of goods in two months, and it was agreed that if she achieved this, she would be paid £2,000 as commission. The Claimant said she was told this was a way to prove herself, and it was suggested by the Second Respondent that this would supplement her pay.
49. On 11 July 2022, the Claimant sent a text message to Ms Gosney. She noted she had not been paid for June. Ms Gosney replied saying that the Claimant should call or text the Second Respondent and say she is broke. She noted she had done this and had been paid on 5<sup>th</sup>. The Claimant responded explaining she had called and texted and noted that the Second Respondent would get cross if she called too often. She noted that the Second Respondent had told Mike Wellington that the Claimant had been paid but when she checked she had not been.
50. On 12 July 2022, the Claimant said she had a discussion with the Second Respondent about having achieved the sale figure he had set. The Claimant's evidence was that she had by this time exceeded the target of £12,000 and achieved sales of closer to £14,000 but the Second Respondent refused to pay her the agreed commission payment.
51. The Second Respondent set out in his witness statement that the Claimant asked for an unreasonably high amount of commission but that they agreed that if she met or exceeded an agreed sales target the issue would be revisited. He set out that the Claimant became upset and volunteered details about her home life. He said that Ms Feather comforted her and then left, at which point, the Claimant started shouting at him. He asked her to calm down and Ms Feather returned and suggested they should speak in the meeting room and not in public. In his oral evidence, the Second Respondent's position was slightly different. He denied he had agreed to pay the Claimant a commission payment, but also denied that he had set her a sales target.
52. The Claimant's version of what occurred on 12 July 2022 was that when the Second Respondent refused to pay her the agreed commission, she remonstrated with him that it was to counter her low wages and the shortfall in her salary. She said that the Second Respondent accused her of overwriting Mike Wellington's sales. The Claimant said this was wrong and that sometimes she would make a sale, but Mike Wellington would write it up. The Claimant said that Mike Wellington was present and told the Second Respondent to pay her the commission that had been agreed. The Claimant said the matter became very heated and the Second Respondent shouted at her that if she did not like the terms of pay, she could leave. The Claimant said she cried, and Ms Feather advised they speak in private. The Claimant said the Second Respondent ordered her to go with him to speak about the matter further, and she responded, "no I cannot go with you as you intimidate me." The Claimant said the Second Respondent then shouted at her again saying if she did not want the job on his terms she could leave. The Claimant said she became very upset and left the shop.

53. The Claimant's evidence was that after she left the shop she went straight to the house of a friend, Mr Burr. Mr Burr attended the Tribunal hearing to give evidence in person. He said that the Claimant arrived at his house very distressed. He also confirmed that the Claimant said to him that the Second Respondent had agreed to pay her a bonus upon her sales, which she had achieved and surpassed, but this had not been paid and nor had her salary. When she had confronted him, the Second Respondent had shouted at her and told her to get out.
54. The Tribunal accepted the Claimant's version of what occurred on 12 July 2022. This was consistent with what was recorded in her diary and with the evidence given by Mr Burr, who confirmed that on the day in question, the Claimant had told him that the Second Respondent had shouted at her and told her to get out. The Tribunal accepted that the Second Respondent was angry with the Claimant for remonstrating with him over the refusal to pay her the commission payment that had been agreed, shouted at her that if she did not like the terms of pay, she could leave, and that in response the Claimant was very upset and crying.
55. On 29 July 2022, the Claimant sent the Second Respondent a lengthy text message. In the text message she wrote, "I never would have achieved your sales target of £12,000 in two weeks without divine intervention..." She also noted, "I continue to do my very best for you and your company though you talk to me as of I was the dirt on your shoe". In the next message, she noted, "I was seeking like minded people who might share my passions and we could together make a sustainable living... but maybe I am not masculine enough, not pliable enough, not white enough, not submissive enough..."
56. On 11 August 2022, the Claimant sent a text message to Ms Gosney. In it she noted that despite what Ms Feather had said to Ms Gosney, the Claimant had last been paid on 12 July 2022 for June. She noted she had achieved the sales target that the Second Respondent had set her of more than £13,000. She noted she had not been paid for July. She had been told by the Second Respondent that she had been paid on 1 August 2022 but when she checked her account she had not been.
57. On 5 September 2022, the Claimant sent a text message to Ms Gosney. She noted she felt under considerable stress as a result of the failure to pay her. In the message she noted she had achieved the sales target of £12,000 that the Second Respondent had set for her within two weeks, but no commission payment had been received.
58. In respect of the issue of whether a sales commission was agreed, the Tribunal concluded that the Second Respondent did set the Claimant a sales target of £12,000 and did agree that he would pay her £2,000 if she reached that target. The Tribunal found that was agreed because the Claimant made numerous references in text messages that she sent near the time to the fact that the Second Respondent had set her a sales target of £12,000. The Tribunal also concluded that this was agreed because immediately after the disagreement on 12 July 2022, the Claimant went to Mr Burr's house and relayed to him what had happened. He confirmed in his evidence that she had told him that the Second Respondent had agreed to pay her a bonus if she reached a sales target, but he had then refused to make payment.

59. On 18 October 2022, the Claimant sent another text message to Ms Gosney in which she set out she had not been paid for August or September 2022. She said when she called Ms Feather, Ms Feather said she would speak to the Second Respondent and then said the Claimant had been paid. The Claimant asked Ms Gosney what she should do. Ms Gosney replied by text that the Claimant should refuse to attend work until she was paid and said the Claimant should start looking for another job.
60. On 28 October 2022, the Claimant went to see her GP. Dr Chudasama wrote a letter on the Claimant's behalf noting the Claimant had attended an appointment and that the Claimant reported stress at work and anxiety leading to palpitations. The letter noted the Claimant had told the GP that she had not been paid in 3 months.
61. On 29 October 2022, the Claimant was told by Mike Wellington that he had done all he could to assist her getting paid and he advised her to speak to the Citizens Advice or to a solicitor.
62. On 2 November 2022, the Claimant sent a text message to Mike Wellington in which she referred to the fact that he had advised her to get advice from the Citizens Advice or a solicitor.
63. On the same day, the Claimant sent a text message to the Second Respondent. In her message she noted that she had called her doctor regarding the stress and anxiety she was experiencing because she was not being paid, was being paid less than the minimum wage, not having the proper PAYE, NI and pension sorted out. She noted she had been ignored, bullied and intimidated when she asked for these basic human and work rights. The Claimant set out in her witness statement that the text message clearly stated she was raising a grievance regarding her treatment in comparison to her colleagues.
64. In her witness statement the Claimant noted that she was signed off work sick by her GP, but instead of offering the Claimant support, the rota was changed so that her hours were reduced to two days per week. The Claimant says this was done without any consultation. There was a document in the bundle setting out how many days the Claimant had worked each month. In October 2022, the Claimant had worked 18 days, in November 2022, she worked 14 days, and in December 2022, she worked 16 days.
65. The rotas in the bundle indicate the Claimant worked 4 days in the first week of November 2022, two days in the second week of November 2022, two days in the third week of November 2022 and two days in the fourth week of November 2022. The rotas in the bundle also indicate the Claimant worked three days in the first week of December 2022, four days in the second week of December 2022, six days in the third week of December 2022, and two days in the fourth week of December 2022.
66. On 6 December 2022, the Claimant's solicitor sent a letter to the Second Respondent. The letter said the Claimant was owed wages, commission of £2000, and made allegations of race and sex discrimination. The letter also referred to various other amounts which were said to be outstanding.

67. On 21 December 2022, the Claimant sent a text message to Ms Curtis. In the message the Claimant referred to being told by Laney about all the trouble she had getting paid for longer than the Claimant. She noted that the Second Respondent had ignored her and that when she asked Anya, Kim and Mike to intercede they had been told it was in her account. The Claimant had arranged for the bank to confirm it was not in her account. She noted Mike had advised her to see the Citizens Advice or a solicitor. She noted she had initiated proceedings, and then the Second Respondent sent her a message asking if she would like to talk. She noted she was still owed £4,000 in wages. Ms Curtis responded that she could not believe the Second Respondent was treating her like this.
68. On 9 January 2023, a solicitors' firm acting for the Respondents replied to the Claimant's letter. The letter set out that the Second Respondent was grossly offended by the allegation of race discrimination. The letter also contained a response to the various points raised in the letter sent by the Claimant.
69. On or around the same day, an email was sent by the Respondent's solicitors to the Claimant's solicitor which noted, "Further to my email below, I understand your client is otherwise scheduled to work at our client's Windsor shop in the next week. In view of the on-going matters, do we presume a garden leave arrangement is in order?"
70. On 13 January 2023, the Claimant's solicitors responded by email noting, "My client is agreeable to going on paid gardening leave. Please can this be communicated to my client in a letter or email."
71. The Claimant set out in her witness statement that her solicitor proposed three months of garden leave at a rate of £1,120 per month but she was not paid her wages, her holiday pay or the amount she said she was owed in sick pay. The Claimant set out in her witness statement that she felt she was being constructively dismissed as the garden leave did not begin or end, and she was not reinstated to her role, nor were any steps taken to resolve the issues she had raised.
72. On 23 February 2023, the Claimant sent the Respondent a grievance. The Respondents failed to deal with the grievance altogether. She says it was entirely reasonable for her to expect a response and for them to take action, but the grievance was ignored. In his witness statement, the Second Respondent noted that he could not recall if a grievance meeting was scheduled, but he found it extraordinary that the Claimant considered there was any scope of the continuation of her employment as it was clear the relationship had irretrievably broken down.
73. When asked during his oral evidence, when the Second Respondent considered the Claimant's employment had ended, he responded that he felt the Claimant could no longer work for him when he became aware he was being accused of things he had not done, and what had upset him the most was the allegation of discrimination, including the allegation he had been sexist, which he categorically denied.

74. The Claimant told the Tribunal that when she was in contact with Acas she reached the conclusion her employment had ended. She considered she had been constructively dismissed because she had not been paid while on garden leave, she had not been paid the outstanding wages, and she had not received a response to her grievance. Although she was not able to recall the exact date on which she considered she was dismissed, at the time her solicitor sought her wages up to 7 March 2023. The Respondent has now paid the Claimant's wages up to 7 March 2023. The Tribunal therefore concluded that by that date, 7 March 2023, both parties viewed the relationship as having come to an end. The Tribunal accepts that the Claimant resigned by conduct, and she did so in response to the Respondents' various fundamental breaches of contract, namely the failure to pay her whilst on garden leave, the failure to pay her the outstanding wages she was owed, and the failure to acknowledge or respond to her grievance.

**The Issues to be decided**

75. As agreed with the parties, the Tribunal needed to decide the following issues:

**Breach of contract**

76. The Claimant claims it was agreed on 21 June 2022 that she would be paid a commission payment of £2,000 if she achieved sales of £12,000 and this was not paid.
77. Did the Respondent act in breach of contract? Is the Claimant owed £2,000 for a commission payment?
78. The Claimant claims she was told that she would be enrolled in a pension.
79. Did the Respondent act in breach of contract? Is the Claimant owed employer pension contributions?
80. The Claimant claims she was wrongfully dismissed. Is the Claimant owed one week of notice pay?

**Direct race discrimination**

81. The Claimant is of South Asian ethnic origin. She claims she was treated less favourably than comparators, Kim Gosney and Sharon Curtis, who are both White British.
82. The Claimant complains about the following acts of less favourable treatment:

**Allegation 1** - From the start of the Claimant's employment to the end, the First Respondent provided the comparators with their section 1 ERA statement of employment terms. In comparison, the Claimant was not provided with any statement of employment terms.

**Allegation 2** - From the start of the Claimant's employment to the end, the First Respondent paid PAYE and NICs on the wages of the comparators to

HMRC. In comparison, the First Respondent did not pay PAYE and NIC on the Claimant's wages.

**Allegation 3** - From the start of the Claimant's employment to the end, the First Respondent enrolled the comparators in a pension scheme. In comparison, the First Respondent failed to enrol the Claimant.

**Allegation 4** - From November 2021 to December 2022, the First Respondent paid the comparators on PAYE and provided them with pay slips on a monthly basis. In comparison, the Claimant was never provided with itemised pay statements and was never included in PAYE.

**Allegation 5** – From November 2021 to December 2022, the First Respondent paid the comparators correctly each month in accordance with their working hours. In comparison, the First Respondent frequently failed to pay the correct wages to the Claimant. Examples: No wages in November and December 2021, no wages in January and February 2022, underpayments in March, April, May, June, July, October, December 2022 and no wages in September and November 2022.

**Allegation 6** – From November 2021 to March 2023, the First Respondent paid the comparators monthly. In comparison, the First Respondent failed to pay the Claimant her wages for her work in November 2021, December 2021 and January 2022, February 2022, September 2022, and November 2022. On 29 January 2024, some of the outstanding wages were paid. Wages for January, February and March 2023 were not paid.

**Allegation 7** – In October 2022, the First Respondent invited the comparators to a Zoom meeting at the end of October 2022, to discuss sales figures. The Claimant was excluded from that monthly meeting and from earlier monthly meetings, despite being a stronger performer than the comparators on achieving sales.

83. The Claimant invites the Tribunal to draw an inference of race discrimination from the following:
- a) The First and/or Second Respondent paid Laney, a colleague who worked at the Wellington Jewelers shop in Marlow, whose race was not white British [Gypsy heritage] late, underpaid her, paid her without PAYE, paid her in cash and without an itemised pay slip.
  - b) The Second Respondent made the following comment to the Claimant in or around late January/early February 2022 "blacks and gays have it worse" when the Claimant said she found it difficult to find work.
84. Did the above occur?
85. Did they amount to less favourable treatment?
86. Was it because of race/ethnic origin?

Direct sex discrimination

87. The Claimant's male comparator is Keshab Asharpatti, a full-time employee, a jeweler of Nepali heritage.
88. The Claimant complains about the following acts of less favourable treatment:

**Allegation 8** - Between 5 November 2021 to 31 December 2022, the comparator received a written contract of employment from the First Respondent. The Claimant was not provided with one.

**Allegation 9** - Between 5 November 2021 and 31 December 2022, the First Respondent ensured that the comparator was paid on PAYE payroll. The Claimant did not receive itemised PAYE statements.

**Allegation 10** - The comparator was paid promptly by the First Respondent. The Claimant was paid late and there were arrears between 5 November 2021 and December 2022.

**Allegation 11** - The First Respondent provided that the comparator was enrolled on the pension scheme and received holiday pay and sick pay. The Claimant was not provided with a workplace pension scheme or provided with holiday or sick pay entitlement.

**Allegation 12** - On or around 12 July 2022, the Claimant was shouted at in an aggressive manner by the Second Respondent. The Second Respondent always spoke to the comparator in a polite and professional manner.

89. Did the above occur?
90. Did they amount to less favourable treatment?
91. Was it because of sex?

Harassment related to sex or race

92. The Claimant complains about the following acts of unwanted conduct:

**Unwanted conduct 1** - On or around late January/early February 2022 the Second Respondent, when responding to the Claimant's verbal request to pay her wages arrears, asked the Claimant inappropriate questions about her personal life and finances, including the Second Respondent asked questions to the effect of "What is your story? What is your background? Why do you really want this job?" which was personal information. The Second Respondent asked "Why do you need to work?" which was about personal finances.

**Unwanted conduct 2** - On or around 12 July 2022, the Second Respondent in response to the Claimant's oral request for the payment of £2000, shouted loudly at the Claimant "if you don't like my terms, get out!" followed by "leave!" and a gesture at the Claimant that she should leave the Windsor shop immediately, and further told the Claimant that she was "lucky to have a job" and that she "should be grateful".

93. Did these events occur?

- 94. Did the events amount to unwanted conduct?
- 95. Were they related to race?
- 96. Were they related to sex?
- 97. If so, did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Victimisation

- 98. The Claimant claims she carried out the following protected act:

**Protected Act 1** – On 29 July 2022, the Claimant sent the Second Respondent a text message at 10.39pm which stated “maybe I am not masculine enough.. not white enough... just not enough than any of my counterparts..” which, the Second Respondent knowing the background, was an allegation raising that the Claimant was treated less favourably than her comparators on the basis of sex and/or race (an allegation of a contravention of Equality Act). A further message was sent by the Claimant to the Second Respondent on 29 July 2022 at 10.39 which stated “if you truly worked with me as you have with Anja, Kim, Sharon..” which raised with the Second Respondent that he was treating the Claimant differently to the white workers referred to (an allegation of a contravention of Equality Act).

- 99. The Claimant says she was subjected to the following detriments because of Protected Act 1–

**Detriment 1** – The Respondent delayed paying the Claimant her July and August 2022 salary.

**Detriment 2** - The Respondent failed to pay the Claimant her August 2022 salary.

**Detriment 3** - The Respondent continued to fail to pay the Claimant her earned sales commission of £2000.

**Detriment 4** - The Respondent ignored the Claimant's messages requesting payment of her salary and earned sales commission.

- 100. The Claimant claims she carried out the following protected act:

**The Protected Act 2** – On 2 November 2022, the Claimant sent the Second Respondent a text message at 6.57pm which included the words “[I] am mentally worn out by your continuous ill treatment of me since I started work, which has resulted in my serious mental any physical health problems. I have been told to rest my mind completely from the undue, unreasonable and unacceptable workplace stress and anxiety” which was an allegation that discriminatory treatment was causing injury to mental and physical health to the Claimant (an allegation of a contravention of Equality Act).



101. The Claimant says she was subjected to the following detriments because of Protected Act 2 –

**Detriment 5** – The Respondent reduced the Claimant's hours from 3 days per week to 2 days per week.

**Detriment 6** - The Respondent failed to pay the Claimant her November 2022 wages.

**Detriment 7** - The Respondent withheld these wages until ordered to pay the wages by the Tribunal on 29 January 2024.

102. The Claimant claims she carried out the following protected act:

**Protected Act 3** – On 9 December 2022, a Letter Before Action was sent to the First Respondent by the Claimant's Solicitor on the Claimant's instructions which made detailed allegations of race and sex discrimination, including harassment and victimisation [the incident on 12 July 2022] (bringing proceedings under the Equality Act and/or an allegation of contravention of the Act).

103. The Claimant says she was subjected to the following detriments because of Protected Act 3:

**Detriment 8** – The Respondent reduced the Claimant's working days in December 2022.

**Detriment 9** – The Respondent requested that the Claimant go on garden leave on 9 January 2023.

**Detriment 10** - The Respondent persisted in failing to pay accrued wages arrears of nearly £5000 despite these arrears being formally notified in writing.

**Detriment 11** - The Respondent resiled from an agreement to pay garden leave.

**Detriment 12** - The Respondent failed to pay the Claimant her January and February 2023 salary.

**Detriment 13** - The Respondent failed to reinstate the Claimant to the workplace when negotiations for an agreed terms exit stalled.

104. The Claimant claims she carried out the following Protected Act:

**Protected Act 4:** On 23 February 2023, a Grievance Letter was sent on behalf of the Claimant to the First Respondent which made detailed allegations of race and sex discrimination, victimisation and harassment [including the incident on 12 July 2022] (bringing proceedings under the Equality Act and/or an allegation of contravention of the Act).

105. The Claimant says she was subjected to the following detriments because of Protected Act 4:

**Detriment 14** – The Respondent failed to schedule a meeting to address the Claimant's Grievance.

**Detriment 15** – The Respondent left it deliberately unclear as to whether the Claimant was still employed.

**Detriment 16** - The Respondent failed to reinstate the Claimant to the workplace.

**Detriment 17** - The Respondent failed to pay the Claimant any wages for March 2023 or pay her accrued wages arrears including arrears of earned sales commission.

106. Did the above alleged protected acts amount to protected acts?

107. Did the above alleged detriments occur?

108. If so, was the Claimant subjected to the detriment because of the protected act in question?

Automatically unfair dismissal on grounds of having asserted a statutory right

109. The Claimant claims she asserted the following statutory rights, by alleging that the First and/or Second Respondent had infringed the following right or rights of hers which is a relevant statutory right:

- a) Sections 13-27 ERA 1996 - The right to be paid for her work and/ or the right not to be subjected to unlawful deductions from wages.
- b) National Minimum Wage Regulations 1998 (as updated 2021 and 2022) - The right to be paid at a rate in accordance with the Minimum Wage Regulations during each pay reference period of 1 month.
- c) Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Reg. 5-7).
- d) Section 8 ERA – Right to itemised pay
- e) Section 13-27 ERA – Right to sales commission which is defined as wages.
- f) Pensions Act – Right to enrolment in a pension

110. Was the reason or principal reason for dismissal that the Claimant had asserted an infringement of a relevant statutory right?

Part time worker detriments

111. The Claimant claims she was treated less favourably than comparable full - time workers, Kim Gosney and Sharon Curtis.

112. The Claimant complains about the following detriments:

**PTW Detriment 1** - Paid £10 less a day than full time staff Kim Gosney and Sharon Curtis, so she is claiming £180.

**PTW Detriment 2** - From the start of the Claimant's employment to the end, the First Respondent provided the comparators their section 1 ERA statement of employment terms. In comparison, the Claimant was not provided with any statement of employment terms.

**PTW Detriment 3** - From the start of the Claimant's employment to the end, the First Respondent paid PAYE and NICs on the wages of the comparators to HMRC. In comparison, the First Respondent did not pay PAYE and NIC on the Claimant's wages.

**PTW Detriment 4** - From the start of the Claimant's employment to the end, the First Respondent enrolled the comparators on an occupational pension scheme. In comparison, the First Respondent failed to enrol the Claimant.

**PTW Detriment 5** – From November 2021 to December 2022, the First Respondent paid the comparators on PAYE and provided them with pay slips on a monthly basis from November 2021 until December 2022. In comparison, the Claimant was never provided with itemized pay statements and was never included in PAYE.

**PTW Detriment 6** – From November 2021 to December 2022, the First Respondent paid the comparators correctly each month in accordance with their working hours. In comparison, the First Respondent frequently failed to pay the correct wages to the Claimant. Examples are no wages in November and December 2021, no wages in January and February 2022, underpayments in March, April, May, June, July, October, December 2022 and no wages in September and November 2022.

**PTW Detriment 7** – From November 2021 to March 2023, the First Respondent paid the comparators monthly. In comparison, the First Respondent failed to pay the Claimant her wages for her work in November 2021, December 2021 and January 2022, February 2022, September 2022 and November 2022. Note that on 29/1/2024 some of the outstanding wages were paid. Wages for January, February and March 2023 were not paid.

**PTW Detriment 8** – In October 2022, the First Respondent invited the comparators to a Zoom meeting at the end of October 2022, to discuss sales figures. The Claimant was excluded from that monthly meeting and from earlier monthly meetings, despite being a stronger performer than the comparators on achieving sales.

113. Did the above occur?

114. Were they acts of less favourable treatment?

115. Was the treatment on the ground that the Claimant was a part-time worker?

116. Was the treatment justified on objective grounds?

**The relevant law**

**Breach of contract**

117. The definition of a 'contract of employment' in section 230(2) of the Employment Rights Act 1996 (ERA) is 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'. As a result, the terms of an employment contract do not have to be in writing. Although there is a statutory requirement under section 1 ERA 1996 for employers to give workers written particulars of a number of their main terms of employment.
118. Contracts of employment can be made up of express terms and implied terms. A source of express terms can be oral promises as well as written promises (*Comberg v VivoPower International Services Ltd* [2020] EWHC 2438, QBD). The process for establishing the existence of binding oral terms is usually made easier if there is evidence to back up the assertion that such terms have been concluded. In *Whitney v Monster Worldwide Ltd* [2010] EWCA Civ 1312, CA, the employee was able to show that the employer was contractually obliged to honour a promise made to him orally by producing near contemporaneous documentary evidence to that effect.
119. A breach of a contract of employment occurs when a party fails to fulfil an obligation imposed by the terms of the contract. A breach of contract gives a claimant the right to bring a claim for financial compensation for losses flowing from the breach.
120. Section 3 of the Employment Tribunals Act 1996 (ETA) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 set out the jurisdiction of employment tribunals to hear claims of breach of contract. A contractual claim can only be heard by a Tribunal under these provisions where the claim arises or is outstanding on the termination of the employee's employment and relates to any of the following:
- (i) a claim for damages for breach of the contract of employment or other contract connected with employment;
  - (ii) a claim for a sum due under such a contract; or
  - (iii) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
121. Section 86 of the Employment Rights Act 1996 sets out the minimum periods of notice that an employer is required to give to an employee:
- “(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
- (a) is not less than one week's notice if his period of continuous employment is less than two years,
  - (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
  - (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.”
122. If an employer fails to give sufficient notice, then the employee is entitled to claim damages for breach of contract.

123. Under Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 1994/1623, the time limit for bringing a claim for breach of contract in the Employment Tribunal is three months starting with the effective date of termination.

**Direct discrimination (section 13 of the Equality Act)**

124. Section 13(1) of the Equality Act 2010 provides that ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’.
125. In order to succeed with a claim of direct discrimination under section 13, a claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, Lord Scott explained that this means that “the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”.
126. In *Shamoon v Chief Constable of the Royal Ulster Constabulary*, the House of Lords took the view that, by tying themselves in knots attempting to identify an appropriate actual or hypothetical comparator, tribunals run the risk of failing to focus on the primary question, namely, why was the complainant treated as he or she was? If there were discriminatory grounds for that treatment, then there will usually be no difficulty in deciding whether the treatment was less favourable than was or would have been afforded to others. Lord Nicholls viewed the issue as essentially boiling down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others?
127. Where a comparison with an actual comparator is possible, there is no obligation on the tribunal to construct a hypothetical comparator. In *Williams v HM Prison Service* EAT 1236/00 the EAT rejected the suggestion that a tribunal should construct a hypothetical comparator in circumstances where a comparison with an appropriate actual comparator had revealed no discrimination. The EAT could not see how, in such a case, any different result could be achieved by looking at a sensibly constructed hypothetical comparator. However, in the absence of an actual comparator, a real person who is in materially the same circumstances as the claimant but who has not suffered the same treatment, the question of less favourable treatment needs to be determined by reference to a hypothetical comparator who resembles the claimant in all material respects.
128. In *Gould v St John’s Downshire Hill* [2021] ICR 1, EAT noted, “The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic.”

**Reason for treatment**

129. In *Gould v St John's Downshire Hill*, Mr Justice Linden commented: "The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision... the influence of the protected characteristic may be conscious or subconscious."
130. The Equality and Human Rights Commission's Employment Statutory Code of Practice ("the EHRC Employment Code") notes that the motive or intention behind the treatment complained of is irrelevant (para 3.14). It is not a defence for an employer faced with a claim under section 13 to show that it had a good reason or a benign motive for discriminating (*James v Eastleigh Borough Council* [1990] ICR 554, HL).

#### Proving discrimination

131. Section 136 of the Equality Act 2010 provides, in essence, that where a claimant proves facts from which a tribunal could conclude in the absence of an adequate explanation that the respondent has unlawfully discriminated against the claimant (a 'prima facie case'), the tribunal must uphold the complaint unless the respondent proves that it did not discriminate. If a claimant establishes a prima facie case of differential treatment from which a tribunal could properly draw an inference that the treatment was because of one of the protected characteristics or because of a protected act, then it will be for the employer to prove that there was some other ground for the treatment.
132. In *Martin v Devonshires Solicitors* [2011] ICR 352, EAT, the EAT recognised that if a tribunal can make positive findings as to an employer's motivation, it need not revert to the burden of proof rules at all. This point was later endorsed by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054, SC. However, in *Gay v Sophos plc* EAT 0452/10, the EAT noted that it is good practice for a tribunal to address the issue of the burden of proof.
133. In *Talbot v Costain Oil, Gas and Process Ltd and ors* [2017] ICR D11, EAT, His Honour Judge Shanks summarised the following principles for tribunals to consider when deciding what inferences of discrimination may be drawn:
- it is very unusual to find direct evidence of discrimination
  - normally a tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
  - it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
  - the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference

- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations
- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment
- if it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

### **Harassment (Section 26 of the Equality Act)**

134. Section 26 of the Equality Act 2010 states:

(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.

135. There are three essential elements of 'harassment', a) unwanted conduct, b) that has the proscribed purpose or effect, and c) which relates to a relevant protected characteristic.

136. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, EAT Mr Justice Underhill expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment to address each of these three elements. Although in *Ukeh v Ministry of Defence* EAT 0225/14 it was noted that a tribunal that does not deal with each element separately will not make an error of law for that reason alone.

137. In *Reed and anor v Stedman* [1999] IRLR 299, EAT and *Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4, EAT, the EAT held that the word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'. This is also set out in the EHRC Employment Code at paragraph 7.8.

138. In *Richmond Pharmacology v Dhaliwal* Mr Justice Underhill said: "Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done

which are trivial or transitory, particularly if it should have been clear that any offence was unintended”.

139. The EHRC Employment Code states ‘a serious one-off incident can also amount to harassment’ (paragraph 7.8). The question whether an act is sufficiently ‘serious’ to support a harassment claim is essentially a question of fact and degree (*Insitu Cleaning Co Ltd v Heads*).
140. In deciding whether the conduct has the effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, each of the following must be taken into account: a) the perception of the person in question, b) the other circumstances of the case, and c) whether it is reasonable for the conduct to have that effect (section 26(4) of the Equality Act 2010).

### **Victimisation (Section 27 of the Equality Act)**

141. Section 27(1) of the Equality Act provides: “A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.” As a result, a claimant seeking to establish victimisation must show two things: first, that he or she has been subjected to a detriment, and, secondly, that he or she was subjected to that detriment because of a protected act.
142. Under section 27(2), each of the following is a protected act “(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act.”
143. Whether a general complaint of discrimination amounts to a protected act under section 27(2)(d) will depend on the facts of the case (*Durrani v London Borough of Ealing* EAT 0454/12).
144. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* it was established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether a claimant has been disadvantaged is to be viewed subjectively. This test was subsequently confirmed by the House of Lords in *Derbyshire and ors v St Helens Metropolitan Borough Council and ors* [2007] UKHL 16, but there, Lord Neuberger went on to stress that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances.
145. The EHRC Employment Code, drawing on the case law, states: “Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards... A detriment might also include a threat made to the



complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment” (paragraphs 9.8 and 9.9.)

146. In *Nagarajan v London Regional Transport* [1999] ICR 877 the House of Lords held that if a protected act has a ‘significant influence’ on the employer’s decision-making, discrimination will be made out. *Nagarajan* was considered by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA, where it was stated that a significant influence is “an influence which is more than trivial.”

Automatically unfair dismissal on grounds of having asserted a statutory right

147. Under section 104 of ERA, an employee’s dismissal is automatically unfair if the reason or principal reason for the dismissal was that the employee alleged that the employer had infringed a relevant statutory right (section 104(1)(b)).
148. Under section 104(2) ERA, it is immaterial whether the employee actually had the statutory right in question or whether the right had been infringed, but the employee’s claim to the right and its infringement must have been made in good faith. Furthermore, it is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was and it is not necessary actually to specify the right (section 104(3)).
149. By virtue of section 108(3)(g) ERA, the two-year qualifying period normally required to bring an unfair dismissal claim does not apply and so an employee may bring a claim of unfair dismissal for asserting a statutory right whatever his or her length of service.
150. Section 104 does not apply to all statutory rights but only to the ‘relevant’ statutory rights referred to in section 104(4). These include ‘any right conferred by this Act (in other words, the Employment Rights Act 1996) for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal’ (section 104(4)(a)). The relevant statutory rights therefore include the right to receive a written statement of employment particulars or an itemised pay statement (sections 1 and 8 ERA) and the protection of wages rights (section 13, 15, 18 and 21 ERA).
151. Under section 104 ERA, the assertion of the relevant statutory right must be the reason, or the principal reason, for the employee’s dismissal.
152. For constructive dismissal claims the employee must demonstrate that he or she resigned in response to the employer’s repudiatory breach of contract, and that that breach was committed because the employee asserted a statutory right under section 104 ERA. The burden of proof is on the employee to establish the reason for dismissal, on the balance of probabilities.
153. Section 104(1) ERA expressly states that it is sufficient that the principal reason for dismissal is the assertion of a relevant statutory right. Therefore even where the employer has mixed or multiple reasons for dismissal, the

dismissal may be automatically unfair if the employee's assertion of a statutory right is the main reason for the decision.

### **Less favourable treatment on grounds of being a part-time worker**

154. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000/1551 ("the Part Time Workers Regulations") sets out the right for part-time workers not to be treated by their employer less favourably than the employer treats comparable full-time workers, either as regards the terms of their employment contract (Regulation 5(1)(a)), or by being subjected to any other detriment by any act, or deliberate failure to act, of the employer (Regulation 5(1)(b)) where the reason for the treatment is that the worker is a part-time worker, and the treatment is not justified on objective grounds (Regulation 5(2)).
155. In *Hendrickson Europe Ltd v Pipe* EAT 0272/02 the EAT held that a tribunal considering whether a breach of Regulation 5 of the Part Time Workers Regulations has occurred must answer the following four key questions:
- what is the treatment complained of?
  - is that treatment less favourable?
  - is that less favourable treatment on the ground that the worker is part time?
  - if so, is the less favourable treatment justified?
156. Regulation 2(4) of the Part Time Workers Regulations sets out the criteria for establishing who is a comparable full-time worker in relation to a particular part-time worker. The effect of this provision is that a part-time worker can compare his or her position with that of a full-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place:
- both workers are employed by the same employer under the same type of contract
  - both workers are engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualification, skills and experience, and
  - the full-time worker works or is based at the same establishment as the part-time worker.
157. Under Regulation 2(4)(i) of the Part Time Workers Regulations, the part-time worker must be employed by the 'same employer' as his or her comparator. There is no provision for comparison with a worker employed by an associated employer.
158. In *Augustine v Data Cars Ltd* [2024] EAT 117, the EAT followed *McMenemy v Capita Business Services Ltd* [2007] IRLR 400, Ct Sess (Inner House), and held that, for there to be a breach of the Part-time Workers Regulations, a claimant's part-time status must be the sole reason for the less favourable treatment.

### **The Tribunal's findings**

#### **Breach of Contract claims**

159. As already set out above, the Tribunal concluded that the parties did agree in June 2022 that if the Claimant achieved a sales target of £12,000 that she would be paid a commission payment of £2,000. The Tribunal considered this was an oral term of the Claimant's contract of employment, relating to a commission payment, which was agreed between the parties. As set out above, the Tribunal reached this decision based on the text messages which the Claimant sent at the time and Mr Burr's evidence about what he was told by the Claimant at the time. The Claimant exceeded the sales target and was therefore entitled to be paid the amount that was agreed.
160. The Claimant was informed on 13 July 2022 that the Second Respondent was not going to pay her the amount which had been agreed, and the Tribunal found that this amounted to a breach of contract.
161. The amount the Claimant was owed was still outstanding at the time of her dismissal, and the Claimant made her complaint to the Tribunal within three months less one day from the date of her effective date of termination.
162. The Tribunal therefore finds that the First Respondent owes the Claimant £2,000 for breach of contract.

#### Pension contributions

163. As set out above, the Tribunal found that when the Claimant was offered employment by the Second Respondent, she was informed it would be "done properly", and that she would be paid by way of PAYE, would be entitled to holiday pay and would be enrolled in a pension. As set out above, in his witness statement, the Second Respondent confirmed that Ms Gosney and Ms Curtis were paid a pension. It is therefore likely that the Claimant was reassured that she too would be offered a pension when she was first being offered the role. The Tribunal concluded that the Claimant accepted the offer of employment on the understanding that she would be paid by way of PAYE, would be paid holiday pay, and would be enrolled in a pension.
164. The Tribunal did not find that the Second Respondent's explanation as to why the Claimant was not enrolled in a pension was credible. The fact that the Second Respondent viewed the Claimant as a probationer, and the fact she was part-time, do not explain why she was not enrolled in a pension. Employers are not relieved of their obligations, in terms of enrolling their staff in pensions, when employees are in a probationary period, and they are not lawfully permitted to only offer a pension to full time staff but not part time staff.
165. The Claimant was not enrolled in a pension throughout her employment. This was a breach of the Claimant's contract of employment. The Tribunal therefore finds that the Claimant is owed the pension contributions that would have been paid by her employer had a pension been set up when the Claimant's employment started in October 2021.

#### Notice pay/wrongful dismissal

166. The Claimant also brings a claim for wrongful dismissal on the basis that she was dismissed but not given notice or paid for her notice period. Under section 86 of the Employment Rights Act 1996, the Claimant was entitled to one week of notice. The Claimant was dismissed by the Respondents. The First Respondent fundamentally breached the contract of employment which entitled the Claimant to treat herself as dismissed, and she resigned by conduct. She was not given notice. The Claimant is therefore entitled to one week of notice pay.

Direct race discrimination

167. The Claimant made 7 allegations of direct race discrimination.
168. In respect of all 7 allegations the Claimant's proposed comparators were Ms Gosney and Ms Curtis, both of whom were white. The Respondents' position was that they were not suitable comparators because they are both employed on a full-time basis by the Second Respondent's Jewellers business, whereas the Claimant worked part-time and worked for the First Respondent.

Allegation 1

169. The first allegation of direct race discrimination which the Claimant made was that "From the start of the Claimant's employment to the end, the First Respondent provided the comparators with their section 1 ERA statement of employment terms. In comparison, the Claimant was not provided with any statement of employment terms."
170. The Tribunal did not conclude that Ms Gosney or Ms Curtis were given a statement of employment terms or a contract of employment. We did not hear any direct evidence on this point. We were not provided with any copies of documents which confirmed this, and this was not confirmed in the oral evidence presented to the Tribunal. The Tribunal did however hear evidence that Mr Asharpatti, who is Nepalese and who worked full time for the First Respondent, was given a contract of employment in 2019.
171. The Tribunal also heard evidence that Ms Feather, who was employed in 2019, and who is White British, did not have a contract of employment until January 2024.
172. There should be no material difference between the circumstances relating to the Claimant and a comparator. There are potentially two material differences between the Claimant and her named comparators. The first is that the named comparators were not employed by the First Respondent. The Second Respondent's evidence was that they worked for a separate business, the jewellery business. Although we did find, as we have indicated previously, there was considerable overlap between the two businesses. The second potentially material difference is that the two comparators worked full time, and the Claimant worked part time.
173. As a result, the Tribunal considered whether the Claimant had been subjected to less favourable treatment than a hypothetical white comparator in materially the same circumstances as the Claimant would have been. In reaching this decision, the Tribunal felt it was reasonable to take into account

all the evidence that we had heard about how all of the members of staff who worked for the Second Respondent were treated.

174. The Tribunal were not persuaded that the Claimant was treated differently from how a hypothetical white comparator would have been treated. As noted above, Ms Feather, who was the Second Respondent's sister in law was not given a contract of employment, whereas a Nepalese employee, Mr Asharpatti, was given one. The Tribunal therefore did not consider that any difference in treatment was because of race.
175. The Tribunal found that the Second Respondent had a different attitude towards the Claimant because he viewed her as a probationer and because she worked part-time. The Second Respondent repeatedly noted in the Grounds of Resistance and his witness statement that it was not appropriate to compare the Claimant's situation to that of Ms Gosney, Ms Curtis, and Mr Asharpatti because they were full time staff. He also explained to the Tribunal that he was of the view that the issue of whether the Claimant would be given a contract of employment or enrolled in a pension was something that he would have considered after she had finished her probationary period. The Tribunal did not find this to be a satisfactory explanation for the way in which the Second Respondent treated the Claimant in terms of failing to offer her a contract, or failing to enrol her in a pension, but we did conclude it was a genuine one.
176. The Tribunal also found that the Second Respondent did not have a good grasp on the legal requirements of being an employer. It was surprising that he frequently referred to not knowing if employees were paid by PAYE, or whether employees received pay slips. Although he said he deferred these matters to his accountant, it was surprising these were matters that he had not checked and did not have oversight of. The overall impression that was given of the business was that it was not well managed or run, as demonstrated by the failure to pay the Claimant her wages on time, on a set day of each month, the failure to provide payslips, and other very basic requirements of running a business that employs staff. However, the Tribunal heard evidence that these poor practices did not just affect the Claimant but effected other employees too. For example, Ms Gosney referred in a text message to having to message the Second Respondent saying she was broke and asking to be paid. Ms Feather said in her evidence she had sometimes been paid late.
177. Overall, the Tribunal did not find that the Claimant was not given a contract of employment because of her race.

#### Allegations 2, 3, and 4

178. I have set out our conclusions in respect of Allegations 2, 3 and 4 together.
179. The second allegation of direct race discrimination which the Claimant made was that "From the start of the Claimant's employment to the end, the First Respondent paid PAYE and NICs on the wages of the comparators to HMRC. In comparison, the First Respondent did not pay PAYE and NIC on the Claimant's wages."

180. The third allegation of direct race discrimination which the Claimant made was that “From the start of the Claimant’s employment to the end, the First Respondent enrolled the comparators in a pension scheme. In comparison, the First Respondent failed to enrol the Claimant.”
181. The fourth allegation of direct race discrimination was that “From November 2021 to December 2022, the First Respondent paid the comparators on PAYE and provided them with pay slips on a monthly basis. In comparison, the Claimant was never provided with itemised pay statements and was never included in PAYE.”
182. When considering our decision, about whether the Claimant was treated less favourably than a hypothetical white comparator in materially the same circumstances would have been, the Tribunal took into account the evidence we had heard about whether the different members of staff had been paid by way of PAYE, had received pay slips and had been enrolled in a pension.
183. The Tribunal were not provided with any documentary evidence which showed that Ms Gosney or Ms Curtis were paid by way of PAYE and received pay slips. The Claimant’s evidence in her witness statement was that they were paid this way. The Second Respondent’s evidence in his witness statement regarding PAYE was that he was not sure as his father had been the one who was responsible for liaising with easy pay, which was the company the Respondent used when it was paying its employees using the PAYE system. The Second Respondent also noted he would need to check with his accountant. In respect of the issue of whether they received pay slips his evidence in his witness statement was, “I believe that Mrs Curtis and Mrs Gosney would have received pay slips, however, this would need to be checked with the accountant.”
184. Despite this comment, about needing to check with the accountant, appearing in the Second Respondent’s Grounds of Resistance and his witness statement, when the Second Respondent gave oral evidence, he still said that he did not know and would need to check with the accountant. It was difficult for the Tribunal to understand why he had not confirmed these matters with his accountant before attending the hearing to give evidence. On balance, the Tribunal concluded that it was more likely than not, that Ms Gosney and Ms Curtis were paid by way of PAYE and received pay slips. The Claimant gave evidence to this effect, and this was not denied by the Respondent. As noted above, it could easily have been checked.
185. The Tribunal heard evidence from the Claimant that Mr Asharpatti was also paid by way of PAYE and also received slips. When the Second Respondent was asked if Mr Asharpatti was paid by PAYE, he responded, “I would guess so” and when asked if Mr Asharpatti received pay slips, he said he did. Ms Feather also confirmed she was paid by way of PAYE.
186. The Second Respondent confirmed that Ms Gosney and Ms Curtis were paid a pension but noted they were full time whereas the Claimant was part-time and still a probationer. When asked if Mr Asharpatti was in a pension scheme, the Second Respondent’s oral evidence was that he would have to check.

187. The evidence suggested the Claimant was treated differently from the way that other members of staff were treated in that the Claimant was not paid by way of PAYE, did not receive pay slips, and was not enrolled in a pension scheme. However, the Tribunal did not find that the reason for this less favourable treatment was because of the Claimant's race.
188. When considering the reason why the Claimant was treated this way, for the same reasons already explained regarding Allegation 1, the Tribunal concluded that the Claimant was treated less favourably by the Second Respondent because she was a part-time worker and because he viewed her as a probationer, but did not find that the failure to pay her through PAYE, provide her with payslips, or to enrol her in a pension was because of her race.
189. Even though the Tribunal addressed the question of the "reason why" the Claimant was treated the way she was (and concluded the reason why was her part-time status and the fact she was viewed as a probationer), the Tribunal also went on to consider if the Claimant had been subjected to less favourable treatment compared to hypothetical white comparator in materially the same circumstances as the Claimant would have been. In reaching that decision we took into account all the evidence we had heard about how all of the members of staff who worked for the Second Respondent were treated. For the reasons already given, and in particular the fact that all of the full time staff, who were of different ethnicities, were treated in a similar manner, and the part-time staff were treated differently, we did not find that a hypothetical part-time white comparator would have been treated differently.
190. The Tribunal did consider if we could draw inferences from firstly, the fact that Laney, who worked in the Second Respondent's Jewellery business, also had difficulties getting paid and secondly, the comment made by the Second Respondent about how "blacks and gays have it worse".
191. We accepted the Claimant's evidence that she had been told by Laney that she was often paid late and faced some of the same problems that the Claimant had with her pay. The Tribunal however did not feel able to draw any conclusions or inferences from this as we were told only that Laney would describe herself as being of Gypsy origin, but nothing more. Further we noted that Laney worked on a part-time basis, and so it was equally possible that the Second Respondent viewed her status in a similar manner to how he viewed the Claimant's status. In other words, that he drew a distinction between the full time workers and the part time workers, but we simply did not hear enough evidence regarding Laney and how she was treated to be able to draw an inference of race discrimination.
192. We also considered if we were able to draw an inference from the comment made by the Second Respondent about how "Blacks and gays have it worse". This was said in response to the Claimant explaining how she found it hard to find work because of her age, gender and the fact she is of South Asian origin. The Claimant found the Second Respondent's response to be dismissive of her and devalued her experience. The Tribunal found the phrase was ill judged but intended to express his view that the job market is more challenging for people who are black or homosexual and was not intended to be a negative comment about people who are black or

homosexual. The Tribunal also did not find the comment was, or was intended to be, dismissive of the Claimant or her experience as someone of South Asian ethnicity. The Tribunal did not feel able to draw an inference from this comment such that we were able to conclude that the manner in which the Second Respondent treated the Claimant in terms of not paying her through PAYE, failing to provide a payslip, or enrolling her in a pension was influenced by the Claimant's race.

**Allegations 5 and 6**

193. The fifth allegation of direct race discrimination which the Claimant made was that "From November 2021 to December 2022, the First Respondent paid the comparators correctly each month in accordance with their working hours. In comparison, the First Respondent frequently failed to pay the correct wages to the Claimant. Examples: No wages in November and December 2021, no wages in January and February 2022, underpayments in March, April, May, June, July, October, December 2022 and no wages in September and November 2022."
194. The sixth allegation was "From November 2021 to March 2023, the First Respondent paid the comparators monthly. In comparison, the First Respondent failed to pay the Claimant her wages for her work in November 2021, December 2021 and January 2022, February 2022, September 2022, and November 2022. On 29 January 2024, some of the outstanding wages were paid. Wages for January, February and March 2023 were not paid."
195. In reaching our decision in respect of these allegations, the Tribunal considered the evidence it had heard about how other members of staff had been treated in terms of the payment of wages.
196. The Tribunal were not provided with evidence which showed that Ms Gosney and Ms Curtis were paid monthly, and correctly each month, and in accordance with their working hours. The Second Respondent did not respond to this point in his witness statement.
197. As already noted, the Tribunal was provided with evidence which suggested that Ms Gosney was paid late on at least one occasion. On 11 July 2022, the Claimant sent a text message to Ms Gosney. She noted she had not been paid for June. Ms Gosney replied saying that the Claimant should call or text the Second Respondent and say she is broke. She noted she had done this and had been paid on 5<sup>th</sup>. Ms Feather's evidence was that she was paid monthly, usually on the first of the month, but that there was sometimes a delay. When asked how many times there had been a delay in being paid, she said maybe 2 or 3 times.
198. The Tribunal did however conclude, on a balance of probabilities, that Ms Gosney and Ms Curtis were generally paid the correct wages they were owed monthly, and were generally on time, even if there were occasions when payments were made late. Therefore, the Tribunal accepted the Claimant was treated differently from how some of the other staff appeared to have been treated.



199. However, the Tribunal did not find that the Claimant's race had a significant influence on the manner in which the Respondents had paid the Claimant. The Tribunal found that the reason why the Respondents failed to pay the Claimant properly and regularly and in accordance with the amount that she worked each month, was because the Second Respondent viewed her as a casual member of staff because she was a part-time worker, and he saw her as having a different status to those who worked full time because he viewed her as a probationer.
200. As previously indicated, the Tribunal did not consider that the Second Respondent's approach was acceptable. Every worker is entitled to be paid each month, the correct amount for the hours they have worked, and to receive itemised payslips. No worker or employee should ever have to repeatedly ask or chase their employer to be paid. But the Tribunal did not find the Second Respondent's attitude to paying the Claimant was significantly influenced by her race. The Tribunal took into account the Claimant's evidence that the only other person who had the same difficulties as her was Laney, but also took into account that the Claimant also alleged, in her claim of direct sex discrimination, that Mr Asharpatti was paid promptly, by way of PAYE and was given payslips. Again, this supports the Tribunal's conclusion that it was those who were part-time and seen as more casual staff who were treated worse than those who worked full time. Therefore, the Tribunal did not conclude that a hypothetical part time white employee who worked for the First Respondent would have been treated differently from how the Claimant was treated.

#### **Allegation 7**

201. The seventh allegation of direct race discrimination was "In October 2022, the First Respondent invited the comparators to a Zoom meeting at the end of October 2022, to discuss sales figures. The Claimant was excluded from that monthly meeting and from earlier monthly meetings, despite being a stronger performer than the comparators on achieving sales."
202. The Second Respondent's explanation for why the Claimant was not invited to the Zoom meeting in October 2022 was that the meeting did not relate to sales figures or antiques but related to the jewellery side of the business. In his witness statement he said that several members of staff who were not involved with the jewellery business were not invited. In his oral evidence, he noted not everyone was invited, and pointed out that Laney was invited.
203. In her grievance, the Claimant complained to the Second Respondent that she was excluded from the meetings whereas her full time comparators were invited. The Tribunal agreed with what the Claimant wrote in her grievance. The Tribunal also found that the reason why the Claimant was not invited to the meetings was because as a part time worker, she was viewed differently. She was viewed as a casual worker who was still on probation. However, the Tribunal did not find that there was any evidence that the Claimant was excluded from the Zoom meetings because of her race.

#### **Direct sex discrimination**

204. In respect of the Claimant's allegations of direct sex discrimination, the Claimant relies on Keshab Asharpatti, a full time male employee who worked for the First Respondent.

205. The Claimant makes 5 allegations of direct sex discrimination.

Allegation 1

206. The first allegation is that "Between 5 November 2021 to 31 December 2022, the comparator received a written contract of employment from the First Respondent. The Claimant was not provided with one."

207. The Tribunal found that Mr Asharpatti was given a contract of employment in 2019. This was confirmed by the Second Respondent. The Claimant was not given a contract of employment at any time. Therefore, the Tribunal concluded that the Claimant was subjected to less favourable treatment. However, the Tribunal considered that Mr Asharpatti was not a suitable comparator, because he worked full time, and so considered the position of a hypothetical part-time male employee working for the First Respondent.

208. When considering the "reason why" the Claimant was not given a contract, as already indicated above, the Tribunal found that the Second Respondent believed he did not need to provide the Claimant with a contract of employment or take other steps such as enrolling her in a pension, because she was a part-time member of staff and, in his eyes, she was still a probationer. The Tribunal found that this, and his generally poor grasp of what was legally required of him when employing staff, was the reason why he failed to give the Claimant of contract. The Tribunal found that this was the reason why he treated her less favourably, and not because of her sex.

209. For the same reasons, the Tribunal did not find that the Second Respondent would have acted differently towards a hypothetical part-time male employee.

Allegations 2, 3 and 4

210. I will take allegations 2, 3 and 4 together.

211. The second allegation of direct sex discrimination made by the Claimant is that "Between 5 November 2021 and 31 December 2022, the First Respondent ensured that the comparator was paid on PAYE payroll. The Claimant did not receive itemised PAYE statements."

212. The third allegation of direct sex discrimination is that "The comparator was paid promptly by the First Respondent. The Claimant was paid late and there were arrears between 5 November 2021 and December 2022."

213. The fourth allegation of direct sex discrimination is that "The First Respondent provided that the comparator was enrolled on the pension scheme and received holiday pay and sick pay. The Claimant was not provided with a workplace pension scheme, or provided with holiday or sick pay entitlement."

214. The Tribunal has already concluded in respect of the Claimant's allegations of direct race discrimination that Ms Gosney and Ms Curtis were paid by

PAYE, and were paid reasonably promptly by the Respondent, and were enrolled in a pension scheme. We also heard evidence from Ms Feather that while she was initially not given a contract of employment, she was paid by PAYE and was generally paid promptly. Therefore, the evidence did not suggest to us that the Claimant's sex was the reason why she was treated differently from Mr Asharpatti, and we did not conclude that a hypothetical part-time male employee would have been treated differently. Instead, it appeared that Mr Asharpatti, Ms Gosney and Ms Curtis, who were all full time employees, were all treated in a broadly similar manner when it came to pay, payslips, and pensions.

215. The Tribunal found that this was further support for the finding that the reason why the Claimant was treated differently was because she was viewed as a more casual member of staff because she worked part-time and because the Second Respondent viewed her as being a probationer, which meant he mistakenly believed she did not have all the same legal entitlements as a full-time employee.
216. The Tribunal did consider if we could draw an inference of sex discrimination from the questions that the Second Respondent asked the Claimant regarding why she wanted to work, about her finances, and about her husband. It was suggested this was indicative of a misogynistic attitude and that the Tribunal should conclude from this that the Second Respondent would have been unlikely to have treated a hypothetical part time male in the same way and was more likely to exploit the Claimant who he perceived to be financially vulnerable. We were also invited to draw an inference from the manner in which Laney was treated, as she was also female. The Tribunal did not consider that it was able to draw an inference of sex discrimination from either the Second Respondent's comments or the way Laney was treated because there were also a number of female full time staff who were paid reasonably promptly, paid by way of PAYE, and enrolled in a pension scheme.
217. For these reasons, the Tribunal did not find that the Claimant was subjected to direct sex discrimination in respect of allegations 2, 3 or 4.

#### Allegation 5

218. The fifth allegation of direct sex discrimination was "On or around 12 July 2022, the Claimant was shouted at in an aggressive manner by the Second Respondent. The Second Respondent always spoke to the comparator in a polite and professional manner."
219. The Tribunal found that the events of 12 July 2022 occurred as the Claimant recounted them in her witness statement and in her oral evidence. As already indicated the Tribunal found that the Second Respondent shouted at the Claimant that if she did not like the terms of pay, she could leave.
220. The Tribunal again concluded that Mr Asharpatti was not a suitable comparator for this allegation. He was not in materially the same circumstances as the Claimant. The Claimant had been put in the position of repeatedly having to ask the Second Respondent to be paid the wages she was owed. It was also her evidence that she remonstrated the Second

Respondent when he refused to pay her the commission that they had agreed. This was not applicable to Mr Asharpatti who was not in a disagreement with the Second Respondent about a commission payment owed for sales achieved.

221. The Tribunal considered if a hypothetical part-time male comparator, in materially the same circumstances as the Claimant, would have been treated the same way by the Second Respondent.
222. The Tribunal considered whether, if a part time male employee had been asking the Second Respondent to be paid for a lengthy period of time, and was then in a disagreement with the Second Respondent about whether he was going to pay a commission payment, the Second Respondent would have shouted at him. In reaching our decision we took into account the Claimant's evidence that the Second Respondent also shouted at Mike Wellington during the same heated argument with the Claimant. The Claimant recorded in her diary, "Mike tries to intercede, saying "let's talk this through". Jack shouted at him and tells him that "he knows what will happen if he does that". Mike continues to work on a watch with his face next to it. Mike is frightened. He cowers. I say to Jack that I achieved the target, earlier than the period, and exceeded it."
223. The Tribunal concluded from this evidence that the Second Respondent behaved in an aggressive manner on 12 July 2022 to his father, Mike Wellington, as well as the Claimant. This suggested that the Second Respondent had lost his temper, and that was why he shouted. The Tribunal concluded that it was likely that he would have shouted at a hypothetical male comparator in the same circumstances.

**Harassment related to race and/or sex**

224. The Claimant complained about two acts of unwanted conduct which she said related to her sex and/or her race.
225. The first allegation was that "On or around late January/early February 2022 Mr Wellington (the Second Respondent), when responding to the Claimant's verbal request to pay her wages arrears, asked the Claimant inappropriate questions about her personal life and finances, including the Second Respondent asked questions to the effect of "What is your story? What is your background? Why do you really want this job?" which was personal information. The Second Respondent asked "Why do you need to work?" which was about personal finances."
226. As already indicated, the Tribunal found the Second Respondent did ask the Claimant why she wanted to work, why she needed to earn money, and asked about her husband, although the Tribunal concluded that this occurred in November 2021. The Tribunal concluded that this did amount to "unwanted conduct" in that the Claimant found the questions to be intrusive and inappropriate.
227. The Tribunal found it was unlikely that the Second Respondent would have asked a male who was seeking a role why they needed to work, why they needed to earn money, or asked them questions about their wife. The

questions were inappropriate because they are based on an outdated idea that men are the main breadwinners in a house. The Tribunal found that these questions were related to sex in that they were motivated by the Claimant's sex, and the Second Respondent would not even have thought to ask these questions of a male who wanted to work in the Antiques store.

228. The Tribunal did not find that these questions were in anyway related to the Claimant's race and at no point was it suggested to us how that case was being put.
229. The Tribunal accepted that these questions created a degrading environment for the Claimant, and violated her dignity, in that she felt she had to justify her need and desire to work and felt she had to explain her financial situation when that was a personal matter. The Tribunal found it was reasonable for the Claimant to have felt this way, given the inherently sexist nature of the questions.
230. The Tribunal therefore upheld the Claimant's claim she had been subjected to harassment related to sex in respect of the first allegation.
231. The second allegation of harassment was that "On or around 12 July 2022 Mr Wellington, in response to the Claimant's oral request for the payment of £2000, shouted loudly at the Claimant "if you don't like my terms, get out!" followed by "leave!" and a gesture at the Claimant that she should leave the Windsor shop (her place of work) immediately, and further told the Claimant that she was "lucky to have a job" and that she "should be grateful"."
232. As already indicated, the Tribunal accepted the Claimant's evidence that she was shouted at by the Second Respondent on 12 July 2022. However, as previously explained regarding the complaint of direct sex discrimination, the Tribunal did not find that this amounted to less favourable treatment because of sex. The Tribunal found the Second Respondent lost his temper, and shouted at his father as well as the Claimant, and as a result, would have treated a hypothetical male comparator in the same way. For the same reason, the Tribunal did not find that the unwanted conduct was motivated by the Claimant's sex, and we did not find any other basis on which it was "related to" sex.
233. The Tribunal also did not find it was unwanted conduct related to race. The conduct is not obviously connected to the Claimant's race, and the Tribunal did not consider it was motivated by the Claimant's race. The Tribunal found the Second Respondent shouted at the Claimant because he was angry with her for remonstrating with him about his failure to pay the agreed commission. Therefore, the Tribunal did not uphold this allegation of harassment.

#### Extension of time

234. The Claimant's first allegation of harassment related to sex occurred in November 2021. Her claim form was presented on 14 April 2023. The Claimant contacted Acas for early conciliation purposes regarding the Second Respondent on 24 February 2023. Therefore, the primary limitation period in respect of the Second Respondent is 23 November 2022. She contacted Acas for early conciliation purposes regarding the First

Respondent on 30 March 2023. Therefore, the primary limitation period in respect of the First Respondent is 31 December 2022. As a result, this claim is approximately a year out of time in respect of the Second Respondent and is approximately a year and a month out of time in respect of the First Respondent.

235. Therefore, the Tribunal had to consider if it was just and equitable to extend time. The Tribunal accepted the Claimant was in a vulnerable position in November 2021. She had only just started working for the First Respondent. She wanted to work in Antiques, as this was her area of expertise, and considered she had limited options. She also felt insecure and hindered in her ability to find work because of her age and race. This meant she was particularly keen to remain in the role with the First Respondent. This also explains why she stayed working for the First Respondent even when she was not paid for many months. The Tribunal accepts that it was not realistic for the Claimant to have raised a complaint of harassment related to sex either as a grievance or to an Employment Tribunal without risking her employment. This was born out by the events that followed, whereby when she did accuse the Second Respondent of discrimination, he was of the view that this meant she could no longer continue working for him, and the employment relationship ended.
236. The Tribunal also took into account the on-going vulnerability and precariousness of the Claimant's position when considering if it was reasonable for her to not have brought her claim earlier. The Claimant was not being paid, was frequently being paid late, and was paid incorrect amounts. Despite this she continued working for the First Respondent because she did not want to lose her role. The Tribunal also considered whether the Respondents were prejudiced by the delay in the Claimant bringing this claim and concluded it was not. The Second Respondent was able to put forward his version of what he said happened on 12 July 2022, and he was also able to call his witness who gave evidence on the issue as well. Therefore, the Tribunal did not consider that the Respondents faced any real practical prejudice by the fact that the claim was out of time. For these reasons, the Tribunal concluded it would be just and equitable to extend time.
237. Therefore, the Claimant's first allegation of harassment related to sex succeeds and is upheld.

### **Victimisation**

238. In respect of her claim for victimisation, the Claimant claimed she made four protected acts. As set out above, under section 27(2) of the Equality Act 2010, a protected act includes bringing proceedings under the Equality Act, giving evidence or information in connection with proceedings under the Equality Act, doing any other thing for the purposes of or in connection with the Equality Act, and making an allegation (whether or not express) that someone has contravened the Act.

### **The first protected act and detriments**

239. The first protected act which the Claimant relies upon is the text message that she sent to the Second Respondent on 29 July 2022 in which she

complained about the way she was being treated and wrote, “maybe I am not masculine enough, not pliable enough, not white enough, not submissive enough...”.

240. The Tribunal found that it was clear that the Claimant was suggesting to the Second Respondent that his treatment of her was influenced by her sex and her race, and therefore found this was an allegation that someone was contravening the Equality Act and was a protected act.
241. The Claimant alleged that because she sent this text message, she was subjected to three detriments as victimisation. The three alleged detriments were that the Second Respondent delayed paying her for July and August 2022, failed to pay her August 2022 wages, and continued to refuse the Claimant her earned sales commission.
242. The Tribunal accepted that factually all of these events occurred, but did not find that they occurred because of the protected act. The failure to pay the Claimant in a timely manner had been an on-going issue from when she started. Indeed, she was not paid at all from when she started at the end of October 2021 until the start of March 2022. The Tribunal also took into account that the Claimant did receive further wages payments in October 2022 and December 2022, so it was not as though the Claimant's payments ceased altogether after she sent this text. The Tribunal found that detriments one and two were simply a continuation of the poor and disorganised way the Respondents paid her.
243. The Tribunal also found that the Second Respondent had conveyed to the Claimant on 12 July 2022 that he would not be paying her the £2,000 that had been agreed as a commission payment. This decision was already made before she sent the text message, and so we concluded this was not a detriment that the Claimant was subjected to because of the protected act.

#### The second protected act and detriments

244. The second protected act which the Claimant relies upon was a text message sent by the Claimant to the Second Respondent on 2 November which included the words “I am mentally worn out by your continuous ill treatment of me since I started work, which has resulted in my serious mental any physical health problems. I have been told to rest my mind completely from the undue, unreasonable and unacceptable workplace stress and anxiety”. The Tribunal concluded that while this was an allegation of poor treatment against the Second Respondent as there was no mention of any protected characteristic, such as sex or race, this was not an allegation that the Second Respondent was contravening the Equality Act. Therefore, the Tribunal did not find that this was a protected act.
245. It was the Claimant's case that she was subjected to three detriments because she sent this text message on 2 November 2022. The Tribunal went on to consider this, in case we were incorrect in our conclusion that the text message of 2 November 2022 did not amount to a protected act.
246. The three alleged detriments were that the Respondents reduced the Claimant's hours from 3 days per week to 2 days per week, failed to pay the

Claimant her November 2022 wages, and withheld these wages until ordered to pay them by the Tribunal on 29 January 2024.

247. The Tribunal did not conclude that the Claimant was subjected to any of these detriments because she sent the text message on 2 November 2022.
248. Although the Claimant's hours were reduced such that she was only rostered to work for two days per week for three weeks in November 2022, her days then increased again in December 2022. The Tribunal therefore did not consider that the Claimant was subjected to a detriment in that her days were reduced from 3 days to 2 days from that point onwards. In any event, the Tribunal were not presented with any evidence which suggested the reason why the Claimant's days were reduced from 3 days to 2 days for three weeks in November 2022 was because of the text message she sent on 2 November 2022.
249. In terms of the allegation that the First Respondent failed to pay the Claimant her November 2022 wages, as previously indicated, the Tribunal found that the failure to pay the Claimant in a timely manner had been an on-going issue from when she started. This was sporadic throughout the year, and it did not get notably worse after this text message was sent. The Tribunal also took into account that the Claimant did receive a further payment of wages in December 2022. The Claimant's payments did not cease altogether after she sent this text.
250. In terms of the third alleged detriment, the Tribunal did not find that the First Respondent withheld the payment of her wages until 29 January 2024 because the Claimant sent the text message on 2 November 2022. The Tribunal was of the view that the reason why the payment was withheld related to the breakdown in the relationship which followed after the Claimant's solicitor sent a letter on 9 December 2022. This is explained further below in respect of other similar alleged detriments.

#### The third protected act and detriments

251. The Claimant's third alleged protected act was the letter sent by her solicitor on 6 December 2022. The Tribunal concluded that the letter sent by the Claimant's solicitor was a protected act as it alleged that the Claimant had been subjected to race discrimination, sex discrimination, harassment and victimisation.
252. The Claimant alleges that as a result of this protected act, the Claimant was subjected to 6 detriments.
253. The first alleged detriment is that the Claimant's working days were reduced in December 2022. The Tribunal did not find as a matter of fact that this occurred. While the Claimant's working days were reduced to two days per week in the second, third and fourth week of November, the rotas in the bundle indicated the Claimant worked three days in the first week of December 2022, four days in the second week, six days in the third week, and two days in the fourth week of December 2022.



254. The second and sixth alleged detriments which the Claimant says occurred because this letter was sent on her behalf were that the Respondents “requested that the Claimant go on garden leave on 9 January 2023” and that the Respondents “failed to reinstate the Claimant to the workplace when negotiations for an agreed terms exit stalled.” The Tribunal concluded that the Claimant was subjected to these detriments because of her protected act.
255. The Second Respondent’s oral evidence to the Tribunal was he felt the Claimant could no longer work for him when he became aware he was being accused of things which he believed he had not done, and what had upset him the most was the allegation of discrimination, including the allegation he had been sexist. The Tribunal found that in effect after the Claimant accused the Second Respondent of discrimination, he considered it was not possible for her to continue to be employed. This was supported by the fact that he wrote in his witness statement, that he could not recall if a grievance meeting was scheduled after the Claimant had submitted a grievance, but he found it “extraordinary” that the Claimant considered there was any scope of the continuation of her employment as it was clear the relationship had irretrievably broken down. It was clear from his oral evidence that he viewed it as being irretrievably broken down because she had accused him of discriminating against her.
256. As a result, in early January 2022, it was suggested by the Respondent’s solicitor that the Claimant be put on garden leave, and when the solicitors were unable to reach an agreement in that period, the Claimant was not reinstated to her role because she had made an allegation of discrimination. These aspects of the Claimant’s claim of victimisation are therefore successful. In other words, the Tribunal concluded that the Claimant’s employment was terminated because she made an allegation of discrimination against the Second Respondent.
257. The other alleged detriments (the third, fourth, and fifth) which the Claimant said occurred as a result of the fact that her solicitor sent the letter on 6 December 2022, were that the First Respondent persisted in failing to pay accrued wages arrears of nearly £5,000 despite these arrears being formally notified in writing, resiled from an agreement to pay garden leave, and failed to pay the Claimant her January and February 2023 salary. The last two of these allegations are effectively the same as the Claimant was on garden leave in January and February 2023.
258. The Tribunal did not find that the Respondents failed to pay the unpaid wages that were owed to the Claimant up to that point, or pay her for January and February 2023, because she made an allegation of discrimination in her letter of 6 December 2022. The Tribunal considered that the reason these payments were not made at that time is because the parties’ solicitors were unable to reach a solution, and the Claimant started litigation in the Employment Tribunal. The Tribunal did not find that the reason for the refusal to make those payments was because of the allegations of discrimination set out in the letter of 6 December 2022, but because as a part of that letter the Claimant was raising a range of matters and seeking payments for other claims over and above her unpaid wages, which the Respondents contested.

The fourth protected act and detriments

259. The fourth protected act which the Claimant relies upon is the grievance that she raised on 23 February 2023. The Tribunal concluded that this was a protected act as it alleged that the Claimant had been subjected to race and sex discrimination.
260. The Claimant alleges that she was subjected to 4 detriments because she carried out this protected act.
261. The first alleged detriment was that the Respondents did not schedule a meeting to address the Claimant's grievance. The Tribunal did not find that the Respondents failed to schedule a grievance meeting because the Claimant raised a grievance. The Tribunal found the reason why the Second Respondent failed to arrange a grievance meeting in response to the Claimant's grievance is because he viewed the employment relationship as being over, because the Claimant had accused him of discrimination in the letter of 6 December 2022. The Second Respondent did not arrange a grievance meeting because in his mind there was no chance of the Claimant returning to work.
262. The second alleged detriment which the Claimant says she was subjected to because she raised a grievance was that it was left deliberately unclear as to whether the Claimant was still employed. The Tribunal did not find that this occurred because the Claimant raised a grievance on 23 February 2023. The Claimant had been on garden leave from the start of January 2023. The parties were corresponding via solicitors to see if the Claimant's claims could be resolved. This was the cause of the ongoing uncertainty. However, it was clear that in the Second Respondent's mind the cause of the irretrievable breakdown in the relationship was the allegations made in the letter of 6 December 2022.
263. The third alleged detriment was the failure to reinstate the Claimant to the workplace. The Tribunal has already found that the Claimant was subjected to this detriment as a result of her third protected act.
264. The fourth alleged detriment was the failure to pay the Claimant any wages for March 2023 or pay her the accrued wages and the outstanding sales commission. The Tribunal did not find that the reason why these payments were not made was because of the grievance submitted by the Claimant on 23 February 2023. This is for essentially the same reasons given in respect of her previous detriment of this nature. The Tribunal considered that the reason these payments were not made at that time is because the parties' solicitors were trying to reach a solution, and when that failed the Claimant started litigation. From 6 December 2022 onwards, it was clear the Claimant was raising a range of matters and seeking payments for other claims over and above her unpaid wages, which the Respondents contested.

**Constructive automatically unfair dismissal for assertion of a statutory right**

265. The Tribunal found that the Claimant set out in the letter of 6 December 2022 that the First Respondent had infringed her statutory rights, and she named some of the statutory rights which are protected under section 104 of the Employment Rights Act, including her right to be paid the wages she was

owed. The Tribunal concluded that she made this assertion in good faith, as her wages were outstanding and had been for a long time.

266. However, the Tribunal did not find that this assertion was the reason or principal reason for the Claimant's dismissal. As already explained, the Tribunal found the reason, or the principal reason, for the Claimant's dismissal was the fact that she accused the Second Respondent of subjecting her to discrimination. This was in effect confirmed by the Second Respondent in his oral evidence, as set out above. Therefore, the Claimant's claim of constructive automatically unfair dismissal for assertion of a statutory right was not successful and is not upheld.

### **Less favourable treatment under the Part Time Workers Regulations**

267. The Claimant alleged that she was subjected to 8 detriments because she was a part time worker.
268. The Claimant identified in her Claim Form that she was relying on full time comparators, Ms Gosney and Ms Curtis. The Respondents' position was that Ms Gosney and Ms Curtis worked for the jewellery business. Although it was accepted that Ms Gosney worked in the Antiques store and the Jewellery business, the Respondents maintained that in terms of who they were employed by, it was the jewellery business.
269. As set out above, Regulation 5(1) gives part-time workers a right not to be treated less favourably than a comparable full-time worker as regards contractual terms or by being subjected to 'any other detriment'. The right under Regulation 5 is the right to be treated no less favourably than a 'comparable full-time worker'. Regulation 2(4) sets out the criteria for establishing who is a comparable full-time worker in relation to a particular part-time worker. A part-time worker can compare his or her position with that of a full-time worker if both workers are employed by the same employer under the same type of contract.
270. The Tribunal reached the conclusion that Ms Gosney and Ms Curtis were not employed by the same employer as the Claimant. The evidence we heard suggested they worked either exclusively (Ms Curtis), or predominately (Ms Gosney), in the Jewellery stores. The Tribunal therefore concluded it was more likely than not that they were employed by the Second Respondent's jewellery business. As the Claimant was employed by the First Respondent and Ms Gosney and Ms Curtis were employed by the Second Respondent's jewellery business, they were not suitable comparators. The Regulations are clear and restrictive, the full time comparators must be employed by the same employer. We were of the view that it was not open to the Tribunal to find that as there was considerable overlap in how the businesses were run, that they were effectively employed by the same employer.
271. As will have been apparent from the conclusions that the Tribunal reached regarding the Claimant's claims of discrimination, we did find that in numerous ways the Claimant was treated less favourably than those who worked full time for the First Respondent and in the Second Respondent's other business because she was a part-time worker. Therefore, we would

have upheld a considerable number of the Claimant's detriments if Ms Gosney and Ms Curtis had been employed by the First Respondent.

272. We considered if it was possible to consider the Claimant's position in comparison to the full time employee who did work for the First Respondent, Mr Asharpatti, but as this was not how the Claimant put her case during the hearing, we did not consider it was permissible for the Tribunal to change the name of the comparator(s) during the deliberations, as that would have clearly offended the principle of natural justice and would have significantly prejudiced the Respondents who considered the case against them was that she was treated differently to full time comparators, Ms Gosney and Ms Curtis.
273. For this reason, the Claimant's claim she was subjected to less favourable treatment on grounds of being a part time worker was not successful and is not upheld.

Adding the Second Respondent as an employer

274. Finally, we address the submissions that were made by the Claimant regarding adding the Second Respondent as the Claimant's second employer. This application was made on the basis that the Claimant was concerned that the Second Respondent would close down the First Respondent business to avoid having to make any payment awarded by the Tribunal. The Second Respondent denied that this was necessary and said that he had no intention of closing the First Respondent business which had had a successful year.
275. The Tribunal concluded it was not permissible to find the Second Respondent was the Claimant's employer to try to make him personally liable. If there had been a contract of employment it would have been between the First Respondent and the Claimant, and the Tribunal would only have been able to find the Second Respondent was the Claimant's employer if she had in fact been employed by him personally. However, she was not. She was employed to work in the Antiques business, and therefore the application is refused.
276. The Claimant has succeeded with her claims of breach of contract and these claims are upheld in respect of the First Respondent. She has succeeded with some parts of her claims for victimisation and harassment related to sex, and these claims are upheld against the First and Second Respondent.

Approved by:

Employment Judge Annand

23 March 2025

Corrected on 30 August 2025

JUDGMENT SENT TO THE PARTIES ON

25 March 2025

FOR THE TRIBUNAL OFFICE

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