EMPLOYMENT TRIBUNALS

Claimant: **Miss. Holly Merriman**

Respondent: **Bugibba Independent Limited**

Heard at: **Nottingham – Hybrid**

On: **19th, 22nd, 23rd, 24th & 25th May 2023**

Before: **Employment Judge Heap**

Members: **Mr. M Alibhai**
Mrs. D Newton

Representation
For the Claimant: **Ms. K Deary – Lay Representative**
For the Respondent: **Mr. K Limpert - Advocate**

JUDGMENT

1. The complaint of harassment or alternatively direct discrimination in relation to the assertion that the Claimant was ostracised is dismissed on withdrawal.

2. The Claimant's complaint of harassment contrary to Section 26(1) Equality Act 2010 succeeds in respect of events of December 2020/January 2021. The complaint of direct discrimination in relation to that complaint is dismissed given the effect of Section 212(1) of the Equality Act 2010.

3. The Claimant's complaints of harassment contrary to Section 26(3) Equality Act 2010 succeed. The complaints of direct discrimination in respect of those same complaints fail and are dismissed as a result of the provision of Section 212(1) Equality Act 2010.

4. The complaints of victimisation contrary to Section 27 Equality Act 2010 are well-founded and succeed to the extent set out below. The complaints of victimisation relating to suspension and to changes in shifts after 28th March 2021 fails and are dismissed.

5. The Claimant did not make a protected disclosure on 28th March 2021 because that disclosure was not made in the public interest and so the complaint of automatically unfair dismissal contrary to Section 103A Employments Right Act 1996 fails and is dismissed.

6. There will be a Preliminary hearing to be conducted by telephone in due course so as to list the claim for a Remedy hearing and to make Orders for preparation of the same. Notice of hearing will follow.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This claim is brought by Miss Holly Merriman (hereinafter referred to as "The Claimant") against her now former employer, Bugibba Independent Limited t/a Project Doughnut (hereinafter referred to as "The Respondent").

2. The claim was presented by way of a Claim Form received by the Tribunal on 27th July 2021. That followed on from a period of ACAS early conciliation which took place between 22nd June 2021 and 6th July 2021. The claim is one of harassment contrary to Section 26 Equality Act 2010 relating to the protected characteristic of sex or, in the alternative, the Claimant advances complaints of direct sex discrimination in respect of those same complaints contrary to Section 13 Equality Act 2010.

3. There are also a number of complaints of victimisation contrary to Section 27 Equality Act 2010 and a complaint of automatically unfair dismissal for having made a protected disclosure advanced under Section 103A Employment Rights Act 1996.

4. The Respondent denies the claims in their entirety either on the basis the facts as set out were said not to have occurred and not to have occurred in the way the Claimant contends they did or, otherwise, that the Claimant was not harassed, discriminated against or victimised in respect of any matters of which she complains.

5. Insofar as the complaint of automatically unfair dismissal is concerned it is also the position of the Respondent that whilst it is accepted that the Claimant was a worker it is not accepted that she was an employee within in the meaning of Section 230(1) Employment Rights Act 1996 so that it is said she does not have standing to bring that complaint. It not disputed that the Claimant has standing to bring the discrimination complaints and that she was an employee within the wider meaning under the Equality Act.

6. The parties had agreed a list of issues prior to the hearing. However, those were adopted entirely from the provisional identification of the issues which Employment Judge Ahmed had set out at an earlier Preliminary hearing based on his understanding of the parties respective cases as they were explained to him at that

point.

7. As it was, however, upon consideration of the Claimant's witness statement it appeared that some matters had been phrased slightly differently so that some complaints of harassment and direct discrimination, for example, had fallen by the wayside. Particularly, the Claimant made no suggestion that after an initial incident in December 2020/January 2021 there had been any further conduct of a sexual nature towards her by Oliver Horn and some acts which had previously been said to amount to direct sex discrimination or harassment were in fact only advanced as acts of victimisation.

8. We were also able to clarify certain matters with the Respondent in that, for example, it was not disputed that the Claimant had done a protected act for the purposes of the victimisation claim and insofar as the whistleblowing complaint was concerned the only area where the Respondent disputed that the Claimant had made a protected disclosure was in relation to the issue of whether the disclosure was made in the public interest.

9. We have appended to this Judgment a copy of the final list of issues which was agreed with the parties before we turned to deal with the evidence. That includes an act of victimisation in respect of the Claimant being ostracised but in fact in her closing submissions Miss. Deary withdrew that complaint because she indicated that that was not something that said the Claimant was able to evidence on the basis of the witnesses from whom we had heard. We have therefore dismissed that complaint on withdrawal.

10. As set out above and reflected in the list of issues, there is a dispute between the Respondent and the Claimant over employment status. The Respondent contends that the Claimant was only a worker and not an employee under meaning of Section 230 Employment Rights Act 1996. The basis of that was largely that the Claimant was not provided with a contract of employment and that it is said that there was no obligation to provide her with work nor any obligation upon her to accept it.

11. The hearing bundle produced by the parties contained no documentation as to remedy. Accordingly, we determined that we would not hear any evidence in relation to the matter of remedy until such time as we had determined liability. That was also on the basis that remedy would invariably turn upon which complaints, if any, succeeded at the hearing.

THE HEARING

12. The hearing of this matter took place over a period of five days from 19th May to 25th May 2023. The first morning of the hearing was spent reading into the witness statements and the hearing bundle. After identifying some preliminary matters, the main hearing was converted to deal with those issues and the hearing was adjourned shortly thereafter for the remainder of that day for reasons which were explained to the parties at the time and which it is unnecessary to rehearse within this Judgment.

13. We concluded the evidence and submissions of both parties in the afternoon of the final day of hearing time. Given the number of facts which we had to find in relation to the remaining complaints before us we determined that we would reserve our decision and we spent the remaining part of the hearing time, namely the afternoon of 25th May 2023, on our deliberations and reaching our decision. The facts that we have found and the conclusions that we have reached were unanimous.

14. The Judge apologises to the parties for the delay in this Judgment being promulgated which was caused by a number of factors including periods of leave away from the Tribunal and other judicial work and commitments. The patience of the parties in awaiting this Judgment has been much appreciated.

WITNESSES & PRELIMINARY MATTERS

15. On commencement of the evidence, we heard from the Claimant in person and on her own behalf. During the course of the hearing an application was made by the Claimant's sister, Miss. Deary who was representing her, for a Witness Order in respect of the Claimant's former supervisor, Hanna Didluch. We granted that application as it was clear that Miss. Didluch had potentially relevant evidence which would go to some of the issues that we were required to determine.

16. Miss. Didluch had previously indicated that she was prepared to be a witness for the Claimant but that did not progress which was, on the Claimant's understanding and which transpired to be correct, that she was concerned for her own position as she remained in employment with the Respondent. We accordingly issued the Witness Order and heard from Miss. Didluch on the final day of the hearing. Although we would generally speaking have heard her evidence immediately after that of the Claimant that was not practicable so as to give Miss. Didluch the necessary amount of notice which would be required to attend the hearing. To accommodate Miss. Didluch we heard her evidence via a CVP link with the rest of the participants aside from two witnesses on behalf of the Respondent (Mr. Oliver Horn and Mr. Matthew Bond) being in physical attendance at the hearing centre. We are satisfied that dealing with the evidence of the three witnesses who we heard from by CVP did not interfere with their ability to give their best evidence nor the fairness of the hearing and neither party objected to the use of a hybrid hearing arrangement.

17. There was also a suggestion by Miss. Deary during the course of the hearing that she may seek to call a further witness to rebut give evidence that had been given by one of the Respondent's witnesses, although that was not in the final event advanced and on the Claimant's side and so we heard only from her and Miss. Didluch.

18. On behalf of the Respondent, we heard from the following witnesses:

    18.1. Mr. Max Poynton, one of three Directors of the Respondent Company;

    18.2. Mr. Matthew Bond, another Director of the Respondent Company;

    18.3. Mrs. Carol Bond, the Respondents then Human Resources ("HR") Manager;

18.4. Ms. Nicola Caley, a former employee of the Respondent who at the material time with we are concerned was a supervisor working alongside Miss. Didluch in the team in which the Claimant worked; and

18.5. Mr. Oliver Horn, a baker formerly employed by the Respondent who the Claimant alleged had sexually harassed her during the course of his employment.

19. We should observe that initially the Respondent did not intend to call Mr. Horn to give evidence. We raised that with Mr. Limpert who was representing the Respondent on the first day of the hearing given that it was plain that at the last Preliminary hearing before Employment Judge Ahmed he had set out clearly the witnesses who would be expected to give evidence. That included Mr. Horn. That was for fairly obvious reasons because he was the only person who could give direct evidence on the Respondent's side as to an incident which the Claimant contended amounted to sexual harassment and which was denied by the Respondent. We raised that with Mr. Limpert on the basis that it appeared to place the Respondent in some difficulty and may well be a matter in respect of which we would be asked to draw inferences.

20. Whilst Mr. Limpert indicated that he had anticipated that the Claimant would call Mr. Horn it would have been unlikely that he would have given evidence which would have assisted her given that he denied that the incident had occurred at all and therefore it was understandable that she would not be seeking to call him.

21. We adjourned the hearing to give Mr. Limpert time to obtain instructions in relation to that issue because it appeared to us that the Respondent would be in some difficulty without the evidence of Mr. Horn given that he was the only person who would be able to give direct evidence in respect of the allegations of harassment that the Claimant made in these proceedings. Mr. Limpert initially told us following an adjournment that the Respondent did not wish to call Mr. Horn to give evidence but that position changed over the weekend and at the commencement of the hearing on Monday it was indicated that there was now an intention to call him. The Claimant made no objection to that application and indeed Miss. Deary indicated that they welcomed it.

22. Given that Mr. Limpert had not spoken with Mr. Horn we determined that before hearing the Claimant's evidence we would adjourn to allow him to discuss the position with Mr. Horn, obtain instructions and produce a draft witness statement for Mr. Horn's approval. It was agreed that was the best course given that if Mr. Limpert only obtained instructions in relation to those matters at a later stage it may necessitate re-calling the Claimant. We therefore adjourned the hearing for that purpose.

23. Mr. Limpert produced a short statement which had been approved by Mr. Horn the following day. Unfortunately, that only addressed one allegation of harassment and made no reference to other matters of which the Claimant complained and in respect of which again only Mr. Horn could give direct evidence on the Respondent's behalf. Mr. Limpert therefore sought to revise the witness statement to take those matters

into account and sent a copy to the Claimant late into the same evening. There was no objection by Miss. Deary to the amended witness statement being used.

24. During the course of the hearing a number of further documents came to light from both parties which had not been disclosed earlier in the proceedings as they should have been. By and large there was no objection to those documents being placed into evidence with the exception of one produced by Mr. Limpert on the final day of the hearing. That was objected to by Miss. Deary on the basis that she indicated that Matthew Bond and Carol Bond would need to be recalled to deal with it.

25. Whilst Mr. Limpert candidly accepted that the Respondent had not particularly turned their minds or been diligent in relation to the issue of disclosure we determined that we would consider the document as part of the evidence before us because it was potentially relevant to the issues that we needed to determine but that we would hear submissions in relation to the weight to be attached to it given that it had not been the subject of any cross examination, either in relation to the Claimant or the witnesses identified by Miss. Deary. We did not consider it necessary to recall those individuals because as the evidence continued to emerge that would have to have taken place a number of times and it was unclear where matters might then stop. It would also have risked the hearing not being able to be concluded in the allotted time available.

CREDIBILITY

26. We now turn to our assessment of credibility of the witnesses of whom we heard given that it has invariably informed our findings of fact in the case where there are a number of disputes as to events and in some instances where we are not assisted by way of the existence of any documentary evidence or at least any documentary evidence to which we were taken to support one side or the other.

27. With regard to credibility, we begin with our assessment of the Claimant. We considered her to be a credible witness and one whose account was rooted in truth. Whilst the Respondent pointed to some inconsistencies such as the date when the first act of harassment occurred we were satisfied that those where minor in nature and that the Claimant has throughout being consistent in the detail of what she says happened to her.

28. That has been the case throughout the process from the initial complaint made, in a letter before action sent to the Respondent (albeit that there were minor typographical errors made by her then solicitors) in her Claim Form, in her witness statement and right through to the account which she gave before us at the hearing.

29. Whilst significant emphasis has been placed by the Respondent in relation to the fact that the Claimant cannot pinpoint the precise date of which she says an initial act of harassment occurred and there was a delay in reporting the matter, we do not consider that to be particularly significant. Many witnesses are unable to recall specific dates, even in relation to an incident which is traumatic and an inability to recall a precise date does not mean that an event has not happened. We also take

into account the fact that at the time of the events in question the Claimant was only 17 years of age and had little or no experience as to the world of work and she has given a plausible explanation for a delay in reporting the incident and the reasons why she reported it at the point that she did.

30. We did not therefore consider that the inconsistencies relied upon by the Respondent should weigh heavily against the Claimant and we found her to be a credible witness.

31. Similarly, we found Miss. Didluch to be a credible witness who gave forthright evidence which was consistent with what we had been told by the Claimant at a point when Miss. Didluch had not been present at the hearing. We did not consider that there had been any collusion as the Tribunal served the Witness Order and Miss. Didluch produced her own witness statement rather than any initial draft being prepared by the Claimant or Ms. Deary. We considered Miss. Didluch's evidence to be candid and there was no suggestion that she had any axe to grind with the Respondent. We take into account in that regard that Miss. Didluch, at that stage at least, remained in employment with the Respondent.

32. We turn then to the Respondent's witnesses and our assessment of their evidence. We begin with Oliver Horn. For the reasons that we set out in our findings of fact below we considered his evidence to be entirely unsatisfactory and we did not consider him a credible or reliable witness. There were inconsistencies in the account that he gave before us in his witness statement in respect of what he reported to the Respondent at the time, what is recorded in the Respondent's ET3 Response and in contemporaneous documentation.

33. For example, he referred for the first time in his witness statement to a suggestion that the Claimant had only made the complaint of sexual harassment against him to the Respondent after an altercation that they had over a cigarette filter when he had become angry with the Claimant and she had threatened that she could say something that would get him into trouble. That would clearly be a key issue to have raised at the time as to his defence to the allegation to the Respondent. Whilst he maintained in his evidence that it had been said at the time that was not recorded in the record of conversation taken by Nicola Caley and we accept her evidence that if it had been said then it would have been recorded. That record of conversation was signed by Mr. Horn and it would appear to us unlikely that he would have signed it if it did not accurately represent what must be a key part of his defence at that time to suggest a reason why the Claimant had made up the allegation against him. That is just one example of why we found Mr. Horn's evidence to be unsatisfactory and we deal with others in our findings of fact below.

34. We also found him to be an unreliable witness. Evidence that he gave that he had only been spoken to on 28th March 2021 by Ms. Caley outside and not in a formal meeting with her and Mr. Poynton could not be reconciled with the evidence of those two witnesses, a record of the meeting which was before us in the hearing bundle and the fact that Mr. Horn had signed it as being an accurate record.

35. Whilst we should note that it was suggested by the Respondent that Mr. Horn may have some vulnerabilities we were not provided with any evidence of that, we made an adjustment to the normal process for Mr. Horn to give evidence via CVP and with his mother present with him and he did not appear to us to require anything further by way of accommodations or experience difficulties in giving his evidence.

36. We did consider Ms. Caley to be a credible witness. Like Ms. Didluch her evidence was candid and forthright and there was no suggestion of her having an axe to grind with the Respondent. We were satisfied that she gave us an honest account to the best of her recollection.

37. Turning then to the evidence of Mr. Poynton, Mr. Bond and Mrs. Bond we also considered them to be unsatisfactory witnesses. They were often contradictory, lacking in recollection or detail and on occasions simply confusing. Mrs. Bond particularly gave evidence which directly contradicted evidence which other witnesses had given and, in particular, as to the reason for the termination of the Claimant's employment. We come to those discrepancies in our findings of fact below.

38. For those reasons where there is a dispute between the Claimant and Respondent which cannot be resolved by way of documentary evidence, we have generally preferred the evidence of the Claimant unless we have expressly said otherwise.

THE LAW

39. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

Employee status – Section 230 Employment Rights Act 1996

40. An employee is defined by the provisions of Section 230(1) Employment Rights Act 1996. That section provides as follows:

> *"In this Act employee means an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment."*

41. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. However, those terms should only be disregarded where they do not reflect the true agreement between the parties – in other words where the contractual terms do not reflect the actuality of the relationship (**Autoclenz v Belcher [2011] UKSC 41**).

42. Whether there is a "contract of service" (and thus a contract of employment) is to be determined against the whole picture of the relationship and will invariably include consideration of a variety of factors. However, the decision in **Ready Mixed Concrete (South East) Limited v. the Ministry of Pensions and National Insurance [1968] 2QB 497** will be of fundamental assistance to a Tribunal tasked

with consideration of employee status.

43. In short terms, the **Ready Mixed Concrete** decision provides that a contract of service exists if the following three conditions are fulfilled:

    (i) The "servant" agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for his "master" – i.e. the requirement for so called personal service;

    (ii) He or she agrees, expressly or impliedly, that in the performance of that service that he or she will be subject to the other's control in a sufficient degree to make that other "master" – the so called control factor;

    (iii) The other provisions of the contract are consistent with it being a contract of service.

44. When considering the third stage of the test it is not only implied or express terms of the contract which Tribunals are entitled to take into account and other relevant factors can be considered. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made *(*see **Atholl House Productions v HMRC [2022] EWCA Civ 501**).

45. A key ingredient of employment status is the degree of mutuality of obligation of the parties to the contract. Mutuality of obligation is often described as the obligation on the employer to provide work on the one hand and the obligation on the individual to accept that work on the other. Without a sufficient degree of mutuality of obligation, there can be no employment relationship.

46. There are other potentially relevant factors which may assist in determining whether there is a contract of service (and which go to the third strand of the **Ready Mixed Concrete** test) such as the degree of any financial risk taken by the "employee"; who is responsible for provision of the tools of the trade; the degree of integration into the business or organisation; whether the individual is free to work elsewhere; the label placed on the relationship by the parties (although see **Autoclenz** above) and the nature and length of the relationship.

47. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must nevertheless be identified to a sufficient extent in order for a contract of employment to exist.

Complaints pursuant Section 103A Employment Rights Act 1996 – Protected Disclosures

48. In any claim based upon "whistleblowing" (whether for detriment or dismissal) a Claimant is required to show that firstly they have made a "protected disclosure".
49. The definition of a protected disclosure is contained in Section 43A Employment Rights Act 1996 and which provides as follows:

> *"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*."

50. Section 43B provides as follows:

> *"In this part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one or more of the following:*
>
> *a) that a criminal offence has been committed, is being committed or is likely to be committed;*
>
> *b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
>
> *c) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
>
> *d) that the health and safety of any individual has been, is being or is likely to be endangered;*
>
> *e) that the environment has been, is being or is likely to be damaged; or*
>
> *f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.*
>
> *For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is of the United Kingdom or of any other country or territory.*
>
> *A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*
>
> *A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between*

> *client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice."*

51. An essential requirement of a disclosure which qualifies for protection is that there is a disclosure of information. A disclosure is more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey facts, even if those facts are already known to the recipient (See **Cavendish Munro Professional Risks Management Ltd v Geluld [2010] IRLR 38 (EAT)**) rather than merely an allegation or, indeed, an expression of their own opinion or state of mind (See **Goode v Marks & Spencer Plc UKEAT/0442/09**).

52. A disclosure need not be embodied in one communication and it is possible, depending upon the content and nature of those communications, for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure on its own (**Norbrook Laboratories (GB) Ltd v Shaw UKEAT/0150/13**.)

53. It is not necessary for a worker to prove that the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect (See **Babula v Waltham Forest College [2007] IRLR 346 (CA)**.

54. A worker must establish that in making their disclosure they had a reasonable belief that the disclosure showed or tended to show that one or more of the relevant failures had occurred, was occurring or was likely to occur. That reasonable belief relates to the belief of the individual making the disclosure in the accuracy of the information about which he is making it. The question is not one of the reasonable employee/worker and what they would have believed, but of the reasonableness of what the worker himself believed.

55. However, there needs to be more than mere suspicion or unsubstantiated rumours and there needs to be something tangible to which a worker/employee can point to show that their belief was reasonable.

56. The questions for a Tribunal in considering the question of whether a protected disclosure has been made are therefore firstly, whether the Claimant disclosed "information"; secondly, if so, did he or she believe that that information was in the public interest and tended to show one of the relevant failings contained in Section 43B Employment Rights Act 1996, and, if so, was that belief reasonable.

57. In order for a disclosure to be a protected disclosure it must also be the case that the worker making it reasonably believed that the disclosure was in the public interest and not only serving the interests of that worker. However, even where the

disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest, as well as in the personal interest of the worker (see **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2015] I.C.R. 920**). In this regard, the following factors might be relevant:

(a) the numbers in any group whose interests the disclosure served;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) the nature of the wrongdoing disclosed, and
(d) the identity of the alleged wrongdoer.

Automatically unfair dismissal – Section 103A Employment Rights Act 1996

58. Section 103A ERA 1996 provides that one category of "automatically unfair" dismissal is where the reason or principle reason for the dismissal is that the employee has made a protected disclosure.

59. Section 103A provides as follows:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

60. A Tribunal therefore needs to be satisfied that a Claimant bringing a successful claim under Section 103A ERA 1996 has firstly been dismissed and, secondly, that the reason or principle reason for that dismissal is the fact that he or she has made a protected disclosure.

61. The burden of proving the 'whistleblowing' reason for dismissal under s.103A Employment Rights Act 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**).

Discrimination complaints under the Equality Act 2010

62. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 26, 27 and 39.

63. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Direct Discrimination

64. Section 13 EqA 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".

65. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

66. If a Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

67. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

68. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246:**

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of

like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

69. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious, but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**).

Harassment

70. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

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

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

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

(i)violating B's dignity, or

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

(2)A also harasses B if—

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

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

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

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

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a)the perception of B;

(b)the other circumstances of the case;

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

71. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant. However, in respect of a complaint of harassment, the word "relate" has a broad meaning (see for example paragraph 7.10 of the EHRC Code).

72. As restated by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a) What was the conduct in question?

b) Was it unwanted?

c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?

e) Was the conduct related to the protected characteristic relied upon?

Victimisation

73. Section 27 EqA 2010 provides that:

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

(a)B does a protected act, or

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

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

(a)bringing proceedings under this Act;

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

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

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

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

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

74. In dealing with a complaint of victimisation under Section 27 EqA 2010. A Tribunal will need to consider whether:

    (i) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);
    (ii) If so, was the Claimant subjected to a detriment;
    (iii) If so, was the Claimant subjected to that detriment because he or she had done a protected act.

75. In respect of the question of whether an individual has been subjected to a detriment, the Tribunal will need to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (paragraphs 9.8 and 9.9 of the EHRC Code).

76. If detriment is established, then in order for a complaint to succeed, that detriment must also have been "because of" the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the "because of" test.

77. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a "significant influence" on the employer's decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the "significant influence" test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).

78. In any claim of victimisation, the Tribunal must be satisfied that the persons whom the complainant contends discriminated against him or her contrary to Section 27 EqA 2010 knew that he or she had performed a protected act (**Nagarajan v London Regional Transport [1999] ICR 877**).

79. As per **South London Healthcare NHS Trust v Al-Rubeyi (2010) UKEAT/0269/09** and **Deer v Walford & Anor EAT 0283/10**, there will be no victimisation made out where there was no knowledge by the alleged discriminators that the complaint relied upon as a protected act was a complaint of discrimination.

The EHRC Code

80. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

FINDINGS OF FACT

82. We ask the parties to note that we have only made findings of fact where those are necessary for determination of the issues which are before us. We have not therefore made findings on each and every area where the parties are in dispute with each other where it is not necessary for us to do so.

The Respondent and the commencement of the working relationship

83. At the time with which we were concerned, the Respondent was, as we understand it, a relatively new start up business. It operates in the confectionary industry and particularly in the manufacture of doughnuts. The Company appears to have had a significant growth from relatively humble beginnings and there was no dispute on the Claimant's part that Directors had made significant achievements.

84. The Claimant was employed[1] as a decorator which involved decorating or finishing doughnuts which had been prepared by the bakers. One of the bakers working at the Respondent company at the time was Oliver Horn.

85. It is common ground that before the Claimant commenced work with the Respondent she undertook a trial shift. It is said by the Respondent that at the end of that trial shift she was told that she was suitable to work with the Respondent and that Matthew Bond made it plain to her that she was not an employee and was only a casual worker. We do not accept the Claimant was told that. Matthew Bond's evidence in relation to those matters was not clear and indeed he had little recollection of many of the key issues involved in the claim. Particularly, he told us that he could not recall at all the content of the conversation that he had had with the

[1] We have used that term neutrally and for ease in our findings given the dispute on employment status until the point that we reach our conclusions.

Claimant as a result of the passage of time but he accepted that he had never told the Claimant that she was on a zero hours contract.

86. We find it more likely than not that the Claimant was simply told that she was suitable and offered employment with the Respondent. Particularly, we accept that she was never told that she was to be a casual worker not that the Respondent was not obliged to offer her work or that she did not have to accept it. She was simply placed on a rota and offered work accordingly.

87. The Claimant commenced work on 21st October 2020 and continued in the decorator role until she was dismissed with effect from 9th May 2021.

88. At some stage during that period a draft contract of employment was prepared by Carol Bond for the Claimant (see pages 39 to 43 of the hearing bundle). Carol Bond had the title of Human Resources ("HR") Manager at the time but in reality on the basis of her evidence and that of the Respondent generally she did not fulfil the type of duties that would typically be associated with that role. She did not, for example, provide HR advice, produce policies or procedures and would not conduct one to one meetings with members of staff. The role that she actually fulfilled was that of an administrator which involved completing paperwork at the direction of the Respondent's directors.

89. The reason that Mrs. Bond was given the title of HR Manager appears to be for public relations reasons and we say more about that in the context of other matters later. It appeared to us that public relations was a key issue to the Respondent and particularly to Max Poynton who is heavily involved in such matters. It does not appear that the staff employed by the Respondent were aware that Mrs. Bond only performed administrative functions and we find it more likely than not that there would have been an expectation that she would have performed a Human Resources style role given the title which she had been given. That was certainly the Claimant's belief at the time and also that of Hanna Didluch.

90. We found it very difficult to reconcile much of the evidence which Mrs. Bond gave to us with that given by Matthew Bond and Max Poynton. It was Mrs. Bond's evidence that she was asked by the directors not to issue employment contract to nine specific members of staff, the Claimant included, because they were unsure if they would be kept on but that other decorator around that time were issued with the contracts. It was Mr. Poynton's evidence that nobody save for a select few people in the office were in fact employees who had been given employment contracts. It was also difficult to reconcile the position of Mrs. Bond exercising administrative functions only - and on the basis of her evidence only at the direct instruction of the Directors of the Respondent – that she would have set about preparing employment contracts of her own initiative in an attempt, as she told us, to tidy things up.

91. Nevertheless, it is common ground that however that contract of employment came about it was never given to the Claimant. That is a matter that the Claimant accepts. The absence of a written employment contract, however, does not negate an employment relationship and it is notable that Mrs. Bond's evidence was that those

people who were given contracts of employment continued in their work no differently than they had done previously.

92. We are satisfied that at no time was the Claimant told that she was only going to be a casual worker nor did that reflect the reality of the arrangements. We find that there were regular shifts available and where those were available they would be offered to the Claimant by the Respondent. We are also satisfied that the Claimant did not have the right to refuse to work those shifts. As with other employees if she could not work a shift for whatever reason then she was required to swap it with another member of staff and if there were any greater difficulties a supervisor would have to be informed. Once she had accepted a shift only under the most exceptional circumstance would she then not be able to work it. Indeed, the evidence of Mrs. Bond was that not turning up to work a shift would be viewed very dimly and it was clear from the evidence of the supervisors from whom we heard that is someone did not attend and they could not be contacted by a supervisor the matter would be escalated to director level.

93. Mrs. Bond's oral evidence suggested for the first time that there had been a number of shifts that the Claimant had failed to turn up to work in January 2021. That was not something that featured in Mrs. Bond's witness statement or supplemental statement nor was it something which had been mentioned at any time previously, including in the Respondent's ET3 Response which had been presented with the benefit of legal advice and assistance.

94. That suggestion also directly conflicted with her evidence that if somebody had not turned up to work a shift in those circumstances the Respondent would not have taken kindly to it and that if a supervisor had not been able to make contact then it would be escalated to director level. The criticisms that Mrs. Bond made of the Claimant both in that regard and about her alleged conduct generally were in our view designed to paint her in a negative light before the Tribunal.

95. There is nothing at all in the documentation that we have seen, including documents that we had asked about of our volition, which showed that there had been any such contact regarding non-attendance by the Claimant for shifts that she was required to work. That was despite Mr. Poynton's evidence that there were "hundreds" of records of people not turning up for work which would have been relevant also to the question of employment status but were not disclosed. Moreover, it was denied in the Respondents ET3 Response that the Directors had made any contact with the Claimant at all on one occasion when she alleged that she had been told that she was absent without leave. We did not accept Mrs Bond's evidence on that point and again we considered that it was raised to seek to paint the Claimant in a poor light along with other evidence which she gave as to the Claimant's alleged behaviour during the course of her employment in respect of which it was clear that Mrs. Bond significantly disapproved.

The December/January incident

96. On a date either in the latter half of December 2020 or in early January 2021 there was an incident which occurred between the Claimant and a baker by the name of Oliver Horn. We will for brevity refer after this point to that as "The Incident".

97. Mr. Horn and the Claimant had previously enjoyed a good working relationship and were on friendly terms. We are satisfied that they would have what has been referred to as "banter" as part of that previously harmonious working relationship.

98. As we shall come to, the Respondent relies on the view of one witnesses interviewed during the course of a later investigation into a complaint made by the Claimant about the Incident, but who has not been called to give evidence before us, that the Claimant and Mr. Horn would have what was described as "flirty banter". However, we are satisfied from the Claimant's evidence that matters went no further than enjoying a joke with Mr. Horn and certainly there was no flirting on her part with him.

99. As we say, that person was not called as a witness by the Respondent and so we have not been able to hear from them as to how they might have formed any contrary impression or, indeed, what they meant by the term "flirty banter".

100. Despite the previous cordial relationship things changed on the day of the Incident. We accept entirely the Claimant's evidence about what happened despite her inability to recall the specific date which we have already commented about above. The Claimant has always been clear about the substance of what happened between herself and Mr. Horn.

101. We accept the evidence of the Claimant that whilst she and Mr. Horn were alone in the canteen area he put his hands on her body by "bear hugging" her and rubbing flour on her before moving his hands downwards and grabbing her bottom as he backed her into the corner of the room. We are satisfied that he said words to the effect of, *"I bet your boyfriend wouldn't like that"* and the Claimant replied, *"I bet your missus wouldn't"*.

102. There are a number of reasons why we prefer the Claimant's account over that of Mr. Horn in which he denied touching the Claimant at all. The main reasons are as follows:

102.1. The Claimant has been consistent in her account of what happened between herself and Mr. Horn. For the reasons that we shall come to further below, Mr. Horn has not;

102.2. Mr. Horn initially signed a very brief witness statement prepared by Mr. Limpert that we were told had been approved. It was not until we pointed out the difficulties in relation to that witness statement that Mr. Limpert then produced a further statement dealing with the other allegations that the Claimant had made in these proceedings. That second statement for the first time raised what Mr. Horn clearly intended to suggest was the motivation for

the Claimant making what he told us was a false allegation of sexual harassment against him. That was not dealt with at all in his first witness statement when clearly it was a very important issue. It was also not referred to by Mr. Horn at all when he was interviewed in connection with the Claimant's complaint by Mr. Poynton and Ms. Caley. That is despite the fact that it would have been fresh in his mind at the time of the interview. Despite the fact that he said that he had not had a meeting with Mr. Poynton he maintained that he would have told the Respondent about an argument with the Claimant which he said was the motivation for a false allegation of sexual harassment being made against him yet the note of the evidence that he had signed as being accurate made no mention of that at all. As we have already referenced, we prefer the evidence of Ms. Caley that the note was correct and that Mr. Horn never made any reference of the Claimant saying that she could get him into trouble after they got into an argument. If the Claimant had said that during the argument as Mr. Horn now maintains it would have been a key thing to say in his defence as to the Claimant's motivation for making a false accusation. He did not mention it at all and we find that that was because it was never said;

102.3. Much of the focus of Mr. Horn's witness statement in relation to the Incident was a strenuous denial of him having taken the Claimant's mobile phone which somewhat oddly he appeared more concerned with than the allegation of sexual harassment. He was particularly vexed about that part of the complaint given that he told us that he had issues when other people took his own property or touched his belongings. In short, he strenuously denied having taken the Claimant's mobile phone and trying to unlock it. We prefer the evidence of the Claimant on that point. The fact that that happened is supported by the fact that during the course of an investigation when a close friend of Mr. Horn's, Mr. Archer, had been spoken to by Mr. Poynton and Ms. Caley, he had said that he had seen that Mr. Horn had the Claimant's phone. That was consistent with the Claimant's evidence that Mr. Archer had walked into the room shortly after the Incident at a time when Mr. Horn had taken her phone away from her and was trying to unlock it to the extent that he entered the incorrect code so many times that it locked her out for a period of time. If we could not trust Mr. Horn's evidence in respect of the taking of the Claimant's mobile telephone, that fed into our ability to accept his account of the remainder of the Incident;

102.4. Mr. Horn's own interview with the Respondent on 28th March 2021 made reference to him having thrown flour on people but he denied having done so in his oral evidence before us in the Claimant's case during the Incident. That could not be reconciled, however, with why he raised that with Ms. Caley and Mr. Poynton in his interview given that that would have been of no relevance if he had in no way touched the Claimant or thrown flour on her; and

102.5. The evidence of Hanna Didluch was that the Claimant had spoken to her in the immediate aftermath of the Incident to tell her what had happened and that she had been extremely distressed at the time. If Mr. Horn's version of events

that the Incident had never taken place was correct then the Claimant would have had to have manufactured the allegation at that stage along with feigning signs of distress and upset to have to use against him in connection with an argument which he says that they did not have until some weeks later. There was no rational explanation for why she would have done that.

103. For all those reasons and taking into account the observation that we have already made as to credibility we prefer the evidence of the Claimant over Mr. Horn and we accept that he touched her in a way that we have described above.

Reporting of the Incident

104. As we have already set out above, Hanna Didluch was one of the supervisors within the team that the Claimant worked in at the time and they were on relatively friendly terms.

105. After the Incident took place the Claimant therefore sought out Miss. Didluch to tell her what had happened. We accept the evidence of the Claimant and Ms. Didluch that she was very distressed about what had happened and what Mr. Horn had done.

106. Ms. Didluch discussed with the Claimant formally reporting the matter but for various reasons we accept that the Claimant did not want to take the matter any further at that stage. The Respondent alleges that those reasons have been conflicting but we do not accept that. In short terms, we accept that the Claimant did not want to get Mr. Horn into trouble for what he had done provided that nothing else happened in the future and that she also had concerns for her own position given that Mr. Horn was a baker who she believed at that time had been in employment with the Respondent a lot longer than she had.

107. She therefore told Miss. Didluch that she did not want to do anything about the situation at that stage but that she would formally report it if anything like it happened again. Miss. Didluch respected that and did not raise the matter with the Respondent at that time.

Working relationship after the Incident

108. We accept the evidence of the Claimant that following the Incident the friendly working relationship that she had previously had with Mr. Horn soured. We do not accept his evidence that everything was well until 28th March 2021.

109. For the reasons previously given as to credibility, we prefer the Claimant's account in that regard.

110. We accept that after the Incident on occasions when Mr. Horn and the Claimant were on shift together he would make comments to her such as calling her a pot washer, saying that she was paid less than him and asking her if she had any chewing gum and telling her that she should have some because her breath smelt.

111. Mr. Horn's evidence was that he called everybody a pot washer because they all had to wash the pots at some stage or another. We do not accept that evidence and are satisfied that this was directed at the Claimant and that in saying it, it was intended as a derogatory term and that it was used in that way to the Claimant.

112. We also did not accept Mr. Horn's explanations that comments about wages were made to younger workers so that they would know when they were likely to receive an increase when they reached a certain age in accordance with the National Minimum Wage Act. We are satisfied from the Claimant's evidence that comments made about the comparison between her wages and that of Mr. Horn were not anything to do with their respective ages and a desire to inform her about when she may receive an increase in pay but were again designed to be derogatory.

113. Mr. Horn denied making any comments regarding the Claimant's breath, but we do not accept his evidence on that point and we are satisfied from the Claimant's evidence that such comments were made. The comments were self-evidently intended to be derogatory.

114. That brings us to the reason why the comments about the Claimant's breath, her rate of pay in comparison to Mr. Horn's and calling her a pot washer were made. As we have already found, those comments were made and intended to be derogatory. Prior to the Incident the Claimant and Mr. Horn had been on friendly terms. The only thing that had changed was that the Claimant had rebuffed his advances and we have accepted her evidence that thereafter there was a change in his behaviour towards her. We are therefore satisfied that souring of the relationship and the treatment of the Claimant by Mr. Horn after the Incident was because she had rejected his sexual advances towards her.

<u>The events of 28th March 2021</u>

115. Matters came to a head between the Claimant and Mr. Horn on 28th March 2021.

116. Again, we prefer the version events given by the Claimant over that of Mr. Horn. Her evidence was that Mr. Horn was looking for Nicola Caley who as we have already observed was a supervisor working alongside Ms. Didluch in the baking team. Mr. Horn asked the Claimant where Ms. Caley was and the Claimant explained that she was with another member of staff who was upset and suggested that Mr. Horn leave matters for the time being. Mr. Horn insisted that he needed to know where Ms. Caley was at that time and we accept the Claimant's evidence that he shouted at her.

117. The Claimant became upset and at that point remarked to James Archer who was one of the bakers that it was lucky that she had not reported Mr. Horn in respect of the Incident. We find it more likely than not that that was what Mr. Archer, who was a friend of Mr. Horn relayed to him at that time and not that the Claimant had simply been circulating rumours about him as Mr. Horn contended.

118. At that point we accept that Mr. Horn shouted words at the Claimant to the effect of *"Holly come the fuck here"* and that when she refused because she was frightened shouted *"fuck you"* before walking out.

119. Mr. Horn's evidence as to what had happened on 28th March was at best confused. He contended that he had been angry with the Claimant because she had not given him a cigarette or a cigarette paper when he had asked for one and that he was upset about that because he frequently gave out cigarettes to other members of staff when asked to do so and could not see why the Claimant had not agreed with his request.

120. He told us that the Claimant then told him that she had something that she could say that would get him into trouble. As we have already observed, that was something that he singularly failed to mention at all in his first witness statement and during the investigation hearing according to the notes which were taken and the evidence of Ms. Caley which we accept. What had happened would have been fresh in his mind at that time and had the Claimant said that we find that Mr. Horn would have told the Respondent.

121. Mr. Horn's evidence was that he was later told by another baker, Mr. Archer, that the Claimant had been telling people in the factory that he had touched her. He denied that he had sworn in the way that the Claimant says that he did and contends that although he accepts that he called her a "bitch" his evidence was that that was done because he was angry that she had been making up false rumours about him.

122. The position adopted by the Respondent was that the Claimant had in effect told everybody or at least a great number of people in the workplace about the Incident. We do not accept that was the case and we find that the Claimant had only told people that she was close to. That would be a difficult position to reconcile in all events with Mr. Horn's evidence that he had no knowledge at all until 28th March 2021 of anything about the Incident if the Claimant had been telling the entire workforce given that rumours would no doubt have been abounding.

123. Of the two conflicting accounts as to what happened on 28th March 2021 we prefer that of the Claimant.

124. Given the pattern of earlier behaviour after the point that the Claimant rebuffed Mr. Horn's advances and the fact that we do not consider him to have given a truthful account of what happened on 28th March 2021 we are satisfied that the way that he treated her on that date was because of her rejection of those advances.

<u>Investigation and outcome to the complaints made by the Claimant</u>

125. Ms. Caley became aware of what had happened in the exchange between the Claimant and Mr. Horn on 28th March and spoke to them both individually. Indeed, she had witnessed some of it because she had heard Mr. Horn shouting at the Claimant.

126. Mr Horn's account was that he had only spoken to Ms. Caley outside the factory where he had gone to cool off after the incident and that he had spoken with her on his own. That cannot be right because he accepted that he had signed a note of an interview later that day with both Ms. Caley and Mr. Poynton. We accept the Claimant's evidence that those interviews took place separately in the Respondent's Boardroom.

127. Ms Caley realised that the seriousness of the situation and called one of the Respondent's directors, Mr. Poynton, to advise him of what had happened. Mr. Poynton gave quite detailed evidence, which was in contrast to some of his other evidence, about his recollection of receiving the telephone call and that he had just been about to sit down to Sunday lunch but effectively had to abandon his meal to specifically go into work to deal with the incident alongside Ms. Caley. That was in contrast to the evidence of Carol Bond and Matthew Bond who said that the telephone call had been made at a time when Mr. Poynton was already on his way into work and that he had been around 10 minutes from the Respondents site. We find it more likely than not that Mr. Poynton's detailed version was designed to seek to persuade us that the Respondent was taking the matter exceptionally seriously when in fact as we shall come to, they did anything but.

128. Ms. Caley and Mr. Poynton met with both the Claimant and Mr. Horn seperately and set out in brief detail what each of them told them. The records of those conversations are at pages 50 to 54 of the hearing bundle and we accept that they are broadly accurate, albeit not particularly detailed. The Claimant informed Mr. Poynton and Ms. Caley not only about the Incident but also about what had happened since then and on 28th March 2021.

129. Mr. Poynton and Ms. Caley were at odds with who led the interviews during the investigation into the allegations made by the Claimant. Mr. Poynton's evidence was that Ms. Caley took the lead in relation to those matters because she has a Human Resources background but Ms Caley's position was that Mr. Poynton had taken the lead in all but one of the interviews. We prefer the evidence of Ms. Caley on that point as at the time she was not dealing with any Human Resources work for the Respondent and that only came at a later stage and Mr. Poynton as a Director of the Respondent would have been expected to have taken the lead on investigation rather than one of the supervisors.

130. The Claimant was told there would be an investigation in relation to the incident and was sent home that day. We do not find that the Claimant was suspended but that she was sent home on full pay because she was distressed and the Respondent did not want her to be looking upset whilst at work. We accept that Mr. Horn was similarly sent home on full pay, although his assertion before us was that he been sent home for a number of days and his pay had been withheld. We do not need to resolve for the purposes of this part of the claim whether he was paid or not but we accept that he was sent home and in that respect at least the Claimant was treated in the same way as Mr Horn was.

131. Ms. Caley and Mr. Poynton also spoke to two other members of staff, Aleks Pietrzyk and James Archer. It remains unclear to us why only two members of staff were interviewed or how they were selected save as for James Archer who had been identified by the Claimant as having come into the canteen area shortly after the Incident took place.

132. The notes of those interviews are at pages 46 to 49 of the hearing bundle. Aleks Pietrzyk told Ms, Caley and Mr, Poynton that she knew about the Incident and described Mr. Horn and the Claimant as having been friendly prior to that but not speaking much after it had occurred. That supports the Claimant's evidence that after the Incident there was a shift in the working relationship between herself and Mr. Horn. Ms. Pietrzyk also described the previous relationship as being one of "flirty banter". She said that she had been told about the Incident by the Claimant more or less straightaway but that the Claimant had not wanted to report it because she did not want to make a big deal of it.

133. Mr. Archer confirmed that he had seen Mr. Horn with the Claimant's mobile phone and that had not witnessed anything else. We accept that he did not witness the Incident because he had only entered the canteen area after the Claimant had pushed Mr. Horn away and he had taken her phone.

134. Other than speaking to the Claimant, Mr. Horn and the two individuals referenced above there was no further investigation in relation to the matter.

135. Prior to the meeting and in the immediate aftermath of the events of 28th March 2021, Miss. Didluch had sought out Ms Caley to tell her that she had been aware of the Incident at the time it had occurred because the Claimant had told her about that.

136. We prefer the evidence of Miss. Didluch to Ms. Caley on that point. She gave clear and cogent evidence about why she had gone to see Ms. Caley about her having previously being told about the Incident which made perfect sense. In this regard we are satisfied that she was concerned that she might herself get into trouble because she had not formally reported what the Claimant had told her at the time. She therefore wanted Ms. Caley to understand why she had not escalated the matter at the time which had been at the Claimant's request. Despite the fact that Ms. Caley was aware that Miss. Didluch had been told about the Incident contemporaneously she was not interviewed in connection with the investigation. We have not been provided with any reasonable explanation for that and it was clear that her evidence was as relevant as that of Ms. Pietrzyk and would have supported what the Claimant had reported.

137. Mr. Poynton met with Mr. Horn upon his return to work. We find that he reassured Mr. Horn that no further action was going to be taken in relation to the allegations that the Claimant had made. That was before he had even spoken to the Claimant about the outcome and there was no separate meeting with her. Mr. Poynton then spoke to the Claimant to tell her that she needed to attend a meeting later that day. We accept that the Claimant was given short notice of that meeting but she was nevertheless able to arrange for Miss. Didluch to accompany her.

138. Mr. Horn was also in that meeting which was perhaps not the wisest choice given that one of them had to not be telling the truth about the Incident. At that point either Mr. Horn had touched the Claimant in the way that she had described or the Claimant had made the allegation up. Having them both in the same room in those circumstances would have and did create an unpleasant atmosphere.

139. It was also curious in our view that the companion attending the meeting with Mr. Horn was one of the directors of the Respondent, Matthew Bond. The Claimant was therefore faced in the meeting not only with an individual who she had made the allegation against but also two directors, one of whom was accompanying Mr. Horn and again that did nothing to promote anything other than a difficult environment. We accept that it was a very difficult and distressing meeting for the Claimant.

140. At the meeting Mr Poynton told the Claimant that there was no evidence to substantiate the allegation that she had made and therefore the Respondent needed to be impartial. That was despite the fact that there was more evidence than there was not to suggest that something had happened as the Claimant had complained of. We find that the Respondent simply decided to overlook that and carried out a woefully inadequate investigation. It was in our view easier to not make any finding about any inappropriate conduct on the part of Mr. Horn than it was to make any positive finding.

141. We accept that that meeting was very distressing for the Claimant and that she was pressured both by Mr. Poynton and Mr. Bond to draw a line under matters and to move on. She accepted that at the time because she was upset about what was happening rather than being satisfied that that was an appropriate outcome to the very serious complaints that she had made.

142. We are satisfied that that was the position because we accept both the evidence of the Claimant and also that of Miss. Didluch that the Claimant was very distressed after the meeting and that she told Miss. Didluch that she was not happy with the way that the matter had been handled. Miss Didluch was equally, in her words, angry about what had happened in the meeting and she did not feel that it had been dealt with appropriately.

143. We accept the evidence of Miss. Didluch that she went to tell both Mr. Bond and Mr. Poynton in no uncertain terms that the Claimant was distressed and the situation had not been handled appropriately. We prefer the evidence of Miss. Didluch over that of Mr. Poynton (who could not recall if Miss. Didluch had come to see him or not) and Mr. Bond about that and that they told her that Carol Bond would become involved as HR Manager and that there would be another meeting.

144. Miss. Didluch relayed that to the Claimant and the Claimant's expectation was that there would therefore be a further meeting. That would be natural given that the Claimant's understanding, as would usually be the case, was that an HR Manager would deal with personnel issues of this nature. However, given that fact that it would appear that Mrs. Bond does not deal with HR matters only administration despite her title, it would seem that the intention of the Respondent irrespective of what Miss.

Didluch had been told was that there was not going to be any further meeting with Mrs. Bond or anyone else about the Claimant's complaints. Indeed, the evidence of Mr. Poynton was that meetings of that nature would not be something that Mrs. Bond would agree to get involved in despite her job title. What Miss. Didluch had therefore been told by Mr. Poynton and Mr. Bond was not true.

145. The Claimant was not contacted any further about the complaints that she had made despite the fact thar the Respondent knew she had not been happy with the outcome of the meeting and no action was ever taken in relation to Mr. Horn either in respect of the Incident or his actions thereafter. It is notable that that included his shouting at the Claimant on 28th March 2021 despite the fact that by his own admission he had sworn at her and Ms Caley accepted that she had heard him shouting at the Claimant.

Shift changes after 28th March 2021

146. After the Claimant formerly reported matters on 28th March 2021 there were some variances in the shifts which she was required by the Respondent to work. We accept that that placed the Claimant in some difficulties because it made it difficult for her to get to work because of transport issues and she would have to arrive earlier that her allotted shift if she was required to start work at 10.00 a.m.

147. Ultimately, the records of the shifts are confusing and it is difficult to reconcile given the variances in the evidence that we have heard on them from various people what shifts the Claimant did or did not work, at what time and when they might have been changed. There do appear to be variances throughout the period of the Claimant's employment but whatever the position was about any changes post 28th March 2021 we are satisfied from the evidence before us of Ms. Caley and Miss. Didluch that they were as supervisors the people responsible for the setting of those shifts.

148. Indeed, Mr. Bond who had overall responsibility for that particular area appeared to have little or no understanding of how the rotas were set or how the shift system worked. We find that the supervisors were responsible for setting the shifts and there is no evidence that they were influenced by anyone to vary the Claimant's shift pattern after she had made her initial complaint. It seems to us that Miss. Didluch would certainly have told us about any such instruction given that she was instrumental in trying to get the Claimant's complaints properly investigated.

Telephone call from Mr. Bond

149. The Claimant contends that on 21st April 2021 she was telephoned by Mr. Bond who told her that she would need to have a meeting with Max Poynton about unauthorised absence that he said that she had taken on 14th April. In fact, that meeting never took place but we prefer the Claimant's evidence that she did receive a telephone call to that effect from Mr. Bond. Although the Respondent has categorically denied any such call taking place Mr. Bond could not say that it had not happened because he could not remember and he accepted in re-examination from questions put by Mr. Limpert that he would involve himself regularly in making such

telephone calls and that also accorded with the evidence of Carol Bond that if somebody failed to attend a shift there would be follow up by the Directors. We accept that the Claimant had not in fact been on unauthorised absence at the time that she was accused of being by Mr. Bond but had in fact been taking a toilet break.

Termination of the Claimant's employment

150. On 28th April 2021 the Claimant was sent a letter by Mrs. Bond. As was the case with all actions taken by Mrs. Bond according to her evidence that was in accordance with an instruction from the directors.

151. The letter said this:

> *"I regret to inform you that you have now been allocated all the shifts that we are able to offer you at Project D and I am writing to advise that we can no longer support your employment as a Decorating Specialist within the Company.*
>
> *Your final shifts on the rota are Monday 3rd and Sunday 9th May. We request that you take these two shifts as Gardening Leave which means that you will be paid for them, but will not work them.*
>
> *Your final payday will be Friday 28th May and you will receive your P45 with your payslip. This payslip will include the 24.82 hours at £6.70 per hour = £166.29 and an additional 12.09 hours of accrued holiday entitlement at £6.70 per hour = £81.00. This gives you a final total of £247.29 gross.*
>
> *We do hope that you have enjoyed your time working as a member of the Project D Dream team and we would like to wish you every success in the future".*

152. The Respondents position is that by this point there had been a downturn in work following a busy Easter period and that as a result the Claimant's services were no longer required because there was insufficient work and as a result the number of available shifts had been reduced. We do not accept that for a number of reasons.

153. Firstly, the Claimant had located a number of press reports between October 2020 and May 2021 which featured in a supplementary bundle which set out that the Respondent was expanding and that their products were very much in demand. Particularly of note was a report in May 2021 – the month after the Claimant had been told that her employment was being terminated – which suggested that the Respondent was expanding, that they had just secured a new contract with DPD and that they could not keep up with demand. That followed on from a report in March 2021 that indicated that the Respondent was actively recruiting and was finding difficulty in filling vacancies that they had. Those reports were not disclosed by the Respondent and were only before the Tribunal because the Claimant had located them. They do not support the Respondent's position that there was a downturn in work and a reduction in shifts and suggest very much the opposite was the case. We were not taken to any other documentation from the Respondent evidencing a downturn in work which we would have expected had there been a genuine reduction

in business and available shifts.

154. Mr. Poynton's evidence before us was that those reports were essentially not factually correct and that the Respondent had only made a profit in one month of trading. Mr. Poynton dismissed what was said in those reports, which he was heavily involved in putting together, as "merely PR". If those matters were "merely PR" and gave a narrative that was inaccurate then it is concerning that the Respondent and Mr. Poynton particularly were prepared to essentially mislead the press and in turn members of the public. It is either that or they were prepared to mislead the Tribunal about there being a downturn in work. Either way, there was a glaring inconsistency between what this Tribunal was being told and what the press and members of the public had been led to believe. That impacts credibility, and that of Mr. Poynton particularly, and we do not accept that there was any downturn in work as is now claimed.

155. Secondly, was an all staff email sent by Carol Bond on 1st April 2021 which again did not fit with the Respondent's position that there was a downturn in work in that month which resulted in there being no role left for the Claimant. The relevant parts of the email said this:

> *"Professionalism, we need to 'up our game'!. Project D has grown at such a rate that this has been challenging to increase doughnut production and manage the bakery environment at the same time. As you are aware, we are currently looking to employ new team members to take the pressure off existing colleagues and ideally, will be taking on people with previous bakery/catering experience. We are delighted to have those of you with experience who are part of our team and know that you will be able to assist in our efforts to make the Project D Dream Bigger Bakery as professional an environment as is possible. We are running a successful/fast paced business but several potential employees have been put off by our lack of professionalism. Further information will follow on what steps we need to make to improve our current practices and procedures within the bakery and would welcome your suggestions. (Please email at HR with your ideas as things are a little hectic in the bakery right now!)".*

156. The email also made plain that people could not get enough of the Respondent's doughnuts. That was not supportive of the Respondent's position that there was a downturn in demand and it was also indicative of the fact that the Respondent was actively recruiting.

157. The oral evidence of Mr. Poynton was that what was said in the email was false and he again suggested that it was "just PR". It must of course have been sent on the directions of the Directors of the Respondent given that Mrs. Bond did not undertake any action without their authority. Mrs. Bond did not accept in her evidence that what was said in the email was false but tried to suggest that what had been said about recruitment was implicitly designed to suggest that members of staff who were not pulling their weight would be replaced.

158. Despite the email making references to people "upping their game", we cannot see how things could be read in the way that Mrs. Bond suggests or that it could in any way be implied by staff that references to the business thriving, the Respondent struggling to keep pace and that there would be active recruitment to take the pressure of existing team members meant that those who were less productive were going to be replaced. On any sensible reading, that cannot possibly be inferred and we did not accept the evidence of Mrs. Bond in that regard. It was evidence that was simply attempting to deal with a document that was unhelpful to the Respondent and which, again, had not been disclosed by them.

159. Thirdly, there was a document which had been included in the main hearing bundle by the Respondent at page 56 which were clearly designed to suggest that a number of employees had also had their employment terminated for the same reasons as the Claimant at the same time. That was to support the position taken by the Respondent in their ET3 Response that all "casual workers" were "stood down" at the same time as the Claimant (see paragraph 23 at page 36 of the hearing bundle). However, as it transpired from the evidence of Carol Bond not one of the members of staff who were referred to in those documents had their employment terminated in the same way as the Claimant. The Tribunal went through each of those people listed at page 56 with Mrs. Bond in her evidence. It was plain from that evidence that the vast majority of them had resigned, returned to their original jobs elsewhere after being furloughed or otherwise had just stopped attending work altogether. None had been terminated as a result of an alleged downturn in work and reduction in available shifts.

160. During her evidence Mrs. Bond asserted that there were two other individuals not named on the list at page 56 of the bundle who had had their employment terminated at the same time as the Claimant and as a result of the alleged downturn in work.

161. They were said to be Jessica Hoe and Charlie Cook. An email was subsequently produced by the Respondent, which again had not been disclosed previously, purporting to be one which Mrs. Bond had sent to payroll which showed that both Jessica Hoe and Charlie Cook had left the Respondent's employ on 9th April 2021.

162. That email was only produced after the close of Mrs. Bond's evidence and even then only in response to questions asked by the Tribunal. It should clearly have been disclosed previously as Mrs. Bond accepted in her evidence and it appears to us that the Respondent has taken their disclosure obligations less than seriously. It was clearly a relevant email as were other documents that were only produced following the Tribunals initial enquiries with the parties.

163. We find that we cannot place any weight on that email nor reach any conclusion that either Ms. Hoe or Ms. Cook were dismissed at the same time as the Claimant and as a result of any alleged downturn in work and available shifts. We can place no weight on the email because there was no opportunity for Ms. Deary to cross examine Mrs. Bond on it and it was not proportionate due to time constrains to recall her. Equally, the Tribunal were not able to ask any questions about the email either.

164. Cross examination would have been necessary because the Claimant's position was that at least one of those individuals had in fact resigned rather than having been dismissed by the Respondent and the email itself gave no reasons for either individual leaving. What limited information we did have from Mrs. Bond also later suggested that neither individual was dismissed as a result of a lack of shifts but because of behavioural matters or not turning up to work. Whilst that fitted the narrative adopted by Mrs. Bond that the Claimant was dismissed for similar reasons, it flew entirely in the face of the position adopted stridently in the ET3 Response.

165. There was therefore no opportunity to test the veracity of the email or any further explanations from Mrs. Bond as to why she had failed to disclose it previously. Given that position and the fact that the content of page 56 of the hearing bundle which had sought to suggest that other individuals had had their employment terminated at the same time and in the same circumstances as the Claimant when in fact none of them had, we cannot place any reliance on that email or find that it is accurate as to any other individual having had their employment terminated because of a downturn in work.

166. Finally, we also had conflicting accounts as to the reasons for the termination of the Claimant's employment with Carol Bond asserting for the first time – and in direct contradiction to both the ET3 Response (in respect of which her evidence was that paragraph 22 was incorrect) and her own termination letter – that the Claimant was dismissed for her conduct because she had started to "mess them around" in regard to shifts although we were not taken to any evidence of that nor was it put to the Claimant in cross examination and other alleged misbehaviour. We did not accept that she was dismissed for that reason or for any reason relating to a reduction in available shifts.

CONCLUSONS

167. Insofar as we have not already done so we now deal with our conclusions in respect of the remining issues that are before us.

Employment status

168. We begin with the question of the Claimant's employment status and in doing so we have considered each of the factors in **Ready Mixed Concrete**. We firstly need to consider whether there is a contract between the Claimant and the Respondent. It is not disputed that Matthew Bond made an offer of work to the Claimant and that she accepted it and that there was valid consideration given that she was paid for the work that she undertook. We are satisfied that there was a contract between the parties.

169. We turn then to consider whether there was a requirement for personal service and a mutuality of obligations. The Respondent contends that mutuality of obligation was inherently absent in this relationship because there was firstly no obligation on the employer to provide work and no obligation on the Claimant to accept it if it was offered.

170. We are satisfied ultimately that this was not the case. In reality, there was work available and this was offered consistently to the Claimant and, with a very limited degree of flexibility as to the possibility of swapping a shift with another member of staff, it was accepted. There may have been times when the Respondent did not have work available - although from the documents we have we can make no firm finding about that - but even had that been the case then that is not fatal to the question of employee status (see **Wilson v Circular Distributers Ltd EATS/00/43/05**) given that we accept that when it was available it was always offered to the Claimant and in practice that created an obligation to do so.

171. The Claimant was never informed that she could refuse to work a shift which was allocated to her and it was certainly not open to her to just fail to attend work. We accept that she could seek to swap a shift and in times of difficulty advise a supervisor who could try to assist but it was not open to her to simply refuse to work a shift or not turn up. We accept that there was therefore a mutuality of obligation.

172. For all of those reasons we do not accept that the Claimant was a casual worker on a zero hours contract. She was never told that nor was there any suggestion of such a position until after she had commenced these proceedings. We are satisfied that the Claimant was offered and accepted employment, that she worked regularly and that she was not able to refuse to work a shift once it had been allocated to her. We are therefore satisfied that she was an employee within the meaning of Section 230 Employment Rights Act 1996 such that she has standing to bring a claim of automatically unfair dismissal.

Did the Claimant make a protected disclosure?

173. We remind ourselves that the only question in this regard is whether the disclosure that was made by the Claimant on 28th March 2021. Whilst the Claimant's position on this issue was that she had not wanted what happened to her to happen to anyone else, we are nevertheless not satisfied that the disclosure was made in the wider public interest. It was made in order to deal with the personal situation that had arisen following the Incident and the fall out from it with a view to having the Respondent deal with the matter and resolve it for the Claimant. It was not, therefore, a disclosure made in the reasonable belief of the Claimant in the public interest.

174. It follows that the Claimant did not make a protected disclosure and so the complaint of automatically unfair dismissal contrary to Section 103A Employment Right Act 1996 must fail and be dismissed on that basis. We do not therefore need to deal at this stage with the reason why the Claimant was dismissed.

Harassment related to the protected characteristic of sex

175. We begin with whether Mr. Horn harassed the Claimant contrary to Section 26(2) EqA 2010. We have found as a fact that Mr. Horn bear-hugged the Claimant, backed her into a corner and grabbed her bottom. Given the fact that involved touching the Claimants bottom and what had been said by Mr. Horn when he did so, we are satisfied that was conduct of a sexual nature. It involved touching the Claimant in an

intimate place.

176. We must then consider the question of whether the conduct was unwanted. We have no hesitation in finding that it was. Whether the Claimant had had what has been described as "flirty banter" or not, there was nothing that could possibly have invited Mr. Horn to grab her in the way that he did. We are more than satisfied that the conduct was not invited or encouraged and that it was entirely unwanted.

177. We then turn to consider whether the conduct had the effect or purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We also have no hesitation in concluding that the effect was that it did. The Claimant's evidence was that it made her feel intimidated and uncomfortable and given the circumstances and Miss. Didluch's evidence as to how she had presented when she told her about the Incident we are entirely satisfied that it did.

178. It follows that the Incident amounted to an act of harassment contrary to Section 26(2) EqA 2010 and this complaint is therefore well founded and succeeds.

179. We turn then to the complaints of harassment contrary to Section 26(3)(c) EqA 2010 and begin with whether Mr. Horn called the Claimant a 'potwasher', made comments about her wages being less than his and said in terms that she needed to chew gum because her breath smelled. We have found as a fact that Mr. Horn did do all of those things.

180. As we have already found Section 26(2) EqA to be made out that leaves the question under Section 26(3)(c) as to whether what Mr. Horn did in this respect was because the Claimant had rejected his conduct in respect of the Incident. We are satisfied from the Claimant's evidence that it was. Prior to the Incident things were harmonious between the Claimant and Mr. Horn and we accept her evidence that after that point there was a shift in regard to the way that he treated her and the inappropriate comments that he made toward her began. That is supported by the comments made by Ms. Pietrzyk when she was spoken to by Ms. Caley and Mr. Poynton. The only thing that had changed between that point and the previously harmonious working relationship was the Claimant's rejection of Mr. Horn's advances during the Incident. Accordingly, we are satisfied that the comments which were made about the Claimant by Mr. Horn amounted to harassment within the meaning of Section 26(3) EqA 2010 and this part of the claim is also well founded and succeeds.

181. In respect of the harassment complaints that then leaves the question of whether Mr. Horn shouted at the Claimant on 28th March 2021, belittled her and called her names and shouted "Holly come the f*** here" and say "F*** you."

182. As set out in our findings of fact above, we accept that Mr. Horn shouted words at the Claimant to the effect of *"Holly come the fuck here"* and that when she refused because she was frightened shouted *"fuck you"* before walking out. Again, the only issue that we need to consider in this regard as a result of our earlier conclusions are

whether what Mr. Horn did in this respect was because the Claimant had rejected his conduct in respect of the Incident. We are satisfied that it was. It came against the backdrop of the shift in the working relationship between the Claimant and Mr. Horn after the Incident and we are satisfied that had the Claimant not rejected his advances at that point then Mr. Horn would not have spoken to her in the manner in which he did. Accordingly, we are satisfied that this exchange also amounted to harassment within the meaning of Section 26(3) EqA 2010 and this part of the claim is also well founded and succeeds.

183. Given that we have found that the above acts amounted to harassment it follows that the alternative complaints of direct discrimination in respect of the same matters must fail and be dismissed given the provisions of Section 212(1) EqA 2010.

184. We should note that we have considered the issue of jurisdiction given that the Incident occurred in December 2020 or January 2021 and the Claimant did not commence early conciliation via ACAS until 22nd June 2021. On the face of it, all acts of harassment other than the events of 28th March 2021 have been presented outside the time limit set out in Section 123 EqA 2010. That is unless we are satisfied that the whole chain of events from the Incident up to and including 28th March 2021 amounted to conduct extending over a period. Ultimately, we are satisfied that it was. The acts of harassment were all perpetrated by the same person and had clear links to the Incident. The acts complained of in respect of harassment were therefore not isolated incidents but were linked and as such amounted to conduct extending over a period and ending on 28th March 2021. All harassment complaints have therefore been presented within time such that we have jurisdiction to determine them.

Victimisation

185. Finally, then we turn to the complaints of victimisation and we deal with each of those separately.

186. The first complaint is that on 28th March 2021 the Respondent took a statement from the Claimant, reassured her that the matters that she had raised would be dealt with and promise to investigate. We are satisfied that that factually happened. What we then need to consider is whether that amounted to a detriment. We are not satisfied that it did. At that stage the Claimant wanted the matters that she had raised with Ms. Caley and Mr. Poynton to be dealt with and so it was not to her detriment that her version of events was taken and that there was a promise that those things would be investigated.

187. The fact that that subsequently did not properly happen is a different matter and we deal with that in the context of other complaints of victimisation advanced.

188. The second complaint was that the Respondent failed to deal with the incident between the Claimant and Mr. Horn on 28th March 2021 at the investigation meeting. We have little hesitation in concluding that that was the case. Despite the fact that Ms. Caley accepted that she had heard Mr. Horn shouting at the Claimant, nothing

at all was done to investigate that or deal with it. We are satisfied that that was a detriment to the Claimant as even on Mr. Horn's own account he had used an offensive word towards her. The Claimant was entitled to expect at least an apology for having been shouted and sworn at by another member of staff.

189. We turn then to consider if the failure to deal with this matter was because the Claimant had done a protected act. We remind ourselves of the provisions of Section 136 EqA 2010 and whether the Claimant has proved facts from which we could conclude, absent a non-discriminatory explanation from the Respondent, that unlawful discrimination had taken place. We are satisfied that there are such facts. Firstly, the Claimant had clearly been distressed by what had happened on 28th March 2021 and that had been witnessed by Ms. Caley who was supposed to be investigating. Secondly, there was a clear favouring of Mr. Horn which was both unexplained and inappropriate given that both he and the Claimant were employees and should have been treated equally. It is abundantly clear that the events of 28th March should have been investigated and appropriate action taken and that failed to take place. We are satisfied that that shifts the burden to the Respondent to provide a non-discriminatory explanation. We have not had anything of a semblance of a reasonable explanation as to why Mr. Horn's clearly inappropriate treatment towards the Claimant of shouting and swearing at her was neither investigated or dealt with in any way. As such, our conclusion is that there has been no acceptable non-discriminatory explanation and it follows that this complaint of victimisation is well founded and succeeds.

190. We turn then to the next complaint which is the holding of a meeting without prior notice in April 2021, failing to adequately investigate the matter or to reach a conclusion on the complaint and pressurising the Claimant to forget about the incident and move on. We are satisfied that al of those matters occurred. The Claimant was called to a meeting on short notice, there was a failure to properly investigate matters, no conclusion was reached on the complaints that the Claimant had made and she was pressured to accept that position by two directors in an intimidating environment and to move on. We are satisfied that that did amount to a detriment to the Claimant. She had raised a serious complaint that she had been the victim of sexual harassment and that was not dealt with at all by the Respondent in any proper and meaningful way. That cannot be anything but a detriment to the Claimant and she was entitled to conclude that the Respondent had not taken her seriously.

191. We then turn to consider whether the Claimant has proved facts from which we could conclude in the absence of a non-discriminatory explanation from the Respondent that unlawful discrimination had taken place. We are satisfied that there are and that the burden of proof has accordingly shifted to the Respondent. There are a number of facts that we have considered relevant in this regard. Firstly, the Claimant's complaints were not properly investigated. Particularly, there was no interview with Miss. Didluch despite Ms. Caley being directly informed by her at the time that the Claimant had told her what had happened with Mr. Horn in respect of the Incident in the immediate aftermath of it. She therefore had evidence which could

have substantiated what the Claimant had reported and that cannot have failed to be on her mind when the investigation begun because Miss. Didluch had spoken to her that very day.

192. There was also clear favouring of Mr. Horn by the Respondent. In this regard he was informed of the outcome of the investigation separately before the April 2021 meeting which the Claimant was not, the Respondent did not take steps to fully investigate to try and ascertain whether what the Claimant had reported was accurate and he was accompanied to the meeting by Matthew Bond, a Director of the Respondent, who was instrumental in pressing the Claimant to accept the outcome and move on. That could not fail to give the impression that Mr. Horn's side was being taken over that of the Claimant. We are satisfied that those matters are sufficient to shift the burden of proof and that therefore a non-discriminatory explanation is required from the Respondent. We have not received any reasonable explanation as to why the Respondent acted in the way that they did and accordingly we must conclude that this complaint of victimisation is made out. It did appear to us that the favouring of Mr. Horn in the way that the Respondent did was suggestive of the fact that it was far easier to sweep what was a very serious complaint under the carpet than it was to properly investigate it and risk having to accept that Mr. Horn had sexually harassed the Claimant in the workplace.

193. The next complaint of victimisation is what is referred to as the suspension of the Claimant during the course of the investigation. We are satisfied that even on the Claimant's own evidence she was not suspended. She was simply sent home on full pay because she was upset. This complaint of victimisation therefore fails on the facts because the Claimant was not suspended.

194. The next complaint is that the Respondent failed to consider the complaint that the Claimant had made seriously or to properly investigate it. This is essentially a repeat of earlier complaints of victimisation and therefore we do not need to deal with those matters again.

195. The next complaint of victimisation is the failure to resolve matters. Again, this is essentially a repeat of earlier complaints of victimisation and therefore we do not need to deal with those matters again.

196. The next complaint of victimisation is the failure to deal with inappropriate comments in respect of what was reported to the Respondent on 28th March 2021 at the meeting with Ms. Caley and Mr. Poynton. Again, this is essentially a repeat of earlier complaints of victimisation and therefore we do not need to deal with those matters again.

197. The next complaint of victimisation is the alteration of the Claimant's shift patterns after 28th March 2021. We are satisfied that on occasions that did occur although the confusion in the documents does not make it possible to ascertain quite how many times that did occur. We are satisfied that that was to the Claimant's detriment because it meant that she had difficulties in travelling to work for a 10.00 a.m. start time and often had to arrive much earlier. However, we are not satisfied that there

are any facts from which we could conclude that this was an act of unlawful discrimination. Particularly, we note that there were variations to the Claimant's shift patterns both before and after 28th March 2021 and that it was the supervisors such as Miss. Didluch who were responsible for setting rotas and there was no evidence of any undue influence on them. This complaint of victimisation is therefore not made out and it fails and is dismissed.

198. The next complaint of victimisation is the Claimant being accused by Mr. Bond of taking unauthorised absence. We are satisfied that that did occur and that it subjected the Claimant to detriment because it was inaccurate and she was told that she was going to have to have a meeting with Mr. Poynton about the matter which left her thinking that she might be disciplined. We then turn to the question of whether there are facts from which we could conclude that unlawful discrimination had taken place. We are satisfied that there are. In that regard the Respondent's Response set out that this allegation was both "unsubstantiated" and "completely untrue" but that was not, however, the evidence of Matthew Bond who admitted that it may have occurred. That part of the Response was therefore misleading and in our view that and what had gone before is sufficient to shift the burden of proof and call for a non-discriminatory explanation from the Respondent. We have not received one and it follows that this complaint of victimisation succeeds.

199. Finally, we turn to the complaint of termination of the Claimant's employment or failure to offer her further shifts. There is no doubt that factually that occurred. There can also be no reasonable suggestion that it did not amount to a detriment to the Claimant because it abruptly brought her employment with the Respondent to an end.

200. The next question is whether there are any facts from which we could draw inferences. We are satisfied that there are. Firstly, we have had contradictory accounts as to the reasons for the termination of the Claimant's employment. The Response made it plain that the reason was an alleged reduction in available shifts whilst the evidence of Mrs. Bond was that the Claimant was dismissed for conduct/behaviour reasons and the direction of Matthew Bond who denied that that was the case.

201. Secondly, there is no evidence that we can accept of any other person having had their employment terminated at the same time as the Claimant as the Response contended had occurred and the documentation that was before us which purported to support that position in fact given the evidence of Carol Bond did not. Again, that was misleading. Whilst Mr. Bond maintained that three decorators including the Claimant had been terminated for an alleged downturn in work, he was not able to enlighten us as to how those people had been selected from the wider decorating team and we do not accept that anyone else was terminated in the same circumstances as alleged to be the case for the Claimant.

202. Thirdly, the decision to terminate the Claimant's employment came at a time very proximate to Miss. Didluch having made it plain to Mr. Bond and Mr. Poynton that the Claimant did not accept the outcome of the meeting in respect of her complaint of sexual harassment and wanted matters to be taken further. Fourthly, Miss. Didluch was told that the complaint would be dealt with further and that there would be a meeting with Carol Bond which plainly from the evidence that we have heard was not true. Given the fact that Mrs. Bond would never become involved in those matters despite what we accept Miss. Didluch had been told, the obvious inference is that that matter was never going to be reopened or taken any further by the Respondent and it was more convenient to bring the Claimant's employment to an end.

203. We turn then to the question of whether, the burden of proof having shifted, the Respondent has provided a non-discriminatory explanation. The explanation relied on by the Respondent (the evidence of Carol Bond aside) was that there had been a reduction in the number of available shifts for decorators because of a downturn in work after a busy Easter period. We have been provided with no evidence of that and for the reasons that we have already given we do not accept it. It follows that this complaint of victimisation also succeeds.

204. The matter will now be listed for further hearings to deal with the issue of remedy unless that can be resolved between the parties directly.

_____
Employment Judge Heap

Date: 18th August 2023
JUDGMENT SENT TO THE PARTIES ON
18/08/2023.....

.....
FOR THE TRIBUNAL OFFICE

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SCHEDULE – AGREED ISSUES

Employment status

Was the Claimant an "employee" of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996 for the purposes of the complaint of unfair dismissal for making a protected disclosure (whistleblowing)? It is agreed the Claimant was a "worker" and an "employee" for the purposes of the discrimination, harassment and victimisation complaints.

Protected disclosure

Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Claimant relies on the same disclosure as is relied upon for the purposes of the victimisation complaints – i.e. what was said in the meeting with Mr. Poynton and Ms. Caley in March 2021.

Was the disclosure made in the public interest? The sole basis upon which the Respondent does not accept that the Claimant made a protected disclosure is that it is said that the disclosure was not made in the public interest but only as a personal grievance.

Was the reason or the principal reason for the dismissal that the Claimant had made a protected disclosure?

Harassment and direct sex discrimination

Did the Respondent's employees do the following acts:

In January 2021 did Mr. Oliver Horn touch the Claimant by giving her a hug, back her up into a corner and grab her bottom?

Was that conduct of a sexual nature?

Did Mr Horn make comments to the Claimant such as calling her a 'potwasher', making comments about her wages, saying that she needed to chew gum because her breath smelled and made such comments in the presence of others? These comments are said to have been made because the Claimant had rejected Mr. Horn's advances in January 2021 and are therefore advanced under Section 26(3)(c) Equality Act 2010 only.

Did Mr. Horn in or about March 2021 shout at the Claimant, belittle her call her names, shouted "Holly come the f*** here" and say "F*** you." These comments are said to have been made because the Claimant had rejected Mr. Horn's advances in January 2021 and are therefore advanced under Section 26(3)(c) Equality Act 2010 only.

Did the conduct in either January or March 2021 have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for the Claimant? If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

If the conduct above did not amount to harassment, was the conduct because of the Claimant's sex and therefore amount to direct discrimination. The conduct cannot be both harassment and direct discrimination because of the provisions of Section 212(1) Equality Act 2010.

Victimisation

It is conceded by the Respondent that the Claimant did a protected act by complaining of the events of January 2021 and thereafter at a meeting with Nicola Caley and Max Poynton in or about March 2021.

Did the Respondent do the following things:

- Take a statement from the Claimant, reassure her that the matter would be dealt with and promise to investigate.
- Fail to deal with the incident in March 2021 at the investigation meeting?
- In April 2021 did the Respondent hold a meeting without prior notice and fail to adequately investigate the matter or to reach a conclusion on the complaint or to pressurise the Claimant to forget about the incident and move on.
- In April 2021 suspend the Claimant during the investigation.
- Failed to consider the complaint seriously or to properly investigate it.
- Ostracise the Claimant. This is said to have been done by James Archer and Tom who it is said both stopped speaking to the Claimant[2].
- Fail to resolve issues;
- Fail to deal with inappropriate comments in respect of what was reported to the Respondent in March 2021 at the meeting with Ms. Caley and Mr. Poynton.
- Alter her shift patterns. This is said to have been done by the shift supervisors commencing on 4th April 2021 when the Claimant's 8.00 a.m. to 12.00 p.m. shift was altered to a 10.00 a.m. start time.
- Accuse her of taking unauthorised absence. This is said to have occurred on 21st April 2021 when the Claimant was told over the telephone by Matthew Bond

[2] This complaint was withdrawn by Ms. Deary in her oral submissions and so we have not determined it.

that she would have to have a meeting about an unauthorised absence on 14th April.

- Terminate her employment or fail to offer any more shifts.

Did the above amount to a detriment?

If so, was it because the Claimant did a protected act?

Remedy for discrimination or victimisation

What financial losses have been suffered, if any, by the Claimant?

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

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

If the claim for discrimination is successful what amount should be awarded for injury to feelings?

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

Did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant?