

THE INDUSTRIAL TRIBUNALS

CASE REF: 4865/17

CLAIMANT: Anonymised Claimant

RESPONDENT: Anonymised Respondent

JUDGMENT

The unanimous judgment of the tribunal is that the respondent unlawfully harassed the claimant on grounds of sex and unlawfully discriminated against the claimant on grounds of sex. The claimant is awarded compensation and interest; comprising £41,500.00 in respect of injury to feelings, £20,000.00 in respect of psychiatric injury and £6,000.00 in respect of aggravated damages, together with interest of £4,360.00. The total award is £71,860.00.

CONSTITUTION OF TRIBUNAL

Vice President: Mr N Kelly

Members: Mrs D Adams
Mr I Rosbotham

APPEARANCES:

The claimant was represented by Mr P Ferrity, Barrister-at-Law, instructed by the Equality Commission.

The respondent appeared in person and was unrepresented.

SUMMARY

1. The claimant worked for the respondent as an assistant in an ice-cream shop.
2. The claimant had been born in 2001. The respondent had been born in 1958.
3. The claimant became a customer at the ice-cream shop when she had been aged 13.
4. The claimant became a part-time employee of the respondent on 17 March 2017 when she had been 15 years of age.
5. The claimant had complained to the Police Service of Northern Ireland about various incidents.

6. The respondent was charged with several counts of sexual offences. That prosecution was delayed on several occasions but he pleaded guilty ultimately to two charges of common assault and agreed to the imposition of a Risk of Sexual Harm Order (“ROSH Order”).
7. On 25 August 2017 the claimant’s mother had lodged an ET1 on behalf of the claimant. That claim form referred to a period when the claimant had actually been employed by the respondent, rather than being a customer, between 17 March 2017 and approximately 7 June 2017.

PROCEDURE

8. This is a long running claim, alleging unlawful harassment on the ground of sex and unlawful discrimination on the ground of sex contrary to the Sexual Discrimination (Northern Ireland) Order 1976 (the 1976 Order). This claim has been subject to repeated delays since 2017. Some were due to the criminal prosecution, some were due to the existence of the ROSH Order, some were due to the respondent’s unsuccessful attempts to challenge that ROSH Order, some were due to the Covid pandemic and some were due to the backlog of cases currently listed in the tribunal. That delay has however been substantial and that is regrettable.
9. The ROSH Order had been agreed to by the respondent and the meaning and effect of that Order had been explained to the respondent by the District Court and by his own solicitor and counsel. It was in any event in clear terms. It was dated 28 May 2019 and stated:

“Charge 1: Defendant on at least two occasions, the said defendant is alleged to have done an act specified in 123(3) of the Sexual Offences Act 2003, namely communicated with a child where part of the communication was sexual. An application is made under the Magistrate’s Court (Sexual Offences Act 2003) Rules (Northern Ireland) 2004 for a Risk of Sexual Harm Order.

***It is adjudged** by the said Court that the facts therein are made out and therefore the conditions are met for a Risk of Sexual Harm Order to be made against the above named Defendant.*

***It is ordered that** the defendant is prohibited from 1. Residing at, or making arrangements to reside at, any accommodation unless approved by the Area Sex Offender Management Committee in advance. 2. Prohibited from approaching, seeking to approach, communicating or seeking to communicate by whatever means either directly or indirectly with the victim and her family, unless approved in advance by his Designated Risk Manager. 3. Prohibited from having any unsupervised access, association, contact or communication with any child under 16 years, unless approved by Social Services, save for every day inadvertent or unavoidable contact. This does not include his own grandchildren, provided there is consent from the parent/guardian of such child. 4. Prohibited from entering into any relationship which affords access to children under 16 without prior verifiable disclosure of offending history by his Designated Risk Manager. 5. Prohibited from taking up any activity in a paid, private, voluntary or*

charitable capacity which affords access to children under 16, unless approved by his Designated Risk Manager. 6. Prohibited from denying police access to his notified address to ensure he is complying with the terms of the ROSH and to carry out home visits under the Public Protection Arrangements for Northern Ireland.”

10. A footnote to the ROSH Order provides:

“If, without reasonable excuse, you do anything you are prohibited from doing by a Risk of Sexual Harm Order you shall be liable on conviction to imprisonment for a term not exceeding five years and you will become subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.”

11. There were initial delays in listing this tribunal claim until the criminal proceedings against the respondent had been completed.

12. Under Rule 49 of the 2005 Rules then in force, the action was anonymised as a sexual offences case. That Rule provided:

“49. In any proceedings involving allegations of the commission of a sexual offence the Tribunal, the Chairman or the Secretary shall omit from the Register, or delete from the Register or any decision, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation.”

When that Rule was in force, the anonymisation of such cases was automatic and mandatory. It did not involve any exercise of a discretion or decision making function on the part of the tribunal.

13. The nearest equivalent Rule under the 2020 Rules in Schedule 1 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 is in markedly different terms. It provides in relevant part:

“44(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances –

(a) where the tribunal considers it necessary in the interests of justice;

(b) in order to protect the Convention rights of any person; -

(2) In considering whether to make an Order under this Rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such Orders may include –

- (a) *an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*
- (b) *an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of the hearing or in it's listing or in any documents entered on the Register or otherwise forming part of the public record;*
- (c) *An order for measures preventing witnesses at a public hearing being identifiable by members of the public;*
- (d) *A Restricted Reporting Order within the terms of Article 13 or 14 of the Industrial Tribunals Order; -"*

14. This claim was intensively case managed on ten separate occasions.

15. As a result of one Case Management Discussion on 30 September 2019, an agreed list of factual and legal issues was lodged on behalf of the parties. Those agreed issues, which seem to combine legal and factual issues without distinction, stated:

"1. Did the respondent make lewd and suggestive remarks to the claimant during the course of her employment with him? To wit:-

Did he ever say to her all or any of the following:-

What's going on with your top part?

Are they developing or what?

Maybe you should do exercises to make them bigger?

Sure get "XY" (the claimant's friend) to help you.

You can just get oil or something to rub them every night.

Have you thought about going on the pill?

At which age did you start letting boys do stuff to you?

Slut isn't she? (To her friend)

Do you shave often?

Do you send like naked pictures of yourself to guys?

Your bum is my bum.

Your body is perfect.

When was the last time she (you) shaved?

What knickers are you wearing?

2. *Did the behaviour alleged above constitute direct sex discrimination under the Sex Discrimination (Northern Ireland) Order 1976?*
3. *Did the behaviour alleged above constitute sexual harassment under the Sex Discrimination (Northern Ireland) Order 1976?*
4. *Can the claimant compare her treatment to that of a hypothetical male for comparison purposes?*
5. *Did the respondent touch and/or fondle the claimant during or in the course of her employment with him? To wit:-*

Did he ever do or say to her any of the following:-

Smack her on the bum and say "that's for forgetting to wipe the fridge and bring the basin down"?

Tell her to sit on a chair and when she had one leg on top of the other say "you know what you need to do to keep your legs closed" and while you said that you touched her private area?

Wanted to play a game with money and said if she guessed the amount of money in the box she could keep it and if she didn't "then you go topless for 5 minutes"?

Touch her hips and pull her to you and squeeze her bum?

Touch her private area – basically rubbing it with your hand and brush your arm on her bum while walking past.

Get her to go into the kitchen and show you what top she is wearing under her jumper, touch her bra and ask her if it was padded?

6. *Did the behaviour above constitute direct sex discrimination under the Sex Discrimination (NI) Order 1976?*
7. *Did the behaviour alleged above constitute sexual harassment under the Sex Discrimination (Northern Ireland) Order 1976?*
8. *Can the claimant compare her treatment to that of a hypothetical male for comparison purposes?*
9. *Did the respondent dismiss or cause the resignation of the claimant because of or for reasons connected to the behaviour at 1 and 5 above?*

10. *If so, was the claimant's alleged dismissal discriminatory under the Sex Discrimination (Northern Ireland) Order 1976?*
 11. *Are any of the alleged incidents out of time? Do they constitute a continuing discriminatory act or state of affairs? If any incidents are out of time, would it be just and equitable to extend time?*
 12. *What loss or damage or injury to feelings has the claimant suffered as a result?*
 13. *What compensation, if any, is the claimant entitled to"?*
16. As indicated above, part of the delay in determining this matter was caused by the respondent's attempts, before another Court, to lodge a late Notice of Appeal against the ROSH Order to which he had agreed initially. The hearing of that appeal was delayed on successive occasions because of Covid and the appeal was eventually dismissed.
17. The respondent's attitude throughout to this litigation has been to deny every single allegation of impropriety. For example in a letter to the claimant's then solicitor on 24 January 2020, the respondent stated:
- "Money is the root of all evil, I will show that this is a scam and I can't believe the amount of smart people have fallen into this person's trap. I have no money anywhere. In 2010 I was cleaned out of money by two rogue solicitors and (?). I am not going to reward a scam artist. I have made it very clear to many people I will go into a wooden box before I pay 1p."*
- In a letter to the Equality Commission dated 14 January 2021, the respondent stated:
- "As my hands are tied at the moment with the rosho order once it is either removed or runs out I will take all measures to clear my name and seek the proper compensation for a false claim and for all my lose's (sic) suffered as a result from all persons including claimant."*
18. At the final Case Management Discussion on 12 August 2021. Mr Jarlath Fields, solicitor, who had acted for the respondent in relation to criminal proceedings but was not acting for him in relation to these tribunal proceedings, attended the tribunal by WebEx to update the tribunal on the respondent's appeal against ROSH Order. He confirmed that that appeal had been unsuccessful. The tribunal is grateful for Mr Fields' assistance in this matter.
19. The Offender Management Unit of the PSNI had given clear permission for the respondent to attend and participate in this tribunal hearing in a letter of 21 October 2019.
20. On that basis, the full hearing was listed for 6-10 September 2021 in Killymeal House. In light of the ROSH Order, specific measures were put in place.
- (i) The tribunal panel, the claimant, and the respondent were all in separate rooms with a live video link between the three rooms.

- (ii) There were staggered arrival and departure times for the claimant and the respondent to ensure that they were separated at all times in the course of this hearing.
- (iii) The respondent was required to provide his questions in cross-examination to the claimant in advance of the hearing no later than 5.00 pm on 31 August 2021. It had been directed that any questions, and to the extent only that they were appropriate, would be put to the claimant by the Employment Judge (the Vice President) hearing the case. It was also directed that, once that procedure was finished, if the respondent wanted any additional questions to be put to the claimant, he should make that application directly to the Employment Judge at that point in the hearing. It was stressed that the respondent would not speak directly at any point to the claimant.
- (iv) Within those restrictions, the tribunal made sure that the respondent had a full opportunity to challenge and to test the evidence by and on behalf of the claimant and to make submissions. He had also been free to call his own witnesses but did not do so.

21. The respondent provided 24 pages of handwritten questions as directed for the cross-examination of the claimant. Many of those questions were simply submissions on the part of the respondent rather than questions in cross-examination and were not put to the claimant. Other questions were not questions for the claimant and were similarly not put to the claimant. Many of the questions were simply not relevant to the issues before the tribunal and were not put to the claimant. Many of the questions were repetitious and were rephrased and put appropriately to the claimant. Other questions were simply inappropriate and were not put to the claimant. The remaining questions, rephrased as appropriate, were put to the claimant by the Vice President.

At the end of the cross-examination, the respondent was asked whether he wished to put any further questions. He seemed quite angry and accused the Vice President of "*pussy footing around*". The tribunal rose for a period of approximately ten minutes to allow the respondent to consider whether he wished additional questions to be put on his behalf. On his return, the respondent confirmed that he did not wish to do so.

22. The claimant gave evidence on her own behalf. The claimant's mother, the claimant's friend ("XY") and Dr Best gave evidence on her behalf.

The respondent gave evidence on his own behalf and called no other witnesses.

23. The tribunal heard evidence over the three days Monday, Tuesday and Wednesday, including Dr Best remotely by WebEx, before hearing final submissions on the fourth day.

24. These submissions fell into two parts. The first part dealt with an application by the claimant to remove the original Anonymisation Order which had been made under the 2005 Rules. The second part of the submissions dealt with liability and remedy in relation to the claim.

25. The ET1 referred only to sexual harassment. However it seems clear that the parties had agreed that the claim as worded also raised a separate claim of direct sex discrimination. That makes no practical difference in the circumstances of this case but it is clear that the claim had been amended by agreement accordingly.

RELEVANT LAW

Anonymisation

26. Rule 49 of the 2005 Rules and Rule 44 of the 2020 Rules are set out above.
27. The tribunal in the case of **McCabe v Northern Ireland Public Services Ombudsman 12368/18 and 24561/19** held that:

“62. *At 1.30 pm, the tribunal first heard the claimant’s application for the anonymisation of the judgment. The claimant relied on her Article 8 Rights and sought the removal of her name from any judgment together with the removal of the details of any reasonable adjustment sought by the claimant and of any reasonable adjustment provided by the respondent. She also sought the removal of all information which would provide what she described as a “jigsaw identification” of the claimant.*

63. *The respondent objected to any such order. There was nothing unusual about this case and nothing to set it aside from the general principle of open and public justice. The claimant had made very serious allegations against individuals which needed to be ventilated in a public forum and determined in a public forum.*

64. *Rule 44 of the Schedule to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 provides:*

“44-(1) *A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances*

(b) in order to protect the Convention Rights of any person;

(2) In considering whether to make an order under this rule the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include –

(b) an order that the identities of specified parties, witnesses or other persons referred to in the

proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;”

65. As the EAT determined in the recent decision of **British Broadcasting Corporation v Roden UKEAT0358/14/DA**:

“An order under Rule 50 [the equivalent GB provision] interferes both with the principle of open justice and the right to freedom of expression.”

66. The EAT referred to the recent decision of the Supreme Court in **A v British Broadcasting Corporation [2014] 2 WLR 1243** which concluded:

“It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy.”

The EAT determined that:

“The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.”

“Where anonymity orders are made, three Convention Rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interest of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression and again is qualified.”

67. While much of the case law in this area concerns criminal law proceedings or orders issued under anti-terrorism legislation, the principles expounded apply equally to employment law. The EAT in **Roden** stated:

*“So far as the interests of open justice are concerned, I do not accept Mr Bowers’ submission in reliance on **A v B** that in the present case there is no public interest in full publication of what is essentially a private employment claim (particularly given the potentially devastating consequences for **G** in being identified). This was addressed by Underhill P in **F v G [2012] ICR 246 at 49** as follows:*

*“I turn therefore, to the second question, namely whether the injury to the Article 8 rights of the students and staff outweighed the interests of open justice. I do not find that easy. As Tugendat J makes clear in **Gray v UVW [2012] EWHC 2367 (QB)**, the default position in English law is and should be that it is in the public interest that the full decisions of courts and tribunals, including the names of the parties, should be published. I need not elaborate the reasons for that view, which simply reflects what has been said by numerous courts and tribunals ever since the decision of the House of Lords in **Scott v Scott [1913] AC 417**, and indeed before. It is not a right specifically of the press but reflects the public interest generally. It applies irrespective of the subject matter of the case. (I do not suppose that the Judge’s observation at paragraph 19 of the reasons that this was an “individual employment claim” which did not “raise issues of public interest in the wider sense” meant that she believed there was only a public interest in full publication in cases where the subject matter of the claim itself happened to involve issues of general public importance; but I should make it clear that if that is what she meant, I cannot agree). In addition to that public interest, weight must also be given to the claimant’s wish for the Judgment to be published in a form which names herself and the college. It is entirely legitimate that someone who has had their rights vindicated after a hard fought piece of litigation should wish to be able to report, and produce the evidence of, that victory without constraint.”*

That legitimate wish, to report that their particular position had been upheld in tribunal, applies equally to whichever party succeeds and therefore applies equally to the claimant and to the respondent. In the present case, serious allegations have been made against the respondent and against particular individuals employed by the respondent, including the then Ombudsman.

68. *The tribunal in the present case determined that it had to undertake a balancing exercise between the Convention Rights contained in Article 6, 8 and indeed Article 10. It was however vital for the tribunal to recognise that a principle of constitutional law is the provision of public justice administered publicly. The Court of Appeal (NI) in **Anakaa v First Source Solutions Limited [2014] ICA 57**; stated:*

“The interest of the public in knowing what is alleged in Tribunals and what decisions Tribunals reach is a substantial one.”

69. *The tribunal accepted that in this case the litigation had been no doubt stressful for the claimant. However the tribunal also had to recognise that the litigation had been stressful for those employed by the*

respondent organisation and in particular for those individuals who had been accused of unlawful activity and indeed accused of lying in sworn testimony. That included in particular Mrs Anderson and the interview panel members. Serious allegations had been made which needed to be either upheld or dismissed in open tribunal and in a public judgment. Such allegations could not be made in private, and determined in private without very good reason. That is not how justice operates.

The claimant referred to a report from Mr Dunlop, a cognitive behavioural psychotherapist dated 30 November 2019. That report opined that a reasonable adjustment for the tribunal would have been to anonymise the judgment as suggested by the claimant. However, with respect to Mr Dunlop, it is not for him to determine what a reasonable adjustment would be in these circumstances. That is a matter for the tribunal conducting the appropriate balancing exercise between Article 6, 8 and 10, in accordance with Rule 44 and the case law set out above.

The tribunal must also remember that it is always the case for all parties in litigation that proceedings are stressful and the provision of a public judgment, in particular in disability discrimination proceedings, can also be stressful. However the nature of the conditions relied on by the claimant, ie dyslexia and, to a lesser extent, depression, are not the sort of conditions which in 2020 could reasonably be expected to attract public opprobrium or criticism, or indeed professional difficulties.

It is also clear that the claimant had, quite properly, been open about her dyslexia in her professional life. It had been, in no sense, a secret.

- 70. In the balancing exercise to be conducted by the panel, the tribunal must give due weight to each of the competing Articles and Convention rights but must also recognise the signal importance of public and open justice in a democracy. The tribunal, in conducting that exercise, determined that there was nothing unusual in this case which would justify departure from the principle of open and public justice, and the judgment would not be anonymised to the extraordinary extent suggested by the claimant, or at all.*
- 71. In any event, the application for anonymisation by the claimant was entirely misconceived in practical as well as in legal terms. The claims were, to a large extent, an allegation of a failure to make reasonable adjustments in an interview process for a particular post in a particular organisation. It is surprising that the claimant thought it would be in any way feasible for the tribunal, when issuing a judgment, to not just anonymise the claimant but to avoid mentioning the reasonable adjustments sought and granted, to avoid mentioning the nature of the relevant disability, and to avoid mentioning anything which would permit a "jigsaw identification", in a small jurisdiction and in an even smaller legal profession. The nature of work undertaken*

by the claimant in the course of her career and in particular the nature of the work undertaken as an Investigation Officer and indeed the adjustment sought in relation to the interview process for Senior Investigating Officer were of crucial importance and could not be ignored in any judgment. Similarly, the work and nature of the respondent organisation was important to the allegations made by the claimant and again could not be ignored and in some way left out of the judgment. Even if it had been appropriate for the tribunal to resolve the balancing exercise by giving, for some reason not apparent to this tribunal, more weight to the claimant's stated Article 8 Rights than to the Article 6 need for open and public justice, there was no practical way in which the claimant's requests could have effectively been fulfilled. It would have either resulted in a judgment which would have made no sense to either party or indeed to anyone who chose to read that judgment, or it would have resulted in a judgement where the parties would have been readily identified in any event."

28. The Court of Appeal issued a decision in respect of parts of that vexed litigation in **[2021] NICA 39** and did not set aside the tribunal decision. The Court stated at paragraph 16:

"The Court notes that the same application was made by the appellant at first instance and refused by the Tribunal. The Court takes into account the reasoning of the Vice President which it considers clear and cogent, while recognising that any application must be determined by it de novo. Notwithstanding, the legal principles to be applied are the same in both contexts and the factual framework of the renewed anonymity application is essentially unchanged. The court takes into account in particular that the whole of the proceedings before the tribunal, which included five days of evidence from both parties, were conducted in public. Furthermore, the judgment of the tribunal is in the public domain. Given these factors the Court considers that an Anonymity Order at this stage would be of little or no practical utility to the appellant. Figuratively the horse has already bolted."

29. In the case of **McNicholl v 1. Bank of Ireland 2. F 1871/16 and 2/17**, the Court of Appeal had remitted the question of anonymisation to the tribunal *"for the purpose of reconsidering the contentious anonymisation decisions and, if considered appropriate, rescinding same and making fresh decisions"*. On remittal, the tribunal stated that:

"The tribunal is satisfied that, when considering whether it is appropriate to make any Anonymity Orders, pursuant to the said rule, it is necessary to have regard to the basis under which any such Order should be made and, in particular, the importance of the principle of open justice, giving full weight to it and the right of freedom of expression. It is clear, under the said rule, the restriction on public disclosure can only be imposed insofar as the tribunal considers it necessary (1) in the interests of justice or (2) to protect the convention rights of any person. – A tribunal is therefore required, when determining this issue, to consider the competing rights and balance one against the other before reaching a decision."

The tribunal in that case lifted the Anonymisation Order in respect of the first named respondent.

Sex Harassment/Sex Discrimination

30. Article 6A of the Sex Discrimination (Northern Ireland) Order 1976 provides:

“(1) For the purposes of this Order, a person subjects a woman to harassment if –

(a) he engages in unwanted conduct that is related to her sex - and has the purpose or effect —

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

(b) *he engages in any form of unwanted verbal, non verbal or physical - conduct of a sexual nature that has the purpose or effect –*

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or”

“(2) Conduct shall be regarded as having the effect mentioned in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of the claimant, it reasonably can be regarded as having that effect.”

31. In ***Pemberton v Inwood [2018] IRLR 542***, the Court of Appeal GB stated:

“In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub-paragraph (1)(b) a tribunal must consider both – whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and – whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course take into account all the other circumstances – The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant’s dignity or creating an adverse environment for him or her, then it should not be found to have done so.”

32. In ***Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 337*** the EAT discussed the definition of harassment under similar legislation relating to race discrimination. Leaving out the references to that legislation, and to race, it stated:

“As a matter of formal analysis, it is not difficult to break down the necessary elements of liability under (harassment). They can be expressed as threefold;

- (i) The unwanted conduct. Did the respondent engage in unwanted conduct?*
- (ii) The purpose or effect of that conduct. Did the conduct in question either:
 - (a) have the purpose or*
 - (b) have the effect*of either
 - (i) violating the claimant’s dignity or*
 - (ii) creating an adverse environment for her?**
- (3) The grounds for the conduct. Was that conduct on the grounds of the claimant’s (gender).*

“Nevertheless it will be a healthy discipline for a tribunal in any case brought under this section (or its equivalents in other discrimination legislation) specifically to address in its reasons each of the elements which we have identified, in order to establish whether any issue arises in relation to it and to ensure that clear factual findings are made on each element in relation to which an issue arises.”

33. Article 3 of the Sex Discrimination (NI) Order 1976 states:

In any circumstances relevant for the purposes of any provision of this Order, a person (“A”) discriminates against another (“B”) if, on the ground of sex, A treats B less favourably than A treats or would treat another person

34. Article 8 deals with ‘discrimination’ as defined above in the employment field. It states:

- (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her-
 - (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or*
 - (b) by dismissing her, or subjecting her to any other detriment**

(2A) *It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment-*

(a) *a woman whom he employs, or*

(b) *a woman who has applied to him for employment.*

35. Article 63A (burden of proof), states as follows:

63A.—(1) *This Article applies to any complaint presented under Article 63 to an industrial tribunal.*

(2) *Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—*

(a) *has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or*

(b) *is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment] against the complainant, or*

(c) *has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of Part III,*

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

36. In ***Frank McCorry and Others v Maria McKeith [2016] NICA 47***, the Court of Appeal stated:-

“The Shifting Burden of Proof.

[35] *While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).*

[36] *On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that “the shifting burden of proof is going to be crucial” (paragraph 136).*

[37] *The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided:-*

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them have established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

[38] *Section 17A(1B) of the 1995 Act provides:-*

‘Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the Tribunal could, apart from this sub-section, conclude in the absence of adequate explanation that the respondent has acted in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.’

[39] *The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*

[40] *The issue was revisited by the Court of Appeal in England and Wales In Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added):-*

“56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. ‘Could conclude’ [in the Act] 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 sex 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 (which I shall discuss later), 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 as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. *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."*

[41] *The Tribunal was satisfied that Ms McKeith had established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147). The Tribunal then found that the Ardoyne Association had not put forward any convincing or coherent explanation for its decision to make Ms McKeith redundant (paragraph 148). It was accepted on the hearing of the appeal that, if this was a case where the burden of proof shifted to the employer, there had not been a sufficient explanation. Accordingly, the challenge was concerned with whether the evidence before the Tribunal was such that a prima facie case of associative direct discrimination had been made out.*

[42] *In this regard the Tribunal set out a number of facts which concerned Ms McKeith having been sent home on previous occasions because of her disabled daughter, Ms Burns' belief that she should be at home with her disabled daughter, the reluctant piecemeal and incomplete nature of discovery, the other two persons who were made redundant at the same time were first re-engaged as volunteers and then rehired, the evasive and unconvincing evidence of the Manager and the non-compliance with statutory dismissal procedures. The Tribunal*

stated “. If this is not a case where the burden of proof should shift, no such case exists” (paragraph 147).

[43] We are satisfied that, as outlined by the Tribunal, there was such evidence of a difference in status, a difference in treatment and a reason for differential treatment that, in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination. The burden on the Ardoyne Association was not discharged. It followed that the Tribunal would find disability discrimination.

[44] We are not satisfied on any of the appellant’s grounds of appeal. The appeal is dismissed.”

Remedy

37. Article 63 of the 1976 Order gives the tribunal jurisdiction to deal with this complaint.

Article 65(1)(b) provides that:

“When an Industrial Tribunal finds that a complaint presented to it under Article 63 is well founded the tribunal shall make such of the following as it considers just and equitable –

(b) an Order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a County Court to pay to the complainant if the complaint had fallen to be dealt with under Article 66.”

Article 66 deals with the parallel jurisdiction in relation to education, goods and services etc which do not come within the employment field which falls to this tribunal.

38. The claimant in the present case seeks damages in respect of (i) injury to feelings, (ii) personal injury/psychiatric damage and (iii) aggravated damages.

Injury to Feelings

39. The relevant Presidential Guidance in relation to Employment Tribunals in Great Britain is generally followed in this jurisdiction. In Presidential Guidance issued on 5 September 2017, Judge Shona Simon and Judge Brian Doyle, the Presidents of Scotland and of England and Wales respectively issued relevant Presidential Guidance. It stated in relevant part:

*“2. In **Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871** – the Court of Appeal in England and Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500.00 to £5,000.00 applied in less serious cases. The middle band of £5,000.00 to £15,000.00 applied in serious cases that did not merit an award in the*

upper band. The upper band between £15,000.00 and £25,000.00 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000.00).

3. *In **Da’Bell v NSPCC [2009] UKEAT/0227/09, [2010] IRLR 19**, the Employment Appeal Tribunal revisited the bands and upgraded them for inflation. The lower band was raised to between £600.00 to £6,000.00; the middle band was raised to between £6,000.00 and £18,000.00; and the upper band was raised between £18,000.00 and £30,000.00.*
4. *The Employment Appeal Tribunal has subsequently stated that the bands and awards for injury to feelings can be adjusted by individual Employment Tribunals where there is cogent evidence of the rate of change in the value of money. However, the bands themselves have not been upgraded in general since the decision in **Da’Bell** in 2009.*
5. *In a separate development in **Simmons v Castle [2012] EWCA Civ 1039 and 1288** – the Court of Appeal in England and Wales declared that with effect from 1 April 2013, the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. This followed upon changes to the rules governing the recovery of costs in personal injury litigation in the civil courts in England and Wales.*
6. *In **De Souza v Vinci Construction (UK) Limited [2017] EWCA Civ 879**, the Court of Appeal has ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Court expressly recognised – that it was not for it “to consider the position as regards Scotland” however, account has now been taken of the position in that jurisdiction by the Scottish President before formulating this guidance.*
7. *So far as awards for psychiatric injury are concerned, the Court of Appeal in **De Souza** observed that the Judicial College guidelines for the assessment of general damages and personal injury cases now have incorporated the 10% uplift provided for in **Simmons v Castle**. If an Employment Tribunal relied upon the Judicial College guidelines in making an award for psychiatric injury then that award would comply with **Simmons v Castle** and **De Souza v Vinci Construction (UK) Limited**. -*
10. *Subject to what is said in paragraph 12, in respect of claims presented **on or after 11 September 2017** [Tribunal emphasis], and taking account of **Simmons v Castle** and **De Souza v Vinci Construction (UK) Limited**, the **Vento** band should be as follows:*

A lower band of £800.00 to £8,400.00 [less serious cases]; a middle band of £8,400.00 to £25,200.00 [cases that do not merit an award in the upper band]; and an upper band of £25,200.00 to £42,000.00 [the

most serious cases] with the most exceptional cases capable of exceeding £42,000.00.”

40. The claim in the present case was lodged on 25 August 2017. That is, in the unanimous view of the tribunal close enough to the start date for the GB guidance to make the GB guidance a proper basis for assessing compensation in this case, with a slight reduction in the direction of the **Da’Bell** limits. It is important to remember that the guidance is only that: guidance with no statutory basis and guidance directed at the tribunals in England, Wales and Scotland. It is of persuasive value only; particularly in Northern Ireland. The tribunal, with the benefit of that guidance, has to bear the effect of inflation in mind when assessing damages for injury to feelings. The **Da’Bell** guidance is clearly seven years out of date in terms of inflation in relation the present case. The appropriate figures for the upper band, for the purposes of the present case, are therefore £25,000.00 to £41,500.00.
41. The tribunal must also be conscious that there is a danger in “double counting” by awarding separately damages under different headings and then simply calculating the total of the sums awarded under the different headings. In **Ministry of Defence v Cannock [1994] IRLR** the EAT stated:
- “Tribunals should – not simply make calculations under different heads, and then add them up. A sense of due proportion, and looking at the individual components of an award and then looking at the total to make sure that the total awards seems a sensible and just reflection of the chances which have been assessed -”*
42. The tribunal must also be conscious that awards for injury to feelings should be purely compensatory; it would be wrong for such awards to be used as a means of punishing or deterring employers from particular courses of conduct or of expressing the tribunal’s disgust at a respondent’s course of conduct - see **Ministry of Defence v Cannock** (above).

Psychiatric Damage

43. In **Harvey (Vol II) at paragraph 900** it states:

“Not uncommonly, a victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful act. In that situation, it has been confirmed that the Employment Tribunal has jurisdiction to award compensation, subject only to the requirements of causation being satisfied. -”

Harvey further states **in paragraph 902** that:

*“Following the approach adopted by the majority of the Court of Appeal in **Essa v Laing Limited [2004] IRLR 313** – it is probably the case that there is no need to show that the injury in respect of which the claim is made was reasonably foreseeable, provided a direct causal link between the act of discrimination and the loss can be made out.”*

44. The guidelines issued by the Judicial College in relation to the Assessment of General Damages in Personal Injury Cases in Northern Ireland refer to psychiatric damage.

The guidelines state:

“The factors to be taken into account in valuing claims for psychiatric damage include the following:

- (i) ability to cope with life, education and particularly work*
- (ii) effect on relationships with family, friends and those with whom he comes into contact etc*
- (iii) extent to which treatment would be successful*
- (iv) future vulnerability*
- (v) prognosis*
- (vi) the extent and/or nature of any associated physical injuries*
- (vii) whether medical help has been sought.”*

45. The guidelines set out four categories for assessing psychiatric damage.

The first is “*severe psychiatric damage*” in which the injured person will have marked problems in relation to factors (i) to (iv) as listed above and the prognosis will be very poor.

46. The second category is “*moderately severe psychiatric damage*” where there would be significant problems associated with factors (i) to (iv) above but the prognosis would be much more optimistic.

47. The third category is “*moderate psychiatric damage*” where there will be the sort of problems associated with factors (i) to (iv) above and there will have been marked improvement by trial and the prognosis would be good.

48. The fourth category is minor psychiatric damage. In respect of that category the guidelines state that the level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep are affected.

49. The awards recommended in relation to moderate psychiatric damage fall between £12,000.00 and £48,500.00. The awards recommended in relation to minor psychiatric damage are described as “*up to £15,000.00*”.

50. In ***Leonard v Theedom [2020] NIQB 42***, Mr Justice Maguire considered a RTA compensation claim in which psychiatric damage had been alleged. The Court determined that “*the plaintiff will have become anxious about driving and have become, at times, stressed and hypervigilant when travelling in a car*”.

It stated:

“The Court is of the view that there was a psychiatric upset in the form of an adjustment disorder which arose in this case – The adjustment reaction, in the Court’s mind would have ended after about 9 months.”

That however had settled by the time of trial. She had received medical help, including the help of a therapist.

The Court assessed damages in respect of the adjustment disorder in that case at £10,000.00.

Aggravated Damages

51. **Harvey at paragraph 903** states that:

“As a matter of principle, aggravated damages are available for an act of discrimination -”

*“Although tribunals – plainly have the jurisdiction to make awards of aggravated damages in appropriate circumstances, the award must still be compensatory and not punitive in nature, see **Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291, EAT** (whistleblowing case, in which the compensation is assessed on the same basis as awards in discrimination cases). In reducing the award of aggravated damages from £20,000.00 to £7,500.00, the EAT (Underhill P presiding) observed that such damages are really an aspect of injury to feelings and tribunals should have regard to the total reward made (ie for injury to feelings and for aggravation to that injury) to ensure that the overall sum is properly compensatory and not – as in **Shaw** – excessive.”*

52. In **paragraph 904 Harvey** referred to **HM Land Registry v McGlue UKEAT/0435/11**. It stated:

“Allowing that aggravated damages have a proper place and role to fill, the EAT warned that a tribunal should also be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”. Such damages are not intended to be punitive in nature and are not dependent upon a sense of outrage on the part of the tribunal. The EAT considered the categories of conduct where it might be appropriate for an award of aggravated damages to be made ie where the distress caused by an act of discrimination may be made worse by (a) being done in exceptionally upsetting way eg “in a high handed, malicious, insulting or oppressive way – (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant was aware of the motive; (c) by subsequent conduct; eg where a case is conducted at a trial in an unnecessarily offensive manner -”

“Although an award of aggravated damages may be justified in such cases, a tribunal considering making such an award should look first as to whether,

objectively viewed, the conduct is capable of having aggravated the sense of injustice and having injured the complainant's feelings yet further."

EVIDENCE

53. In all crucial respects, this case involves an absolute conflict in evidence. The claimant makes serious and detailed allegations of unlawful harassment and discrimination. The respondent denies each of those allegations. The tribunal therefore has to consider the two conflicting versions of events in this decision before reaching its conclusion on which version it prefers on the balance of probabilities.
54. The claimant provided a witness statement to this tribunal which incorporated three witness statements which she had made earlier to the PSNI about the respondent. She adopted those witness statements as her evidence in chief.
55. The claimant made specific detailed allegations in her witness statement to the tribunal which appear in large measure to be consistent with the witness statements made to the PSNI some years previously.
56. The claimant alleged that the respondent had made a number of verbal remarks to her which amounted to sex harassment. She had alleged that he had said:

"Can I ask you a question, what's going on with your top part?"

"Are they developing or what?"

"Maybe you should do exercises to make them bigger."

"Sure get ("XY") to help you."

"Have you thought about going on the pill?"

"You can just get oil or something and rub them every night."

"At which age did you start letting boys do stuff to you?"

"Slut isn't she?"

"Do you shave often?"

"Do you send like naked pictures of yourself to guys?"

"Your bum is my bum."

"Your body is perfect."

"When was the last time she shaved?"

57. The claimant alleged that the claimant had told her to sit on a chair and when she had one leg on top of the other he had said *"you know what you need to do to keep your legs closed"* and that he had also touched her private area at that point.

58. The claimant alleged that the respondent had wanted to play a game with money and had said that if the claimant had guessed the amount of money in the box she could keep it but if she did not he said *"then you go topless for 5 minutes"*.
59. The claimant alleged that the respondent had *"touched my private area – basically rubbing it with his hand and he brushed his arm on my ass while walking past."*
60. The claimant also alleged that on Sunday 28 May 2017 or Monday 29 May 2017, the respondent had got her to *"show him what top I'm wearing under my jumper. I only pulled it up a bit but he pulled it to the very top and touched my bra and asked if it is padded."*
61. The claimant alleged that the respondent had asked the claimant what knickers she was wearing.
62. The claimant alleged that the respondent had *"smacked me on my bum"* and that he had said *"that is for forgetting to wipe the fridge and bring the basin down."*
63. The claimant also alleged that in or around December 2015, the claimant had been in the ice cream shop with a friend "XY". She alleged that the respondent had told "XY" that if she crawled from one side of the room to the other she could have a free slushie (a frozen beverage). "XY" had been 13 years of age at this point. The claimant alleged that "XY" had felt compelled to do as she was told and that she had crawled across the floor as directed. The claimant stated that the respondent walked behind her and that a video had been made of this episode. When the video had been looked at later, she and "XY" had noticed that the claimant had an erection when this was happening.
64. "XY" gave evidence to the tribunal and adopted her witness statement which she had given to the PSNI as her evidence. That witness statement had been taken on 25 November 2017 and had been taken as part of the PSNI investigation into the allegations brought by the claimant.
65. "XY's" date of birth had been 24 December 2002 and at the time of the PSNI interview she had been 15 years of age. A social worker had been observing the interview from the next room.
66. "XY" stated that the relevant incident in which she had crawled across the floor for a free slushie had occurred *"two or three years ago"* ie when she would have been 12 or 13 years of age. She stated that the claimant had taken a video of this incident and that when they looked back at the video they had realised that the respondent had been walking behind "XY". The video had been cut into a birthday video for "XY"'s birthday and that when they looked back at the video they had noticed that the respondent had had an erection. "XY" stated the respondent had been laughing as he walked behind her.
67. "XY" also stated that the respondent had hit her with a towel on her "ass". She also stated:

"Then that is what he used to do to (the claimant) as like a punishment but he would like actually like hit her if that makes sense."

“XY” stated that the claimant *“used to just like cry about it and always tell me about it”*. However she had not actually seen anything of that nature. She stated that she and the claimant had talked about *“what he used to do to her all the time”*.

68. The claimant’s mother also gave her evidence by way of witness statement which she adopted as her evidence in chief. She is a Russian speaker and an interpreter was provided for her evidence. In her witness statement to the tribunal she adopted a previous witness statement she had given to the PSNI. In her witness statement to the tribunal, she stated:

“When (the claimant) told me what everything happened I started to see that (the claimant) was really upset. I saw that my daughter was lost. After everything happened (the claimant) was scared to leave the house, every time she left she wore a hood, as if she just turned off her emotions from the world. When (the claimant) asked me to help her ring the police and tell them what happened, I warned her that it could take some time and that it would be hard emotionally, (the claimant) answered by saying she doesn’t want anyone else to feel that way and she doesn’t want (the respondent) doing that to others. When (the claimant) showed me a video that she showed the police at (the respondent’s) shop, where he made “XY” crawl on the floor for a free slushie I was angry and shocked and asked her why hasn’t she showed me the video before or why did she even take it. The claimant told me at that time she was only 14 maybe less and she just thought of it as a game and nothing bad, it got me upset because if I would have seen that video earlier I wouldn’t have let her go back to that shop which at the end resulted in a lot of problems in my daughter’s life.”

69. In the PSNI statement adopted by the claimant’s mother as part of her evidence, the claimant’s mother stated that on a day at the end of May 2017, the claimant had come home from work angry and agitated. She had asked her daughter what had happened and the claimant had told her that she was in trouble at work and she wanted to go to the police. She stated that the claimant had been so agitated that she had needed to get her to calm down, sit down and talk about what had happened. She stated that the claimant had wanted to go to the police because (the respondent) had sexually harassed her and behaved as if he wanted sex. The claimant’s mother accepted that she had tried to discourage the claimant from going to the police because she had thought that as she was a young girl she maybe misunderstood something. Then however the claimant gave further details. She stated that the respondent had touched the claimant on her legs as well as her private parts. She told the claimant not to go to work on the following day and they then went to the police.

70. The respondent alleged that the relationship between the claimant and himself had been friendly. He stated that the claimant had *“started opening up to me and telling me things that would be very hard for someone to talk about. I never at any stage thought I was being taken for a mug. The conversation got worse and more crude that she was asked to stop.”* He stated that he had been *“totally shocked”* when the PSNI had arrived at his door. He did not state in his evidence in chief that the PSNI had previously arrived at his door in relating to similar allegations in 2013. He stated *“I did not have any thoughts of anything being wrong.”*

71. The respondent alleged that the conversation in respect of the size of the claimant's breasts had occurred because the claimant had herself said she was jealous of her friend "XY" in that respect. The respondent denied making any comment as alleged by the claimant.
72. The respondent also stated that the claimant had thought she was pregnant at one stage and that he had paid for her to take a pregnancy test. He alleged that he had discussed the potential father with the claimant.
73. The respondent alleged that the references to shaving had been started by the claimant alleging that she and "XY" had covered herself in Veet, a hair removal cream. She had stated that she had shaved "*down there*". The respondent alleged that he had told her to stop that conversation.
74. The respondent stated that the claimant had done a "*twirl*" behind the counter and the respondent had said "*something like there's nothing wrong with your body and left*".
75. His evidence was confusing in the extreme. He appeared to accept there had been a conversation about "*knickers*" but that had been instigated by the claimant. He alleged that he had not touched the claimant in her private parts. He stated that if that had happened it would have been on the CCTV. He denied suggesting that the claimant should go topless. He stated that it was sometimes "*impossible not to bump into*" the claimant.
76. The respondent accepted that he had pleaded guilty to two charges of common assault and that he had agreed to the ROSH Order. He also seemed to deny that he had ever been charged with a sexual offence. That however plainly was not the case. He had been charged with such offences and on the day of the hearing, that had been reduced to two charges of common assault with the ROSH Order. He may have been confusing "*charged*" with "*convicted*" although it is difficult to see how he could have made that mistake.
77. The respondent alleged that he had "*consoled*" the claimant as she had been telling him about "*abuse*". He alleged also that instead of touching her inappropriately he had taken her by the hand and pulled her up off the chair so he could sit down.
78. The respondent stated in cross-examination that he had been misled by his solicitor and counsel and indeed by the District Judge in the criminal proceedings. He alleged that he did not believe the ROSH Order had been in any way serious. He had been told it had been a "*win*" and that it had been nothing to worry about. He had been told just to sign it. If he had known that it referred to "*anything sexual*", he would never have signed it.
79. The respondent stated at various times that he would seek compensation for a false claim and/or defamation and that the PSNI and the National Health Service would also take action. He also alleged that he would seek to have his criminal convictions overturned.

CREDIBILITY

80. In *Thornton v Northern Ireland Housing Executive [2010] NIQB 4*, Gillen J stated at paragraph 13 in connection with the problem of assessing the credibility of witnesses:

“The Court must pay attention to a number of factors which, inter alia, include the following:

- *the inherent probability or improbability of representations of fact.*
- *The presence of independent evidence tending to corroborate or undermine any given statement of fact.*
- *The presence of contemporaneous records.*
- *The demeanour of witnesses eg does he equivocate in cross-examination.*
- *The frailty of the population at large in accurately recollecting and describing events in the distant past.*
- *Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication?*
- *Does the witness have a motive for misleading the Court?*
- *Weigh up one witness against another.”*

81. The respondent’s evidence in cross-examination was both evasive and unconvincing. It lacked credibility. For example:

- (i) the respondent put forward the proposition that he had forgotten about being interviewed, at some considerable length, following sexual abuse allegations made by three females under the age of 18 in 2013. The summary of that interview covered six pages and it had lasted for 33 minutes. The respondent had been arrested at his house, cautioned and conveyed to the custody suite. The interview had been conducted in Banbridge police station. At one point in his cross-examination, the respondent was asked:

“Do you agree you were interviewed about it (the 2013 allegations) by the police?”

At that point the respondent shuffled through the bundle for some 20 seconds without responding. He was asked by the Vice President:

“You do not need to look at the papers. It is in your memory. Were you interviewed by the police or not?”

The respondent’s response to that question was:

“Honestly, I couldn’t remember – but I have checked it and I have been.”

82. The Vice President asked the respondent:

Question (Q) *“You couldn’t remember until you looked at those papers?”*

The respondent’s answer was:

Answer (A) *“Correct”.*

83. The suggestion put forward by the respondent in evidence that he could not remember being arrested, taken to the cells and taking part in a serious police interview on similar charges to the allegations made by the claimant in the present case, until he read through the papers which he had, in any event, for some time before the present tribunal hearing, was utterly unconvincing and evasive.

84. Counsel for the claimant put to the respondent at one point:

Q. *“You told the tribunal you had forgotten about this (the 2013 allegations)?”*

The respondent’s answer to that was:

A. *“No, I was saying about what was I interviewed by the police – when I came to here, I parked about half an hour from here because if I came in round here I will get lost. I will not know where I am. I park up here because I forget everything. If I go to a hospital appointment, they have to write it on yellow paper for me and I have to write it in stickers. It is a problem I have. I cannot help it. I also have a thing which is called “face blindness”.*

85. It is noticeable that this defence of memory loss does not appear to have been put forward by the claimant or by the claimant’s solicitor in the course of either police investigation or in the course of the pleadings in relation to the present tribunal claim. It is also unsupported by any medical evidence.

86. Another example of the respondent’s evasive and entirely unconvincing evidence occurred as follows:

Q. *“Were these not similar allegations to those made by the claimant and by “XY”?”*

A. *“- whether if the claimant and “XY” were acquainted with these people or not, I don’t know.”*

Q. *“Were the allegations similar?”*

A. *“They were similar, but if they were all pals, why not?”*

Q. *“You had the opportunity, if they were pals, to put it to them (in cross-examination)?”*

- A. *"I had three weeks to get ready". [Tribunal's note: this claim has been outstanding since 2017.]*
- Q. *"Are you seriously suggesting – what way do you see this happening – that they in some way got together and influenced and worked with (the claimant)?"*
- A. *"They were pally like – they were pals – they have been pals."*
- Q. *"You said you didn't know if they were acquainted with each other and now you are saying they were pals – which is it?"*
- A. *"No I am saying they could be pals – I have seen them together."*
- Q. *"You have said two entirely different things and now a third one. Firstly you said you didn't know if they knew each other. Secondly you said they were pals. Thirdly you said they may be pals. Which is it?"*
- A. *"Ok I don't know how pally they were – I have seen them together."*
- Q. *"How do you know if you have seen them together if you don't know this (2013 female)?"*
- A. *"in Armagh Courthouse."*
- Q. *"You said you didn't know (2013 female) – how is it you say you saw her when you didn't know her and when you suffer from face blindness?"*
- A. *"Ok I retract that – it was pointed out to me in Armagh Courthouse".*
- Q. *"Were they not there for the trial? – How were they there because they were pals?"*
- A. *"Again, you will have to ask them that".*
- Q. *"Is that a place where teenagers generally go to hang out – the courthouse?"*
- A. *"When you see people sliding down the bannisters in the courthouse – I don't know was it a playhouse?"*

87. In summary, the tribunal therefore does not regard the evidence of the respondent as credible for the following reasons:

- (i) The respondent, on the day of the contested hearing of the criminal charges, pleaded guilty to two counts of Section 42 common assault and accepted a ROSH Order. The respondent denied in evidence to the tribunal that the two counts of assault and the ROSH Order were serious matters. When the title of that Order and the contents of that Order were put to the respondent in cross-examination, he sought to blame his solicitor, his counsel and also the

District Court. He argued that he had been misled. The respondent kept saying that a Sexual Offence Prevention Order (SOPO) had been made and withdrawn and the ROSH Order made. He alleged he did not know that the ROSH Order indicated that the offences to which he had pleaded guilty had been adjudged sexual in nature.

"If I had known that I would have objected (to the ROSH Order)".

"I was called about one minute before it ended. I was told a SOPO Order was being made" – "It was withdrawn by the Chief Justice."

"If I had believed it had anything to do with sexual, I would never have agreed to it."

"I was badgered into accepting something."

The tribunal accepts, even if the respondent does not, that two convictions for assault in these circumstances and a ROSH Order were serious matters and that the Order had been imposed, as the name implies, and text of that Order indicates, because the respondent's conduct had been sexual in nature.

The Order had been made under the Magistrates Courts (Sexual Offences Act 2003) Rules (Northern Ireland) 2004. It stated clearly that:

"Defendant on at least two occasions, the said defendant is alleged to have done an act specified in 123(3) of the Sexual Offences Act 2003, namely communicated with a child where part of the communication was sexual. An application is made under the Magistrates Courts (Sexual Offences Act 2003) Rules (Northern Ireland) 2004 for a Risk of Sexual Harm Order. It is adjudged by the said Court that the facts therein are made out and that the conditions are met for a Risk of Sexual Harm Order to be made against the above named defendant."

It is also clear that the Order imposes serious restrictions on the respondent's liberty and that a breach of the Order carries with it the potential penalty of a term not exceeding five years imprisonment. The restrictions on the respondent's liberty are that he cannot live at any address unless it is approved by the Area Sex Offender Management Committee in advance; that he may not approach or communicate with the victim or her family unless approved in advance by the Designated Risk Manager; that he is prohibited from having any unsupervised access to a child under the age of 16 (apart from his own grandchildren) unless it is approved by the Social Services; that he is prohibited from entering into any relationship which affords access to children under 16 and that he is prohibited from taking up any occupation which affords access to children under the age of 16. Since the respondent, at the relevant time, had owned and run a sweets and ice-cream shop, that Order effectively prevented him from operating a similar business or any business that afforded access to children. It had a clear and substantial effect on the respondent's ability to earn a living.

- (ii) In evidence, the respondent sought to downplay the importance of his agreement to this Order. He argued that he had been asked simply whether he had intended to move house at any stage in the near future and if he had intended to form a new relationship with a woman in the near future. He said that when he said 'No', he had been told to sign the Order. He had been told to go home and "*have a party*". Despite the attempts by the respondent to downplay the importance of the ROSH Order, while at the same time seeking to blame others for his agreement to the imposition of the Order, the respondent appears to have expended significant effort in trying to appeal latterly against the imposition of the Order. That appeal was rejected.

The respondent's attitude to the imposition of the ROSH Order is disturbing and indicates at best a significant level of delusion on his part.

- (iii) The respondent made repeated attacks on the claimant before the tribunal. He alleged that she was lying and that she was doing all this to seek financial compensation. "*It was all a money thing – for compensation – a claim – setting me up – making me a mug*". He accused the tribunal of "*pussy footing*". He accused his solicitor at the time (not Mr Fields) of incompetence and of misleading him. He accused his counsel of incompetence and misleading him. He accused the District Court of misleading him. He accused "XY" of lying and doing so simply to assist the claimant. He accused other individuals who had made similar complaints in 2013 against him to the PSNI of lying or of "*making up a story*". In short, everyone apart from him had been in the wrong.

The respondent's attitude to all these individuals is again disturbing and indicates at best a significant degree of delusion on his part.

- (iv) The respondent sought to downgrade the substance of his convictions (on his plea of guilty) to simply putting his arm around the claimant's shoulder to console her and once touching her on her hip or waist as he moved past her. He protested that he had not known that this could have amounted to a criminal offence but he had been told by a solicitor that simply touching someone anywhere "*from head to toe*" without their consent had been a criminal offence. He had not been aware that he had done anything wrong. The respondent's attempt to rewrite history in this respect is entirely unconvincing. The District Court took the view that this had been sufficiently serious to impose a term of imprisonment of four months suspended for a period of two years and also to impose the ROSH Order.
- (v) The respondent's argument that he had not known he had been breaking the law in relation to the claimant, has even less credence when it became clear that in early 2013, some four years previously, the respondent had been interviewed at length by the PSNI in relation to similar complaints made by three females under the age of 18. When this matter had been put to the respondent in cross-examination his initial reaction was to claim that he could not remember having been interviewed in this respect. While that evidence rapidly changed, it is entirely unconvincing that he sought to suggest that he had forgotten the 2013 interview. Being arrested and being interviewed by the PSNI in relation to sexual misconduct allegations made by three girls under 18 is not the sort of thing that anyone would be likely to

forget. That incident involved the respondent being arrested on 31 January 2013 in relation to two charges of inciting a child to engage in sexual activity and one charge of sexual assault. That is the sort of incident that would tend to lodge in anyone's memory, particularly given the circumstances of the present claim.

- (vi) The allegations made in 2013 by three underage females against the respondent were of sexual assault by touching a child's bottom and of encouraging a child to engage in a game of dares for sexual purposes. Those allegations are remarkably similar to the allegations made by the claimant in the present case.

When the respondent was asked in cross-examination whether he could put forward any reason why three young females in 2013 had made such similar allegations to those made by the claimant and "XY" in 2017, his response was "*no you tell me*". Counsel for the claimant yielded to temptation and responded to this invitation by suggesting that the reason had been that the respondent had been "*a dirty old man*".

One of the underage girls in 2013 (aged 14 at the time of the interview) stated in particular in an Achieving Best Evidence (ABE) interview with the PSNI that:

"And ehm he just like wrote out paper like paper full of dares and all like topless and ehm touch each other and rub each other down and go with each other and all that and we didn't, me and (other under-age girl) just looked at each other and didn't do it and he put money on it and my friend went to the toilet and ehm she dropped a jar and bent down and picked it up and he came behind her and slapped her ass."

The same under-aged girl stated that at a different point in the ABE interview that:

"Ehm he was like and then like we were just me and my friends were just talking about boobs or something saying like oh I don't like my boobs and I don't like my boobs and I goes I don't like my boobs and he overheard and he was over here and he said sit back. Well yeah he was over there and he said sit back so I sat back and he was like looking at my boobs to see if they were ok or nothing an all."

The same under-age girl stated at a different point in the interview:

"Then like he come back over and ehm he goes so like girls nowadays shave and all and like he asked us do we shave and we all looked at each other and we just laughed and didn't give an answer."

The under-age girl was asked what she thought the respondent meant and she replied:

"Ehm like your pubic area."

Another one of the underage girls in 2013 (aged 15 at the time of the ABE interview) stated:

“And then he started, like me (other girl) and (other girl) went back and then he started saying do you shave and all. I think it is good like I think all girls do and all ”

“And then it was just me and (other girl) and then he started asking like do you like your boobs and all and she said to (other girl). (Other girl) goes I don’t like my boobs and then he goes sit back and like she sat back cause she didn’t like know like know what to do.”

“And then he goes I think you’ve got perfect boobs and then he goes what about you.”

“And then he goes eh he did some dares out. Eh one was till touch each others boobs and I can’t remember like then was about 5 or 6 of them.”

The ABE interviews with both of these girls had been carefully conducted and showed the interviewing officer getting details of a particular allegation, moving on and then returning later to the original allegation to check consistency of recollection.

These allegations are remarkably similar to those made in the present case. They alleged conduct in relation to “boobs”, “shaving pubic areas” and “dares” with sexual penalties. The respondent’s response was that he did not think he was before the tribunal to talk about incidents in 2013; he did not “recollect” any such incident and the three girls had been lying. His evidence was evasive and unconvincing.

- (vii) The CCTV footage in the shop which formed part of the criminal prosecution was not available to the tribunal. Nevertheless, there are interview records between the PSNI and the respondent in which it is clear that both the PSNI interviewing officers and the respondent had been looking at the CCTV footage in the course of the interview. It is equally clear that in the course of those interviews, it had been put to the respondent that it had been clear on the CCTV footage that he had been unlawfully touching the claimant.

That evidence was disturbing and further detracted from the respondent’s credibility.

- (viii) As part of his final submission to this tribunal, the respondent stated that he would seek to reopen his criminal convictions on the basis of “the new evidence” produced in this tribunal hearing. He also indicated that there would be a “back lash” against the claimant from the PSNI and NHS.

These statements were frankly mystifying and indicate again at best a high level of delusion on the part of the respondent.

88. The claimant, in contrast, impressed the tribunal as a calm, consistent and truthful witness. She recounted the events in detail and her evidence had been broadly consistent with PSNI statements completed four years earlier. Her evidence had been supported by “XY” who corroborated the claimant’s account of the “*slushie*” incident and who recounted the claimant’s contemporaneous complaints about the respondent’s behaviour.

The claimant also freely admitted to a matter which she might have felt did not rebound to her credit; ie that she had feared she had become pregnant while employed by the respondent and that the respondent had paid for her to undertake a pregnancy test. She did not attempt to conceal or to deny that this had occurred. It is likely that a dishonest witness would simply have denied that she had thought she was pregnant and that she had taken a pregnancy test.

89. The claimant’s mother, similarly, impressed the tribunal as an honest witness. She also freely admitted to a matter which she might have felt did not rebound to her credit; ie that she had initially tried to dissuade her daughter from making a complaint to the PSNI, although she changed her mind particularly once she saw the video of the “*slushie incident*”. Again a dishonest witness would simply have left out that part of her evidence.
90. “XY” also came across as a truthful witness. The respondent alleged that she had been lying to support her friend, the claimant. However, “XY” in evidence in chief and in her police statement accepted that she had not seen the respondent abuse the claimant verbally or physically. She stated that the claimant had complained about such behaviour to her but she had not actually seen it. A dishonest witness would have gone further and would have alleged that she had seen some or all of the acts of misconduct alleged in the claim form.

RELEVANT FACTS

91. The respondent ran an ice-cream and sweets shop which was frequented by a range of people including young people.
92. The claimant had been a customer of the shop for over one year before commencing employment on a part-time basis.
93. The claimant’s date of birth is 25 June 2001. She started work on 17 March 2017 and had therefore been aged 15 years at that point. She worked for approximately 12 hours per week on Fridays, Sundays and Mondays and was paid £4.00 per hour in cash. She still attended school during this period.
94. During her employment in the ice-cream shop, the claimant would have been alone on many occasions with the respondent. Since the respondent had been interviewed at length in 2013 about allegations of sexual misconduct which had been made by three girls of a similar age, and had been arrested at that time, it is difficult to see how the respondent had thought that that had been either appropriate or wise. It is not consistent with the actions of an innocent man who, some four years earlier, according to the respondent, had been accused wrongly of sexual misconduct by three underage girls. An innocent man in these circumstances would have made sure that he was never in a position to be wrongly

accused of sexual misconduct with young girls. He would not have employed a 15 year old girl and he would not have been alone with her.

95. The respondent had installed CCTV in the premises. The relevant CCTV recordings had been seized by the PSNI in or around 2017 for the purposes of the criminal prosecution. That CCTV footage was not available for the present tribunal hearing, although the Equality Commission had tried to obtain it from the PSNI.
96. Nevertheless, detailed interview records were available from the PSNI investigation which had preceded the prosecution of the respondent for offences relating to the present claimant. Those interview records contained, in particular, records of interviews which had taken place with the respondent in Banbridge Police Station on 1 June 2017 and 29 September 2017. In the course of those interviews the respondent confirmed that there had been CCTV in the shop premises and that that CCTV had recorded footage on to a hard drive.

It is clear from the record of the interview on 29 September 2017, when the respondent had been represented by a solicitor, that the Detective Sergeant and the Detective Constable had played relevant parts of the CCTV footage and that the respondent and his solicitor had watched the CCTV footage with those two police officers. That interview record contains the following:

“AG1 hard drive is shown to interviewee, he says he presumes it is his and he was aware that it had been seized, the download LC1 exhibit is what is showed to the interviewee. He confirms that the shop on the CCTV is his. He confirms he is the male in the CCTV and that the female is (claimant’s name) the injured party. The incident about the top is shown, he is seen touching her, he denies this is to do with her top. 19.02 on CCTV – nothing to do with top but he is unsure what it is to do with. Date 28 May 2017 – he says that this is two or three days before, he doesn’t know what the incident was about. He asks what he actually did? He denies that he put his hand up her top, it is put to him that this can be seen in the CCTV but he says to his belief it does not go up his(?) top. He says he does not know what the situation is but says that it is not to do with the top issue he is able to offer no account from what he has been shown.”

97. The interview record further records:

“CCTV 28 May 2017 – IP (injured party) is on chair and you can be seen leaning towards her, her hands appear to be pushing you away and it looks like you are pulling her towards you. He is asked to account for what is happening in the clip – he says this is the day that she went on about being a slut the day he sent her home early when her friend comes in. He says that he grabbed her hip him telling her he wished to could shake the life out of her. It is put to him that this is where (claimant’s name) would say he was touching her private. He says at no stage was his hand up her top. It is put to him that the behaviour that can be seen is inappropriate behaviour for a business man and 15 year old girl. He says at no stage his hand was up her top. He talks about for days before she rubbed her belly telling him to rub her baby. It is put to him that he is the adult, she is 15, he is a business man and it is his responsibility to put a stop to it, he is asked to give an account of what can be seen in the CCTV and to give an explanation for this as at

present it looks like what she has told police is what is happening in the CCTV – he states that there is no sexual contact whatsoever that he will recall, he says that he never has touched somebody for sexual reasons, this has never happened.”

98. The interview record further records:

“CCTV is started again, put to the suspect that he looks like he is laughing and having a joke and that he pulls her back, he is asked if he admits his hands are on her bottom? He asks if it is bottom or waist? He is asked what he is doing? He says he is not sure if it is hands – he is asked what is happening in the CCTV – he is unsure of the situation or what is going on. Relevant CCTV from 29 May 2017 is shown, interviewee and (claimant’s name) can be seen in the CCTV. It looks like (claimant’s name) has come towards him and he has grabbed her hand, he is asked what this is about he says they are looking at the screen above them, he is asked to explain grabbing her hand he offers no explanation but says there are looking at the camera for upstairs. He is shown a further clip that shows him grabbing her hips and pulling her towards, he is asked if he squeezed her ass, this is what it looks like. He is asked if he has any explanation for touching this child? He says we keep talking about this child but that she is very sexually active, interviewee is reminded that she is 15 and is therefore a child, he says it should not made out that she is innocent. It is pointed out to him that he is the adult, she is the child and he has been asked to account for this touching. (Claimant’s name) can be seen in the CCTV on her own, then it looks like he has touched her bum. His hand can be seen going towards her, he is asked if he agrees that what we see is what he sees and he says if you are asking if I touched her bum or her side he cannot be sure. Put to him that she says he touched her bum. He is reminded that this is his opportunity to provide us with an account.”

99. The interview record continues:

“He is not denying that he tried to console her on occasion to tell her that everything is ok or not ok or a pat on the panic don’t panic about it, he says that there is no sexual intent meant or executed. Why not touch her shoulder then rather than her bottom or side bottom or up her top? He denies that he was up her top at any time. You are on her stomach at the very least? He denies that he touched her top. He says that it was her that did it all talking about her baby – he is reminded that he denied touching her yet he can be seen on the CCTV touching her stomach. He says that for 5, 6, 7 days she was doing it and he told her to go away. It is put to him that what can be seen in the CCTV is almost flirtatious and is very inappropriate.”

“He does not think that there is anything majorly wrong. He feels that everything has been twisted and that he should be taking a case for harassment.”

100. The interview record continued:

“He is asked what his agenda was employing 15 year old girls – he said that he had no agenda and he tried to get her to go to the social worker or doctors to talk to people.”

“Last clip of CCTV put to interviewee. He is asked to account for the clip – he looks like he pulls her off the chair towards him. It is unclear exactly what is happening. He states that he has probably said to her would you not let an old boy sit down. Pointed out that it looks like she is pulling away – he is saying he has maybe asked her to do something. Put to him that this is about him and his actions – he says the chair is always there and he put it there. He is asked if there is a reason why he put it there? He says no there is no reason – he denies it is there because of the slightly out of sight.

Put to him that the CCTV corroborates what (claimant’s name) said during first interview he never mentioned any of this – put to him that he gets a kick of it and that he is lying when he says that he denies this and says as far as he is concerned he has not done anything wrong. Put to him that given what has been seen in the CCTV she is 15 and he is the employer, he is asked if that was his 15 year old daughter would he be happy? He says he was telling her to pull herself together.”

101. In the absence of the CCTV footage, the tribunal must proceed on the basis of the evidence available to it. It has not been suggested that this interview record has been falsified or doctored or altered in any way by the PSNI or by the Equality Commission. It formed the basis of the criminal prosecution which initially included several charges of sexual offences and which ultimately resulted on the day of the contest to two charges of common assault and the acceptance of a ROSH Order, together with a suspended penalty of four months imprisonment.

On the balance of probabilities, the tribunal concludes that the CCTV footage clearly had shown the respondent touching the claimant inappropriately. The interview record compiled by the PSNI of an interview conducted by a Detective Sergeant and Detective Constable and at which the respondent had been represented by a solicitor records:

“He denies that he put his hand up her top, it is put to him that this can be seen in the CCTV.”

“He is shown a further clip that show him grabbing her hips and pulling her towards – he is asked if he squeezed her ass, this is what it looks like.”

“(Claimant’s name) can be seen in the CCTV on her own, then it looks like he has touched her bum, his hand can be seen going towards her.”

“He is reminded that he denied touching her yet he can be seen in the CCTV touching her stomach.”

“It is put to him that what can be seen in the CCTV is almost flirtatious and is very inappropriate.”

102. It is also notable that the respondent's reaction to the PSNI interview had been to threaten that he would bring a case for harassment and to accuse the 15 year old complainant of being sexually active.
103. Looking at the specific allegations of misconduct which are set out in the list of issues which is recorded in paragraph 13 above, paragraph 5 of those list of issues sets out various allegations of physical and verbal misconduct. The claimant states in evidence that these occurred and the respondent states in evidence that they did not occur. The respondent alleged that it had all been lies on the part of the claimant. The tribunal unanimously concludes on the balance of probabilities that these alleged incidents occurred as described by the claimant for the following reasons:
- (i) The interview records of the PSNI quoted above which corroborate those allegations to a significant extent.
 - (ii) The tribunal's conclusions on the credibility of the respondent as opposed to the credibility of the claimant.
 - (iii) The fact that the incidents alleged are consistent with and similar to the incidents separately and independently alleged by three underage girls in 2013.
 - (iv) The fact that the allegations are consistent with the allegation of sexual misconduct towards "XY" which is supported by the credible evidence given by "XY" and by the claimant.
104. Paragraph 1 of the list of issues sets out several allegations of verbal misconduct on the part of the respondent. The claimant states in evidence that these verbal incidents had occurred. The respondent denies that they had occurred. The unanimous decision of the tribunal is that these incidents did occur as described by the claimant because:
- (i) The interview records of the PSNI quoted above which corroborate those allegations to a significant extent.
 - (ii) The tribunal's conclusions on the credibility of the respondent as opposed to the credibility of the claimant.
 - (iii) The fact that the incidents alleged are consistent with and similar to the incidents separately and independently alleged by three underage girls in 2013.
 - (iv) The fact that the allegations are consistent with the allegation of sexual misconduct towards "XY" which is supported by the credible evidence given by "XY" and by the claimant.
105. On or about 29 May 2017, the claimant spoke to her mother about what had happened at work and asked for help in reporting these matters to the police. The claimant's mother initially tried to explain that this would be difficult for the claimant. However on seeing the video recording of "XY" crawling across the floor for a

free slushie in or around “XY”’s birthday, the preceding year, the claimant attended the police station and made a complaint.

106. The claimant, the claimant’s mother, “XY” and the respondent were interviewed at some considerable length by the PSNI. The respondent was arrested and charged with six charges under Article 7(1) of the Sexual Offences (NI) Order 2008 and one charge under Article 22A of that Order.
107. The District Court hearing was repeatedly delayed and put back.
108. When eventually listed for full hearing, the respondent pleaded guilty on the day of the hearing to two charges of Section 42 common assault and agreed to the imposition of an ROSH Order. The Court imposed a penalty of four months imprisonment suspended for two years.

MEDICAL REPORT

109. On 8 January 2020, Dr Stephen Best MB Bch MRCPsych, a consultant psychiatrist examined the claimant. That report stated:

“Mental State Examination

(Claimant’s name) was casually but appropriately dressed for a girl of her age. She looked well nourished. She formed good eye contact. She was not overly distressed when describing her experiences. There is no evidence of thought disorder, delusional thinking or perceptual disturbance. She did not look depressed at interview. Appetite and sleep patterns appear stable. She is of normal intelligence.

Diagnosis

Adjustment Disorder Prolonged Depressive Reaction ICD10F43.21

Opinion

(Claimant’s name) has been exposed to sexually abusive behaviour by her employer. She was only 15 at the time. It was a frightening unpleasant experience for her.

She was young and did not know what to do. The lewd behaviour progressed to physical touching which distressed her and she eventually reported the matter to the police. This all happened at a very important time in this adolescent’s life.

Then the people who encouraged her to go to the police were not particularly supportive in statements and her employer denied the abusive behaviour take place.

There was then a protracted police investigation and the man was eventually convicted after a two year period. The whole investigation further traumatised (claimant’s name), although police officers were supportive and

she felt believed. Facing court and the prospect of hostile cross-examination was terrifying for this teenager.

After this man's conviction she has now to attend an Industrial Tribunal and her employer is again denying that much abusive behaviour took place further traumatising (claimant's name).

Her mental disorder has been depression. Whether anti-depressants were appropriate or not is not the issue. She was depressed enough for doctors to feel they were necessary and for her to be referred to Child and Adolescent Mental Health Services.

Her incident did not end just when she left the man's employment. The investigation and the Court appearance further traumatised (claimant's name). Eventually after several years she has improved only to feel anxious again as she approaches more possible Court appearances and questioning as to her honesty. This is likely to cause some deterioration in her anxiety state.

I feel that the cluster of symptoms reported was anxiety, depression, sleep disturbance and fear of others is best described by the term, an adjustment disorder, a stress reaction.

I feel that the symptoms were intense enough to be considered a mental disorder for over two years and there is likely to be further recurrence of some symptoms as this tribunal takes place.

I feel that the whole condition will lead to a mental disorder lasting for approximately three to four years following this unpleasant experience for this girl who was a teenager at the time of the abuse.

It could take some time for her to establish trust with future employers but hopefully with successful employment with an employer that behaves appropriately she will develop appropriate trust in the general population in Northern Ireland or in Latvia should she decide to live there.

I have been asked to comment on the impact that an Industrial Tribunal will have on (claimant's name) as the accused is representing himself. The tribunal will be a difficult experience for (claimant's name) but if she wishes it to proceed she will have to take part and face questions from her former employer. This will be difficult it could be empowering for (claimant's name). To prevent her from facing the man is reinforcing her fear of him given her the belief that she continues to have reason to be afraid of him. To face him again may help her overcome her fear of him. She is older and more mature now.

The tribunal chairperson should control and interrupt any inappropriate questioning or comments by her former employer, should they be made."

110. On 8 June 2018, South Tyrone Hospital recorded a visit by the claimant to Armagh Community Hospital on 10 May 2018. It referred to a Mental Health Service known as CAMHS. It recorded that the claimant had stated that she still

thought about the man who had sexually assaulted her. It stated that her worry was that she would meet him in Armagh and that there was potential for him to get angry at her. It stated that she drink one night per week and that when she was drinking she did not think about him at all and that that gave her some relief. It recorded that after a particular drinking incident and a row with her mother, the claimant had *“started to take an overdose of medication”*. It recorded that the claimant had said that *“she did not want to die and it was her mum getting upset and the alcohol that caused her to take the tablets”*. The report also recorded the claimant had said that she smoked cannabis one night each week or at most two nights. The claimant had stated that she gets a few hours of benefits from this so that she did not think of the perpetrator. The claimant had mentioned having elaborate dreams of the perpetrator usually once or twice a week. These dreams involve the perpetrator coming to *“verbally attack”* the claimant. The claimant stated that she wakened just before that happened in her dreams. At this stage the claimant was getting a prescription for anti-depressants which were increased in the course of that visit. The report was compiled by a Dr David McFarland.

111. The GP’s notes and records to which the tribunal was referred, referred to a drug overdose described as *“mixed – impulsive”* on 7 May 2018 together with a prescription for anti-depressants. It referred to ongoing counselling with CAMHS.

DECISION

112. The tribunal is satisfied that the claim was made within the statutory time limit. This had been a continuous pattern of discriminatory conduct and the claim was lodged within three months of the last conduct.
113. As indicated above, the unanimous finding of fact of the tribunal is that the incidents of verbal and physical misconduct, as alleged in the claim form, took place.
114. The unanimous decision of the tribunal is that each of these incidents satisfied the statutory test for harassment under Article 6A of the 1976 Order.
115. It is clear that each and every incident as alleged and as determined by the tribunal amounted to unwanted conduct. It is also clear that that conduct had been of a sexual nature.
116. That conduct had the effect of violating the dignity of the claimant and of creating an intimidating, hostile, degrading, humiliating and offensive environment for her while working in the respondent’s shop.
117. It is also the unanimous decision of the tribunal that the respondent’s purpose in perpetrating the conduct as alleged and as determined by the tribunal had been to both violate the claimant’s dignity and to create an intimidating, hostile, degrading, humiliating and offensive environment for her.
118. The unanimous decision of the tribunal is also that, for the purposes of Article 3 of the 1976 Order the respondent had treated the claimant less favourably than he would have had treated a male in relation to working arrangements and the working environment.

119. The evidence of the claimant, the lack of credibility on the part of the respondent as outlined above, the existence of contemporaneous documentation in relation to the extensive police interviews, the similarity of the allegations made by the three young girls in 2013 and the corroboration of “XY” and the claimant’s mother all provide more than prima facie evidence to support those findings. To the extent that it is necessary to go through the two stage process under Article 63A, in the circumstances of this case, the burden of proof has shifted to the respondent in respect of both the claims of sex harassment and sex discrimination and the respondent has not rebutted that burden of proof.

ANONYMISATION

120. Because the ET1 contained allegations of sexual offences, the claim had been anonymised as indicated in Rule 49 of the 2005 Rules which were then in force. That Rule would have required the anonymisation of the Judgment.
121. Those 2005 Rules have been revoked and replaced by the 2020 Rules. Rule 44 of the 2020 Rules is not in mandatory terms. There is instead a discretionary power which allows anonymisation where it is necessary in the interests of justice or where it is necessary to protect the Convention rights of any person.
122. The claimant has applied for the lifting of the original Anonymisation Order. She states that she wishes the truth to be public and wants to “*empower other women*”.
123. The tribunal has to weigh in the balance competing rights under Articles 6, 8 and 10 of the Convention. In doing so it has to give full weight to the principle of open justice.
124. The Supreme Court has determined in **A v BBC (above)**:
- “That it is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. That principle is an aspect of the rule of law in a democracy.”*
125. In **F v G (above)**, it was determined that where a claimant, who has been successful in establishing her claim, wishes the judgment to be published, that wish must be taken into account:
- “In addition to that public interest, weight must also be given to the claimant’s wish for the judgment to be published in a form which names herself and the college. It is entirely legitimate that someone who has had their rights vindicated after a hard fought piece of litigation should be able to report, and produce evidence of that victory without constraint.”*
126. The tribunal was concerned that the claimant may not have fully appreciated the difficulties that publishing the judgment in full might bring to her; including media and social media attention which, given the sensitive nature of the case, might prove intrusive. However the claimant has confirmed her desire to remove the anonymisation order.
127. Weighing the claimant’s wishes, together with the important principle of public justice against the respondent’s wish to preserve anonymity while balancing the

competing Convention rights, the unanimous decision of the tribunal is that the anonymisation order should be lifted.

128. The tribunal is concerned that the respondent might wish to appeal against any decision in this respect, having regard to the competing Convention rights. It is also possible that the claimant may have second thoughts about this issue because once anonymity is lifted, that decision is, in any real sense, irrevocable.
129. The claimant's counsel asked, if the decision were to remove the anonymisation order, and if that were to be stayed, that the Judgment should not be first put on the website in an anonymised form. He argued that "*old news is no news*". Putting Judgments, in their current form, on the website is standard practice and that practice will be followed in this case. News management is not a matter for this tribunal. If, subject to any appeal, anonymisation is removed, the Judgment, with that change in place, will then be put on the website.
130. Since the respondent has indicated that he wishes to appeal any such decision, and since the removal of anonymisation straight away would render any such appeal nugatory, the removal of anonymisation is stayed until 15 November 2021, to allow the respondent to take advice on an appeal. If the tribunal is informed by a solicitor, or by the Court of Appeal, that such an appeal has or will be lodged, the stay will be extended until this appeal is complete.

REMEDY

131. The claimant seeks compensation for
 - (i) injury to feelings;
 - (ii) personal injury/psychiatric damage; and
 - (iii) aggravated damages.

INJURY TO FEELINGS

132. As indicated above the **Vento** guidelines were upgraded on 5 September 2017 shortly after the claim in the present case was lodged by the claimant's mother on 25 August 2017. That upgrading took place to update the previous upgrading which had taken place some seven years earlier in the **Da'Bell** judgment. Even though the claim in the present case was lodged some two weeks before the operative date of the 2017 guidelines, the appropriate bands for injury to feelings compensation in this case must be very close to those guidelines.
133. This is a case in which a 15 year old girl was subjected to a period of harassment and discrimination over three months. The difference in ages between the claimant and the respondent is an aggravating factor. The sordid nature of the abuse which she suffered is another aggravating factor. It is evident from the testimony of the claimant, her mother, "XY" and Dr Best that the harassment and discrimination which the claimant had suffered, albeit over a relatively short period, had been profoundly upsetting to the claimant. As Dr Best recorded:

"It was a frightening unpleasant experience for her."

“She was young and did not know what to do. The lewd behaviour progressed to physical touching which distressed her and she eventually reported the matter to the police. This all happened at a very important time in this adolescent’s life.”

It is also clear that this injury to her feelings had resulted in medical treatment for depression. It is clear that the unlawful discrimination, including harassment, had caused that injury to feelings.

134. The unanimous decision of the tribunal is that the higher band is appropriate in this case. That higher band applies to *“the most serious cases”*. It is difficult to conceive of a more serious injury to feelings than the present case.
135. The tribunal therefore awards a sum of £41,500.00 to reflect the upper end of the upper band with a slight discount to take account of the fact that the claim was lodged shortly before the introduction of the 2017 guidelines.
136. For the purposes of Regulation 7(1)(a) of the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996, (the 1996 Regulations) interest is payable at the rate of 8% per annum from 29 May 2017 to the present date. That period is a period of four years and 125 days; or 4.34 years. That would ordinarily lead to the following calculation:

$$4.34 \times 8\% \times £41,500.00 = £14,408.80.$$

However, the tribunal having regard to Regulation 7(3) of the 1996 Regulations is concerned that serious injustice might occur in the circumstances of this case if the full period were used, having regard in particular to the delays consequent on the criminal prosecution, the terms of the ROSH Order and Covid. The tribunal therefore determines interest over a one year period. Therefore the calculation for interest is:

$$1 \times 8\% \times £41,500.00 = £3,320.$$

PERSONAL INJURY/PSYCHIATRIC DAMAGE

137. The tribunal is conscious of the dangers of double counting or improperly inflating an award to adopt a punitive rather than a compensatory approach. Nevertheless, it is clear in this case that the claimant, in addition to the injury to her feelings, has suffered moderate psychiatric damage as defined in the guidelines set out in paragraph 44 above. It is clear that the unlawful discrimination, including harassment had caused that psychiatric damage.
138. There had been an impact on the claimant’s ability to cope with life and on her relationships, particularly with men. However the adjustment disorder had largely receded by the time of the hearing and the prognosis is good.
139. The psychiatric report compiled by Dr Best states that there was an adjustment disorder which has lasted for over two years. Using the *Tweedom* decision (above) as a guide, the tribunal notes that the High Court awarded £10,000.00 in that decision. In the present decision the adjustment disorder seems worse and lasted for longer.

140. The unanimous decision of the tribunal is that the claimant is awarded an additional £20,000.00 for moderate psychiatric damage.
141. For the purposes of Regulation 7(1)(b) of the 1996 Regulations, interest is payable at the rate of 8% per annum from the midpoint date and ending on the date of calculation: that is for a period of two years and 62 days: or 2.17 years. That would ordinarily lead to the following calculation:

$$2.17 \times 8\% \times £20,000.00 = £3,472.00$$

However, the tribunal having regard to Regulation 7(2) of the 1996 Regulations is concerned that serious injustice might occur in the circumstances of this case if the full period were to be used, having regard in particular to the delays consequent on the criminal prosecution, the terms of the ROSH Order and Covid. The tribunal therefore determines interest over a six month period. Therefore the calculation for interest is:

$$0.5 \times 8\% \times £20,000.00 = £800.00$$

AGGRAVATED DAMAGES

142. The tribunal is conscious of the need to remember that aggravated damages, like damages for injury to feelings and damages for personal injury, are meant to be compensatory and are not punitive in nature. The tribunal is also conscious that it must avoid over-compensating by not awarded compensation under this heading in respect of matters which have already been dealt with under injury to feelings and personal injury.
143. In the present case, the tribunal has concluded that the respondent's "*subsequent conduct*" (see ***HM Land Registry v McGlue*** above) merits an award of aggravated damages. The respondent's conduct in the course of both the criminal prosecution and during the tribunal litigation had been oppressive and improper.
- (i) In his police interviews he denied doing "*anything majorly wrong*". He accused the claimant (then 15) of being "*sexually active*" and stated that "*it should not be made out that she is innocent*". He threatened to take "*a case for harassment*".
 - (ii) He downplayed the importance of his convictions and the ROSH Order. He continued to insist he had been convicted of purely technical non-sexual matters, despite the clear wording of that Order.
 - (iii) He described the claimant as a "*scam artist*" and a liar.
 - (iv) He threatened to seek "*compensation for a false claim*" from the claimant.
 - (v) He threatened to reopen his criminal conviction.
 - (vi) He stated that the claimant would be at risk of some form of legal action by the PSNI and NHS.

144. All of these matters, post-dating the period of the employment, aggravated the claimant's sense of injustice and injured the claimant's feelings yet further.
145. The unanimous decision of the tribunal is that aggravated damages in the sum of £6,000.00 should be awarded in this case.
146. For the purposes of Regulation 7(1)(b) of the 1996 Regulations, interest is payable at the rate of 8% per annum from the midpoint date and ending on the date of calculation. That is for a period of two years and 62 days; or 2.17 years. That would ordinarily lead to the following calculation:

$$2.17 \times 8\% \times £6,000.00 = £1,041.60$$

However the tribunal having regard to Regulation 7(3) of the 1996 Regulations is concerned that serious injustice might occur in the circumstances of this case if the full period were used, having regard in particular to the delays consequent on the criminal prosecution, the terms of the ROSH Order and Covid. The tribunal therefore determines interest over a six month period. Therefore the calculation for interest is:

$$0.5 \times 8\% \times £6,000.00 = £240.00$$

SUMMARY

147. The tribunal has considered the total compensation awarded in this case under the three headings and is satisfied that the total figure is appropriate and does not involve double compensation.
148. The claimant is therefore awarded:

Injury to feelings	£41,500.00
Personal injury/psychiatric damage	£20,000.00
Aggravated damages	£ 6,000.00
Total Interest as calculated	£ 4,360.00
	—————
Total Award	£71,860.00

149. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 and the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996.

Vice President:

Date and place of hearing: 6, 7, 8 and 9 September 2021, Belfast.

This judgment was entered in the register and issued to the parties on: