EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr AB		**CD Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 6, 7 & 8 March 2017
and 19 & 20 April 2017

EMPLOYMENT JUDGE Algazy QC

Members

Mrs M.J. Bradshaw
Mr C.J. Ledbury

Representation

For the Claimant: Mr N. O'Brien- Counsel
For the Respondent: Miss M. Anderson- Consultant

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

I. The Claimant's claim of direct discrimination on grounds of sex discrimination fails and is dismissed.

II. The Claimant's claim of victimisation fails and is dismissed.

III. The claim in respect of unpaid wages is upheld and the Respondent is ordered to pay the Claimant £ 20.10

R E A S O N S

INTRODUCTION

1. The Claimant, AB, was employed as a driver by the Respondent pizza delivery company. The employment commenced on 11 January 2016 and terminated on the Claimant's resignation on 25 January 2016.

2. The Claimant brings claims for direct discrimination on grounds of sex, post employment victimisation for having done a protected act (complaining of sex discrimination) and unpaid wages.

3. The Respondent denies all the claims.

4. The Claimant was represented by Mr O'Brien of Counsel. The Respondent was represented by Miss M. Anderson, a consultant.

5. The Claimant gave evidence himself and called his partner, Miss EF and a Mr GH . We were also invited to accept the written evidence of Mr IJ and Mr KL . The Respondent called Ms MN, support manager and Mr OP, area manager who was generally referred to as Mr OP.

6. There was a bundle of documents produced by the Claimant which contained all the documents in the bundle produced by the Respondent and some additional documents, therefore the Tribunal worked with the Claimant's bundle. There was a second Claimants bundle marked B2 produced for the first Hearing and a third Claimant's bundle produced for the adjourned Hearing. References in square brackets are to those three bundles unless other wise indicated as [1.XX]. [2.XX] and [3.XX] respectively. Further documents were introduced during the course of the hearing. Both sides submitted written closing submissions.

THE CLAIMS - ISSUES

7. It is convenient to set out the Claimant's pleaded case at box 8.2 of the ET1 in full:

   I faced discrimination at work. I was asked repeatedly by the manager to wear a cap despite being a delivery driver. On one such incident he ignored and allowed a girl to work without the cap despite the fact she was handling the food.

   I informed the manager about the same and he favoured the her and suggested she is a girl so it fine. I informed him I will leave the job for this issue and I did.

   He later called me multiple times and when I went to store he threatened me that he will complaint about me in my other work place and get me fired from there. I informed him that I have been going through mental stress and psychiatric treatment, despite that he abused and threatened me.

   I was also not paid according to clock in and clock out hours rather what manager felt it was right.

   For some reason, this page [1.10A] was not in the Claimant's bundle and had not in fact been seen by the Claimant's counsel until inserted on the first day of the Hearing.

8. The issues relevant to liability had been determined at a preliminary Hearing held on 22 September 2016:

1. Section 13: Direct discrimination because of sex

1.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely

1.1.1. That he was required to wear a cap whereas a female employee was not

1.1.2. When he sought to address this he was not supported

1.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators

1.2.1. MN

1.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

2. Section 27: Victimisation

2.1. Has the claimant carried out a protected act and/or did the respondent believe that the claimant had done or may do .a protected act? The claimant relies upon the following:

2.1.1. Complaining of sex discrimination as above on 22 January 2016

2.2. If there was a protected act, has the respondent subjected the claimant to any of the alleged detriments identified below because the claimant had done a protected act?

2.2.1. Mr Sajjad's subsequent calls, texts and threats

2.2.2. subjecting the claimant to aggression and abuse in the store on 7 February 2016

3. Unpaid wages

3.1. What was the claimant's entitlement to pay?

3.2. How many hours had the claimant worked?

3.3. How many hours remain unpaid?

3.4 How much pay is outstanding to be paid to the claimant?

9. The Parties confirmed that there were no time/jurisdiction issues.

10. If the claims were successful, the Tribunal would need to address the question of remedy. The Schedule of Loss [2.88-91] originally claimed general damages of some £100,000 including £ 50,000 for “Psychiatric harm and permanent health issue” as well as a basic award and compensatory award despite there being no unfair dismissal claim. Those particular claims were all abandoned by Mr O’Brien, as were certain other claims. Additionally there were claims for unpaid wages and other sums. In the event, Mr O’Brien put the general damages for injury to feelings claim at a maximum of £15,000 to cover the discrimination and victimisation claims. The Claimant was also

mounting a claim for lost wages flowing from the resignation in consequence of the alleged discrimination limited to the point until the Claimant suffered a road traffic accident. In closing submissions, the unpaid wages claim was reduced to the sum of £20. 10 for unpaid breaks.

THE FACTS

11. Mr AB commenced working for the Respondent on 11 January 2016. The principal Statement of Terms and Conditions of Service refer to him being a driver only. In evidence before the Tribunal, the Claimant claimed to be a management trainee as well. It is noteworthy that there is no such reference to this in the Claimant's ET1. The Respondent does not accept that the Claimant was a trainee manager.

12. Some 11 days after commencing employment, a dispute arose between the Claimant and Ms MN, variously described as support manager and trainee shift leader. It is this dispute that is at the centre of the claim advanced by Mr AB.

13. It is the Claimant's case that Ms MN was not wearing her cap and that she was working in the kitchen. He also tells us that he remonstrated with her and that she was rude in her response stating "**You sister f*****r, it is your second day as a driver. Go and do your driving. Don't teach me**".

14. We observe that that is an escalation of the way that the Claimant put this exchange in his complaint letter to the Respondent received on 12 February 2016 [1.48]. In that document, the exact quotation from the Claimant is that Ms MN said "**You mind your own work and don't teach me what to do".** We pause in the narrative to observe that this was not the only refinement or, on one view, embellishment emanating from the Claimant in respect of his evidence before the Tribunal.

15. After the exchange with Ms MN, Mr AB approached the store manager, QR. The Claimant maintains that Mr QR was unsupportive of the Claimant's concerns and asked him to forget the incident.

16. Furthermore it is the Claimant's case that Mr QR allowed Ms MN to continue working without a cap for a number of hours until her shift was over. There is a dispute about when precisely Ms MN worked on the 22 January 2016.

17. Again on the Claimant's case, he went to Mr QR for a second time to complain that Ms MN was not wearing a cap. At this point Mr QR is alleged to have said "**She is a girl, leave it, she has taken on her ego. You forget it."** This upset the Claimant and he resigned with effect from 24 January 2016.

18. For her part, Ms MN denied that the Claimant's version of events is correct. She told the Tribunal that on 22 January 2016, she had swapped shifts with her manager and had worked the earlier shift that day. That would be from about 11.30 to 17.00. After she had finished her shift she changed out of her uniform and got ready to go home. She further told the Tribunal that on her way out, passing by the despatch area and not the kitchen, she stopped briefly to assist a driver to cash off a delivery. It was at that point that the Claimant asked her why she was not wearing a hat. Ms MN denies swearing at the Claimant as he alleges. She communicated with the Claimant in Urdu.

19. Ms MN explained to the Claimant that she was going home as she had finished her shift and that if he had a problem, he should complain to the manager. She admitted to being confused about whether she had been present when Mr QR informed the Claimant that she had finished her shift and that she was on the way out. Ultimately she told the Tribunal that Mr QR told her what he had said to the Claimant in the office and this was not in front of the Claimant. She adamantly denied the Claimant's account, just as she denied that she continued to work for several hours after the exchange and without a hat at all times.

20. Ms MN also informed the Tribunal that the timesheet at page [1.41] was incorrect and that it had been altered the following week to reflect the actual hours that she had worked. She particularly remembered this correction as a result of this incorrect entry. She indicated that such errors had happened before.

21. After the Claimant left the Respondent's employment, he told the Tribunal that Mr QR kept on calling him and dropping him text messages to come back to work. There were no texts produced to the Tribunal which supported that allegation. The Claimant said that was because those requests were only communicated in the voice calls. He also claimed that he was harassed for the return of the Respondent's uniform, namely a T-shirt.

22. When he eventually did go back to the store, the Claimant alleges that Mr QR made threats that he would call his new employer and get him fired, that he was called an idiot in front of the staff and customers and that he was manhandled and pushed out of the store. The Claimant told the Tribunal that he reported this to the police who advised him to seek assistance from ACAS.

23. In a section of his Witness Statement headed **"Important Evidence I am Relying on in Support of my Claim",** the Claimant makes reference to a number of matters.

24. He alludes to the Respondent's case in respect of Ms MN being on her way out when she was not wearing her cap and suggests that if she were to give that evidence to the Tribunal she would be committing perjury. He states that he has overwhelming evidence from witnesses

that she was still working at the material time he asked her to wear the cap and that she did not finish her shift for another few hours. The Tribunal did not hear evidence from other witnesses, much less overwhelming evidence, to support that allegation. The tribunal considered this to be an unsatisfactory aspect of the evidence adduced in support of the Claimant's case.

25. Mr AB also relied on a secretly recorded conversation with Mr QR that took place on the 9 June 2016. A transcript of that conversation was produced to the Tribunal marked as exhibit "AB-2".

26. This was one of a number of transcripts that the Claimant produced. AB-1 was a transcript of a meeting held by the Claimant with Mr OP on 25 March 2016, at which the Claimant's partner Miss EF was also present. It appears that that meeting was also secretly videoed. AB-2 is the transcript of a telephone call that took place on 9 June 2016 between the Claimant and Mr QR. GH ("Mr GH") a friend of the Claimant who also works as a part-time manager at a different branch of Pizza Hut also produced a transcript of a conversation that took place in a car with another of the Respondent's store managers, a Mr ST. This was many months after the incident in early January 2016 and took place on 28 November 2016. Another individual called UV was also present in the car.

27. We admitted the transcripts into evidence in spite of some objection from the Respondent. All of the transcripts bore a stamp with the name of a company called Privilege Linguistics Limited. There were some unusual features about these transcripts. For example at page [1.90] the transcript refers to Mr OP nodding/agreeing. When the Claimant was asked about how that could appear on the transcripts of what was purported to be an audio file, the Claimant revealed for the first time that there had been a secret video tape made of the meeting. Nor was it clear how the transcriber was made aware of the content of the video. That video had not been disclosed to the Respondent. It was submitted that the Claimant had simply wrongly considered that it should not be disclosed. We were told that the device used to make the video recording was no longer in the Claimant's possession. The transcriber was abroad and he had the video pen that was used

28. Another unusual feature of the transcripts appears at page [1.98A]. One seemingly significant entry attributed to the Claimant at the bottom of the page was underlined to give it emphasis: **"I didn't left the job because of her reason or something, I left because not of discrimination and malpractice".** The "not" in that passage was said to be a Typo. There was no explanation as to how that underlining could have come about. Miss EF, who told the Tribunal that she did not know that there was either a recording or a video recording of the meeting, suggested that it might be because the transcriber had been told that this was a case about discrimination.

29. The existence of the transcripts themselves was only made known some little time before the date that this case was originally to be heard, namely 16 January 2017. The Respondent had been given some CD Roms, not all of which were accessible or readable and it had not had a chance to go through the material. On that occasion, Mr O'Brien indicated that the relevance of the transcript was two-fold only. Firstly – to show that Mr OP was wrong to assert that discrimination was not raised at the meeting on 25 March 2016 and secondly - that the phone call transcript at page [1.115] contained a partial admission. In due course, further reliance was placed on that transcript in submissions by the Claimant.

30. In any event, what was said to be the partial admission at page [1.115] appears as the entry half way down the page where Mr QR says "**Yes. She didn't wear, yes she didn't wear, yes she didn't wear".** However that transcript contains another underlined passage at page [1.116] at the top of the page. It is the second entry on that page and has Mr QR saying "**Because she was not cutting the pizza. She was just standing next to it ok. If she was cutting the pizza, then how can I allow any person to when she is handling food, I can allow her to work without a cap. No I can't. She was just standing to it, next to it".** Mr O'Brien made the submission that this supported the Claimant's case that Ms MN was in the kitchen without a hat.

31. The Claimant produced some text messages [1.45-1.47]. In support of the allegation that he had been harassed and victimised. The Claimant was forced to concede in cross-examination that they reveal no animosity as he had originally alleged. He went on to accept that although Mr QR was calling him, in fact he had shown no animosity towards the Claimant before the 7 February 2016. Although he said that Mr QR was not happy when he called, he retracted specifically the suggestion that any animosity was being shown other than on the 7 February 2016. The Tribunal carefully noted this significant concession and the Tribunal's note was read back to the Claimant who confirmed it as accurate.

32. In respect of texts and WhatsApp messages that the Claimant was able to produce, he explained to the Tribunal that a number had been lost when he got a new phone at the end of January or the beginning of February. Although some data had transferred, none of the WhatsApp messages had transferred. Just some of the texts did transfer. There was no clear evidence as to why that was so.

33. Before the Tribunal reconvened on the 19 April 2017, the Claimant had obtained a disclosure order from Employment Judge Broughton for EE records of his telephone calls for the period beginning 1 February 2016. These were not available for January 2016. The Tribunal noted that those records revealed that no phone calls had been made by Mr MR to the Claimant in the first 7 days of February. It was at this point that the Claimant, through his Counsel, suggested that there were calls

but they were WhatsApp calls and therefore would not feature on the EE bill. This was the first time that reference had been made to WhatsApp calls. In any event, the evidence previously given by the Claimant on the second day of the hearing (7 March 2017) was that there had been 6 or 7 WhatsApp messages and about 10 calls (EE) over the period from 24 January to 7 February, a period of 13 days. WhatsApp calls had not been mentioned. The reference by the Claimant to there having been WhatsApp calls was intended to explain the apparent dearth of calls shown by the EE records for the first 7 days of February. The relevance and significance of this was unclear. Even if the calls were made, the Claimant has accepted that Mr QR showed him no animosity until the events of the 7 February 2016.

34. There was another issue between the parties about whether or not the Claimant had informed Mr QR that his wife had suffered a miscarriage and that he was leaving the Respondent's employment to care for her. This was flatly denied by the Claimant. Miss EF gave evidence that she was not, in fact, the Claimant's wife and that she had never had a miscarriage. At the reconvened Hearing on 19 April 2017, a doctor's letter in support of Miss EF's denial of pregnancy or miscarriage was produced [3.12].

35. On Day 2 of the hearing, the Respondent was able to produce the copy of a text between the Claimant and Mr QR. The document labelled R3 appeared to be earlier in a chain of texts that the Claimant had produced at page [1.45]. There is an entry, which on the Claimant's evidence must have taken place on the 28 or 29 January 2016 because he was in Scotland attending a technology showcase on the 29 January 2016. The entry reads: **"I am a little upset. I requested u not to talk about my personal loss. The only reason I told u about my loss was because u were my manager and wanted to let u know the real reason for me leaving. U shouldn't discuss the personal matter of ur staff or ex-staff to other staff member. I am really upset about this."**

36. The Claimant sought to explain what he meant by the expression "personal loss" in his text message. He told the Tribunal that he was talking about all the health issues that he had had. That is, his mental health loss. The Claimant had produced evidence in relation to those matters in the second bundle [2.1-68]. The phrase was being used as in the expression "he has lost his mind". With reference to the expression **"the real reason for me leaving"** he told the Tribunal that his health issues were, in fact, not "the" real reason but just one of the reasons. The Claimant had been concerned that Mr QR had told Mr IJ about the reason that he had left the employment of the Respondent. This was the same Mr IJ who had produced a witness statement but who was not attending the Hearing, as he was in Pakistan.

37. The Claimant told the Tribunal that he was on the autistic spectrum and had previously had CBT therapy. He thought it better for his health to

walk away when he couldn't win a fight. It was note worthy that these matters were not covered in his witness statement.

38. Other evidence relevant to this particular issue regarding Miss EF can be seen in exhibit AB-1 [1.83]. Mr OP makes reference to **"Your wife had problems or something"** and the response from the Claimant is **"Yeah? But that that…".** In answer to a question from the Tribunal about why there had been no straightforward denial of that fact, the Claimant said that he was about to say it was not true. Nor was there any interjection from Miss in respect of that issue at that meeting. She also did not complain that she was not the Claimant's wife, a matter that she was demonstrably upset about at the Hearing.

39. There was also a reference in Mr GH's evidence that he was aware that the Claimant had not resigned because of his "family situation". He was to explain this as there being no pressure on the Claimant from his family.

40. Turning to the evidence from Miss EF, she of course did not witness the incident of 22 January 2016, nor indeed the events of 7 February 2016. Her witness statement dated 22 December 2016 did not refer to the fact that she was the Claimant's partner. She simply says that she is a good friend of Mr AB. Her explanation for that was that the relationship was on a break or "Time-Out" at the time. She said at paragraph 5 of her witness statement that the Claimant "**had to quit his job due to the distress and depression he suffered whilst working in the store."** That described a rather different position to the one incident that occurred on 22 February 2016.

41. Miss EF also alluded to racial malpractice going on in the management at paragraph 6. Again, not a matter advanced by the Claimant.

42. When asked about the meeting of 25 March 2016 at which she was present, she said, in answer to a question put to her, that she could not answer as to whether or not Mr OP knew he was being recorded. When asked whether or not she or the Claimant had told Mr OP he was being recorded her response was **"I don't know".** As to the transcript of the meeting she had read it when approached by the Claimant's solicitors some time in December 2016 before making her statement. She had become aware of the existence of the video that had been taken of that meeting in discussion with the Claimant's solicitors. She had not known that the Claimant had taken a video of the exchange.

43. At paragraph 9 of her witness statement Miss EF said that the Claimant had informed her that Mr OP and management were denying that the whole episode ever happened. By the "whole episode" she explained that she just was referring to the hat incident. She did not want to add anything to her statement in that regard. She accepted that there had been no denial from Mr OP that the hat episode had never occurred at

the meeting on 25 March 2016. She objected to what she described as the outrageous statement that she was the Claimant's wife and that she had a miscarriage. She was not his wife and she had never had a miscarriage.

44. In questions from the Tribunal about paragraph 5 of her witness statement and the reference to distress and depression whilst working in the store and what she meant by that, her answer was **"I need to reconsider this point**". She explained that her point was not that it was when he was working but what had happened after the main incident.

45. Mr GH gave evidence by reference to his witness statement dated 21 December 2016. The Statement of Truth refers to the statement having been explained to him in the Hindi language and expressed the belief that the contents of the statement were true to the best of his knowledge. He also stated at paragraph 3 that the contents of the witness statement were within his own knowledge and true save where otherwise specifically appears. He also said at paragraph 4**: "As I mostly have first-hand knowledge of whatever goes around in the store I can safely confirm."** It seemed as though there may have been some missing words to that sentence but it was explained that he meant whatever happened in the store.

46. Mr GH's witness statement appeared to confirm directly that the Claimant was victimised, abused, threatened and manhandled by Mr QR in February. This was as well as seemingly giving direct evidence of the incident of 22 January 2016 involving Ms MN. He appeared to confirm the Claimant's account. In cross-examination he had to accept that he was not there. He accepted that what he had written in his witness statement about the incidents of 22 January and 7 February 2016 was not within his direct knowledge. He was told that that is what had happened. He accepted that it followed that paragraph 3 of the statement was untrue.

47. He also told the Tribunal that no one had asked him to record the conversation in the car with Mr ST. He explained that it was his habit, for his own safety, to record from the moment he enters the shop to the moment he leaves. He told the Tribunal that, on this occasion in the car going home, he accidentally recorded the conversation and that he had not realised he had not turned off the recorder. If that is so, it is somewhat surprising that that just happened to be the day on which the incident taking place back in January 2016 was being discussed some 10 months later. He told the Tribunal that he had kept the recording made accidentally and thought it might be helpful to the Claimant so he emailed it to him.

48. With regard to the Respondent's evidence, the evidence of Ms MN has been referred to above.

49. The Area Manager, Mr OP, was able to clarify for the Tribunal the various stages of food preparation that would occur. There appeared to be five stages:

    (i) the pizza is cut in the kitchen;
    (ii) the pizza is placed in a box in the kitchen;
    (iii) a pouch is obtained from the pouch rack outside of the kitchen;
    (iv) the box is placed inside the pouch inside the kitchen;
    (v) the pouch is placed with the pizza back on the pouch rack.

50. The location of the pouch rack is outside of the kitchen near the despatch area in the corridor entered from the staff entrance. He also explained that when drivers make boxes, they have to wear a hat to protect the box. Also drivers are asked to wear caps when they make a delivery so that the customer can identify them as a Pizza Hut driver. That is why drivers are asked to wear hats at all times.

51. Mr OP also confirmed that neither drivers, nor any team members, get paid for their breaks. They are simply deducted automatically by payroll. The breaks are calculated in accordance with the hours that any particular member of staff works.

52. With reference to the meeting on the 25 March, he confirmed that he did not know that the meeting was being recorded. He had not taken any notes of the meeting himself. He believed there was some part of the conversation missing from the transcript both at the beginning and at the end.

53. He gave evidence about the documentation regarding rotas and timesheets. The Respondent was not asserting that the documentation that was produced was accurate. Criticisms were also made of the documentation by the Claimant. He was unable to confirm that the times recorded at page [1.41] for Ms MN were accurate. He thought it unlikely that there would be no amendments. Ordinarily there would definitely be some changes. The document at [1.59] was the original rota which showed that MN's original hours were due to be 1700 to 2300 on the 22 January 2016. The timesheet at [1.41] showed MN working from 18.21 to 22.00. Despite being pressed in cross-examination, he did not accept that the times identified at page [1.41] were necessarily accurate. There was a haphazard system with regard to clocking in but it was important that all drivers did clock in. The clocking really did not represent the hours actually worked. For example a driver does not have to clock in until an order comes in.

54. Mr OP also gave evidence about having received the complaint made by the Claimant on around 25 February 2016. It was not in the format that is exhibited at [1.48] but the content was broadly the same. He investigated by speaking to Mr QR. Various criticisms were made by Mr O'Brien of the way that Mr OP went about dealing with the matter. For reasons, which appear below, these are not set out in full. One

specific complaint concerned the fact that Mr OP had not made sufficiently urgent attempts to obtain CCTV for 7 February 2016. When he had attempted to check the CCTV, the record had expired.

55. Mr OP was most unhappy about the fact that his meeting with the Claimant had been recorded and videoed. He felt really bad about that. He had not made any notes at the time and he could not now remember what he said.

56. In due course, the Claimant issued proceedings on 13 June 2016.

THE LAW

DIRECT DISCRIMINATION

57. Section 13(1) of the Equality Act 2010 ("EqA") provides that direct sex discrimination occurs where, because of sex, a person (A) treats another (B) less favourably than (A) treats or would treat others. An employee claiming direct sex discrimination must show that he has been treated less favourably than a real or hypothetical comparator in circumstances that are not materially different to theirs – see Section 23 EqA. The relevant "circumstances" are those factors which the employer has taken into account in deciding to treat the Claimant as it did with the exception of the Claimant's sex – see **Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**.

58. Therefore in a claim based on the Claimant's sex (as here) the comparator must be someone who is identical to the Claimant in all material respects but is not male.

59. According to the EqA, discrimination based on sex occurs where the less favourable treatment is "because of" the Claimant's sex. The EqA requires the Tribunal to consider the reason why the Claimant was treated less favourably and determine what was the employer's conscious or sub-conscious reason for the treatment.

60. Following the guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd** [2003] IRLR 352, as developed and refined by the Court of Appeal in **Igen Ltd v. Wong and others [2005] IRLR 258 & Madarassy v. Nomura International plc [2007] IRLR 246** , the burden of proof in a discrimination claim falls into two parts.

Stage One

61. Firstly, it is for C to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that R has committed an act of discrimination which is unlawful. (The outcome of the analysis by the tribunal at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.)

62. If C does not prove such facts, he must fail.

Stage Two

63. Secondly, where C has proved facts from which it could be inferred that R has treated C less favourably on proscribed grounds, then the burden of proof moves to R.

64. It is then for R to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

65. To discharge that burden it is necessary for the R to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the proscribed grounds of which complaint is made.

66. That requires a tribunal to assess not merely whether R has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not any part of the reasons for the treatment in question. If R can do this, the claim fails.

67. Since the facts necessary to prove an explanation would normally be in the possession of R, a tribunal would normally expect cogent evidence to discharge that burden of proof.

68. If the burden is not discharged, the tribunal is bound to find that discrimination has taken place.

69. As observed by Langstaff P. when considering whether “stage one” has been satisfied by a claimant in a discrimination claim:

> **“It has been so well-established as to be trite that the bare facts of a different status and a difference in treatment are insufficient to achieve this; they only indicate a possibility**

of discrimination". – **Millin v. Capsticks Solicitors LLP - UKEAT-0093/14 and UKEAT/0094/14**."

70. The Tribunal was also taken to a number of authorities by the Respondent:

(i) **Shamoon v Chief Constable RUC** [2003] 2All ER 26
(ii) **Osei-Adjei v RM Education** UKEAT/0461/12/JOJ
(iii) **Rowstock v Jessemey** [2014] 1 WLR 3615
(iv) **Onu v Akwiwu** [2014] ICR 571
(v) **Khan v Royal Mail Group** [2014]EWCA Civ 1082

VICTIMISATION

71. Section 27 (1) EqA provides so far as material:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

72. Post employment victimisation is covered - **Rowstock v Jessemey.**

EQUALITY ACT 2010 CODE OF PRACTICE

73. We also had regard to relevant chapters of the code including chapters 3,6 and 15.

UNLAWFUL DEDUCTION/BREACH OF CONTRACT

74. Section 13 of the Employment Rights Act 1996 ("ERA") makes it unlawful for an employer to make a deduction from a worker's wages unless the deduction is required or authorised by statute or a provision in the worker's contract; or the worker has given their prior written consent to the deduction.

75. In respect of a breach of contract claim, if applicable, we reminded ourselves of the provisions of Section 3(2), Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623).

76. A claim has to arise or be outstanding on the termination of the employment of the employee in question and be for one of the following:

- damages for breach of a contract of employment or any other contract connected with employment; or
- the recovery of a sum due under such a contract; or
- the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

CONCLUSION

77. In making our findings on the evidence before us, we have to deal with the significant conflict of evidence as to what happened on the 22nd January 2016. Apart from the evidence of the witnesses who were called before the Tribunal, we were also asked to look at the evidence of Mr IJ and Mr KL. The evidence of Mr IJ, beyond the seas in Pakistan, was admitted into evidence, subject to the usual warning about the weight that could be attached to a statement where the witness was not subject to cross examination. This was clarified by an email dated 18 April 2017 [3.20]

78. The evidence of Mr KL was not initially admitted into evidence. He had been unwell on the occasion of the first three days of the hearing. It was hoped that he might attend on a later occasion. At the adjourned hearing, we were told that he was not going to be coming to the Tribunal because he was remaining at home upset about the current events in Syria. The Respondent objected to his evidence being admitted. We did not consider that the explanation advanced on the Claimant's behalf was sufficiently persuasive to allow us to admit that statement into evidence. In any event for the reasons that appear below, its inclusion in the evidence formally before us would have made no difference to the outcome; he was not present on 22 January 2016.

79. Overall, we were unimpressed by the evidence adduced on behalf of the Claimant. We have made reference to some of the matters that caused us concern in the section above headed "The Facts".

80. We found that the Claimant's explanation of the expression "personal loss" in the text at R3 was unconvincing. A document produced by the Claimant on 8 March 2017 in the middle of his evidence, labelled C2, did not improve the position. The Claimant had sought to introduce a document from what appeared to be the division of student affairs of the University of Texas dealing with counselling and mental health. The Respondent objected to the document being admitted into evidence at all. We were prepared to admit into evidence and give it such weight as was thought appropriate. It was introduced to seek to persuade the Tribunal that the expression "loss" was broad enough to include his explanation of his mental health problems. The precise status of this document is unclear. In a sense, it is akin to introducing expert evidence. The Tribunal is not aware whether or not the views expressed in this document reflect a well-established body of opinion in the area.

81. Be that as it may, we are not persuaded on the evidence that that is how the expression was being used by the Claimant in the text at R3. We were not persuaded by the submission that it was unlikely that Mr AB would have discussed such a delicate issue with Mr QR, given the shortness of their relationship. We consider it equally unlikely that he would have shared detailed information about his mental health issues. We do not consider that we have to determine that issue to reach the conclusion that we do below. However, if it is necessary to do so, we find that some sort of allusion was made to his partner's health, whether truthful or not, to Mr QR as a reason for resigning. Our overall conclusion on this matter did not reflect well on the credibility of the Claimant.

82. Furthermore the explanations about why only certain texts had been produced and the switch of phones was unsupported by any direct evidence from a phone company. The somewhat complicated explanation from the Claimant was that he had got the phone from a friend who bought it in India on 8 January 2016. He took the SIM out of his old phone and put it in his new phone and that was around the end of January or the beginning of February. No explanation was proffered as to why the texts at R3 had not been produced by the Claimant when it was apparently part of the chain of texts produced at [1.46]. At one stage, he appeared to suggest that the old phone had been lost.

83. Miss MN's evidence was not persuasive. We have referred above to what she told the Tribunal about her knowledge of the meeting of 25 March 2016 being recorded. We regard it as unlikely that she was unaware of her partner's intentions to record the meeting and that her answers on this topic and Mr OP's knowledge appeared evasive and unhelpful.

84. Miss MN's witness statement also exaggerated matters, as in the example contained at paragraph 5 where she talked of the Claimant having to leave his job because of distress and depression suffered

whilst working in the store. Also at paragraph 6 in respect of the allegation of racial malpractice, which was not advanced by the Claimant himself. However, she was not a witness to the key incidents and her evidence does not advance the Claimant's case on those issues in any event.

85. Mr GH's evidence was wholly unsatisfactory as explained above. There were at least four paragraphs of his witness statement which purported on their face to give direct evidence of matters about which he had no direct knowledge. We also considered that the explanation as to how the car journey on 26 November 2016 came to be recorded by accident lacked credibility.

86. Mr IJ's untested statement and email were supportive of the Claimant's position on uniform return and breaks. However, he had not witnessed the key events and gave hearsay evidence about them. In the circumstances, we did not feel able to give his evidence on the central matters any weight.

87. The evidence adduced on behalf of the Respondent was not perfect either. Although Mr OP was unable to remember certain details of the conversation that took place at the meeting on 25 March 2016, his evidence was given in a clear and straightforward manner. The demeanour and the clarity of his answers impressed the Tribunal. He of course did not have direct knowledge of the key incidents of 22 January 2016 or 7 February 2016 either.

88. The only person having such direct knowledge called by the Respondent related to the 22 January 2016 incident only and that was Ms MN. She was a little confused in her evidence about certain matters, however we also gained the impression that she was doing her best to assist the Tribunal with her recollection of the relevant events. We did not feel that her evidence was diminished by cross-examination.

89. The Claimant criticised the Respondent for not calling Mr QR. The Tribunal was told that Mr QR had stopped working for the Respondent some time ago. We accept that it would have been helpful to have heard from Mr QR. However the transcript of the secretly recorded conversation on 9 June 2016 does assist the Tribunal to some extent. We do not share Mr O'Brien's views about what that transcript shows. We reject the submission that the entry at page [1.15] is supportive of the Claimant's version of events.

90. We equally reject the submission that the entries at page [1.16] establish that Ms MN was working in the kitchen when not wearing a hat. Specifically, we find that a fair reading of the transcript shows Mr QR flatly rejecting the proposition that he would allow Miss MN to work without a cap when handling food.

91. We turn to our findings on the events of 22 January 2016. We prefer the Respondent's evidence on this matter. The Tribunal considers it inherently unlikely that the Respondent would not only have allowed the member of staff, Ms MN to have handled food on one occasion without a cap but would, in fact, have allowed her to remain working in the kitchen area for hours on end without a head covering. The Claimant had set the bar high in respect of the level of conduct that he was accusing the Respondent of condoning.

92. We accept Ms MN's evidence that she was simply helping a driver to cash off on her way out. Mr OP had explained to the Tribunal that drivers are not able to do that for themselves. It was clear that the Respondent's records were simply too unreliable to provide the Tribunal with any real assistance, one way or the other. We accept Ms MN's evidence about the hours she worked and the inaccuracy of the records which had to be corrected.

93. That being the case, the claim falls at the first hurdle. The Claimant has not proved primary facts, on the balance of probabilities, from which the Tribunal could properly and fairly conclude, on the assumption that there is no adequate explanation, that the Respondent's conduct amounted to discrimination, namely less favourable treatment because of the Claimant's sex.

94. Concerning victimisation, the Claimant must establish that he did a protected act or that the Respondent believed that he had done or may do a protected act. An allegation of contravention of the EqA need not be express but it must still be made.

95. Mr O'Brien, on behalf of the Claimant, accepted that there were no words in the Claimant's witness statement at paragraph 6 that suggests that he did a protected act on the 22 January 2016. No language, express or implied, was used to make an allegation of sex discrimination. Rather the submission on behalf of the Claimant was that the act of resignation either constituted a complaint by conduct or was sufficient to cause Mr OP to believe that a protected act had been done. Mr O'Brien did not rely on any authority to support that proposition.

96. On the evidence before us, we reject the submission that the resignation constituted a complaint by conduct which amounted to a protected act within the meaning of the EqA. Nor do we accept that the events of the 22 January 2016, as we have found them to be, were sufficient to cause Mr QR to believe that a protected act had been done, or indeed may be done although the latter proposition was not how Mr O' Brien put it.

97. The List of Issues made it plain that it was only what had occurred on 22 January 2016 that was relied on as constituting a protected act.

98. In the absence of a protected act, whatever occurred on 7 February 2016 does not constitute detriment for the purposes of a victimisation claim under Section 27 of the Equality Act.

99. The Claimant has not, on the balance of probabilities, established the necessary primary facts from which the Tribunal could properly and fairly conclude, on the assumption that there is no adequate explanation, that the Respondent's conduct amounted to victimisation.

100. Further, even if there had been a protected act and detriment, we do not consider that there was any, or any persuasive, primary evidence from which we could properly and fairly conclude on the balance of probabilities that the actions of Mr QR on 7 February 2016 were done because of that protected act.

101. Lastly we turn to the question of the claim for unpaid wages. Whilst it had been clarified with the Claimant's Counsel that this was being advanced as an unlawful deductions claim, the Closing Submissions sought to put it on the alternative basis of a breach of contract claim. The Claimant gave evidence that he did not take breaks. That could not be seriously challenged by the Respondent. Ms MN told the Tribunal that she did not consider it her obligation to tell drivers to take breaks.

102. On the evidence before us, we accept that the Claimant is entitled to the sum of £20. 10 for unpaid breaks and this is awarded to the Claimant as an unlawful deduction from wages.

Employment Judge Algazy QC

26 May 2017

Judgment sent to Parties on

30 May 2017

Re - signed by Employment Judge Algazy QC

14 July 2017

Judgment re-sent to Parties on

26 July 2017