



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Donlon

**Respondents:** (1) Leslie Easton & Co Ltd  
(2) Leslie Easton

**Heard at:** London South Employment Tribunal

**On:** 16-19 May 2022

**Before:** Employment Judge Ferguson

**Members:** Ms N Christofi  
Ms J Saunders

## Representation

**Claimant:** In person

**Respondents:** Mr S Hoyle (consultant, Croner Group Ltd)

# JUDGMENT

**It is the unanimous judgment of the Tribunal that:**

1. The complaints of unfair dismissal, wrongful dismissal and failure to provide a written statement of reasons for dismissal are dismissed following a withdrawal by the Claimant.
2. The Respondents subjected the Claimant to harassment of a sexual nature by:
  - a. in June 2017, the Second Respondent making a comment about the Claimant removing her clothes;
  - b. in 2019, the Second Respondent making a sexually suggestive comment when the Claimant bent down to pick up a pen;
  - c. between February 2018 and 1 March 2020, the Second Respondent sending “memes” and videos of a sexual nature to the Claimant via WhatsApp.

3. The Respondents victimised the Claimant by the Second Respondent sending her a text message on 9 May 2020 containing a veiled threat to report undeclared cash income.
4. The Claimant is awarded compensation for injury to feelings in the sum of £15,000 plus interest of £4,000. The total sum awarded is £19,000 for which the Respondents are joint and severally liable.

# REASONS

## INTRODUCTION

1. By a claim form presented on 3 September 2020 the Claimant brought complaints of unfair dismissal, wrongful dismissal, sexual harassment, victimisation and failure to provide a written statement of reasons for dismissal. Early conciliation for the First Respondent took place between 9 May 2020 and 9 June 2020. For the Second Respondent it took place between 16 May 2020 and 10 June 2020. The Claimant has withdrawn all complaints relating to her dismissal. The issues to be determined on the remaining complaints are as follows:

### Jurisdiction

- 1.1. Were the harassment and victimisation complaints made within the time limit in section 123 of the Equality Act 2010 ("EqA")? The Tribunal will decide:
  - 1.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
  - 1.1.2. If not, was there conduct extending over a period?
  - 1.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - 1.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    - 1.1.4.1. Why were the complaints not made to the Tribunal in time?
    - 1.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

### Harassment related to sex/ sexual harassment (EqA section 26)

- 1.2. Did the Respondents do the following things:
  - 1.2.1. In June 2017, the Second Respondent making a comment about the Claimant removing her clothes;
  - 1.2.2. In 2019, the Second Respondent making a sexually suggestive comment when the Claimant bent down to pick up a pen;
  - 1.2.3. From February 2018 to 1 March 2020, the Second Respondent sending "memes" and videos of a sexual nature to the Claimant via WhatsApp?

- 1.3. If so, was that unwanted conduct?
- 1.4. Did it relate to sex and/or was it of a sexual nature?
- 1.5. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation (EqA section 27)

- 1.6. Did the Claimant do a protected act as follows: on 8 May 2020 sending a letter of complaint to the Second Respondent which included allegations of sexual harassment?
- 1.7. Did the Respondents do the following: instead of providing a proper response to the letter, the Second Respondent sending a text message at 9.31am on 9 May 2020 saying "I assume you mentioned that you worked 16 hours a month, plus cash in hand for cleaning".
- 1.8. By doing so, did they subject the Claimant to detriment?
- 1.9. If so, was it because the Claimant did a protected act?

Remedy for discrimination or victimisation

- 1.10. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 1.11. Should interest be awarded? How much?

**PRELIMINARY AND PROCEDURAL ISSUES**

Preliminary matters

2. At the start of the final hearing the Respondents made an application to strike out the victimisation complaint on the basis that it had no reasonable prospect of success. We dealt with that application and the jurisdiction issue as preliminary matters because we had time within the five days allocated to the case to do so, and it would have potentially saved considerable time and expense if we had determined that the Tribunal does not have jurisdiction and/or the victimisation complaint should be struck out.
3. We refused the strike-out application and found that the Tribunal had jurisdiction to consider all of the complaints. To the extent that it was necessary to do so we extended the time limit on just and equitable grounds. We gave oral reasons for our decision at the time. Written reasons were requested by the Respondents and are therefore provided here.
4. The Claimant makes three allegations of sexual harassment and one of victimisation. The sexual harassment allegations are all, on their face, out of time. Taking the latest date of 1 March 2020, the ordinary time limit expired on 31 May 2020. The Claimant had contacted ACAS by this date, which extended to the time limit to one month after the end of early conciliation. The extended time limit therefore expired on 9 July 2020 for a claim against the First Respondent and 10 July 2020 for a claim against the Second Respondent. The Claimant did not present her claim to the Tribunal until 3 September 2020, almost two months later. There is no dispute that the victimisation complaint is in time, the detriment relied upon having taken place on 9 May 2020, but

the Respondents separately argued that this complaint should be struck out on the basis it has no reasonable prospect of success. The text messages of that date show that immediately after the Second Respondent sent the text message at 9.31am the Claimant responded saying "Do not contact me ever again". The Respondents argued that there was no reasonable prospect of the Claimant establishing that any failure to respond to her complaint by 9.30am the day after the complaint was sent amounted to a detriment.

5. Dealing with the victimisation complaint first, although the Claimant said at the case management hearing that the detriment was "failure to address her complaint or to offer an appeal", she clarified at the start of the hearing that it was the Second Respondent's failure to respond professionally to the letter, and instead sending the text message at 9.31am. She accepted she could not rely on any failure to respond after she sent the text message saying do not contact me ever again.
6. We consider it will be a matter for us to determine having heard the evidence whether the text message was a detriment. The issue of whether an act amounts to a detriment is determined largely, although not entirely, based on the Claimant's subjective impression and will always depend on the context. It is possible that we would accept, having heard the Claimant's evidence, that she reasonably considered the text message to amount to a detriment. We do not therefore accept that the complaint has no reasonable prospect of success, or that it is appropriate to strike out the complaint on the first day of the final hearing, rather than determining it on the evidence.
7. As for the sexual harassment complaints, we must consider whether the Claimant has established an arguable case that all of the acts of alleged sexual harassment and the alleged victimisation formed part of a continuing act, and if not whether it is just and equitable to extend the time limit. We note that at the case management hearing in October 2021 the jurisdiction issue appears to have been discussed on the assumption that the allegation about the WhatsApp communications was in time, so the only issue was whether the other allegations of sexual harassment formed part of a continuing act with those communications. As noted above, that is not the position; all of the sexual harassment allegations are on the face of it out of time.
8. The question of whether any or all of the sexual harassment allegations formed part of a continuing act with the victimisation allegation is another issue that is more appropriately determined on the evidence. That is the correct approach when considering a continuing act issue at a preliminary stage (Caterham School Limited v Rose UKEAT/0149/19). It is at least arguable that the victimisation was part of a continuing act because the protected act was a complaint about the sexual harassment and the Claimant says that is what led to the detriment.
9. We also considered the question of whether it would be just and equitable to extend the time limit if there was not a continuing act that included the alleged victimisation. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the Claimant to show that it is just and equitable to extend the time limit.
10. Having determined that the victimisation complaint would proceed to be determined on the evidence, we considered that even if the sexual harassment complaints did not form part of a continuing act it would be just and equitable to extend the time limit in respect of all of them. The Claimant's explanation for the delay was that she believed that once she had submitted her complaint of 8 May 2020 to the Respondents there was no further issue with the time limits, i.e. she was not aware there was any deadline for submitting her claim to the Tribunal. She said she instructed solicitors in early

August 2020 and they wrote a pre-action letter to the Respondents on 11 August 2020. She says the Second Respondent responded on 2 September 2020 and she submitted her claim to the Tribunal the following day. The solicitors had by that stage said they could not act for her. She said there were no discussions with either ACAS or the solicitors about the time limit for submitting a claim. We consider that somewhat unlikely, but we note that the original claim included a complaint of unfair dismissal, which was in time, so the Claimant might have been proceeding on the assumption that provided the complaint about her dismissal was in time there would be no difficulty with the other complaints. Even if it is correct that the Claimant was not advised of the time limits in respect of the earlier sexual harassment complaints, we consider she should have taken some steps to find out more about the time limits, and therefore she does bear some responsibility for the delay.

11. Having said that, the reason for the delay and the steps taken by the Claimant are not determinative. We also considered the relative prejudice to the parties. The Claimant would obviously be significantly prejudiced if the claim is not allowed to proceed. The complaints of sexual harassment were clearly identified in the claim form and the Respondents did not argue in their response that they were out of time, or that they would have any difficulty in responding to them. Nor have they done so at any stage before the first day of the final hearing. We accept for most of that time they have not been legally represented, but the same goes for them as for the Claimant; they could have taken steps to find out the legal position and could have instructed solicitors sooner than they did.
12. The most significant point is that in order to determine the victimisation complaint we will need to hear about the background that led the Claimant to complain about sexual remarks and messages. If those allegations were true it would make it more likely that the Second Respondent subjected the Claimant to a detriment as a result. If we are to hear evidence and determine that issue anyway there is very little, if any, prejudice to the Respondents in determining the sexual harassment allegations as well.
13. Further, central to the Claimant's allegations are the WhatsApp communications which are documented and easily reproduced in evidence. A delay of some 7 weeks in presenting the claim causes no prejudice to the Respondents in dealing with those communications. If the Respondents wanted to challenge what the Claimant has submitted in the bundle or rely on other messages to indicate they were not unwanted, it has had ample opportunity to do so.
14. For all those reasons we are satisfied that it would be just an equitable to extend the time limit, if necessary to do so, in respect of all of the allegations of sexual harassment.

#### Procedural issues

15. We heard evidence from the Claimant and, on her behalf, from Robbie Goodwright. On behalf of the Respondents we heard from Justin Easton, the Second Respondent's son and a co-owner and director of the First Respondent. The Second Respondent, Leslie Easton, was initially called as a witness at the start of the third day of the hearing, but we almost immediately adjourned because there appeared to be a conflict between him and the Respondents' representative, Mr Hoyle, about his evidence. The Respondents had not produced any witness statements for the purposes of these proceedings in accordance with the Tribunal orders. Mr Hoyle told the Tribunal on the first day that Leslie Easton wished to rely instead on a document in the bundle, which is unsigned and undated, but appeared to be a letter from Leslie Easton. The Claimant gave evidence that this document was a letter her solicitors received from Leslie Easton on 2 September 2020. When Leslie Easton was taken to the document, immediately after taking the oath, he denied he had written it. Mr Hoyle indicated that

he believed this was a medical issue resulting from Mr Easton's memory problems. The Tribunal then asked Leslie Easton some questions about his medical history, which he answered clearly and straightforwardly. He said he had had a heart bypass operation in Thailand in 2017. He then had a stroke in September 2020. He said the stroke had not had any long-term impact on his cognitive skills, but he had ongoing mobility problems. He mentioned having had Covid and said that this had affected his long-term memory but it was coming back. He confirmed that he had documents at home relating to all of those medical issues. When the Tribunal asked if there was anything in his documents that mentioned the effects on his memory he said "I don't suppose there is". Mr Hoyle claimed to have specific instructions from Leslie Easton that he wished to rely on the document in the bundle as his witness statement. Leslie Easton told us that was not true. We adjourned to enable the Respondents and Mr Hoyle to discuss the matter. When the hearing resumed Mr Hoyle applied for an adjournment to enable the instruction of a joint medical expert on the issue of whether Leslie Easton was fit to give evidence and participate in the proceedings. He said he believed Mr Easton was not fit to give evidence and if the application was refused he would not be calling him as a witness. We refused the application for the following reasons.

16. The Respondents had had ample opportunity to raise an issue about Leslie Easton's ability to give evidence or participate in the proceedings before the final hearing began. We noted that Justin Easton had raised issues with the Tribunal about his hearing loss and the specific adjustments needed, including at a time when the Respondents were not legally represented. He never raised any issue with the Tribunal about Leslie Easton's ability to give evidence due to cognitive problems or memory loss. Nor was it raised at the case management hearing in October 2021, even though Leslie Easton's general health as a result of his heart operation and COPD were discussed.
17. On the first day of the hearing the Tribunal asked the Respondents whether there were any medical issues relating to Leslie Easton that it needed to be aware of in terms of adjustments and we were told there were not. During submissions on the jurisdiction issue on the first day Mr Hoyle asserted that Leslie Easton suffers from memory lapses. The Tribunal queried the lack of medical evidence about that and he said we would see it for ourselves in his evidence. We pointed out that we were not medical experts and again queried the fact that the Respondents had not even produced documents that must already exist about Mr Easton's conditions. Notwithstanding that discussion, no medical evidence was subsequently provided.
18. The case had been progressing for the first two days without Mr Hoyle raising any issue about ability to take instructions or Leslie Easton's fitness to give evidence. The issue had arisen solely because of Leslie Easton's evidence about the document we were told was going to be relied upon as his witness statement. Having heard from Leslie Easton about his medical history in such cogent terms we could not be sure that this problem did not arise because of a failure on Mr Hoyle's part to take proper instructions. Mr Easton's position on the document should have been fully explored before the start of the hearing, notwithstanding that Mr Hoyle was only instructed on Wednesday last week. Mr Hoyle said that he had raised the issue of Mr Easton's health with his employer, Croner, but a decision was made to proceed without seeking an adjournment for medical evidence. That decision having been made, it seemed to us possible that the concerns raised part-way through the hearing were not genuine.
19. Justin Easton told us that the reason the issue was not raised earlier was because Leslie Easton was a proud man who did not want to admit he has cognitive or memory issues. If that is correct, of course we have sympathy with the difficulties it presents, but it would be wholly unfair to the Claimant to allow an adjournment at the eleventh hour, just as Leslie Easton was about to give evidence, because the Respondents have suddenly changed their mind about whether he was fit to give evidence. Taking

into account the overriding objective and fairness to the Claimant, we considered it would be wholly inappropriate to adjourn the case part-way through the final hearing to enable the Respondents to obtain a medical report.

20. Having refused the application, we adjourned for lunch and reminded the Respondents that the question of whether Leslie Easton was called to give evidence was for them alone, but we were not satisfied that he was unfit to do so.
21. When we returned after lunch Mr Hoyle produced a medical report dated 15 October 2020, not previously disclosed or submitted to the Tribunal, relating to the neurological effects of Leslie Easton's stroke in September 2020. Mr Hoyle applied for a reconsideration of our decision to refuse the adjournment and in the alternative an adjournment pending an appeal to the EAT. We refused both applications. We considered that the report did not alter the position. The only explanation for it not having been produced before was that Leslie Easton did not want anyone to see it. As we had said in our original decision, if the Respondents wanted to establish that Leslie Easton was not fit to give evidence the issue could have been raised long before day three of the final hearing. The issue of his reluctance to admit the problems would have needed to be addressed head on. Indeed it was obviously intended that he would give evidence because he was called, and it was only when he denied knowledge of the document we had been told would be relied upon as his witness statement that the application was made. No adequate explanation had been given for the issue having arisen suddenly part-way through the hearing. In those circumstances, as we had already said, the Respondents changing their mind as to Mr Easton's fitness to give evidence was not a sufficient reason to adjourn, bearing in mind the significant delay and waste of Tribunal time that would be involved.
22. The application to adjourn pending an appeal to the EAT was also refused. The Respondents were of course entitled to appeal our decision and if they succeed a rehearing would be ordered. There was no reason not to complete the final hearing which was already in train.
23. Leslie Easton was not ultimately called as a witness. We take into account the October 2020 report, which sets out the findings of a neuropsychological evaluation, presumably conducted shortly before the date of the report. It states that the stroke had impacted Mr Easton's intellectual functioning, including attention and in particular short-term memory. He was said to have no difficulties with language. His performance on tests assessing "executive functioning" was variable. The report also sets out strategies that may be useful to mitigate any negative impact and says "the rate and amount of recovery...is different for each person". The report does not include any comment on Mr Easton's individual prognosis. We note that the report concerned the effects on Mr Easton very shortly after the stroke. In the absence of any medical evidence whatsoever relating to Mr Easton's current mental state, there is no basis on which we could conclude that he was not fit to give evidence.
24. We accept based on common knowledge about strokes and brain injuries that Mr Easton may well have ongoing issues with his memory or other cognitive functions. If he had given evidence we would have taken into account the very limited medical evidence we have on that subject, together with any other evidence such as that we heard from Justin Easton to the effect that his father is very forgetful, that his short-term memory is particularly poor, and that he is reluctant to admit the problems. What we cannot accept without medical evidence is that Leslie Easton is unfit to give evidence to the Tribunal or otherwise participate in these proceedings. The Respondents chose to proceed without such medical evidence and we determined it would not be fair to the Claimant or in accordance with the overriding objective to adjourn when the Respondents changed their mind about that part-way through the hearing. We must therefore proceed on the basis that Leslie Easton chose not to give

evidence in his own defence and that of the company.

## FACTS

25. The First Respondent is a family company and operates a number of businesses at Hollytree Parade, Sidcup, including a glass and mirror shop and double glazing and conservatory businesses. The company is co-owned by the Second Respondent, Leslie Easton, and his son, Justin Easton. They are both directors of the company. Justin Easton is profoundly deaf and has participated in the proceedings with the assistance of speech-to-text captioners provided by the Tribunal. Justin Easton's evidence to the Tribunal was that his father's health started to deteriorate in 2017-2018. Leslie Easton had a stroke in September 2020. Since then, although Leslie Easton remains the majority shareholder and a director of the company, Justin Easton says his father has no involvement in the day to day running of the company.
26. The Claimant started work for the First Respondent as a part-time administrative assistant on 14 April 2014. She was employed to work three hours a week, the day and hours being agreed with the accounts manager, Hayley. She reported principally to Leslie Easton. The Claimant said that she took on the job to further her accounts training, having enrolled on an AAT course. The part-time hours suited her because of her family circumstances.
27. The Claimant's evidence was that from about six months after she began working for the company, Leslie Easton began making rude remarks. The two incidents she complains of in these proceedings are examples.
28. The Claimant says that on 20 June 2017 it was a hot day and she was wearing knee-length shorts that resembled a skirt. A customer remarked that she was lucky to be able to wear shorts to work and Leslie Easton said "well we keep telling her to take all her clothes off but she won't have any of it".
29. The bundle contained an unsigned, anonymous letter apparently from the customer complaining about the incident. The letter was addressed to Leslie Easton, Justin Easton and Robbie Goodwright who was a director of the company at the time. It reads:

"I have to draw your attention to an incident which occurred on Tuesday 20\* June 2017. I had attended the shop to enquire about window and door replacement throughout my property. I was taken to an office where there was a pleasant young lady who was wearing shorts. I commented that it was unusual that shorts were allowed in an office. Her reply was that it is so hot that the management on this occasion allowed the wearing of shorts. I said to her (sorry I didn't get her name) that she must have very good bosses.

At this time an older gentleman with grey hair appeared in the office. He commented on our conversation. His reply surprised, disgusted and appalled me.

'I didn't say she could wear them, I have told her she should just take them off'

I walked out of the office in disgust but should have stayed to make sure the young lady was okay."

30. Mr Goodwright gave evidence that he was also present during this incident. He said:



“On one occasion I took a female client round to the office to see Mr Easton and as it was a very hot day the office girls including Ms Donlon were wearing shorts and the customer commented your boss must be ok letting you wear shorts to which Mr Easton replied ‘it would be better if they had nothing on’ The customer was taken aback and consequently looked the business up on companys house and wrote to all the managers expressing the disgust  
(I still have the letter)”

31. The Claimant said in her oral evidence that the next time she was in the office Justin Easton asked to speak to her about this incident, having received the letter from the customer. The Claimant explained to him what happened and he responded “Oh well that’s my dad, he’s old school”.
32. The Respondents did not say anything at all about this incident in their response to the claim, and nor did they give any evidence on the issue. As noted above, Leslie Easton chose not to give evidence. Justin Easton said he was not there so could not give any evidence about it. As for the conversation with the Claimant about the letter of complaint, he could not remember whether it took place.
33. The Respondents submitted that the accounts given by the Claimant and Mr Goodwright, and the one in the customer letter, were inconsistent with each other, undermining their credibility on this issue. We do not agree. The essential allegation in each of the accounts is the same, that Leslie Easton made a joke about the Claimant taking her clothes off. The fact that they are not word-for-word identical does not undermine their credibility. On the contrary, it would be surprising if their recollections of the words used were identical.
34. Given that the letter is anonymous and both the Claimant and Mr Goodwright have said they do not know the name of the customer, we give no weight to the contents of the letter as evidence of what was said. Mr Goodwright did say, however, that he received a copy of the letter as a director at the time and kept it. That is how the letter came into the Claimant’s possession for these proceedings. The Claimant’s evidence about the subsequent conversation with Justin Easton is also premised on Justin Easton having known of the complaint and wanting to speak to the Claimant about it. We take the letter as evidence that a complaint was made at the time, rather than evidence of the truth of its contents. We accept that a complaint was made about this incident and that the Claimant had the conversation she described with Justin Easton afterwards.
35. In the absence of any evidence from the Respondent on this issue, and there being no other evidence that calls into question the Claimant’s account, we accept that Leslie Easton made the comment alleged. We would have made this finding whether or not Mr Goodwright had given evidence. He was cross-examined on the basis that he had given evidence in support of the Claimant only because of his own animosity towards the Respondents. He accepted that he had a claim himself against the Respondents, but strongly denied that this had any bearing on his evidence. For the avoidance of doubt, although we did not consider his evidence determinative of the Claimant’s complaint, we considered him to be a credible witness.
36. The Claimant says that in February 2018 she started to receive offensive messages from Leslie Easton by WhatsApp. She produced what she described as a sample of these messages in the bundle, consisting of 146 “memes” and 31 videos, dating from 22 February 2018 to 1 March 2020, many apparently forwarded from messages Leslie Easton had himself received. We have not seen the videos, but the Claimant has included descriptions of them which the Respondents have not taken issue with. The messages are relatively evenly spread throughout the period, but on some days more

than one message was sent, and there are some gaps of up to about 6 weeks. They were sent at all times of the day, including sometimes very late in the evening. Not all of the messages produced are of a sexual nature. All are offensive in some way. We would describe them collectively as extremely distasteful, crude and many are shockingly racist. Around 50 of the memes are of a sexual nature. Some are simply bad, misogynistic jokes. Others include pornographic images. One includes a doctored image of a young naked boy with adult genitals. It has never been disputed that Leslie Easton sent the messages. We find it extraordinary that a director and owner of a company would send messages of this nature to any employee. In fairness to the Respondents, although Justin Easton described his father as being from a different generation by way of explanation for his conduct, they have not sought to excuse or diminish the content of the messages. Their only defence is that they were not “unwanted” by the Claimant.

37. The Claimant’s evidence was that these types of jokes, not always offensive, some she described as “everyday jokes”, were the only messages she received on WhatsApp from Leslie Easton. She would occasionally write messages to him about work, for example if she was running late or unable to attend, but he would never respond on WhatsApp. The Respondents did not challenge that evidence or produce any documents to refute it.
38. The Claimant also said in her witness statement that she asked Leslie Easton to stop sending these messages to her but he totally ignored all of her requests. In her oral evidence she said that these conversations took place normally in Leslie Easton’s office with no witnesses. The Respondents did not adduce any evidence to the contrary.
39. The Respondents have never suggested or produced any evidence to show that the Claimant ever positively indicated that she was happy to receive such messages, by participating in sending similar messages or otherwise responding in a way that suggested she found them funny or that she welcomed them.
40. We accept the Claimant’s evidence that she did not find the messages funny, and that she felt humiliated and victimised by receiving them. We also accept that she told Leslie Easton on a number of occasions that she did not want to receive them, but he continued to send them.
41. On 29 September 2018 Leslie Easton created a group on WhatsApp entitled “Friends” and added the Claimant to the group. The group included Justin Easton and his brother Nick. The Claimant said she did not know anyone else on the group apart from one customer and someone she believed was Leslie Easton’s sister. The Claimant was the only member of staff from the company in the group, except for those in the Easton family. The Claimant’s unchallenged evidence was that she did not ask to be included in the group and did not know why she had been added. Messages were shared on the group with a similar level of frequency to the messages the Claimant was receiving directly from Leslie Easton. They were also of a similar nature. The Claimant’s unchallenged evidence was that Leslie Easton would forward her directly many of the messages that were shared on the group.
42. The Respondents said in their response to the claim on this issue: “Tina was also part of a group chat between Mr Leslie Easton and his family and friends where texts, jokes and messages were shared between them, if some of the shared dialogue offended her she was free to leave the group chat at will.”
43. The Claimant’s evidence was that she asked Leslie Easton several times to take her off the group chat. In her oral evidence she said she did not know how to leave the group herself. Eventually, in February 2020, she asked her teenage daughter to help

her leave the group and she left on 11 February 2020. She also said that she was concerned that the group had been set up by her manager, and if she removed herself it would have “looked bad” and she would have been questioned about it. She said that a couple of other people left the group in early 2020 and that is what prompted her to leave.

44. The Respondents argue that it is not plausible that the Claimant did not know how to leave the group, and also point to the different explanations given for not leaving. The question for us is whether the Claimant’s continued membership of the group is evidence that she did not object to the messages. We do not consider that it is. Again, the Respondents have not suggested or led any evidence to indicate that the Claimant participated in or otherwise positively demonstrated that she condoned or welcomed the messages. We accept that a junior employee would inevitably feel reticent about unilaterally removing themselves from a WhatsApp group set up by their boss, particularly one which included his personal friends. We find that the Claimant objected to these messages just as strongly as the messages she received directly from Leslie Easton and never communicated to anyone that she found them funny or acceptable.
45. The Claimant says that on an occasion in 2019 she was in Leslie Easton’s office, without anyone else present, and a pen was dropped on the floor. When she bent down to pick it up Leslie Easton said “ooh, while you’re down there, love”, insinuating that she should perform a sexual act. She said she felt humiliated, embarrassed and intimidated.
46. The Respondents did not respond to this allegation in their response to the claim. It has not adduced any evidence on the issue. Leslie Easton has not been called as a witness. Nor was the Claimant cross-examined about it. We accept that it happened as alleged.
47. The Claimant’s employment ended on 5 or 6 May 2020. She originally complained of unfair dismissal which was disputed by the Respondents on the basis that the Claimant had refused to return to work when furlough was ended. The Claimant accepts that she disputed whether it was necessary for her to work in the office as opposed to at home, but says that she was willing to return and the Respondents dismissed her in the mistaken belief that she had applied for another job. Mr Hoyle sought to make much of the way in which the Claimant’s employment ended. We expressed our doubts as to the relevance of this issue to the matters we had to determine, but we allowed him to question the Claimant about it. We also allowed the Respondents to introduce late evidence, after the Claimant’s evidence had concluded, of text messages about furlough and the decision to ask staff to return to work in early May 2020. We note, however, that they did not adduce any of the messages from 5 May onwards that actually resulted in the Claimant’s employment coming to an end. Having considered all of the evidence before us we consider the way in which the Claimant’s employment ended is irrelevant to the issues we have to decide and we make no findings about it.
48. We record at this juncture that Mr Hoyle frequently objected throughout the hearing, often in a discourteous manner, to the Tribunal querying the relevance of the questions he was asking or otherwise reminding him of Tribunal procedures, such as the need to request permission to introduce late evidence or ask supplementary questions of his own witness. At one stage he implied that the Tribunal had already made up its mind and may not reach its factual findings in an impartial manner. We had to point out that such a comment was uncalled for and remind him that we would reach our conclusions only after considering all of the evidence and submissions.
49. The Claimant says that on 8 May 2020 she hand-delivered a letter to Leslie Easton complaining about the way in which her employment had ended. She also complained

of sexual harassment (“constant sexual remarks from you” and messages with “sexual undertones” which she did not appreciate). She claimed she had been unfairly dismissed and said that she had contacted ACAS. She said “please reply by return”. Although Mr Hoyle told the Tribunal at various times during the hearing that his instructions were that neither Justin Easton nor Leslie Easton received this letter, we did not hear any evidence from the Respondents to that effect and the Claimant was not cross-examined about it. We accept the letter was sent and received.

50. On the following day, 9 May 2020, Leslie Easton texted the Claimant at 9.31am:

“I assume you mentioned that you worked 16 hours a month, plus cash in hand for cleaning”

We note that there was no evidence of any other communication from the Claimant, except for the letter of 8 May 2020, to which this message could have related.

51. The Claimant immediately responded:

“Do not contact me ever again. I do not want to hear from you. I have taken this advise from the police. Do not contact me again. Tina”

52. The Claimant’s evidence was that she found Leslie Easton’s message to be impolite and unprofessional. She took it as a threat to report in some way that the Claimant was working for cash in hand (which she denies). She said she had spoken to the police the previous weekend about the offensive messages received from Leslie Easton and they had advised if she received anything further to ask him not to contact her again, and that is why she sent the response she did.

53. The Claimant was cross-examined about why she did not leave her job sooner, if she was being subjected to sexual harassment. She said that she needed the experience for her AAT qualification and Hayley was teaching her some accountancy skills. Although she accepted she was not doing accountancy work from September 2019 onwards because Justin Easton asked her not to, she said she was looking for other work from then onwards but there were no suitable part-time jobs. The hours at the company suited her home environment at the time. She obtained full-time employment shortly after leaving the First Respondent. This was because her personal circumstances had changed and among other things she no longer needed to be at home as much to keep an eye on her autistic son.

54. We accept the Claimant’s account, and we do not consider that her remaining in employment in any way undermines her complaints of sexual harassment.

## **THE LAW**

55. Section 26 of the Equality Act 2010 (“EQA”) provides:

### **26 Harassment**

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

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

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

(i) violating B's dignity, or

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

- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

56. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' and refers to conduct that is unwanted by the employee. The question should largely be assessed subjectively, i.e. from the employee's point of view. Conduct that is by any standards offensive or obviously violates a claimant's dignity will automatically be regarded as unwanted. (Reed and anor v Stedman [1999] IRLR 299, EAT). However, conduct that is clearly not objected to will not be 'unwanted' even if most people would find the conduct in question unacceptable to the extent that it could be regarded as inherently unwanted (English v Thomas Sanderson Blinds Ltd 2009 ICR 543, CA). The fact that the conduct has been going on for a long time with no apparent objection does not necessarily mean that the claimant accepts or condones it (see, e.g., Munchkins Restaurant Ltd and anor v Karmazyn and ors EAT 0359/09).

57. Section 27 of the Equality Act 2010 provides:

**27 Victimisation**

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

58. The question whether conduct amounts to a detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841, HL.

**CONCLUSIONS**

Sexual harassment

59. We have accepted that the two remarks complained of were made. There is no dispute that the WhatsApp messages were sent by Leslie Easton.
60. As regards the two remarks, we find that they were both unwanted conduct of a sexual nature. They fall into the category of “inherently unwanted” conduct because they were demeaning and embarrassing to the Claimant. The Respondents did not suggest, and there is no basis on which we could find, that the Claimant clearly did not object to the conduct. The Respondents also did not seek to argue that they did not have the proscribed effect. We accept that they had the effect, even if not the purpose, of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
61. The only defence raised by the Respondents as regards the WhatsApp messages was that this was not “unwanted conduct”. All of the other elements of harassment were accepted.
62. We have accepted that the Claimant asked Leslie Easton to stop sending the messages and he did not do so until 1 March 2020. The Claimant could not be specific about the dates on which she spoke to Leslie Easton about this, but we are satisfied that for at least some of the period during which he was sending the messages the Claimant had made it clear that she did not want to receive them. We have also found that the Claimant did nothing to indicate approval or consent to receiving the messages. Even if she had not expressly indicated her objection, therefore, we do not consider her silence on the matter could be taken as “clearly not objecting” to the conduct. These were extremely offensive messages sent by the owner and director of the company to a junior employee. They clearly constituted unwanted conduct.
63. All of the complaints of sexual harassment therefore succeed.

Victimisation

64. We heard no evidence from Leslie Easton as to why he sent the message at 9.31am on 9 May 2020. We must therefore assess the conduct based on the natural meaning of the message in the context that we have heard about. We consider the message can only be interpreted as a veiled threat to report undeclared cash income. That is how the Claimant interpreted it and why she asked Leslie Easton not to contact her again. We do not find that the Respondents should have responded in full to the 8 May 2020 letter by that time, and indeed after the Claimant asked them not to contact her again they cannot be criticised for not having responded. But the Claimant considered the text message to be a detriment and we do not find that was unreasonable. We also find that the text message must have been sent because Leslie Easton was annoyed by the letter of complaint. We have found that the sexual harassment took place, so it is likely that he would have been aggrieved by the Claimant complaining about it. As noted above there is no evidence of any other communication that he could have been responding to. There is no dispute that the letter included an allegation of sexual harassment and was therefore a protected act. The complaint of victimisation therefore succeeds.

Remedy

65. The Claimant claims compensation for injury to feelings only. The applicable Vento bands are as follows:
- £900 - £9,000 for lower band;

- £9,000 - £27,000 for middle band;
  - £27,000 to £45,000 for upper band.
66. The Claimant described feeling embarrassed, intimidated, humiliated and victimised by the sexual harassment. In her submissions she referred to an impact on her mental health, but we heard no evidence about that, let alone any medical evidence. We therefore assess the injury to feelings on the basis of what she described in terms of the embarrassment etc, which we consider entirely consistent with the type of conduct she was subjected to, i.e. any female employee is likely to have felt the same way in the circumstances.
67. The conduct complained of continued over a period of more than two years. It did not extend to any physical contact or harassment, but the WhatsApp messages were very persistent and relatively serious in the spectrum of material of a sexual nature. Some of the pornographic images were disturbing. The Claimant was also subjected to victimisation, albeit one-off and at a relatively low level of seriousness, when she complained about the harassment. Taking the Respondents' conduct as a whole, we do not consider this was so serious that an award in the upper band of Vento is warranted. But nor would the lower band be appropriate for such serious and persistent conduct.
68. We consider this conduct falls just below the middle of the middle band. We award £15,000.
69. As for interest, we need to identify an appropriate date from which to calculate the interest. The complaints range from 20 June 2017 to 9 May 2020. The mid-point between those dates would give a date towards the end of 2018. However we note that the text messages only started in February 2018 and the group chat was created in September 2018, so the harassment worsened towards the end of the period. We consider a fair date from which to calculate the accumulation of interest is around mid-January 2019. This is not an exact science but we calculate it on the basis of 3 years and 4 months to the date of the hearing. At 8% a year this gives a figure of exactly £4,000. Neither of the parties took issue with this method of calculating the interest.
70. We award the Claimant £19,000 in total, for which the Respondents are joint and severally liable.

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Employment Judge Ferguson

Date: 20 May 2022