**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100336/2022**

**Final Hearing held in person at Glasgow on 1, 2 and 3 August 2022; and Deliberation at Members' Meetings held remotely in chambers on Microsoft Teams on 8 August 2022 and 22 September 2022**

**Employment Judge Ian McPherson**
**Tribunal Member Julie Ward**
**Tribunal Member David Calderwood**

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|---|---|
| **Ms C** | **Claimant**<br>**Represented by:**<br>**Mr Stuart Swan**<br>**Solicitor** |
| **Thistle Communications Ltd(in liquidation)**<br>**c/o Claire Middlebrook**<br>**Middlebrooks Business Recovery & Advice** | **Respondents**<br>**Not Present and**<br>**Not Represented** |

**ANONYMISED JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The **unanimous** reserved judgment of the Employment Tribunal is that: -

(1) The Tribunal notes and records that, having heard from the claimant's solicitor on day 1 of this Final Hearing, the respondents not being present, nor represented, despite Notice of Final Hearing having been issued to them, on 17 May 2022, and an email from their director, Michael McDade, on 25 July 2022, having been replied to by the Tribunal on 26 July 2022, confirming that the Final Hearing listed for 3 days would proceed on 1, 2 and 3 August 2022, the Tribunal, in exercise of its powers under **Rule 47 of the Employment Tribunals Rules of Procedure 2013,** decided to proceed with the listed Final Hearing in the absence of the respondents, having considered the information available to the Tribunal about the reasons for the

respondents' failure to appear or be represented, and it being in the interests of justice to proceed, the claimant and her solicitor being present, ready and able to proceed, as also the full panel of the Tribunal assembled for that purpose, and any further delay would be contrary to the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay.

(2) Further, the Tribunal also notes and records that, on the oral application of the claimant's solicitor, on 1 August 2022, the Tribunal issued an Anonymity Order in terms of **Rule 50(3)(b)** ordering that the identity of the claimant, her GP practice, and her counselling support charity, shall not be disclosed to the public or in any documents entered on the Register or otherwise forming part of the public record, and the Tribunal accordingly directs that an anonymised version of this Judgment and Reasons shall be published on the Gov.UK website.

(3) The Tribunal further notes and records that, on the application of the claimant's solicitor, made orally on 3 August 2022, having considered the claimant's application to be allowed to add two additional respondents to the case, in terms of **Rule 34 of the Employment Tribunal Rules of Procedure 2013**, namely to add (1) **Mr Michael McDade**, and (2) **Mr Muhammed Bilal Shahid** (known as Billy Shahid), the Tribunal's interlocutory decision was to **refuse** the claimant's application, on the basis that it is not in the interests of justice to allow additional respondents at this late stage of the proceedings, nor is it in accordance with the Tribunal's overriding objective under **Rule 2** to deal with this case fairly and justly to allow that application; and that for the reasons given orally by the Judge, on behalf of the full Tribunal, at the Final Hearing, and now confirmed in writing in our Reasons below, at paragraph 93.

(4) The claimant's solicitor having confirmed, in his closing submissions, on 3 August 2022, that the claimant accepts that she does not have the necessary 2 years' qualifying service with the respondents, required in terms of **Section 108 of the Employment Rights Act 1996**, to pursue any complaint of unfair

dismissal contrary to **Section 94 of the Employment Rights Act 1996,** and a **Rule 52** judgment not having been issued previously dismissing the unfair dismissal head of complaint, the Tribunal, following upon the claimant's confirmation of withdrawal of that part of her claim, in terms of **Rule 51,** dismissed that part of her claim under **Rule 52.**

(5) Having heard the sworn evidence of the claimant, and thereafter closing submissions from her solicitor, and having reserved judgment to be given later, after time for private deliberation in chambers, and the full Tribunal, having resumed consideration of the case at a Members' Meeting held remotely on 8 August 2022, and again, on 22 September 2022, in light of additional information provided on 31 August 2022 by the respondents' liquidator, appointed on 18 August 2022, the Tribunal, after private deliberation in chambers, now gives its **reserved judgment** as follows:

(a) in respect of the claimant's complaint of direct discrimination by the respondents, contrary to **Sections 13 and 39 of the Equality Act 2010,** on the grounds of her asserted protected characteristics of sex and sexual orientation, the Tribunal finds those heads of complaint established, but in respect of only the act on 18 November 2021, when Bilal Shahid subjected the claimant to questioning about her sex life, and Mr Shahid and Matthew Graham subjected her to questioning about gay men, and otherwise dismisses those heads of complaint as not well-founded.

(b) in respect of the claimant's complaint of harassment by the respondents, contrary to **Sections 26 and 40 of the Equality Act 2010,** on the grounds of her asserted protected characteristics of sex and sexual orientation, the Tribunal finds that both of those heads of complaint are established in full, and it finds that those heads of complaint are well-founded.

(c) accordingly, in respect of those successful heads of complaint, upheld by the Tribunal, the Tribunal awards compensation to the claimant, in terms of **Section 124 of the Equality Act 2010**, in respect of financial loss in the amount of **ONE THOUSAND, ONE HUNDRED AND ONE POUNDS, AND TEN PENCE (£1,101.10),** plus interest of **THIRTY POUNDS, AND SEVENTY SEVEN PENCE (£30.77)** calculated in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

(d) in respect of injury to the claimant's feelings, in respect of those successful heads of complaint, upheld by the Tribunal , the Tribunal awards her further compensation, in terms of **Section 124 of the Equality Act 2010**, in the amount of **TWENTY FIVE THOUSAND POUNDS** (**£25,000)**, plus interest of **ONE THOUSAND, SEVEN HUNDRED AND TWENTY SIX POUNDS, AND TWO PENCE (£1,726.02),** calculated in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

(e) In respect of the claimant's complaint of the respondents' unreasonable failure to comply with the **ACAS Code of Practice on Disciplinary and Grievance Procedures**, the claim (being a complaint under **Section 120 of the Equality Act 2010**) falling within the jurisdictions listed in **Schedule A2 to the Trade Union & Labour Relations (Consolidation) Act 1992,** and in terms of its powers under **Section 207A** of that Act, the Tribunal finds that the claim to which these proceedings relate concerns a matter to which a relevant Code of Practice applies, and that there was an unreasonable failure to comply by the respondents, in respect of **paragraph 45 of the ACAS Code of Practice** and, in respect of that failure, the Tribunal considers it just and equitable in all the circumstances to increase the award of compensation payable to

the claimant by **10%**, and accordingly, the respondents are ordered to pay to the claimant a further sum of **TWO THOUSAND, SIX HUNDRED AND TEN POUNDS, AND ELEVEN PENCE (£2,610.11).**

(f) in summary, the respondents are ordered to pay to the claimant, within 14 days of issue of this Judgment, the total amount of **THIRTY THOUSAND, FOUR HUNDRED AND SIXTY-EIGHT POUNDS (£30,468).**

(6) The Tribunal reserves, for its determination at a later date, and in a further Judgment to follow, whether or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** and allows the respondents' liquidator a period of **no more than 14 days from date of issue of this Judgment** to make any written representations to the Tribunal, which failing the Tribunal will make a reserved decision without any further delay, and without the need for any attended Hearing, unless the respondents' liquidator requests to be heard.

## REASONS

### Introduction

1. This case called before us as a full Tribunal on the morning of Monday, 1 August 2022, at 10.00am, for a 3-day Final Hearing in person, previously intimated to both parties by the Tribunal, by Notice of Final Hearing dated 17 May 2022. It was listed for full disposal, including remedy, if appropriate.

### Claim and Response

2. The claimant, then acting on her own behalf, presented her ET1 claim form in this case to the Tribunal, on 19 January 2022, following ACAS early conciliation between 21 December 2021 and 18 January 2022. Her claim was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 21 January 2022.

3. As a sales assistant employed by the respondents at their Vodafone shop in [redacted] Shopping Centre, [redacted], stated to be between 4 October 2021 and 16 January 2022, the claimant alleged unfair dismissal, and also unlawful discrimination against her on the grounds of sexual orientation and sex, as well as sexual harassment, and she set forth the nature of her complaints at section 8.2 of her ET1 claim form, as follows:

> ***"I was subjected to several comments around my sexual orientation, my gender and sexual harassment as I was asked a very sexually explicate*** [sic] ***question by my male Manager, twice.***
>
> ***I will list the comments below:***
>
> ***"So, how do lesbians have sex then, I'm intrigued" said by Billy my Senior Manager. I told him I wasn't going to answer that question and he asked me again after a customer left.***
>
> ***"You look like a normal lassie to me" said by Matthew my manager to me when referring to my sexuality -as in*** [sic] ***to say being gay is abnormal? "People in the community are hurt over the past" said by Matthew my manager in an abrupt and angry way.***
>
> ***"That's a waste" said by Mathew*** [sic] ***referencing a gay woman.***
>
> ***"I mean I think it's great, you're a lesbian but I can't imagine having this conversation with a gay guy" said by Billy to Mathew*** [sic] ***(it wasn't a conversation, he was asking me inappropriate questions where I felt uneasy and humiliated.***
>
> ***"Aye cause you're a guy" said by Mathew*** [sic] ***to Billy***
>
> ***"Aye like, I just wouldn't want that on me" said by Billy then continues to ask me "So what do you think about gay guys" I replied that some of my best friends are gay men.***
>
> ***"What's a fag hag" said by Mathew*** [sic] ***my manager***

***"Love who you want to love but when it comes to affecting my child, I don't think LGBT should be taught in schools "***

***"Of course you're not financially driven, you don't have any children" said by Matthew***

***Some of these comments were overheard by the business owner who chose not to reprimand or stamp out that kind of terminology or behavior*** [sic].***"***

4. At section 15 of her ET1 claim form, the claimant added additional information, stating as follows:

***"The company have upheld a lot of my grievance however I don't think they have taken seriously the damage this has caused to my mental health. I don't feel safe to return to an environment which humiliated me, alienated me and has made me need to seek counseling, this has cost me months of my life, I have endured those comments from start to finish in that employment and it has made me feel like irreparable damage has been caused. I have never been humiliated like that, being asked to describe the inner workings of my sexual orientation to a grown man whilst he smiles at me when asking was so disturbing and I've never been so oversexualised in my personal life or working career. No other woman was asked that or subjected to the comments around their orientation, only me, because I am gay. I don't think I will ever feel safe or comfortable enough now to disclose my sexuality to another employer."***

5. In respect of remedy, in the event her claim was successful, the claimant stated she sought an award of compensation against the respondents. Although no specific amount was stated, she did state : ***"I asked in early conciliation for £10,000 and my ex employer came back with £2,500 and would not negotiate further".***

6. The claim form was served on the respondents at their registered office address of 52 Bruce Street, Dunfermline, Fife, KY 12 7AG, by Notice of Claim and Notice of Preliminary Hearing sent to them by the Tribunal on 21 January 2022. A Case Management Preliminary Hearing was listed for 18 March 2022, and the respondents were informed that they should submit an ET3 response by 18 February 2022, which failing, if no extension of time had been agreed by an Employment Judge, they would not be entitled to defend the claim.

7. Thereafter, on 26 January 2022, a Mr Michael McDade, managing director of the respondents, emailed the Glasgow ET, with copy to the claimant and ACAS, asking for a 2-week extension of time to lodge an ET3 response due to his child being born on 25 January 2022, in order to allow him his statutory entitlement to paternity leave of 2 weeks, and seeking an extension to respond no later than 4 March 2022.

8. By letter dated 31 January 2022, a Legal Officer at the Tribunal sought the claimant's comments on the respondents' application for an extension of time to submit their ET3 response. On 2 February 2022, the claimant confirmed that she had no objection to the extension sought by Mr McDade, so by letter dated 8 February 2022, a Legal Officer confirmed, there being no objection by the claimant, that the time to present an ET3 response was extended until 4 March 2022.

9. In the ET3 response, lodged on 4 March 2022 by Mr McDade, on behalf of the respondents, he stated that the respondents defended the claim, and the attached paper apart grounds of resistance stated as follows:

***1. <u>Background</u>***

***1.1 The Claimant, [redacted] joined Thistle Communications Ltd (A Vodafone Partner Franchise) on 4th October 2021 following an interview conducted by the Respondents Managing Director, Michael McDade and***

***the Respondent's employee and Store Manager, Matthew Graham in September 2021 for the position of Retail Adviser.***

***1.2 On joining the Claimant was provided with an employment contract and completed all training required as part of her onboarding.***

***1.3 During the course of the Claimant's employment, she worked 20 hours per week with the occasional overtime. Her main place of work was our Vodafone store in [redacted].***

***1.4 The Claimant, and all other Thistle Communication Ltd employees receive commission based on individual and store performance.***

***1.5 The Claimant reported directly to Matthew Graham, Store Manager.***

***1.6 An alleged incident happened between the Claimant and two other employees Bilal (Billy) Shahid and Matthew Graham on 18th November 2021, following the incident, the Claimant worked an additional two shifts and communicated with the Respondent Michael McDade without raising anything until the 24th November 2021.***

***1.7 The Claimant has admitted to telling other members of staff that she has taken her previous employer to tribunal and got a pay-out for Sex Discrimination.***

***1.8 The Claimant is claiming for constructive dismissal. However, the claimant had submitted her notice and did not leave with immediate effect. She was employed until her notice period had expired.***

***2. <u>Incident</u>***

***2.1*** ***On 24th November 2021, the Claimant sent the Respondent's Michael McDade an email at 11.30am with the subject 'Complaint' following a discussion with the Respondent's Michael McDade where the Claimant raised concerns. The Respondent's Michael McDade suggested that the Claimant put these in writing to him, allowing him to investigate formally and respond.***

***2.2*** ***The Respondent receives outsourced Human Resource support from an external Human Resource Provider, namely Best HR Limited and the Respondent's Michael McDade emailed Best HR Limited on 25th November 2021 at 14.24pm asking for support regarding an investigation into the allegations made by the Claimant.***

***2.3*** ***Amanda Parsons the appointed HR practitioner returned from Annual leave on the 29th November 2021. On the 30th November 2021 Best HR invite the Claimant to an investigation meeting on the 3rd December 2021 to discuss the grievance.***

***2.4*** ***On 3rd December 2021 the meeting was held. The meeting was held by Amanda Parsons, Roseleinne Artigo, Best HR was also in attendance and was note taking.***

***2.5*** ***On 6th December 2021 Matthew Graham was investigated. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and was note taking.***

***2.6*** ***On 6th December 2021 Bilal Shahid was investigated. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and was note taking.***

***2.7*** ***On 6th December 2021 Vicky Krikken was investigated as a witness. The meeting was held by Amanda Parsons,***

***Roseleinne Artigo was also in attendance and was note taking.***

***2.8 On 6th December 2021 Andeel Khan was investigated as a witness. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and was note taking.***

***2.9 On 6th December 2021 Michael McDade was investigated as a witness. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and was note taking.***

***2.10 As part of the grievance process the Claimant was asked what she would be looking for in terms of an outcome from the grievance and she stated***

***2.10.1 "I need to feel safe in order to return to work. Safety for me is to not have people ask me about how I have sex, about being included, not feeling ostracised."***

***2.11 On 13th December 2022*** [sic] ***the claimant was emailed the outcome of the grievance. An outcome of the Grievance was that that there had been inappropriate comments made, as well as inappropriate discussions involving all employees(including the Claimant),a decision to partially uphold the Claimants grievance was made taking in the point 2.10 above the grievance officer made the following recommendations that were subsequently implemented.***

***2.11.1 LGBT+ training was to be implemented with all team members within 4 weeks of starting.***

***2.11.2 In addition to this the claimant would no longer be working with those involved with the incident.***

***2.12 On 15th December 2021 the claimant submitted her appeal.***

***2.13 As part of the grievance appeal the Claimant was asked what she was looking for to be able to return to work and resolve the issue she had. The Claimant informed the grievance officer that due to the breakdown of the relationship between her and the Respondent she felt she couldn't return to work. The grievance officer offered mediation and the Claimant refused making it clear that she had no intention of returning to work.***

***2.14 On 17th December 2021 the appeal was heard by Paul Bailey CEO of Best HR and also in attendance was Matthew Peacock who took notes.***

***2.15 On 30th December 2021 the claimant received the outcome of the appeal via email. Satisfied that a complete and thorough investigation had taken place with the information available and having reviewed all the evidence, the decision was made not to uphold the Claimants Grievance appeal.***

***2.16 On 10th January 2022 Thistle Communications received an email from the Claimant submitting her letter of resignation with a full notice period served.***

***2.17 On January 10th January 2022*** [sic] ***the Respondents HR Support Best HR received a Call from ACAS stating that the Claimant was looking to make a claim via tribunal and was invited to early reconciliation. An offer was made to the Claimant Via ACAS for £2,500 and the Offer was rejected.***

***3. <u>Summary</u>***

***3.1 A full investigation was conducted as well as appeals process as well as actions and sanctions taken to allow a safe return to work for the Claimant."***

**Procedural History of the Case prior to this Final Hearing**

10. The ET3 response was accepted by the Tribunal administration on 8 March 2022, and a copy sent to the claimant and ACAS. Following Initial Consideration by Employment Judge Claire McManus, on 10 March 2022, she ordered that the claim proceed to the listed Case Management Preliminary Hearing on 18 March 2022.

11. On 11 March 2022, Claire Cochrane, solicitor at Legal Services Agency Ltd, Glasgow, advised the Glasgow ET, with copy to Mr McDade for the respondents, that she had been instructed by the claimant, and apologised that the claimant's PH Agenda (due by 25 February 2022) was being lodged late. She copied that PH Agenda to Mr McDade as the respondents' representative.

12. In the claimant's amended PH Agenda provided to the Tribunal, on 14 March 2022, by her legal representative, Ms Cochrane, confirming her complaint of direct discrimination and harassment, at section 2.1, she went on, at section 2.7, to seek copies of the respondents' equal opportunities policy, anti-harassment and bullying policy, and copies of the mandatory and optional training materials available to staff regarding equalities.

13. At this Final Hearing, we were advised by Mr Swan, the claimant's solicitor, that no such copy documents were provided by the respondents, hence they were not included in the claimant's Bundle provided to the Tribunal, and the respondents did not lodge any documents in any Bundle on their own behalf.

14. In that PH Agenda for the claimant, it was stated, at section 5.3, that it was anticipated that the claimant would lodge a medical report and / or medical

records in support of her claim for injury to feelings, which, at section 3.2, were estimated in middle ***Vento*** band.

15. In that same PH Agenda, in describing the alleged unlawful discrimination and harassment complained of by the claimant, the following detail was provided in Schedule 1:

> *"**S.4** If you complain about **direct discrimination**:*
>
> ***(i) What is the less favourable treatment which you say you have suffered, (include the date or dates of this treatment and the person or persons responsible.)***
>
> *1) On various dates Matthew Graham treated the Claimant less favourably than other part time Retail Advisers Andeel and Alexander (or a hypothetical part-time Retail Adviser) by assigning her shifts in excess of her contracted 20 hours per week, by putting her on shift every Saturday during her employment and by attempting to put her on shift on Christmas Eve, Boxing Day and New Years Eve when no other member of staff was asked to work all three shifts.*
>
> *2) On 18/11/21 Bilal Shahid subjected the Claimant to questioning about her sex life and Mr Shahid and Mr Graham subjected the claimant to questioning about gay men*
>
> *3) The assistant manager, Vicky Krikken, advised the claimant shortly after she commenced employment that she and the claimant would share the cleaning between them, including cleaning the male staff toilet.*
>
> ***(ii) Why do you consider this treatment to have been because a protected characteristic?***

1. *Matthew Graham began treating the Claimant less favourably after he found out that she was gay.*

2. *It is the claimant's position that they would not have asked similar questions of a male colleague or a straight female colleague and only put the Claimant in this uncomfortable situation because she is a gay woman.*

3. *Ms Krikken and the claimant were the only female members of staff. The male staff were never asked to clean."*

*"**S.7** If you complain about **harassment**:*

***(i) Give brief details of all instances of the 'unwanted conduct' that you complain of including, in each case, the date (s) and the person(s) responsible.***

1) *Within the first few weeks of starting, Matthew Graham said to the Claimant "Of course you're not financially driven – you don't have children!" – Sex harassment and sexual orientation harassment*

2) *25/10/21 Matthew Graham said "You look like a normal lassie to me" – sexual orientation harassment*

3) *01/11/21 Matthew Graham said "That's a waste" – sexual orientation harassment and sex harassment*

4) *10/11/21 Michael McDade said "I didn't know you were gay, you really don't know what to say to people these days" – sexual orientation harassment*

5) *10/11/21 Matthew Graham said "People in the community are hurt over the past" – sexual orientation harassment*

6) *10/11/21 Michael McDade followed the Claimant in to the break room during her lunch and said "If any of us ever say anything inappropriate just tell us to shut up". – sexual orientation harassment*

7) *10/11/21 Michael McDade stood over the Claimant where she sat in the break room and, referring to an earlier conversation in which he had asked her to work an extra shift, he said "I was just exerting my power." – sexual harassment*

8) *Unknown date – a Friday, Matthew Graham said "I mean, love who you want to love but when it comes to affecting my child, I don't think LGBT should be taught in schools" – sexual orientation harassment*

9) *Unknown date – the Claimant, Michael Graham, Matthew McDade and Vicky Krikken were having a conversation and Mr McDade made a comment about some customers being likely to want to speak to Mr Graham as they would assume that he will be more knowledgeable, but that some customers would prefer to speak to the claimant and Ms Krikken and that they may wish to "bat their eyelashes" at any older male customers. – Sex harassment*

10) *18/11/21 Bilal Shahid twice asked the Claimant to explain how lesbians have sex – sexual harassment*

11) *18/11/21 Bilal Shahid said "I mean I think it's great you're a lesbian but I can't imagine having this conversation with a*

*gay guy." Matthew Graham responded, "Aye cause you're a guy." Bilal Shahid replied, "Aye like, I just wouldn't want that on me. So what do you think about gay guys?" Matthew Graham then asked the Claimant "What's a fag hag?" – sexual orientation harassment*

12) *23/11/21 The claimant texted Matthew Graham to highlight that she was the only member of staff who was on the rota to work Christmas Eve, Boxing Day and New Year's Eve and requested that she be taken off the rota for New Year's Eve. Mr Graham did change the rota however he did not reply to the Claimant's message despite posting a message in a group chat with other employees after she had sent it. – sexual orientation harassment*

13) *13/12/21 the claimant received the outcome of her grievance which suggested that her response to the inappropriate behaviour of her colleagues encouraged them to continue asking her questions – sex harassment and sexual orientation harassment*

***(ii) Why do you consider that the conduct was related to a protected characteristic?***

*1) It is the Claimant's position that Mr Graham would not have made this comment to a man or a straight woman.*

*2) This comment was made in response to Mr Graham learning that the Claimant is gay*

*3) This comment was made in reference to a woman Mr Graham had befriended on TikTok after learning that she was gay. It was inferred that the purpose of women is to be sexually available to men*

*4) Mr McDade referred to the claimant's sexual orientation*

*5) This comment was made in response to the claimant explaining that the word "queer" is acceptable as it has been reclaimed by the gay community*

*6) Mr McDade was prompted to say this after hearing Mr Graham make the comment referred to at paragraph 5.*

*7) The claimant felt that this comment was of a sexual nature*

*8) Explicit referent* [sic] *to sexual orientation*

*9) The comment suggested that women should flirt with men to increase sales.*

*10) The claimant was asked about her sex life*

*11) Mr Shahid and Mr Graham were discussing gay men*

*12) The claimant noticed that Mr Graham started giving her worse shifts than colleagues and treating her unfavourably after he found out she was gay*

*13) This comment related to the Claimant's response to sexual harassment and sexual orientation harassment.*

***(iii) Do you say that this conduct had the purpose or effect of violating your dignity? If so, how?***

*Yes, the claimant found the conduct described above to be extremely invalidating and it made her feel that she was viewed as "less" than everyone else in the workplace.*

***(iv) Do you say that this conduct had the purpose or effect of 'creating an intimidating, hostile, degrading, humiliating or offensive environment" for you? If so, why?***

*Yes*

*1) The claimant felt she was seen as being "less than" her colleagues with children. It made her feel as though she was seen as being less important and her sexuality was unacceptable. She felt as though she was put in a position where she was expected to defend herself for not having children*

*2) The conduct implied that being gay is abnormal. The claimant also felt that the conduct gave the impression that Mr Graham found the Claimant more acceptable than a "stereotypical" gay woman because of the way she looks.*

*3) The Claimant felt that this was the ultimate invalidation of her sexuality which she has struggled with since she was a young child. This was another instance where she felt like she was being told that gay people are "less than" heterosexual people and she found this hurtful and embarrassing.*

*4) This statement implied that Mr McDade thought the claimant should be spoken to or treated differently because she is gay. The Claimant also felt that there was an inappropriate expectation that she should have disclosed her sexual orientation, when the same thing would not have been expected of a heterosexual person. This reinforced her sense of being made to feel like an outsider because she was gay.*

*5) The comment was made in an aggressive tone and gave the impression that Mr Graham was annoyed that he could not say whatever he wanted to say openly and freely.*

*6) The claimant felt that this comment acknowledged the impact of the comment outlined at paragraph 5, but instead of confronting Mr Graham directly about his conduct Mr McDade put the onus on the claimant to challenge harassment directly whenever it was directed at her. The claimant is not a confrontational person and did not want to be put in that position.*

*7) The claimant felt intimidated by this remark taken in the context of it being made by the male owner of the business as he stood over her in a small room.*

*8) Claimant felt that this comment demonstrated that her manager did not accept her and her lifestyle. Reference to education about LGBT matters "affecting" his children made the claimant feel as though he felt that being gay was something that could "rub off" on others and gave the impression that he was not happy to be in close proximity to her.*

*9) Claimant felt that she was being objectified.*

*10) The manner in which this question was asked made the Claimant feel that Mr Shahid was asking it for sexual gratification. He failed to respect the Claimant's boundaries.*

*11) The comments about gay men and the terminology used by Mr Graham were offensive to the Claimant.*

*12) This behaviour made the Claimant feel excluded and marginalised within the workplace.*

*13) The Claimant found this deeply offensive as she felt that she was being criticised for her reaction to a situation which she found humiliating and shocking. The Claimant felt that there was a suggestion that there was some onus on her to behave in a confrontational manner in response to harassment in her place of work.*

***(v) Do you say that this conduct was of a sexual nature or related to sex (as in gender)? If so why?***

*See above paras 1, 3, 7, 9, 10 and 13."*

16. At the Case Management Preliminary Hearing held, by way of telephone conference call on 18 March 2022, Employment Judge Sandy Meiklejohn heard from Ms Cochrane, solicitor for the claimant, and Mr McDade, the respondents' director. He clarified that the discrimination claims were brought under **Section 13** (direct discrimination) and **Section 26** (harassment) of the **Equality Act 2010**.

17. Only the claimant's solicitor had provided a completed PH Agenda – Mr McDade had failed to do so for the respondents, despite the fact the Tribunal had previously directed that it be lodged by no later than 11 March 2022.

18. For the benefit of Mr McDade, as an unrepresented, party litigant, Judge Meiklejohn set out the relevant parts of the relevant statutory provisions in his written PH Note & Orders dated 22 March 2022, as issued to both parties under cover of a letter from the Tribunal sent on 24 March 2022.

19. Judge Meiklejohn's Note also set out the various case management orders he made for the purposes of this Final Hearing, including for documents in a Joint Bundle, Schedule of Loss, and List of Issues. He noted that in addition to the claimant as a witness at the Final Hearing in person, for the respondents there would be Mr M McDade, Ms A Parsons (who dealt with the claimant's grievance) and Mr P Bailey (who dealt with the claimant's grievance appeal).

20. Date listing letters were issued by the Tribunal to both parties, on 24 March 2022, for return by 7 April 2022, to list the case for Final Hearing in June / August 2022. On 7 April 2022, Mr McDade returned the respondents' completed listing stencil, giving Amanda Parsons and Paul Bailey as witnesses for the respondents, at an estimated ½ day each. In a subsequent email to the Tribunal, on 2 May 2022, Mr McDade stated that : " ***I assumed as I was the Respondent I would automatically be a witness as it is myself acting on behalf of the company"***. He confirmed that he would be a witness, and estimated his evidence at a half-day.

21. On 20 April 2022, Mr Stuart Swan, solicitor at the Legal Services Agency Ltd, Glasgow, emailed the Glasgow ET, with copy to Mr McDade for the respondents, advising that he had taken over conduct of this matter from his colleague, Ms Cochrane, and attaching a draft List of Issues in accordance with paragraph 11 of Judge Meiklejohn's PH Note sent to parties on 24 March 2022. In a separate email, sent later that same day, Mr Swan provided a draft Schedule of Loss in accordance with paragraph 10 of Judge Meiklejohn's PH Note.

22. By letter from the Tribunal dated 25 April 2022, issued on Employment Judge McPherson's instructions, Mr Swan's correspondence of 20 April 2022 was acknowledged, and placed on the casefile. A typographical error was noted, where "***Section 25- Harassment***" was read as being "***Section 26***", and Mr Swan was ordered, within 14 days, to update the draft Schedule of Loss regarding the amount of commission being sought by the claimant. Mr McDade was directed to provide his written comments on both the List of Issues and Schedule of Loss within 14 days.

23. Thereafter, on 9 May 2022, Mr Swan emailed the Glasgow ET, with copy to Mr McDade for the respondents, with a revised, updated Schedule of Loss for the claimant, seeking a total award of **£23,037.07**, including a sum of **£22,000** for injury to feelings.

24. He confirmed that Judge Meiklejohn had thought 3 days would be required for the Final Hearing, and he agreed with that assessment, advising that while a date listing stencil had not been returned on the claimant's behalf, the claimant herself would be the only witness for the claimant, estimated at up to one day in total, with the respondents' witnesses taking around / slightly in excess of another day, with submissions for both sides at around 1 to 2 hours in total, meaning that the case (including remedy) should be dealt with within 3 days.

25. As Mr McDade did not reply to the Tribunal's letter of 25 April 2022 within the 14 days allowed, i.e., by 9 May 2022, a reminder was sent to him, by

email from the Tribunal, on 13 May 2022, asking for his comments on the claimant's updated Schedule of Loss within 7 days, i.e., by 20 May 2022.

26. On 17 May 2022, Notice of Final Hearing was issued to both parties by the Tribunal, setting aside 3 days for full disposal, including remedy, if appropriate, before a full Tribunal.

27. Despite the Tribunal's reminder to Mr McDade, on 13 May 2022, he did not respond so, on Judge McPherson's instructions, on 24 May 2022, a Strike Out Warning was issued by the Tribunal to the respondents to advise that the Judge was considering Strike Out of the response, in terms of **Rule 37(1)(c) of the Employment Tribunals Rules of Procedure 2013**, for non-compliance with an Order / Direction of the Tribunal, given no reply to the Tribunal's correspondence of 25 April and 13 May 2022.

28. Mr McDade was given 7 days to set out his reasons for disagreeing with the proposed Strike Out, and to advise whether he wanted a Hearing fixed so that he could put forward his reasons in person. He replied timeously by email to the Glasgow ET, on 27 May 2022, with copy to Mr Swan for the claimant, apologising for missing the previous deadline, and stating : "***I have no issues with the loss of earning calculations. However I would like to challenge the rational*** *[sic]* ***behind this instance being classed as the middle Vento. From my own understanding of the landings*** *[sic]* ***it would only qualify as the lowest banding."*** A copy of that email was produced to the Tribunal as document 5, at page 34, of the claimant's Bundle used at this Final Hearing.

29. When Mr McDade's email of 27 May 2022 was received and placed on the case file, it was referred to Employment Judge McPherson as the allocated Judge. On his instructions, the Tribunal clerk wrote to both parties by letter dated 7 June 2022, stating:

> *"Following referral to the allocated Judge, Employment Judge Ian McPherson, I am instructed to advise both parties that the disputed banding for injury to feelings is noted, and it will form part of the issues*

*for judicial determination at the Final Hearing, if the claimant is successful in her complaints against the respondents. Those issues are as set out in the claimant's solicitor's List of Issues intimated on 20 April 2022, subject to the corrected typo identified in the Tribunal's letter of 25 April 2022.*

*In terms of the case management orders made by Employment Judge Meiklejohn, in his PH Note & Orders issued to parties on 24 March 2022, paragraph 9 refers regarding the Joint Bundle. By 27 June 2022, parties should have sent to each other copies of all documents on which they intend to rely at the Final Hearing. Not later than 11 July 2022, the claimant's solicitor should send the respondents' representative a copy of the Joint Bundle. Finally, no later than 25 July 2022, the claimant's solicitor shall send 5 copies of the Joint Bundle to the Tribunal.*

*Further, in terms of paragraph 10 of Judge Meiklejohn's Note, Judge McPherson directs that, when lodging the Joint Bundle, the claimant's solicitor shall update the claimant's Schedule of Loss intimated on 9 May 2022, and send a copy to the Tribunal, and respondents' representative."*

30. Thereafter, by email to the Glasgow ET, on 25 July 2022, copied to Mr Swan for the claimant, Mr McDade, the respondents' representative, stated as follows:

***"I refer to the above claim and write to advise that I (Michael McDade) will no longer represent the Respondent and will not be attending any further in the proceedings.***

***There are no funds in the Respondent's bank account and, therefore, no funds to defend the claim or any potential award. The Respondent is now going through a formal process of insolvency.***

***I can also confirm, as per rule 92, that we are, as a courtesy, copying in the Claimant Representative."***

31. Following receipt of Mr McDade's email of 25 July 2022, it was referred to the allocated Judge. On instructions from Judge McPherson, the Tribunal clerk wrote to both parties' representatives, by email sent to Mr McDade and Mr Swan, on 26 July 2022, stating as follows:

*"The Tribunal has received Mr McDade's email of 25 July 2022 which has been placed on the casefile and referred to the allocated Judge.*

*Employment Judge Ian McPherson had noted that Mr McDade is no longer acting as the respondents' representative, and that he does not intend to attend future hearings.*

*A check of Companies House shows the respondent company as still active, and with no indication of any insolvency proceedings. As such, the listed Final Hearing on 1/3 August 2022 shall proceed .*

*If the respondents are to appoint a new representative, please provide details by return to the Tribunal, with cc to the claimant's representative.*

*The Tribunal has received the claimant's Bundle. If the respondents intend to lead any witnesses / lodge any documents, please advise as soon as possible.*

*The respondents have defended the claim as per the ET3 response previously lodged with the Tribunal. Do the respondents insist upon their defence to the claim, or do they now concede that the claim, in whole or on part, is not contested? Please clarify by return.*

*If the respondents do not attend the Final Hearing , and if they are not represented at that Hearing on 1 August 2022, the Tribunal may, having considered the available information, decide to proceed without the respondents being in attendance, as per Rule 47."*

32. On 25 July 2022, the Tribunal received 5 hard copies of the Bundle of Documents to be used at this Final Hearing. As explained by Mr Swan, in his covering letter to the Tribunal, it was not a Joint Bundle.

33. He advised that he had contacted Mr McDade on several occasions and received no response. His last communication with Mr McDade was on 4 July 2022. He indicated to him that if he did not hear from him prior to 11 July 2022, he would prepare the Bundle to be used at this Hearing based on the documents that the claimant had provided to him.

34. Mr Swan provided a copy of the Bundle to Mr McDade, and emailed him a copy of his letter, and he advised further that there was no revision to the Schedule of Loss intimated on 9 May 2022 which appears in the Bundle at pages 32 and 33.

**Final Hearing before this Tribunal**

35. When the case called in public hearing before the full Tribunal on Monday, 1 August 2022, it did not do so until 10:23am, as a 10:00am start was not possible as the respondents were not in attendance, nor represented, although the full Tribunal, Mr Swan and the claimant, were all present and ready to proceed at the listed start time.

36. On instructions from the Judge, the Tribunal clerk confirmed that there had been no email response from Mr McDade to the Tribunal's email of 26 July 2022, and attempts by the Tribunal clerk to contact Mr McDade by phone were unsuccessful, as the calls went unanswered and straight to voicemail.

37. Having heard from the claimant's solicitor, Mr Swan, the respondents not being present, nor represented, despite Notice of Final Hearing having been issued to them, on 17 May 2022, and an email from their director, Michael McDade, on 25 July 2022, having been replied to by the Tribunal on 26 July 2022, confirming that the Final Hearing listed for 3 days would proceed, the Tribunal, in exercise of its powers under **Rule 47 of the Employment Tribunals Rules of Procedure 2013,** decided to proceed with the listed Final Hearing in the absence of the respondents.

38. We did so, having considered the information available to the Tribunal about the reasons for the respondents' failure to appear or be represented, and it being in the interests of justice to proceed, the claimant and her solicitor being present, ready and able to proceed, as also the full panel of the Tribunal assembled for that purpose, and any further delay would be contrary to the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay.

39. When Mr Swan addressed the Tribunal in oral submissions, at the start of day 1 of this Final Hearing, he informed the full Tribunal that he would like to get the case to proceed, and get a finding from the Tribunal for the claimant. In a novel proposition, he then added that, if there was no need to hear evidence, and the papers lodged were in order, then he would take direction from the Judge about what evidence was to be heard by the Tribunal.

40. Developing his submission, Mr Swan stated that as the case was now undefended, the Tribunal could accept what the claimant had said in her case, and it would just be a question of what evidence needed to be heard, or whether we could shorten proceedings, under the Tribunal's overriding objective, and so save expense, while dealing with the case justly.

41. At this point, the Judge clarified, for the avoidance of any doubt on Mr Swan's part, that the case was not undefended, as the respondents' ET3 response had not been withdrawn, further to the Tribunal's email of 26 July 2022 to Mr McDade, and this was not a situation where the claimant's case wins by way of a Default Judgment.

42. When the Judge indicated that the Tribunal would require to hear the claimant's evidence, herself only being led, and then proceed to hear Mr Swan's closing submissions, Mr Swan stated that he would lead the claimant in evidence, and as regards closing submissions, he indicated that these would be oral submissions, with just reference to the applicable legislation, and not any specific case law authorities being cited or relied upon by him as the claimant's solicitor.

43. After Mr Swan then asked the Judge if he could be provided with a list of any case law authorities that the Tribunal might expect him to refer us to, the Judge stated that as this is a discrimination case, where discrimination is denied by the respondents, so the claimant's evidence is led first, and there are several familiar case law authorities on liability and remedy, as also applicable ET Presidential guidance on ***Vento*** awards for injury to feelings.

44. Mr Swan then estimated that his evidence in chief from the claimant might take ½ day, some 2 to 3 hours, and the Judge then raised with him, some preliminary matters, for clarification, arising from the Tribunal's pre-read of the claimant's Bundle, while attempts had been made, with no success, to contact the respondents via Mr McDade.

45. Mr Swan had provided the Tribunal with hard copies of the claimant's Bundle, duly indexed, running to some 25 documents, over 98 pages. We were concerned that, within that Bundle, at document 23, at page 93, there was what was described as "***Letter from*** [redacted]***- C's counselling support - 20/06/22***", and also, at document 24, at page 94, there were what was described as "***Medical records (irrelevant notes redacted) – 06/07/22."***

46. In relation to document 23, Mr Swan explained to us that it was there to support the claimant's evidence to be given to the Tribunal, in her evidence in chief, but he was not leading [redacted], the CBT Counsellor, who had written that letter, and he accepted that, in those circumstances, it would be a matter for this Tribunal to consider what weight to give to that letter of 22 June 2022 when it was unsigned, and there was no witness to speak to its terms, other than the claimant as the recipient of that letter.

47. As regards document 24, being GP records from the [redacted] Health Centre, [redacted] we noted that it had substantial blacked out redactions, it was only page 1 of what was shown from its footer as being 3 pages from the claimant's GP practice, and we were concerned that somebody had taken it upon themselves to redact much of the content, but

Mr Swan, on the claimant's behalf, had not sought the permission of the Tribunal to do so, and no prior warning had been given that the claimant's medical records, with significant redactions, were being lodged in that redacted format with the Tribunal.

48. For the avoidance of any doubt, the Tribunal wishes to place on record and make it very clear that when a Tribunal orders the disclosure of documents, or the preparation of a Bundle, there is no inherent right on the part of any party to the Tribunal proceedings, or their representative, to redact anything without the Tribunal's express and prior permission. This matter was revisited later, as we record below at paragraph 75 of these Reasons.

49. The Judge also raised with Mr Swan what the claimant's position was about any privacy order or restrictions on disclosure, in terms of **Rule 50 of the Employment Tribunals Rules of Procedure 2013**, given the matter had been expressly raised by EJ Meiklejohn in his PH Note of 22 March 2022, at paragraph 13, where he had indicated that it was up to either party to make an application to the Tribunal for an Order under **Rule 50** if they wished to do so.

50. To date, the Judge noted that neither party had made any such application, but the terms of documents 23 and 24 in the claimant's Bundle, in addition to the type of discrimination being complained of by the claimant, had raised the matter, which is why the Judge was seeking comments from Mr Swan as the claimant's solicitor.

51. In a frank concession, Mr Swan replied to the Judge, stating that this was not something that he had discussed with the claimant, and he asked for time to take her instructions. By way of an observation, and not a criticism, the Judge stated that it was disappointing for the Tribunal that this matter had not been addressed before, given EJ Meiklejohn's PH Note in March 2022, but the Tribunal would allow an adjournment for Mr Swan to seek instructions from his client.

52. On another matter raised by the Judge, having noted the terms of the ET1 claim form, at section 9.2 (page 8 of the Bundle), and ET3 response form, at paragraph 2.17 of the paper apart (page 26 of the Bundle), both parties had openly referred to early conciliation settlement figures with ACAS, despite the clear and unequivocal terms of **Section 18(7) of the Employment Tribunals Act 1996**, which provides that anything communicated to an ACAS conciliation officer in connection with the performance of his functions shall not be admissible in evidence in any proceedings before an Employment Tribunal, except with the consent of the person who communicated it to that officer.

53. When the Judge observed that both parties appear to have consented to disclosing these figures to the Tribunal, Mr Swan did not demur on behalf of the claimant.

54. Still looking at documents in the claimant's Bundle, the Judge referred to the grievance and grievance appeal documents produced, and given their terms, asked whether there were not other relevant documents missing from the Bundle. In reply, Mr Swan stated that the claimant has notes of the grievance appeal, and these could be lodged with the Tribunal, as also that the claimant had received a P45 from the respondents, but he was not sure what leaving date was shown on that document.

55. The Judge had noted that, although the ET1 had given 16 January 2022 as the end date, and the ET3 had agreed both start and end dates for the claimant's employment by the respondents, yet the claimant's draft Schedule of Loss (produced at page 32 of the Bundle) had stated that ***"the last day of employment may have been 17/01/2022 but this is not material.".*** As the Tribunal requires to make a specific finding in fact as to the effective date of termination of employment, the Judge observed that this was a material fact for it to make a finding upon.

56. In reply to a further query from the Judge, Mr Swan confirmed that the Schedule of Loss (at pages 32 and 33), although marked "***DRAFT***" was, in fact, the finalised version from 9 May 2022. While, at that page 32,

reference was made to the claimant's final payslip of 31 January 2022, Mr Swan advised that payslips from November and December 2021, as well as January 2022, could be lodged with the Tribunal, as none were presently contained within the claimant's Bundle. Mr Swan further agreed with the Judge that, on page 33, at paragraph 4, second sentence, there was a typographical error where the stated "***20/02/21***" should read "***20/02/22***".

57. Further, on the matter of the injury to feelings sought at **£22,000** (being middle band ***Vento***) at page 33, the Judge noted that there was no reference to any interest being sought in terms of the **Employment Tribunals (Interest on Discrimination Case Awards) Regulations 1996**. Mr Swan sought, and he was granted, an adjournment to discuss that, and the other matters raised with him by the Judge in preliminary discussion, with the claimant as his client.

58. Proceedings adjourned at 10:53am for that purpose, and the public Final Hearing resumed again at 12:06pm. During the adjournment, Mr Swan emailed to the Glasgow ET office, at 11:26 am, on 1 August 2022, and attached grievance appeal notes of 17 December 2021, P45 (issued 26 January 2022, showing 17/01/2022 as leaving date), and 3 payslips for months ending 30 November 2021, 31 December 2021,and 31 January 2022, and he further advised that he would update the Bundle index accordingly. These were added to the Bundle as document 26 (grievance appeal minutes, at pages 99-106), document 27 (P45, at pages 107-108), and document 28 (payslips, at pages 109-111).

59. Later, in the course of the Final Hearing, yet further documents were produced by Mr Swan, on the claimant's behalf, and, with approval of the Tribunal, we allowed them to be received, and added to the Bundle. Mr Swan provided a continued Bundle index, showing new documents 29 to 38, running from pages 112 to 183.

60. In allowing these additional documents for the claimant, we note and record that we did so because we considered it in the interests of justice to allow us to have access to the maximum documentary evidence available.

61. That said, it was disappointing for the Tribunal that in a case where the claimant was professionally represented, and EJ Meiklejohn's case management orders from March 2022 were clear and unequivocal, that there was so much late production of relevant and necessary documentation to the Tribunal. It very much gave the impression that the case for the claimant had not been fully prepared in advance of the start of this Final Hearing.

**Anonymity Order granted by the Tribunal**

62. Having taken instructions on the matter of any **Rule 50** Order application, Mr Swan apologised that he had overlooked EJ Meiklejohn's PH Note, and he then made oral submissions on that matter. Before doing so, however, he clarified that as regards the date for calculation of any interest on any award of compensation that the Tribunal might make to the claimant, given the range of events narrated by her in her complaint to the Tribunal, he proposed a middle date of 18 November 2021, midway between the start and end of the claimant's employment with the respondents.

63. Mr Swan, in addressing the Tribunal, stated that there was evidence about historical sexual abuse of the claimant, and thus the Hearing should be heard in private, and nothing about that referred to in any public Judgment to be issued in this case. The Judge allowed him to borrow his bench copy of "***Butterworths Employment Law Handbook,"*** and drew his specific attention to the terms of **Rule 50**, and what it allows.

64. In reply, Mr Swan stated that the Final Hearing should be partly held in private, in terms of **Rule 50(3)(a)**, and that a Restricted Reporting Order ("RRO") should be put in place, under **Rule 50(3)(d),** for that part of the evidence heard by the Tribunal.

65. In the alternative, Mr Swan submitted that the claimant sought an Anonymisation Order, in terms of **Rule 50(3)(b)**, for the claimant's name, and he further stated that he had a concern about the possibility of jigsaw identification of the claimant.

66. In further discussion with him, Mr Swan agreed that anonymisation would be sufficient, without the need for a private Hearing, and / or without the need for any RRO, and he did not anticipate that he would need to re-raise this matter.

67. In these circumstances, on the oral application of the claimant's solicitor, on 1 August 2022, the Tribunal issued an Anonymity Order in terms of **Rule 50(3)(b)** ordering that the identity of the claimant, her GP practice, and her counselling support charity, shall not be disclosed to the public or in any documents entered on the Register or otherwise forming part of the public record.

68. The Tribunal accordingly directed that an anonymised version of this Judgment and Reasons shall be published on the Gov.UK website. The full, non-anonymised Judgment has been sent to the parties. The Judge also indicated, in giving the Tribunal's oral ruling, that in drafting the findings in fact, they would be drafted with a view to protecting the claimant's identity, and that the listed Final Hearing would proceed as a public Hearing.

69. Further, the Judge stated that the claimant's solicitor had the usual liberty to apply for any further **Rule 50** Order in the course of this Final Hearing, if Mr Swan felt the need arose. No further application was made by him on the claimant's behalf.

70. We pause to note and record here that, by letter sent to both parties by email from the Tribunal clerk, on 2 August 2022, they were both sent a copy of the **Rule 50** Anonymisation Order granted by the Tribunal, and it was confirmed that the Final Hearing had proceeded, in the absence of the respondents, as per **Rule 47**.

71. Due to an administrative error by the clerk, the covering letter stated "**RESTRICTED REPORTING ORDER**." By further letter from the Tribunal clerk, emailed to Mr Swan and Mr McDade, on 3 August 2022, it was confirmed that the Tribunal had not made any RRO, and a sincere apology

was given for the incorrect subject heading have been used in the Tribunal's correspondence on 2 August 2022.

72. That matter addressed, discussion then focused on the redacted medical records produced as document 24, at page 94 of the claimant's Bundle. Mr Swan stated that he was not leading the claimant's GP as a witness, only the claimant in person, and this document, and that it was he who had made the redactions, on the basis that he did not believe the redacted sections of the GP medical records (at page 1 of 3) were relevant to matters before this Tribunal.

73. In answer to the Judge, Mr Swan stated that the redactions made related to events after 14 February 2022, up to 26 June 2022, all after the claimant's employment had ended, to entries for 9 and 13 December 2021 related to discharge from hospital, and to an entry from 29 November 2021 related to a dermatology clinic.

74. Mr Swan then stated that he had all 3 pages of the GP records, unredacted, along with 16 pages of attachments from the GP, and he could produce these to the Tribunal, if required. The Judge indicated that it would be helpful to the Tribunal to see the 3 unredacted pages of the GP records to assess what had been redacted.

75. In a further email, sent at 12:30pm, Mr Swan enclosed the unredacted version of document 24, being 3 pages of the GP medical records printed on 6 July 2022. It was added to the Bundle, as document 24A, immediately after the redacted page 94.

**Respondents' Trading Status / Solvency**

76. Finally, the discussion turned to the respondents' then current trading status / solvency, given Mr McDade's email of 25 July 2022, and the Tribunal's unanswered email to him of 26 July 2022.

77. Having checked the publicly available Companies House web search, it was noted that by micro-accounts for the respondents, up to 31 October

2021, signed by M McDade, director, on 27 July 2022, the company, which was showing as ***"Active"***, and no indication of any insolvency proceedings, had its registered office address with Taxassist Accountants, Dunfermline, being his correspondence address as MD, and the respondent company had net current liabilities at that balance sheet date of 31 October 2021 of **£17,579**.

78. Mr Swan stated that he had seen that information in the last week, but he had no further information, nor any other preliminary matters to raise with this Tribunal. In those circumstances, it then being 12:33pm, the Tribunal adjourned for a one-hour lunch break, following which evidence was taken from the claimant, starting at 13:32pm, after hard copies of the additional document 24A were received, and added into the Bundle, as also hard copies of additional documents 26-28, and the continued Bundle with documents 29-38.

**List of Issues for the Tribunal**

79. In the claimant's PH Agenda of 11 March 2022, her then solicitor, Ms Cochrane , at section 4.1, stated the issues very briefly, as follows:

> ***1.Whether the conduct complained of amounted to harassment on the grounds of sex, sexual orientation and / or sexual harassment.***
>
> ***2.Whether the respondent took all reasonable steps to prevent the harassment.***

80. That skeletal draft related only to liability, and in the very simplest of terms, and included nothing about remedy, or the matter of the respondents seeking ***"costs"*** against the claimant, as intimated by Mr McDade to EJ Meiklejohn on 18 March 2022, as recorded at paragraph 15 of his PH Note issued on 24 March 2022.

81. Thereafter, matters were developed, and on 20 April 2022, Mr Swan, the claimant's new solicitor, intimated a draft List of Issues, as ordered by EJ Meiklejohn at paragraph 11 of his PH Note. It was copied to Mr McDade, as required by **Rule 92**, but Mr McDade never responded to him, or to the Tribunal, despite correspondence from the Tribunal on 25 April and 13 May 2022.

82. We do not reproduce that List of Issues here, because, with the typo of "***Section 25***", rather than "***Section 26***", identified previously by the Judge, and corrected, the finalised version was reproduced by Mr Swan, on 3 August 2022, when intimating his closing submissions for the claimant, where he inserted his comments / submissions after the original text, based on his assessment of the claimant's oral evidence and the written material produced in the Bundle used at this Final Hearing.

83. In narrating the claimant's closing submissions, later in these Reasons, at paragraphs 105 to 107 below, and the Appendix to this Judgment, we will return to the List of Issues before us for our judicial determination.

84. For present purposes, we simply note and record that by email to the Glasgow ET, on 3 August 2022, sent at 09:27am, Mr Swan provided his written submissions document, and a tracked change, revised Schedule of Loss dated 3 August 2022. He brought hard copies for use of the Tribunal that morning.

85. We also note that the revised Schedule of Loss was itself superceded by a finalised version on 4 August 2022, as we record later in these Reasons, at paragraph 109 below.

86. As Mr Swan explained to us, in his email of 3 August 2022, sent at 14:26, he was "***struggling with the figures***" re Schedule of Loss / pension contributions, in light of Nest Pensions contribution details that the claimant had received (and a copy of which he provided to the Tribunal). We allowed

that further additional document, extending to four pages, to be added to the claimant's Bundle. We have included the relevant details in our findings in fact later in these Reasons, at paragraph 88(29) to (31) below.

**Findings in Fact**

87. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

88. On the basis of the sworn evidence heard from the claimant before us over the course of this Final Hearing, and the various documents in the claimant's Bundle of Documents provided to us, along with additional documentation received and allowed by the Tribunal, so far as spoken to in evidence, the Tribunal has found the following essential facts established:

Introduction

(1) The claimant, [redacted], aged [redacted], is female as regards her gender, and a lesbian / gay woman, as regards her sexual orientation.

(2) She was formerly an employee of the respondents, working in their [redacted] store, until her employment with them ended on 17 January 2022, with her resignation from their employment, after 3 months, 13 days (15 weeks), she having started employment with them on 4 October 2021.

(3) The respondents are a private limited company, incorporated in Scotland, and registered at Companies House under company no. SC 623117.

(4) The sole director and MD of the respondents is Michael McDade. He is the active person with significant control of the company, whose business is the retail sale of mobile telephones. The respondents operate as a Vodafone Partner franchise. Mr McDade is the franchise owner.

(5) As at the date of the Final Hearing before the Tribunal, the respondents were shown on Companies House as an active company, and there was no indication on the public record of any insolvency proceedings in relation to the company.

(6) In her evidence to the Tribunal, the claimant stated that the respondents' [redacted] store continued to operate and trade, as before, as it had done when she was employed there.

(7) After the conclusion of the Final Hearing, the respondents went into a creditors' voluntary liquidation, effective from 18 August 2022, and they are now shown on Companies House as an insolvent company.

(8) The respondents' liquidator is Claire Middlebrook of Middlebrooks Business Recovery & Advice, Edinburgh.

(9) She is aware of these Tribunal proceedings. Her consent to the continuation of these proceedings is not required as the respondent company is not in compulsory liquidation.

Claimant's Employment by the Respondents

(10) The claimant joined Thistle Communications Ltd on 4 October 2021 following an interview, for the position of Retail Adviser, conducted in September 2021 by the respondents' Managing Director, Michael McDade, and the respondents' employee and Store Manager, Matthew Graham.

(11) On joining the respondents' employment, the claimant was provided with an employment contract, a copy of which was produced to the Tribunal at documents 7 and 8 of the claimant's Bundle, being terms and conditions of employment dated 28 October

2021 (at pages 37-45 of the Bundle), and contract (at page 46 of the Bundle).

(12) In terms of that employment contract, which she signed electronically on 28 October 2021, the claimant was employed on a permanent basis from 4 October 2021, as a Retail Sales Adviser, subject to a 6-month probationary period. During that probationary period, she was required to give one week as notice of termination of employment.

(13) Company employment policies, including disciplinary and grievance procedures, were available for her to read on the respondents' computer, but the claimant could not access them after her employment with the respondents ended, so there were no copy policy documents included in the claimant's Bundle lodged and used at this Final Hearing.

(14) Her normal hours of work were specified to be 20 hours per week, unless otherwise agreed, and the [redacted] Shopping Centre, [redacted], was specified as her normal place of work.

(15) Her remuneration was specified to be £9.50 per hour (less tax, NI and other deductions required by law) payable by credit transfer monthly on or around the 28th day of each calendar month.

(16) Copy pay slips were produced to the Tribunal as additional documents added to the claimant's Bundle, as document 28, at pages 109-111. These covered her pay from the respondents for the months ended 30 November and 31 December 2021, and 31 January 2022.

(17) From those copy payslips, it was vouched that the claimant received the following wages from the respondents:

| Date | Payments/ Taxable Gross Pay | Deductions | Net Pay | Year to Date |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| 30/11/21 | £902.50 [95 hours @ £9.50 = £902.50] | £27.96 [tax £0.00, NI £12.66, NEST £15.30] | £874.54 | Taxable gross pay £1,814.50 Tax £0.00 Employee NI £26.46 Employer NI £46.99 Employee pension £30.98 Employer pension £23.24 |
| 31/12/21 | £632.40 [26 hours @ £9.50 = £247.00, and SSP £385.40] | £4.50 [tax £0.00 NI £0.00 NEST £4.50] | £627.90 | SSP £385.40 Taxable gross pay £2,446.90 Tax £0.00 Employee NI £26.46 Employer NI £46.99 Employee pension £35.48 Employer pension £26.62 |
| 31/01/22 | £355.55 | £0.00 | £355.55 | SSP £674.45 |

| | | | | |
|---|---|---|---|---|
| | [7 hours @ £9.50 = £66.50, and SSP £289.05] | | | Taxable gross pay £2,802.45 Tax £0.00 Employee NI £26.46 Employer NI £46.99 Employee pension £35.48 Employer pension £26.62 |

(18) The total pay in the respondents' employment at **£2,802.45** was shown in the claimant's P45, issued by the respondents, on 26 January 2021, a copy of which was produced to the Tribunal as document 27, at pages 107-108 of the Bundle.

(19) During the course of the claimant's employment, she worked at the respondents' Vodafone store in [redacted]. She reported directly to Matthew Graham, Store Manager. She was one of several staff working in that store.

(20) In addition to Mr Graham as store manager, there was also a part time store manager, Bilal Shahid, known as Billy. Mr Shahid A is a business partner of Mr McDade, the franchise owner, in another venture.

(21) According to her ET1 claim form, the claimant worked an average 20 hours per week in her job with the respondents, for which she was paid monthly, at £632 gross pay before tax.

(22) From the finalised version of the claimant's Schedule of Loss, produced to the Tribunal on 4 August 2022, the claimant's average

earnings with the respondents are estimated to have been **£231.62 per week**.

(23) In her ET1 claim form, the claimant stated that when her employment ended, she was not paid a period of notice. She further stated that she was in her employer's pension scheme, and that she received no other benefits from the respondents as her employer.

(24) The claimant, and other Thistle Communication Ltd employees, could receive commission based on individual and store performance.

(25) The basis of the commission system was not known to the claimant, and no document was lodged with the Tribunal to explain how it operated.

(26) The claimant's evidence at this Final Hearing is that she earned commission but she did not know how it was calculated, and no commission was paid to her, although due.

(27) In her finalised Schedule of Loss, the claimant accepted the respondents' figures for commission that she might have earned from the respondents at **£31.08.**

(28) In her payslips, as produced to the Tribunal, there are deductions for employer and employee pension contributions, and specific deductions for NEST.

(29) On 3 August 2022, the claimant produced, as a further document to add to her Bundle, which the Tribunal allowed, a screen shot of a response she had received, on 20 January 2022, from Nestpensions.org.uk, showing her contribution details made between 3 October 2021 and 30 January 2022.

(30) The attached spreadsheet from Nest showed her contributions history details, with contributions from her salary, and from Thistle Communications Ltd as her then employer.

(31) It shows 3 contributions from her salary, namely, on 02/11/21 for £15.68; 14/12/21 for £15.30; and 20/01/22 for £4.50, with

employer contributions of £11.76 on 02/11/21; £11.48 on 14/12/21; and £3.38 on 20/01/22.

Incidents complained of by the claimant

(32) Following an incident between the claimant and two other employees Bilal (Billy) Shahid and Matthew Graham on 18 November 2021, the claimant placed a journal entry message for Craig on her Universal Credit page, on 19 November 2021, a copy of which was produced to the Tribunal as document 11, at page 59 of the claimant's Bundle.

(33) In that message, the claimant wrote : ***" Hi Craig, further to our conversation a couple of weeks ago, the comments about me being gay have gotten a lot worse and yesterday I was asked to describe personal details of my sex life as they were curious about "how lesbians actually have sex." I'm literally beside myself with frustration and upset. I don't know how I'm meant to continue to work in a place where people find it acceptable to ask me that. That's the franchise owners business partner – I don't feel like I've any one to turn to in work and I really don't think I should be subjected to that. What happens if I feel like I can't go back? Will I be penilised*** [sic] ***applying for benefits?"***

(34) Further, on 22 November 2021, the claimant emailed the Vodafone Group LGBT email address to highlight her concerns there, a copy of which was produced to the Tribunal as document 12, at page 60 of the claimant's Bundle.

(35) In that email, the claimant wrote: ***"I'm hoping you can offer some advice or even just hear my concerns in work regarding some homophobic comments that have been made and extremely inappropriate comments regarding my sexuality. As I work for a franchise of Vodafone, it's not clear if we even have an HR department and the comments have came*** [sic] ***from my store manager and a part time store manager who is also the***

***franchise owners business partner in another venture. I feel I have no one to turn to and I feel like I have no option but to leave."***

(36) There were produced to the Tribunal, as document 9 in the Bundle, at pages 47 to 56, various WhatsApp messages with "***Vodafone Michael***", being the respondents' MD, Michael McDade, between 21 October and 24 November 2021, concerning her accrued holiday hours, and shifts over the festive holiday period, as also, at document 10, at pages 57-58, WhatsApp messages with "[redacted] ***dream team"***, between 23 November 2021 and 1 December 2021.

(37) In particular, on 24 November 2021, the claimant messaged Michael McDade, as produced at page 53 of the Bundle, stating : ***" I won't be in for my shift today or Friday, the past few weeks there's been a lot of homophobic comments made and other inappropriate behaviours. Specifically one particular recent incident. I'm sat here in tears over this, I'm so upset about what's been said and I can't wrap my head around it. Waiting on doctor's surgery to get me an appointment, I would phone you Michael but I'm still in shock and trying to process what's been said and I can't speak to you about it when I'm this emotional and humiliated. I'm sure you'll appreciate, homophobia, it's a very sensitive subject."***

(38) Mr McDade replied to the claimant's message, as reproduced at page 54 of the claimant's Bundle, stating : "***Hey*** [redacted] ***I'm sorry to hear this. 100% I want to get to the bottom of this and if there as*** [sic] ***been any inappropriate comments please believe I will deal with it appropriately." Once you are able to please give me a call so I can understand what has happened."***

(39) In reply to Mr McDade, still on 24 November 2021, the claimant messaged him stating (as produced at page 55 of the Bundle) : ***"Thanks Michael for understanding why I won't be in. There's***

***most certainly has been inappropriate comments, very serious inappropriate comments. I have documented them and I will talk you through them in detail in a few days once I have processed what's happened. I've been in shock over some of the comments so I need time to work through what's been said."***

Claimant's sick leave absence

(40) The claimant went off sick from 8 December 2021, and remained off sick until her employment with the respondents terminated.

(41) There were produced to the Tribunal, as document 25 in the Bundle, at pages 95-98, copy GP Med 3 fit notes from the claimant's GP stating that, having assessed her case, and because of "***stress at work***", the GP advised that she was not fit for work.

(42) The GP first so certificated the claimant's sickness absence on 8 December 2021 to 21 December 2021. On that later date, the GP recertified her to 3 January 2022. On that later date, the GP recertified her to 16 January 2022. Finally, on 19 January 2022, the GP recertified her for a further 28 days.

(43) There was also produced to the Tribunal, as document 24 in the Bundle, at page 94, a redacted copy of page 1 of 3 of the claimant's GP medical records printed on 6 July 2022.

(44) An unredacted copy of the full 3 pages was added to the Bundle, on 1 August 2022, as document 24A. The entry in the GP medical records for 8 December 2021 reads :

***" Telephone encounter during covid 19. Spoke with patient. Long conversation. Crying and upset throughout consult. Direct discrimination case at work last year, went through court and concluded in March 2021 in favor*** [sic] ***of patient. Went back to new job and had inappropriate remarks and medias sent to her from management people and has went***

***through grievance*** [sic] ***process again, struggling with things going on at work and feels fighting things on her own, had grievance hearing 3 days ago, not slept since, not leaving house and not coping with things. Speak with someone called*** [redacted] ***has check ins with her once a month, she makes sure people still ready for counciling*** [sic] ***, had referral done Nov 2020 and on waiting list. States feels scared and unsafe and doesnt know why. Taking medication as prescribed and having to take propranolol throughout day for anxiety, Talks with her mu and girlfriend and has support from both. No plans for taking her life but the intrucive*** [sic] ***thoughts have been there, has previously had thoughts of self harm and suicide."***

(45) There were also produced to the Tribunal, as documents 16 to 19 of the Claimant's Bundle, at pages 77 to 80, emails between the claimant and Michael McDade, on 13 December 2021, at 12:47,14:12, 14:24 and 14:43.

(46) As per copy produced at page 77 of the Bundle, the claimant attached her sick line from her GP. She asked Mr McDade to keep contact to email , and stated : ***"I'm sure you will recognise that this has caused a lot of stress and affected my mental health."***

(47) In his reply, Mr McDade (as per copy at page 78) advised the claimant : ***"I appreciate that you have a current fitness from work statement regarding stress at work. The reason for my call was to discuss the barriers which have been preventing you from attending work, specifically the grievance that you submitted. I am aware that this grievance has now been resolved, and whilst you have the right to appeal, I believe that the barriers have now been removed to allow you to return to work."***

(48) The claimant in her message back to Mr McDade, still on 13 December 2021, as per copy produced at page 79 of the Bundle, stated: "***With all due respect, whilst in your opinion, the barriers have been removed and have been resolved – I do not. I have to deal with my mental health that's been aggravated because of the comments made. Just because you deem it is safe for me to return to work, does not mean that I feel safe to return to work. My doctor has deemed me not fit for work on my sickline so I'm not sure that I'm understanding why that isn't sufficient enough at the present moment? I don't feel comfortable talking with you on the phone now Michael, not when you're not understanding that I'm signed off with mental health and stress caused by work.***"

(49) In his response to the claimant, Mr McDade messaged her ( as produced at page 80 of the Bundle) stating : ***"My call was to discuss and agree what support I can provide you in order to aid a safe return to work for you. I appreciate you are not currently fit for work as per your fitness for work statement and this will be recorded. I propose that we have a call on 21st December, your final day of sickness to discuss what support I can provide you, if any. However in the meantime, if there is anything I can do please do not hesitate to get in touch."***

(50) Finally, there was produced to the Tribunal, as document 23 in the Bundle, at page 93, copy letter dated 20 June 2022 from the [redacted] addressed to the claimant from a [redacted], CBT counsellor.

(51) So far as material for present purposes that letter states:

***" The [redacted] is a charity based in [redacted] that supports children and adults affected by childhood sexual abuse. We provide***

***counselling and therapeutic services as well as regular on-going support by trained staff.***

***I am writing to confirm that [redacted] first attended the [redacted] for support on the 16/11/20. She has received on-going support and is now engaging in weekly Counselling Sessions.***

***Through the emotional support that [redacted] receives she has identified problems / issues that are impacting on her day-to-day functioning. She is exploring how she can, in time, adopt healthy coping strategies and thought processes. She presents symptoms of Complex PTSD which includes depression and anxiety which leads to panic attacks, triggers to her Childhood sexual abuse, flashbacks and night terrors which further contributes to feelings of anxiousness and fear. [redacted] becomes withdrawn and isolated relating to fear and anxiousness.***

***The forthcoming Court Case has been a significant trigger to [redacted]'s childhood sexual abuse. It has been detrimental to her emotional wellbeing and how she is coming to terms with the Trauma she has experienced. As well as dealing with Childhood sexual abuse in her counselling sessions, she is also getting help to deal with this."***

Claimant's grievance

(52) On 25 November 2021, the claimant sent Michael McDade an email at 11.30am following a discussion with him where she listed the comments that had been said to her and some of her

concerns. A copy of this email was produced to the Tribunal as document 13, at pages 61 to 63 of the claimant's Bundle.

(53) The respondents receive outsourced Human Resource support from an external Human Resource provider, namely Best HR Limited, Glasgow, and Michael McDade asked Best HR Limited for support regarding an investigation into the allegations made by the claimant.

(54) Amanda Parsons the appointed HR practitioner returned from annual leave on 29 November 2021. She is HR Operations Director with Best HR. On 30 November 2021, Ms Parsons from Best HR invited the claimant to a formal grievance hearing meeting to be held at the Wright Business Centre, Glasgow, on 3 December 2021 to discuss the points in the claimant's grievance dated 25 November 2021 ***"in finer detail."***

(55) A copy of the invite letter to a formal grievance hearing was produced to the Tribunal as an additional document 29, at page 112 of the claimant's Bundle. Ms Parsons designed herself as ***"an independent investigation manager on behalf of Thistle Communications Ltd."***

(56) On 30 November 2021, as per additional document 30, added to the Bundle, at pages 113 to 121, the claimant advised Ms Parsons that : ***"I'm not 100% comfortable with the fact that the meeting is somewhere I don't know. I unfortunately don't drive… and a long way to travel home when I will have been discussing delicate information and will be upset so can this meeting not be more local or video call perhaps."***

(57) Thereafter, still on 30 November 2021, Ms Parsons offered, and the claimant accepted, for the meeting to be held via Zoom.

(58) On 3 December 2021 the grievance hearing meeting with the claimant was held by Zoom. The meeting was conducted by Amanda Parsons, and Roseleinne Artigo, HR assistant at Best HR, was also in attendance and note taking. Although the claimant had

been advised of her right to have a work colleague or accredited trade union official to act as her companion present at the meeting, she chose to attend on her own.

(59) A copy of the grievance hearing notes taken by Ms Artigo from Best HR were produced to the Tribunal at document 14 of the claimant's Bundle, at pages 64 to 72. Although lined off for the employee's signature, at page 72 of the Bundle, the claimant never signed them off.

(60) The version of these notes, produced in the claimant's Bundle, at pages 64 to 72, were the notes after the claimant had added her own comments, prefaced with an asterisk to show what she had added in to reflect her recollection of what was said at this meeting.

(61) The original text of those notes were an additional document, added to the Bundle as document 31, at pages 122 to 129. Those notes had been emailed to the claimant by Ms Parsons on 6 December 2021, as per the email produced to the Tribunal at page 133 of the Bundle, as part of additional document 32, added to the Bundle, at pages 130 to 134.

(62) In her email of 6 December 2021, copy at page 133 of the Bundle, Ms Parsons had asked the claimant to review the contents of those notes, and go back to her with any amendments as soon as she could, and she stated that: ***" I am still meeting some key people within the business to gather the facts and will be in touch as soon as I have come to a conclusion."***

(63) In her reply to Ms Parsons, still on 6 December 2021, as per copy email at page 133 of the Bundle, the claimant stated that : ***"there's a considerable amount of misquotations…. I wasn't expecting so many mistakes."***

(64) On 7 December 2021, as per copy email produced at page 132 of the Bundle, the claimant returned the minutes, stating : ***"I've corrected some of the errors and misquotations for myself and for you. There was a lot."*** She attached her amended minutes –

these were what the Tribunal had received as document 14, at pages 64-72 of the claimant's Bundle.

(65) Thereafter, later on 7 December 2021, as per copy email produced at page 130, Ms Parsons emailed the claimant to thank her for her email of 7 December 2021, with corrected minutes, and stating : ***"I will review and conclude the investigation and come back to you as soon as I can."***

(66) It is not known to the claimant, nor to the Tribunal, what (if any) further investigation was undertaken by Ms Parsons, nor when, on 6 December 2021, or otherwise, she interviewed other employees of the respondents.

(67) According to the respondents' ET3 response, paper apart, at paragraphs 2.5 to 2.9, other investigatory meetings were allegedly held by Ms Parsons with other members of the respondents' staff.

(68) It is asserted by the respondents that, on 6 December 2021, Matthew Graham was investigated. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and note taking.

(69) It is asserted by the respondents that, on 6 December 2021, Bilal Shahid was investigated. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and note taking.

(70) It is asserted by the respondents that, on 6 December 2021, Vicky Krikken was investigated as a witness. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and note taking.

(71) It is asserted by the respondents that, on 6 December 2021, Andeel Khan was investigated as a witness. The meeting was held by Amanda Parsons, Roseleinne Artigo was also in attendance and note taking.

(72) It is asserted by the respondents that, on 6 December 2021, Michael McDade was investigated as a witness. The meeting was

held by Amanda Parsons, Roseleinne Artigo was also in attendance and note taking.

(73) As part of the grievance hearing, the claimant was asked by Ms Parsons what she would be looking for in terms of a preferred resolution from the grievance and (as recorded in the notes, at page 69 of the Bundle) she stated : ***"I need to feel safe in order to return to work… Safety for me is to not have people ask me about how I have sex, about being included, not feeling ostracised."***

(74) There was produced to the Tribunal, as additional document 33, at pages 135-148 of the Bundle, a subsequent email trail between Ms Parsons and the claimant on 7 to 9 December 2021.

(75) On the evening of 7 December 2021, in Ms Parsons' email to the claimant, copy produced at page 146 of the Bundle, Ms Parsons advised the claimant that she had "***some further questions for you to help me peace*** [sic] ***together the facts."***

(76) On 8 December 2021, the claimant emailed Ms Parsons ( at page 144 of the Bundle) to say that a meeting by Zoom or telephone would be fine with her. A Zoom meeting was set up, for 9 December 2021, but the claimant could not get into Zoom, and a telephone call ensued.

(77) After that telephone call with Ms Parsons, the claimant emailed her, on 9 December 2021 (copy produced at page 139 of the Bundle) to pick up on a few things. Ms Parsons acknowledged her comments, and stated : "***I will include this along with all of the other evidence and come back to you as soon as I can.***"

(78) When, later on that same day, the claimant emailed Ms Parsons again, to say that she had been talking things though with her mum, the claimant refuted calling Matthew Graham a "***middle aged man stuck in his ways."*** Ms Parsons replied, to say that this would be noted.

(79) Notes of this second grievance meeting with Ms Parsons held on 9 December 2021 were taken by Roseleinne Artigo, from Best

HR, and a copy provided to the claimant. Again, although lined off for the employee's signature, they were not signed by the claimant.

(80) The original notes of this second meeting were produced to the Tribunal as additional document 34, at pages 149-154 of the claimant's Bundle.

(81) When sent to the claimant for comment, she updated them. Her updated version of those notes, with her asterisked additions, were produced to the Tribunal as additional document 35, at pages 155-161 of the Bundle.

(82) A further email trail between Ms Parsons and the claimant on Friday, 10 December 2021 was produced to the Tribunal as additional document 36, at pages 162-168 of the Bundle. Ms Parsons had emailed the minutes from the follow up meeting on December 2021 to the claimant for her review and approval.

(83) The claimant returned her amendments, and Ms Parsons advised her that she hoped to have an outcome to the claimant over that weekend.

(84) On 13 December 2021, the claimant was emailed the outcome of the grievance in a 4-page letter from Amanda Parsons, Best HR. A copy of that grievance outcome letter was produced to the Tribunal as document 15 at pages 73 to 76 of the claimant's Bundle.

(85) An outcome of the Grievance was that that there had been inappropriate comments made, as well as inappropriate discussions involving all employees, including the claimant.

(86) A decision to partially uphold the claimant's grievance was made, together with the following recommendations: (a) LGBT+ training was to be implemented with all team members within 4 weeks of starting; and (b) In addition to this the claimant would no longer be working with those involved with the incident.

Grievance appeal

(87) On 15 December 2021, the claimant submitted her grievance appeal to Paul Bailey, CEO of Best HR. Her original email to him was superceded by an updated version. A copy of that updated appeal, running to 3 pages, was produced to the Tribunal as document 20, at pages 81-83 of the claimant's Bundle.

(88) In her grievance appeal, as per the copy produced at page 83 of the Bundle, the claimant had concluded her appeal by stating that: ***" I'm not happy with the outcome or how I have been victim blamed, the lack of professionalism on Michael's part and the last*** [sic] ***of respect towards me being signed off sick by my doctor for work related stress."***

(89) On 17 December 2021, the appeal was heard by Paul Bailey CEO of Best HR and also in attendance was a Matthew Peacock (an HR assistant from Best HR) who took notes. The meeting was conducted by Zoom. The claimant was not accompanied, but chose to attend on her on, although advised of her right to have a companion present, if she so wished.

(90) A copy of those grievance appeal notes were produced to the Tribunal as document 26, at pages 99-106, and again at document 37 at pages 169-176 of the claimant's Bundle. Although lined off for the employee's signature, these notes were not approved by the claimant.

(91) Unlike the notes of her grievance meetings on 3 and 9 December 2021 with Ms Parsons, where the respondents' notes of those meetings had been sent to the claimant for comment and approval, and she had submitted revised versions, the notes of the grievance appeal with Mr Bailey were not sent to the claimant for prior comment and approval.

(92) This failure to send the claimant the grievance appeal hearing notes to check through was despite Mr Bailey telling her, at the appeal meeting (as shown in the respondents' notes, at pages 99

and 169 of the Bundle) that she would be sent a copy after the meeting for that purpose.

(93) There was produced to the Tribunal, as additional document 38, at pages 177 to 183 of the Bundle, copy of the email trail between Mr Bailey and the claimant between 17 and 30 December 2021.

(94) On 27 December 2021, as per the claimant's email of that date to Mr Bailey (copy at page 179 of the Bundle), the claimant advised him that she had not heard anything from him since the meeting on 17 December 2021, and she just wanted to check what was happening, and she noted that she had not received the notes over from that appeal meeting either.

(95) Mr Bailey apologised for the delay, by email later on 27 December 2021 to the claimant, explained that he had caught Covid the previous week and he had been unwell with the symptoms, but he would get her response and notes out later that week.

(96) On 30 December 2021, the claimant received the outcome of the appeal via email of that date from Mr Bailey. He apologised for the delay in getting her grievance appeal outcome letter over to her, and for her understanding, stating that his Covid topped with a chest infection had really set him back.

(97) In the respondents' notes of the appeal (copy produced at pages 106 and 176), Mr Bailey had closed the meeting on 17 December 2021 advising the claimant that he would be back in touch with her "***when I have done a further investigation into things that have happened",*** and he hoped to catch up with the claimant sometime the next week.

(98) There was no follow up appeal meeting between Mr Bailey and the claimant. It is not known to the claimant, nor to the Tribunal, what further investigation (if any) Mr Bailey conducted after the close of the appeal hearing with the claimant on 17 December 2021.

(99) A copy of that 7-page grievance appeal outcome letter from Mr Bailey to the claimant was produced to the Tribunal as document 21

at pages 84 – 90 of the claimant's Bundle. It was emailed to her by Mr Bailey along with the respondents' notes of the appeal meeting on 17 December 2021.

(100) In his outcome letter, Mr Bailey addressed each of the 5 issues raised by the claimant in her grievance appeal of 15 December 2021, and gave his responses. He referred to having considered statements from the original grievance.

(101) It is not known to the claimant, nor to the Tribunal, whether this included witness statements from the persons interviewed by Ms Parsons on 6 December 2021. If so, no such witness statements had been shown to the claimant.

(102) Mr Bailey's outcome letter (at page 89 of the Bundle) stated that Ms Parson's outcome letter had upheld part of the claimant's grievance, stating that both Matthew Graham and Billy Shahid had acted inappropriately, that blame was definitely not on the claimant as victim, and that the respondents has taken appropriate (but not specified) action against both employees.

(103) The claimant was advised by Mr Bailey that Billy Shahid and Matthew Graham were no longer working inside the Cumbernauld store. On her final point that Michael McDade had heard all the comments and turned a blind eye, Mr Bailey did not uphold that element of the claimant's grievance appeal.

(104) Satisfied that a complete and thorough investigation had taken place with the information available and having reviewed all the evidence, the decision was made by Mr Bailey from Best HR (as shown at page 89 of the Bundle) not to uphold the claimant's grievance appeal.

<u>Claimant's resignation from employment</u>

(105) On 10 January 2022, the claimant submitted her notice of resignation to the respondents, by email to Michael McDade, and she did not leave their employment with immediate effect.

(106) She gave one week's notice, as required by her contract of employment, and, while off on sick leave, she was employed until her notice period expired one week later on 17 January 2022.

(107) A copy of that emailed resignation was produced to the Tribunal as document 22 at pages 91 and 92 of the claimant's Bundle. In her resignation email, the claimant stated that: "***I don't feel it's appropriate to continue my employment given what has happened and with Acas's involvement, I hope we can come to an agreement in terms of settling and a reference."***

Claimant's circumstances post-termination of employment

(108) Following termination of her employment with the respondents on 17 January 2022, the claimant did not immediately get another job but she has since secured new employment with another employer.

(109) In her evidence to this Tribunal, the claimant stated that she was unemployed until 21 February 2022, and in receipt of Universal Credit. She searched for suitable job opportunities, and commenced in a new job on 21 February 2022.

(110) She is a keyholder for [redacted] Her earnings in that new employment are higher than her earnings were with the respondents, so there is no continuing loss after that date.

(111) In the event of success with her claim before the Tribunal, the claimant stated that she did not seek to be re-instated, or re-engaged by the respondents, but she sought an award of compensation against them, as per her finally revised Schedule of Loss seeking, with an uplift, a total sum of up to **£24,518.65**.

(112) We do not detail its full content here, but incorporate it, in the interests of brevity, from the full document reproduced later in these Reasons, at paragraph 109 below.

Complaint to the Employment Tribunal

(113) After ACAS early conciliation, between 21 December 2021 and 18 January 2022, the claimant presented her ET1 claim form to the Tribunal on 19 January 2022.

(114) While a copy was not included in the claimant's Bundle, the Tribunal noted from its own casefile the ACAS early conciliation certificate R204395/21/44, issued to the claimant, by email on 18 January 2022, following her early conciliation notification to ACAS on 21 December 2021.

(115) According to the respondents' ET3 response, also on 10 January 2022, the respondents' HR Support Best HR received a call from ACAS stating that the claimant was looking to make a claim via the Employment Tribunal and they were invited to early reconciliation. An offer was made to the claimant via ACAS for £2,500 and that offer from the respondents was not accepted by her.

(116) In her complaint to the Employment Tribunal, the claimant complained that, during her employment by the respondents, she had suffered less favourable treatment by staff and management of the respondents, which treatment she considered to have been because of her protected characteristics of sex and / or sexual orientation.

(117) She asserted that she had been unlawfully, directly discriminated against by the respondents, and / or their staff for whom they were responsible.

(118) Further, during that employment, the claimant also complained that she had suffered unwanted conduct by staff and management of the respondents, which conduct she considered to have been related to her protected characteristics of sex and / or sexual orientation.

(119) The claimant asserted that she had been unlawfully, harassed by the respondents, and / or their staff for whom they were responsible, because she believed that the unwanted conduct to which she had been subjected had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating of offensive environment for her while at her work .She believed that some of this unwanted conduct was of a sexual nature or related to sex (as in gender).

(120) In her oral evidence to the Tribunal, the claimant spoke of all of these matters, as she had previously detailed in her ET1 claim form, and / or PH Agenda.

**Claimant's Application to add Additional Respondents refused by the Tribunal**

90. On the afternoon of day 3, Wednesday 3 August 2022, during the course of his closing submissions to the Tribunal, Mr Swan, the claimant's solicitor, made an oral application to the Tribunal to be allowed to add two additional respondents.

91. By email to the Glasgow ET, sent at 14:26pm, Mr Swan provided attachments and links from Companies House to various companies with Michael McDade and / or Muhammed Bilal Shahid as directors, as also their home addresses for service, if the Tribunal should grant his application for them to be added in as additional respondents, in terms of the Tribunal's powers under **Rule 34 of the Employment Tribunals Rules of Procedure 2013.**

92. We pause here to note and record the precise terms of that statutory provision, as follows:

***Addition, substitution and removal of parties***

> ***34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.***

93. Having heard oral submissions from Mr Swan, the Tribunal adjourned at 2:51 pm for private deliberation in chambers. After that private deliberation, when the full Tribunal resumed in public Hearing at 3:56pm, the Judge read *verbatim* from a Note and Order prepared in chambers, and agreed by the full Tribunal, as follows:

> *"The **unanimous** order of the Employment Tribunal, having considered the claimant's application this afternoon to be allowed to add two additional respondents to the case, in terms of **Rule 34 of the Employment Tribunal Rules of Procedure 2013**, namely to add (1) Mr Michael McDade, and (2) Mr Muhammed Bilal Shahid (known as Billy Shahid), is to **refuse** the claimant's application, on the basis that it is not in the interests of justice to allow additional respondents at this late stage of the proceedings, nor is it in accordance with the Tribunal's overriding objective under **Rule 2** to deal with this case fairly and justly to allow that application; and that for the following reasons.*
>
> **Reasons**
>
> *"The Tribunal has carefully considered, in chambers, during its private deliberation, all that has been said by Mr Swan, as solicitor for the claimant, in making his oral application , and we*

*have given careful and anxious consideration to his arguments as to why he invites the Tribunal to allow two additional respondents.*

*After careful scrutiny of the arguments advanced for allowing the application, for the current respondent (Thistle Communications Ltd has chosen not to be present, or represented at this Final Hearing), so we have no opposition from the present respondents, and the two potential respondents have had no prior notice of this application, and so we do not know what their position might be in reply.*

***Rule 34*** *allows an application to be made by the Tribunal, on its own initiative, or by a party. Here, it is the claimant who makes the application. The application can be made at any stage of the proceedings but, as the Judge explained earlier, in exercising any of its powers under the ET Rules, the Tribunal has to have regard to* ***Rule 2*** *and the overriding objective.*

*For reasons of brevity, given this is an oral ruling, we do not rehearse here the full arguments advanced orally by Mr Swan, but we have paid particular attention to his oral submissions. We will detail them, as and when we come to issue our final written Judgement & Reasons, when we will have committed to that public document the terms of this oral ruling, drafted by the Judge, and agreed in chambers with both members, before I come to deliver this oral ruling now, on the full Tribunal's behalf.*

*Such an application to add an additional respondent should not be refused solely because there has been a delay in making it, and there are no time limits for making an application. Of paramount consideration is the relative injustice or hardship involved in refusing or granting the application. As the Tribunal*

*has to have regard to the interests of justice, we remind ourselves that that includes the interests of both parties, and not just those of the claimant. We also have to have regard to the wider administration of justice, and appropriate and proportionate use of the Tribunals resources, against that familiar saying of justice delayed is justice denied.*

*In our view, the application falls to be refused for the following reasons:*

*(1) While the claimant was unrepresented when she lodged her ET1 claim form, she has been represented by the LSA for several months now, and since the earlier Case Management PH before EJ Meiklejohn in March 2022. At no stage, has there been any application by either existing party to add any additional respondent. The present application arises from a concern, held by the claimant and her solicitor, that there may be an issue in the claimant's ability, if successful in her claim, and if awarded compensation, in enforcing that award against the respondents, Thistle Communications Ltd, which Mr McDade, its director, advised the Tribunal, by email on 25 July 2022, was with no funds, and was going through a formal process of insolvency.*

*(2) As at today's date, the Companies House website shows it as an active company, and there is no indication of any insolvency proceedings. The Tribunal has no information, beyond Mr McDade's email, as regards the company's current financial circumstances, but we do have the claimant's evidence, yesterday, that the [redacted] store is still open, and trading.*

*(3) In these circumstances, it seems to the Tribunal that the claimant's concerns re insolvency are speculative, rather than substantive. Further, the Tribunal is dealing here not with an unrepresented, party litigant, but with a claimant who has been legally represented for many months. That is a relevant factor for us to take into account, and we have also borne in mind the real practical consequences of allowing or refusing the proposed application.*

*(4) It is significant, in our view, that Mr Swan accepted that allowing the application was at odds with those parts of* ***Rule 2*** *that relate to saving of expense, and avoiding delay. He conceded that, if his application were granted, then there would need to be service on the new respondents, and that would have implications for further procedure, perhaps parking where we are at now, and revisiting it in due course, as and when any proposed respondent was served, and responded. There is no guarantee that, if allowed, and if served, either proposed respondent would reply by ET3. If they did, they might seek to have their addition to the case reconsidered, and revoked, resulting in further applications, and so further time and expense. Likewise, if they engaged and defended, they might well seek to have the case listed before a fresh Tribunal, with different membership, and for longer than the 3 days used here.*

*(5) The timing and manner of the application support it being refused. While an application can be proposed at any stage, and the lateness of the application in itself is not a good ground for refusing it, it is that, taken together*

*with its practical consequences, which makes the Tribunal refuse the application. No real or satisfactory explanation has been provided, on the claimant's behalf, as to why the application has only been made at this late stage, and why it was not made much earlier, as soon as possible after 25 July, and certainly no later than the start of this Final Hearing on Monday morning, 1 August 2022*

*(6) The Tribunal has also required to consider whether, if the application is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the duration of a Final Hearing will be lengthened if new issues are raised. Delay may, of course, in an individual case have put a proposed additional respondent in a position where evidence relevant to their position is no longer available or is of lesser quality than it would have been earlier.*

*(7) It seems to the Tribunal that this case is not a case very much in its early stages, where, if the application were allowed, all parties (existing, and proposed) would have reasonable time to reflect before the evidential Hearing, and prepare accordingly, as regards necessary witnesses, productions, etc, but a case where a 3 day Final Hearing has already been held, following earlier case management. The parameters of the factual and legal dispute between the parties have been set in the ET1 and ET3 to date, and to open up the claimant's pled case, and allow her to also run a case against two named individuals, is likely to require further enquiry, and thus time and expense to all parties, impact on*

*evidence to be led, and time for questioning of witnesses, and all that at a relatively late stage in the proceedings.*

*(8) While we appreciate that refusing the application will be disappointing to the claimant, the Tribunal wishes to advise her that if the matter had to be re-run, she would have to go through the whole process again, and relive her experience at a further Final Hearing, with the possibility of the respondents attending and participating, and we do not consider that appropriate, against the background of where we are now in this case. We have heard her evidence, obtained Mr Swan's closing submissions, and are now ready to proceed to our private deliberation in chambers. We would aim to issue written Judgment within the ET administration's target of about 4 weeks. We consider that approach best serves the interests of justice, and that is why we have refused the application."*

94. The Judge advised Mr Swan that the oral ruling would be included within the reserved Judgment and Reasons to follow, and it is as reproduced in the immediately preceding paragraph of these Reasons. Although Mr Swan did not request written Reasons, as per **Rule 62,** the Judge took the view that these should be provided for the record, and also so that the respondents, who were not present nor represented, could see and understand the basis of the Tribunal's oral ruling refusing Mr Swan's application.

## Tribunal's Assessment of the Evidence led at the Final Hearing

95. In considering the evidence led before the Tribunal, we have had to carefully assess the evidence heard from the claimant, as the only

witness led before the Tribunal, and to consider the many documents produced to the Tribunal in the claimant's Bundle and additional documents lodged and used at this Final Hearing, insofar as spoken to in evidence, which evidence and our assessment we now set out in the following paragraphs.

96. Overall, we were satisfied that the claimant was giving the Tribunal a full recollection of events, as best she could remember them, and she came across to the Tribunal as a wholly credible and reliable witness.

97. The claimant spoke of what had happened to her in the course of her employment with the respondents, and how she had been treated by the respondents as her former employer. She came across to the Tribunal as an honest and reliable historian of events, and she recalled the impact on her as an individual of those events relating to her employment.

98. In writing up this Judgment, the Tribunal is reminded that, in the EAT judgment of His Honour Judge Auerbach, in **Miss M Limoine v Ms R Sharma [2019] UKEAT0094/19/RN**, it was held that it is an error of law to enter a Default Judgment under **Rule 21(2)** simply on the basis that a claim is undefended. The Judge must first consider, and be satisfied, treating what is asserted in the claim as uncontested, that the essential factual elements of it are properly made out on the material presented to the Tribunal.

99. As the respondents did not participate in this Final Hearing, and no evidence was led or produced on their behalf, the Tribunal did not have any contradictor to what the claimant was saying. We found the claimant to be a credible and reliable witnesses, as to the essential facts spoken to in her evidence , and we were satisfied that

she did not embellish, or exaggerate, any of the matters about which she gave evidence to this Tribunal.

100. The claimant was able and willing to answer questions of clarification asked by members of the full Tribunal panel, and she did not avoid or seek to evade probing questions from the panel. She was not cross-examined, as the respondents were not in attendance, nor represented, and so they could not do so at this Final Hearing.

101. Equally, we note and observe that the respondents took no steps to intimate any written representations to this Tribunal, and so all we could take into account is what was within their ET3 response, and emails received by the Tribunal from their MD, Mr McDade.

102. **Rule 42 of the Employment Tribunals Rules of Procedure 2013** provides that the Tribunal "***shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing."*** Here, however, the respondents provided no such written representations.

103. At this Final Hearing, we only heard from the claimant's side and there was no evidence led by the respondents, nor any written representations lodged on their behalf, so we are without any arguments presented by the respondents.

104. In the absence of their attendance, or representation, we are left with a clear and distinct view that they are failing to actively pursue their resistance to the claim, if not acting otherwise unreasonably, but we decided to proceed in their absence, in terms of **Rule 47**, and hear the case on its merits, and no application was made by Mr Swan, as the claimant's solicitor, that we should consider striking out the response under **Rule 37**.

**Closing Submissions for the Claimant, and finalised Schedule of Loss**

105. We received written closing submissions from Mr Swan, the claimant's solicitor. Thereafter, Mr Swan spoke to the terms of his written submissions, so there is no need to rehearse his written points again here again. After discussion, he intimated that he was not seeking any award of expenses against the respondents.

106. As the respondents were not present at this Final Hearing, it is important that they understand the full submissions made to us. Exceptionally, we have decided it is appropriate to reproduce them here, in full, in this our Judgment, rather than merely summarise the salient points.

107. We have included, as an **Appendix to this Judgment**, a full copy of the relevant parts of Mr Swan's written submissions. We refer to pages 105 to 126 below.

108. On Thursday, 4 August 2022, Mr Swan, the claimant's solicitor, emailed the Glasgow ET, at 10:03am, with a clean copy of the claimant's revised Schedule of Loss. He did so as an earlier version provided to the Tribunal had tracked changes, and when he edited it, to create the finalised version, it became more difficult to read. As such, he removed the tracked changes, and where new figures appear, he put them in **bold text**.

109. That finalised Schedule of Loss reads as follows:

***SCHEDULE OF LOSS FOR THE CLAIMANT***

***DETAILS***

*Start date* *04/10/2021*

*Finish date 17/01/2022*

*Gross weekly wage* ***£231.62 per week (based on weekly below plus £6.14)***

***£6.14 pension contribution based on £26.62 employer pension contribution for full month worked x 12 /52***

*Net weekly wage* ***£231.62*** *per week*

*The claimant worked variable hours. From 04/10/2021 – her start date - until 07/12/2021 – the day before she went off sick - the claimant was paid £2,061.50.*

*This figure is based on the following information from the payslips at pages 109 to 111.*

*Month ending November payslip – taxable gross pay year to date £1814.50*

*Month ending December payslip 26 hours at £9.50 = £247.00*

*1814.50 + 247.00 = £2,061.50*

*£2061.50 / 9.142857143 weeks = £225.48 per week.* ***Plus £6.14 per week = £231.62***

*Gross weekly wage of £231.62. x 52. weeks =* ***£12,044. 24***

*In tax year 2021/22 the standard Personal Allowance was £12,570.*

***FINANCIAL LOSS***

***Past loss***

1. *The claimant's average earnings are estimated to be **£231.62** per week. The claimant was entitled to receive commission payments however no commission was ever paid.*

2. *The claimant went off sick from 08/12/21 as a result of the treatment she had suffered. She remained off sick until 16/01/22. As set out in her final payslip of 31 January 2022, she received £674.45 in sick pay. Had the claimant not gone off sick she would have earned **£1,290.46** based on average weekly earnings. The loss attributable to this period is: **£616.01***

3. *After leaving employment the claimant received £671 in Universal Credit. She was unemployed until 21/02/22 - for 4 weeks and 6 days. Had the claimant remained in employment she would have earned **£1,125.01**. Her loss for this period is: **£454.01***

4. *The claimant searched for suitable job opportunities and commenced a new job on 21/02/22. The claimant's earnings are higher than **£231.62** gross per week so there is no continuing loss after 20/02/22 **apart from the losses that she incurred in respect of attendance at the Employment Tribunal if allowed.***

5. *The respondent has calculated commission at £9.14 - average per month for 20hrs.Taking into account the overriding objective, the claimant is prepared to agree this figure. On this basis the commission that would have been earned is £31.08 for the period from 4 October 2021 until 16 January 2022 (3.4*

*months at £9.14 per month, rounded to the nearest penny). The lost commission is:* ***£31.08***

***Total Past Loss = £1,101.1***

*In the alternative, the total gross pay received by the claimant was £2,802.45. No tax was paid. Both of these figures appear in the payslip month ending 31 January 2022.*

*The time period is 15 weeks.*

*2,802.45 / 15 = £186.83. plus pension contributions of £6.14 per week =* ***£192.97***

*4 weeks and 6 days @* ***192.97*** *per week =* ***£937.28***

*This would change two figures at 3. above and the total past loss figure to:*

*After leaving employment the claimant received £671 in Universal Credit. She was unemployed until 21/02/22 - for 4 weeks and 6 days. Had the claimant remained in employment she would have earned* ***£937.28*** *Her loss for this period is:* ***£266.28****.*

***Total Past Loss = £882.29***

*The claimant's evidence was that she had earned commission but did not how it was calculated. Also, as commission was not paid, and if the Tribunal decides that it cannot accept the agreement regarding the commission figure, total past loss would be £31.08 less in each case. The claimant's evidence was that she had earned commission but did not how it was calculated.*

***NON-FINANCIAL LOSS***

***Injury to feelings***

1. *The claimant seeks compensation for injury to feelings in the middle Vento band. Given the number of incidents and the impact on the claimant the Tribunal is invited to make an award around the upper quartile of the middle band:* ***£22,000.00***

***LOSS SOUGHT £23,101.10***

*Or in the alternative, if the claimant's losses for attendance at hearing can be included her evidence was that she was not able to work for 3 days. Her rate of pay is £10.40 per hour and she works 7.5 hours per day. 3 x 10.40 x 7.5 =* ***£234***

*Loss sought would therefore be* ***£23,335.10***

***UPLIFT***

*It was submitted on behalf of the claimant that there may have been an unreasonable failure in respect of a failure to follow the ACAS Code of Practice. Reference was made to paragraphs 34 and 40. If the Tribunal determines that these failures have been made and that they are unreasonable, an uplift 5% is sought.*

***23,101.10 + 5% = 24,256.15***

***23,351.10 + 5% = 24,518.655***

**Reserved Judgment**

110. When proceedings concluded, on the afternoon of Wednesday, 3 August 2022, at 4:07pm, the claimant and Mr Swan were advised that judgment was being reserved, and it would be issued in writing, with reasons, in due course after private deliberation by the Tribunal.

111. By letter from the Tribunal, dated 5 August 2022, parties were advised, for their information only, that a Members' Meeting would take place the following Monday, 8 August 2022, but that parties were not required to attend the Tribunal.

112. We discussed the evidence, and Mr Swan's closing submissions, at our first Members' Meeting held remotely on MS Teams on Monday, 8 August 2022.

113. An update letter from the Tribunal was sent to both parties, on 11 August 2022, confirming that the full Tribunal had met in chambers on 8 August 2022, and that, following that private deliberation, the Judge was progressing to draft a written Judgment & Reasons, which he would seek to agree with both lay members within the Tribunal administration's target of 4 weeks.

114. In light of additional information received from the respondents' liquidator, and separately from Mr Swan, on 31 August 2022, concerning liquidation of the respondents, about which we detail matters in the following paragraphs of these Reasons, we had a further remote Members' Meeting on 22 September 2022, when we discussed and agreed the finalised terms of this our Judgment and Reasons.

**Liquidation of the Respondents**

115. On 31 August 2022, the Tribunal received an email communication from Middlebrooks Business Recovery and Advice, Edinburgh, to advise that Claire Middlebrook of that firm was appointed Liquidator of the respondent company on 18 August 2022.

The Tribunal was requested to send any further correspondence relating to this case to their offices.

116. Attached to that email to the Glasgow ET were copies of the certificates of appointment for the Tribunal's information. We noted these documents at our second Members' Meeting. We were provided with certificate of appointment of Liquidator by Deemed Consent signed by Michael McDade on 18 August 2022, and certificate of appointment of Liquidator by Members signed by Michael McDade on 18 August 2022.

117. We also noted, from an updated Companies House web search, that the respondents (company no. **SC 623117**) are now shown on that public register as being in creditors voluntary liquidation from 18 August 2022. Mr McDade is shown as an active director, and person with significant control of the company.

118. Following receipt of an email from Mr Swan, the claimant's solicitor, on 31 August 2022, advising of the respondents' liquidation, as he had been sent a separate email, and he did not know whether any similar notification had been sent to the Tribunal, he considered it appropriate to flag with the Tribunal at the earliest opportunity.

119. The Tribunal replied to Mr Swan on 8 September 2022, by emailed letter, with copy sent to Mr McDade as the respondents' MD. On 12 September 2022, a further letter was sent to Mr Swan, and to the Liquidator, apologising for the Tribunal's administrative error in copying in Mr McDade, rather than Ms Middlebrook, the Liquidator, to the earlier letter of 8 September 2022.

120. In that letter of 8 September 2022, following instructions from Employment Judge McPherson, the Tribunal clerk had written to both parties. The Tribunal was unaware of the liquidation, and in those circumstances, the Tribunal's casefile record has been

updated, and now shows the respondents (in liquidation), and per the liquidators' address.

121. As the case was heard at Final Hearing prior to the liquidation, and it is a creditors' voluntary liquidation, there is no impact on what the Tribunal still has to do, namely promulgate its final decision. Consent of the liquidator is not required, as it is not a compulsory liquidation.

122. Due to the Judge's sitting in a 15-day Final Hearing in another case over the previous 3 weeks, his draft Judgment & Reasons in the present case has not then been completed, and so parties were advised that there would be a delay in its issue to the other members of the full Tribunal panel, for which the Judge apologised.

123. Further, as the Judge was then on annual leave, not returning until Monday, 12 September 2022, he was unable to complete the draft, and send it to the 2 lay members of the Tribunal for their comments / approval, in light of their private deliberations at the Members' meeting held on 8 August 2022.

124. The clerk's letter relayed to both parties that the Judge would use his best endeavours, on his return to the office, to prioritise that, and the Tribunal's finalised Written Judgment & Reasons would be issued as soon as possible thereafter. Our second Members' Meeting was held remotely on 22 September 2022.

125. This unanimous judgment represents the final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

**Issues before the Tribunal**

126. The case called before the full Tribunal for full disposal, including remedy if appropriate. The issues for determination were, as per the claimant's List of Issues, as mentioned earlier in these Reasons at paragraphs 105 to 107 above, and the Appendix to this Judgment. In our discussion and deliberation, we have had regard to the paragraphs of that list, which we discuss later, taking account of the written and oral submissions from Mr Swan, as the claimant's solicitor.

127. We record here that the claimant's solicitor having confirmed, in his closing submissions, on 3 August 2022, that the claimant accepts that she does not have the necessary 2 years' qualifying service with the respondents, required in terms of **Section 108 of the Employment Rights Act 1996**, to pursue any complaint of unfair dismissal contrary to **Section 94 of the Employment Rights Act 1996,** and a **Rule 52** judgment not having been issued previously dismissing the unfair dismissal head of complaint, the Tribunal, following upon the claimant's confirmation of withdrawal of that part of her claim, in terms of **Rule 51,** dismissed that part of her claim under **Rule 52.**

## Relevant Law

128. While the Tribunal received written closing submissions from Mr Swan, with some statutory provisions recited, and with some case law references, the Judge has required to give the Tribunal a self-direction on the relevant law to cover all aspects of the case before this Tribunal.

129. As Mr Swan's written submissions reproduced the full text of the relevant statutory provisions being relied upon from the **Equality Act 2010**, being **Sections 4, 11, 12, 13, 23, 26, 39, 40, 109, 120, 123, 124**, and **136,** we do not need to reproduce them here again.

130. Sex and sexual orientation are both protected characteristics listed in **Section 4**. These terms are further defined at **Section 11**(sex), and **Section 12** (sexual orientation).

131. In this case, the claimant complains of direct discrimination, per **Section 13**, as read with **Section 23**, which provides for comparison by reference to circumstances, and harassment, per **Section 26.**

132. In addition to these statutory provisions, we have also had regard to the relevant provisions of the **Equality & Human Rights Commission (EHRC) Code of Practice on Employment** in force since 6 April 2011 by the **Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011** (SI 2011/857).

133. **Chapter 2** (protected characteristics), **chapter 3** (direct discrimination) and **chapter 7** (harassment) all refer, as does **chapter 17** (avoiding discrimination in employment). Parts of this EHRC Code of Practice were cited in Mr Swan's written submissions to the Tribunal.

134. Cited by Mr Swan, and relevant for our consideration of the case before this Tribunal, we have noted the terms of **Section 39 of the Equality Act 2010**, which deals with discrimination against employees, and **Section 40** which deals with harassment against employees.

135. **Section 39(2)(c) and (d)** provide that an employer (A) must not discriminate against an employee of A's (B) by dismissing B, or subjecting B to any other detriment. Further, **Section 40(1)(a)** provides that an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

136. **Section 109** was cited by Mr Swan. It relates to the liability of employers and principals, and includes an employer's "***reasonable steps"*** defence. In our deliberations, we did not require to consider this statutory provision further because, as Mr Swan noted in his annotations to the statutory provisions, included as part of his written submissions to the Tribunal : "***Actions of the employees are to be treated as actions of the respondent. There was no evidence regarding steps, reasonable or otherwise, taken before the conduct complained of."***

137. **Part 5 of the Equality Act 2010** deals with work, and **Section 120** provides that an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of **Part 5**, and time limits for such complaints are set forth in **Section 123**. There is a 3-month time limit for bringing such a complaint, subject to the ***"just and equitable"*** extension of time.

138. In our deliberations, we did require to consider this statutory provision further because, as Mr Swan noted in his annotations to the statutory provisions, included as part of his written submissions to the Tribunal: ***"Primary position is that any acts that could be time barred are part of a continuing act/course of conduct. In the event that any act is determined to be potentially time barred it would be just and equitable to extend the time limit in relation the act or acts."***

139. In the event of success with a discrimination complaint, remedies available from the Tribunal are set forth at **Section 124**. In terms of **Section 124 (2)**, a Tribunal may (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; and (c) make an appropriate recommendation, which is defined (at **Section 124 (3)**)

as being a recommendation that within a specified period, the respondent shall take specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

140. As the claimant is no longer in the respondents' employment, we were not invited to make any recommendation. Our focus, in the event of finding for the claimant, was on compensation. Further, in terms of the Tribunal's powers, under **Section 124 (6) of the Equality Act 2010**, we note and record that the amount of compensation which may be awarded under **Section 124 (2) (b)** corresponds to the amount which could be awarded by the Sheriff Court under **Section 119.** **Section 119 (4)** provides that an award of damages may include compensation for injured feelings, whether or not it includes compensation on any other basis.

141. The Tribunal is empowered to make an award of interest upon any sums awarded pursuant to the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.** (SI 1996 No.2803). The rate of interest prescribed by **Regulation 3(2)** is the rate fixed for the time being, currently an amount of 8 *per cent per annum* in Scotland.

142. By **Regulation 6**, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. In the case of other sums for damages or compensation and arrears of remuneration, interest shall be for the period beginning with the mid-point date and ending on the day of calculation.

143. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in

**Regulation 6(1) and (2),** it may, under **Regulation 6(3),** calculate interest for a different period, as it considers appropriate.

144. **Section 136 of the Equality Act 2010** deals with the burden of proof. So far as material for present purposes, it provides as follows:

> ***Burden of proof***
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
> *…*
> *(6) A reference to the court includes a reference to—*
> *(a) an employment tribunal;…*

145. As it was raised by the Tribunal, Mr Swan's written submissions also included reference to **Section 12A of the Employment Tribunals Act 1996** relating to financial penalties. We do not reproduce the terms of that statutory provision again, but discuss it later in these Reasons at paragraphs 223 to 227 below, when discussing and deliberating upon his written submissions.

146. Further, and because it is also relevant to remedy, we have considered the specific terms of **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.** It provides that if, in the case of proceedings to which the statutory provision applies, which includes a discrimination complaint under the **Equality Act**

**2010**, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

147. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** (2015) is a relevant Code of Practice. It came into effect on 11 March 2015 in accordance with the **Employment Code of Practice (Disciplinary and Grievance Procedures) Order 2015** (SI 2015 No. 649).

148. We discuss the matter of the respondents' alleged unreasonable failure to comply with the ACAS Code, and any statutory uplift, later in these Reasons at paragraphs 207 to 222 below, when discussing and deliberating upon Mr Swan's written submissions.

**Discussion and Deliberation: Liability**

149. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence from the claimant, and within the various documents spoken to in evidence at the Final Hearing, and produced to us in the claimant's Bundle, and additional documents.

150. In carefully reviewing the evidence led in this case, and making our findings in fact, and then applying the relevant law to those facts, we have had to consider the each of the claimants' various heads of claim against these respondents.

151. The Tribunal finds that 17 January 2022 is the effective date of termination of the claimant's employment with the respondents, as

vouched by that date being given as her leaving date, on the P45 issued to her by the respondents, a copy of which was produced to the Tribunal, as document 27, at pages 107-108, in the Bundle.

152. On the balance of probability, the Tribunal finds that all of the acts of less favourable treatment complained of by the claimant, as constituting her complaint of direct discrimination, are established, as having occurred on the various dates specified by her, and by the person or persons named by her as the persons responsible.

153. However, the Tribunal does not find it established that all of the alleged acts of less favourable treatment were because of the protected characteristics relied upon in her claim before this Tribunal.

154. The only act of direct discrimination that the Tribunal finds well-founded, and upholds, is the act on 18 November 2021, when Bilal Shahid subjected the claimant to questioning about her sex life, and Mr Shahid and Matthew Graham subjected her to questioning about gay men.

155. The Tribunal accepts that that act was because of the claimant's protected characteristics, because Mr Shahid would not have asked similar questions of a male colleague or a straight female colleague, and he only put the claimant in that uncomfortable situation because she is a gay woman.

156. The Tribunal does not find, as established, that assigning the claimant certain shifts in excess of her contracted 20 hours per week, or her sharing in toilet cleaning duties at the respondents' store, were unlawful acts of direct discrimination on grounds of her sex or sexual orientation.

157. Further, on the balance of probability, the Tribunal finds that all of the instances of unwanted conduct complained of by the claimant,

as constituting her complaint of harassment, are established, as having occurred on the various dates specified by her, and by the person or persons named by her as the persons responsible.

158. The Tribunal also finds it established that all of the instances of unwanted conduct were because of the protected characteristics relied upon in her claim before this Tribunal.

159. As such, the Tribunal finds well-founded, and upholds, all of the instances of unwanted conduct complained of by the claimant, and that she was subjected to unlawful harassment by the respondents.

160. The unwanted conduct was found by the claimant to be extremely invalidating and it made her feel that she was viewed as "less" than everyone else in the respondents' workplace, specifically that she was seen as "less than" her colleagues with children, and that she was seen as being less important and her sexuality was unacceptable. She felt that her manager, Matthew Graham, did not accept her or her lifestyle, and that she was being objectified.

161. Having struggled with her sexuality since she was a young child, the claimant felt like she was being told that gay people are "less than" heterosexual people, and she found this hurtful and embarrassing, and she felt like an outsider because she was gay.

162. Whether by purpose or effect, the Tribunal finds that this unwanted conduct violated the claimant's dignity, and created an intimidating, hostile, degrading, humiliating or offensive environment for her in the respondents' workplace. She felt excluded and marginalised within the workplace.

163. On the evidence available to the Tribunal, we are not satisfied that the respondents took all reasonable steps to prevent the

harassment of the claimant by management and employees of the respondents.

164. In their ET3 response, it was stated by the respondents that ***"A full investigation was conducted as well as appeals process as well as actions and sanctions taken to allow a safe return to work for the Claimant."***

165. The claimant did not return to work with the respondents, after she went off on sick leave from 8 December 2021. She received statutory sick pay from the respondents, not any company sick pay.

166. On the evidence available to this Tribunal, the Tribunal cannot be satisfied that the investigation carried out by Best HR for the respondents was full.

167. Assertions have been made to that effect, in the ET3 response, but the respondents did not appear at this Final Hearing, and while they had previously indicated that they would lead evidence from Michael McDade, along with Amanda Parsons and Paul Bailey from Best HR, no evidence was led before the Tribunal from any witness for the respondents.

168. It is not known by the claimant, and it is not understood by the Tribunal, what (if any) significance is to be drawn from the asserted facts pled by the respondents in that ET3 response that Matthew Graham and Bilal Shahid were "***investigated***", while the others named (being Vicky Krikken, Andeel Khan, Michael McDade) were "***investigated as a witness."***

169. Not all of the documentation believed to be part of the respondents' investigation process was provided to the claimant during the grievance and grievance appeal process. In particular, as

she explained in her evidence to the Tribunal, she did not receive copies of any statements made by other employees of the respondents allegedly interviewed by Ms Parsons, as narrated in the respondents' ET 3 response, paper apart, at paras 2.5 to 2.9.

170. Contrary to the assertion in the respondents' ET3 response, paper apart, paragraph 1.7, that the claimant had admitted to telling other members of the respondents' staff that she had taken her previous employer to a Tribunal and got a pay-out for sex discrimination, the claimant explained, in her oral evidence to this Tribunal, that she had been the victim of sexual harassment by a line manager in a previous employment, and that that matter had been resolved between the parties, without a Tribunal judgment.

171. She further explained to this Tribunal that she had made reference to that previous experience in pursuing her complaint / grievance with the present respondents to give context to her view that inappropriate / discriminatory conduct / behaviour can have legal consequences for a business and its staff.

**Remedy for the Claimant**

172. Having established the extent of the respondents' liability, we turned next to consider the matter of remedy. In addition to a declaration of her rights, namely that she has been subjected to unlawful direct discrimination, and harassment, contrary to **Sections 13 and 26**, read along with **Sections 39 and 40 of the Equality Act 2010**, the claimant is entitled to an award of compensation payable by the respondents.

173. In considering this matter, we have had regard to the claimant's evidence before the Tribunal, both oral and documentary, and, in particular, the terms of her finalised Schedule of Loss, provided on 4

August 2022, and reproduced earlier in these Reasons, at paragraph 109 above.

**Financial Loss**

174. We looked first at her claim for financial loss, past loss only, there being no claim for future loss, as her earnings in new employment are higher than when she was employed by the respondents, and so her financial losses ceased as at 20 February 2022.

175. In his email of 27 May 2022, as reproduced earlier in these Reasons, at paragraph 28 above, the respondents' then representative and MD, Mr McDade, stated he had no issues with the loss of earnings calculations then stated by the claimant, in her 9 May 2022 updated Schedule of Loss, showing total past loss of **£1,037.07,** inclusive of **£31.08** lost commission.

176. We are satisfied, having regard to the finalised Schedule of Loss provided on 4 August 2022, that the claimant's net loss of wages, after her receipt of Universal Credit, is **£1,070.02**. We also award her the **£31.08** for lost commission. Altogether then, we award the claimant the sum of **£1,101.10** for past financial losses.

**Interest**

177. We now turn to the question of interest on that sum. In terms of the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996,** we received no submission from either party that we should calculate interest for a different period than set forth in the Regulations, because a serious injustice would be caused if we awarded interest as per the Regulations.

178. Further, and in any event, we do not consider it appropriate to do so. We cannot, of course, alter the interest rate of 8%, as that is prescribed by law, and it is a matter in respect of which we have no judicial discretion to vary the interest rate, only the period to which that rate refers.

179. Accordingly, the appropriate interest rate is 8%. For these purposes, the day of calculation is today's date, that is to say, 28 September 2022 being the date of this Judgment.

180. We order that the respondents shall pay to the claimant the appropriate sum of interest upon the financial loss award of **£1,101.10** calculated at the appropriate interest rate of 8% p.a. for the period beginning with the mid-point date between 17 January 2022, being the date that the claimant's employment with the respondents ended, and 28 September 2022, that being the date of this Judgment, a period of **255 days**.

181. Our calculation of interest payable is **£1,101.10 x 0.08% x 255 / 365 days** x **50%** = **£30.77**, as per paragraph (5) (c) of our Judgment above.

182. Accordingly, in respect of the claimant's successful heads of complaint, upheld by the Tribunal, the Tribunal awards compensation to the claimant, in terms of **Section 124 of the Equality Act 2010**, in respect of financial loss in the amount of **£1,101.10,** plus interest of **£30.77** calculated in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

**Injury to Feelings**

183. On the claimant's behalf, Mr Swan has sought an award for injury to feelings. The principles to be determined when assessing

awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162.** Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

184. Citing from **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, we remind ourselves that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."***

185. Lord Justice Mummery said (when giving guidance in **Vento**) that "***the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise……. tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson".***

186. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

187. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band.

The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

188. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, see **Da'Bell v NSPCC [2010] IRLR 19 (EAT)**, and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in **Simmons v Castle [2012] EWCA Civ 1039**. Therefore, until ET Presidential Guidance was issued, the amount appropriate for the lower band was then £660 to £6,600 and the amount appropriate to the middle band was then £6,600 to £19,800. The amount appropriate for the top band was then £19,800 to £33,000.

189. More recently, in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, the Court of Appeal in England & Wales ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to ET awards of compensation for injury to feelings, but it expressly recognised that it was not for it to consider the position as regards Scotland. However, account has now been taken of the position in Scotland by Judge Shona Simon, the then Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET(England & Wales), issued on 5 September 2017, and updated by annual addenda, most recently by the fifth addendum issued on 28 March 2022, in respect of claims presented on or after 6 April 2022.

190. For claims presented on or after 6 April 2021, the fourth addendum to the ET Presidential Guidance, issued on 26 March 2021, being the appropriate addendum for the purposes of the present case, provides that the **Vento** bands are as follows: **a lower band of £900 to £9,100** (less serious cases); **a middle band of £9,100 to £27,400** (cases that do not merit an award in the upper

band); and **an upper band of £27,400 to £45,600** (the most serious cases), with the most **exceptional cases capable of exceeding £45,600.**

191. In deciding upon an appropriate amount, we first of all have had to address the appropriate band as per **Vento.** It is our judgment this is a case that appropriately falls into the middle band, although Mr McDade, the respondents' then representative, in his email to the Tribunal on 27 May 2022, submitted to us that he regarded it as falling within the lowest banding.

192. In our judgment this is a middle band case, and it clearly falls within the middle **Vento** band. In this case, there was not any concerted campaign against the claimant, but equally it was not an isolated incident, as there were issues on the way she was treated throughout her employment with the respondents. However, we are here looking only at the established acts of direct discrimination and harassment.

193. As per the EAT judgment in **Base Childrenswear Ltd**, cited to us by Mr Swan, we readily accept that our focus must be on the impact of the discriminatory acts on the claimant. Equally, as the EAT observed, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety.

194. We have heard evidence from the claimant, and read what is stated in her medical records as produced to this Tribunal. In considering this matter, we have reminded ourselves of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12,** which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings.

195. Here, we have the claimant's own evidence, and her GP's medical records, but not any evidence from any other person with knowledge of the precise nature and extent of the claimant's injured feelings, so it has been difficult for us to differentiate between any stressors caused by the respondents, any other stressors, such as the stress that any person will suffer due to a lack of regular money coming into the household, and any additional stressors caused by the claimant's decision to prosecute this claim before the Tribunal, a feature common to all litigants.

196. While the claimant's GP was not led as a witness before this Tribunal, we have found as credible and reliable the claimant's own account of the impact of the respondents' conduct and harassment towards her.

197. In deciding this matter, we have borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer.

198. The claimant provided credible and reliable first-hand evidence about her treatment by the respondents, and the manner of it, and how that had affected her, and we found this oral testimony from her compelling and convincing. We have no doubt, having heard her evidence at this Final Hearing, that the claimant felt at the time, and still feels even now, hurt about the respondents' treatment of her while employed in their workplace.

199. In his finalised Schedule of Loss for the claimant, Mr Swan sought the sum of **£22,000** for injury to feelings. Applying a broad brush, we assess the amount payable to the claimant for injury to feelings for the acts of discrimination and harassment that she

suffered at the hands of the respondents, their management and employees, as **£25,000** in today's money, and so that is the amount which we have ordered the respondents to pay to the claimant, as per our Judgment above.

200. A **£25,000** award of compensation for injury to feelings in our considered view is not inappropriate, but a just and equitable amount, and the fact that it exceeds the **£22,000** figure suggested by Mr Swan is noted but, as we see it, that simply represents a difference of professional judgment between him as the claimant's solicitor, and us as the industrial jury exercising our judicial discretion to decide upon an appropriate level of compensation for injury to feelings.

**Interest**

201. We now turn to the question of interest on that sum. In terms of the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996,** we received no submission from either party that we should calculate interest for a different period than set forth in the Regulations, because a serious injustice would be caused if we awarded interest as per the Regulations.

202. Further, and in any event, we do not consider it appropriate to do so. We cannot, of course, alter the interest rate of 8%, as that is prescribed by law, and it is a matter in respect of which we have no judicial discretion to vary the interest rate, only the period to which that rate refers.

203. Accordingly, the appropriate interest rate is 8%. For these purposes, the day of calculation is today's date, that is to say, 28 September 2022 being the date of this Judgment.

204. We order that the respondents shall pay to the claimant the appropriate sum of interest upon injury to feelings award of **£25,000**

calculated at the appropriate interest rate of 8% p.a. for the period between 18 November 2021, being the date of the discrimination and harassment complained of, and 28 September 2022, that being the date of this Judgment, a period of **315 days.**

205. Our calculation of interest payable is **£25,000 x 0.08% x 315 / 365 days** = **£1,726.02**, as per paragraph (5) (d) of our Judgment above.

206. Accordingly, in respect of injury to the claimant's feelings, in respect of those successful heads of complaint, upheld by the Tribunal , the Tribunal awards her further compensation, in terms of **Section 124 of the Equality Act 2010**, in the amount of **£25,000**, plus interest of **£1,726.02** calculated in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

**Statutory Uplift on Compensation**

207. In the finalised Schedule of Loss for the claimant, provided on 4 August 2022, Mr Swan referred to the respondents' unreasonable failures to follow the ACAS Code of Practice at what he identified as being **paragraphs 34 and 40**.

208. We pause here to note and record that, at paragraphs 32 to 40, the ACAS Code of Practice states:

***Grievance: Keys to handling grievances in the workplace***

***Let the employer know the nature of the grievance***

*32. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of*

*the grievance. This should be done in writing and should set out the nature of the grievance.*

***Hold a meeting with the employee to discuss the grievance***

*33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.*

*34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.*

***Allow the employee to be accompanied at the meeting***

*35. Workers have a statutory right to be accompanied by a companion at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. So this would apply where the complaint is, for example, that the employer is not honouring the worker's contract, or is in breach of legislation.*

*36. The statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker. Employers must agree to a worker's request to be accompanied by any companion from one of these categories. Workers may also alter their choice of companion if they wish. As a matter of good practice, in making their choice workers should bear in mind the practicalities of the arrangements. For instance, a worker may choose to be accompanied by a companion who is suitable, willing and*

*available on site rather than someone from a geographically remote location.*

*37. To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. A request to be accompanied does not have to be in writing or within a certain time frame. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting. Workers should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow worker or trade union official or representative.*

*38. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.*

*39. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.*

***Decide on appropriate action***

*40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set*

*out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.*

***Allow the employee to take the grievance further if not resolved***

*41. Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.*

*42. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.*

*43. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.*

*44. Workers have a statutory right to be accompanied at any such appeal hearing.*

*45. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.*

209. On the evidence available to the Tribunal, we are satisfied that there was an unreasonable failure by the respondents to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), but at **paragraph 45**, rather than **paragraphs 34 and 40,** as stated by Mr Swan. Even then, we find that breach of paragraph 45 was a minor failure, rather than wholescale disregard of the Code and its suggested best practice for employers and employees.

210. We do not accept Mr Swan's submission that there was an unreasonable failure to comply with **paragraph 34** – it is clear on the evidence before us that the respondents did provide the claimant with a grievance hearing, and a grievance appeal hearing, without unreasonable delay. Indeed, if anything, both matters were "***fast-tracked",*** compared to many such instances that this Tribunal sees in many other cases involving other employers.

211. Rather than deal with the matter in house, the respondents' MD, Michael McDade, instructed an external HR consultancy Best HR. The claimant and Mr Swan attacked the impartiality of Best HR, given they were paid by the respondents, but it is inevitable that if an outside resource is used, the employer is likely to have to pay for it. Payment of a fee to an HR consultancy of and in itself is not evidence of lack of impartiality.

212. As we did not hear from any witnesses for the respondents, we did not have the opportunity to raise matters directly with Mr McDade, nor with Ms Parsons or Mr Bailey from Best HR. What we can say, however, based on our review of the documents provided, in the claimant's Bundle, is that Best HR appear to have gone through a grievance and grievance appeal process with the claimant.

213. We do not find, as Mr Swan invited us to do, that there has been an unreasonable failure to comply with **paragraph 40** of the ACAS Code of Practice.

214. Although Mr Bailey, from Best HR, had Covid, and this affected him, according to his email to the claimant at the time, it is clear to the Tribunal that there was delay in updating her after the grievance appeal hearing held on 17 December 2021, and failure by Best HR to let her see and comment upon the grievance appeal notes before Mr Bailey issued his grievance appeal outcome letter to the claimant on 30 December 2021.

215. While that delay is perhaps understandable, given the time of year, and the mitigating circumstances outlined by Mr Bailey, which we accept at face value, what we find unreasonable is that he deviated from what he had promised the claimant on 17 December 2021 that he would do, namely send her the meeting notes before giving his outcome decision.

216. When considering a statutory uplift, we have, at the Judge's direction, for this case law authority was not identified to us by Mr Swan, considered the Employment Appeal Tribunal's judgment in **Allma Construction Limited v Laing [2012] UKEATS/0041/11.** It is an unreported judgment by Lady Smith, the then Scottish EAT judge in the Employment Appeal Tribunal, on 25 January 2012, at paragraph 29.

217. Further, we have also noted the more recent judicial recognition of Lady Smith's guidance provided, at paragraphs 51 and 54 of Mr Justice Langstaff, then President of the EAT's unreported judgment of 21 October 2015 in **Bethnal Green & Shoreditch Education Trust v Dippenaar [2015] UKEAT/0064/15**.

218. In **Allma,** Lady Smith stated that : "…***an employment tribunal requires to ask itself: does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased, by how much ought it to be increased? Why do we consider that that increase is appropriate?"***

219. An award for compensation can be increased by up to 25%, if the employer has failed unreasonably to comply with the ACAS Code

of Practice Disciplinary and Grievance Procedures (2015). In **Slade & Hamilton v Biggs and others EA-2019-000687-VP/EA-2019-000722-VP**, a more recent case law authority to which we were referred by the Judge, the EAT suggested that Tribunals apply the following four-stage test when assessing whether an ACAS uplift is appropriate:

> *a. Is the case such as to make it just and equitable to award any ACAS uplift?*
>
> *b. If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?*
>
> *c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?*
>
> *d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?"*

220. Having carefully considered the facts and circumstances of the present case, and considered the EAT's four-stage test in **Slade**, the Tribunal has decided that it is just and equitable in all the circumstances to increase the compensation payable by the respondents to the claimant by **10%,** rather than the **5%** sought by Mr Swan on behalf of the claimant , and accordingly we have ordered the respondents to pay to the claimant the further sum of **£2,610.11**, being **10%** of the total compensation awarded at **£26,101.10.**

221. It is appropriate to do so, at that **10%** level, rather than the maximum **25%** uplift, so that the uplift awarded by the Tribunal does not overlap with the Tribunal's awards for compensation, both

financial and non-financial, and to avoid any element of double-counting.

222. A **10%** uplift, in our considered view, is not disproportionate in absolute terms, and so we have decided upon that level of uplift. The fact that it exceeds the **5%** uplift suggested by Mr Swan is noted but, as we see it, that simply represents a difference of professional judgment between him as the claimant's solicitor, and us as the industrial jury exercising our judicial discretion to decide upon an appropriate level of uplift.

**Financial Penalty**

223. While, on the claimant's behalf, in his closing submissions to the Tribunal, Mr Swan stated that he was not inviting us to make a financial penalty order against the respondents, in our private deliberation, we have agreed that we should consider doing so, and offer the respondents' liquidator an opportunity to reply.

224. The respondents are still a limited company on the public register, although now in liquidation, and they are still a party to these Tribunal proceedings and, as such, they are entitled, via their liquidator, to a copy of this Judgment and Reasons. It is being issued to the liquidator , along with a copy sent to the claimant via Mr Swan as her solicitor and representative in these Tribunal proceedings.

225. In light of our reserved judgment, we have found that the respondents have breached the rights of the claimant and, in these circumstances, and as it may be that this case has one or more aggravating features, such that a financial penalty might be imposed against the respondents, under **Section 12A of the Employment Tribunals Act 1996**, before we consider whether to issue such a penalty and, if so, in what sum, we have decided to give the

respondents' liquidator a period o**f no more than 14 days from date of issue of this Judgment** in which to make written representations as to why we should not do so or, if we decide to do so, what amount the penalty ought to be, having regard to all the circumstances of the case, and the respondents' ability to pay such an award, all as provided for in **Section 12A** itself. We have so ordered at paragraph (6) of our Judgment above.

226. A financial penalty can be one half of the award made by the Tribunal. When replying to the Tribunal, **within the next fourteen days**, the respondents' liquidator should also confirm whether or not payment of the sums awarded to the claimant in terms of this Judgment have been paid to her, which is another factor that may be taken into account by us.

227. Following the expiry of that 14 days from date of issue of this Judgment, we wish to make it plain that if the respondents' liquidator does not make any written representations to the Tribunal, we will proceed to make a reserved decision, without any further delay, and without the need for any attended Hearing. In that event, the full panel will meet again, remotely, and we will deal with the matter in chambers, and on the available papers.

**Closing Remarks**

228. As the respondents are now in liquidation, and while this Judgment is being sent to them, per their liquidator, the claimant's solicitor will require to take appropriate action to lodge a claim in that liquidation. The claimant is likely to be an unsecured creditor in that liquidation.

229. Except perhaps for the arrears of pay awarded to her as part of her financial loss award, the Tribunal's award of compensation for injury to feelings would seem to fall outside the power of the

Secretary of State, though the Redundancy Payments Service ("RPS"), whereby the National Insurance Fund will make certain payments to ex-employees of an insolvent employer where certain conditions are satisfied, as per **Sections 182 to 190 of the Employment Rights Act 1996**.

230. An ex-employee must make a claim to the RPS, who may make certain payments for a limited amount of the debts of the insolvent employer to the ex-employee. The claimant, though Mr Swan , or otherwise should take her own professional advice as regards her next steps.

231. As regards the respondents, we have a few closing remarks for them.

232. Firstly, the Tribunal notes and records that it is troubled by the fact that the respondents, although defending the claim, as per the ET3 response lodged by Mr McDade, chose not to attend and / or be represented and participate in this Final Hearing.

233. By that choice, they missed their opportunity to present their own evidence, cross-examine the claimant, and make their own closing submissions to this Tribunal.

234. We did take into account the available information from them, being the ET3 response lodged by Mr McDade on 14 March 2022, and his emails of 27 May and 25 July 2022, as detailed earlier in these Reasons.

235. Secondly, it is to be hoped that, arising from this case, lessons have been learned already by the respondents, about the importance of working relationships within the workplace, the need to avoid discrimination, bullying and harassment in the workplace, and how, if such issues arise, they should be dealt with by the employer.

236. Thirdly, we note that the respondents are a franchise of Vodafone. It is not a matter for this Tribunal to look further into that matter, but arising from the circumstances of this particular case, we trust that the franchisor may well wish to look into how the [redacted] Vodafone store is run, as it seems to us that there are many issues arising from this case, and what support, if any the franchisor makes available to employees of franchisees as regards LGBT+ support.

237. Finally, in writing up this Judgment, the Tribunal takes this opportunity to draw to the attention of the respondents that guidance on discrimination, bullying and harassment at work, and how to handle such complaints, is available from ACAS. It can be accessed online at https://www.acas.org.uk/discrimination-bullying-and-harassment.

238. It may be that the respondents, in ongoing, continuous professional development for staff, supervisors and managers, may wish to take account of this ACAS guidance.

**G. Ian McPherson**
_____
**Employment Judge**

**28 September 2022**
_____
**Date of Judgment**

**Date sent to parties** _____

**APPENDIX :**

**This is a copy of the written closing submissions provided to the Tribunal on 3 August 2022 by the claimant's solicitor.**

**In the Employment Tribunals (Scotland) Case number 4100336/2022**

**Ms C V Thistle Communications Limited**

**(Claimant) (Respondent)**

**Written Submissions for the claimant**

**Introductory notes**

a) All references to page numbers are references to the pages contained within the bundle unless otherwise stated.

b) All references to sections of an Act are references to the Equality Act 2010 unless otherwise stated.

c) The oral evidence referred to is not verbatim but is given based on my recollection and/or impression of the evidence given by [redacted] **Ms C**

**Preliminary matter – Unfair dismissal claim withdrawn**

d) In terms of her ET1 form, the claimant had brought a claim of unfair dismissal, p6 at 8.1 At the preliminary hearing that took place on 18 March 2022 the claimant's representative confirmed that the claimant did not have the necessary qualifying service to pursue a claim of ordinary unfair dismissal. As the unfair dismissal claim has been withdrawn, the Tribunal is invited to dismiss the unfair dismissal claim only under Rule 52 of the Employment Tribunal Rules of Procedure 2013 (as amended) – later referred to as "ET Rules".

**Credibility and Reliability**

e) I invite the Tribunal to find that the claimant, [redacted], is a credible and reliable witness. She gave her evidence in an open and honest fashion. It was consistent with the written material before the Tribunal. Her evidence was not challenged as the respondent, or someone acting on its behalf, did not appear at the final hearing that took place on 1, 2 and 3 August 2022.

**Commentary on some of the oral evidence**

f) The Tribunal heard the evidence and will be in the best position to determine the findings in fact. However, I would like to highlight certain parts of the oral evidence.

g) In terms of the procedure followed in respect of her grievance (in terms of inviting her to a meeting, offering the right to be accompanied etc.) the claimant did not have many concerns. As came out in her oral evidence however she was not provided with notes of the investigation meetings with other employees. She was not referred to occupational health despite the contractual right to do so and the respondent knowing that she took time off for counselling sessions. She expressed concerns regarding her mental health on many occasions, as reflected in both her oral evidence and in the documents. The fit notes all refer to work stress. Her main substantial concern was in relation to substance in that she would not get a fair process because Best HR was paid by the respondent. Best HR did not demonstrate independence. The notes from the meetings and the outcome letters show partiality. Where there was some conflict in the information that Best HR had (although there are no documents or other evidence in this regard, it could be assumed that either there was a denial or a different position stated) the default position was to put equal weight on both versions. It was only where the witnesses had admitted points were findings made. However, the

claimant's evidence was clear and consistent. It was supported by the chronology of events. In the claimant's view – and as supported by the written materials - Amanda Parsons's questioning was biased and the outcome letter suggested that blame was also being put on her. The claimant referred to victim-blaming in different terms at different points but her evidence was always consistent.

h) [To be supplemented with oral submissions]

**The list of Issues**

The original text is reproduced from the list of issues submitted on 20 April 2022 (with the typo of 25 Harassment - as identified previously by the Employment Judge - corrected). Based on the claimant's oral evidence and the written material, I have inserted my comments/submissions after the original text in **blue italics**.

[Note by Judge – Mr Swan's blue italics have been replaced by **black bold**.]

In summary, the list of issues are:

1. Did the respondent directly discriminate against the claimant contrary to section 13 of the Equality Act 2010 (EqA")? **Yes**

2. Did the respondent harass the claimant contrary to section 26 of the EqA? **Yes**

3. If yes to either or both, what compensation, if any, should be awarded to the claimant? **In line with the revised schedule of loss – or such other amount as the Tribunal sees fit - plus interest at the rate of 8% per annum to be calculated from 18 November 2022 until the date of the hearing.**

[Note by Judge – it is assumed that 18/11/22 is a typo, and should read 18/11/21]

4. [Should an award of expenses be made against either party?] **No**.

## SECTION 13 DIRECT DISCRIMINATION BECAUSE OF A PROTECTED CHARACTERISTIC

It is open to the Tribunal to determine that some of the alleged acts are capable of amounting to either sexual orientation or sex. As "combined" discrimination is not possible, the acts/omissions have been grouped under the protected characteristic that seems more likely on the available information.

### SEXUAL ORIENTATION

For the purpose of the direct sexual orientation discrimination claim, the claimant relies on the following comparators: Mr A Khan, Mr A Armstrong and Ms V Krikken.

1) On various dates, did Mr M Graham treat the claimant less favourably than the actual comparators (or a hypothetical part-time Retail Adviser) by

   a) assigning her shifts in excess of her contracted 20 hours per week;
   b) by putting her on shift every Saturday during her employment; and
   c) by attempting to put her on shift on Christmas Eve, Boxing Day and New Year's Eve when no other member of staff was asked to work all three shifts? **Yes**

2) Did M Graham begin to treat the claimant less favourably after he found out that she was gay? **Yes**

3) On 18/11/21 did Mr B Shahid subject the claimant to questioning about her sex life? **Yes – this was a matter that the respondent accepted –**

**please see grievance outcome letter on pages 73 to 76 – in particular page 74, numbered paragraph 4.**

4) On 18/11/21 did Mr B Shahid and Mr M Graham subject the claimant to questioning about gay men? **Yes**

5) Would similar questions be asked of a male colleague or a straight female colleague? **No. The claimant's evidence was she was 100% sure that it would be not be asked of a male colleague and very sure that it would not be asked of a straight female colleague.**

6) If so, did the above alleged act(s) amount to less favourable treatment? **Yes**

1) If so, are the claimant's circumstances materially different to those of the relevant comparators? **No, they are similar with the difference being sexual orientation. [The claimant's evidence came to this point.] Mr A Khan and Mr A Armstrong were both part time employees in the same role as the claimant. Ms V Krikken's circumstances were somewhat different in that she was an assistant manager, however it is submitted that this is not a material difference in the context of whether a straight female colleague would have been asked similar questions.**

[Note by Judge – Mr Swan's numbering is incorrect]

7) Can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment (identified above) was because of the claimant's sexual orientation? **It is submitted that the claimant has proved primary facts including those at 1 to 4 above, and that the Tribunal could properly and fairly conclude that the different in treatment**

8) If so, can the respondent prove a non-discriminatory reason for such treatment? **The respondent has not advanced a non-discriminatory reason in the ET3 and did not appear at the final hearing. The claimant was asked about this.**

9) If not, did the respondent take reasonable steps to prevent any such act(s) of discrimination from occurring so as to make it not liable for the conduct in accordance with section 109(4) EqA? **No. The respondent had not taken reasonable steps in advance. In the ET3, grounds of resistance, the respondent at paragraph 2.11 on pages 25 and 26 of the bundle indicates that the grievance officer made recommendations that were subsequently implemented. Emphasis is placed on subsequently implemented. Further, it became clear from the claimant's evidence that the respondent had not provided a code of conduct or similar. Training modules/resources that were available online were understood to be Vodafone's modules/resources. While the claimant had completed these modules they were not mandatory and it is unknown whether any other employees took the modules. The thrust of the claimant's evidence was understood to be that if training had been undertaken she would not have been put in the position that she had been.**

**DIRECT DISCRIMINATION BECAUSE OF SEX**

For the purpose of the direct sex discrimination claim, the claimant relies on the following comparators: Mr A Khan and Mr A Armstrong.

[Note by Judge – Mr Swan's numbering is incorrect]

2) Did the assistant manager, Ms V Krikken, advise the claimant shortly after she commenced employment that she and the claimant would share the cleaning between them, including cleaning the staff toilet? **Yes**

3) Were Ms V Krikken and the claimant were the only female members of staff? **Yes, at the store that the claimant worked**.

4) Were Mr A Khan or Mr A Armstrong asked to clean? **No**

5) If so, did the above alleged act amount to less favourable treatment? **Yes**

6) If so, are the claimant's circumstances materially different to those of the relevant comparators? **No. Mr A Khan and Mr A Armstrong were both part time employees in the same role as the claimant.**

7) Can the Tribunal could properly and fairly conclude that the difference in treatment (identified above) was because of the claimant's sex? **Yes**

8) If so, can the respondent prove a non-discriminatory reason for such treatment? **The respondent has not advanced a non-discriminatory reason.**

9) If not, did the respondent take reasonable steps to prevent any such act(s) of discrimination from occurring so as to make it not liable for the conduct in accordance with section 109(4) EqA. **Not on the evidence before the Tribunal.**

**SECTION 26 –HARASSMENT**

Were the following statements made in the terms, or similar terms, as set out below and did the following acts place on or around the dates given:

1) Within the first few weeks of starting, did Mr M Graham say to the Claimant "Of course you're not financially driven – you don't have children!"? **Yes**

2) On 25/10/21 did Mr M Graham say “You look like a normal lassie to me”? **Yes**

3) On 01/11/21 did Mr M Graham say “That’s a waste”? **Yes**

4) On 10/11/21 did Mr M McDade say “I didn’t know you were gay, you really don’t know what to say to people these days”? **Yes**

5) On 10/11/21 did Mr M Graham say “People in the community are hurt over the past”? **Yes**

6) On 10/11/21 did Mr M McDade follow the claimant in to the break room during her lunch and say “If any of us ever say anything inappropriate just tell us to shut up”? **Yes**

7) On 10/11/21 did Mr M McDade stand over the claimant where she sat in the break room and, referring to an earlier conversation in which he had asked her to work an extra shift, say “I was just exerting my power.”? **Yes**

8) On an unknown date – a Friday, did Mr M Graham say “I mean, love who you want to love but when it comes to affecting my child, I don’t think LGBT should be taught in schools? **Yes. This is a matter that the respondent accepted – please see grievance outcome letter on pages 73 to 76 – in particular page 74, numbered paragraph 5.**

9) On an unknown date – were the claimant, Mr M Graham, Mr M McDade and Ms V Krikken having a conversation during which Mr M McDade made comments about some customers being likely to want to speak to Mr M Graham as they would assume that he will be more knowledgeable because he is a man; and Ms V Krikken or the claimant, because they are women, may wish to “bat their eyelashes” at any older male customers. Further, did Mr M Graham laugh at these comments? **Yes**

10) On 18/11/21 did Mr B Shahid twice ask the claimant to explain how lesbians have sex? **Yes**

11) On 18/11/21 did Mr B Shahid say "I mean I think it's great you're a lesbian but I can't imagine having this conversation with a gay guy." Did Mr M Graham respond, "Aye cause you're a guy." Did Mr B Shahid reply, "Aye like, I just wouldn't want that on me. So what do you think about gay guys?" Did Mr M Graham then ask the claimant "What's a fag hag?" **Yes**

12) On 23/11/21 did Mr Graham not reply to the Claimant's text message - the claimant texted Matthew Graham to highlight that she was the only member of staff who was on the rota to work Christmas Eve, Boxing Day and New Year's Eve and requested that she be taken off the rota for New Year's Eve - despite posting a message in a group chat with other employees after she had sent it? **Yes**

13) On 13/12/21 – does the outcome of the claimant's grievance suggest that her response to the inappropriate behaviour of her colleagues encouraged them to continue asking her questions?
**Yes - please see the unnumbered fourth, fifth and sixth paragraphs on page 75. Mr Paul Bailey in his outcome letter – at page 89, numbered paragraph 3 included:**

> **"On the third point in relation to the outcome letter stating you are at fault and "victim blaming", my investigation established that this was not the case and was definitely not the intention of the investigation officer…."**

**Intention or purpose is not required. It is whether the conduct has the purpose or effect.**

If the Tribunal finds that any of the above items are established, did they relate to a protected characteristic? In particular, and using the same numbering:

1) Would Mr Graham have made this comment to a man or a straight woman? **No**

2) Was this comment made in response to Mr M Graham learning that the claimant is gay? **Yes**

3) Was this comment made in reference to a woman who Mr Graham had befriended on TikTok after learning that she was gay? Is it reasonable to draw the inference from this comment that the purpose of women is to be sexually available to men? **Yes**

4) Did Mr M McDade refer to the claimant's sexual orientation? **Yes**

5) Was this comment made in response to the claimant explaining that the word "queer" is acceptable as it has been reclaimed by the gay community? **Yes**

6) Was Mr McDade prompted to say this after hearing Mr Graham make the comment referred to at paragraph 5? **Yes. The claimant's evidence was clear on this. The context and chronology of events supports the claimant's evidence. Why would the question "If any of us ever say anything inappropriate just tell us to shut up"? be asked at that point if something had not been said before?**

7) Was this this comment of a sexual nature? **Yes**

8) Was this comment an explicit reference to sexual orientation? **Yes**

9) Does this comment suggest that women should flirt with men to increase sales? **Yes**

10) Was claimant was asked about her sex life? Was this unsolicited and unwelcome? **Yes**

11) Does this conversation explicitly demonstrate Mr B Shahid and Mr Graham were discussing gay men in a negative way? Is the question about a fag hag derogatory towards women? **Yes**

12) Was the claimant given worse shifts than colleagues – which treated her unfavourably - after the respondent found out she was gay? **Yes**

13) Was this related to the claimant's response to sexual harassment and sexual orientation harassment? **Yes**

**If any the conduct above is established**

1) Did it have the purpose or effect of violating the claimant's dignity? **Yes. The claimant's evidence was that it had the purpose. In context that is a reasonable position for the claimant to take. However, even if the conduct established did not have the purpose of violating the claimant's dignity it clearly had the effect of violating the claimant's dignity.**

2) Did it have the purpose or effect of 'creating an intimidating, hostile, degrading, humiliating or offensive environment" for the claimant? **Yes**

3) Was the conduct as set out in paragraphs 1, 3, 7, 9, 10 and 13, of a sexual nature or related to sex (as in gender)? **It is submitted that it was and the Tribunal is invited to make this finding in relation to conduct/paragraphs referred to. If the Tribunal is not able to make a finding in relation to the conduct/paragraphs referred to in all cases, the Tribunal is invited to make this finding in relation to some of the conduct/paragraphs referred to.**

4) Did the conduct complained of amount to harassment on the grounds of sex, sexual orientation and/or sexual harassment? **Yes**

5) Did the respondent take all reasonable steps to prevent the harassment? **No, not on the evidence before the Tribunal.**

**COMPENSATION**

1) If the Tribunal establishes that there has been direct discrimination or harassment, with reference to the Vento bands, what compensation should be awarded to the claimant?

**In line with the revised schedule of loss – or such other amount as the Tribunal sees fit - plus interest at the rate of 8% per annum to be calculated from 18 November 2022 until the date of the hearing.**

**No medical injury is required. It is the effect on the claimant.**
**Compensatory not punitive.**
**Potentially relevant factors**
**Personal characteristics. If a claimant reacted to the discrimination more severely than others then this should be accounted for regardless of whether the discrimination could be viewed "objectively" as less serious.**
**Any medical condition from which the claimant is suffering.**
**Factors such as panic attacks, stress, loss of confidence and interference with personal relationships.**
**The nature of the claimant's job and the effect the discrimination has on their career.**
**The manner in which the respondent dealt with any grievance brought by the claimant.**

[Note by Judge – it is assumed that 18/11/22 is a typo, and should read 18/11/21]

**[EXPENSES**

1. Should an award of expenses be made against either party?] **To be confirmed – rule quoted with my emphasis in bold**.

ET Rules – Rule 75

Costs orders and preparation time orders 75.—(1) A costs order is an order that a party ("the paying party") make a payment to— (a) another party ("the receiving party") in respect of the **costs that the receiving party has incurred while legally represented** or while represented by a lay representative; (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or (c) **another party** or a witness in respect of **expenses incurred,** or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

**Other matters arising**

i) Potential financial penalty. This is for the Tribunal to determine. In my view there are aggravating factors so it is clearly open to the Tribunal to impose a financial penalty.

j) To be discussed – but outline thoughts.

k) A difficulty that the claimant and I have is that we do not know what the formal insolvency process is, or indeed if there is such a process. The claimant's evidence was that she had passed the shop and that it was trading as normal. That does not mean that there is not an insolvency process but the manner the proceedings have been conducted by Mr M McDade on behalf of the

respondent, and the timing of the correspondence indicating that there was an insolvency process and no money in the bank is somewhat suspect. As I understand it the correspondence from the Tribunal dated 26 July has not been responded to by return as requested or otherwise.

l) In brief terms:

m) If the respondent is insolvent and there are no assets or ultimately no funds following insolvency, it may (perhaps will) be that any financial penalty imposed will not be paid/recovered. It may (most likely will) be the case that the claimant may be unable to recover any sums that the Tribunal may award to her as compensation.

n) If the respondent is insolvent and there are assets or ultimately some funds following insolvency (and while I do not know if the fine would take precedence in the hierarchy of debts), imposing a financial penalty could be to my client's detriment. [In another case that I was involved in creditors were paid 11 pence in the pound.]

o) If the respondent is not insolvent (or if there is a cash injection into the business or similar) my instructions may have been different. However, following discussion and my advice the claimant has decided not to actively seek a financial penalty in the particular circumstances.

**Legislation**

[ Note by Judge: this has not been reproduced here. In his commentary on the statutory provisions cited, which we have detailed under **Relevant Law** in our Reasons, Mr Swan stated :

- The Employment Tribunal has jurisdiction to hear the claims.

- The protected characteristics relied upon are sex and sexual orientation.
- There is no evidence or pleadings in respect of a proportionate means of achieving a legitimate aim. The draft issues were raised at the preliminary hearing. Subsequently the draft list of issues was sent to Mr M McDade. He did not comment on the list of issues before he withdrew from acting for the respondent.
- Actions of the employees are to be treated as actions of the respondent. There was no evidence regarding steps, reasonable or otherwise, taken before the conduct complained of.
- Primary position is that any acts that could be time barred are part of a continuing act/course of conduct. In the event that any act is determined to be potentially time barred it would be just and equitable to extend the time limit in relation the act or acts.]

**Cases**

**Harassment**

**Richmond Pharmacology v Dhaliwal [2009] ICR 724**

https://www.bailii.org/uk/cases/UKEAT/2009/0458_08_1202.html

21 and 22

In that case, the EAT found no error of law in the tribunal's finding that there had been harassment of an Indian employee where reference was made, by the employer, to the possibility of her being "married off in India". This remark, while not intended to violate her dignity, had that effect and the EAT could not accept the employer's argument that the remark could not reasonably have been perceived as doing so.

An individual's dignity would not necessarily be violated by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended.

**Land Registry v Grant [2011] EWCA Civ.769; [2011] ICR 1390**

https://www.bailii.org/ew/cases/EWCA/Civ/2011/769.html

53 *In my judgment the appeal fails. I agree with the EAT that the only reasonable inference from the Tribunal's decision is that the Tribunal failed to have regard to a crucial fact, namely that the claimant had chosen to reveal his sexual orientation at Lytham. In my view, in the light of that fact, and given that the Tribunal did not find that with respect to either of the first two incidents there was any intention of harassing the claimant, it would not be open to a tribunal to conclude that either of these two incidents constituted either direct discrimination or harassment. I would therefore remit the case to another tribunal to consider the other four complaints only.*

*54. I would add this. Ms Monaghan made powerful submissions to us why it is important that gay persons should be able to reveal their sexual orientation on a confidential basis, and that to break that confidence would be likely to involve a breach of Article 8 and might, depending on the circumstances, also involve sexual orientation discrimination. She referred us in particular to the ACAS guide on sexual orientation in the workplace which states in terms that "outing" someone might have those consequences. Nothing in this judgment is intended to minimise those concerns or cast doubt on the accuracy of those statements. The circumstances here, however, where someone has chosen widely to reveal his sexual orientation, puts the case into a different category.*

To be contrasted with the facts of this case

**Pemberton v Inwood [2018] ICR 1291**

Pemberton v Inwood [2018] EWCA Civ 564 (22 March 2018) (bailii.org)

Importance of context when deciding whether it is reasonable for conduct to have had the necessary effect to amount to harassment. In that case a Church of England Bishop refused to give a gay clergyman an extra-parochial ministry licence (EPML) to enable him to take up a post as chaplain at a hospital, because he had married his same-sex partner, in breach of the Church's doctrine on marriage. Underhill LJ said:

> *"I have no difficulty understanding how profoundly upsetting Canon Pemberton must find the Church of England's official stance on same-sex marriage and its impact on him. But it does not follow that it was reasonable for him to regard his dignity as violated, or an "intimidating, hostile, degrading, humiliating or offensive" environment as having been created for him, by the Church applying its own sincerely-held beliefs in his case, in a way expressly permitted by Schedule 9 of the Act. If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive. It would be different if the Bishop had acted in some way which impacted on Canon Pemberton's dignity, or created an adverse environment for him, beyond what was involved in communicating his decisions; but that was found by the ET not to be the case."* (Underhill LJ, at paragraph 89).

- In order to decide whether conduct has either of the proscribed effects, a tribunal must consider both:
- whether the claimant perceives themselves to have suffered the effect in question (**the subjective question**) and
- whether it was reasonable for the conduct to be regarded as having that effect (**the objective question**).
- It must also take into account all the other circumstances.

- The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect.
- The relevance of the objective question is that, if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

**Injury to Feelings**

**Vento v Chief Constable of West Yorkshire Police (No.2 [2002] EWCA Civ 1871 / [2003] IRLR 102)**

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 (20 December 2002) (bailii.org)

- **The lower band**: £500 – £5,000, for "less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".
- **The middle band**: £5,000 - £15,000, for "serious cases, which do not merit an award in the highest band".
- **The top band**: £15,000 - £25,000, for "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race". Only in "the most exceptional case" should an award for injury to feelings exceed the top of this band.

**ET Presidential Guidance**

https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2021-addendum-1.pdf

*2. In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the*

*upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.*

https://www.judiciary.uk/wp-content/uploads/2015/03/vento-bands-presidential-guidance-20170905.pdf

**Esporta Health Clubs & Anor v Roget [2013 UKEAT 0591/12**

Esporta Health Clubs & Anor v Roget (Practice and Procedure : Bias, misconduct and procedural irregularity) [2013] UKEAT 0591_12_2305 (23 May 2013) (bailii.org)

8 – requirement for evidence re injury to feelings

**Komeng v Creative Support Limited [2019] UKEAT/0275/18**

https://www.bailii.org/uk/cases/UKEAT/2019/0275_18_0504.html

17 – focus should be on the actual injury suffered by the claimant and not the gravity of the acts of the respondent

**Base Childrenswear Ltd v Miss N Lomana Otshudi [2019] UKEAT/0267/18**

https://assets.publishing.service.gov.uk/media/5cdaf21be5274a179b30ae66/Base_Childrenwear_Ltd_v_Miss_N__Lomana_Otshudi_UKEAT_0267_18_JOJ.pdf

Whether the discrimination was a one-off incident or a course of conduct, will be a relevant factor for the tribunal to take into account, but it will not be required to make an award in the lower Vento band in respect of a one-off incident. It is the effect on the claimant that is important

In particular paragraph 38.

Also, paragraph 43 – it is right to look at the overall sum awarded for injury to feelings and aggravated damages.

[My comment – Aggravations could be dealt with within the injury to feelings figure rather than a separate head of loss.]

**Jumard v. Clywd Leisure Ltd & Ors [2008] UKEAT 0334_07_2101 (21 January 2008) (bailii.org)**

49. *Of course, where discriminatory heads overlap, it is not simply a case of treating both forms of discrimination wholly independently and then adding the sum for each; the degree of injury to feelings is not directly related to the number of grounds on which discrimination has occurred. It may be, for example, that a tribunal takes the view that the injury to feelings in, say, a case of race and disability discrimination is not materially different from the injury that would have been experienced had it been race alone.*

*50. However, where, as in this case, certain acts of discrimination fall only into one category or another, then the injury to feelings should be considered separately with respect to those acts. Each is a separate wrong for which damages should be provided. Apart from that, it will help focus the Tribunal's mind on the compensatory nature of the award. We would suggest for example, that it would not at all follow that the level of awards should be the same for different forms of discrimination. The offence, humiliation or upset resulting from a deliberate act of race discrimination may quite understandably cause greater injury to feelings than, say, a thoughtless failure to make an adjustment under the* ***Disability Discrimination Act****.*

*51. Having said that, the courts have emphasised on a number of occasions, not least in* ***Vento*** *itself (para. 68), that at the end of the*

*exercise the tribunal must stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate, and that there is no double counting in the calculation.*

**Employment: Statutory Code of Practice | Equality and Human Rights Commission (equalityhumanrights.com) -**

7.8 *The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.*

*7.18 In deciding whether conduct had that effect, each of the following must be taken into account:*

a) *The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.*

b) *The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.*

c) *Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that*

*another person subjected to the same conduct would not have been offended.*

**Employment Judge:** **I McPherson**
**Date of Judgment:** **28 September 2022**
**Entered in register:** **28 September 2022**
**and copied to parties**