EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107984/2020

Held in Glasgow on 10 June 2022

Employment Judge: C McManus

Members: J S Anderson
J Burnett

Ms K Reilly	**Claimant** **In Person**
RT Management Bridgeton Limited	**Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:-

1. A declaration is made that the claimant's dismissal by the respondent was an unfair dismissal.

2. The claimant is awarded the sum of **£2092.80 (TWO THOUSAND AND NINETY TWO POUNDS AND EIGHTY PENCE)** as a compensatory award in respect of this unfair dismissal.

3. The claimant's claim of harassment under section 26 of the Equality Act 2010 and is successful.

4. The claimant is awarded the sum of **£10,000 (TEN THOUSAND POUNDS)** in respect of injury to feelings (solatium).

5. The respondent has made an unauthorised deduction from wages contrary to Section 13 of the Employment Rights Act 1996 in terms of unpaid wages and the respondent is ordered to pay to the claimant the sum **of £26.16 (TWENTY SIX POUNDS AND SIXTEEN PENCE)** in respect of such unpaid amount.

6. A declaration is made under section 30(3)(a) Working Time Regulations 1998 ('WTR'), that the respondent has refused to permit the claimant to exercise her right to an uninterrupted rest break under Regulation 12 of the WTR.

7. Compensation is awarded to the claimant under section 30(4) WTR, being the sum **of £517.44 (FIVE HUNDRED AND SEVENTEEN POUNDS AND FORTY FOUR PENCE).**

REASONS

Background

1. There were telephone Case Management Preliminary Hearings ('TCMPHs') in this case on 3 March and 2 September 2021. The claims are in respect of: -

    - Automatic Unfair Dismissal
    - Failure in duty to make reasonable adjustments (section 20/ 21 of Equality 2010)
    - Harassment (section 26 of Equality Act 2010 re. a number of protected characteristics)
    - Unlawful deductions from wages

2. The claimant was unrepresented. The claimant requested that adjustments be made by the Tribunal, in particular, rest breaks as required and that those present in the hearing room avoid using perfume, spray deodorant or other aerosol chemicals such as hairspray. Those adjustments were made.

3. A representative for the respondent appeared at both TCMPHs. On INSERT June 2022 the Tribunal and claimant received correspondence from the respondent's HR function informing that the respondent had 'ceased trading' in March 2022.

4. Case Management Orders were issued with the Notes following the TCMPH in March and September 2021. Without explanation, the respondent did not comply with the Orders issued on them.

5. There was no appearance for or on behalf of the respondent at this Final Hearing. Evidence was heard on oath or affirmation from the claimant and one other witness, Max Fullerton, who was previously employed by the respondent in a similar role to the claimant's.

6. The respondent had not complied with the Case Management Orders re a Joint Bundle of Productions. The claimant relied on papers contained in two separate Bundles, each ordered, paginated and numbered consecutively within each Bundle. Documents within these Bundles are referred to by their page number within each Bundle: B1(1 – 108) and B2 (1 – 83).

7. On 30 May 2022 the Tribunal received email correspondence from RaceTrack HR stating:- informing that the respondent had 'ceased to trade' on 31 March 2022. A reply was sent from the Tribunal office noting that the respondent remained listed in Companies House as active and asking whether there would be any attendance for or on behalf of the respondent. The reply to this was a re-statement that the respondent has ceased to trade and an attached accountant letter also stating that position.

8. At the Hearing, the claimant produced documents from Companies House showing a change in registered address for the respondent, effective from 13 May 2022. The address set out above for the respondent is the address shown in Company House records to be the respondent's registered address from 13 May 2022 .

Issues

9. The issues for determination by this Tribunal were :-

Unfair Dismissal

- What was the reason for the claimant's dismissal?
- Was that dismissal an automatically unfair dismissal in terms of the Employment Rights Act 1996 ('the ERA')?

Harassment

- Was there unwanted conduct related to the claimant's protected characteristic(s) of disability / sex / belief of veganism which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, offensive or humiliating environment?

Unlawful Deductions

- Were there unlawful deductions from the claimant's pay in respect of:-
  - Untaken rest periods, and / or
  - Cancellation of a Just Eat order in September 2020.

Remedy

- What compensation (if any) is the claimant entitled to?

Relevant Law

10. The Tribunal's overriding objective is set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'), being:-

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

Dealing with a case fairly and justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Wages

11. Part II of the Employment Rights Act 1996 ('the ERA') contains provisions in respect of Protection of Wages. Section 13 provides for the right of an employee not to suffer unauthorised deductions from wages. Section 13(3) states:

'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.'

12. Sections 17 – 22 ERA apply to cash shortages and stock deficiencies in retail employment.

13. Section 27 sets out provisions with regard to meaning of wages, including at section 27(1)(a) 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.'

Working Time Regulations

14. Entitlement to rest breaks is provided for in section 12 of the Working Time Regulations 1998 ('WTR'):-

(1) An adult worker's daily working time is more than six hours, he is entitled to a rest break.

(2) …

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an

uninterrupted period of not less than 20 minutes and the worker is entitled to spend it away from his workstation if he has one.

Section 30 WTR sets out the provision re remedies for breach.

The details of the rest break to which an adult worker is entitled under paragraph (1), including its duration is entitled to a rest period of not less than

Unfair Dismissal

15. It is for the employer to show the reason (or if more than one, the principal reason) for the dismissal (section 98(1) of the Employment Rights Act 1996 ('ERA')).

16. Chapter I of Part X of the ERA contains provisions in respect of dismissals for certain reasons. This includes:-

- Section 100 (Health and Safety cases)
- Section 103A (Protected disclosure)
- Section 104 (Assertion of a Statutory Right)
- Section 104A (The National Minimum Wage)

17. Section 43B(1)(d) ERA provides that any disclosure which in the reasonable belief of the worker is made in the public interest and tends to show that the health and safety of any individual has been, is being or is likely to be endangered is a qualifying disclosure (protected disclosure).

18. Section 103A provides that the dismissal of an employee is automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure. Section 124(1A) provides that in cases of automatically unfair dismissal, where the dismissal was by reason of the employee having made a protected disclosure in contravention of section 103A, the statutory maximum compensatory award limit does not apply.

19. The provisions in respect of compensation for unfair dismissal are set out at sections 118 – 126 ERA. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Equality Act 2010

20. Sections 5 – 12 of the Equality Act 2010 set out the meaning of the protected characteristics. The relevant protected characteristics are –

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

21. Section 6 of the Equality Act provides a definition of "disability" as follows:

(1) A person (P) has a disability if:

(a) P has a physical or mental impairment , and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

22. S212(1) of the Equality Act provides that "substantial" means more than minor or trivial.

23. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2(1) provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last

for at least 12 months or is likely to last for the rest of the life of the person affected.

24. Para (5) provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.

25. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in *Aderemi v London and South Eastern Railway Ltd* 2013 ICR 391. The burden of proving disability lies with the claimant.

26. The claimant relies on section 26 of the Equality Act 2010 (Harassment):-

"(1) a person (A) harasses another (B) if -

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

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

(i) violating A's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for A…

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

(a) the perception of B;

(b) the other circumstances of the case;

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

27. Guidance on the extent of awards of compensation for solatium (injury to feelings) was given by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police 2003 ICR 318, CA.* These guidelines provide for three broad

bands: a top band applicable to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment; a middle band applicable to serious cases that do not merit an award in the higher band; and a lower band applicable to less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

28. Following the decision of the Court of Appeal in *De Souza v Vinci Construction (UK) Ltd 2017 IRLR 844, CA*, the bands are updated in Presidential Guidance issued by the Presidents of the Employment Tribunals in Scotland and In England and Wales. For claims presented before 5 April 2022, the relevant bands are:-

- a lower band of £900 to £9,100 (for less serious cases)
- a middle band of £9,100 to £27,400 (for cases that do not merit an award in the upper band), and
- an upper band of £27,400 to £45,600 (for the most serious cases), with the most exceptional cases capable of exceeding £49,300.

29. The consideration of the claims under the Equality Act is in terms of the burden of proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others* 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870). The initial burden of proof lies with the claimant to demonstrate her case and prove facts from which, absent a reasonable explanation, the Tribunal can conclude discrimination has occurred. If the claimant is able to show on the face of it that there has been treatment that could amount to discrimination, then the burden of proof would shift to the respondent. The respondent was not present to seek to prove on the balance of probabilities that its treatment of the claimant was in no sense because of his protected characteristic.

Code of Practice

30. In determining the claims under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

Equal Treatment Benchbook

31. The Tribunal took into account the relevant guidance in Equal Treatment Benchbook (updated February 2021), in particular Chapter 1 re litigants in person.

Findings in Fact

32. The following facts were material facts to the claimant's claims which were found by the Tribunal to be proven:-

33. The respondent operates a franchise of Subway, which is an international brand of sandwich stores. The respondent and its associated companies operate a number of these franchises in Scotland. The claimant was employed as a 'Sandwich Artist' at their franchise which operates out of a petrol station in the Bridgeton area of Glasgow (London Road). Prior to applying for the job there, the claimant had been employed as a Quality Assurance Manager. She had been made redundant from that job as a result of consequences from the Covid 19 pandemic. She required to secure alternative employment in a sector which remained open during the pandemic restrictions. The claimant has two young children. She required to earn money to pay for her mortgage and bills.

34. The claimant has been diagnosed with the following conditions:-

- Postural Orthostatic Tachycardia Syndrome (POTS)/ Dysautonomia
- Hypermobile Ehlers Danlos Syndrome (EDS)
- Mast Cell Activation Syndrome (MCAS)
- Histamine Intolerance

35. The claimant's diagnoses followed her examinations by a number of medical specialists, since October 2020, including Dr Alan Hakim (Consultant Physician and Rheumatologist), Dr Alexandra Croom (Consultant Allergist), Mr W A S Taylor (Consultant Neurosurgeon), Mr Luke Cascarini (Consultant Oral and Maxillofacial, Head and Neck Surgeon), Professor Vik Khullar (Consultant Obstetrician and Gynaecologist), Dr Sanjay Gupta (Consultant

Cardiologist) and Dr Arnold Deering (Consultant Physician). Their opinions are set out in correspondence and medical reports produced at B1/ 72 - 91 Her medical history is described as '*complex'* (B1/ 79). The symptoms experienced by the claimant are long standing, having been present throughout most of the claimant's life. The claimant has experienced symptoms since childhood. The symptoms worsened considerably following the claimant contacting pneumonia in 2012. Since then, the symptoms have had a significant effect on the claimant's day to day activities. The complex and varied nature of the symptoms led to a delay in diagnosis.

36. Dr Sanjay Gupta (Consultant Cardiologist) wrote following his consultation with the claimant on 17 April 2021:-

"*This is to confirm that Kady Reilly is under my care for a long-standing constellation of extremely debilitating symptoms which are all consistent with a unifying diagnosis of dysautonomia."*

37. Dr Gupta also wrote following his consultation with the claimant on 22 May 2021:-

"*…she continues to be troubled with extremely debilitating symptoms, even on performing the most minor of quotidian tasks…"*

38. The claimant was interviewed for her position with the respondent by then Manager Nicola McIntyre. Nicola McIntyre's employment with the respondent ended soon after the claimant began her employment with them. The interview was on 7 August 2020. At the interview the claimant told Nicola McIntyre that she was undergoing medical investigations. The clamant told Nicola McIntyre that she was suffering from fatigue and joint problems and that she had a number of allergies. The claimant's employment with the respondent began on 8 August 2020. She was employed as a 'Sandwich Artist'. Her duties included serving customers, preparing and serving food and drink orders for both in person and on line customers and cleaning tasks.

39. A 'Welcome Pack' including Policies and the Employee Handbook was emailed to the claimant by 'RaceTrack HR System' on 7 August 2021 (B2/6).

The attachments to that email are in documents at B2/ 7 – 68. This includes an 'Environmental Policy' which includes the following statements:-

- "*The company will maintain a safe environment for all employees, customers and contractors."*

40. The Safety Policy (B2/ 10) includes:-

- "*In addition to complying with strict health and safety measures as required by legislation, it will be the Company's policy to promote, and give high priority to, the continuing establishment of a healthy and safe working environment."…*

- *The Company's objective is to ensure that for the protection and health, both of its employees and the general public, working conditions and practices are established and continuously reviewed to achieve a safe, healthy and injury-free operation by means of :*

    - *A safe and healthy work environment*

    - *Appropriate training and employee induction*

    - *Identification of possible hazards to health and safety in the workplace and the implementation of plans to eliminate or control such hazards.*

    - *Provision of appropriate and adequate protective clothing…."*

41. The 'Deductions from Pay Agreement' (B2/ 11- 12) includes:-

"*Any cash shortages. This includes discrepancies in Paypoint and Lotto, at the end of the shift will be the responsibility of the shift on duty and must be made good by that shift or stock deficiencies that you are found to be responsible for. Any such shortages will be deducted from wages."*

42. In the Employee Handbook (B2/29 – 68), in the section 'Joining Our Organisation' and under the heading 'Probationary period', it states:-

"*You join us in an initial probationary period of six months. During this period your work performance and general suitability will be assessed and, if it is*

satisfactory, your employment will continue. However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action(which may include the extension of your probationary period) or terminate your employment at any time."

43. The claimant's Line Manager was Himanshu Lahar. Himanshu Lahar was aware that the claimant was undergoing medical investigations. On most occasions the claimant worked alone for the respondent. She was required to prepare food, carry out kitchen duties, including washing up, serve customers (both in person and via the Just Eat machine), clean, cash up and drop cash in the safe at the end of the shift. The claimant normally worked 16 hours a week on day shifts, working from 9am until 7.30 or 8.30pm. The claimant required to take two/ three days to recover from working for the respondent. This caused her to miss attending classes at university. Her fatigue was exacerbated by long periods of standing and the lack of provision of a seat at the Subway counter.

44. Further to the information passed on by the claimant at her interview, on 8 September 2020, Ryan Sutherland from the respondent's HR department contacted the claimant. Following that discussion, Ryan Sutherland completed a medical assessment form in respect of the claimant (B1/94-95). The medical declaration states:-

"I have atopic dermatitis which means I can't use hand sanitiser but I have prescription hand wash and lotion I carry at all times. I also carry an EpiPen due to allergies (airborne/if eaten)."

45. The claimant raised with Ryan Sutherland that the medical declaration did not contain all the information she had provided in respect of her health problems and the symptoms she was experiencing. Ryan Sutherland's position was that the Declaration could only contain information in respect of symptoms for which the claimant had received a diagnosis. The claimant explained that she was under medical investigation in respect of her various symptoms. She described those symptoms to Ryan Sutherland.

46. The claimant was concerned about lack of steps taken by the respondent to minimise risk from Covid. She believed that the respondent did not take seriously their obligations to minimise the risk from Covid. In particular she was concerned about:-

- Lack of signage e.g. to encourage the wearing of face masks, social distancing, etc.
- Lack of screens
- Lack of enhanced cleaning procedures
- Lack of social distancing
- No one way system in place
- Cardboard promotional material at the till, which couldn't be cleaned.

47. The claimant had considerable contact with Himanshu Lahar at the start of her employment, when he was present giving the claimant training e.g. on making sandwiches. The claimant raised a number of concerns with him. She raised concerns about health and safety practices re the food being served to customers; lack of provision of protective equipment (including failure to provide suitably long gloves for dish washing in the deep commercial sink); lack of provision of a bin in the toilet for sanitary waste disposal; being unable to take rest breaks; lack of steps taken to minimise risk of spread of Covid. When the claimant had worked in another Subway franchise she had not worked alone and could take uninterrupted rest breaks. When the claimant had worked in another Subway franchise the two employees on shift had been allocated one hour at the end of the shift to clean up. The claimant raised concerns with Himanshu Lahar that she was expected to clean up on her own, in half an hour at the end of the shift, and to continue to serve customers for as long as possible. The claimant raised concerns that in the allocated time it was impossible for normal clean up duties to be completed, and that additional cleaning should be being carried out during the Covid pandemic. Following the initial training period, the claimant's shift sometimes crossed with the shift worked by Himanshu Lahar. During these half hour

crossover periods, the claimant continued to raise her concerns with him verbally.

48. Max Shearer also worked for the respondent at the London Road petrol station. In September 2020, Max Shearer received notification that he required to self-isolate because he had been identified as being a close contact of someone who had tested positive for Covid. Max Shearer was encouraged by Himanshu Lahar to attend work during the period when he required to self-isolate. Himanshu Lahar encouraged him to attend work on the basis that it would be difficult to get cover and that Himanshu Lahar would require to work long hours to cover the shift and that he would be '*fine so long as [he] washed hands and wore a mask."* At that time the guidance from the Scottish Government was to self-isolate for 14 days after contact with a positive Covid case, even with a negative PCR test.

49. Over the course of the claimant's employment with the respondent, Himanshu Lahar made disparaging comments to the claimant about her appearance. He was aware that the claimant was undergoing a number of medical tests and examinations. He said that '*NASA should send her back to space*' and made comments about her being '*experimented on*' and being '*a science experiment*'. Himanshu Lahar knew that the claimant had many allergies and required to carry an EpiPen. He tried to encourage the claimant to eat foods which she is allergic too. He made comments such as '*Go on, what's the worst that could happen?*'. He waved under the claimant's nose food which the claimant is allergic to, saying '*Go on, eat it, what could happen?."* He often said '*Eat like a man, walk like a bull*.' When the claimant objected to that on the basis that she is allergic to the foodstuff, he commented '*NASA should send you back to Mars'*. The claimant then disclosed to Himanshu Lahar that she is vegan. He laughed at her, made jokes about her veganism and encouraged her to handle and eat meat. The claimant raised concerns when Himanshu Lahar served dairy cheese to a customer who had ordered a vegan sandwich, which ought to have been served with a vegan cheese alternative. Himanshu Lahar's position was that the vegan alternative cheese had run out and that it should be substituted with dairy cheese. The claimant told him that it was dangerous to serve a dairy product to someone who is

allergic to those products and that allergic reactions could be dangerous and even fatal. She told him that it was morally wrong to serve dairy products to someone who is vegan and choses not to ingest dairy products.

50. On some shifts worked by the claimant she was the only employee working for the respondent at that premises. The claimant required to serve customers when they were at the Subway counter. On the occasions when the claimant was working alone, the claimant had no opportunity to take an uninterrupted rest break. Cover for rest breaks was provided by shifts being arranged with a short overlap. That allowed a rest break to be taken during this overlap period, at the end or start of a shift. On some shifts the claimant could not take a rest break.

51. There was a single toilet provided for the use of staff at the petrol station premises where the claimant worked. That toilet was to be used by all staff, whether working at the Subway counter or at the petrol station counter. During the period of time when the claimant worked there, there was no sanitary waste disposal bin provided in the toilet. The claimant required to come out of the toilet with used sanitary products and find a suitable bin to dispose them. The claimant was embarrassed by this. It affected her dignity. The claimant raised the issue with both Himanshu Lahar and the General Manager of the petrol station. The claimant was told that she was '*the only female of menstruating age who used the toilet*' and that she should dispose of the sanitary products in another bin. Himanshu Lahar told her to dispose of the sanitary products in the bin in the kitchen area. That required the claimant walking through the petrol station premises and in front of customers. The claimant did not dispose of her waste sanitary products in the kitchen bin, on the basis that that was unhygienic. The claimant went out to the forecourt and disposed of the sanitary products in a bin there. That caused embarrassment to the claimant and affected her dignity because she felt that the other staff then knew when she was menstruating because she had to often go out to the forecourt to dispose of the used products.

52. The claimant required to wash items as part of her duties. These items were washed in the deep commercial sink in the kitchen area. The respondent did

not provide the appropriate rubber gloves for this purpose. The gloves provided were domestic use rubber gloves, which were not long enough for use in the deep sinks and allowed water and cleaning products to have contact with skin on the arms and hands. The use of these gloves while washing caused the claimant to suffer from skin problems. The claimant complained to Himanshu Lahar about the inappropriate provision of rubber gloves. The appropriate gloves were not provided during the claimant's employment with the respondent. The claimant raised concerns with Himanshu Lahar about health and safety practices at the Subway where the claimant worked. The claimant had worked at another franchise of Subway two years previously. She was concerned that the respondent's practices were not in line with those which she had experienced when working in that other franchise. The claimant was concerned that there was not enough time or staffing resources at the end of a shift for the required amount of cleaning to be carried out. On some occasions the claimant worked beyond the end of her shift in order to carry out cleaning duties. She was not paid for that overtime.

53. The claimant was aware from her experience with Subway that meatballs should be disposed if not used within 4 hours of being heated and kept warm. Himanshu Lahar told the claimant that she should not dispose of meatballs after that period. He told her that the meatballs should be left for the duration of the shift (up to 10 hours) and if not used during the shift should be put in the fridge to be reheated and served the following day. The claimant did not follow those instructions because she was concerned about the risk to the health and safety of customers. Himanshu Lahar told the claimant that lettuce should not be discarded when it reached its use by date. He told her that the owners had instructed that nothing should be put through as waste. He instructed her to serve lettuce which was five days past its use by date and was turning brown. When food had reached the use by date on the printed label, he would print off another label with a later use by date and continue to serve the out of date product to customers.

54. The claimant raised concerns with her line manager Himanshu Lahar about:-

- Food not being disposed of as waste on expiration of the relevant date.
- Replacement labels being printed and put on food to substitute a later use by date, if the product had not been used by its original use by date.
- Meatballs being defrosted then kept warm longer than the maximum 4 hours (sometimes for up to 10 hours) and not being disposed if not used after being kept warm.
- Meatballs being put back in the fridge after being defrosted and kept warm, and then being reheated the next day.
- Dairy cheese being used as a replacement for the advertised vegan cheese alternative.
- Lack of provision of a bin or sanitary waste disposal unit in the toilet.
- Lack of provision of adequate protective gloves when washing dishes.
- Lack of time to clean at the end of a shift

55. Himanshu Lahar did not seek to remedy the issues in respect of the concerns made by the claimant. He appeared unconcerned about the issues. He continued to serve dairy cheese where vegan substitute cheese had been ordered. The claimant and Max Shearer did not follow the instructions to serve dairy cheese instead of the vegan replacement.

56. The claimant contacted Environmental Health about her concerns. She reported the issues in respect of :-

- Lack of steps being taken to prevent the spread of Covid.
- Food not being disposed of as waste on expiration of the relevant date.
- Replacement labels being printed and put on food to substitute a later use by date, if the product had not been used by its original use by date.
- Meatballs being kept warm longer than the maximum 4 hours (sometimes for up to 10 hours) and not being disposed if not used after being kept warm.

- Meatballs being put back in the fridge after being kept warm, and then being reheated the next day.

- Himanshu Lahar not regularly washing his hands and handling food without gloves and after handling cash

- Lack of provision of a bin or sanitary waste disposal unit in the toilet.

57. The claimant contacted Environmental Health and reported these concerns on 15 September 2020. The claimant raised these concerns with Environmental Health on an anonymous basis. As a result of these issues being raised by the claimant, on 23 September 2020 an Environmental Health Officer carried out an inspection of the respondent's premises in the London Road petrol station. Max Shearer was present at the time of the inspection.

58. As a result of the visit from an Environmental Health Officer, the respondent was instructed to carry out actions at the London Road premises. They were instructed to:-

- Put up signage encouraging wearing of face masks

- Require staff to wear face masks at work

- Put a one way system in place

- Remove carboard promotional material at the till

- Put up a screen at the till area

- Put up a notice requesting customers stand back from the till area.

- Provide a bin in the toilet.

59. Following the visit by the Environmental Health Officer, Himanshu Lahar made comments to the claimant about the concerns raised by Environmental Health having been previously raised by the claimant. He said to her '*They asked about the bin. That's what you asked about wasn't it?*' and '*They asked about the date stickers. That's what you asked about, as well, didn't you?'* The claimant felt the atmosphere at work to be tense after the visit from the Environmental Health Officer.

60. The claimant had the amount of £12.60 deducted from her wages. This is shown on wage slip dated 11 September 2020 (B2/47). The deduction is noted as a 'discrepancy'. The claimant had no prior notice that this deduction was being made. The claimant queried why this had been deducted. She sent an email to Amy Hurles in the respondent's HR department saying '*Can you please tell me what 'discrepancies' are and why this has been deducted?'.* That email is at B2/48. The What's App messages at B2/49 and B2/51 show messages between the claimant and other employees of the respondent who had had deductions made from their wages by the respondent without notice or detail as to what the deduction was for. The claimant was told by the respondent's HR department to contact her manager to find out what the deduction was in relation to. The claimant did so by What's App message to Himanshu Lahar on 14 September 2020 (@14.22). The screenshots at B2/50 show the claimant's messages to Himanshu Lahar re the deduction, and his reply, which was that he would check with HR. The claimant received an email from Ryan Sutherland at the respondent's HR department at 15.54 on 14 September. That email stated:-

"*A full description of the Discrepancies can be found in your 'Deductions from Pay Agreement' which was signed on 7 August 2020 when completing your new starter form. In regards to the Discrepancy this information would come from your line manager, HR are only provided with a monetary value. In the first instance, we ask that your ask your line manager what this Discrepancy was."*

61. The claimant replied:-

"I already asked my line manager who didn't know and said he'd contact HR to find out."

62. On 16 September 2020, the claimant again sent this email stated:-

"*I still don't know why a deduction was made from my wage as my manager said he didn't know and he'd need to speak to HR as I said in my email on Monday.*

I never before had anyone deduct any value from my wage, including when I worked for Subway in the past. I referred to the relevant section of the Newstart form and would imagine in order for a deduction to be made there needs to be good cause and someone should be able to communicate the reason to me when I am paid. If a reason is not known, why has a deduction occurred and is this an issue that happens frequently?"

63. Ryan Sutherland replied on the same day stating *"We have spoken with your line manager today and he will discuss this with you to give you further clarity."*

64. Document B2/52 shows screenshots of What's App messages sent by the claimant to Himanshu Lahar on 20, 23 and 28 September 2020 again asking what the deduction from her August wage was for, and the replies. Himanshu Lahar replied to applied to the claimant on 28 September 2020 saying:-

"*I check money was deducted for big order that was cancelled just waiting for refund from Just Eat and you will credit back when money comes back Megan from head office is still chasing for it."*

65. The claimant queried why the amount deducted was not the same as the cancelled order. The cancelled order referred to was an order which had been placed through Just Eat, automatically accepted by the Just Eat order machine, then cancelled. There was an issue with the Just Eat order machine which had caused the order to be accepted then cancelled. On 30 August 2020, the claimant had sent messages about the cancelled order on the What's App Group set up by the respondents to communicate with its employees. Those messages are at B2/46. The claimant was told to contact Just Eat about the issue, and did so. Max Shearer put a message up on that chat on the same day, stating that the same problem had occurred with him.

66. The claimant has not received payment from the respondent in respect of this deduction of £12.60.

67. The screenshots of What's App messages at B1/9 – B1/12 show the claimant having raised her concerns in writing about lack of rest breaks, the lack of time to conduct a clean at the end of a shift, the lack of deep cleaning, the risk to public health and her working in excess of her shift hours in order to clean.

These messages were posted by the claimant on 5 October 2020 on the What's App group used by the respondent to communicate with its employees. The participants in that group included Himanshu Lahar and the respondent's Director and owner, Shamlay Sud. Shamlay Sud replied to the claimant's messages on the What's App group on 5 October 2020 as follows (B2/12):-

"*This conversation needs to now be made face to face. To explain how organisation and how to work the day. Yesterday was excessively quiet. Sat was busy right up to the end so it is understandable that Max worked late and it has been noted. And yes you would have had to do the prep the following morning.*

This conversation will not continue any further now. Then pick up the phone or come in. It is all about organisation and nothing more."

68. Also on 5 October 2020 Himanshu Lahar sent the claimant a What's App message saying '*I want to see you today in the evening.".* The claimant replied "*I won't be able to do that. I will be looking after my children after university."* Those messages are shown at B2/12.

69. The claimant did not attend work with the respondent after 5 October 2020. The claimant was in London on 6 October 2020, attending a medical appointment. The claimant expected to meet with Shamlay Sud to discuss her concerns on her return to work. On 8 October 2020 the claimant's employment was terminated by a phone call from Amy Hurles. The claimant was told that she had not passed her probation period. The probation period was normally for six months. The claimant had received no previous notification that her employment would be reviewed earlier in the probation period or that her standard of work was such that she was likely not to be employed after her probation period. The issues which the claimant had put in writing in the What's App messages on 5 October 2020 were not discussed with her after that date.

70. The claimant tried to obtain alternative employment. There were difficulties in doing so because of the restrictions caused by the Covid pandemic. The

document at B2/107 is a summary of the jobs the claimant applied for after being dismissed by the respondent. The claimant obtained employment at Glasgow University, starting on 5 January 2021. The claimant had a net wage loss of £2092.80 in the 16 week period between 8 October 2020 and 5 January 2021.

Submissions

71. The claimant relied upon her own evidence, the documentary evidence relied upon by her and the evidence of Max Shearer. It was her submission that that evidence supports her position.

72. She submitted that her dismissal was an automatically unfair dismissal for making protected disclosures. She submitted that she was dismissed because she had raised concerns about health and safety practices and entitlement to rest breaks. She relied upon the timing of her dismissal and the hostile environment she had experienced after the visit from Environmental Health.

73. She sought a compensatory award of £2092.80, based on her being out of work for 15 weeks after her dismissal and having worked for the respondent for 16 hours a week, at £8.72 an hour.

74. Following discussion, the claimant progressed her claims under the Equality Act in reliance on section 26 only. She submitted that Himanshu Lahar's conduct caused her to suffer a very intimidating and hostile environment which affected her dignity. Her position was that the lack of proper sanitary waste disposal facilities was degrading and embarrassing. She had felt humiliated because of the comments relating to her medical symptoms and the investigations which were being carried out. She found the comments and behaviour in relation to her veganism to be offensive. She had been concerned about the breaches in health and safety standards,

75. She believed that the deduction from her wages re the cancelled Just Eat order was unlawful, on the basis that she did not know what the deduction had been made for and because she had not been at fault. She sought the sum of £12.60 in respect of this deduction.

76. She relied upon the Working Time Regulations providing entitlement to an uninterrupted 20 minute rest break, and her evidence that she never received a rest break away from her work station and if breaks were received they were at the beginning or end of a shift. She sought the sum of £17.44 in respect of breaks worked, calculated on the basis of the National Minimum Wage.

77. She relied on proper health and safety practices not having been conducted by the respondent, including the failure to provide adequate gloves for washing, which caused her harm.

78. She submitted that she was due the sum of £26.16 in respect of three hours unpaid overtime. She described that as a '*very conservative estimate'*.

79. She described her time with the respondent as a '*really poor experience'* and that she had never before been unsupported at work by a manager and owners of the business. She relied on her dismissal then requiring her to look for a job during a Covid lockdown, which she described as '*very stressful'*. Her position was that she is a home owner and that she nearly had to drop out of her university degree to find work to pay her mortgage.

80. It was the claimant's submission that respondent had sought to avoid the consequences of her bringing her claims to the Employment Tribunal, by not appearing at the Final Hearing and by informing the Tribunal that they had 'ceased to trade'. She believed that the respondent should be held accountable for their actions. She believed that the respondent had no respect for her or for the court process. She relied upon the information from the respondent that they had 'ceased to trade' in March 2022 not being provided until June 2022. She relied on the respondent's failure to comply with the Orders issued by the Tribunal.

81. She submitted that she is entitled to an award in respect of solatium (injury to feelings) and that with regard to the *Vento* bands, that award should not be in the lower band because it was not a one off incident. She submitted that if in the lower band, then the award should be at the higher end on the basis that it was a serious case of harm where she was continually mocked for her protected characteristics. Her position was that her dismissal was not

because of her protected characteristics, but because she had made protected disclosures.

82. There was no appearance for or on behalf of the respondent and therefore no evidence or submissions presented by the respondent. We took into account the respondent's position set out in the ET3 and the completed Agenda form. In their completed Agenda form, the respondent gave the name of the claimant's line manager as Himanshu Lahar and stated '*Himanshu not being the named respondent directly it would be helpful to hear his evidence.'*

Comments on Evidence

83. The claimant relied on documents in B2 showing a change in the respondent's registered address. This included (at B2/2) an email from RaceTrack Pitstop sent to the claimant and the Tribunal on 7 June 2022 stating:-

"We have been informed that RT Management Bridgeton Ltd are no longer trading. An email was sent to glasgowet@justice.gov.uk on 30.05.2022 to inform the court that RT Management Bridgeton Ltd ceased trading as from 31.03.2022. I have attached a letter from their accountants confirming this information."

84. That email had very similar branding to the respondent's, with just the name being different. There was no explanation for the delay in notification between 31 March and 7 June. Documents at B2/6 show information from Company House website detailing a change of address for the respondent on 13 May 2022 from 198 Nithsdale Road Glasgow to St James Church 30 Underwood Road Paisley PA3 1TL. The respondent's address has therefore been changed on the Tribunal's records to that registered address. It is noted that that change of address post dates the address said by Race Track Pitstop to be the date when that company ceased to trade. The document at B2/3 also shows a print out from Company House website showing the respondent's company status as active. Companies House replied to communication from the Tribunal office and confirmed that as at 16 June 2022 no action had been taken to dissolve the company. Documents at B2/4 and B2/5 showed information from Companies House that a separate company, RT Bridgeton

Ltd, was incorporated on 25 March 2022, with the registered address of St James Church 30 Underwood Road Paisley PA3 1T, and that the Director of both companies is Shamly Sud.

85. We found the claimant to be an entirely credible, reliable and impressive witness. Her evidence was supported by and consistent with the documentary evidence she sought to rely on. She did not seek to exaggerate her claims. The amounts she sought in respect of unlawful deductions from wages, rest breaks and overtime were in line with her evidence and the evidence of Max Shearer

86. The claimant described the requirement for her to walk through the premises with sanitary waste because of the lack of a sanitary waste disposal bin in the toilet as '*really humiliating*.' She described being '*shocked'* at Himanshu Lahar's flippant attitude towards allergies and the possible consequences of a person consuming a substance which they had a severe allergic reaction to. She said that she had '*never been disrespected in a work environment before'*. She described the process which she was going through at the time to obtain a diagnosis as '*very stressful'*. The claimant described her employment with the respondent as '*a really poor experience'* and '*very stressful'*.

87. Max Shearer was also found to be entirely credible and reliable. We accepted his position that he had left his employment with the respondent on good terms and had '*no axe to grind with them'*. His evidence supported the position of the claimant, without any evidence of collusion. He volunteered his views on the claimant's good standard of work. We accepted his position in respect of instructions from Himanshu Lahar re steps that should be taken re date labels etc when they had notice of an inspection from Subway. We considered it to be significant that Max Shand pracearer and the claimant were consistent in their evidence of working conditions with the respondent and the lack of steps taken by the respondent to reduce the risk of spread of Covid. We accepted his evidence on the instructions which had been given by Environmental Health at their visit to the London Road premises. We accepted his evidence that there was no bin in the single staff toilet while the

claimant was employed there, although one was supplied *'a month or so'* after the visit from Environmental Health. We accepted his evidence on having had deductions of £1.50 from his wages and not being aware of the reason for this, but presuming it to be in relation to a *'can of juice'* as that was the cost of a can and he knew that if there were any stock shortages the cost of them would be deducted. We accepted that he has raised issue with this with HR but had left it after being told to put it in writing.

88. The evidence from the claimant and Max Shearer and the documentary evidence relied upon supported the claimant's case and did not support the position of the respondent as set out in their ET3 and completed agenda form.

Discussion and Decision

Unfair Dismissal

89. We accepted the claimant's position that she was dismissed because she had made protected disclosures about lack of rest breaks and health and safety concerns.

90. We accepted the claimant's position that she was identified as the person who had contacted Environmental Health because:-

- The claimant had first brought those concerns to the attention of Himanshu Lahar
- The claimant was the only female of menopausal age who used the toilet on the premises
- Environmental Health raised concerns about the lack of sanitary waste provision in the toilet and date labelling on food
- After the visit from Environmental Health, Himanshu Lahar spoke to the claimant about the same matters that had been discussed by Environmental Health previously having been raised with him by the claimant.

91. We accepted the evidence of the claimant. We were satisfied that by raising concerns about non provision of rest breaks and about health and safety

matters with the respondent and with Environmental Health the claimant had made protected disclosures, with regard to the statutory definition of 'protected disclosure' found in section 43B ERA. On the evidence, and applying an objective test (following *Phoenix House Limited v Stockman* [2017] ICR 84) we were satisfied that the information imparted by the claimant to Himanshu Lahar and to Environmental Health and to Shamay Sud in the Whats's App messages, tended to show the likelihood of breaches of legal obligations in respect of health and safety, or of endangerment to health and safety. In her discussions with Himanshu Lahar, her communications to Environmental Health and her What's App messages on 5 October 2020, the claimant disclosed information which went beyond allegations. She provided factual information, Applying *Kilraine v London Borough of Wandswarth* [2018] ICR 1850, 'information' and 'allegation' are not mutually exclusive. There must however be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure. The claimant must have had a reasonable belief that it was true. The claimant must reasonably believe that information disclosed by the claimant tends to show one of the matters falling with section 43(B)(1). We were satisfied that these tests were met. The information disclosed showed that the respondent had failed to provide breaks in accordance with the Working Time Regulations, as well as that the health and safety of employees (and customers in disclosures to Himanshu Lahar and Environmental Health) would be affected by the respondent's practices. We accepted that at the time the claimant made the disclosures she reasonably believed that the disclosures showed that there was a failure to provide breaks and that health and safety measures, including those in relation to Covid, were not being followed. The claimant had therefore made qualifying disclosures within sections 43B(1)(b) and (d) of the ERA.

92. We were satisfied that the claimant reasonably believed at the time of making the disclosures that those disclosures were in the public interest. In the circumstances, it was objectively reasonable for her to believe that her disclosures were in the public interest. We accepted that the claimant's motivation was to protect employees, customers and potential customers of

the respondent. We accepted that the numbers of customers and potential customers could potentially be large; the premises were in a city location. We accepted that the claimant's concerns were serious. The wrongdoings referred to appeared to be deliberate, and she believed that to be the case. There was no evidence that the claimant had anything to gain personally from making the disclosures. We accepted that she genuinely believed she was making the disclosures in the public interest. The disclosures were protected disclosures within the meaning of the ERA section 43A, with reference to sections 43B(1)(b) and (d).

93. Having found that there had been protected disclosures made by the claimant, we considered the following facts to be significant with regard to the reason for the dismissal:-

- The comments made by Himanshu Lahar to the claimant about what had been raised by Environmental Health having first being raised by her
- That the claimant had raised concerns about rest breaks and health and safety issues in writing in the What's App chat on 5 October 2020
- The terms of Shamly Sud's What's App message on 5 October 2020 (B2/12).
- The timing of the claimant's dismissal: That the claimant did not attend work after 5 October 2020 and was dismissed on 8 October 2020, without her concerns having been discussed.
- The failure to discuss the claimant's concerns with her after the What's App messages on 5 October 2020.
- The contract providing for a probationary period of 'up to 6 months'.
- No indication having been previously given to the claimant that she was at risk of failing her probationary period, or that her employment would be reviewed prior to six months into her employment.

94. On the evidence before us, we concluded that the reason or principal reason for the claimant's dismissal was that the claimant had made protected disclosures. In those disclosures the claimant raised concerns about entitlement to rest breaks and about health and safety issues. The claimant's claim under section103A ERA succeeds.

95. A declaration is made that the claimant's dismissal was an unfair dismissal, with regard to section 103A ERA. The claimant is entitled to remedy in respect of her successful claims. She seeks compensation. The claimant does not seek reinstatement or reengagement (neither of which is considered by us to be practicable).

96. There was some discussion at the stage of submissions that if the claimant were successful in her unfair dismissal claim, she may be entitled to an unfair dismissal basic award. In the circumstances of this case, neither section 120 (minimum basic award) nor section 121 (basic award of two weeks' pay) of the ERA applies. The claimant was employed for less than a year. No basic award is made.

97. The claimant is awarded an unfair dismissal compensatory award, reflecting her wage loss as a result of her unfair dismissal. The claimant took reasonable steps to mitigate her loss by seeking alternative employment. The claimant is awarded a compensatory award of **£2092.80**, reflecting wage loss for 15 weeks, calculated on the basis of her having worked 16 hours per week for the respondent, at the rate of £8.72 an hour.

Equality Act 2010

Protected Characteristics

98. The claimant relies on the protected characteristics of disability, sex (gender) and her belief in veganism.

99. We were satisfied on the basis of the claimant's evidence, supported by the medical reports provided, that the claimant had the protected characteristic of disability at the time of her employment with the respondent. We took into account that the claimant had not received all of her current diagnosis at that time. We accepted that her symptoms were long term and had a significant

effect on her normal day to day activities. The comments by Dr Gupta were significant in this regard.

100. We accepted the claimant's evidence on what she disclosed to the respondent at her interview. On that basis, we determined that the respondent knew, or ought reasonably to have known about the claimant's disability status as from the time of the interview and therefore throughout the course of the claimant's employment with the respondent.

101. We were satisfied that the respondent knew or ought to have known of the claimant's disability. We accepted the claimant's evidence on what she disclosed at her interview. We considered it to be significant that a medical declaration form had been completed. We accepted the claimant's evidence in respect of the discussions she had with HR re that declaration not setting out all that had been disclosed by the claimant.

102. There was direct evidence of conduct towards the claimant by the claimant's Line Manager Himanshu Lahar, which was related to the claimant's protected characteristic of disability. That was:-

- Comments made to the claimant about tests being carried out on her, as set out in the findings in fact.
- Comments made to the claimant relation to her allergies, as set out in the findings in fact.

103. That conduct was unwanted, was in relation to the claimant's protected characteristic of disability and created an intimidating, hostile, degrading, humiliating and offensive environment for the claimant. That conduct was conduct in breach of the Equality Act section 26(1)(b)(ii).

104. We were satisfied on the basis of the claimant's evidence that her belief in veganism perpetrates her life and how she lives her life. The claimant's evidence was that she does not use products which contain animal substances, or which have been tested on animals. She brings up her children as vegan. She is a peaceful activist for animal rights. She carries out fundraising activities for animal charities. She provided an explanation for

why she worked for the respondent, in a job which requires her to handle meat products. Her position was '*I'm not eating it or funding it'* and that *'it was either that or no job and I had to pay my mortgage*.' The claimant showed that her practice of veganism is a belief intrinsic to her sense of identity. We were satisfied that for the claimant, veganism is a philosophical belief within the meaning of section 10 of the Equality Act 2010 and is a protected characteristic for the claimant.

105. The claim of sex discrimination is based on the fact the female sex menstruates, and the respondent's failure to provide a sanitary product waste disposal bin in the premises where the claimant worked. We were satisfied that the behaviour related to that was behaviour related to the claimant's protected characteristic of sex, within the meaning of section 26(1)(a) of the Equality Act 2010.

Section 26 (Harassment)

106. There was direct evidence of unwanted conduct related to the claimant's protected characteristic of sex, which had the purpose or effect of violating the claimant's dignity and created a degrading and humiliating environment for her. That was:-

- Failure to provide a sanitary waste disposal bin in the toilet on the premises, requiring the claimant to walk through the premises with used sanitary products to dispose of them. (sex discrimination)
- Comments made by Himanshu Lahar to the claimant that she was the only female of menstruating age who used the toilet on the premises regularly.
- The claimant required to walk through the petrol station premises carrying used sanitary products to dispose of them outside the toilet.

107. That conduct was harassment on the grounds of the claimant's protected characteristic of sex and was in breach of the terms of the Equality Act 2010 section 26(1)(a) and (b)(i) and (ii).

108. The claimant is a vegan for ethical reasons. She privately practices her belief in veganism by not eating or using animal products. Ethical veganism may be a protected characteristic under the Equality Act 2010 (*Casamitjana* Costa *v The League Against Cruel Sports ET Case No.3331129/18*). The claimant's belief in veganisim is a philosophical belief which perpetrates how she lives her life. There was direct evidence of conduct towards the claimant by the claimant's Line Manager Himanshu Lahar, which was related to the claimant's philosophical belief in veganism . That was:-

- Comments made encouraging the claimant to eat meat and handle meat products
- Waving meat products close to the claimant's face.

109. That conduct was unwanted and created an intimidating, hostile, degrading, humiliating and offensive environment for the claimant. That conduct was conduct in breach of the Equality Act section 26(1)(b)(ii).

110. During the course of her employment with the respondent, the claimant had the protected characteristic of disability, with regard to the definition in section 6 of the Equality Act 2010. The claimant has been substantially debilitated from the symptoms of her conditions since 2012. We were satisfied on the basis of the medical reports produced and the claimant's evidence that those symptoms have had a substantial long term effect of the claimant's day to day activities. The position of Dr Gupta, as set out in the findings in fact was considered to be significant in that regard.

111. For these reasons, the claimant's claims under section 26 of the Equality Act 2010 is successful. The claimant demonstrated her case and proved facts from which, absent a reasonable explanation, the Tribunal concluded discrimination has occurred.

112. The claimant is entitled to an award in respect of her successful claims under the Equality Act 2010. The reason for the claimant's dismissal was not on the grounds of any of her protected characteristics. The claimant has not suffered wage loss arising from the breaches of the Equality Act 2010.

113. We carefully considered what the extent of the award for solatium (injury to feelings) should be, in accordance with the guidelines in *Vento*. There was no evidence of the claimant having sought or required medical support or counselling as a result of her treatment by the respondent. We took into account that the Court in *Vento* added that there would be considerable flexibility within each band, allowing tribunals to fix what they considered to be fair, reasonable and just compensation in the particular circumstances of each case. Furthermore, common sense required that regard should be had to the '*overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage*'. No award was sought or is applicable in this case in respect of psychiatric damage or aggravated damages. We took into account the claimant's reliance on submissions on it not being a one off incident. We took into account that an award for injury to feelings is made under more than one head of claim. We had regard to the general principles that apply to assessing an appropriate injury to feelings award set out by the EAT in *Prison Service v Johnson* [1997] IRLR 162, para 27:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

- Awards should not be too low, as that would diminish respect for the policy of the antidiscrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

- Tribunals should bear in mind the need for public respect for the level of awards made. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

114. We considered the circumstances in which other awards have been made. In *Egan v Kingsborough Family Church t/a Coat of Many Colours Nursery ET Case No.3301496/15*, the claimant was awarded £10,000 for injury to feelings for pregnancy discrimination. She was dismissed because she was pregnant. The employment tribunal found that she had lost a job that was very valuable to her, both financially and for her self-esteem. It gave her an identity beyond that of being a mother. The loss of her job came without warning and without a convincing explanation. She had to pursue proceedings to the very end and the nursery had not issued any apology. Taking into account what that claimant had said about her feelings, that case fell within the middle Vento band, albeit in the lower half of that band.

115. In the present case the claimant lost her job because she had made protected disclosures. She did not lose her job because of a protected characteristic. We accepted the claimant's reliance on the conduct in breach of section 26 occurring over a period of time and not being a one off event. We considered the claimant's evidence on the way the conduct made her feel. In all the circumstances, an award for injury to feelings is made at the lower end of the middle band.

116. The respondent is the only named respondent in this case. In their completed Agenda, the respondent indicated that they would call Himanshu Lahar as a witness. The ET3 does not contain any suggestion of a defence that the respondent are not responsible for the acts and failure of its employees (or in particular for Himanshu Lahar. There is no mention of any discrimination or equality training having been provided by the respondent to its employees (or

in particular for Himanshu Lahar. The respondent liable for the actions and failures of its employees during the course of their employment (vicarious liability}. The respondent was not present at the hearing. No evidence was presented by them. The respondent is liable for the actions and failures of Himanshu Lahar during the course of his employment with them.

117. The claimant's claim under sections 26 of the Equality Act 2010 is successful. The claimant is awarded the sum of **£10,000** in respect of injury to feelings.

Unlawful Deductions

118. The deduction of £12.60 from the claimant's wages was an unlawful deduction under section 13 of the ERA, with reference to section 19. The claimant has signified her consent to deductions for certain deductions to be made by signing INSERT on INSERT. That was an agreement or consent in terms of section 15 ERA. Prior to the deduction of £12.60 being made, there was no notification or demand for payment, as is required under section 20 ERA. The claimant's complaint under section s23(1)(b) ERA is successful and the claimant is awarded the sum of £12.60 in respect of that unlawful deduction.

119. On the evidence of the claimant and Max Shearer, we were satisfied that there were occasions when the claimant required to work in excess of the hours for which she was paid. The respondent's failure to pay the claimant in respect of overtime worked is an unlawful deduction from wages under section 13 ERA. We accepted the claimant's calculation of the amount due to her in respect of such unpaid wages being **£26.12.** The claimant is awarded that sum in respect of unpaid wages.

Working Time Regulations

120. The Government's position in the 1998 consultation document that accompanied the draft Working Time Regulations was that it is implicit in the word 'break' that a rest break cannot be taken at the start or end of a period of working time and that a break cannot, therefore, overlap with the separate and additional entitlement to daily or weekly rest. This view is reflected in the Government guidance, 'Rest breaks at work', which states: 'Employers can say when [workers] take their rest break during work time as long as… the break is

taken in one go somewhere in the middle of the day (not at the beginning or end).'

121. In *Gallagher and ors v Alpha Catering Services Ltd t/a Alpha Flight Services 2005 ICR 673, CA*, the Court of Appeal provided clarification that downtime could not be a rest break and a period of downtime could not retrospectively become a rest break only because it was seen, after it was over, that it was an uninterrupted period of at least 20 minutes. The Court of Appeal defined a rest break as an uninterrupted period of at least 20 minutes that was neither a rest period nor working time, both of which were defined at Reg.2(1), and which the worker could use as he pleased.

122. We had regard to the decision of the Employment Tribunal in *Miller v Lambert D Ltd ET Case No.1807836/00*: following her dismissal from a service station run by LD Ltd, M brought a number of claims before an employment tribunal, including that she had been unable to take the rest breaks to which she was entitled under Reg 12. M was usually the only person on duty at the service station. Accordingly, in order to take a toilet break, she had to lock the door, leaving customers waiting. The tribunal found that LD Ltd would not have found it acceptable if M had taken a break of 20 minutes. Furthermore, there was no room in which she could have taken a break away from her workstation. The tribunal held that, in failing to make provision for M to take her rest entitlement, LD Ltd had been in breach of Reg 12.

123. Similarly, in the circumstances of this case, we are satisfied that it would not have been acceptable to the respondent for the claimant to have taken an uninterrupted break of 20 minutes during which she did not serve customers. There was no place for the claimant to take her break away from her workstation. There was no cover to serve customers while the claimant was on an uninterrupted rest break.

124. On the evidence of the claimant and Max Shearer, we were satisfied that there were occasions when the claimant was not able to take the rest break to which she was entitled under the Working Time Regulations. 1998 ('WTR'). We accepted the claimant's calculation of her loss in respect of such worked breaks to be £**17.44.** We considered the terms of Shamlay Sud's reply as set out in

the What's App message of 5 October 2020, and the fact that there was no further discussion with the claimant on the issue, and that the claimant was then dismissed, to be significant. On that evidence we were satisfied that the respondent refused to allow the claimant the rest breaks to which she was entitled under regulation 12.

125. We considered the guidance given by the EAT in Miles v Linkage Community Trust Ltd [2008] IRLR 602 on the factors to be considered when making an award under Regulation 30(4) WTR. We considered

- The period of time during which the employer was in default
- The degree of default, i.e. how outrageous or offensive the employer's behaviour was, and
- The 'amount' of the default in terms of the number of hours the employee was required to work and the number of hours he or she was to be given as rest periods.

126. With regard to the length of the default, we took into account that the 'refusal to permit' is a distinct act in response to a worker's attempt to exercise his or her right and that on the guidance from the EAT, the employer's default therefore arises when there is a deliberate act of refusal, rather than when the employee takes up employment under the relevant working pattern. (Although another division of the EAT in *Grange v Abellio London Ltd 2017 ICR 287, EAT*, refused to follow that aspect of the decision) On the terms of Shamlay Sud's What's App message, we considered that the default occurred on 5 October 2020. Following the guidance in *Miles,* with regard to the degree of default, we considered whether there was a lack of faith or goodwill on the part of the respondent. There was no evidence before us on their understanding of the entitlement to rest breaks under Regulation 12. We considered the terms of the ET3. Under the heading 'Breaks', the respondent's position in the ET3 is:-

"*Kady has claimed that she was unable to take breaks during her shifts and had them deducted from her wage anyway. However, on reflection of the sales during her shifts over her full employment and due to the current pandemic,*

there was more of an opportunity for Kady to take her breaks. Each break deduction was based on the information confirmed by Kady's line manager."

127. There weas no evidence of the respondent's actions being flagrantly imposed in disregard of plain legal advice. We took into account the extent of the breach, with regard to the sum sought by the claimant re unpaid breaks and the length of her employment with the respondent. Having regard to these factors, we considered that it was just and equitable to award the claimant compensation under Regulation 30(4) in the total sum of £517.44, including £17.44 in respect of attributable financial loss under Regulation 30(4)(b).

128. The claimant's complaint under the WTR is well founded. A declaration is made under section 30(3)(a) WTR, that the respondent has refused to permit the claimant to exercise her right to an uninterrupted rest break under regulation 12 WTR. Compensation is awarded to the claimant under section 30(3)(b) WTR. Compensation is made with regard to section 30(4) WTR. Compensation is made in the sum of **£517.55**, being the sum of £17.44 in respect of financial loss sustained by the claimant and the sum of £500 with regard to the respondent's default.

Employment Judge: **Claire McManus**
Date of Judgement: **29 June 2022**
Entered in register: **29 June 2022**
And copied to parties