EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Tamara Chard	AND	Jasper Byrne Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 2, 3 and 4 May 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms V Blake
Mr K Ghotbi-Ravandi

Representation
For the Claimant: Mr A Robbani, Solicitor Advocate
For the Respondent: Miss J Linford of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:
1. The claimant succeeds in her claim for harassment; and
2. The respondent is ordered to pay the claimant compensation in the sum of £11,976.06 which includes interest; and
3. The claimant's application for costs is dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Tamara Chard claims that she has been discriminated against because of a protected characteristic, namely sex. The claim is for direct discrimination, and harassment. The respondent contends that there was no discrimination.
2. We have heard from the claimant, and from Mrs Joanne Wray on her behalf. For the respondent we have heard from Mr Barry Lewis, Mr Don Somerville, Mrs Sarah Dawe, Mr Hugh Byrne and Mr David Jasper.
3. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The Facts:
5. The respondent company Jasper Byrne Ltd operates next to Botathan abattoir near Launceston in Cornwall. Its business largely involves processing lambskins for sale and export. It is closely associated with HR Jasper & Sons Ltd which is based at the abattoir, and which is a client of the respondent. This second company trades as Jasper Quality Lamb, and it is known colloquially as Jaspers. These companies have common directors, including Mr David Jasper from whom we have heard.
6. The respondent's premises are next to the abattoir site, and include storage facilities, a yard, and an office. By its very nature it is a coarse working environment where swearing and industrial language are commonplace.
7. The claimant Mrs Tamara Chard was born in 1964 as a mother of six sons. She was employed by the respondent as a part-time office administrator working 20 hours per week. She commenced employment on 26 May 2021, and she resigned her employment on 5 January 2022.
8. The respondent Manager is Mr Barry Lewis, from whom we have heard. He has worked for the respondent in various roles for 34 years. He asserts that the claimant was a popular employee and that he got on with her well. Mr Donald Somerville, from whom we have also heard, has been the respondent's Foreman for five years. He and the claimant got on well in the office and he often helped her to resolve administrative issues as they arose.
9. The claimant's administrative duties involved dealing with invoices which effectively meant checking them on arrival, doublechecking them against the delivery note which gave rise to the invoice, and then passing to Mr Lewis to check and sign. The claimant would then send these authorised invoices to the payments office for payment. She also recorded the movement of stock (namely lambskins) on a weekly basis. This required keeping an accurate ledger of the respondent's stock. She also ordered fuel, salt to preserve the skins, stationery, and pallets. Effectively her job was to assist Mr Lewis in all administrative matters.
10. Although the claimant had worked in an office before, she did not have any previous administrative or accounts experience. Her predecessor was Mrs Joanne Wray, from whom we have heard. It was Mrs Wray who told the claimant that she was leaving the respondent's employment and after discussion she recommended the claimant to Mr Lewis as her replacement. The claimant asserts that Mrs Wray told that she no longer wished to work with Mr Lewis because his behaviour was "making her feel uncomfortable" but the claimant was of the view that she had "raised six boys into men" and would be able to deal with Mr Lewis. The claimant was then interviewed by Mr Lewis in the presence of Mrs Wray and they discussed the duties which she would take on, and all agreed that the claimant would commence employment with the respondent.
11. There is a significant dispute between the parties as to the claimant's working environment. The claimant now complains of a course of sexual harassment and other unacceptable behaviour by Mr Lewis, which Mr Lewis and the respondent deny. We deal this below.
12. Before we do so, we note that the sixth and final allegation is at least partly admitted by Mr Lewis. This allegation as relied upon by the claimant is that he would frequently use the lavatory without closing the door and proceed to urinate in sight of the claimant. We have seen a plan of the layout of the relevant office. The claimant used a desk in the office and on the other side of the office through a door was a kitchen area. There was a toilet on the other side of the kitchen area, with its own toilet door. The kitchen area and toilet beyond it were both out of sight of the claimant's desk. Mr Lewis accepts that on occasions he would urinate without fully closing the door, but that this was never in sight of the claimant. He says that the claimant never asked him to close the door fully, and she could have closed the first kitchen door if she was concerned.
13. Against this general background, the claimant did not raise any complaint or grievance, formal or informal, until her resignation letter on 5 January 2022. The circumstances were as follows.
14. The claimant was on authorised annual leave between 23 December 2021 and her return to work on 4 January 2022. It became clear during her absence that the claimant had made a significant error in her stock-keeping records. She had failed to record accurately the

whereabouts of 16,200 lambskins. The value of these lambskins was in excess of £50,000, but the value of lambskins varies depending upon when exactly they could be sold. Because of the seasonal nature of lamb, the skins were more valuable to sell in November or early December than they would be in January. The respondent asserts that this basic stock-keeping error on the part of the claimant meant that it had to take urgent measures to seek to sell these lambskins but at a disadvantageous price.

15. Although it does not fall to us today to determine exactly what happened to these lambskins, it is worth recording that the respondent's evidence on this matter was inconsistent and confusing. Mr Lewis suggested that he had spotted the error by doing a manual check and the respondent's stock held 16,200 lambskins fewer than the claimant's stock records indicated. This is consistent with the claimant saying in her resignation letter that she had wrongly shipped 16,200 lambskins, in other words they had been sent somewhere. On the other hand, Mr Byrne gave evidence to the effect that 16,200 lambskins were still in stock, because the respondent had to take steps to try and sell them in January rather than the previous November or December, and that it had lost money in doing so. Both versions cannot be true.
16. The respondent has also referred to a number of invoices which it says it found in the claimant's desk drawer after her departure, and which had not been processed properly. However, the majority of these invoices clearly appear to have been received whilst the claimant was absent on her Christmas holiday, and she could hardly be blamed for failing to process these. However, we do accept the respondent's evidence that the claimant had made a number of administrative errors during her employment. She had passed her three-month probationary period, but was not experienced in administrative, stock-keeping or accounting matters and her work had contained a number of errors.
17. Mr Hugh Byrne, from whom we have heard, is a director of the respondent, and he is known colloquially as Paddy. Mr Byrne gave evidence which was unchallenged to the effect that it was probable that the respondent would have dismissed the claimant within a few weeks from the date of her resignation in any event.
18. The claimant returned to work on 4 January 2022, and she noticed the stock-keeping error which the respondent was working to resolve. She mentioned it to Mr Lewis, and she agreed to return to work the following day 5 January 2022 even though this was a day on which she was not due to work. The claimant says that she was anxious to sort out the error which she had made. Having stayed for about two hours, she then resigned her employment.
19. The claimant's letter of resignation was dated 5 January 2022, and it was addressed to Mr Byrne, and it runs to nearly two pages. The letter starts as follows: "It is with a heavy heart that I find myself writing this letter. I've tried so hard for the last eight months working in the office at Jasper Byrne that at times has been very hard. Today I've gone into the office which is my day off giving my own unpaid time to rectify the mistake I made in the book. I wholeheartedly hold my hands up to the mistake which entailed failing to deduct 16,200 skins that had been shipped and for that I am truly sorry and have now corrected the mistake in the book and also via email with the figures I sent to Stella. I have enjoyed the actual admin job but I can no longer work in the office alongside Barry …" The remainder of the letter complains of a series of unacceptable, unpleasant and harassing behaviour on the part of Mr Barry Lewis. This includes (but is not limited to) the six specific examples of harassment which we are required to determine, and which are set out below.
20. Despite the claimant's request that she should not be contacted, it seems that Mr Lewis did make contact with her to try to ascertain whether she was coming to work, and Mr Somerville also sent the claimant a text asking if she would be returning to work. On 10 January 2022 the claimant sent a text to Mr Lewis complaining of the "abuse of name-calling and constant harassment from you and your disgusting habits" confirming that she did not want to be contacted again by him.
21. Meanwhile Mr Byrne had acknowledged the claimant's resignation by email dated 6 January 2022, asking her to telephone him. He sent the claimant a further email on 10 January 2022 confirming that Mr Lewis had told him that she had not turned up for work and that: "I'm waiting for Barry to come clean". By email dated 12 January 2022 the

claimant wrote to Mr Byrne to confirm: “just wanted to let you know that thankfully the messages have stopped as a result of my message to Barry and I wondered if he has now come clean.” On 13 January 2022 Mr Byrne replied: “thanks for your update and for letting me know the messages have stopped. If you need any references at any time, please do not hesitate to get in touch with me and I will be happy to provide whatever is required.”

22. The claimant then instructed her solicitors, and they wrote a letter of claim to the respondent dated 20 January 2022. The respondent decided to investigate the matter in more detail, and instructed Mrs Sarah Dawe, from whom we have heard, to conduct that investigation. Mrs Dawe is an HR and health and safety consultant who is known to HR Jasper & Sons Ltd.
23. Mrs Dawe then conducted an investigation by reviewing the relevant documents which the respondent had sent to her. This included the claimant’s contract of employment, the staff handbook, her resignation letter, the claimant’s solicitors’ letter, details of the stock keeping error, and resignation letters from three other employees who had previously worked with Mr Lewis (and not 30 letters as was mistakenly indicated in the respondent’s grounds of resistance). She interviewed Mr Somerville on 18 February 2022, and she was assisted by Mrs Sue Gallant, an employee of HR Jasper & Sons Ltd, to take the notes. Mr Somerville denied the allegations raised by the claimant. Mrs Dawe interviewed Mr Lewis on 18 February 2022, and he denied all but one of the allegations (which relates the use of the toilet for which see further below). Mrs Dawe found Mr Lewis to be honest in his answers and “genuinely shocked and upset” by the allegations made against him. Mrs Dawe spoke with Mr David Jasper who confirmed that the claimant had not raised any complaint to him about her concerns and/or about Mr Lewis. Mrs Dawe also spoke to Mr Byrne who confirmed that the claimant had never raised any complaint about Mr Lewis with him during her employment.
24. Mrs Dawe also exchanged emails with Mrs Sue Gallant during the course of her investigation. In an email dated 3 March 2022 Mrs Gallant confirmed that the claimant had not made any complaint or grievance to her about Mr Lewis’s behaviour. She also confirmed that she had not received any formal complaint from any other members of staff. However, she did make the following comment about the claimant’s predecessor Mrs Joanne Wray, and her predecessor in turn Jean England: “In the past I had Jean England very often complain about Barry and generally how useless he was and that he never did anything. Then Jo took over from Jane and she would complain about the same thing.”
25. Mrs Dawe completed her investigation in early March 2022 and concluded that there was no evidence to support the claimant’s allegations.
26. Meanwhile, there is the curious incident of an amended email. The claimant knew and liked Mrs Sue Gallant, the aforementioned employee of HR Jasper & Sons Ltd. The claimant sent her a copy of her resignation letter, because she says that Mrs Gallant would then be in a position to show it to the two directors Mr David Jasper and Mr Keith Jasper. On 14 January 2022 at 11:02 am Mrs Gallant replied to the claimant: “I read your letter and it is absolutely disgusting the way you have been treated. Both David and Keith Jasper have read it and think exactly the same. Keith has spoken to Paddy about it and he’s going to speak to Barry. I will let you know if I hear anything more.”
27. It seems that Mrs Gallant may have had second thoughts about that email and there is another version of her reply dated 14 January 2022 at 11:02 am. This alternative version simply reads: “I have read your letter. Both David and Keith Jasper have read it. Keith has spoken to Paddy about it and he’s going to speak to Barry. I will let you know if I hear anything more.”
28. During the normal disclosure of documents in the course of these proceedings the claimant relied on the first email which supported her allegations that she had received disgusting treatment, and the respondent relied on the second more neutral version. There was a dispute between the parties with the result that the directors of HR Jasper & Sons Ltd agreed that a search could be made of their IT records, and it became clear that Mrs Gallant had sent the first email to the claimant, and then apparently doctored that email to suggest a different reply had been sent, (which it also had been).

29. The claimant's predecessor in her position Mrs Joanne Wray also gave evidence before us. She had worked as an administration assistant with the respondent for 20 hours a week from March 2019 to May 2021. She says that she was warned by her predecessor Jean England about Mr Lewis's unacceptable behaviour and that she should not "tolerate his abuse". Mrs Wray gave evidence that she had witnessed a course of unacceptable behaviour and sexual harassment from Mr Lewis. This included: asking if she wore her knee-length boots in the bedroom for her husband; commenting about a lady vet on site to the effect that Don wanted "to give her one"; showing sexually explicit videos; receiving and showing texts of an explicit sexual nature to other men in the office in her presence; and repeatedly referring to her as "Knob Job, Dickhead and Tosser". Mrs Wray says that she challenged Mr Lewis about this behaviour, but nothing was done, and she decided to seek alternative employment elsewhere at a lower salary because she was fed up with this treatment.
30. For the respondent, Mr Lewis denies that this occurred, and the respondent asserts that Mrs Wray made it clear that she left for alternative employment which was nearer her home which allowed her to walk dogs during lunchtime. In addition, this evidence seems inconsistent with her recommending the claimant to the respondent's employment to work with Mr Lewis, and the fact that she helped the claimant and Mr Lewis to understand the details of her job. It also seems inconsistent with her helping Mr Lewis when he was recovering from an operation, for instance by assisting with the shopping.
31. The claimant then approached ACAS under the Early Conciliation procedure on 8 February 2022 (Day A). ACAS issued the Early Conciliation certificate on 14 March 2022 (Day B). The claimant presented these proceedings on 16 March 2022. There was then a case management preliminary hearing on 6 December 2022, and Employment Judge Bax set out in a Case Management Order dated 6 December 2022 the six allegations upon which the claimant now relies, and which this Tribunal has to determine. The same allegations are expressed to be harassment related to sex, and direct sex discrimination.
32. Before determining these allegations, we make the following observations about the background evidence, and the credibility of some aspects of the respondent's evidence. In the first place both Mr Lewis and Mr Somerfield indicated that there was no swearing in the workplace. In the coarse industrial surroundings of an abattoir, we find that assertion to be frankly incredible. Secondly, the respondent's evidence about the missing lambskins seemed confused and inconsistent. Thirdly, when Mr Byrne challenged Mr Lewis about the claimant's complaints in her resignation letter, Mr Lewis's answer was to the effect that he refused to own up to something he said he had not done, and Mr Byrne's comments to the claimant thereafter were that he was waiting for Mr Lewis "to come clean". Fourth, the versions given by Mr Lewis and Mr Somerfield as to the events surrounding "the Tamara sandwich" were inconsistent, and Mr Lewis accepted in his evidence that one of the two of them must be wrong. Fifth, the respondent produced some invoices to seek to indicate that the claimant's performance was below standard because she had failed to process them, when it was clear a number of these had arrived by post during her authorised absence on holiday.
33. In addition, what little contemporaneous evidence there was supports the claimant's allegations. Her resignation letter which was completed at the time set out her complaints in detail, and it includes the six allegations which we are required to determine. Similar allegations were made in her text to Mr Lewis shortly after her resignation. Furthermore, the claimant's allegations in general terms as to the unacceptable behaviour of Mr Lewis are entirely supported by Mrs Wray, albeit during a previous period. She also gives evidence of Mr Lewis's swearing and other offensive comments of a sexual nature. There is also Mrs Gallant's email of 3 March 2022 (sent during Mrs Dawe's investigation) in which she confirmed that the claimant's predecessor Mrs Wray who had taken over from her predecessor Jean England, had both complained often about Mr Lewis's behaviour (although without mentioning any specific allegations of harassment).
34. For all these reasons where there was a direct conflict between the evidence of the claimant and that of the respondent, particularly Mr Lewis, we preferred the evidence of the claimant.

35. The allegations and our findings of fact in respect of each allegation are as follows.
36. Allegation 1: In July 2021, Mr Lewis in a conversation with Mr Somerfield and in the presence of the claimant, referred to another colleague as "camel hoof" and said: "I bet you would like to get your head in between her legs".
37. Although these comments are denied by Mr Lewis and Mr Somerfield, for the reasons explained above we prefer the evidence of the claimant, and we find that Mr Lewis did make these comments to the claimant in the present of a work colleague as alleged. We find that these comments related to the claimant's sex, and we also find that these comments were of a sexual nature.
38. Allegation 2: From September 2021 Mr Lewis on a regular basis referred to and/or called the claimant as "Knob Job, Dickhead; Tosser; and Fuckface", and in particular on 6 December 2021 Mr Lewis called the claimant "Dickhead" when she did not have the office key readily to hand.
39. Although these comments are denied by Mr Lewis, for the reasons explained above we prefer the evidence of the claimant, and we find Mr Lewis did call the claimant these unpleasant names as alleged. Given the nature of these comments, we also find that they related to the claimant's sex.
40. Allegation 3: In mid-December 2021 (after calling the claimant "Fuckface") Mr Lewis said to Mr Somerfield "She even answers to Fuckface".
41. Although these comments are denied by Mr Lewis and Mr Somerfield, for the reasons explained above we prefer the evidence of the claimant, and we find that Mr Lewis did make these comments to the claimant in the present of a work colleague as alleged. Given the nature of these comments, we also find that they related to the claimant's sex.
42. Allegation 4: in October 2021 Mr Lewis showed the claimant a video clip from Strictly Come Dancing and said "I would love her legs wrapped around me".
43. Again, Mr Lewis denies this event, but for the reasons explained above we prefer the evidence of the claimant. This allegation is also consistent with allegations of similar behaviour by Mr Lewis which Mrs Wray recounted in her evidence. We find that these comments related to the claimant's sex, and we also find that these comments were of a sexual nature.
44. Allegation 5: In about the week commencing 13 December 2021, Mr Somerfield blocked the claimant's exit and Mr Lewis stood immediately behind the claimant and said: "Oh look we have a Tamara sandwich".
45. This incident is denied by Mr Lewis and Mr Somerfield. However, their evidence was inconsistent and when Mr Lewis was challenged to the effect that either one of them must be lying, he agreed that either one of them must be wrong. In addition, it seems surprising to us that Mr Somerfield should have such a clear recollection of what happened in that doorway in the office on an occasion when he says nothing else happened. We prefer the evidence of the claimant, and we accept her evidence that she found herself physically between Mr Somerfield at the door and Mr Lewis behind her, and that Mr Lewis said words the effect "Oh look we have a Tamara sandwich". We also find that this comment was of a sexual nature.
46. Allegation 6: During the course of the claimant's employment Mr Lewis would frequently use the lavatory without closing the door and proceed to urinate within sight of the claimant."
47. That allegation is partly upheld to the extent that Mr Lewis has admitted frequently urinating without closing the toilet door. However, this was not within sight of the claimant, who never challenged Mr Lewis about this, nor asked him to close either or both of the kitchen and toilet doors. Mr Lewis behaved in that way whoever was in the office, either male or female.
48. Having established the above facts, we now apply the law.
49. The Law:
50. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.
51. The protected characteristic relied upon is sex, as set out in sections 4 and 11of the EqA.

52. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
53. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. Under s26(2) A also harasses B if (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to above in subsection 1(b).
54. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
55. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
56. Under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
57. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition the tribunal may also award interest on any award pursuant to section 139 of the EqA.
58. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.
59. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
60. We have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; Ayodele v Citylink Ltd and Anor CA [2017]; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT: Vento v West Yorkshire Police [2003] IRLR 102 CA; Da’Bell v NSPCC [2010] IRLR 19 EAT; Simmons v Castle [2012] EWCA Civ 1039; De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879; and the Presidential Guidance on awards for injury to feelings and psychiatric injury dated

24 March 2023. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

61. The Issues to be Determined:
62. The issues to be determined in this case were set out in a List of Issues in the Case Management Order of Employment Judge Bax dated 6 December 2022. The claims are for harassment related to sex and/or harassment of a sexual nature under section 26 EqA; and for direct discrimination because of sex under section 13 EqA.
63. Duplication of Direct Discrimination and Harassment:
64. The allegations raised by the claimant are presented as both harassment and/or direct discrimination. We have determined these allegations in the following manner. In the first place these allegations have been considered as allegations of harassment. If any specific factual allegation is not proven, then it is dismissed as an allegation of both harassment and direct discrimination. If the factual allegation is proven, then the tribunal has applied the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it is dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
65. Harassment:
66. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
67. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
68. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."
69. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at

para 17: “one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”

70. Of the six allegations which fell to be determined by this Tribunal, we have found that the first 5 Allegations did take place, and that they related to the claimant’s sex, and that the comments in Allegations 1, 4 and 5 were all of a sexual nature.
71. We next apply the statutory test of harassment. The respondent makes the point that this conduct has to be unwanted conduct for section 26 EqA to be engaged. However, this is not the sort of case where the respondent has conceded that the conduct took place but that it was engaged in on an equal basis by the claimant and, for example, that there was mutual banter without any unwanted conduct. The claimant has made it clear that she found the conduct humiliating and embarrassing and wished that it would stop. We find that it was unwanted conduct.
72. Although the claimant’s subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant (applying Betsi Cadwaladr University Health Board v Hughes and Ors). By any stretch of the imagination, it is reasonable to assume that the conduct of Mr Lewis which we have found to have occurred had the proscribed effect upon the claimant. Her evidence was not successfully challenged to the effect that she found the course of conduct of Mr Lewis to be offensive, degrading and humiliating. With regard to the statutory definition, we note the cases that “violating” is a strong word, the strength of which is sometimes overlooked, and merely offending dignity is insufficient. Nonetheless there are two parts to the statutory definition. The claimant’s evidence was in the first place that this unwanted conduct did have the effect of violating her dignity, and secondly in any event it created a work environment which on occasions she found degrading humiliating and otherwise offensive.
73. For these reasons we find that each of the Allegations 1 to 5 meet the statutory definition of harassment, and each of the Allegations 1, 4 and 5 also meet the statutory definition of harassment of a sexual nature. The claimant therefore succeeds in her claim.
74. Finally, we turn to Allegation 6: “During the course of the claimant’s employment Mr Lewis would frequently use the lavatory without closing the door and proceed to urinate within sight of the claimant.”
75. That allegation is partly upheld to the extent that Mr Lewis has admitted frequently urinating without closing the toilet door. However, this was not within sight of the claimant, who never challenged Mr Lewis about this, nor asked him to close either or both of the kitchen and toilet doors. Mr Lewis behaved in that way whoever was in the office, either male or female. Although it may well have been unpleasant and discourteous, we cannot find that it met the statutory definition of harassment because it was not conduct related to sex, or of a sexual nature. We dismiss this allegation of harassment.
76. For these reasons we find that each of the Allegations 1 to 5 meet the statutory definition of harassment, and each of the Allegations 1, 4 and 5 also meet the statutory definition of harassment of a sexual nature. The claimant therefore succeeds in her claim.
77. Out of Time Issues:
78. The claimant approached ACAS under the Early Conciliation procedure on 8 February 2022 (Day A). ACAS issued the Early Conciliation certificate on 14 March 2022 (Day B). The claimant presented these proceedings on 16 March 2022. Arguably any claim which arose before 9 November 2021 (which is a period of three months before issuing proceedings bearing in mind the extension under the Early Conciliation provisions) is out of time by reason of Section 120 of the EqA. However, we have found that there was a course of conduct, namely continued harassment, between and including Allegations 1 and 5, over the period from July 2021 to mid-December 2021. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period. For this reason, we do not accept that the claims were presented out of time.
79. Direct Discrimination:

80. Allegations numbered 1 to 5 inclusive have been upheld as allegations of harassment. Given that these allegations of harassment are made out, then they are dismissed as allegations of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
81. There is now only one allegation remaining, namely Allegation 6, which is Mr Lewis urinating with the toilet door open, and which is largely factually established. As a claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
82. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
83. In this case, it is clear that Mr Lewis behaved in this way in the presence of both men and women. It is simply not the case that the claimant has been treated less favourably than an actual or hypothetical male comparator was or would have been treated. We find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.
84. Remedy:
85. The claimant seeks compensation only by way of remedy for her successful harassment claim. This consists of loss of earnings and an award for injury to feelings. We deal with each of these in turn.
86. The claimant resigned her employment on 5 January 2022 and obtained alternative employment at a rate sufficient to mitigate her loss fully with effect from 22 January 2022. The parties have helpfully agreed compensation in the sum of £500.00 inclusive of interest for this element of the compensation.
87. This leaves the remaining element of an award for injury to feelings. The claimant suggests that an award should be towards the higher end of the middle band of Vento for the following reasons: the claimant particularised more than 10 incidents of harassment which occurred over a period of five months; these incidents directly resulted in her resignation; following termination Mr Byrne suggested that it was for the claimant to tell Mr Lewis that she would not be returning to work; the respondent's investigation was commenced only after the instruction of solicitors; the respondent failed to disclose key documents; and Mr Jasper sought to amend his statement.
88. The respondent argues that any award should be well within the lowest band of Vento for the following reasons. The claimant's employment was for a short period of time and the effects on her would have been minimal. At no stage was the claimant sufficiently upset to raise a formal or informal grievance. There is no medical or other evidence to suggest that the claimant was particularly upset and none of the allegations were of significant severity.
89. We accept the claimant's evidence that she felt upset and humiliated by the course of harassment to which she was subjected, and we do consider it appropriate to make an award for injury to her feelings. That said, we agree with the respondent that the claimant's employment was for a short period of time, and she resigned her employment when her significant bookkeeping error came to light, rather than just because she felt unable to continue in the face of constant harassment. She had not submitted a grievance, formally

or informally, to complain of Mr Lewis's conduct. There was no medical-related evidence to suggest that the claimant required medical intervention or assistance to cope with the events at work.

90. We agree with the respondent that this claim falls within the range of less serious cases. The lowest band of Vento for less serious cases has very recently been increased to the range of £1,100 to £11,200 following the Sixth Addendum to the Presidential Guidance on Awards for Injury to Feelings dated 24 March 2023. We unanimously decide to award the claimant an amount at the higher end of this lower band, and we award the sum of £10,000 as an award for injury to her feelings.
91. The claimant is entitled to interest at the rate of 8% pursuant to the relevant Regulations from the date of the initial discrimination in July 2021. That is 674 days to today's hearing at the rate of £2.19 per day which amounts to interest of £1,476.06.
92. The respondent is therefore ordered to pay compensation to the claimant in the total sum of £11,976.06 (which is inclusive of interest).
93. Costs Application:
94. The claimant has also made an application for its costs on the basis that the respondent has acted abusively or otherwise unreasonably in the way in which the proceedings have been conducted. The claimant asserts that the respondent has acted vexatiously or otherwise unreasonably in the following ways: the respondent's outright refusal to engage in judicial mediation; the circumstances surrounding the doctored email from Mrs Gallant; the respondent refusing to call Mrs Gallant as a witness; the respondent's late disclosure of documents and its failure to disclose certain key documents; the claim that it had reviewed 30 resignation letters but only four were then disclosed; a delay of 13 days in exchanging witness statements; a delay in finalising the bundle; not submitting signed witness statements; Mr Jasper amending his witness statement; and more latterly failing to settle the matter when the claimant made reasonable offers to do so.
95. The respondent resists the application. It asserts that an award of costs in the Employment Tribunal is the exception rather than the rule, and costs do not follow the event. It is not unreasonable for a party to proceed to a tribunal in order to for the tribunal to be given the opportunity to determine which evidence it prefers when there is a genuine dispute. The respondent asserts the claimant's initial application was prompted by the confusion over Mrs Gallant's email which has now been clarified, namely that she has never been an employee of this respondent and they were unaware that she had doctored the email and submitted two versions. That cannot be unreasonable behaviour on the part of the respondent. The arguments about witness statements and disclosure are normal minor disputes in the course of the litigation. Similarly, the parties are not required to enter mediation nor to accept an offer put forward by the other side, particularly in the absence of a careful Calderbank type letter.
96. The Rules
97. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
98. Rule 76(1) provides: "a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.
99. The Relevant Case Law
100. We have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA;
101. The Relevant Legal Principles
102. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation

in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

103. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

104. Decision on Costs:

105. We do not accept that the respondent has acted unreasonably in the conduct of these proceedings. There was a genuine dispute between the parties as to the evidence which was to be preferred, which was not easy for this Tribunal to unravel. The curious incident of two conflicting versions of Mrs Gallant's email was not conduct on the part of the respondent. If the respondent chose to decline mediation and failed to accept settlement offers made by the claimant during the course of this litigation, and then preferred to await the decision of the tribunal on the evidence, it was entitled to do so, and again that was not unreasonable conduct. Similarly late exchange of documents and/or witness statements, and applications or disputes about these issues along the way seem regrettably to be part and parcel litigation nowadays. It is not the case that costs follow the event. Applying Gee v Shell Ltd the award of costs is the exception rather than the rule. In circumstances where we do not accept that the respondent has acted unreasonably or vexatiously as is required by the claimant's application under Rule 76, we dismiss the claimant's application.

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Employment Judge N J Roper
Dated 4 May 2023

Judgment sent to Parties on 17 May 2023

For the Tribunal Office