THE INDUSTRIAL TRIBUNALS

CASE REF: 8786/20

CLAIMANT: **Paula Irvine**

RESPONDENT: **Neil O'Hagan trading as Clearview Cleaners and Property Services**

JUDGMENT

The unanimous judgment of the tribunal is that all claims are dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr M McKeown**
Mrs D Adams

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Mr R Fee, Barrister-at-Law, instructed by O'Hare Solicitors.

SUMMARY

1. The claimant ran a small cleaning company, cleaning commercial premises and some Airbnb apartments.

2. The claimant worked for the respondent as a cleaner for three complete months before resigning on 17 February 2020.

3. The claimant alleged that she had been subjected to unlawful harassment contrary to the Sex Discrimination (Northern Ireland) Order 1976 and that she had left her employment as a result.

4. The claimant, in her claim form, stated that:

   (i) She had been *"forced to leave work as a result of acts of harassment".*

   (ii) She had taken one week's sick leave after the alleged harassment with the necessary implication that that sick leave had been as a result of that alleged harassment.

(iii) That she had been so *"paranoid"* thereafter that she was being watched by the respondent while she was at work or watched by the respondent on cameras while she was at work. This had *"really creeped me out."*

(iv) That she had become *"depressed and very stressed"* about the alleged harassment and that her doctor had given her a sick line for four weeks for stress; the necessary implication being that the sick line had been given for stress related to the alleged harassment.

(v) That the respondent had tried to get out of paying her statutory sick pay; the necessary implication being that the respondent had done this because she had rejected the alleged harassment.

(vi) That the alleged harassment had caused her "*fear*".

5. This claim had been case managed on two occasions and, on the second occasion, the draft legal issues prepared by the respondent had been explained to the claimant and had been adopted as the legal issues raised by this claim. They were:

(i) Was the claimant subject to harassment on the grounds of her sex, contrary to Article 6A of the Sex Discrimination (NI) Order 1976? In particular, did the text messages sent to the claimant by Mr O'Hagan on 26 December 2019 constitute unwanted conduct of a sexual nature that had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

(ii) Was the claimant treated less favourably on the grounds of her rejection of the conduct contrary to Article 6A(1)(c) of the Sex Discrimination (NI) Order 1976? If this is alleged, how does the claimant say she was treated less favourably?

(iii) Was the claimant unfairly constructively dismissed by reason of the text messages contrary to Article 45 of the Sex Discrimination (Northern Ireland) Order 1976? (Tribunal's note: this issue and the reference to Article 45 makes no sense.)

RELEVANT LAW

6. Article 6A of the Sex Discrimination (Northern Ireland) Order 1976 provides:

> *"(1) For the purposes of this Order, a person subjects a woman to harassment if -*
>
> *(b) he engages in any form of unwanted verbal - conduct of a sexual nature that has the purpose or effect –*
>
> *(i) of violating her dignity, or*
>
> *(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or*

(c) on the ground of her rejection of - unwanted conduct of a kind mentioned in sub-paragraph - (b), he treats her less favourably than he would treat her had she not rejected - the conduct."

7. *"(2) Conduct shall be regarded as having the effect mentioned in paragraph (1)-(b) only if, having regard to all the circumstances, including in particular the perception of the claimant, it reasonably can be regarded as having that effect."*

8. Article 63A(2) provides in relation to complaints to Industrial Tribunals that:

"(2) Where, on the hearing of the complaint, the complainant proved facts from which the tribunal could, apart from this Article conclude in the absence of an adequate explanation that the respondent –

(a) has committed an act of – harassment against the complainant which is unlawful by virtue of Part III –

The tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act."

9. In determining whether an action or actions amounted to harassment for the purposes of the Order, the tribunal must take into account the circumstances of the case, the perception of the claimant, and whether it was reasonable for the claimant to reach that perception. In ***Land Registry v Grant [2011] IRLR 748,*** Elias LJ stated:

"Tribunals must not cheapen the significance of these words. (Intimidating, hostile, degrading, humiliating or offensive.) They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

10. In ***Pemberton v Inwood [2018] IRLR 542***, the Court of Appeal GB stated:

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub-paragraph (1)(b) a tribunal must consider both – whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and – whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course take into account all the other circumstances – The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

11. In ***Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 337*** the EAT discussed the definition of harassment under similar legislation relating to race discrimination. Leaving out the references to that legislation, and to race, it stated:

> *"As a matter of formal analysis, it is not difficult to break down the necessary elements of liability under (harassment). They can be expressed as threefold;*
>
> *(i) The unwanted conduct. Did the respondent engage in unwanted conduct?*
>
> *(ii) The purpose or effect of that conduct. Did the conduct in question either:*
>
> *(a) have the purpose or*
>
> *(b) have the effect*
>
> *of either*
>
> *(i) violating the claimant's dignity or*
>
> *(ii) creating an adverse environment for her?*
>
> *(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's (gender).*
>
> *It stated:*
>
> > *"Nevertheless it will be a healthy discipline for a tribunal in any case brought under this section (or its equivalents in other discrimination legislation) specifically to address in its reasons each of the elements which we have identified, in order to establish whether any issue arises in relation to it and to ensure that clear factual findings are made on each element in relation to which an issue arises."*

12. The EAT, when considering an argument that the claimant's dignity had been violated by an alleged remark, stated:

> *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hyper-sensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

13. In ***Weeks v Newham College of Further Education UKEAT/0630/11***, the EAT considered, inter alia, the significance of a delay on the part of the claimant in objecting to the alleged harassment. It concluded that any delay in objecting to the

alleged harassment could be relevant to whether or not the statutory tests had been satisfied but that delay would not necessarily be determinative of the issue when considered on its own. It stated:

> *"The timing of an objection has an evidential importance. It may mean that the individual complaining of conduct after the event did not in fact perceive the conduct as having the offensive qualities spoken of in (the legislation). We would urge caution for a tribunal in placing too much weight upon timing. Where conduct is directed towards the sex of the victim, it may be very difficult for the victim personally, socially and, in particular, in some circumstances, culturally, to make any immediate complaint about it. The fact of there being no immediate complaint cannot prevent a complaint being justified, but equally we cannot say that it is a factor that a tribunal is not entitled to consider as part and parcel of the overall circumstances that it has to gauge."*

14. In ***Forbes v LHR Airport [2019] IRLR 895,*** the EAT considered whether a tribunal had erred in law in taking into account an apology for the offending conduct which had been offered by the respondent shortly after the event. It determined that the tribunal had been correct to take that into account when considering all the circumstances. It stated:

> *"- the tribunal is required to consider whether conduct has the purpose or effect of creating a hostile and intimidating etc environment. That may, in appropriate circumstances, include taking account of an apology that is made shortly after the impugned conduct or the immediate cessation of the conduct once it is brought to the employer's attention. Both of those matters could be relevant in assessing whether there was a hostile environment which has been proscribed by the legislation."*

15. The Employment Rights (Northern Ireland) Order 1996 provides that a worker must have 52 weeks continuous service before that worker is entitled to claim unfair dismissal under that Order. The claimant did not fall within any of the exemptions to that requirement and had only three months complete service.

PROCEDURE

16. This case had been case managed and directions had been given in relation to interlocutory procedure and the exchange of witness statements.

17. The claimant gave evidence on her own behalf and was cross-examined. Counsel for the respondent, on the basis of answers given in the course of that cross-examination, elected not to call the respondent to give evidence.

RELEVANT FINDINGS OF FACT

18. The respondent was the claimant's employer. The respondent and the claimant appear to be of a similar age.

19. In the early hours of Boxing Day 2019, the claimant and the respondent had returned from separate festivities to their respective home addresses. They were exchanging WhatsApp messages with each other. They compared notes on their

Christmas celebrations. It was clear from the content of those WhatsApp messages that both individuals had drink taken. The claimant stated at 1.21 am; *"Brill drunk ni wasn't even meant to drink (Laughing emoji)".* It is clear from the content of the messages that punctuation, grammar and spelling did not trouble either party.

20. The WhatsApp messages to which we were referred commenced at 1.19 am on Boxing Day, although it is clear that other messages had preceded 1.19 am. The messages were friendly in nature and both the claimant and the respondent had clearly been comfortable chatting about personal details, such as their families.

21. After an exchange of messages between 1.19 am and 1.26 am, the respondent sent the following WhatsApp message to the claimant.

> *"I am single. If you fancy chatting. I have been single about three moths."*

That message was followed a few moments later by:

> *"Don't worry if you don't".*

22. The claimant responded:

> *"Neil UR drunk go to bed. (Two smiley emoji's)"*

The claimant was clearly treating the respondent's attempted advances in a firm but humorous way.

23. The respondent replied with four short messages over the next 15 minutes which were:

> *"So that is a no (3 frowning emoji's)"*
>
> *I am living over here in Bookvale*
>
> *Brookvale ave*
>
> *Hi ya? No talk."*

24. The respondent followed that with another four short messages over the next 26 minutes which read:

> *"If you don't fancy my then that's sound*
>
> *Sorry Paula.*
>
> *So that's a no.*
>
> *My apologies for being so forward. Ive had too many beers. Are you ok Funks ATM."*

25. That last reference asked the claimant whether she had been ok to work in Funky Monkeys at the moment.

26. The claimant responded at 2.46 am to state:

> *"Its ok wev all been ther lol its just abit weird ffs UR wife is my cuzins friend".*

The message is difficult to construe given the lack of punctuation, correct spelling or grammar. However, again, the claimant was responding to the claimant's advances in a firm but humorous manner.

27. It is clear in this response from the claimant at 2.46 am and in her earlier response at 1.53 am, that the claimant had not been upset or in any way annoyed at the respondent's WhatsApp messages. That lack of annoyance or upset was made more evident by exchanges over the ensuing weeks.

28. The respondent then attempted to telephone the claimant at 2.53 am and was unsuccessful. He followed this up with six brief WhatsApp messages over a period of some seven minutes between 3.05 am and 3.12 am. They were:

> *"I have been split with (wife's name) for three moths, I have my on place. Sorry but I have seen you, you looked beautiful when you work.*
>
> *When work I mean.*
>
> *Beautiful you are.*
>
> *Ffs you look great.*
>
> *No problem if you don't like me? We all work the same.*
>
> *But jesus your sexy (emoji with sunglasses)."*

29. The claimant did not respond to those messages.

30. At 11.20 am the next morning the respondent sent the following message to the claimant:

> *"Sorry about last night, a few too many drinks, it won't happen again. My apologies."*

It is clear that this constituted an immediate apology and that there had been an complete cessation of inappropriate behaviour (see ***Forbes*** above).

31. The respondent then asked the claimant at 11.57 am:

> *"Are you ok for Funkys tonight?"*

That was a request for confirmation that she was able to work in Funky Monkeys that night.

32. Unsurprisingly, since this was still Boxing Day, the claimant replied:

> *"Funkys isn't open tonite".*

Significantly, she did not refer to the earlier WhatsApp messages or even to his apology at 11.20 am.

33. On the following day, 27 December, the claimant stated that she would not be in work that night. The respondent indicated that he would get another employee to cover her. There was no mention of the WhatsApp messages or of any feeling on the claimant's part that she had been harassed, put in fear or made paranoid.

34. On 28 December 2019, the respondent asked the claimant is she was ok for Monday in Funky Monkeys. The claimant replied:

> *"I haven't left bed in two days. Think IV a kidney infection and my docs isn't open to Monday IL prob need a few days off."*

35. It is therefore clear and not disputed by the claimant that on both 27 December 2019 and 28 December 2019, the claimant had indicated that she was not working because she had a kidney infection and not for any other reason. The claimant did not tell the respondent or indeed her doctor that she was on sick leave because of the WhatsApp messages on Boxing Day.

36. The respondent replied sympathetically and received the following reply:

> *"Nps"*.

37. That apparently means "*no problems*".

38. On 30 December 2019, the respondent sent a WhatsApp message to the claimant to state:

> *"Hi, how you feeling today? Do you want me to cover Funks for a while?"*

39. The claimant replied:

> *"No better. Yeah pls IL be back in a few days."*

40. The claimant was indicating that she was still sick but expected to be back at work in a few days. Again, there was no suggestion of fear, paranoia or stress caused by the Boxing Day WhatsApp messages.

    It is also notable that far from tackling the respondent about his behaviour which she now alleges rendered her ill, paranoid and in fear, she had politely accepted his offer to cover her duties in Funky Monkeys.

41. The respondent replied:

> *"No probs get well soon."*

42. On 2 January 2020, the claimant emailed the respondent to state:

> *"I have been put on another course of antibiotics beciz I am still sick so il not be in to work till Monday."*

There is nothing to suggest that the courses of antibiotics had been a prescribed treatment for stress, fear and paranoia.

43. The respondent replied sympathetically to indicate that it was no problem and that he had expected this news. She replied that her doctor had told her that she would probably have needed another antibiotic and she had needed one. The respondent advised her to rest up as much as she could.

44. Again, it was not in dispute that there was no mention at this stage by the claimant of any alleged harassment and no indication that the relationship between the claimant and the respondent had been anything other than friendly and on first name terms. Stress, fear and paranoia were not mentioned and were not evident.

45. On 5 January 2020, three days later, the respondent asked in a further WhatsApp message, whether she would be back into work on the following day. On 6 January 2020, the claimant confirmed that she would be back into work and that she was feeling better.

Again, there was no indication on the claimant's part that she had been suffering from anything other than a kidney infection for which she had been treated with antibiotics and, in particular, no indication whatsoever that she felt she had been harassed in any way, or that she had been suffering from stress, fear and paranoia.

46. On 7 January 2020, there was a further exchange of WhatsApp messages in which the claimant asked for flexibility on Wednesday mornings to enable her to take her child swimming. The respondent stated that that was no problem and that he could cover Wednesday. Again, there was nothing to indicate harassment, or stress, fear and paranoia on the part of the claimant.

47. On 14 January 2020, the claimant asked the respondent in another WhatsApp message what had been happening with the apartments and in particular whether business had been picking up. She explained that she had only left her previous employment for employment with the respondent because it would have meant her working during the day between 10.00 am and 2.00 pm cleaning apartments and in Funky Monkeys in the evening only when the apartments were not busy and when she had to make up her 16 hours per week. She complained that she had been working in Funky Monkeys every night from when she started (that is, before the alleged harassment on 26 December 2019). She stated *"it's not really working for me – if it's not gona pick up in the apartments I'm gona have to start looking for somewhere else but, I'm gona keep working for u until I find somewer else".*

The claimant had been unable to work at weekends.

48. Again, it is significant that the claimant had wanted to continue working for the respondent, provided the work was available in the apartments between 10.00 am and 2.00 pm on Monday to Friday. She did not object to continuing working for the respondent because of harassment or for any other reason. She made it clear that she wished to do so, but only if work in the Airbnb apartments between 10.00 am and 2.00 pm on those days could be provided.

There was absolutely no mention of alleged harassment, or stress, fear and paranoia and no mention of any view on the part of the claimant that she was unable to continue working for the respondent. Quite the reverse; if work in the apartments were not available, she was going to continue working for the respondent until she found something else.

49. The respondent replied to state that the apartment's work was *"off and on atm (at the moment)"*. He stated that he would have a look at the work and see what was going on in the next few weeks. The claimant's response was:

> *"Nps thanks."*

50. Again, there was absolutely mention of a desire on the part of the claimant to cease working for the respondent for any reason related to the WhatsApp messages on Boxing Day. To the contrary, there was a clear desire to continue working for the respondent but only if the work was available in the Airbnb apartments between 10.00 am and 2.00 pm on weekdays.

51. The respondent replied later that day to state:

> *"Hi I have been looking at the apartments and it is mostly weekend cleans for January and February, so it doesn't really help your situation out. I totally understand it isn't suiting you with the kids. Myself and Peter (the owner of the apartments) were looking at the figures and it is a general down turn on week days, the weekends are always full."*

52. The claimant responded later that evening to state:

> *"No it doesn't help. I didn't take this job on for to do Funkys every nite. If I had of known this at the start I would never have took the job. I'm gona have to look for sumwer else."*

53. The respondent replied:

> *"I know I am sorry about that it is just the apartments have dropped off we didn't expect that to happen."*

54. Again, it is perfectly clear that the claimant had a settled view that she wished to continue working for the respondent but only if work in the apartments was available during weekdays. She made it plain that she was not happy with working in Funky Monkeys in the evening after those premises had shut. There was again absolutely no mention of either harassment or of any decision on the part of the claimant to cease working for the respondent because of that alleged harassment. There was no mention of stress, fear and paranoia.

55. On 20 January 2020, the claimant visited her doctors again and sent a WhatsApp to the respondent to state:

> *"Just out of the doctors they have gave me a sick line for four weeks. IL sign it n drop it into Funkys for u."*

56. Again there was no mention of alleged harassment and no indication that the doctor

had given her a sick line for stress as a result of alleged harassment, which the claimant had alleged in her claim form.

57. The claimant accepted in evidence, and had indeed accepted at one of the two CMPHs, that she had not mentioned the alleged harassment to her doctor on 20 January 2020. She had instead indicated to that doctor that she had been suffering stress because of particular domestic circumstances which had been entirely unrelated to the respondent.

58. It was clear that there was then a dispute between the claimant and the respondent about whether she had been entitled during this absence to statutory sick pay paid through the respondent. It was equally clear that the respondent had been advised by his accountant that the claimant had not been entitled to statutory sick pay and that it should not be paid. The respondent had simply been following the advice of that accountant, even though it turned out that the advice of the accountant had been wrong.

59. Even though documentation had been provided to the claimant, which had included a copy of the email from that accountant issuing those incorrect instructions to the respondent, and even though the respondent had made it plain that he had been acting solely on that advice, and even though statutory sick pay had been paid fairly quickly once the mistake had been realised, the claimant persisted in arguing to the tribunal that the respondent had not paid her statutory sick pay because of the alleged harassment. The claimant however accepted in cross-examination that she had no evidence whatsoever to support that allegation.

60. The tribunal concludes that the issue concerning statutory sick pay had been entirely unrelated to the exchange of WhatsApp messages early on Boxing Day 2019 and that it had instead been a simple case of the respondent, in an area with which he had been entirely unfamiliar, acting on the advice of his accountant.

61. That dispute nevertheless generated a significant number of WhatsApp messages between the claimant and the respondent between 20 January 2020 and 23 January at 9.10 am. Those messages were friendly in nature and there was no mention of alleged harassment or of stress, fear and paranoia.

62. At one point, the possibility of overpayments had been raised. That possibility seems to have infuriated the claimant. On 23 January 2020, the claimant reacted in the following way:

> *"Wat do u mean overpayments? I have everything on my bank statements u can't just take money from my wage this wk becuz u say my other payments were wrong. So y pay me them then? Funny Ur only noticing that they could be wrong now. Wat is it do ya not want me to get sick pay or sumthin becuz it sounds like it. One of the reasons y I'm on the sick is becuz of Ur creepy msgs at Christmas I haven't felt comfortable at all going bk to work for you after that. So know wat that's dead on. IL go c a solicitor today about that like I shud have already and HMRC r getting a fone cal and my bank statements sent also."*

63. That was the first occasion on which the claimant had mentioned the messages which had been sent on Boxing Day. That was almost one month after those

messages had been sent and after the respondent had apologised for those messages. During that intervening period, there had been repeated and friendly contact between the claimant and the respondent and the claimant had actively tried to increase her hours working for the respondent.

64. The respondent repeated his apology in response to that WhatsApp. He stated that he had made up the claimant's hours to 16 hours every week so it would not affect her benefit claims. He stated that sometimes the actual hours had only been 10-12 hours but he had still paid 16 hours. He stated he had never seen the apartment work drop off like it had done and that the only way he could keep the claimant working was to cover Funky Monkeys until the apartment work had picked up again.

65. The claimant responded that:

> *"U should never have sent them msgs in the first place. Ur my boss do u know how wrong that is. And I didn't ask u to pay me extra that's ur own fault."*

66. Further WhatsApp messages passed between the claimant and the respondent about the calculation of pay and sick pay.

67. On 16 February 2020 the respondent indicated that the statutory sick pay had been sorted out and stressed that he had done what he had been told to do by his accountant and that he had never dealt with SSP before. He apologised again.

68. The claimant responded on 17 February 2020:

> *"I won't be coming back to work. After what happend I still feel like I can't work for u. I will need my P45 sent over and the rest of my payslips."*

69. It is clear from the evidence that the claimant had gone for a trial in another job (while on sick leave) on 14 February 2020, and that that trial had been successful.

The claimant commenced that new job immediately after her resignation.

DECISION

Unfair Dismissal

70. The claimant does not have the necessary qualifying continuous service to claim constructive unfair dismissal under the 1996 Order and is not exempt from that requirement.

71. Even if the tribunal had jurisdiction to consider such a claim, that claim would have been rejected in any event. The claimant did not resign from her employment because of any alleged repudiation of the employment contract by the respondent; whether that alleged repudiation had been unlawful harassment or any other matter. The claimant made it perfectly clear in the exchange of WhatsApp messages on 14 January 2020 that she had been looking for other employment, and intending to leave employment with the respondent, because her cleaning duties had been largely in Funky Monkeys in the evening, when she had wanted to

work during the day in the apartments. That allocation of duties had been entirely in accordance with her contract of employment and could not on any reading have been regarded as a repudiation of the contract.

The only reason the claimant had resigned from her employment with the respondent was that she had wanted to work during the day rather than during the evening, because of child care issues. It had had nothing to do with the alleged harassment.

72. Furthermore, the claimant did not resign promptly after any alleged harassment on 26 December 2019. She remained in employment from almost two months thereafter before resigning; thereby waiving any alleged repudiation of her employment contract.

Harassment

73. Not every occasion when inappropriate conduct occurs amounts to harassment within the specific definition in the 1976 Order; sometimes it is just inappropriate conduct.

74. The tribunal has to look at all the evidence before it and to consider in particular the actual perception of the claimant, which is not necessarily the same as alleged perception of the claimant.

75. Given the content of the WhatsApp messages sent by the respondent on 26 December 2019, there is clearly prima facie evidence that the respondent had engaged in unwanted conduct of a sexual nature and also arguably, prima facie evidence that the conduct in question had the purpose or the effect of either violating the claimant's dignity or of creating an adverse working environment for her. The onus of proof has shifted to the respondent in this respect. Where the respondent has elected not to give evidence in this matter, the evidence which the tribunal must consider is that which was contained in the claimant's witness statement and, more importantly, in her answers during cross-examination.

76. The tribunal has concluded that the following facts are relevant to the claim of harassment:

(i) The exchange of WhatsApp messages between the claimant and the respondent on 26 December 2019 had been initially a friendly exchange.

(ii) Both the claimant and the respondent clearly had drink taken.

(iii) The claimant showed no signs of being offended by the respondent's WhatsApp messages. She had in fact responded on two occasions to those messages in a humorous manner.

(iv) The respondent apologised immediately after the alleged harassment and there was no recurrence of the relevant behaviour. (See ***Forbes*** above).

(v) The relevant messages were not threatening or abusive.

(vi) The relevant messages contained nothing which would have put the claimant in *"fear"* and fear was not evident.

(vii) The claimant continued to be in friendly contact with the respondent thereafter with frequent messages dealing with various work-related and personal matters. There had been significant delay in alleging harassment and no convincing explanation of that delay (see ***Weeks*** above).

(viii) The claimant actively sought to increase her hours of work cleaning the Airbnb apartments; the location where the claimant sought to argue in cross-examination that she had been *"creeped out"* by the thought of the respondent watching her on camera.

(ix) The claimant had attended her GP twice after the alleged harassment and had twice been put on sick leave. The claimant sought to allege before this tribunal that her sick absences had been due to her being suffering from stress, fear and paranoia as a result of the messages on 26 December 2019. However, she did not tell her GP any of this. It is clear that the first absence was because of an infection for which she had been prescribed antibiotics. It is also clear that the second absence had been because of stress for an entirely unrelated domestic reason.

(x) The claimant sought other employment only because there had not been sufficient hours available cleaning apartments during week days and because she did not working in the evening in the premises of Funky Monkeys.

(xi) The claimant had not even mentioned the alleged harassment until a row had commenced about statutory sick pay and primarily the issue of overpayments. She had already been seeking other employment for entirely unrelated reasons.

77. The tribunal unanimously concludes that the respondent has rebutted the onus of proof in relation to the allegation of unlawful harassment contrary to the 1996 Order. It is clear that the behaviour had not been for the purpose of violating the claimant's dignity or creating an oppressive working environment. This had been no more than a drunken WhatsApp exchange between two people of roughly similar ages, even though one person had been the employer and one person the employee. There had been no threatening or abusive behaviour. There had been an immediate apology and no recurrence of the behaviour. It had been an exchange in which the claimant had made it plain that she had regarded the approaches as humorous. It had also been an exchange which did not put the claimant, as she subsequently sought to allege, *"in fear"* or which left her in *"paranoia".* On the evidence before the tribunal, it is clear that the respondent had not intended to violate the claimant's dignity or to create an oppressive working environment.

78. As regards the second limb of the statutory definition, this WhatsApp exchange did not have the effect of violating the claimant's dignity or of creating an oppressive working environment. The claimant did not go on sick leave because of this exchange. She clearly went on sick leave on the first occasion because of an infection which had required two courses of antibiotics. On the second occasion, she went on sick leave because she had been experiencing stress as a result of

unrelated issues. Her argument before the tribunal, that she had decided not to explain the situation to her GP, is simply not credible. If she had decided to take four weeks sick leave because of alleged harassment, that would have been made plain to the GP and it was not. There had been a friendly exchange of messages thereafter even when there had been a difference of opinion about statutory sick pay. The WhatsApp message were only raised by the claimant when she had been infuriated by the possibility of overpayments.

79. Unlawful harassment of the type alleged is a serious matter (see ***Grant*** above). It should not be trivialised or rendered meaningless by the inclusion of minor matters which had no real effect on the claimant and which were, in reality, simply being used to bolster a claim where the claimant had later decided to leave her employment because she did not like the hours.

80. The claim of unlawful harassment is dismissed.

81. There appeared to be no evidence in relation to a claim that the actions of the respondent had in any way been motivated by the claimant's refusal to accept or condone *"harassment"*. There was no *"harassment"* as defined in the 1976 Order. For the sake of completeness, the evidence clearly establishes that the respondent did everything within his power to secure additional hours for the claimant cleaning in the apartments and that he did everything within his power, not just to apologise for the inappropriate WhatsApp exchange, but also to retain the claimant in employment, even to the extent of making up her hours and paying her for hours which she had not worked to maximise her social security entitlements. The initial refusal of Statutory Sick Pay had been caused solely by the incorrect advice from the respondent's accountant.

    This claim is also dismissed.

SUMMARY

82. The claims are dismissed.

Vice President:

Date and place of hearing: **23 August 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: