



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000363/2024**

**Held at Aberdeen on 18 & 19 September 2024**

**Employment Judge N M Hosie  
Members J Clewlow  
A Atkinson**

**Miss Freya Pealing**

**Claimant  
Represented by,  
Mr B McKinlay,  
Trainee Solicitor**

**The Croft Aberdeen Ltd**

**1<sup>st</sup> Respondent  
Represented by,  
Miss H Suleman,  
Senior Litigation  
Consultant,  
Peninsula**

**Andrew Robert Eagar**

**2<sup>nd</sup> Respondent  
Represented by,  
Miss H Suleman,  
Senior Litigation  
Consultant,  
Peninsula**

**E.T. Z4 (WR)**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that:-

5 (1) the first respondent, The Croft Aberdeen Ltd, shall pay to the claimant the sum of One Hundred Pounds (£100), as an unlawful deduction from wages;

(2) the first respondent, The Croft Aberdeen Ltd, unlawfully directly discriminated against the claimant by treating her less favourably because of her sex, in  
10 terms of s.13 of the Equality Act 2010;

(3) the first respondent, The Croft Aberdeen Ltd, unlawfully discriminated against the claimant, by way of harassment of a sexual nature, in terms of s.26(2) of the Equality Act 2010;

15 (4) the first respondent, The Croft Aberdeen Ltd, shall pay to the claimant the sum of Five Thousand, Two Hundred and Fifty Five Pounds (£5,255), by way of compensation for the unlawful discrimination;

20 (5) the complaint of victimisation, in terms of s.27 of the Equality Act, is dismissed; and

(6) the claim, in so far as directed against the second respondent, Andrew R Eagar, is dismissed.

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**REASONS**

**Introduction**

30 1. Miss Freya Peeling brought complaints of sex discrimination (direct discrimination, in terms of s. 13 of the Equality Act 2010; harassment, in terms of s.26 and victimisation, in terms of s.27). The claim was denied in its entirety by the respondents.

2. Miss Pealing is a student. She worked on a part-time basis for the first respondent at its bar/restaurant, Resident X, in Aberdeen. The claim arose because of an “incident” which occurred on a “staff night out” on 30 January 2024.

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### **The evidence**

3. We heard evidence first from Miss Pealing.

- 10 4. We then heard evidence on behalf of the respondents from the second respondent, Andrew Eagar, who is a Director of the first respondent Company.

5. A bundle of documentary productions was also submitted (“P”).

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### **The facts**

6. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. By and large, they were agreed or not disputed.

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7. The first respondent, The Croft Aberdeen Ltd, operated the “Resident X” bar and restaurant in Marischal Square, Aberdeen (“the restaurant”). Andrew Eagar, the second respondent, is a Director of the first respondent Company.

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8. Miss Pealing is a student. She worked part-time at the restaurant as a “bar tender”. She started to work at the restaurant on 15 December 2022. She had a zero hours contract. She normally worked on Friday and Saturday nights. Her employment was uneventful. She was a valued employee.

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**“Night Out” on 30 January 2024**

- 5 9. Miss Pealing, together with several colleagues at the restaurant, went on a “night out” on Tuesday 30 January 2024. There was only one other person in attendance at the night out who did not work at the restaurant. The purpose of the night out was to celebrate the end of a busy festive and new year period at the restaurant. It was organised by way of a “WhatsApp group chat”. Mr Eagar and his fellow Director, Ryan Clark, were aware of and encouraged the night out. The restaurant was closed for the night. The Directors made a cash contribution to the night out and arranged for the group to eat and drink free of charge in a restaurant owned by Mr Clark. The group met in the restaurant at 6pm. After the meal and drinks, the group went to a nearby public house at around 8pm. The atmosphere was convivial.
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- 15 10. Once in the public house, Alex West, Miss Pealing’s Line Manager, pulled up a stool and sat down beside her and others at a table and commented, *“What happens on a staff night out stays on a staff night out and “I’m not your colleague tonight, or words to that effect. We were not persuaded that this was directed only at Miss Pealing but she said the comments made her feel uncomfortable.*
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- 25 11. Zuzanna Herchel, one of the Managers, stood up from the table to go to the bar to get another round of drinks for everyone. Mr West proceeded to take money from the “kitty” to give her. At that point, Miss Pealing held out her hand and said *“where’s mine”*. Mr West said, *“How could I forget, here’s yours”* and gestured to put a banknote down Miss Pealing’s cleavage. Mr West did not make physical contact with her. However, Miss Pealing’s reaction was to pull away and put her hands up. It was clear that she was shocked and Mr West said, *“Sorry that was inappropriate”*. In response, Miss Pealing said *“It’s fine, it’s fine”*. Mr West then stood up from the table and went to the toilet.
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12. While Mr West was away, Miss Pealing spoke to the others at the table. She said that she felt, *"humiliated, embarrassed and objectified"*. The others agreed that what Mr West had done was not acceptable. However, Miss Pealing did not leave.
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13. When Mr West returned from the toilet, he resumed sitting next to Miss Pealing and apologised again.
14. Miss Pealing said that she continued to feel, *"almost trapped and uncomfortable"* in Mr West's presence. She said she distanced herself from him and told Jordan O'Donnell, a Manager at the restaurant, what had happened. However, Miss Pealing did not leave and go home. She said that she spent most of the night after the incident, *"texting my partner and speaking to Jordan"*. However, she made no mention of the incident 'with Mr West in the text messages to her partner and she did not phone him. She continued on the night out and visited four more public houses along with her colleagues, including Mr West, before she left just before midnight and walked to her partner's home. When asked at the Hearing why she had not left earlier she said, *"I felt that if I left it would have drawn unwanted attention to the incident. I was humiliated. I knew if I left it would be the topic of discussion."*
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15. Miss Pealing sent a text message to her partner at 23:11 to say that she would be home *"within the hour"*; and another at 23:33 to say *"7 am coming in 10"* (P.131). She walked to her partner's flat and arrived there at around 23:52. There were then a number of text message exchanges with her partner which included sending a photograph of her whereabouts on her way home (P.132). She still made no mention of the earlier incident with Mr West.
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16. Miss Pealing spoke with Jordan O'Donnell during her next shift at the restaurant on Thursday 1 February. She told him that she wanted to make a complaint about Alex West. She had to remind Mr O'Donnell of what she had told him about what happened on the night out. Mr O'Donnell said it would be *"complicated"* because Mr West was a Manager. However, he took a

handwritten note of Miss Pealing's complaint. He suggested that she should "sit down and speak" with Mr West. He also suggested that Mr West could apologise to her again but she told him that she didn't want to speak to him. Mr O'Donnell told her that he would arrange to change her shifts so that she didn't work at the same time as Mr West. Miss Pealing said that would be "preferable".

### Saturday 3 February 2024

10 17. Miss Pealing was on her way to work when she received a text message from Jordan O'Donnell who told her not to come in as her shift would overlap with Mr West's shift that day (P.87). Mr O'Donnell made reference in his text message to a "meeting" which he had arranged with Mr West and Zuzanna Herchel for the purposes of mediation but Miss Pealing was unaware of that.

15 18. As she had been advised by Mr O'Donnell that Andrew ("Andy") Eagar, one of the Directors, would now be dealing with the matter (P.88), Miss Pealing sent a text message to him and Mr Eagar telephoned her. He told her that Mr West had told him that he had found Mr O'Donnell's hand written notes of her complaint which he had left on his desk by accident

20 19. We heard evidence from Mr Eagar at the Tribunal Hearing. He gave his evidence in a consistent, open, convincing, manner and presented as credible and reliable. He had been unaware of any issues arising from the night out until Mr West spoke to him after he discovered Mr O'Donnell's notes.

25 20. Miss Pealing said that during their telephone conversation Mr Eagar had made certain comments such as "*Lads on tour was something we say to let young ones misbehave*" and that Mr West was "*flirty*". However, this was denied by Mr Eagar when he gave evidence. As we recorded above, Mr Eagar presented as credible and reliable. Essentially, it was Miss Pealing's word against his and we were unable to make a finding in fact that Mr Eagar made such comments.

**Grievance**

21. Miss Pealing submitted a written grievance on 3 February 2024 (P.81).

5 22. Miss Pealing's grievance was investigated by Mr Eagar. He spoke with Mr West and others who had attended the night out. As Mr Eagar put it, "*They all thought it was odd that Freya responded that way.*"

10 23. Mr Eagar was of the view (mistakenly as the Tribunal decided) that this was not a work related matter as the incident had taken place outwith the restaurant and not during working hours, but he took Miss Pealing's grievance seriously.

15 24. On 6 February 2024, Mr Eagar and Ryan Clark, the two Directors of the respondent Company wrote to Miss Pealing with the outcome of her grievance, as follows (P.94).-

20 *"We've taken your complaint very seriously and done an internal investigation, interviewing members of staff mentioned by yourself in your complaint and also spoken to the team in general.*

*Our first point is that this happened on a night out, outwith work hours and also outwith Resident X premises and therefore this shouldn't really be a work-related issue.*

25 *But nevertheless we have done a full investigation.*

*Outcome*

30 *We feel that Alex is very remorseful for what happened and has apologised for his actions. This was witnessed by several people on the evening. We have asked a selection of staff members if they have ever felt the same way in his company and the consensus is 'No'. They feel he is a good addition to the team and someone they are comfortable with, even on a one to one basis.*

35 *You did not leave the night out and continued socialising and following him and allowing him to purchase drinks for you and the rest of the team for the rest of the night.*

*From an employer point of view, we are looking at closing this out and the matter is closed.*

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*We value you as a team member and do not want you to feel threatened and unhappy in the workplace, so the decision is effectively yours if you want to carry on as part the (sic) team”*

**ACAS**

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25. On the following day, 7 February, Miss Pealing notified ACAS of her intention to bring an employment tribunal claim (P.3).

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26. As no response had been received from Miss Pealing to the grievance outcome letter, Mr Clark sent an e-mail to her on 12 February 2024, in the following terms (P.64):-

*“Hope you are well.*

20

*We would ask that you attend a meeting with myself this week at Resident X. Looking to have a chat with you regarding your complaint and also the outcome of our investigation and working arrangements going forward.*

25

*Aware you informed Andy that you were not comfortable working shifts with Alex and haven’t turned up to your allocated shifts since your complaint.*

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*Apart from tomorrow I am really flexible this week so please just let me know a day and time that works for you. If you could get back to me tomorrow that would be great.*

*Cheers*

*Ryan”*

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27. There was an exchange of e-mails between Miss Pealing and Mr Clark the following day (P.63-64). Miss Pealing wished to attend the meeting



accompanied by a trade union representative. However, she advised that *"this could take four weeks"*.

- 5 28. Mr Clark replied to say that he had no difficulty with this and suggested that Miss Pealing consider being accompanied by a colleague.
- 10 29. He also requested in his e-mail details of Miss Pealing's trade union and her representative. Miss Pealing replied to say that she was, *"with Unite the Union"* but that she was unsure when a representative would be available. As we understand it, as Miss Pealing was not a trade union member at the time of the incident the Union was unable to represent her and no meeting was ever held.
- 15 30. On 19 February, Mr Clark sent an e-mail to Miss Pealing to advise her that: *"I have instructed the management team to ensure that you are rota'd on for shifts when Alex isn't working"* (P.62)
- 20 31. Miss Pealing was aware, therefore, that she would not have to work the same shifts as Mr West. Mr O'Donnell also advised her of this (P.89). However, despite this and despite Miss Pealing being offered shifts (P.66-75), she did not return to work for the first respondent at Resident X.
- 25 32. On 20 March 2024, Mr Eagar sent a WhatsApp message to Miss Pealing to advise her that: *"Alex no longer works for the company. So there is no need to be worried about him on the premises. Please let us know a suitable time and date."* (P.109).
- 30 33. Miss Pealing said that she, *"still did not feel able to take any shifts despite being offered them"*. However, she did not provide the first respondent with any "sick notes".

34. On 21 May 2024, Miss Pealing was removed from the WhatsApp "RX Staff Group" (P.109). However, we were satisfied that this was a mistake by the Manager, Zuzanna Herchel. Shortly after, she was reinstated to the Group by Mr Eagar who sent the following message to her (P.119):-

5                    "*For the avoidance of any doubt. You were removed from this group by Zuzanna by mistake.*

*You have been offered shifts the same way as every other employee has been since you have been absent without leave.*

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*So again, for the avoidance of doubt and specifically for you. Would you like any shifts next week?"*

15 35. However, Miss Pealing still did not take any shifts and that remained the position until the first respondent stopped trading early in September 2024 and Resident X closed.

### Claimant's submissions

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36. The claimant's representative made written submissions which are referred to for their terms. He also made oral submissions. The following is a brief summary.

25 37. He spoke to complaints of direct discrimination, in terms of s.13 of the Equality Act 2010; harassment, in terms of s.26; and victimisation, in terms of s.27.

30 38. The first issue which he addressed was that of vicarious liability. He submitted that the first respondent was vicariously liable for Mr West's conduct on the night out as this was, "*in the course of employment*", which is "*defined very broadly and is not restricted to tasks required to be done as part of a person's job*". In support of his submissions in this regard, he referred to **Jones v. Tower Boot Co.** [1997] IRLR 168 and **Forbes v. LHR Airport Ltd** [2019]

IRLR 890. He submitted that, "*the nexus between the night out and employment was clear*".

5 39. He further submitted that as the respondent had not led any direct evidence about the events on the night out, the claimant's evidence should be accepted.

40. He maintained that Mr Eagar had "*down played*" Mr West's actions.

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### **Direct discrimination**

41. The claimant's representative submitted that the claimant was treated less favourably than a hypothetical male would have been because of her sex.  
15 He also submitted that there was direct discrimination because the respondents denied giving her shifts and prevented her from attending work.

### **Harassment**

42. The claimant's representative submitted that Mr West's "*lewd comments*" and his attempt to put money down the claimant's cleavage amounted to harassment under s.26(2) of the 2010 Act.  
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43. He also alleged that Mr Eagar's comment on the telephone to the claimant and his grievance letter constituted harassment.

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44. This was unwanted conduct, he submitted. Miss Pealing felt "*objectified*".

### **Victimisation**

30 45. Miss Pealing's representative submitted that her verbal and written complaints were "protected acts" and that she was subjected to detriments because of this. In particular, she was prevented from attending work. He

submitted that she was prevented from taking shifts and this was motivated by her raising a grievance.

### Respondents' submissions

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46. The respondents' representative spoke to written submissions which are referred to for their terms. The following is a brief summary.

### Vicarious liability

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47. The respondents' representative submitted that Mr West's conduct on the night out, *"wasn't in works time, nor was it on works premises it happened outside of work. The respondent investigated the complaint made by the claimant. They provided the claimant with an outcome and gave her an opportunity to discuss the complaint moving forward but it was the claimant who did not respond or attend any meeting. She refused to contact the respondent and did not attend any shifts moving forward even though these were offered to her."*

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20 48. She submitted, with reference, in particular to ***Moore v. Bude-Stratton Town Council*** [2000] IRLR 676 at Para 23, that:

*"The claimant has failed to show that the night out was connected to work. Yes, the respondent provided monies for drinks and a meal, but they cannot be held liable for the actions of Mr West."*

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### Direct discrimination

49. The respondents' representative submitted that the respondents had not treated the claimant any less favourably than it treats or would have treated others.

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50. It was accepted by the claimant that Mr West's comments were not made to her alone but rather to all the people on the night out, nor were they directed

to any individual or gender. She did not challenge Mr West at the time and although she said in evidence that she felt uncomfortable she did not excuse herself. She made a joke to Mr West to which he responded by *"making a gesture by throwing money towards the claimant's cleavage. Mr West apologises and the apology is accepted by the claimant. She continues in the company of Mr West, takes photos with him, she doesn't excuse herself, she doesn't contact anybody, she doesn't go out for fresh air, she accepts the apology and carries on with the night out. She doesn't leave until some four hours afterwards. Yes, she raises it with Mr O'Donnell and Mr O'Donnell advises her to make a complaint. If the claimant was feeling uncomfortable, objectified, harassed or victimised why would you remain in the company of Mr West?"*

51. While Mr O'Donnell advised the claimant not to attend her shift on 3 February, that was because he had discovered her shift would overlap with Mr West's shift. Shifts were offered to her following the investigation, in the same way as they were offered to all staff. Also, the claimant was advised that the respondents would ensure that she would be rota'd on for shifts when Mr West was not working (P.62).

52. It was submitted that, *"the claimant was not treated any differently than any other staff nor was any treatment due to the claimant's sex. If anything the respondent went over and beyond to confirm that they would not place her on shifts with Mr West. The test has not been made out."*

### Harassment

53. It was submitted that, *"the claimant's case is not proven"*. The respondents' representative relied on the submissions she had made in relation to the direct discrimination complaint.

## Victimisation

54. The respondents' representative denied that the claimant had been subjected to a detriment because she had done a protected act, namely her verbal complaint to Jordan O'Donnell on 1 February 2024 and her written grievance on 2 February 2024. She was advised that the respondent would ensure that she was rota'd on for shifts when Mr West was not working (P.62). She made reference to this in a WhatsApp message to her partner on 16 February (P.100). However, she did not respond to any messages after 19 February and she did not take up the offer of shifts, despite being advised by Mr Eagar on 20 March 2024 that Mr West has left his employment (P.109). There was no excuse for her not to accept shifts.

55. It was further submitted that the claimant's grievance was fully investigated by Mr Eagar. She was offered an opportunity, *"to discuss the complaint moving forward but it is the claimant who did not respond or attend any meetings"* (P.62-64 and P.109) and did not take any shifts, even though these were offered to her (P.66-75).

56. As far as the letter dated 27 March 2024 which Mr Eagar sent to the claimant was concerned (P. 110), the claimant had not provided the respondent with any sick notes despite being advised that Mr West was no longer working for the respondent. The claimant was, therefore, *"absent without leave"*. The letter was sent by him after taking legal advice.

## Discussion and Decision

### Observations on the evidence

57. The Tribunal was extremely surprised that no evidence was led on behalf of the respondents from anyone who had been on the night out, in particular from Mr West. The respondents' representative had indicated that Zuzanna Herchel, a Manager who had been on the night out, would be called but the

Tribunal was then advised that she was “no longer available”. Although Mr West was no longer employed and the business had closed, no witness order was sought for him or anyone else. This meant that the only direct evidence which we had about what happened on the night out was from Miss Pealing.

5 This was not at all satisfactory as we did have concerns about the credibility of Miss Pealing’s evidence that she was “humiliated”, “embarrassed” and felt “objectified” by Mr West’s conduct. The reason for our concerns was primarily Miss Pealing’s own admitted conduct after the incident, as submitted by the respondents’ representative: after Mr West apologised she remained at the

10 table; she stayed on the night out for almost four hours, in Mr West’s company, although she said she distanced herself from him; she, along with the others, visited four more public houses in the course of the evening; photographs were taken which included both Miss Pealing and Mr West, we understand, but none were produced in evidence; we had reservations about her explanation that she did not leave because she did not wish to draw

15 attention to herself; she walked home on her own; we found it very surprising that in her messages to her partner that night she made no mention of the incident or of her distress and she did not phone him; we heard from Mr Eagar that Miss Pealing’s partner had worked previously for Resident X but had

20 been “sacked” by him and was replaced by Mr West; in text messages to Miss Pealing her partner referred to Mr Eagar in derogatory terms (P. 120); Miss Pealing notified ACAS of her intention to bring a claim 8 days after the incident; and while the incident was undoubtedly unsavoury, unpleasant and caused upset, the level of Miss Pealing’s subsequent alleged distress and

25 the alleged impact on her, seemed disproportionate to the incident and was at odds with her conduct in the immediate aftermath.

58. However, Tribunal proceedings are adversarial in nature and the role of the Tribunal is not an inquisitorial one. We could only base our decision on the

30 evidence which was presented and both parties were represented. This meant, that without any conflicting evidence from anyone who had been on the night out, we accepted Miss Pealing’s evidence, by and large, of what had occurred.

**Vicarious liability**

59. This was the first issue which we considered. Under s.109(1) of the 2010 Act an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment.
60. At the relevant time, there was an employment relationship between the employer and the alleged discriminator: Mr West was an employee of the first respondent Company.
61. So, was Mr West acting “in the course of employment” on the night out?
62. In **Chief Constable of Lincolnshire Police v. Stubbs** [1999] ICR 547, the EAT acknowledged that the dividing line between employment and off-duty conduct can become especially blurred where social events involving colleagues are concerned.
63. The relevant factors identified by Mr Justice Lindsay in **Moores** (at Para 23), to which we were referred by the respondents’ representative, were helpful. However, his Judgment was a dissenting one and that case can be distinguished from the present case. The circumstances and the issues were quite different as the alleged discriminator was a Councillor and not an employee of the respondent, Bude-Stratton Town Council
64. The Court of Appeal explained in **Jones v. Tower Boot Co. Ltd** [1997] ICR 254, to which we were referred by the claimant’s representative, that the words ‘in the course of employment’ are to be construed in the sense in which every lay person would understand them and this is a question of fact for an Employment Tribunal to determine.
65. In **Lister & Ors v. Hesley Hall Ltd** [2001] ICR 665, the House of Lords held that the question to be asked is whether the employee’s wrongful acts were



so closely connected with his or her employment that it would be fair and just to hold the employer vicariously liable.

5 66. This “close connection” test was affirmed by the House of Lords in ***Dubai Aluminium Co. Ltd v. Salaam & Ors*** [2003] IRLR 608.

67. So, what of the present case? The night out was attended almost exclusively by the first respondent’s employees (we heard that there was only one other person in attendance who was not an employee but he had a connection, as  
10 a nearby business owner to Resident X). Ryan Clark, a Director of the respondent Company, had planned to attend but was unable to do so due to ill-health. Resident X was closed for the evening. The two Directors of the respondent Company made a financial contribution to the night out and paid for a meal and drinks at a local restaurant owned by Mr Clark.

15 68. According to the EHRC Code of Practice on Employment (2011), at Para 10.46:- *“The phrase ‘in the course of employment’ has a wide meaning: in the workplace it may also extend to circumstances outside such as work-related social functions or business trips abroad. For example, an employer could  
20 be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party.”*

69. For all these reasons, the Tribunal arrived at the unanimous view that there was a sufficiently “close connection” between the night out and the incident  
25 to render it just that the employer, the first respondent Company, should be vicariously liable for Mr West’s actions that evening.

70. That said, the issue was not straightforward. We could well understand why Mr Eagar took the view that the incident was not an employment related  
30 matter. However, we accepted the submission by the claimant’s representative that, *“the nexus between the night out and employment is clear”* and in terms of s.109 (3), *“it does not matter whether that thing is done with the employer’s or principal’s knowledge or approval”*.

**Direct discrimination**

71. The relevant statutory provision is s.13(1) in the 2010 Act:-

**'Direct Discrimination**

(1) *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"*

72. In order to claim direct discrimination under s.13, therefore, the claimant must have been treated less favourably than a comparator who was in the same or not manifestly different circumstances as the claimant but did not share the claimant's protected characteristic. In the present case, the claimant's representative relied upon a hypothetical comparator. It was a man, on a night out with the first respondent's colleagues.

73. There was no doubt, on the evidence, that Miss Pealing was treated less favourably because of her sex, which is a protected characteristic. Mr West would not have treated a man the same way. The less favourable treatment of Miss Pealing was motivated by the fact that she was a woman. That was the reason why Mr West treated Miss Pealing the way he did. But for the protected characteristic, the act complained of would not have happened.

74. We had no difficulty, therefore, arriving at the unanimous view that this was direct discrimination.

**Harassment**

75. The relevant statutory provision is s.26(2) of the 2010 Act:-

**"26 Harassment**

(1) *A person (A) harasses another (B) if-*

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

(b) *the conduct has the purpose or effect of-*

(i) *violating Bs dignity, or*

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

(2) *A also harasses B if -*

(a) *A engages in unwanted conduct of a sexual nature and*

(b) *the conduct has the purpose or effect referred to in sub-section (1)(b)”*

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76. Unlike the direct discrimination complaint, a comparator is not required. As recorded above, we only had direct evidence about the incident from Miss Pealing. She said she was “*humiliated*” and felt “*objectified*”. While her conduct for the rest of the evening suggested otherwise, as we recorded above we did not hear any direct evidence from anyone else who was there that night to the contrary. Her evidence about what had happened and how it made her feel was accepted, for the most part, therefore, by the Tribunal.

77. On the basis of the evidence, we decided, unanimously, that Miss Pealing had satisfied the statutory test in s.26(2) and that Mr West’s conduct that evening constituted harassment. While there was no physical contact, what Mr West did was unwanted by Miss Pealing and, by its very nature, it was clearly conduct of a sexual nature which violated Miss Pealing’s dignity and humiliated her.

78. In the particular circumstances, the first respondent, The Croft Aberdeen Ltd, as Mr West’s employer, was liable for Mr West’s conduct that evening.

### **Mr Eagar**

79. However, we were not persuaded that Mr Eagar was also guilty of harassment, as alleged. While his grievance outcome letter (P.94) could have been better framed, which he readily accepted, we were satisfied that he did take the claimant’s grievance seriously. The letter did not, in our unanimous view, satisfy the statutory test of harassment.

80. The letter also had to be considered in the context of a genuine desire on the part of the respondents to support Miss Pealing and facilitate her return to

work, an assurance having been given given that she would not have to work at the same time as Mr West. Shifts were offered to Miss Pealing. However, it appeared that she was set against any return. There was a continuing failure by her to communicate and engage in any meaningful way with the respondents and we could not understand her failure to return to work after she was advised that Mr West was no longer employed at Resident X.

### Victimisation

81. The relevant statutory provision is s.27 of the 2010 Act:-

#### ***“27 Victimisation***

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because*

(a) *B does a protected act, or*

(b) *A believes that B has done or may do, a protected act.*

(2) *Each of the following is a protected act -*

(a) *bringing proceedings under this Act;*

(b) *giving evidence or information in connection with proceedings under this Act;*

(c) *doing any other thing for the purpose or for in connection with this Act;*

(d) *making an allegation (whether or not express), that A or another person has contravened this Act);*

(3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

(4) *This section applies only where the person subjected to a detriment is an individual.*

(5) *The reference to contravening this Act includes a reference to committed a breach of an equality clause or rule.”*

82. We accepted the submission by the claimant’s representative that Miss Pealing’s verbal complaint and written grievance were protected acts. She

had made an allegation that Mr West had contravened the 2010 Act (s.27(2)(d)).

5 83. However, we were not persuaded that Miss Pealing was subjected to any detriments because she had made these protected acts. We did not find in fact that Miss Pealing was prevented from attending work as her representative submitted. Quite the contrary, in fact, as in our unanimous view the respondents endeavoured to facilitate Miss Pealing's return to work, and gave her an assurance that she would not have to work at the same time  
10 as Mr West, but, as we recorded above, it appeared that she was set against any form of return.

15 84. Miss Pealing failed to establish a *prima facie* case of discrimination which she was required to do.

15 85. While the grievance outcome letter could have been better framed (P. 94), it was not influenced, in any way, by the protected acts and, in any event, it did not amount to a detriment. The fact that Miss Pealing had raised grievances was not the reason why the letter was framed in that way. Mr Eagar took her  
20 grievance seriously and it was investigated. Her complaints about Mr West's conduct on the night out were not the reason why Mr Eagar responded to Miss Pealing the way he did.

25 86. We arrived at the unanimous view, therefore, that this complaint was not well-founded and it is dismissed.

## Remedy

### Unpaid wages

5 87. As we recorded above, Mr Eagar accepted that the respondent Company was due to pay Miss Pealing wages for the shift which, for good reason, she was not required to work on 3 February. It was agreed that a payment of £100 would be made

### 10 Injury to feelings

88. We decided that it would be just and equitable to award Miss Pealing compensation to reflect her injury to feelings in respect of the direct discrimination and harassment. The incident was a "one of" and of very short  
15 duration. Mr West apologised immediately and apologised again shortly afterwards. There was no physical contact. It was only a gesture by Mr West, but a distasteful and offensive one, nevertheless. The medical evidence was limited and ended on 2 May 2024 (P.130). Miss Pealing did not submit any "sick lines" and she was prepared to report for work a few days after the  
20 incident. However, on the basis of Miss Pealing's evidence alone, the incident caused her considerable distress. Although she did not contact her G.P. immediately, she did so some 10 days later and a copy of her "Medical History" recorded intermittent consultations. She was prescribed "anxiety medication" which she continues to take. Miss Pealing also spoke of losing  
25 sleep, having difficulty in social settings, a fear of meeting her work colleagues and missing University classes.

89. We decided, in all the circumstances, that an award for injury to feelings just below the middle of the lower band in ***Vento v. Chief Constable of West Yorkshire Police (No.2)*** [2003] IRLR 102, should be made. Lord Justice  
30 Mummery said that an award in the lower band was appropriate for less serious cases, such as where the act of discrimination is an isolated or one

off occurrence. The “**Vento** bands” are regularly updated by Presidential Guidance. In respect of claims presented on or after 6 April 2023, the lower band was £1,100 to £11,200. We decided, unanimously, that it would be just and equitable to award Miss Pealing £5,000 for injury to feelings.

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90. This is the total award for both grounds of unlawful discrimination. They overlapped, in the sense that they both arose entirely out of the same set of facts.

10 **Interest**

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91. The award also attracts interest at the rate of 8% from the date of the act of discrimination complained of, which in this case was 30 January 2024, to the “day of calculation” which was 19 September 2024. This was a total of 234 days. The interest amounts to £255.

92. The total award of compensation, therefore, is £5,255.

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**Employment Judge: N M Hosie**  
**Date of Judgment: 14 October 2024**  
**Entered in register: 14 October 2024**  
**and copied to parties**