THE EMPLOYMENT TRIBUNALS

Claimant **Mrs C Martin**

Respondent **Sunuva Limited**

HELD AT: **London Central**

ON: **9-13 February 2017**

EMPLOYMENT JUDGE: Mr J Tayler **Members: Mrs J Griffiths**
Ms J Collins

Appearances

For Claimant: **Mr M Mageee**
For Respondent: **Mrs Y Montaz**

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 19 August 2016 the Claimant brought complaints of unfair dismissal, sex discrimination, victimisation and unlawful deduction from wages.

2. The matter was considered at a Preliminary Hearing for Case Management before Regional Employment Judge Potter on 19 October 2016. The issues were identified as set out in an agreed List of Issues attached to the Order.

Evidence

3. The Claimant gave evidence on her own behalf.

4. The Claimant called Claire Pool, Maternity Cover for Gabriella Amodeo

5. The Respondents called:

   5.1 Bunty Stokes, Managing Director

   5.2 Robert Mears, Part time financial controller since February 2015

   5.3 Sabrina Naggar, Co-Founder and shareholder

5.4 Marc Erlich, Wholesale Manager

6. The witnesses gave evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

7. We were provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

Findings of fact

8. The Respondent is a small business engaged in the sale of fashion swimwear with UV protection for children. It was set up in 2007. It was established by two cofounders and shareholders; Emily Coen and Sabrina Naggar.

9. The Claimant was offered employment with the Respondent on 9 August 2012 (P52). She was offered the role of international sales manager. At that time, Gabriella Amodeo was the head of wholesale.

10. The Claimant commenced her employment on 19 September 2012. The Claimant was considered to have made a very good start. The business was gradually developing and sales were increasing significantly. Notwithstanding this, the business it did not become profitable. The Claimant was given sales targets. She did not exceed them on any occasions and so did not receive bonuses.

11. In December 2012 Ms Amodeo went on maternity leave. During Ms Amodeo's maternity leave the Claimant was primarily responsible for wholesale. She had good relations with the owners of the business. In or about September 2013 the Claimant discussed with the owners the possibility of becoming head of wholesale. The owners thought it would not be possible in the short term, as Ms Amodeo was shortly to return from maternity leave, but was possible in the future. It was agreed that Ms Amodeo would return to work part-time. A significant number of members of staff at the Respondent work part-time. Both the co-owners have children and work part-time.

12. In July 2014, the Claimant was granted share options. In part this was to establish a level of stability in the business in circumstances where its finances did not permit an increase in salary, but it also reflected the view of the owners who were at the time satisfied with the Claimant's role and performance.

13. In February 2015 Ms Amodeo commenced a second period of maternity leave. Ms Pool was at recruited to provide cover, working four days a week; two or three days per week in the office; the other days at home. Ms Pool accepted in cross examination that the Respondent was very family friendly. Ms Pool focused on key accounts, travel resorts and the UK. Ms Pool struggled in achieving sales. The Claimant covered agents and distributors and international independents. The Claimant had recruited agents and distributors who operated in territories outside of the UK. They generally had exclusive rights in the territories. They charged commission of between 10 and 30%.

14. From about July 2015, the co-owners became increasingly troubled by the financial position of the company. While there had been an initial period of growth it became clear to them that, in circumstances in which the business had yet to become profitable, they would need to raise additional funds. They did so and had to give up part of their equity in the business. This resulted in them at taking a more business-like approach. They concluded that it was necessary to have a managing director with a more hands-on approach who would take strategic day to day control of the business. They were keen to ensure that the business became profitable as soon as possible.

15. Bunty Stokes was recruited as managing director on 14th of July 2015. She met with each member of staff after her appointment. In August 2015 there was a discussion between the Claimant and Ms Stokes about the Claimant's wish to become head of wholesale. The Claimant said that the co-owners had raised this possibility with her and she expected to move into the role.

16. On 18 August 2015 (P74) the Claimant requested eight days holiday in lieu of weekend working while on business trips. On or about 25 August 2015 there was a discussion between the Claimant and Ms Stokes about the time off in lieu. Ms Stokes had joined the business knowing that it needed to be reinvigorated and that there was a substantial shortfall in revenue that needed to be made up soon. She felt that it was all hands on deck and therefore was taken aback that the Claimant wished to take off time in lieu when there was such a substantial shortfall in revenue. Although Ms Stokes accepted that she could not prevent the Claimant taking the time off she requested her not to do so. The Claimant was not prepared to agree and, as was her legal right, took the time off.

17. On or about 26 August 2015 there was a further meeting between Ms Stokes and the Claimant. The Claimant said her position was untenable. She said that she had understood from the owners that she would be moving to the position of head of wholesale, but that this had not occurred. We accept that the Claimant said that as she had not been given the role promised to her why should she give a hundred percent. Mr Stokes was very troubled by the comment. She felt that it suggested that the Claimant had an insufficient commitment to the Respondent's business.

18. On 22 September 2015 Ms Stokes completed a business review (P75). She raised concerns about the way the business was operating and the fact that wholesale was currently behind plan and lacking an entrepreneurial, strategic or a proactive mentality. Ms Stokes wrote that she had concerns over the skills of the current wholesale team. She stated that there was a potential attitude issues with the Claimant which might not only stifle growth, but potentially infect the rest of the business. Ms Stokes referred to the need to restructure the team and to look at how the business was divided up to create a vertical structure including a head of the wholesale business. Ms Stokes referred to reviewing agents and distribution agreements. There were 11 agents and distributors. Some were bringing in significant amounts of businesses; others were not. The owners and Ms Stokes were concerned by the margin they lost by paying commission to agents and distributors, and the fact that their

exclusive territorial rights would prevent the Respondent from entering contacts with major independent shops in certain territories.

19. The document also referred to the potential recruitment of an acquisition member of the team. We accept that at around this time Ms Stokes came to the decision that the most urgent task for the Respondent was to find someone who could quickly obtain major new clients.

20. On 5 October 2015 Ms Stokes met with the Claimant and discussed a proposed new contract of employment and restrictive covenants. The documents were attached to an email sent to the Claimant on 12 October 2015 (P 93A). It is more likely than not that the Claimant did sign the documents and return them to the Respondent. There is an email response from the Claimant on receipt of the document saying that she would check them overnight. There is no later email from Claimant stating that she was refusing to sign the documents. Ms Stokes produced a check sheet which shows her as having ticked the Claimant's name to record that she had returned the signed documents. While this document was not disclosed until the hearing we accept Ms Stokes evidence that it was provided to the Respondent's representative, Peninsula, who failed to disclose it. We do not accept that the late disclosure establishes that the document was falsified. When the restrictive covenants were raised by the Respondent after the termination of the Claimant's employment, the Claimant replied that the document had not been signed. In the next letter from the Respondent it was stated that the matter was being put in the hands of Peninsula. The Respondent did not state and that they had a record of the document being signed. However, we accept that when the Respondent was seeking to rely on the restrictive covenant the owners and Ms Stolkes felt unable to deal with the matter themselves. They initially proposed that Peninsula would deal with it. Peninsula responded that it was outside their field of expertise. The Respondent then consulted solicitors with the primary concern of trying to seek to prevent any inappropriate at dealing with their clients. However, the Respondent swiftly realised that the likely costs involved meant that they would not be able to take action. While dealing with that matter they did not think to point out that they had a signed copy of the document. Unfortunately, that signed copy was removed from the Claimant's file.

21. Ms Stokes was absent on sick leave from 14 October to 1 November 2016. The owners decided to hold a meeting on 20 October to deal with the position in wholesale. The owners were very concerned that there was a £300,000 budget shortfall. They hoped that the Claimant would be able to explain the financial position and suggest ways in which the shortfall could be made up. The Claimant felt that the meeting was an opportunity for the owners and Rob Mears, the part-time financial controller, to explain the figures and put forward their proposals as to how at the problems could be resolved. The meeting did not go well. The participants had a poor grip on the figures. The owners felt that the Claimant was unable to explain the financial position and put forward proposals for resolution of the problems. The Claimant felt that she was bombarded with questions, but not provided with the financial information that she required.

22. The budget for the year to October budget was approximately £1 million. The current sales were approximately £721,000. The biggest shortfall by far were the key accounts, resorts and UK areas covered by Ms Pool. The Claimant's area of responsibility, agents distributors and international independents was approximately £95,000 below the target. However, much of that the revenue came from agents and distributors for whom the Claimant was responsible and so was entitled to include their revenue in her figures. However, the sales were made by the agent or distributor, rather than he Claimant herself.

23. The Claimant felt extremely negative after the meeting. She sent an email to Mr Stokes (P 93E). She said that nothing positive came out of the meeting. She complained that the owners wanted her to say how the team needed to be re-structured. The Claimant stated that she didn't really say anything as it was not her place to change people's roles.

24. Ms Stokes spoke with the Claimant by telephone after the meeting. The Claimant explained how upset she had been. We accept that she said that she and Mrs Pool were "ready to walk". Ms Stokes forwarded the Claimant's email to the owners, rather unwisely, as it clearly had been written for her alone. The owners replied on 21 October 2015 stating that they not feel the meeting had been as negative as the Claimant suggested and that it was worthwhile. They set out proposals for the future, including at a review of agents and distributors.

25. Sabrina Naggar sent an email to Ms Stokes at on 21 October 2015 gving her overview of the situation. She stated that the wholesale team did not have a strong grasp of their figures and were unable to answer simple questions. She set out a number of concerns, including the substantial revenue shortfall, how this was to be turned around and about the Claimant taking her TOIL days at a time when the business was in severe difficulties. Ms Stokes replied that there were clearly established performance and behavioural issues with the Claimant. She suggested speaking to Peninsula to obtain advice on best practice regarding performance management so that a programme of tangible KPIs could be put in place to manage the situation. The reality was that the owners and Ms Stokes were coming to the opinon that there was excessive reliance on agents and distributors that should be reduced. They lacked confidence in the Claimant and decided that they needed a new member of staff who could within a short period obtain substantial new business. It is also clear that they were having difficulties in working out how to deal with the practical problems. Their initial reaction was to engage in performance management of the Claimant.

26. At around this time Ms Stokes spoke to one or more of her contacts from her previous job and let it be known that the Respondent would be interested in employing someone with the ability to obtain substantial new contracts quickly. In their sales speak such a person was referred to as a "hunter".

27. The Claimant was absent on her holiday using her TOIL from the 2 to 11 November 2015.

28. On 3 November 2015 Mark Erlich sent a CV to the Respondent. He set out a glowing report of his abilities. He said that he had obtained very substantial sales for the businesses that he had previously worked for within a short time,

including achieving sales close to £1 million in the first season for a recent employer. He had a referee who supported his contention that he could quickly bring in substantial contracts.

29. At about this time at the Respondent briefed a recruitment agency. They stated that they would be interested in looking in the medium term for a head of wholesale; but in the short term wanted a person who could concentrate on achieving immediate sales. If a new recruit was successful in bringing in such sales he or she would be very well-placed to move to the role of head of wholesale in the future.

30. Ms Stokes arrange for Mr Erlich to meet with the directors on around 4 November 2015. On 9 November 2015 (P103) Mr Erlich sent an email stressing how interested he was in the role and what passion and hunger he had to join the business.

31. On 12 November 2015, on the Claimant's return from holiday, she had a conversation with Ms Stokes. Ms Stokes said a new member of staff was being recruited. We accept that she referred to the possibility of that person taking the head of wholesale role. We do not accept that Ms Stokes suggested that this would take place immediately, but it was suggested as a possibility in the future. Ms Stokes referred to a disconnect between the Claimant and management. Ms Stokes was increasingly of the view that the Claimant was not the right person for the Respondent. We consider it is likely that she hoped that the Claimant would decide that the time had come to move to a new position.

32. On about 17 November 2015 Ms Stokes informed the Claimant that Mr Erlich had been recruited to work in the wholesale team.

33. The offer letter to Mr Erlich gave his job title as acquisitions manager. The contract referred to him as wholesale manager.

34. A personal development meeting was held between Ms Stokes and the Claimant on 18 November 2015. Ms Stokes referred to the meeting of 20 October 2015. She was concerned that the Claimant had not been able to put forward a positive plan for resolution of the problems in wholesale. Ms Stokes suggested a resolution meeting between the Claimant and the owners. Ms Stokes referred to the Claimant having said she was not giving a hundred percent. Ms Stokes noted the concern the Claimant had that she had not been offered the head of wholesale at role and suggested that the positive approach that the Claimant brought to the role when she joined the company had not continued in subsequent years. We accept that during the resolution meeting reference was made to the comment made by the Claimant about her and Ms Pool being ready to walk and that the Claimant said that she had “not meant it in that way”. That was the evidence of Ms Stokes and Mrs Naggar.

35. From November 2015 Ms Stokes took a more hands-on approach with the wholesale department and set targets to be achieved over a 30-day period, on a rolling basis. Her aim was to increase the level of performance. This was described as a performance improvement plan in her statement. We do not accept that that was how it was presented to the Claimant. She was given

targets for the department to meet. In the period November to mid-December 2015 it seemed likely that the targets would be hit; the business coming predominantly from agents and distributors; but with a significant shortfall in international independents. The plan was designed to improve performance in the current structure rather than a new structure that would produce the required substantial increase in overall sales.

36. By November 2015 the Claimant was very concerned about her role in the business. She updated her CV (P301). She sent an email in May 2016 attaching a document "Claire CV November 2015". The Claimant stated that she did not update her CV in November 2015 and suggested that any issue with dates resulted from the fact that the internal clock her laptop computer was wrong. That would not explain the naming of the document. We reject her evidence and concluded that she did update her CV in November 2015.

37. Mr Erlich commenced employment with the Respondent on either 31 November or 1 December 2015. He focused on obtaining new sales. At a team meeting on 3 December 2015 it was agreed that his title would be wholesale acquisition manager; the title that had originally been given in the offer letter.

38. In December 2015, the Claimant was told that she should only attend part of a forthcoming tradeshow. This was because it had been decided that Mr Erlich should attend part of the show to try and obtain new business.

39. On 9 December 2015 an agreement was made that when Ms Amodeo returned she would be working on a revised version of her part-time hours.

40. The Claimant was due to go on holiday for approximately three weeks in December 2015. Mr Stokes met with the Claimant on 17 December 2015. We accept that Ms Stokes raised concerns about whether the new part-time arrangements for Ms Amado would work in the light of the departure of Ms Pool and the Claimant's holiday. We do not accept that Ms Stokes said that she was generally against part-time working. We accept that Ms Stokes was a supporter of such arrangements.

41. On 6 January 2016 a pack was produced by Ms Stokes for a forthcoming board meeting (P130). It was noted that wholesale continue to be behind target, that Mr Erlich was to focus on new business acquisition, that the good agents should be pushed harder and that poor agents should be divested. Ms Stokes stated that she was currently working through the wholesale structure to ensure that the right resources were apportioned to the right part of the business.

42. On 11 January 2016 (P139) Ms Stokes completed a pro forma word template document provided by Peninsula designed to consider the need for a business change or redundancies. Ms Stokes stated that wholesale sales were static for a second year, that the current structure was not working and a restructure was required. She noted that the business had not achieved budget the last two years and that the business was not profitable. Ms Stokes noted a new acquisitions manager had been employed to drive the need to restructure. Provision was made for reducing costs. A new structure was set out. It was

specifically stated that the Claimant was to be made redundant. In answer to a question asking which jobs were risk Ms Stokes stated the that the job holder was the Claimant. We accept that the business case genuinely and accurately sets out the Respondents thinking. Ms Stokes and the owners felt that there should be a restructure and that the restructure would result in the Claimant no longer having a role. Thereafter they acted on the advice of Peninsula. Peninsula advised that there should be a redundancy process with a pool and selection criteria. Ms Stokes stated that to maintain their indemnity from Peninsula they had to follow that advice. That that was also the evidence of Mrs Naggar. While we accept that the Respondent followed the advice of Peninsula that does not absolve them from the fact that they adopted a process that was designed to make it look as though they were genuinely applying redundancy selection criteria when, in fact, they were not. Ms Stokes accepted in her evidence there was never any prospect of anyone other than the Claimant being selected for dismissal. It had been decided at the outset that she would be dismissed.

43. The purported redundancy exercise commenced on or about 2 February 2013. The initial consultation was on 3 February 2016. In a meeting with Mr Erlich it was suggested that he might like to suggest reasons why he should be removed from the redundancy pool. Not surprisingly, he did, and was removed from the pool. A matrix was produced. Purported consultation meetings were held with the Claimant and Ms Amodeo. At the end of the process the predetermined decision to make the Claimant redundant was put into effect.

44. In the morning of the hearing on 12 January 2017 the Respondent conceded that the dismissal was unfair on the basis that it was accepted that there was a business reorganisation rather than a redundancy.

45. On 22 February 2016 the Claimant was dismissed. The Claimant was placed on garden leave. The Claimant's contract of employment is in unusual form in that it provides a right to keep the employee in employment without providing any work but does not require the employee to be ready and available for work, or to attend meetings, during garden leave.

46. On 26 February 2016 the Claimant appealed against her dismissal.

47. On 3 March 2016 at the Claimant was at informed that the garden leave could be extended to 1 April 2016. The Claimant sought a change the appeal date because she was to be away on holiday for one week. She was informed that the extension would be granted but that she would not be paid for the week that she was on holiday.

48. The appeal hearing took place on 16 March 2016. The appeal was dismissed by letter dated 29 March 2016. The appeal was decided on the basis that there had been a genuine redundancy consultation. This did not reflect the reality of the situation.

49. The Claimant's employment terminated on 1 April 2016.

50. On 17 May 2016 the Claimant commenced temporary consultancy work with "Platypus" an Australian company that produces ultraviolet protection swimwear.

51. On 18 May 2016 the Claimant's solicitors wrote to the Respondent alleging unfair dismissal and claiming that the Claimant's dismissal was discriminatory. It was alleged that the Respondent had dismissed the Claimant because, as a newly married woman, it was thought likely that she would wish to start family and would request part-time working. It was alleged that the Respondent did not wish to have employees working part-time.

52. On 31 May 2016, the Respondent was informed of an allegation that the Claimant was contacting clients and suppliers. On 9 June 2016 Ms Stokes sent a letter to the Claimant setting out the restrictive covenant and suggesting that action might be taken against her. Subsequently the letter was sent to Platypus.

The Law

53. Sex is a protected characteristic pursuant to Section 4 of the Equality Act 2010 ("EQA"). Direct discrimination is defined by Section 13 EQ:

> **13 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.

54. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this meant, in most cases, the Tribunal will have to consider how the Claimant would have been treated if she did not have the protected characteristic. This is sometimes referred to as relying upon a hypothetical comparator.

55. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

56. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, there may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the reversal of the burden of proof: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v. Devonshires Solicitors** [2011] ICR 352, as approved in **Hewage v Grampian Health Board** [2012] ICR 1054.

57. In **Shamoon** it was stated that, particularly when dealing with a hypothetical comparator, it may be appropriate to consider the reason why question first; why the treatment was afforded. It is also important to note that the Claimant's race need not be the sole, or even principal, reason for the treatment, provided it has significantly influenced the treatment: see **Nagarajan v London Regional Transport** [1999] IRLR 572.

58. While unfair treatment may not, of itself, lead to an inference of discrimination: **Strathclyde Regional Council v Zafar** [1998] ICR 120; unexplained unfair treatment can: **Madarassy v Nomura International Plc** [2007] IRLR 246 EOR 163.

59. The Respondent conceded that the dismissal was unfair. Where a dismissal is unfair the tribunal may have to consider whether there should be any reduction in compensation. Pursuant to Section 123(1) ERA the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances. This section provides the statutory basis for a reduction when the Claimant would, or might, have been dismissed had a fair procedure been followed; as a result of which it is not just and equitable to pay full compensation because the Claimant's losses do not solely arise from the unfairness on the part of the Respondent in dismissing her: **Polkey v AE Dayton Services** [1987] IRLR.

60. Pursuant to section 13 ERA an employer must not make an unlawful deduction from an employee wages.

61. Where a Claimant is successful the tribunal has discretion to award the issue and hearing fees. That does not require the employer to have acted unreasonably or to have raised a defence that had no reasonable prospects of success.

62. The tribunal is also entitled to award costs where a defence raised by a Respondent had no reasonable prospects of success or where the Respondent acted unreasonably in defending the claim.

Analysis

63. the Respondent conceded that the Claimant was unfairly dismissed.

64. The next matter to consider is the sex discrimination claim. The principal claim is that the dismissal of the Claimant was an act of sex discrimination. There are three matters that are said should shift the burden of proof. First, it is suggested that the way in which the Respondent dealt with the dismissal by purporting to apply a redundancy selection process in circumstances in which a decision had already been made that the Claimant should be dismissed is conduct that is so unfair and inappropriate it should lead to an inference of discrimination. The Claimant contends that the Respondent has been unable to give a consistent explanation of the reason for the dismissal. While unfair treatment by itself cannot give rise to an inference of discrimination; unexplained unfair conduct potentially can. However, we are fully satisfied that the conduct is explained. The Respondent genuinely set out its position in the business case and then decided to follow advice from Peninsula in going through the purported redundancy exercise. While we do not accept that the Respondent is absolved from all responsibility and by taking advice from Peninsula, we do consider that advice is the entire reason they adopted the procedure they did and that they genuinely believed that the Claimant did not have the skills that they required.

65. Next is the original basis for the claim of sex discrimination; that the Respondent thought that the Claimant would seek to work part-time in future and wished to avoid this. This was based on a discussion between Ms Stokes and the Claimant when Ms Amodeo was about to return from maternity leave. Ms Stokes referred to the difficulties of her immediately coming back on a new part-time arrangement. However, we do not accept that evidence shows any general antagonism towards part-time working. We accept that, far from it, the Respondent was very positive about part-time working. More fundamentally, the reality of the situation was that the Respondent had decided that they did not wish the Claimant to be working for them at all. There was no question of them wanting her to be full-time rather than part-time: they had decided that she did not have the skills that they required which is why there was to be a reorganisation that would lead to her dismissal.

66. Finally, it was argued that comments made by Ms Stokes in her statement, where she compares an acquisition person to an account manager involves gender stereotyping. She states at paragraph 49: “a. Acquisition requires a different skill set from account management. Acquisition is about tenacity, cold calling and requires individuals to be thick-skinned, resilient to knock backs, forceful. There are also negotiation skills required in opening new accounts in terms of payment terms, discount and size of order. The ability to not accept ‘no’ for an answer is key to this position. b. Account management requires a more nurturing, softer and relationship building approach. The skills required are clear communications, a detailed understanding of the accounts, where they have been and where they are going and attention to detail. There is also an element of strategic and landscape knowledge required to understand competition/distribution.”

67. The Claimant also relies on the term “hunter” being used for the acquisition role. It is suggested that words that show gender stereotypes are tenacity, being thick skinned and the term “hunter” being used as opposed to the nurturing and softer skills said to be needed for account management. Both might historically have reflected gender stereotypes about such roles. However, we analyse the matter as follows. First, we accept that the attributes referred to in Ms Stokes statement are the Respondent’s genuine view of the type of skills that are required. We do not consider that Ms Stokes assumed that those skills are male or female skills. She explained that in her early career she had been a hunter. We also have tested this by considering two hypothetical comparisons: Ms Stokes spoke to her friends in the industry about the need for the Respondent to employ someone who could bring in large sales very quickly. Had a woman come forward who presented as Mr Erlich, putting a very positive spin of her selling abilities and who could point to recent success supported by a referee, as Mr Erlich did, we consider there is nothing to suggest that Ms Stokes would have been any less keen on appointing such a person because she was a woman. Similarly, if the Claimant had been a man and had referred to not being hundred percent committed to the business, had insisted on taking time off in lieu at a time when the business had was in very great financial difficulty, we see no reason to believe that Ms Stokes would have thought any better of him because he was a man. While the possibility of there being gender stereotyping in the wording used in the statement might be said to be such as to shift the burden of proof we are fully satisfied that the real reason that Ms Stokes decided that the Claimant should be dismissed was her belief that she did not have the skills or commitment necessary for the Respondent business to thrive. The real reason that Mr Erlich was recruited was that Ms Stokes thought that he could prove, with the support of a referee, that he had the ability to bring in the new business the Respondent desperately required in a short period of time. That had nothing whatsoever to do the genders the Claimant and Mr Erlich.

68. The above analysis also deals with the Claimant’s selection for dismissal over Mr Erlich.

69. The Claimant alleged that there was a failure to promote her to the head of wholesale compared to Mr Erlich. We do not accept that he was made head of wholesale. Although there was a suggestion he might have that role in the future, he was not given the role. Furthermore, we see nothing to suggest that his treatment was to any extent because of his gender.

70. We do not accept that the Claimant’s and Mr Erlich's gender had anything to with the possibility of him taking over some of the Claimant's role. It was a necessary consequence of the gradual restructuring wholesale business.

71. Mr Erlich was told by Ms Stokes that his presentation at meetings could be improved. He was told to be less informal. That was general mentoring that Ms Stokes would provide to any member of staff. It had nothing whatsoever to do with Mr Erlich's gender.

72. Mr Erlich's removal from the selection pool was part of the dismissal process and resulted from the fact that it had been decided at the outset that the

Claimant was the person to be dismissed for reasons that was totally unrelated to her gender.

73. In respect of the victimisation complaint, it is accepted that the Claimant did protected acts in her original appeal against her dismissal and through her solicitor's letter of 18 May 2016. However, we consider in circumstances in which the Claimant had received a signed copy of the restrictive covenant, the reason that the Respondent reminded the Claimant of the restrictions was solely because the Respondent had been informed that it appeared that the Claimant was approaching suppliers, potential suppliers and clients. That was the entire reason for them seeking to warn the Claimant. They did not do so because the Claimant had raised the possibility of discrimination complaints.

74. It is accepted between the parties that the Claimant that the Claimant's garden leave period was extended. We accept that the Respondent deducted salary for one week because the Claimant was to be away on holiday for that week. She had used her holiday entitlement for the year. The Respondent genuinely did not believe there was any reason why they should pay the Claimant for the holiday. We do not consider that there is anything to suggest that they did so because the Claimant had raised discrimination claims in her appeal letter or her solicitor's letter.

75. The unusual wording of the garden leave provision relied upon by the Respondent is such that it allows them to require the Claimant not to attend work, but it does not require her to be available for work while on garden leave. In the circumstances, there was no right to deduct a week's pay and the Claimant is entitled to recover it as an unlawful deduction from wages.

76. We went on to consider what would have occurred absent the unfairness of the dismissal. The reality is that from the late autumn of 2015 the Respondent had come to the conclusion that the wholesale business was not working effectively. In part this was because there was an excessive emphasis on distributors and agents. That was not something that had been raised with the Claimant. She thought her job was going reasonably well. When the owners began to properly review the figures they appreciated that using agents and distributors had substantial downsides: their margin was eroded by the commission paid to the agent and distributor and their use could prevent the Respondent obtaining major contracts in the relevant territory. Therefore, they wish to decrease at their reliance on agents and distributors and focus on obtaining new business. The Claimant had been performing poorly in obtaining new business with international independents. The Respondent should have consulted the wholesale department about the proposed new structure and given the members of the wholesale team an opportunity to comment and put forward alternatives. That should be have been done prior to Ms Stokes putting out the word that an acquisitions person was required. We consider that there are a number possible scenarios. There is a chance that the Claimant might have agreed with the Respondent that it was time for her to move on and reach some form of compromise. In such circumstances, we consider that she would have required a reasonable payment which we consider would have been in the region of six months' pay. Alternatively, a new structure might have been trialled in which the Claimant could have sought to obtain new business. However, we consider there is a significant

likelihood, considering her motivation and the level of new sales to international independents, that she would not have been successful. In such circumstances, there would have had to be a performance management procedure that could have resulted in the Claimant leaving the Respondent's employment. In fixing a period we consider that there is some chance that the period might have been shorter and some chance that it might have been longer, but fix a six-month period as a reasonable period for trying out such a new structure. Had such a new structure succeeded the Claimant would have remained in the Respondent's employment for the foreseeable future. However, taking into account the difficulties that had arisen between the Claimant and Ms Stokes, the owners' loss of confidence in the Claimant and her relatively poor performance in respect of new contracts for international independents we consider that the likelihood is either by leaving of her own accord at the beginning of a six-month period with a payment covering six months or by going through performance management and leaving after a six month process, there is a two thirds chance that the Claimant would have left with a payment for six months and a one third chance that she would have remained in the Respondent's employment for the foreseeable future.

77. An argument was raised, that did not appear in the list of at issues, that the Claimant's compensation should be reduced for contributory conduct. We do not accept that the evidence has come close to establishing there was blameworthy conduct. There was an issue about whether the Claimant had obtained a contracts and targets for distributors, but we heard very limited evidence about this. The Claimant explained that some distributors require that they contract on their standard terms. We do not accept that blameworthy conduct has been established and do not consider that there should be any further reduction in compensation. The figures for compensation were agreed by the parties.

78. At the conclusion of the hearing the Claimant applied for costs. A cost schedule that was provided showing costs of £25,705 36, with solicitor's costs limited to the applicable County Court rate for Chelmsford. The application was limited by not pursuing issues about costs wasted by reason of problems in producing the bundle. The application was put on the basis that the defence to the claim of unfair dismissal had no reasonable prospects of success. In submissions the Respondent's representative accepted that that was the case, as she had no real choice but to do, as it is clear from the business case created in January 2016 that a decision was taken to dismiss the Claimant following which that sham process was put in place. From the outset, the Respondent should have admitted liability. In circumstances in which it is accepted that the claim of unfair dismissal never had any reasonable prospect of success the threshold for making an award of costs has been passed. The real question is what was the consequence of the Respondent not having admitted the unfair dismissal at the outset. There were in addition claims of sex discrimination and of victimisation. Any discrimination award was only likely to add injury to feeling as the other losses were within the unfair dismissal limit. With an admission of liability there is a possibility of the discrimination claim continuing, but we consider that the greater likelihood is that there would have either been no hearing with only limited costs incurred by the Claimant, or there would have been a much shorter hearing. There is a small possibility that there was still would have been a full hearing on the

discrimination complaints, but we consider that that is unlikely. We consider the best way to deal with those possibilities is to make an overall deduction from costs and we award the Claimant two thirds of the sums that she has requested, £17,136.90. and those of the costs that we order the Respondent to pay the Claimant. We consider that costs are justified in a case in which a false reason for dismissal was put forward by the Respondent which they persisted in maintaining until the last but one day of the hearing. The Respondent that the Claimant should be awarded the issue and hearing fee.

Employment Judge Tayler
13 March 2017