EMPLOYMENT TRIBUNALS

Claimant: AA

Respondents: (1) R Limited
(2) AB
(3) AC

HELD AT: Manchester **ON:** 27, 28, 29 and 30 November and 1, 4 and 5 December 2017

BEFORE: Employment Judge Horne

MEMBERS: Ms J K Williamson
Mrs S J Ensell

REPRESENTATION:

Claimant: In person
Respondents: Mr C Bourne, counsel

JUDGMENT was sent to the parties on 6 December 2017. It consisted of paragraphs 1 to 6 ("the liability judgment") and paragraphs 7 and 8 ("the costs order"). The claimant's email of 6 December 2017 has been treated by the Tribunal as a request for written reasons for both the liability judgment and the costs order. Accordingly, the following reasons are provided:

REASONS FOR THE LIABILITY JUDGMENT

Preliminary

1. To give effect to an order made by Regional Employment Judge Parkin on 29 August 2017, these reasons must not contain any information which is likely to lead members of the public to identify any of the parties in these proceedings. For this reason, the parties themselves are referred to by their somewhat cumbersome labels in these proceedings ("claimant", "first respondent" and so on), and other individual names have been replaced by suitable code names. The locations have been kept deliberately vague.

Complaints and Issues

2. By a claim form presented on 7 November 2016 the claimant raised a number of legal complaints against the respondents. Over the course of the proceedings, various of these complaints fell away. By the time the claim reached the final hearing, the remaining complaints were:

   2.1. Unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");

   2.2. Direct sex discrimination, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");

   2.3. Harassment related to sex, contrary to sections 26(1) and 40 of EqA; and

   2.4. A claim for damages for breach of contract by failing to give notice of termination (wrongful dismissal).

3. At the outset of the final hearing, the claimant applied to amend her claim to include various complaints of disability discrimination. We unanimously rejected the claimant's application. Oral reasons for our decision were given at the hearing. Written reasons for that decision will not be provided unless a party makes a request in writing within 14 days of these reasons being sent to the parties.

4. The basis upon which the remaining complaints were advanced was set out very helpfully in a Case Management Order prepared by Employment Judge Franey and sent to the parties on 3 February 2017. The relevant extracts from Annex B to that Order are reproduced here:

> **"Unfair Dismissal – Employment Rights Act 1996**
>
> 1. Can the respondents show potentially a fair reason for dismissing the claimant, namely a reason relating to her conduct?
> 2. If so, was the dismissal fair or unfair?
>
> **Breach of Contract – Notice Pay**
>
> 3. Can the respondent establish that the claimant was guilty of gross misconduct which entitled the respondent to terminate her employment without the notice period to which her contract entitled her?
>
> **Equality Act 2010**
>
> <u>Factual Issues</u>
>
> 4. What are the facts in relation to the following allegations:
>
> a) On 24 May 2016 [the third respondent] became extremely aggressive, jumped up out of his seat and came towards the claimant with fists clenched and eyes wild, shouting at the claimant to "get the fuck out and never fucking come back again… take your fucking money and never fucking come back." …

b) On 31 May 2016 [the third respondent] told the claimant that he had spoken to [the second respondent] and that they had decided the best way forward would be for [Mrs X] to take the claimant's job as she was better than the claimant. …

c) On 2 June 2016 the claimant was placed on garden leave without her consent by [the second respondent]. …

d) On or before 1 August 2016 [the second and third respondents, Mrs X and Mr Q] decided that the claimant would be issued with written notice that she was at risk of redundancy …

e) On or before 4 August 2016 [the second respondent] decided to dismiss the claimant….

f) The day after she was released from hospital the claimant sent [the third respondent] a text but he ignored it and told her sister that the claimant was lucky she had not been arrested for blackmail …

…

Direct Sex Discrimination

7. In relation to allegations a) – f), can the claimant prove facts from which the Tribunal could conclude that because of her sex the respondents treated her less favourably than they would have treated a man?

8. If so, can the respondents never the less show that they did not convene Section 13?

Harassment related to sex

9. In relation to allegations a) and b) can the claimant prove facts from which the Tribunal could conclude that:

a) [the second respondent] and/or [the third respondent] subjected her to unwanted conduct
b) which was related to sex, and
c) which had the purpose or effect of violating the claimant's dignity, or creating an intimidating hostile, degrading, humiliating or offensive environment for her?

10. If so, can the respondents nevertheless show that they did not contravene Section 26?

...

Time limits

13. In so far as any of the matters which the claimant seeks a remedy occurred more than 3 months before the date upon which the claimant initiated early conciliation against the respondent in question, can the claimant show that those acts formed part of conduct extending over a period of ending on or after the date 3 months before any conciliation began?

14. If not, can the claimant nevertheless show that it would be just and equitable for the Tribunal to allow a longer time limit for such matters?"

Evidence

5. We considered documents in an agreed bundle which we marked CR1, concentrating in particular on those documents to which the parties had drawn our attention, either in witness statements or orally during the course of the hearing. Bundle CR1 ran to 316 pages. We also considered an additional bundle of documents upon which the claimant wished to rely. This bundle, which ran to 141 pages, we marked C1.
6. Before hearing oral evidence, we watched CCTV footage of an incident on 2 August 2016. Our viewing of the footage was at the invitation of the respondents. The claimant did not object.
7. Another step we took before beginning to hear the evidence was to seek the parties' agreement to a hearing timetable. Counsel for the respondents estimated that he would need "most of a day" to cross-examine the claimant, but very little time with any of the other witnesses. Needless to say, the claimant had less experience of time estimates than her opponent. When it came to assessing how much time she would need to cross-examine the respondents' witnesses, however, she was confident that "half a day per witness would be sufficient".
8. The claimant gave oral evidence on her own behalf. She confirmed the truth of her original written witness statement and a supplemental statement which she handed to the Tribunal and the respondents on the morning of the hearing. Cross-examination of the claimant took from 3.14pm on the first day until 4.40pm on the second day. Proceedings were slowed by the claimant giving long answers to short questions and, on one occasion, the claimant needing to take a break following an emotional outburst. Once the claimant had answered questions, she called her brother-in-law ("Mr J"), her sister ("Mrs J") and her father ("Mr K") as witnesses. Very few questions were asked of them.
9. The respondents relied on the oral evidence of the third respondent (the claimant's husband) the second respondent (Managing Director), and a shareholder ("Mr Q").
10. All three witnesses confirmed the truth of written statements and answered questions. Cross-examination of the third respondent lasted from 11.35am on the third day until 10.21am on the fourth day. By 4.41pm on the third day, the tribunal was concerned that the claimant was taking substantially longer to ask her questions than she had initially anticipated. The employment judge asked the claimant to focus on her remaining questions during the overnight break and try hard to complete her questioning of all the witnesses by the end of the week, so that closing arguments could begin the following week. On the fourth day, the

second respondent was due to give evidence in the morning and Mr Q was scheduled for the afternoon. As it turned out, the claimant cross-examined the second respondent between 10.28pm and 12.35pm. There was then an extended break whilst the tribunal waited for Mr Q to arrive. Eventually, Mr Q arrived at 3.10pm. The claimant asked him questions for 20 minutes, finishing at 3.35pm. Once the evidence had concluded, the parties agreed to come back on the morning of the 5th day to present their closing arguments.

11. The first respondent has two further employees who were involved to some extent in the events which give rise to this claim. One of these is the second respondent's wife, to whom we will refer as "Mrs X". The second employee ("Mr Y") took notes of a grievance meeting on 10 June 2016. Neither of these employees was called by the respondents to give evidence. The claimant invited us to draw conclusions adverse to the respondents from their failure to take this step. We did not think it appropriate to draw such conclusions. From the evidence before us, we were satisfied that these employees' involvement was not central to the case and it was plain that they did not want to become involved.

12. This is a convenient opportunity for us to discuss our impressions of the witnesses. In this particular case, we have chosen to set out our approach to the evidence in more detail than would usually be necessary. This is for two reasons. First, the allegations made by the claimant against the respondents are very serious. Second, we were attempting to find facts in a context which calls for the greatest care and sensitivity. It was the claimant's case that for many years, the third respondent had subjected her during the course of their marriage to sustained psychological abuse and coercive control. She also alleged that the second respondent was abusive and violent towards his wife, Mrs X. From our reading of the material in C1, and also from our own general knowledge, we were aware of potential pitfalls in approaching evidence in cases such as these. Fact-finders may misinterpret evidence and reach unsafe conclusions based on lack of awareness of domestic abuse. Stereotypical assumptions of the behaviour of either abusers or their victims can lead courts and tribunals to reach unfair conclusions about a particular witness' credibility. This was also a case where it was important to examine closely the respondents' behaviour from the perspective of the claimant herself. Bullying and harassment, in their non-technical sense, are phenomena which depend very much upon their effect on the victim. We also had to remind ourselves that the claimant has for a long time suffered from a mental illness and has had to cope with the additional stress of representing herself in these proceedings.

13. Having warned ourselves in this way, we set about examining the reliability of the claimant's evidence. In our view, it was very difficult to place any weight on it when it conflicted with the accounts of other witnesses. Here is how we reasoned:

    13.1. The claimant made a great many generalised allegations of "abuse", "domination", "coercion" and "control" on the part of the second and third respondents. She gave very few examples, which was surprising given that her evidence was that this behaviour had gone on for many years. With one exception, when she was asked about those examples she did give, her version of the facts did not appear to us to fit the general label she had given to them. See, for example, paragraph 21 below.

13.2. Another difficulty we faced was that the claimant's perception of events appeared to have changed over time. For example, in relation to an incident that took place on 24 May 2016 (Allegation (a)), the claimant described in her witness statement that she was afraid that she was about to die; yet her descriptions of the incident during the days and weeks that followed made no mention of the claimant fearing for her life, or indeed fearing any violence at all. We are conscious that people who experience domestic violence, especially if they have suffered abuse in the past, may not complain straight away. They may internalise their feelings, mistakenly believe that the perpetrator's behaviour is normal, or simply be too afraid to speak out. But here, following the episode on 24 May 2016, the claimant started complaining within a few days. She was vociferous and persistent in her criticism of the third respondent's conduct. We would have expected her to mention the most serious aspect of it if it had happened.

13.3. Another reason for having to be careful about the claimant's perception of events is that, during the course of the hearing, the claimant demonstrated a complete lack of perspective or objectivity. We noted one example in the claimant's answers during cross examination. Describing an incident on 2 August 2016 involving the third respondent, the claimant said, "He's my husband, I've got every right to punch him in the face". It also troubled us that the claimant could not see any difference between the incidents on 2 August 2016 and 24 May 2016. She described these two events as "identical" a number of times during her closing arguments. It appeared to us that the claimant was simply unable to recognise that there was an important difference between the two occasions. The difference was that, on the first occasion, there had been some shouting and swearing by the third respondent towards the claimant, and on 2 August 2016 the claimant had twice gone to the third respondent's house and subjected him to sustained attacks including punching him, kicking him and throwing garden furniture at him whilst he was on the telephone to the police. She was unable to envisage any circumstances in which it would be appropriate to discipline her for these attacks, adding for emphasis, "It wouldn't matter if I hit him with an iron bar".

13.4. Another example of the claimant's apparent inability to see things from another person's point of view was her description of the third respondent's demeanour from the CCTV recording of the second assault. She told us that the third respondent could be seen behaving in a casual, laid back and completely unafraid manner. As will be seen below, that is not what any reasonable observer of the footage would think.

13.5. The claimant used inflammatory language both in her communications with the respondents at the time of the disputed events and also at times during the Tribunal hearing. For example, she looked directly at the third respondent during the hearing and said, "I hate you". She made a point of swearing elaborately on her children's lives and insisting that the third respondent did the same. Remarks such as these and others caused us to question whether the claimant could keep her understanding of events in proportion.

13.6. The claimant admitted in her oral evidence that she had told a highly significant lie during the course of her appeal against dismissal. She falsely denied assaulting the third respondent in his bedroom and instead

maintained that the altercation had begun at a later time. It was clear to us that her motive for lying was to portray the assault as having been triggered by something entirely unconnected with work.

14. Mr and Mrs J and Mr K all appeared to us to be trying their best to tell us the truth. To the extent that they could give relevant evidence, however, it was based for the most part on what the claimant had told them. Their accounts of what they had actually seen and heard were broadly consistent with the respondents' version of events.

15. We found the evidence of the respondents and Mr Q to be consistent and generally believable. Because it was the claimant's very strong contention that they were lying to us, we set out briefly our reasons for disagreeing with her:

    15.1. It is important to acknowledge, particularly in discrimination cases, that discriminators are unlikely to admit to having been improperly influenced, and may not indeed be aware that they have done so. The same is likely to be true where a person is alleged to have behaved in a coercive or controlling way towards their employee or spouse. As the claimant put it, "beliefs drive behaviour". We had to examine their behaviour carefully to see if it revealed any improper motivation on their part. Applying these concepts in practice, we looked for example at the claimant's assertion that the third respondent's failure to reply to the claimant's text messages following 2 August 2016 was "a form of controlling behaviour". We thought that his decision not to reply was much more consistent with the third respondent's evidence that he had simply had enough of the claimant by that time. She had, after all, just assaulted him.

    15.2. We also looked to see whether, as the claimant alleged, the third respondent had been motivated to ill-treat the claimant because "what grated him down to his core was that his abusive behaviour had been exposed" by the claimant's grievance. That grievance was addressed to the third respondent himself. The third respondent immediately passed it to the second respondent to investigate. That was not, in our opinion, the action of a man who was desperate to avoid his behaviour being exposed.

    15.3. We were conscious that, according to the material in C1, it is a common tactic of abusers to portray themselves as being the victim. We have therefore had to be careful about drawing conclusions from the respondents' demeanour in the witness box. They might have been putting on a show. A far more reliable guide to the actual demeanour of the third respondent in particular was his behaviour whilst the claimant was assaulting him. He showed no sign of aggression at all. What we saw on the CCTV video was much more consistent with the respondents' description of his behaviour than the starkly contrasting description offered by the claimant.

The Facts

16. The first respondent is a company running a relatively small business in the field of communications technology. The company was formed in approximately 2009 or 2010 when the second and third respondents decided to go into business together. It was agreed at that time that each of them would employ their wives in the business. The company's shares were held by the second and third respondents. The second respondent was Managing Director, the third

respondent was Operations Director. The claimant was Operations Manager and Mrs X (although we are unsure of her exact role title) was responsible for finance and administration. In her role as Operations Manager, the claimant was responsible for maintenance contracts, which included scheduling engineer visits and liaising with customers.

17. The claimant and third respondent lived together in a house in the North West of England. The second respondent and Mrs X lived together in the East of England. Both couples worked from home. The claimant's work was telephone and computer based. Provided that the right equipment was installed, she could in theory do the work from anywhere. The second and third respondents had a more field-based role. As well as being directors, they would visit client premises and carry out the more technical delivery work.

18. The first respondent also employed Mr J, who was married to the claimant's sister, Mrs J.

19. In late 2010, or possibly late 2011, the respondents arranged a Christmas party. The two couples decided to make a weekend of it. They arrived at the hotel venue the night before the party was due to take place. During the course of the evening, the claimant said something to Mrs X which caused her to get up and leave the table. The second respondent followed Mrs X. It is the claimant's evidence that, at this point, the second respondent behaved towards Mrs X in a way that demonstrates that he "beats his wife", is "an abuser" and generally has a low opinion of women. We did not think it was safe to try and make a finding about precisely what happened. We found the claimant's evidence to be unreliable in other respects. The claimant did not put her version of events to the second respondent when asking him questions, nor did she give him a fair chance to answer the very severe generalised allegations about his behaviour towards women. Whatever happened on the night, it soured the mood. Mrs J could sense that there was a strained atmosphere at the party the following day.

20. In September 2011, Mr Q bought shares in the first respondent. He took an interest in the affairs of the company and regularly attended directors' and shareholders' meetings. He did not, however, involve himself in the day-to-day running of the business.

21. The marriage between the claimant and the third respondent lasted some 16 years. During that time, the third respondent adopted the claimant's two children from her previous marriage. By about 2014, their relationship was under strain and continued to deteriorate. They finally decided to separate in January 2016. The third respondent was the one who actually finished the relationship, but it was clear to both of them they could no longer go on living together. We have not found it necessary to go into all the disagreements over the previous few years that led to this realisation finally dawning upon them. We are quite satisfied that this was not the dominating, controlling and coercive relationship that the claimant invites us to believe it was. The claimant herself describes herself as being a strong woman. We agree with her assessment, during her oral evidence, that the third respondent "didn't have any power within the home". Where our view parts company with that of the claimant is in her suggestion that "he asserted control in the workplace". There may well have been occasions when, for example, the claimant attempted to get the third respondent's attention whilst he was on the telephone and he would turn around and snap at her, "I'm busy".

There were also, however, numerous occasions on which the claimant would repeatedly tell the third respondent that he was not doing his job properly. In particular, she thought that the third respondent was "a pushover" in his dealings with customers. They would attempt to bypass the claimant by telephoning the third respondent directly, because they knew that the third respondent was more likely to indulge them than the claimant. When this happened, the claimant would speak her mind quite unreservedly.

22. Following their decision to separate, the claimant and third respondent agreed that the third respondent would stay in the matrimonial home and that they would both continue to us it as an office. The third respondent released the equity in the matrimonial home so as to enable the claimant to place a deposit to purchase a home of her own. The third respondent assisted the claimant in her dealings with her mortgage lender, and gave them an assurance that the claimant's job was "safe".

23. At this time, the separation was proceedings relatively amicably. The claimant moved into her new home in April 2016.

24. In May 2016 the second and third respondents and Mr Q discussed changing the roles and responsibilities undertaken by the claimant and Mrs X. The discussion was driven, at least in part, by concerns held by the third respondent that customers were unhappy about the claimant's treatment of them. No doubt, by this stage, the third respondent was looking at the claimant through the lens of his recent failed marriage to her. It is possible that he may have lost sight of some of the qualities that had led him to want to marry the claimant in the first place. He genuinely, and reasonably in our view, saw the claimant as having a very forceful and sometimes aggressive personality. There was a genuine difference of opinion between him and the claimant about how demanding or late paying customers should be handled. The third respondent thought that communications with customers like these required diplomacy. The claimant believed that a more "strident" tone would better serve the interests of the company. The directors and shareholders therefore discussed a change of role, whereby Mrs X would be responsible for most of the existing contacts and the claimant would deal with maintenance, marketing and possibly stock control.

25. The claimant was not a party to these discussions. She did, however, start to notice increasingly that Mrs X was taking calls that had been previously handled more commonly by her. She started to feel disillusioned. In an email dated 14 April 2016, she announced her intention to leave the business as soon as she could find another job, complaining that she was "too bored" and fed up of being bypassed by customers.

26. The third respondent discussed the proposed role changes with the claimant. He tried to explain the reason why they were thinking of making the changes. The claimant replied, seemingly without having listened to the third respondent's explanations, that she thought the third respondent was trying to get the claimant out of the company. The third respondent replied that this was not true. We accept that the third respondent's reassurance was sincere. It would not have been in his interest to engineer the claimant's departure from the company. Whilst the claimant kept her job, in effect, the second respondent and Mr Q were subsidising the third respondent's divorce. If she lost her job, the third respondent would have to make additional financial provision for her. There were genuine

opportunities for the claimant to use her talents to the benefit of the first respondent without having to exercise diplomacy with customers. The claimant did not believe him. She repeatedly accused him of pushing her out.

27. Matters came to a head on 24 May 2016. The third respondent started the day with a hangover from having consumed alcohol the night before. He completed two customer call-outs and then returned to the former matrimonial home. He lay down on the sofa near the office in order to get some rest. The claimant, who was at work in the house as normal, began again to accuse the third respondent and others of pushing her out of the company. Again, the third respondent tried to reassure the claimant that he had no such intention. The claimant did not take no for an answer. Eventually, the third respondent went to the kitchen to make himself a cup of tea. The claimant followed him towards the kitchen, repeating the same accusation. Eventually, the third respondent lost his temper. He shouted words along the lines of "fuck off!", "get out and never fucking come back!", and "you will be paid your fucking money". He was standing in the kitchen doorway when he said these words. Contrary to the claimant's evidence, we find that the third respondent did not have his hands clenched into fists, nor did he make any sudden movement towards the claimant. Nevertheless, we accept that the claimant was shocked and offended by the third respondent's outburst. She carried on working that afternoon, but at 4.08pm she sent a text message to Mrs X stating that she was feeling unwell and was going home. The following day, she returned to work as usual.

28. The third respondent apologised for his conduct soon after it had occurred. There is a dispute about whether the third respondent apologised directly to the claimant. On balance, we think it likely that he did. In any event it is undisputed that the third respondent also apologised to Mrs J.

29. This brings us to factual Allegation (a). We are satisfied that the reason why the third respondent shouted and swore at the claimant was because he was frustrated by the claimant's repeated insistence that he was pushing her out of the company. Doubtless that frustration was compounded by the fact that he felt hung over and wanted some rest. A contributing factor was the recent breakdown in their marriage. They had had previous arguments in which they had spoken to each other in a way that one would not normally expect of an employer-employee relationship. We are persuaded that the third respondent's outburst was absolutely nothing to do with the fact that the claimant is a woman. That fact did not influence his thinking either consciously or subconsciously. We have been able to make this finding without recourse to the statutory provisions on the burden of proof. Were it necessary to go through that exercise, we would not be able to could conclude from the facts that the third respondent was motivated improperly by the claimant's sex. We have rejected the claimant's generalised assertion that everything the third respondent did was because of his low opinion of women.

30. On 25 May 2016 the claimant and Mrs X exchanged messages. The claimant was in work but contemplating getting a sick note from her doctor. Mrs X sought to persuade the claimant that, if she was ill, she ought to go home or see her doctor. Despite that advice, the claimant remained in work.

31. On Sunday 29 May 2016, the third respondent attended the claimant's house to fit a garage door. As a way of saying thank you, the claimant cooked dinner for

them both. They had a pleasant evening and the third respondent's enraged outburst of a few days before appeared to have been forgotten. The next day was the May Bank Holiday. Neither of them attended work.

32. On Tuesday 31 May 2016, the claimant attended the former matrimonial home and immediately started pressing the third respondent for answers about the proposed change in job roles. The third respondent told the claimant that Mrs X would take over responsibility for booking in work. He did not tell her that the respondents had decided to give Mrs X her job. He did, however, explain to the claimant that Mrs X had better geographical and technical knowledge than the claimant and was consequently better at booking in work. Again, he explained that there would still be plenty of responsibilities, such as maintenance contracts, marketing and stock control, that would occupy the claimant in her role.

33. This is as good a point as any to consider factual Allegation (b). The reason why the third respondent told the claimant that part of her role would be passed to Mrs X was because the third respondent believed, genuinely and reasonably, that Mrs X would be better suited to that particular aspect of the role. The fact that the claimant is a woman was nothing to do with it. Again, we did not find the statutory burden of proof provisions to be of particular assistance in helping us to reach this conclusion. For completeness, however, we could not find any facts which would enable us to detect any discriminatory motivation, either conscious or subconscious, on the third respondent's part. We could not ignore the rather obvious point that the main beneficiary of the reallocation of roles was herself a woman.

34. The claimant was very disgruntled following the conversation on 31 May 2016. At 7.14pm that evening she sent an abusive text message to the third respondent. The following morning, she sent him a lengthy email headed "Restructuring". The great majority of the email was devoted to her dissatisfaction with the proposed changes to her job role. The email indicated that the claimant had spoken to ACAS and wanted her email to be treated as a grievance. One paragraph indicated that there was a further element to the grievance. It read:

> "Over the six years that I have worked for this company, I have been subjected to severe workplace bullying, which has contributed to my ill health. I am no longer willing to be subjected to this and will take matters further in future."

35. The next two paragraphs of the email reverted to the general complaint about the role change.

36. On receipt of the claimant's email, the third respondent immediately forwarded it to the second respondent to investigate. On receipt, the second respondent formed the view that the most serious aspect of the grievance was the accusation of bullying. Early the next morning, he emailed the claimant to inform her how seriously he was going to take the bullying aspect of the grievance and asking her for more information so that it could be investigated in depth. He also wrote to the claimant the same day giving her details of the forthcoming investigation. The final paragraph of his letter read, "Please note that you should continue to attend work while the investigation takes place".

37. Later on 2 June 2016, the claimant provided further information in response to the second respondent's request. She gave only two examples of bullying. The

first was the incident on 24 May 2016. Her account of the incident in this email quoted the words we have set out in our findings. There was no mention of any physically aggressive or violent behaviour. The second example of bullying related to an alleged threat by the third respondent to resign from the company. The rest of the email consisted of generalised assertions of having been "subjected to workplace bullying throughout my employment…sometimes on a daily basis". There followed a text message conversation between the claimant and the third respondent in which the claimant made the veiled threat that things were "going to turn nasty". Her messages during the course of this conversation were highly assertive. By contrast, the third respondent's texts appeared to be moderate and designed to placate her. At 5.59pm that evening, the third respondent emailed the claimant to offer her the opportunity to work from home pending the investigation. His email offered to provide all necessary equipment to enable her to carry out her role. The claimant's reply, the following morning, was that she would still be comfortable to work at the former matrimonial home provided that the third respondent was also comfortable with her being there. At the time of sending this email, the claimant preferred not to work from home. The claimant and the third respondent exchanged text messages during the course of the day. The claimant's messages became increasingly immoderate, accusing the third respondent of being an "untrustworthy liar" and of having "screwed me over". She emailed the company's general email address announcing her intention to go home and not return until 7 June 2016 at the earliest. Then at 7.23pm, she texted the third respondent to say that she could not cope with going into work every day, knowing that he had taken her job away from her.

38. On Sunday 5 June 2016 the claimant exchanged text messages with the third respondent again. In this conversation, the claimant tried a different tack. She sought to warn the third respondent against the second respondent and Mrs X, describing them as a "pair of crooks".

39. Having received advice, the second respondent decided that the claimant should not work from the office at the former matrimonial home while the investigation was underway. On Monday 6 June 2016, he renewed his offer to the claimant to provide her with the equipment necessary for her to work from home. As an alternative, he gave her the option of taking full paid leave for the duration of the grievance investigation. Such leave would not be deducted from her holiday allowance. His email invited the claimant to a grievance meeting, which subsequently took place on 10 June 2016.

40. The claimant's next working day was 7 June 2016. Unfortunately, the equipment was not ready to be installed on that day. There was a further delay until the Friday of that week, the same day as the grievance meeting. On that day the equipment was installed.

41. We have now recorded sufficient facts to enable us to address Allegation (c). The claimant was never placed on garden leave. The treatment that she alleges simply did not happen. Indeed, on 2 June 2016 (the date on which garden leave was allegedly imposed), the action of the first and second respondents was precisely the opposite. The claimant was required to continue attending work. An offer was made to the claimant to make that requirement compatible with the obvious desire to avoid the claimant and third respondent having to work in the same office. There was a period of only three days during which the claimant was available to work, but prevented from doing so. This was entirely due to the

delay in supplying the necessary equipment. None of this had anything to do with the fact that the claimant is a woman.

42. In advance of the grievance meeting, the second respondent sought the third respondent's comments on the information provided by the claimant in her email about the alleged bullying. The third respondent gave a detailed reply. He admitted shouting and swearing at the claimant during the course of a private conversation in the kitchen of his home. He explained that the claimant had made a threat against the business. He denied bullying the claimant, although he acknowledged that they had had "arguments just like any other married couple".

43. The grievance meeting proceeded on 10 June 2016. Present were the claimant, accompanied by her father (Mr K), and the second respondent. Mr Y attended as a somewhat inexperienced notetaker. His notes were by no means word-for-word, but they captured the main points. Early in the meeting, the claimant asserted that part of her role had been taken away and that she had been told as much by the third respondent. The second respondent told her that the third respondent should not have said that, and that the roles had yet to be defined by the directors. The conversation moved on to the incident on 24 May 2016. The claimant stated that the third respondent had behaved aggressively. She may have added the word, "extremely". It is unclear to us how much she told the meeting about the bulid-up to the third respondent's outburst. What is plain, however, is that she did not mention any clenched fists or sudden movement on his part, or give any hint that she had feared that the third respondent would be violent towards her, still less that he would kill her. The second respondent explored the possibility of mediation, but the claimant expressed her preference for the matter to be resolved internally by the company. The meeting reinforced the second respondent's impression that, although the bullying allegation was the most serious, the issue that mattered the most to the claimant was the change to her role.

44. Following the meeting, the second respondent set about making his decision. In his view, there was a conflict between the claimant's and third respondent's accounts of what had caused the third respondent to shout and swear. There was also some uncertainty in the second respondent's mind about the extent to which the argument was work-related, but he thought it highly probable that the breakdown of their marriage had contributed to the row. Against this backdrop, the second respondent thought it inappropriate to take formal disciplinary action against the third respondent. In our view, to an extent, the second respondent's thinking was somewhat clouded by the fact that the second and third respondents were, in reality, business partners. He did, however, decide that the third respondent should be reminded of his responsibility to behave professionally and courteously towards his colleagues. He also thought it desirable to review company policies to ensure a good working environment. The outcome was communicated to the claimant in a letter dated 14 June 2016. The letter renewed the second respondent's offer to bring in an external mediator. It also assured the claimant that her role was not at risk. The following day, he informed the third respondent by letter that there would be no formal disciplinary action. His letter reiterated the obligation to deal with all employees in a professional manner.

45. The claimant continued working from home. For a time, the claimant and third respondent were able to communicate civilly with each other by text message about work related matters, but the third respondent would not speak to the

claimant on the telephone for fear of an argument breaking out. On 5 July 2016 the claimant sent a series of emotionally-charged e-mails referring repeatedly to their marriage and demanding an explanation as to why Mrs X was taking her role. On 8 July 2016, after a series of cordial and relatively mundane messages about delivery of office equipment, the claimant e-mailed Mrs X, challenging her about why she wanted the claimant's job. Mrs X replied that she found it unfair and upsetting for the claimant to involve her in her dispute with the respondents.

46. On, or shortly before, 20 July 2016, the second respondent discovered that the claimant had e-mailed a customer, asking them to direct queries to the "service" e-mail address and not to Mrs X. The second respondent challenged the claimant and instructed her not to tell customers to avoid contacting other members of staff. In their following e-mail conversation the claimant and the second respondent exchanged frank views about what Mrs X's role entailed. The claimant was completely unapologetic, but agreed to abide by the second respondent's instruction.

47. On 21 July 2016, the second and third respondents met with Mr Q in a combined directors' and shareholders' meeting. They decided that the current business structure was not working. It was plain that the claimant and third respondent could not work together in the same office. In their view it was unsatisfactory for the claimant to work completely autonomously from her home. Despite her role title being Operations Manager, they believed, reasonably in our view, that she needed some degree of supervision. Up to that point she had worked side by side with the third respondent. They also discussed recent occasions on which their computer servers, based at the third respondent's home office, had malfunctioned. With the claimant no longer working at the former matrimonial home, there was nobody present to reboot the servers. Jointly, the shareholders agreed that the respondent would acquire new office premises in the East of England. The servers would be located there, together with the entire back office function. This would include all the claimant's tasks and responsibilities. Mrs X should be offered the new role of Office Manager, based at the new premises. Realistically, the shareholders did not envisage that the claimant would want to move away from the North West, having just bought her own house. In those circumstances, the shareholders decided that the claimant should be informed that she was at risk of redundancy and a consultation process should begin. Not being able to think of anything that the claimant might say to avoid redundancy, they also instructed solicitors to offer enhanced redundancy terms and to draft a settlement agreement. The intention was that the claimant should receive the "at risk" notice at the same time as the enhanced offer.

48. It is the claimant's case, (Allegation (d)), that the second and third respondents, together with Mr Q and Mrs X, decided to make the claimant redundant because she is a woman. We accept that Mr Q and the respondents set themselves on a course that would almost inevitably result in the claimant's redundancy. Our positive finding, however, is that the decision was not influenced, consciously or subconsciously, by the claimant's sex. It was for the reasons we have set out above. As with the other allegations, there were no facts from which we could conclude that the claimant's sex was a factor.

49. At about 8.00am on 2 August 2016, the claimant received and read the solicitors' offer and draft settlement agreement. At the same time, albeit in a different envelope, she received a letter from the second respondent informing her that

she was at risk of redundancy and initiating the consultation process. She felt utterly betrayed by the respondents, especially her husband. She immediately went to the former matrimonial home, where the third respondent was still sleeping. Having let herself into the house, she entered the third respondent's bedroom and punched him twice in the face as he lay in his bed. She refused to leave when asked to do so. All the while she was holding the redundancy offer letter in her hand and shouting about the redundancy. She then left the house, only to return at about 9am. This time she entered via the side gate. At this time the third respondent was in the home office. The claimant once again started talking about the redundancy letter in abusive language. The conversation briefly turned to the return of the claimant's guitars. At that point, the claimant noticed a greeting card on the third respondent's desk. The card appeared to the claimant – correctly as it turned out – to have come from the third respondent's new partner. On seeing the card, the claimant started attacking the third respondent again. Much of the attack took in the yard outside the house and was captured on CCTV. The footage showed the claimant ripping the shirt from the third respondent's back, kicking him and punching him and throwing garden furniture at him from close range over a period of about 7 minutes. For most, if not all, of this time, the third respondent was trying to talk to the police on his mobile phone. He could be seen constantly retreating from the claimant, with his back hunched and head turned away from her. By the time the police arrived, the claimant had left.

50. The third respondent told the police that he did not wish to make a formal complaint. During his conversation with the police, the second respondent telephoned him and found out what had happened. The second respondent asked the third respondent to make a statement and to show him the CCTV footage, which he did. On viewing the footage, considering the third respondent's version of events, looking at his scratches and bruises, and verifying with Royal Mail the delivery time of the redundancy information, the second respondent decided that the claimant should be dismissed for gross misconduct. It was significant in his view that the claimant had been justifying her behaviour by referring to the redundancy letter. In his mind, the claimant's constant references to redundancy made her conduct work-related, as opposed to a purely private dispute with her husband. He made a conscious decision to depart from the company's usual disciplinary procedure. In his opinion, holding a face-to-face meeting would put the first respondent's employees at unacceptable risk of being assaulted by the claimant. He did not think about holding a meeting by telephone or seeking the claimant's written representations. His main concern was to ensure that he and the third respondent were at a place of safety when the claimant was informed of the decision.

51. By 4 August 2016 the claimant had taken advice from her trade union, who in turn had received advice from counsel. She telephoned the second respondent and said that her barrister had advised her to leave in return for one year's pay. The second respondent was non-committal. The reason for his hesitancy was that, by that time, he had already decided to dismiss the claimant.

52. With factual Allegation (e) in mind, we have considered whether the second respondent's decision to dismiss was influenced in any way, wittingly or unwittingly, by the fact that the claimant is a woman. We are satisfied that he was not. In coming to this view we have compared the second respondent's

dismissal decision with his treatment of the third respondent following the incident on 24 May 2016. The claimant is not comparing like with like. The use by the claimant of sustained violence made the circumstances of 2 August 2016 materially different from those of the earlier incident.

53. On 5 August 2016, the claimant received a letter from the second respondent, terminating her employment with immediate effect. The letter gave brief reasons for the decision and informed her of her right of appeal.

54. The claimant appealed by e-mail at 11.24am the same day. This was the first time the claimant gave any explanation for assaulting the third respondent. Her e-mail stated that "I saw a card from his new girlfriend and that was the reason I hit him." In fact, the claimant had already assaulted the third respondent before she saw the card. Her e-mail indicated her awareness of her right to bring a claim to an employment tribunal. Later that day, the claimant sent a further e-mail asking for the CCTV footage. Vigorously – and untruthfully – the claimant in her e-mail denied having assaulted the third respondent in his bedroom. The e-mail also observed that the second and third respondents were working from home in breach of their mortgage conditions and contained a thinly-veiled threat to report that fact to their mortgage lenders. A third e-mail sent that day announced the claimant's intention to "fight to the death".

55. During 5 and 6 August 2016 the claimant sent the third respondent numerous angrily-worded text messages on various matters to do with their divorce, return of her belongings and her claimed entitlement to shares in the first respondent. The third respondent did not reply.

56. On 8 August 2016 the claimant's mental health had deteriorated to the point where she was admitted to hospital. She was discharged the following day. On 10 August 2016, she sent a long message to the third respondent. Much of the message was pleading in its tone: she begged the third respondent to help her get a year's pay from the first respondent so that her mental health could improve. Other parts of the message were more menacing. For example, she informed him that she would win in court and would have to call witnesses including their daughter. The third respondent did not reply. Contrary to Allegation (f), his silence was nothing to do with the fact that the claimant is a woman. Nor was it a way of controlling the claimant. The third respondent had had enough of the claimant and wanted to stay out of her way.

57. On 12 August 2016, the claimant sent a text message and an e-mail to the second respondent. Both messages accused him of lying about further CCTV footage that she was requesting.

58. Mr Q, shareholder, was appointed to hear the claimant's grievance. He wrote to her on 12 August 2016, listing the various communications that the claimant had sent regarding her appeal and seeking to check whether he had all the information she wished him to consider.

59. The following day, the claimant forwarded to Mr Q a number of e-mail and text chains that she wished for him to take into account in considering the appeal. At the same time, she sent Mr Q a long e-mail of her own. It started by accusing Mr Q and the respondents of having "plotted behind my back". More worryingly from the respondents' point of view, the letter raised sensitive information about the second respondent's circumstances. It would be obvious to anyone reading the

e-mail that it was of the utmost importance that that information be kept secret. Looking in isolation at the paragraph of the e-mail that contained the sensitive information, it was not clear why the claimant was raising it. Four paragraphs further on, the claimant indicated that, if the respondents wished to settle, her price had risen by £10,000. The respondents took the claimant's e-mail to contain an implied threat that, unless they gave the claimant what she wanted, she would reveal the sensitive information about the second respondent. This threat, in their view, amounted to blackmail. Their fears about the claimant's actions were not helped by a text message sent the same day to the third respondent, acknowledging the fact that he had changed the locks on the former matrimonial home, but observing that "if I desperately want to get in then a brick through the window would work just as well as a key". The remainder of her text message consisted of insults expressed in explicit sexual language.

60. Mr Q informed the second and third respondents of the contents of the 13 August 2016 e-mail. Shortly afterwards, the third respondent spoke to the claimant's sister, Mrs J. During the course of the conversation, he told Mrs J that the claimant was lucky that she had not been arrested for blackmail. The reason why the third respondent said this was because of his interpretation of the claimant's e-mail. It was not, as Allegation (f) contends, motivated in any way, knowingly or otherwise, by the fact that the claimant is a woman.

61. On or shortly before 19 August 2016, Mr Q set about reaching his decision. He took account of the material that the claimant had forwarded to him. Rather than confine himself to examining grounds of appeal, he considered all the evidence and made his own findings of fact. Based on the claimant's (false) denial, Mr Q identified the main factual dispute as being whether the claimant had attacked the third respondent in his bedroom. On balance, he preferred the third respondent's account. He was also alive to the issue of whether the claimant's assault on the third respondent was work-related or purely personal. In his view it was work-related. Important factors leading him to this conclusion were the lack of any ongoing personal relationship with the third respondent, the fact that she no longer lived at the former matrimonial home and, crucially, the timing of her entry into the house. It was within minutes of having received the letters concerning her redundancy. Based on those facts, Mr Q was satisfied that the claimant had committed gross misconduct and that the decision to dismiss her should stand. Mr Q's decision, and the reasons for it, were communicated to the claimant's trade union representative in a letter dated 19 August 2016.

62. The claimant commenced early conciliation with ACAS on 28 September 2016 and obtained her certificate on 28 October 2016.

Relevant law

Unfair dismissal

63. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

1. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
2. shall be determined in accordance with equity and the substantial merits of the case.

64. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

65. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

66. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

67. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

68. There may be circumstances where a dismissal is unfair because the employer has treated two employees inconsistently for the same misconduct. However, for a dismissal to be unfair, the circumstances must be truly comparable: *Hadjiouannou v. Coral Casinos Ltd* [1981] IRLR 352. Where the employer consciously distinguishes between the two employees, the tribunal must not interfere unless the employer had no reasonable basis for distinguishing between them in that way: *Epstein v. Royal Borough of Windsor and Maidenhead* UKEAT/0250/07.

69. Where there is evidence supporting the employer's investigation into alleged misconduct, suspension "should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is": *Crawford v. Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402, CA.

Direct discrimination

70. Section 13 of EqA provides:

    2.1. 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.

71. Sex is a protected characteristic.

72. A claimant may compare herself to how a real comparator was treated and/or to how a hypothetical comparator would have been treated. In both cases, the circumstances of the claimant and those of the comparator must be the same or not materially different: section 24(1) EqA.

73. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

74. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.* This latter consideration is important, because people rarely admit discrimination and may themselves be unaware that they are discriminating.

75. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Harassment

76. Section 26 of EqA provides, so far as is relevant:

    (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 B's dignity, or

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

…

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

(*a*) the perception of B;

(*b*) the other circumstances of the case;

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

77. Sex is one of the relevant protected characteristics.

78. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. 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 related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Time limits

79. Section 123 of EqA provides, so far as is relevant:

(1)… proceedings on a complaint [of discrimination] may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

80. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”.

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

81. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

82. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*,* CA.

Burden of proof

83. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

84. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA Civ 1913.

85. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

86. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Breach of contract

87. Where notice is required to terminate a contract of employment, the employer may nevertheless terminate the contract without notice if the employee repudiates the contract by committing gross misconduct.

88. "Gross misconduct" for the purposes of a claim of wrongful dismissal, has been defined in the report of Lord Jauncey in *Neary v. Dean of Westminster* [1999] IRLR 288. For conduct to come within the definition, it must so undermine the

relationship of trust and confidence that the employer can no longer be expected to keep the employee in employment.

Conclusions

Unfair dismissal

89. We find that the reason for dismissal was the belief held by the second respondent and Mr Q that the claimant had twice assaulted the third respondent, who was not only her husband but also a director of the first respondent. That belief plainly related to the claimant's conduct.

90. A factor in the decision was their belief that the assaults were not pure domestic incidents, but were connected to the claimant's work.

91. It was undeniable that the claimant had carried out the second assault captured on CCTV. There were reasonable grounds, based on the account of the third respondent, for believing that the claimant had also assaulted the third respondent in his bedroom. It was also reasonable to believe that the first assault, at least, was work-related. It happened immediately after the claimant received the "at risk" notice and solicitors' offer. They were entitled to accept the third respondent's word that the claimant had redundancy paperwork in her hand at the time of the first assault.

92. We have concluded that the procedure one which a reasonable employer could have adopted. In coming to this view we have examined the entire procedure in the round, including the appeal. We have also borne in mind that it was beyond doubt that the claimant had assaulted the third respondent. In our view, this is one of those rare cases where the initial dismissing manager was reasonably entitled to dispense with the usual requirement to hold a face-to-face meeting with the affected employee. It would have been better practice for him to have attempted to telephone the claimant, to have sought her views in writing, or to have organised a meeting on Skype. Had it not been for the appeal, we may well have found the process to be unfair. But, at the appeal, the claimant had a full opportunity to put forward any information that she wished. By the time Mr Q had to make his decision, it would not be reasonable to expect him even to speak to the claimant on the telephone. The tone of her e-mails and texts had become so abusive and menacing that we can understand his reluctant to engage in any kind of direct conversation. It was open to Mr Q to conduct the process entirely in writing. This he did carefully enough to make up for the defect in the original dismissal procedure.

93. In our view, dismissal was easily within the range of reasonable responses for the claimant's conduct. The claimant had attacked a company director in his own home as a response to his co-director initiating a redundancy process. A director cannot be expected to continue employing an employee who does that, even if she happens to be his wife.

94. Our conclusion is not changed by the second respondent's handling of the incident on 24 May 2016. It was reasonably open to him to regard the two events as being different for the reasons we have already given.

95. Overall, we have asked ourselves whether the first respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for

dismissing her. In our view, its actions were reasonable. The dismissal was therefore fair.

Direct sex discrimination

96. We start with Allegations (d), (e) and (f). This is because, in respect of those allegations, there is no dispute that the claim was presented within the statutory time limit.

97. It should already be apparent, in the light of our findings of fact, that these allegations of direct sex discrimination are not well-founded. As recorded at paragraphs 48, 52, 56 and 60, the treatment of the claimant was not motivated in any way, consciously or subconsciously, by the claimant's sex.

98. This brings us to Allegations (a) to (c), of which Allegation (c) concerns the latest incident in time. The last date on which this allegedly less favourable treatment can be said to have been "done" for time limit purposes is 10 June 2016. From that date onwards, the claimant had not only permission, but also the necessary equipment, to work from home. If she could in any sense be described as having been on "garden leave" prior to 10 June 2016, there was no question of her being on garden leave after that date. The last day for presenting her claim to the tribunal in respect of this complaint was 9 September 2016. The statutory early conciliation provisions do not alter the analysis because early conciliation did not begin until the time limit had already expired. The claim was therefore just under two months too late.

99. In our view it would not be just and equitable to extend the time limit. The claimant was represented by her trade union, assisted by counsel, from 4 August 2016 onwards. She clearly had mental health difficulties at that time, but they did not stop her from threatening to bring a tribunal claim or repeatedly asserting her rights. More importantly, in view of our factual findings, there would be no disadvantage to the claimant in refusing to extend time. This is because the Allegations (a) to (c) would inevitably fail on their merits in view of our findings of fact.

100. The tribunal therefore has no jurisdiction to consider the complaint of sex discrimination so far as it concerns Allegations (a) to (c).

101. In case we are wrong in our analysis of the time limits, we should also make clear our conclusion on the merits of Allegations (a) to (c). They are not well-founded. Unquestionably, the claimant was badly treated on 24 May 2016 (Allegation (a)), but, as we found at paragraph 29, the reason had nothing to do with the claimant's sex. Likewise, on 31 May 2016, it was reasonable for the claimant to think that it was detrimental to her to have a significant part of her role taken away. Few employees like to be told that one of their colleagues is better than them, even if the comparison relates only to a particular aspect of the role. But what the third respondent told her on that day had nothing to do with the fact that the claimant is a woman: see paragraph 33. As for paragraph (c), the alleged less favourable treatment simply did not happen. The claimant was not placed on garden leave in June 2016 at all. Even if it could be said that the practical obstacles to the claimant's working from home prevented her from carrying out her role and amounted to a form of indirect garden leave, this state of affairs only lasted for three days and was completely unconnected to the claimant's sex: see paragraph 41.

Harassment

102. Both harassment allegations ((a) and (b)) are over two months out of time. The later of the two episodes of unwanted conduct happened on 31 May 2016, meaning that the last day for presentation was 30 August 2016. For the same reasons as we have given in relation to direct discrimination, we do not think it would be just or equitable to extend the time limit.

103. In any case, our view of the harassment complaint is that it should fail on its merits. We would readily accept that the third respondent's conduct towards the claimant on 24 May 2016 was unwanted. It was reasonably perceived by the claimant as having the effect, albeit temporary, of creating a hostile and offensive environment for her. It did not have the effect of creating an intimidating environment; the claimant showed no sign of being scared of the third respondent. But the reason why this complaint fails is that the third respondent's outburst was completely unrelated to the fact that the claimant is a woman. See paragraph 29 for our finding in this regard. Allegation (b) is unsuccessful on two grounds. First, as paragraph 33 makes clear, there is no connection between the third respondent's conduct and the claimant's sex. Second, we do not consider that the conduct had the purpose or effect of violating the claimant's dignity or creating the environment proscribed by section 26 EqA.

Breach of contract (wrongful dismissal)

104. We have reminded ourselves that, for the purposes of the claim of wrongful dismissal, we are concerned with whether the claimant actually did commit gross misconduct or not. We may substitute our view for that of the first respondent and we may take into account facts that were unknown to the first respondent at the time of dismissal.

105. In this case it is relevant to record further facts:

105.1. We accept that the claimant suffered from depression for many years and, in a non-technical sense, experienced a "breakdown" on 2 August 2016.

105.2. The claimant has admitted to us, although she denied it at the time of her appeal, that she did assault the third respondent in his bedroom and that she did so virtually immediately on receiving the correspondence relating to her redundancy. She felt utterly betrayed by the third respondent, who had previously assured her that her job was safe.

106. In the light of these facts, and the facts we have already recorded, we take the view that the claimant did commit gross misconduct. Her mental health was a mitigating factor, but the claimant's actions in assaulting the third respondent so undermined the relationship of trust and confidence that the first respondent could no longer be expected to continue employing the claimant. The first respondent was therefore entitled to terminate the contract without giving notice.

REASONS FOR THE COSTS ORDER

The issues for determination

1. Once the tribunal had announced its liability judgment, the respondent applied for costs. The legal foundation for the application was rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013, read alongside rule 39(5)(a). The respondents asked the tribunal to make an order for costs summarily assessed in a sum not exceeding £20,000.

2. The basis of the application was twofold. First, the respondents argued that the claimant had acted unreasonably in continuing to pursue the claim after the respondent had sent her a costs warning letter on 20 February 2017.

3. In respect of this strand of the application, the tribunal had to decide:

   3.1. Whether the claimant had acted unreasonably as alleged;

   3.2. If so, whether in its discretion the tribunal should order the claimant to pay costs; and

   3.3. If so, the amount of the costs order, having regard to all parties' conduct of the case as a whole and also to the claimant's ability to pay.

4. The second strand was based on deposit orders made on 24 February 2017 and 15 June 2017. The issues for the tribunal were:

   4.1. Whether the allegations or arguments identified in the deposit orders had been decided against the claimant for substantially the reasons given in the deposit order; and

   4.2. If so, whether the claimant could show that she had not acted unreasonably; and

   4.3. If not, whether in its discretion the tribunal should order to pay costs; and

   4.4. If so, the amount of the costs order, having regard to the same considerations.

Relevant procedural history

5. At an early stage in the case, the respondents applied for the claim to be struck out.

6. On 20 February 2017, the respondents' solicitors sent a long letter to the claimant and the tribunal. The letter set out the respondents' detailed arguments as to why, in the respondents' opinion, each of the claimant's allegations was doomed to fail. The main purpose of the letter was to support their strike-out application. On the final page of the letter, however, the claimant was warned that the

respondent intended to apply for a costs order if the claimant persisted with her claim.

7. The respondents' strike-out application was heard on 24 February 2017 by Regional Employment Judge Robertson. At this hearing, the respondents were represented by Ms Hubbard, solicitor. After hearing arguments from both sides, REJ Robertson decided to strike out, amongst other things, the complaints of direct sex discrimination and harassment and the claim for damages for breach of contract. The unfair dismissal complaint was not struck out, but it was made the subject of a deposit order as follows:

> 5. The claimant is ordered under rule 39 of the Employment Tribunals Rules of Procedure 2013, as a condition of being permitted to proceed with her complaint of unfair dismissal within the Employment Rights Act 1996, to pay a deposit in the sum of £250.00 on the ground that the complaint has little reasonable prospect of success.

8. A written judgment was subsequently sent to the parties along with written reasons. Here are the extracts which we consider to be relevant:

> "31. As to [Allegation (a)], she says that she has been a victim of violence from a man in the past. The [third] respondent knew that and how she might be affected by his behaviour on 24 May 2016. She says that the fourth respondent avoids confrontation with male colleagues, but he "will run at a female with his fists clenched". The fourth respondent did not treat any male work colleagues in the way he treated her. She says that "he only seems to pick on girls", and does not like females standing up to him. …
>
> …
>
> 57. If the claimant's factual allegations are true, which I will assume at this stage, she was badly treated. But bad treatment is not enough, and the question is whether her complaint that the treatment was because of her sex has any reasonable prospect of success.
>
> 58. I have carefully read the claimant's lengthy Particulars of Claim (18-26). Whilst the claimant reputedly asserts in the Particulars of Claim that the respondents "wanted her out" after and because of the break-up of her relationship, I can find no mention of her sex or gender at all, and nothing which even begins to suggest that her sex was the reason for any of her treatment. When explaining to me in submissions why she had decided not to pursue her complaint of unlawful marriage discrimination, the claimant told me she had realised that the treatment was not because she was married but who she was married to, which plainly relates it to the break-up of the relationship. ... [The] claimant asserted in submissions that her treatment after 1 June 2016 was because of what she told the fourth respondent on 24 June 2016 or alleged in her grievance on 1 June 2016, or alternatively was because of what she told the second respondent about the price for her to leave the company on

4 August 2016. None of this suggests that the reason was her sex. Despite Employment Judge Franey's careful explanation of the principles on 20 January 2017, I felt that the claimant did not fully understand the distinction between direct sex discrimination and victimisation.

59. Allegation [(a)] concerns the [third] respondent's behaviour on 24 May 2016. This must have been a frightening and distressing incident for her. It perhaps stands apart from the claimant's other allegations and the claimant says it precipitated the events leading to her dismissal.

60. I refer back to what the claimant told me at paragraph 31 above. But it seems to me that these are generalised assertions by the claimant, and she has put forward no facts and matters whatever as to the specific allegation, alone or taken with the other matters on which she relies, from which a Tribunal might conclude that the [third] respondent's behaviour on 24 May 2016 was done because she is a woman. I have in mind that the claimant admits that she "pushed matters" with the [third] respondent, her estranged husband, that day as to her future with the company, and the overall context was the break-up of their marriage. I accept that the reason for treatment is fact-sensitive, but I have concluded that in the circumstances of this case, the claimant's contention that the [third] respondent acted as he did towards her on 24 May 2016 in some significant way because of her sex has no reasonable prospect of success.

61. Allegations [(b) to (d)] concern the claimant's role with the company. The claimant told me in submissions, although it does not appear in the Particulars of Claim, that the second respondent does not treat women with respect and had been seen behaving aggressively towards his wife, the third respondent, and had objected to her, the claimant, seeing the company accounts because, in her view, he did not like a woman knowing about his financial affairs. But neither in the claim form nor in submissions has the claimant attributed this treatment to her sex. She says the respondents wanted her out following the break-up of her marriage. If that is right, it is not because of her sex. Insofar as she attributes it to her allegations of sex harassment on 24 May 2016 and in the grievance of 1 June 2016, I address it when addressing the claimant's complaint of unlawful victimisation, below, but these are not allegations of direct sex discrimination. The claimant's complaint of direct sex discrimination in respect of these allegations has no reasonable prospect of success.

62. The claimant says that she believes the decision to dismiss was made either as part of the plot to remove her from the company or because of her financial demands to the second respondent. Even if true, this is not treatment because of sex and the claimant's

complaint in respect of [Allegation (e)] has no reasonable prospect of success.

63. The claimant has not begun to explain to me how she attributes the behaviour at [Allegation (f)] to her sex. If made, it seems reasonable to attribute the "blackmail" comment to the claimant's remarks to the second respondent about her price to leave the company. The second respondent had reason to be concerned about his identity, but whether it was true or not, the claimant has not put forward any facts or matters to suggest that her sex was the reason for making the allegation.

…

68. The claimant relies only on allegations 4a) and b) as unlawful harassment within section 26. These occurred on 24 May and 1 June 2016, which raises an obvious time limit issue.

69. In my judgment it is just arguable that the treatment of the claimant by the [third] respondent on 24 May 2016, which was plainly unwanted and had the effect set out in section 26(1)(b), was in the broader sense "related to" her sex within section 26, in the sense that the treatment would not have been meted out to a woman. I am concerned that the claimant relies on assertions about the [third] respondent's attitude to women, rather than on actual evidence, but I would not be prepared to strike out the allegation as having no reasonable prospect of success on this ground only. But when I turn to [Allegation (b)] I see no basis on which the claimant can properly argue that the proposal that she should make way for Mrs X, also a woman, was related to her sex. This contention has no reasonable prospect of success.

70. The difficulty then facing the claimant is that the single remaining allegation of harassment within section 26 on 24 May 2016 is considerably out of time. A claim relating to this incident should have been presented by 23 August 2016, but the claimant did not present her claim to the Tribunal until 7 November 2016, and the extension of time for early conciliation does not avail her as she did not begin early conciliation until after the time limit had already expired.

71. This hearing, as I have already said, is not to address time limit issues, but I see no possibility that the claimant will be able to persuade a Tribunal that that it would be just and equitable to allow this single allegation of harassment to proceed out of time, and accordingly I conclude that the claimant's complaint of unlawful harassment under section 26 has no reasonable prospect of success and should be dismissed.

72. It is not in dispute that the claimant was dismissed. It is not in dispute that the reason for the dismissal given by the company, as

set out in the dismissal letter, was the incident on 2 August 2016. It is not in dispute that on 2 August 2016, the claimant twice attacked the fourth respondent in his own home.

73. It might be thought, on this basis, that the first respondent would have little difficulty in showing a conduct reason for the dismissal within section 98(2). The claimant accepted in submissions that she may have given the first respondent reason to dismiss her by behaving as she did on 2 August 2016.

74. The claimant, however, says that the real reason for her dismissal on 5 August 2016 was that she had told the second respondent the previous day that she would leave the company for a year's pay and her redundancy payment. She says that she was not dismissed until immediately after she had the conversation with the second respondent.

75. Given how the claimant had behaved on 2 August 2016, it seems to me very likely that the first respondent will be able to establish a conduct reason for dismissal. Whilst I accept that the claimant was not dismissed until after her conversation with the second respondent on 4 August 2016, the lapse of time since 2 August 2016 was very short.

…

87. There are issues about the fairness of the dismissal within section 98(4). There was no disciplinary hearing, and I am not persuaded that a Tribunal will accept that the first respondent had fears about the claimant's likely conduct at a disciplinary hearing such as to render it within the range of reasonable responses to dismiss without a disciplinary hearing.

88. But I have in mind that the claimant was given the right of appeal against her dismissal which may have cured the earlier unfairness. I am sceptical about the prospects of success of the claimant's argument that her behaviour on 2 August 2016 was insufficiently connected with her employment to merit dismissal. …

89. Given all these factors, I have concluded that the claimant's complaint of unfair dismissal has little reasonable prospect of success as to liability or effective remedy and she should be required under rule 39 to pay a deposit as a condition of proceeding with it.

9. In April 2017 the claimant was seen by a mental health practitioner who confirmed that the claimant was suffering from depression, having given a history of domestic abuse.

10. Understandably disappointed with the judgment, the claimant applied for reconsideration. Her application was heard by REJ Robertson on 15 June 2017. After hearing the claimant and Ms Hubbard, he decided to revoke his

earlier decision to strike out the complaints of harassment and direct sex discrimination. Having done so, he made a deposit order in the following terms:

> "7. Pursuant to rule 39 of the Employment Tribunals Rules of Procedure 2013, the claimant is ordered as a condition of being permitted to proceed with the complaints set out below to pay deposits as follows, on the ground that the complaints have little reasonable prospect of success:
>
> (a) In respect of the complaint of unlawful direct discrimination, as set out at paragraphs 7 and 8 of Annex B to the Tribunal's Case Management Orders made on 20 January 2017, the sum of £250;
>
> (b) In respect of the complaint of unlawful harassment related to sex, as set out at paragraphs 9 and 10 of Annex B, the sum of £100; and
>
> (c) In respect of the complaint of breach of contract, as appears at paragraph 3 of Annex B, the sum of £50."

11. Written reasons accompanied the order. Relevantly, the reasons stated:

> "
>
> (4) In my earlier Judgment, I concluded that the claimant's complaints of unlawful direct sex discrimination and harassment had no reasonable prospect of success and should be struck out. I refer to paragraphs 56 to 71 of my Reasons.
>
> (5) Notwithstanding the claimant's forceful submissions, I am of the view that these complaints are unlikely to succeed, for the reasons I gave at paragraphs 56 to 71. However… I have concluded on reconsideration that I cannot say that the complaints have no realistic prospect of success such that they should be struck out. In my view, they have little reasonable prospect of success, for the reasons I have given, but the appropriate action is to revoke the strike out judgment and to replace it with a deposit order under rule 39.
>
> (6) Further, in regard to the complaint of unlawful harassment, I have concluded that I should not have struck out the complaint on the basis that the claimant had no reasonable prospect of success… However, I remain of the view that the allegations have little reasonable prospect of success and I have made a deposit order under rule 39 accordingly.
>
> (7) In respect of the claimant's complaint of breach of contract, the claimant contends that her behaviour on 2 August 2016 was in the context of a mental breakdown which led to her being sectioned a few days later, on 9 August 2016. Whilst it seems to me that the Tribunal is likely to conclude that the claimant was guilty of conduct entitling the respondent employer to dismiss her without notice, the circumstances surrounding her behaviour on 2 August 2016 are such that I cannot say that the complaint has no reasonable

prospect of success and so I revoke the strike out order and substitute for it a deposit order under rule 39.

…

(10) I remind the claimant that if she pursues her complaints, but they are dismissed by the Tribunal for the reasons I have given, she may lose the deposit paid by her and will be at increased risk of being found to have acted unreasonably such that a costs order might be made against her. She would benefit from objective assessment of the strength of her claims and I have urged her to seek independent legal advice."

12. A further document sent to the parties with the reconsideration judgment was a written case management order. The order provided, amongst other things, for disclosure of documents, preparation and copying of the bundle, and written witness statements.

The respondents' schedule of costs

13. In support of their application, the respondents handed the tribunal a schedule of costs. Helpfully, the schedule was broken down into periods of time. The costs incurred for the period from 15 June 2017 onwards were set out in broad categories, including time on letters and e-mails, time on documents, copying charges and counsel's fees.

14. Counsel for the respondents clarified that the fee claimed was a £5,000.00 brief fee plus refresher fees of £750.00.

Relevant law

15. Rules 75 to 84 of the Employment Tribunal Rules of Procedure 2013 provide, relevantly:

75.—(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative…

…

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party… has acted … unreasonably in … the way that the proceedings (or part) have been conducted;…

…

78.—(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding

> £20,000, in respect of the costs of the receiving party;
>
> …
>
> **84.** In deciding whether to make a costs…order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

16. These rules are supplemented by rule 39(5), which reads, relevantly:

> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown…

17. A tribunal faced with an application for costs must decide, first, whether the power to award costs under rule 76 has been triggered and, second, whether in its discretion it should make a costs order and, if so, in what amount.

18. In deciding whether unreasonable conduct should result in an award of costs, the tribunal should have regard to the "nature", "gravity" and "effect" of the conduct. There is no need for rigid analysis under the separate heading of each of those three words. 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had': *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78.

19. We have found the following passage in *Harvey on Industrial Relations and Employment Law* P1-1052.02 to be of assistance in taking account of the paying party's ability to pay:

> The fact that a party's ability to pay is limited does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay (see *Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797*, *[2012] ICR 159, at para 37*). In *Arrowsmith* the Court of Appeal, in upholding a comparatively low costs order of £3,000 made by an employment tribunal against a claimant of very limited means, commented that '[h]er circumstances may well improve and no doubt she hopes that they will' (per Rimer LJ). In *Vaughan v London Borough of Newham [2013] IRLR 713*, the EAT (Underhill J presiding) analysed the question of affordability in relation to the exercise of a tribunal's discretion in more detail. The tribunal in that case had awarded costs against the claimant of one-third of the respondents' total costs, which meant that she faced a potential bill of between £60,000 and £87,000. This represented more than twice her pre-tax earnings at the date of dismissal. The tribunal took into account

her ability to pay. Although she was out of work at the date the order was made, and had no savings or capital assets, it concluded that there was no reason to assume that she would not return to her chosen career at her previous level of pay (about £30,000) 'at some point in the future'. Upholding the tribunal's award, Underhill J held that the question of affordability does not have to be decided 'once and for all by reference to the party's means as at the moment the order falls to be made', so that if there is a realistic prospect that the claimant might at some point in the future be able to pay a substantial amount, it was legitimate to make a costs order in that amount thereby enabling the respondents to make some recovery 'when and if that occurred' (para 28). In any event, as the order would be enforced through the county court, that court would be able to take into account the claimant's means from time to time in determining whether to require payment by instalments and, if so, in what amount. Underhill J added that questions of what a party could realistically pay over a reasonable period 'are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential' (para 29).

The claimant's arguments

20. The claimant's arguments on costs were not always easy to follow. The claimant appeared crestfallen following the liability judgment the day before. Having considered whether or not to adjourn the costs hearing to a later date, we decided not to do so. This was mainly because the claimant, on the 5th day of the hearing, had expressed her wish for the case to be concluded as soon as possible. We had already tried to make allowances for the claimant's likely distressed state by breaking for the afternoon at about 2.15pm on the 6th day, so as to allow the claimant the opportunity to compose herself for the costs hearing on the 7th day.

21. As we understood them, the claimant's arguments against the making of a costs order were:

    21.1. that tribunal proceedings are supposed to be informal; if the respondents choose to instruct a legal team, they should pay for it;

    21.2. that her claim must have stood a reasonable prospect of success because otherwise the respondents would not have instructed counsel;

    21.3. the parties had not been on an equal footing because the claimant was representing herself and had had a mental injury;

    21.4. the tribunal process had been unfair from the start;

    21.5. the tribunal had been wrong to conclude that the incidents of 2 August 2016 and 24 May 2016 were materially different;

21.6. she could not afford to pay the costs order;

21.7. she had allowed the respondents' solicitor an extension of time; by contrast, the respondents' solicitor had left it so late to send her the bundle that she only had 19 days to prepare for the hearing;

21.8. the respondents' costs warning letter of 20 February 2017 was "blackmail"; and

21.9. the respondents were trying to take her home away from her. The claimant was visibly very upset whilst making this last point.

The claimant's means

22. The claimant gave evidence on oath about her ability to pay. Having heard her evidence and answers to questions, we found the following facts:

22.1. The claimant receives means-tested benefits and has no other income.

22.2. The claimant's state of health is such that it is unlikely that she will get a job in the near future.

22.3. She has no savings.

22.4. The equity in the claimant's own home is approximately £35,000.

22.5. There are ongoing matrimonial proceedings including a contested application for ancillary relief. Although, in theory, the claimant may be granted a share in the third respondent's assets (for example, the former matrimonial home and his shares in the first respondent), it is far from clear that this will be the outcome.

Conclusions

23. In our view the claimant did not act unreasonably in proceeding with her claim following the respondents' solicitors' letter of 20 February 2017. At that stage of the case it was reasonable for her to think that the respondents were trying to intimidate her. That is not to say that we criticise the respondents' solicitors for writing the letter. It is just that the claimant's perception of intimidation was reasonably held. Her suspicion of the respondents' motives at that time was understandable. The respondents' letters of 1 August 2017 came as a genuine shock to her, especially after she had been repeatedly told that her job was safe. We also believe that the claimant's fragile mental health made her more inclined to feel intimidated by ordinary steps taken by the respondent in the litigation.

24. We do not think that the claimant acted unreasonably in seeking to have REJ Robertson's strike-out judgment reconsidered. That application was largely successful.

25. There is therefore no jurisdiction under rule 76 for us to award costs under this strand of the application.

26. We are, however, obliged to consider awarding costs from 15 June 2016 onwards. This is because the claimant acted unreasonably in pursuing the claim following the making of the deposit orders. We have compared our reasons for the liability judgment with REJ Robertson's reasons for ordering deposits. In our opinion, the reasons are substantially the same. It therefore falls to the claimant to show that she did not act unreasonably. Our conclusion is that she has not overcome that hurdle. REJ Robertson's reasons were detailed. They were clear, even to a reader who was not legally trained. They took account of the claimant's arguments put forward at two separate hearings. The claimant was warned in plain language that she was at risk of having to pay a costs order if she persisted with her claims. She also knew that the respondents had been represented at two preliminary hearings by a solicitor, so it was highly likely that the respondents would continue to incur legal costs if the claim progressed. In our view, the claimant should have heeded those warnings. It was unreasonable of her not to do so. The fact that the respondents instructed counsel did not make the claimant's stance a reasonable one. It is not clear when the claimant first became aware that counsel had been instructed. Even once she became aware, it would not be reasonable for her to deduce from counsel's involvement that her claim had a better prospect of succeeding.

27. The next stage is to decide whether or not, in our discretion, costs should be awarded. In our view, they should. The claimant's obstinate pursuit of this claim has predictably caused the respondents to incur substantial legal costs. The claimant's various arguments, though we thought some of them relevant to the amount of a costs order, did not persuade us to refrain from making a costs order altogether.

28. The claimant's mental health was in our minds in deciding whether or not to order costs. She has clearly been unwell. As we observed in our liability judgment, she had little sense of perspective. But she was able to read and follow written communications for the tribunal. She may have disagreed with REJ Robertson's assessment of the merits of her claim, but she appeared to have no difficulty in understanding it.

29. Having decided to make a costs order in principle, we looked at the amount. It should have been obvious to the claimant that those costs would be likely to escalate as the final hearing approached. This is because REJ Robertson's case management order required time-consuming steps to be taken such as preparation of the bundle and witness statements. It would not necessarily have been clear to her that the respondents would instruct counsel. Ignorance of that fact, however, would have been unlikely to lull the claimant into any false sense of the size of the respondents' eventual costs bill. The cost of a senior solicitor's attendance at an 8-day hearing would have been unlikely to have been much less. In our view, counsel's brief fee was reasonable.

30. We have looked at the case in the round, including the conduct of the respondents' solicitors. In our view they spent an excessive amount of time sending e-mails and letters. Whilst this was not a straightforward case, we bear in mind that, by June 2015, all the initial communication between solicitor and client had already been done. We reduced the time allowance to 5 hours. We also reduced the time spent on documents to 10 hours. This reduction reflected

not only our view of what was a reasonable amount of time to spend, but also our disapproval of the respondents' solicitors providing an unrepresented claimant with the bundle only 19 days before the start of the final hearing. The remainder of the respondents' costs we thought reasonable to award.

31. Taking all these factors into account, our view is that the appropriate amount of the costs order is £15,445.60.

32. We took the view that the claimant would not be able to afford to satisfy the costs order immediately. She could, however, afford to pay a substantial amount once her house was sold. We were conscious that, in taking this approach, we might encourage the respondents to think that they might obtain earlier payment of the costs order if they were to force an order for sale of the house. At the hearing we sought to disabuse the respondents of any such notion. Forcing a sale of the claimant's house would, in our view, be a most unwise course of action. First, as we explained, the matrimonial proceedings have not yet reached their conclusion. Depriving the claimant of her home would almost certainly result in the claimant seeking additional financial provision from the third respondent to cater for her housing needs. Second, we must stress that it was an important factor in our reasoning that we did not think the respondents would seek a premature sale of the claimant's home. If we thought that the respondents were likely to take this course, we would have considerably reduced the amount of the costs order. Accordingly, if the respondents do try to take steps to force an early sale, we would be sympathetic to a late application by the claimant for reconsideration of the costs order.

Employment Judge Horne

18 December 2017

REASONS SENT TO THE PARTIES ON

4 January 2018

FOR THE TRIBUNAL OFFICE