EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Solomon	**v**	**1. University of Hertfordshire** **2. Paul Hammond**

Heard at: Watford

On: 22-25 May 2017
25 September - 3 October 2017
& 20-23 November 2017
(in chambers)

Before: Employment Judge Smail
Ms P Breslin
Mr D Bean

Appearances

For the Claimant: Mr C Ameadah (the Claimant's husband)
For the Respondent: Ms C Richmond (Counsel)

JUDGMENT

1. The Claimant was procedurally unfairly dismissed by the First Respondent.

2. The claims under the Equality Act 2010 against the First and/or Second Respondents are dismissed.

3. There will be a Remedy Hearing in respect of the unfair dismissal claim against the First Respondent only on 23 February 2018 at 10am at the Watford Employment Tribunal unless the parties can come to terms beforehand.

REASONS

1. The Claimant was employed as an internal auditor between 1 November 2010 and 2 September 2015. By a claim form presented on 10 October 2016 the Claimant claims unfair dismissal, race, sex and pregnancy or maternity discrimination. The Claimant was dismissed following an alleged irretrievable breakdown of her relationship with her line manager the Second Respondent. The Respondents have been jointly represented, there being no conflict of interest perceived between them.

THE ISSUES

2. The issues are attached at Appendix 1. The Claimant has decided to raise 38 matters covering approximately 4/5ths of her time with the Respondent. Consideration of these matters has involved a considerable amount of documentation, witness evidence and Tribunal deliberation.

3. The Claimant is a black woman of Caribbean origin. Race discrimination figures as a protected characteristic throughout the issues. There has been in fact very little evidence in terms of race discrimination. The case is principally one of sex discrimination and pregnancy and maternity discrimination, along with unfair dismissal. There has been no substantial or any comparator evidence put forward as to why the Claimant says she was treated less favourably on the grounds of her race. In the disciplinary hearing and subsequent appeal the emphasis is on pregnancy discrimination, race does not figure.

THE LAW

Unfair dismissal

4. By s.98(1) and (2) of the Employment Rights Act 1996 an employer has to show a potentially fair reason for dismissal which has to be conduct, capability, redundancy, statutory prohibition from employment or 'some other substantial reason for dismissal. If it does that, the Tribunal has to consider under section 98(4) whether the dismissal is fair or unfair having regard to the reason shown by the employer, depending on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably as treating it as a sufficient reason for dismissing the employee, and the question shall be determined in accordance with equity and the substantial merits of the case. In this case the Respondent relies upon irretrievable breakdown of the line management relationship as some other substantial reason for dismissal

Some other substantial reason for dismissal

5. The Respondent contends that it did not dismiss for misconduct but rather for some other substantial reason for dismissal, namely that it had lost all confidence in the Claimant. It seems to us that the authorities suggest the following:

6. Where as a matter of fact there has been a total breakdown of the working relationship that can be a reason for dismissal as some other substantial reason. Where in truth the conduct giving rise to the alleged breakdown in the working relationship is a central focus then the correct reason is misconduct.

7. Where misconduct, then the ordinary disciplinary process needs to be followed; however, even where some other substantial reason is the likely potentially fair reason there nonetheless needs to be a basic procedure followed to establish that indeed the working relationship has totally broken down. That will involve the

employee knowing that this is alleged; an investigation; an opportunity to state a case and where appropriate an appeal.

8. An important authority on some other substantial reason in this area is Ezsias v North Glamorgan NHS Trust UK EAT/039 9/09/CEA-18/3/2011. In that case the relationship between a Consultant Oral and Maxillofacial Surgeon employed by the Respondent Trust had hit a fundamental low. The Consultant had made what he considered to be 75 protected disclosures about shortcomings at the Trust all of which, as far as we can tell, were rejected such that nine senior members of his department signed a petition asking the Trust to address issues concerning Mr Ezsias. They said that there was a complete lack of confidence in, and a total breakdown in the relationships between this consultant and the senior staff within the department. That had significant effects on the service provision and the quality of care provided to patients within the Trust. They all sought urgent confirmation that immediate progress would be made to redress those issues before a complete breakdown of the service resulted.

9. In the light of such representations the Respondent commissioned a senior professional in the field of Human Resources to undertake an investigation at the same time as suspending the consultant. The HR Consultant produced a report. At the same time a Barrister was appointed to chair an independent enquiry into the concerns that the Consultant had made. The HR Consultant wrote that the Consultant surgeon's practice of firing off letters to all and sundry had led to a sense of exasperation among his colleagues which was irreparable. The Consult believed that Mr Ezsias had little or no understanding of the impact of his behaviour on his colleagues. Rightly or wrongly he regarded himself as superior to them and when what he regarded as best practice was not followed he took it as a personal affront. The HR Consultant's judgment was that the surgeon found it very difficult to move on when things had not turned out to his liking. The conclusion was that working relationships between the surgeon and his colleagues appeared to have broken down irretrievably and there was little, if any, prospect of good relations ever being restored. In due course he was dismissed for that reason. Mr Justice Keith ruled that on those facts the surgeon was not dismissed for his conduct or competence. His dismissal was not a disciplinary matter at all and that therefore the Whitley Council Disciplinary Procedure did not apply. What had happened was that in effect the employer had excluded in terms of its reasoning, the surgeon's responsibility for the breakdown of the relationships as the cause of, or a factor contributing to that breakdown. Once one concentrates only on the fact of the breakdown of the relationships the answer inevitably is that the reason is not conduct but some other substantial reason, namely the fact that those relationships had broken down.

10. A further case on some other substantial reason worth noting, although on different facts from the present case, is Governing Body of Tubbenden Primary School v Sylvester, a decision of the Employment Appeal Tribunal in April 2012, presided over by Mr Justice Langstaff UK EAT/0527/11/RN. In that case a Deputy Head Teacher was friendly with a fellow Teacher who was arrested and suspended for having indecent images of children not at the appellant's school. She maintained a friendship discreetly. Some nine months after it was indicated to her by the school and the LEA that there was nothing wrong in her continuing with it, without more than three days prior warning she was suspended from the post and disciplinary

proceedings were initiated. On appeal it was held that her actions had not brought the school into disrepute nor did they pose a safeguarding risk to children at the school but, nonetheless, the Head Teacher had lost confidence in her such that her continued employment at the school was untenable and her dismissal was confirmed. The School maintained this was SOSR. The Employment Tribunal accepted this but found the dismissal unfair in the circumstances especially since the employer had not only failed to warn her of the risk to her employment but had appeared to condone her conduct in maintaining a friendship. It was contended by reference to other cases including Ezsias that in a case of dismissal for SOSR for loss of confidence, an ET was not entitled to have regard to the causes of that loss but should be restricted merely to the fact of it. This was rejected by the EAT. Section 98 ss.4 entitled the Employment Tribunal to take a broader view. This was consistent with observations in the authorities relied upon. The context was analogous to a dismissal for conduct in which case a warning or its absence would be highly relevant to any consideration of fairness.

11. Mr Justice Langstaff examined the role of procedural fairness in a case where SOSR has been alleged. In particular, a breakdown in trust and confidence. In particular, whether the Tribunal should be concerned with the circumstances of the development of the breakdown in trust and confidence. He said at paragraph 37 "Where the substantial reason relied upon is a consequence of conduct, there is such a clear analogy to a dismissal for conduct itself that it seems to the EAT entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It could not, in the EAT's view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case as s.98 would require. Mr Justice Langstaff continued at paragraph 38 that the Employment Appeal Tribunal was not at all unhappy as a matter of principle to reach that view, that was because as a matter of principle if it were open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law for that reason precluded from examining how that position came about, it would be open to that employer, at least if he could establish that reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before the unfair dismissal legislation came in, in the first place.

12. In terms of an appeal, we follow the guidance given in the case of Taylor v OCS Group Limited [2006] ICR 1602 where Lady Justice Smith guides us that:

> "Where on claims of unfair dismissal complaint is made about the employer's procedure the employment Tribunal should focus on the statutory test in s.98 ss.4 ERA 1996 and look at the substance of what had happened throughout the disciplinary process. That it was inappropriate for a Tribunal to attempt to categorise an internal appeal as either a re-hearing or a review as there was no rule of law that only a re-hearing was capable of curing earlier defects. What matters was whether the overall process was fair, notwithstanding any deficiencies at an early stage and that further the Tribunal should consider the fairness of procedural issues together with the reason for the dismissal and decide whether in all the circumstances the employer had acted reasonably in treating it as a sufficient reason to dismiss. It is not appropriate to separate procedural unfairness from the misconduct alleged. The Tribunal has to assess the fairness of the disciplinary process as a whole".

13. In expanding on her reasoning Lady Justice Smith said at paragraph 47(f) of the judgment that:

> " If the Tribunal find that at an early stage the process was defective and unfair in some way the Tribunal will want to examine any subsequent proceedings with particular care but their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted, the thoroughness, or lack of it of the process, and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

14. In terms of the inter-relationship between procedural and substantive unfairness, Lady Justice Smith said this at Paragraph (h):

> "So, for example, where the misconduct which founds the reason for dismissal is serious an Employment Tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature so that the decision to dismiss was nearer to the borderline, the employment Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."

Equality Act 2010

Direct discrimination

15. By s.13 ss.1 of the Equality Act 2010 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.

16. By section 18(2) of the 2010 Act direct discrimination is made out if in the protected period, in relation to a pregnancy of hers, the employer treats her unfavourably (a) because of the pregnancy or (b) because of illness suffered by her as a result of it. By section 18(3) unfavourable treatment because a woman is on compulsory maternity leave is prohibited. Likewise under section 18(4) if the unfavourable treatment is because of exercising or seeking to exercise the right to maternity leave.

Harassment

17. By s.26 ss.1 of the 2010 Act a person A harasses another B if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of: violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Under s.26(4) each of the following must be taken into account. The perception of the employee, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

18. By section 27 of the 2010 Act a person victimizes an employee if he/she subjects the employee to a detriment because the employee has done a protect act or the person believes that the employee has or may do a protected act. A protected act includes doing anything in connection with the 2010 Act, typically asserting discrimination.

Burden of proof

19. Burden of proof is important in discrimination cases under s.136 ss.2 of the 2010 Act if there are facts from which the court could decide, in the absence of any other explanation that a person A contravened the provision concerned, the court must hold that the contravention occurred.

20. By s.136 ss.3, ss.2 does not apply if A shows that it did not contravene the provision. What this means in short is that the Claimant has to show a prima facie case of discrimination. If he does that successfully the burden transfers to the Respondent to show that the protected characteristic played no role whatsoever in its reasoning: Igen v Wong Court of Appeal [2005] ICR 935.

Time Limits

21. By s.123 ss.1 discrimination proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment Tribunal thinks just and equitable.

22. By ss.3 conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decides on it. The Respondents reserve their position on time limits.

23. In terms of harassment we take note of the guidance provided by Mr Justice Underhill, as he then was, in the case of Richmond Pharmacology Limited v Dhaliwal [2009] IRLR 336. In that case Mr Justice Underhill advised Employment Tribunals that it would be sensible to make findings in respect of each element of the test of harassment. He was dealing with the pre-cursor to s.26 but his observations nonetheless remain valid. He also provided some observations of assistance to Tribunal, three of which we note here.

24. That it was important to note the formal breakdown of two alternative basis of liability: purpose and effect. That means that a Respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose and conversely that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so. Mr Justice Underhill suspected that in most cases the primary focus would be on the effect of the unwanted conduct rather than on the Respondent's purpose, though that did not necessarily exclude consideration of the Respondent's mental processes.

25. Secondly, a Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be *reasonable* that the consequence has occurred. The proscribed consequence is of its nature concerned with the feelings of the putative victim. That is the victim must have felt or perceived his dignity to have been violated or an adverse environment had been created that can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the Tribunal is required to consider is whether if the Claimant has experienced those feelings or perceptions it was reasonable for him to do so. Thus if, for example, the Tribunal believes that the

Claimant was unreasonably prone to take offence then even if he did generally feel his dignity to have been violated there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt his dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for the Tribunal to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was or was not intended to cause offence. The same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

26. Thirdly, in the context of the Respondent's motivation Mr Justice Underhill observed in most cases the detriment complained of does not consist in the application of an overtly discriminatory criterion where it is obvious what the Respondent's purpose was. Where it is not obvious, the reason or grounds for the act have to be sought by considering the Respondent's motivation. It seemed to him to be particularly important to bear that point in mind in harassment cases. Where the nature of the conduct complained of consists, for example, of overtly racial abuse the Respondent can be found to be acting on racial grounds without troubling to consider his mental processes.

FINDINGS OF FACT RELEVANT TO THE ISSUES

27. It seems necessary or advisable to set out the relevant facts in chronological order and thereafter to make summary findings on the 38 allegations.

28. The Claimant started employment on 1 November 2010. Terms and conditions were initially set out in the offer letter dated 27 October 2010. Commencing salary was £40,119 per annum. The appointment was conditional on satisfactory completion of a six-month probationary period. The hours of work were 37 hours per week. The university's normal hours of business were 8.30am to 5.00pm Monday to Thursday and 8.30am to 4.00pm on Friday. The Claimant's precise working pattern would be by agreement with her manager Alan Harley.

The Probationary Period

29. There was a probationary review meeting in the second month on 13 January 2011 conducted by Alan Harley. Mr Harley explained there were a number of issues which he needed to raise with the Claimant, the first was timekeeping. The Claimant had explained during the job interview in September 2010 that her primary reason for wishing to leave her previous employer, Grant Thornton, was owing to childcare issues and that she understood the university would be more flexible on working times. At that point the Claimant was living in Stevenage. She had two young children who needed to be taken to nursery and to a childminder in Stevenage. The earliest drop off time for the nursery was 8.30am. She could not get to Hatfield before 9.00am. Some of her arrival times had been after 9.30am and on a few occasions after 10.00am. Those were a matter of concern to Mr Harley. The Claimant explained she had to take two buses and the train to travel to and from Hatfield. Mr Harley acknowledged her difficulties in this regard and they agreed a

9.30am start and a 5.30pm finish with a half hour break for the time being. Ideally he would prefer a 9.00 to 5.00 regime but he was prepared to be flexible.

30. Soon after commencement the Claimant had enquired about the possibility of working at home on two fixed days per week to fit in with her children's nursery/childminding routine. Mr Harley explained that that would not fit in with the operational arrangements and the request could not be accommodated. He was prepared to allow working at home on individual days for report writing purposes on appropriate occasions.

31. The second matter Mr Harley raised was that of time spent on audits. Budgets for individual audits were typically 10 days. That was represented by about one day for research and preparation; about five days field work; and about four days for report writing. The Claimant was reminded that the department had an agreed annual audit plan to complete and failure to do so would result in severe criticism of the internal audit service from the university's audit committee and senior management. Mr Harley was concerned that the Claimant had significantly exceeded the budget on her first solo audit relating to car parking income control. To date she had spent 22 days with the audit still unfinished. It is likely that the total audit would exceed 30 days, namely three times the budget. The Claimant provided an explanation relating to the need to familiarise herself with the university's systems and the ways of working and in particular the required report writing style. Mr Harley explained that significant overruns could not be allowed and that the Claimant would need to be more aware of the time spent on the different phases of the audit process. The Claimant agreed that she needed to manage her time better and would work to achieve this. Satisfactory work was also recorded in respect of an audit of overseas recruitment agents. There was also work in respect of a European Union project and a review of royalties due to the university from a third party.

32. The Claimant expressed a desire to complete the Institute of Internal Auditors' Qualification and had asked whether there was financial support for this. Mr Harley agreed to look into it. Mr Harley decided to hold additional interim monthly reviews ahead of the second probationary review due in April 2011.

33. There was an interim probationary review meeting on 3 February 2011. Mr Harley raised concerns in respect of audit file maintenance. Although management meeting notes were in the file, they were all at the back of the file rather than being filed by risk area. All documentation and supporting information should be filed in the relevant area of the file. He also mentioned the lack of audit test summary sheets for the activities she had examined during the audit. He explained that for review and challenge purposes there had to be clear and easily found supporting information to substantiate audit findings and conclusions. He explained what he wanted it to see in the future.

34. The version of the report that he had seen was not the standard he expected. The presentation was lacking, some paragraphs were not numbered or in the right font or format. Reports and audit issues and risks were not fully brought out, in particular with regard to the ineffective monitoring by estate staff of pay and display cash income as reported to the university by its cash collection contractor. Mr Harley said that he had to rewrite a number of paragraphs in the audit findings section of the report because he found them unclear and similarly with regard to the conclusions

contained in the executive summary and the number priority ratings and nature of some of the recommendations. He reminded the Claimant as to the need for clear reports because those formed an important part of the way the internal audit service was perceived.

35. There was a probationary review at five months held by Mr Harley on 8 April 2011. The matters picked up previously had been addressed and Mr Harley at that point now considered the Claimant's performance to be satisfactory. On 27 April 2011 the probationary period was recorded as having been passed and the appointment confirmed.

Ongoing timekeeping concerns

36. Mr Harley started taking diary notes of the Claimant's attendance in September 2011. On 5 September she arrived at 11.30am. She explained that she had to wait at home while her husband took her daughter to school. Her son was at home still asleep. The time her husband got back from school it was too late for the 9.15 bus. The next bus was 10.26. On Thursday 8 September the Claimant telephoned Mr Harley saying the new childminder who was starting that day had not arrived. The Claimant wanted to work at home to observe the childminder in her house. Mr Harley had not been informed of this in advance. She did not come in that day saying she would be in on the Friday. On Friday 9 September she arrived at 9.42am. The Claimant was uneasy about the new childminder. She was looking into the possibility of funding a nursery in Hatfield. She could not afford the university nursery. The Claimant told him that her mind was all over the place and at midday she asked to take half a day annual leave so she could go home and see what was happening. On 12 September the Claimant phoned at 9am to say her child was unwell. She requested to work at home. She wanted to do more online research on student retention but Mr Harley was of the view that she had done enough of that and if she was not coming in she would have to take a day's annual leave. Having said that she might come in after all, the Claimant did not. On Tuesday 13 September the Claimant arrived at 10.30am and the explanation for the lateness was that the son was still not well, the Claimant was very tired, her husband's car had broken down. On Wednesday 14 she arrived at 10am, the bus was said to be very late. On Thursday 15 September although the Claimant had arrived at 9.34am, at 11am she requested to catch the 2.30pm bus to pick up the children from school nursery. Mr Harley had to agree because the children would have been uncollected otherwise. On Friday 16 she arrived at 9.30am and left at 2.20pm. On Monday 19 September she arrived at 9.45am, Tuesday 20 at 9.30am, Wednesday 21 at 9.40am, Thursday 22 at 9.27am, Monday 26 at 9.50am.

Flexible Working requests

37. On 16 September 2011 the Claimant applied for flexible working as a parent of young children. Mr Harley agreed a proposal which involved a daily working pattern of 9.30am to 2.30pm which was a five hour period at the Internal Audit Office with the balance of her contracted hours to be worked at home. This agreement started on 19 September 2011 as the Claimant needed to start this proposed arrangement straightaway because of childcare arrangement difficulties. The agreement was for a three-month period and would be reviewed by Mr Harley after approximately six weeks. This arrangement reflected what in practice was happening anyway so that the Claimant could get home to pick up her children. This then was a trial period of

three months. Mr Harley made clear that the review would consider whether the arrangement was working efficiently and that the Claimant's internal audit work was being undertaken without detriment to the operation of the service.

38. On 2 December 2011 Mr Harley sent the Claimant an email entitled "Review of your flexible working arrangement and other issues". The document was for further discussion between them. The email followed a meeting they had on 28 November 2011. As to timekeeping: Mr Harley had essentially kept an audit of the Claimant's arrival times. There were 33 recorded arrivals in the first six weeks of the operation of the flexible working arrangement. The Claimant had been early or on time on five occasions and had arrived late on 28 occasions involving, according to Mr Harley's calculation, 565 minutes of lost time with a typical arrival time of 9.50am. On two occasions she was 55 minutes late. The explanation put forward by the Claimant was a persistent lateness of the 635 bus. Mr Harley had checked with the bus company and had established that this indeed was the case because of traffic delays in Hitchin and Letchworth. In terms of departure times it was noted that the Claimant had left a few minutes before 2.30 in order to catch the 635 bus.

39. Mr Harley concluded that the Claimant was not fulfilling her obligation to attend the office for the agreed five hours per day. A change in bus timetable might help as might the Claimant moving to Hatfield but the situation could not go beyond the three month trial period according to Mr Harley.

40. In terms of the Claimant's obligation to work at home Mr Harley asked when the Claimant was doing that. He was told that the Claimant did some in the evening but more often did the work between 4am to 6am. The Claimant said she was usually awake anyway at that period. Mr Harley expressed his concern that working at those hours was probably not the most effective time to be doing so, although she assured him that she was able to do it. Mr Harley invited the Claimant to keep a record showing when she did her work at home. He would like to see a record on a regular basis. Accordingly, the Claimant was challenging that any delays were necessarily her fault. At this time Mr Harley was liaising with Fran Shaw of HR.

41. Mr Harley also raised the issue of the quality of the draft report writing which had been raised with her earlier in 2011. The situation would be reviewed further in February 2012. He also expressed concerns about the adequacy of her audit files containing evidence and documentation to support the content of the draft internal audit reports. The Claimant replied by email dated 16 December 2011. She said that she ensured that she made up for lost office time from home. She had an early start with two or more hours completed in the morning, she claimed, and a further one and half to two hours in the evening. She often did more than her contracted 37 hours per week, she claimed further, but she did not make that an issue as her objective was to get the job done. She claimed that client feedback from her audits had been exceptional. As to the suggestion that she kept a record of home working: she suggested that this seemed onerous given that she already prepared weekly timesheets. She asked whether this could be incorporated into any existing timesheet. The Claimant then continued to maintain the quality of her work was high. She suggested that some alterations required by Mr Harley had perhaps watered down some of the strength of the recommendations she was making, changing, for example, to an assessment of substantial assurance in respect of the maintenance audit when she was proposing limited assurance. The Claimant also mentioned that

there were differences between Mr Harley's reviews of her work and Paul Hammond's reviews of her work, which had on occasion required reinstating information which Mr Hammond had removed.

42. It is worth reminding ourselves that at this time Mr Harley was the Head of Internal Audit and Mr Hammond, the Second Respondent, was the Senior Auditor.

43. On 6 December 2011 the Claimant emailed Fran Shaw asking for a confidential meeting with her as to how the flexible working arrangement could be made to work. They met on 8 December 2011. At that time the Claimant had not appreciated that Fran Shaw was acting in an HR capacity advising Mr Harley. Fran Shaw stated that she should meet with Mr Harley as soon as possible. There was a potential conflict of interest and it might be in the Claimant's best interest to speak with another HR representative or a Unison representative if things did not settle down. In our view Fran Shaw was acting appropriately here. HR's primary duty is to management and was advising Mr Harley as to how to handle the matter.

44. On 4 January 2012 Mr Harley and the Claimant met to discuss further the flexible working arrangement. There is a handwritten note of the meeting taken by Mr Harley on 6 January 2012 relating to the meeting on the 4 January. Mr Harley reiterated that report writing needed to improve with less carelessness and greater clarity and audit file maintenance needed to be brought up to standard and for the file to be ready before the draft report was submitted for review. The Claimant maintained that her report writing was better. She acknowledged that her audit file maintenance could be improved. There was a suggestion that the Claimant would be moving home from Stevenage to Hatfield which should improve timekeeping. There would be a second review of the flexible working in mid-February 2012 once 65 recorded morning attendances had been reached and there would be a further review at the end of February 2012 with regards to the report writing and audit file maintenance issues. There was reference in the meeting to the fact that Mr Hammond rewrote the control matrices for the estates stores report. These rewritten matrices were handed to the Claimant for examination.

45. The Claimant did indeed move to Hatfield on 27 January 2012.

46. On 2 February 2012 Mr Harley emailed Fran Shaw mentioning that the Claimant had 21.5 days of sickness absence over 14 occasions since joining in November 2010. In the last 12 months February 2011 to January 2012 she had 17 days of sickness over 11 occasions. The sickness had been short term and uncertified. The sickness reasons had mainly been stated as colds, viruses, headaches and neck pains. Mr Harley also informed Fran Shaw about attendance concerns together with concerns about report writing deficiencies and the Claimant falling asleep in the office on 1 February 2012. The Claimant's wish to be supported in respect of her Institute of Internal Auditors' Professional Qualification by distance learning was also mentioned. It was noted that HR had agreed to advise on the way forward.

47. On 20 February 2012 Mr Harley wrote to the Claimant following a recent meeting they had held recording the matters he wished to raise as to timekeeping. He reiterated his concern that the Claimant was not in the office sufficiently and required to complete her hours at home when it seemed that the work was being done either very early in the morning or late at night. The action he proposed was that in the

review period 20 February to 23 March 2012, after which the Claimant would be on annual leave for three weeks, he expected the Claimant to ensure that she was in the office at the times agreed, ie 9.30 to 2.30. Further, he wished to be advised in writing on a weekly basis of the work that the Claimant had completed at home. He had designed a form for this purpose. If there was no significant improvement in timekeeping and if the Claimant was unable to demonstrate that she was working to a full time contract, then he would have to refer the matter to HR for advice on whether they could continue with the flexible working arrangement and whether the Claimant was able to do a full time job.

48. As to attendance: he observed that the sickness record was poor. There were numerous incidents of short-term absence which had been self-certified. There appeared to be a pattern with many Wednesdays and Mondays in particular when she had exceeded the level of absence at which he could have referred the matter to HR and occupational health for consideration. He wanted to know whether there was any underlying health condition and whether occupational health should be informed. If there was no underlying health cause then he needed to see an improvement in attendance. The action was that during the period up to 23 March 2012 the Claimant's attendance must show improvement. Failure to show this without any underlying medical reason would result in consideration of a formal disciplinary warning.

49. As to performance: he repeated his concerns about draft report writing in terms of content, clarity and presentation which had involved both Mr Hammond and himself in spending more time than should be necessary in reviewing reports and in rectifying matters. There were concerns, in particular, with the estates stores and risk management audits. However, he was conscious that her recent work on overseas recruitment agents went well and the report required little intervention from him. He was also aware that the Claimant had excellent feedback from audit sponsors for the audits on student retention and on overseas recruitment agents. Nonetheless, there was an action point: within the next five-week period he expected the Claimant to address the shortcomings identified. If she were unable to do this he would have to consider if further action was warranted.

50. It was also because of his concerns with regard to attendance, timekeeping and performance that he felt unable at that time to support her request to complete her internal auditors' professional qualification through distance learning. He felt it would be unfair to burden her with extra demands when she was struggling to cope with daily demands of her job. That could be reviewed should there be a sustained improvement in her attendance performance and timekeeping.

51. There was a meeting between them to discuss the letter the following day on 21 February 2012. The Claimant was not happy with many of the points raised. As to the reference of falling asleep at work she pointed out that not only was she not well, but she had moved house that weekend and so was exhausted. As to attendance, she stated that because of job pressure and continuous criticism she felt very run down and much of the bouts of illness were job related. As to performance concerns she felt that more positive points should be added. She was very upset about the withdrawal of study support until things have improved. She became upset and tearful and left and said she would respond in writing. She sent Mr Harley an email

saying she could not talk about the matter at the moment. She needed time and would speak to him.

52. On 2 March 2012 the Claimant emailed Marcella Wright, the head of equality at the Respondent. She said she was not happy how her trial period of flexible working had been handled and felt that the process was being made difficult for her. She was looking to get some feedback about this as it relates to equal opportunities. Marcella Wright said she would be very happy to meet and talk with the Claimant. The Claimant did indeed meet with Marcella Wright around this time.

Mr Harley retires and Mr Hammond, the Second Respondent, is appointed to the post of Head of Internal Audit

53. In or around June 2012 Mr Harley gave notice of his retirement from the post of head of internal audit. The job was advertised; both Mr Hammond and the Claimant applied and Mr Hammond was successful. We note that it is not part of the Claimant's case that there was any actionable cause of action around Mr Hammond's appointment to the position of head of internal audit. Mr Hammond was appointed on 1 August 2012.

54. It seems that in July 2012 the Claimant informed Alan Harley of her pregnancy.

55. Upon taking office Mr Hammond decided to delete the post of senior internal auditor, that is to say the post he used to have, and instead to recruit another internal auditor. Mr Hammond explains that there was a reorganisation within the team. The University of Hertfordshire audit service had also been performing audits for the University of Bedfordshire under a contract. That arrangement had come to an end. They were therefore reducing from a team of four to a team of three. Mr Hammond took the decision not to backfill the senior auditor position from the structure based on costs and efficiency. Instead he decided to recruit another internal auditor on the same grade as the Claimant to fill the vacancy caused by the conclusion of the shared service with the University of Bedfordshire. This he discussed with the secretary and registrar and finance manager at the time. Mr Hammond does not recall the Claimant saying to him that she wanted to apply for the post but in any event the post was deleted in the reorganisation. Whilst it is true that this decision deprived the Claimant of a promotion opportunity, there is no primary evidence that that was Mr Hammond's motive. It was a consequence of the decision.

56. From 2 August 2012, with the agreement of Alan Harley, Mr Hammond put in place weekly reviews of audit progress with the Claimant.

57. Just before leaving, Mr Harley completed an appraisal preparation form on the Claimant. He recorded that the Claimant had completed the 14 audits which were allocated to her in 2011 to 2012. He agreed that the Claimant had received good feedback from those audited. He recorded that, as had been discussed with her, it had been necessary for him to spend an average of one and a half days per audit revising the Claimant's draft reports. The Claimant needed to ensure that draft reports were written to their highest standards and level of accuracy so that management time can be reduced in the future. They also discussed the time spent on completing the audits. Those averaged 13 days per audit ranging from 2 days to 22 days. The Claimant needed to work to a maximum of 15 days per audit in the

coming year and it was recorded that Mr Hammond was proposing to install weekly progress checks for the Claimant and the other newly appointed internal auditor to help ensure that the 15 day maximum was not exceeded. In her comments on this topic the Claimant provided quotations from those audited showing their appreciation.

58. We have seen the calculations compiled by Mr Harley in support of the comments that he made in this appraisal document. The notes read as though recording comments conveyed to the Claimant. The notes say that draft report presentation was improved on last year but there was still room for further improvement. Mr Harley could never send the Claimant's draft reports out without very careful review. The points and findings in the Claimant's drafts were not always explained clearly and the recommendations needed tidying up. There was also a table of audits and time taken, the Claimant's time and Mr Harley's additional time, which supported the figures given in the appraisal.

59. It was noted in the appraisal that the university had agreed to support the Claimant to complete her IIA examinations. The Claimant had started this process and had received her distance learning documents in July 2012. The proposal was to complete the three modules by November 2013. The Claimant advised Mr Hammond that she wished to continue with her IIA studies during her coming maternity leave period. Further it was stated that the university would grant her appropriate pre-exam study time and examination leave in accordance with the university's policy.

60. On 31 August 2012 the Claimant emailed Mr Hammond complaining about the way he had treated her on the day before. She stated she felt physically and emotionally stressed after the way she had been treated, was concerned about her wellbeing and that of her unborn baby. She was not well and would not be in that day. She noted that Mr Hammond had said that there was no need to document concerns in an email and that they should speak about any issues in person. She said she attempted to do that on 30 August when she challenged some of the figures that had appeared in her appraisal about the number of days it took to complete an audit. The maximum she said it took her to complete an audit was 20 days not 22 and that she had explained the reasons for the extra days taken. There was information in the appraisal document which had not been discussed in the appraisal meeting. She was concerned that Mr Hammond had told her that the proposal to introduce weekly monitoring checks was not because of her. She had been concerned that she had received the email saying weekly reviews would be introduced when on sick leave. Mr Hammond had told her that he feared she was using the appraisal to "slag him off". The wording of the appraisal showed the Claimant that its content was on account of her or Mr Hammond's views of her performance. She felt very disappointed. She had been greatly disturbed when the discussion regarding her appraisal ended in Mr Hammond suddenly demanding the Space Utilisation report asking whether she would get it to him that day. She knew that she had been off sick three days last week and would not be able to submit the report by then. To be honest, she said, she felt bullied. She was unclear when the monitoring meetings would be having thought they would be on Mondays when Mr Hammond seemed to ask for one on a day other than Monday. She revealed that she had suffered a miscarriage with her previous pregnancy and was concerned that a stressful situation would result in the same. Mr Harley was copied into that email. He was due to leave on 22 September. Accordingly, this email is sent during the period of handover between Mr Harley and Mr Hammond.

61. Mr Hammond did not accept the validity of the concerns expressed by the Claimant. He was of the view that she was unhappy with her appraisal and sought to have it rewritten. Mr Hammond disputed that he was aggressive towards her in the discussion on 30 August. It seems that the Claimant approached Mr Hammond to discuss her appraisal. She was angry about the contents. Mr Hammond stated that confrontationally the Claimant said she would raise a number of allegations in her appraisal documents about him in relation to her opinion of his management style and how she was being treated by him in the office. Mr Hammond stated that, 'as was her way', the Claimant increased in volume in her voice, did not allow him to speak and talked over him when he tried to talk to her. She did not listen he says. Eventually they agreed that the matters she was raising were misunderstandings or had not happened as she was recalling them. Later that day after Mr Harley had left the Claimant asked Mr Hammond to show her the figures he had used to enter data about the time audits took in a spreadsheet. Doing the best we can, we understand that Mr Hammond would put the information into a spreadsheet and Mr Harley took this information in preparing his own table of analysis. Mr Hammond maintains that although he tried hard to ensure that it did not, the discussion became heated, the discussion that took place was based around the contents of the appraisal document completed by Mr Harley on 9 August 2012. The issues arose from the Claimant's continued belief that Mr Hammond was introducing the weekly monitoring process specifically in relation to her. Mr Hammond tells us that he had previously discussed this issue with the Claimant on at least two occasions and had made it clear that all auditors would be subject to the weekly monitoring process. Mr Hammond suggested that if she wanted the appraisal changing she speak to Mr Harley and have it amended. His recollection was that the appraisal documents were never referred back to Mr Harley or signed as a finalised document by either party. The Claimant had alleged that Mr Hammond had said: "Your appraisal won't go anywhere". That was not the true meaning he explained. His comment was that because the appraisal would not go outside of internal audit, if she had concerns about the appraisal that had been undertaken she should contact HR. The Claimant seemed reluctant to do that and rebuffed the suggestion immediately. As far as the Tribunal can tell, the Claimant did not raise any appraisal issues with Mr Harley. Mr Harley was the author of the appraisal even if he took into account the data that had been prepared by Mr Hammond.

62. The Claimant was then off sick between 31 August and 28 September 2012.

63. On 14 September 2012 Mr Hammond flagged up with HR and Philip Waters, who served on the audit committee, a concern that the internal audit service would not be able to meet its annual targets given its lack of resourcing and the fact that the Claimant could be off for maternity related reasons. He wanted a meeting to be held as soon as possible to discuss how to manage the situation effectively without causing the Claimant distress, certainly for the three months remaining before she was to start her maternity leave.

64. On 19 September 2012 the Claimant emailed Eppey Gunn, her union representative, saying she would not take out a formal grievance about the appraisal but would instead refuse to sign it. She would not take out a formal grievance because she feared it would affect her health. The union agreed with her that it was sensible to

put the matter on the back boiler given the need to protect her health and that of her baby. Her issues with the appraisal however were listed as being:

64.1 Objectives included were not discussed at the appraisal;
64.2 Maximum of 22 days taken by her to complete an audit is incorrect;
64.3 Although it was an annual appraisal it did not give a general overview of her performance for the year, for example the total number of days taken to complete the 14 audits assigned against the annual budget;
64.4 The appraisal form did not reflect the discussion at the appraisal meeting, for example it did not include the reasons she provided for some of the audits exceeding the maximum of 15 days;
64.5 There was yet to be formalisation of flexible working in her contract and that was not included in the action plan.

65. Notwithstanding all of those points she decided, on the face of it for health reasons, not to pursue those allegations in a grievance.

66. Whilst we are aware the appraisal was not signed, we do not believe we have seen an email from the Claimant in which she told Mr Harley that she was refusing to sign the grievance.

67. On 6 October 2012 Mr Hammond agreed with the Claimant that she would no longer be required to complete working at home timesheets provided that the weekly reviews took place.

68. On 26 June 2012 the Claimant asked Fran Shaw to amend her contract along the lines of the flexible working arrangements that had been agreed. Fran Shaw replied that Mr Harley would need to advise the HR team in writing that he was happy for the arrangement to continue. She would then be issued with a confirmation letter but in most cases managers tend to put in a clause to the effect that the arrangement would be reviewed in 12 months' time and that there was no guarantee that it would continue but that was a matter between her and Mr Harley.

69. In October 2012 the Claimant was suffering from complications with her pregnancy. She was referred to occupational health and the occupational physician expressed his opinion on 16 October 2012 that it would be advisable for the Claimant to reduce her hours from full time to part time between 22 to 25 hours per week for the rest of the period until she started on her maternity leave. Although it was at the manager's discretion, the view was expressed that she might be allocated a small percentage of her administrative work to be done from home.

70. In response to this on 13 November 2012 Fran Shaw emailed the Claimant following a meeting the day before. She reported that Mr Hammond had identified a project which he believed the Claimant could work on largely from home for 25 hours per week. There may be some occasions when she would need to come into the university. She would remain on full pay. The project should take to the end of December. At the start of 2013 they would review how she was. If she was well enough she could return to work from the office on a more regular basis and if not they would try to identify other work that she could do from home. She also mentioned the university's view that the flexible working pattern to which she had been working over the last six months was set up temporarily and had not been

agreed permanently. Fran Shaw explained that she could not guarantee that the same arrangements could be made available to her on her return from maternity absence. She said that she would need to speak to Mr Hammond about her preferred working arrangements closer to her return to work date. They also spoke about work relationships and discussed possible mediation. That related to the Claimant's working relationship, in particular with Mr Hammond.

71. The Claimant expressed her thanks in an email on 13 November 2012 to both Mr Hammond and Fran Shaw for the adjustments that had been made to support her in respect of the complications around her pregnancy.

72. In short then, at the commencement of the Claimant's maternity leave there was no concluded entitlement to return to work on a flexible working basis.

73. The Claimant took annual leave from 1 February 2013 until her maternity leave period began from 25 February 2013.

74. In the meantime, in January 2013 Mark Allen had been appointed as the second internal auditor.

Flexible working request of 11 June 2013

75. On 11 June 2013 the Claimant sent in her flexible working request on an official application form. She was proposing a formal variation to her contract to include 30 office hours worked between 9.00am and 3.00pm Monday to Friday and 7 hours home working weekly. She proposed to complete the home working hours daily with one and a half hours completed each day, Monday to Thursday and one hour on Friday. The basis for the request was that she had children under the age of 16 and she was making a request to help her care for the children. Mr Hammond shared the application with HR. In an email to Fran Shaw dated 14 June 2013, which of course the Claimant did not see at the time, Mr Hammond expressed his concerns relating to what would the Claimant do each night. She would be fitting any working time around caring for her three children. How would that affect performance? He did not want the work to be undertaken at 4.00 or 5.00 in the morning as it had been suggested was done previously. That would not be good for the Claimant he thought and not good possibly for her performance. Fran Shaw proposed a meeting on 25 June 2013. Mr Hammond wrote to the Claimant saying he did not think the suggestion was operationally feasible for the following reasons. First, he did not think there was enough work which could be done from home; secondly, they were a very small team and he did not think the unit could accommodate it; thirdly, the Claimant was working to a similar arrangement before she went on maternity leave pursuant to a trial arrangement agreed by Alan Harley. Both Alan and he himself did not think the arrangement was working because of the nature of the job and the small size of the team. They both felt that the Claimant was not turning around the volume of work that would be expected of a full time member of staff. She would have been told that the arrangement was unsustainable going forward. However, because of her ill health during her pregnancy they continued with the arrangement. Mr Hammond said that he appreciated that with three very young children the Claimant may find working a traditional 37 hour week challenging and he was willing to talk about other ways they may be able to support her. He would be happy to consider a request from her for part time working along the hours she had suggested, ie office hours

9.00am to 3.30 or 4.00pm each day with some time built in for a lunch break. That would enable them to use the saved hours to buy in additional resources to assist the team. Alternatively she could return full time but she would need to be kept to the standard office hours. He proposed a meeting to discuss this but essentially his position was that no home working was appropriate.

76. A meeting was held on 2 July 2013 in which these points were aired. It was agreed at the meeting the Claimant would come back to them on the nature of the work which she believed could be done each evening at home which would amount to about two hours per night. The effect that would have in her eyes on her audit colleagues; the effect it would have on her ability to deliver work to the required volume and standard; and whether there was any other sort of flexible arrangement she would be willing to consider. The union was copied into this. Indeed, the union we believe was present at the meeting. The Claimant responded with a three-page submission.

77. Mr Hammond for the benefit of HR prepared a five-page submission in response on or about 11 July 2013. The outcome of all of this was that on 15 July 2013 Mr Hammond responded with the university's position subject to the right of appeal. He remained convinced that the arrangements proposed were not reasonably practicable. There was insufficient work of the sort that could be done at home; there would be an impact on the rest of the team; internal audit was a customer facing operation; and he was trying to increase the visibility of the team at the university. He expanded on these to say he had significant reservations that there would be sufficient productive work available to be undertaken every night. Based on her working under previous flexible arrangements, he had concerns that she would be able to complete the required number of orders each year. He had concerns about the long-term sustainability of the arrangement and feared that that would have a detrimental effect upon the achievement of the objectives of the service. There had been timekeeping issues in the past. The Claimant herself apparently had expressed concern about her ability to meet start and finish times.

78. Mr Hammond went on to say that he remained agreeable to working from home requests from time to time when circumstances were appropriate and with permission in advance. He was also open to discussion about part time working. He invited the Claimant to consider this alternative and would be happy to talk further. Details of her right of appeal were provided. The Claimant did indeed appeal by letter dated 31 July 2013.

79. The last day of the Claimant's maternity leave was 13 August 2013. She was then on annual leave to 8 September 2013.

Flexible Working Appeal

80. The appeal hearing was on 4 September 2013. The appeal was allowed. What was put in place was a three-month trial period. The hours agreed were 8.30am to 14.50 allowing for a 20-minute break. The hours could not be varied without pre-authorisation of the head of internal audit; the remaining seven hours would be made up that week, ideally on a daily basis but with flexibility to allow for peaks and troughs. Working in the office would be six hours each day, that would include any

work on the university campus. The success criteria stated the following about working from home:

> "This may be granted from time to time to members of the internal audit team with prior approval from the head of internal audit but only if sufficient advance notice is provided to the head of internal audit: there are reasonable extenuating circumstances; it is clear what work is to be done; the work is sufficient to last the day; the work can be done effectively from home; and the work will not be affected significantly by the reason given for working from home."

81. It seems to us that this was applying generally to members of the internal audit team but not specifically to the seven hours that the Claimant would be working to make up the week. Later in the chronology Fran Shaw confirmed that home working was seven hours for the Claimant. Mr Hammond in an email to his managers expressed concern as to the lack of specificity in the success criteria. He felt that the flexibility in terms of the seven hours would provide a greater challenge to him to monitor what was being achieved at home.

82. We have seen a copy of the first Respondent's policy on flexible working provisions. It is clear from paragraph 3 on page 4 of the policy that trial periods may be had. The provision is as follows: "Where a trial period or time limited period has been agreed this should be detailed in the agreement." That is what the success criteria resulting from the appeal was purporting to do.

83. The Claimant returned to work on 9 September 2013. However, she was off with stress from 11 September to 25 September 2013. On 17 October 2013 the Claimant emailed the chair of the appeal panel, Mr Gibbins, stating that she had sought to establish clarification on the exact criteria which would be used in assessing the success of the flexible working trial arrangement. She had concerns about how the criteria would be assessed through the appraisal process essentially as Mr Hammond had been opposed to a request for flexible working in the first place. Mr Hammond had expressed concern to her, she says, that a weekly report of work carried out during the seven hours working would be insufficient to make a judgment on the working arrangement and that he would require her to indicate which work would be undertaken before leaving each day and to show proof of the work undertaken by the following morning. Apparently, he later retracted this position saying he had no choice but to follow the terms of the success criteria as published. This left the Claimant, however, with concerns as to the outcome of the trial. In broad terms the Claimant was raising concerns about Mr Hammond managing and monitoring the trial. It seems that Mr Hammond had sought to include criteria in the appraisal relating to the success of the trial. The Claimant had asked for the postponement of the appraisal on 17 October 2013. We note she had only been back at work for three weeks or so.

84. By this time Sue Grant, the secretary and registrar, the Head of the employed staff at the university not the academic staff, had been copied in to matters. Fran Shaw sent an email on 17 October copying Mr Gibbins and Sue Grant recording her proposal that Mr Hammond sit down with the Claimant and her union representative to explain the criteria on which the trial period would be assessed.

85. In the appraisal the Claimant had written that she would like to know the specific criteria which would be used in assessing whether the flexible working arrangement had been successful. Mr Hammond added the comments that the assessment of

whether the flexible working arrangement had been successful would be measured against the criteria sent to her at the end of her appeal. As soon as was practicable towards the end of the trial period, ie before the Christmas break 2013, the success or otherwise of the flexible arrangement would be discussed with the Claimant. This prompted the Claimant to escalate to the chair of the appeal panel the question as to how this would work. Mr Gibbins replied to the Claimant's email stating that he had met with Sue Grant to review the success criteria. They were modified and expanded on for the purposes of clarity to enable a positive discussion about the trial period to take place between the Claimant and Mr Hammond at the end. The success criteria this time make it crystal clear that the remaining seven hours would be made up from home. Expected output was confirmed as being 14 audits for 2013/2014, that is to say, between her return to work date and 31 July 2014. The plan was that the Claimant would have completed four to five audits at the end of the trial period in December 2013. By 6 December it was expected that she would complete four audits and to have commenced the fifth.

86. The Claimant replied also on 25 October 2013 to Mr Gibbins, copying in her union representative Sue Grant, Fran Shaw and Mr Hammond. She appreciated the discussion concerning her concerns. She went on to say that she would need to see some evidence from Mr Hammond herself as she felt she was being treated differently. She was suggesting she was being given a heavier workload than Mark Allen. She felt she was being given less time per audit bearing in mind she had been off sick. She was suggesting that the bar was moving every time. Fundamentally she was still concerned that Mr Hammond who had refused the arrangement in the first place would ultimately take the decision on the success or failure of the arrangement. In short, the Claimant was concerned about the level of output required and as to the fact that it would be Mr Hammond who was assessing the success or otherwise of the trial period.

87. Mr Gibbins proposed a meeting for the Claimant with Mr Hammond and Eppey Gunn from the union accompanied by Fran Shaw or himself to go through the points. It was hoped that the meeting would take place the following week on 30 October 2013. The Claimant declined the meeting. She stated that she did not think there was need for another informal meeting as there had already been informal meetings to discuss flexible working arrangements and its terms. She was clear about what was expected of her but she was not happy about how the appeal process had gone including the fairness of the terms. However, she would continue to work towards the terms set out and await the decision on completion of the trial period.

88. The Tribunal has difficulty with the Claimant's position here. She had suggested that she was being treated less favourably and being comparatively overworked. A meeting was offered to discuss that and other issues. The Claimant then declined the meeting. It seemed she raised matters but then did not follow them through upon invitation to a meeting.

89. It is right that Nigel Gibbins and Sue Grant met following the Claimant's email raising her concerns about how the trial period would be monitored. In the issues the Claimant criticises them for not inviting her to a meeting held in response to her email. It is the Claimant's assumption, it seems, that Mr Hammond was at that meeting. It is not clear to the Tribunal that that was the case. In any event, management is entitled to meet to discuss responses to issues raised by its

employees. There was no legitimate expectation on the part of the Claimant to attend this meeting. The Claimant was in fact invited to a meeting resulting from raising her concerns which she declined to attend.

90. The Claimant was off with neck pain between 30 October 2013 and 6 November 2013.

91. The Claimant notified Mr Hammond that she was pregnant again on 13 November 2013 with the expected due date being 19 May 2014.

Fran Shaw's paper of 14 November 2013

92. Fran Shaw produced a paper on the Claimant's situation on 14 November 2013. Fran Shaw sent the paper to Sue Grant, Nigel Gibbins and Theresa Stadden. She deliberately did not include Paul Hammond into the circulation because by this time Mr Hammond's own health was becoming a factor. The paper amounted to a detailed chronology going back to the Claimant's appointment. There was an analysis of attendance excluding leave. If you count in pregnancy related illness her absence was 15.4%, if you discount it, it was 9.5%. There had been maternity absence of approximately 26 weeks. If you included maternity absence the Claimant had missed 32% of working days. Fran Shaw qualified the position in her paper that maternity absence quite rightly was protected time off and nonetheless the impact on the small team could not be underestimated, she said the current situation as described by her was that the Claimant's attendance was poor during the trial flexible working arrangement. She had not produced either the volume or quality of work which was expected of an auditor at her level and with her experience. She had just notified Mr Hammond that she was pregnant again. She notified Mr Hammond that she was having further pregnancy related health problems. Again, Mr Hammond was described as being hugely frustrated and was left with a major problem in that he has a small team and needed the Claimant to be effective in order for internal audit as a whole to meet its targets.

93. They owed a duty of care to Mr Hammond, she said, who had himself a health issue in the form of migraines which were being exacerbated by the difficulty in managing the Claimant. Fran Shaw made recommendations that the Claimant would need to be referred to occupational health for assessment of her current health and ability to perform the whole range of her duties including whether reasonable adjustments were necessary. It was proposed that at the end of the trial period on 9 December 2013 the Claimant be advised that her adjusted working arrangements be agreed but the Respondent would reserve the right to review it annually in discussion with her in light of operational requirements. Secondly, that the Respondent was very concerned about the quality of her work and the quantity. A six week action plan was proposed together with a statement that failure to reach agreed targets would lead to the possibility of a first written warning under a capability procedure and that she be informed that they were very concerned about her attendance which would be monitored with advice from occupational health.

94. There is no doubt that the analysis and the observations included periods when the Claimant would be protected under pregnancy and maternity rights. In the issues, the Claimant suggests there was a secret meeting convened to discuss this chronology document. There are no minutes of a meeting that we can see but it is

entirely likely that Sue Grant and Fran Shaw would regularly meet to discuss the Claimant and other HR matters, Fran Shaw working in close proximity and reporting to Sue Grant. Fran Shaw informed us that all the people emailed with a copy of her chronology and analysis came to the view that because of the fact that periods of maternity leave and periods of pregnancy related illness are protected it would not be appropriate to take any sort of disciplinary action.

95. In the issues and in her evidence, the Claimant alleges that she was told by Mr Hammond that she was speaking rubbish on 28 November 2013. Mr Hammond denies this. In the absence of any corroboration one way or the other the Claimant fails to establish that Mr Hammond said this. Even if he did, and we do not find that he did, saying that someone was speaking rubbish is not of itself discriminatory.

96. On 28 November 2013 Mr Hammond made a referral concerning the Claimant to occupational health. Mr Hammond explained that the Claimant had been working a trial period for flexible working since her return from maternity in September 2013. Two of the agreed terms related to start times and the length of break for lunch. The Claimant had explained that as she was pregnant she required longer breaks. The flexible working arrangement required the Claimant to work at home each night in addition to the responsibility of her then three small children, the fourth being on the way. Mr Hammond was concerned about how the Claimant's responsibilities at work combined with the needs in her personal life could affect her health. He was also concerned how that might affect the Claimant's performance. Since returning to work at the beginning of September 2013 the Claimant had been absent for 22 days owing to illness. In the issues the Claimant challenges this referral as questioning her ability to undertake her role flexibly as a mother of young children.

97. Mr Hammond had on several occasions aired his concerns that it would not be possible to perform the home working element of the flexible working agreement comfortably at home when the Claimant had extensive childcare responsibilities. He was airing that concern once again in this referral. The Claimant's position had consistently been that she could perform the required work either in the early hours of the morning between 4am and 6am or after the children had gone to bed. Mr Hammond was never persuaded that this was ideal. The Claimant had never maintained that she was working at home consistently, for example, between the hours of 9.00 to 5.00. It seems to us that the element of the referral that was new was that the Claimant was pregnant. That might require new adjustments. To an extent it does seem that Mr Hammond was revisiting old ground when he was mentioning the fact that the Claimant had the responsibility of looking after three small children. That after all had been fully taken into account in the flexible working appeal. We do note however that this referral was made towards the very end of the trial period. It seems to us legitimate for Mr Hammond to have concerns about output and quality of work. The mere fact that the Claimant was a mother of three small children would not necessarily impact on that. To that extent Mr Hammond had introduced a potential irrelevancy in this referral.

98. The Claimant met occupational health on 6 December 2013 and the handwritten note of the meeting compiled by the occupational health physician is before us. It records that the Claimant was 16 weeks pregnant, it was her fourth pregnancy, the Claimant was tearful throughout the meeting. She described the breakdown of the relationship with her manager and believed she was being bullied and marginalised.

She described poor office dynamics and tensions in connection with interpersonal relationships with the manager. It is recorded that the Claimant was thinking of taking out a grievance against the manager for bullying. The Claimant felt the workload was unreasonable although she was fit to work a workload in keeping with her capabilities.

99. The Claimant alleges that on 5 December 2013 Mr Hammond said to her: "Sod you Sharmain". The following day at 8.00 in the morning Mr Hammond emailed Fran Shaw. He said that all day yesterday he had been getting questions from the Claimant which seemed to him to have ulterior motives in terms of how they were communicated. In addition he mentioned that that morning he had received an email from the Claimant saying she decided to go directly to see occupational health and that she would like to work from home for the rest of the day. She said she did not want to be in the office as she was finding the current situation too difficult to cope with especially during her pregnancy.

100. He relayed that on the afternoon of 5 December 2013 the Claimant came into his office to ask how many days he was going to use for her audit on home and international student recruitment when assessing the trial period. He gave a figure and was then told that his information was incorrect. He tried to explain why there might be a difference between his figure and her expectation but her immediate reaction was to begin to talk about the stress he was causing her and how she was working for a manager who did not listen, etc. He said he stopped her straightaway and said he did not want to go over the same old ground again with her and said that unless there was anything different or new she wanted to discuss could she leave the discussion to the time when it was more appropriate and because he was busy.

101. There is no corroboration anywhere for the suggestion that Mr Hammond said "Sod you Sharmain" to the Claimant. In the absence of corroboration we are not in a position to conclude whether this was said. The Claimant has not proved the comment with any reliable cogent evidence.

102. On 6 December 2013 Mr Hammond invited the Claimant to a meeting on 12 December to discuss the trial period. The Claimant confirmed the meeting but said that she wanted a copy of the decision and supporting papers ahead of the meeting. In the event, the Claimant decided not to attend the meeting. She said in an email to her union representative on 9 December that she had discussed with Fran Shaw that she really did not want to go through another meeting to discuss the flexible working arrangement in light of the stressful situation in the office. Fran Shaw had agreed to send her some proposals for the working arrangement going forward. The Claimant would respond to those once received.

103. On 9 December 2013 Mr Hammond wrote to the Claimant saying they were due to have the meeting on 12th but he now understood she wanted the outcome explained in writing instead. It was unfortunate he thought that there was no opportunity therefore for a two-way discussion. Mr Hammond then addressed the success criteria that had been set by Mr Gibbins and Sue Grant. In terms of hours of work Mr Hammond stated that unfortunately over the course of the three month trial period the Claimant had arrived late on a number of occasions and she had exceeded the break time on a number of occasions without making it up either in the office or at home. She had recently requested a start time of 9.15am rather than 8.30am owing to

childcare issues and that had been agreed on a temporary basis. Further, she had indicated she would need more than 20 minutes break because of her pregnancy. The weekly report on home working had been produced. There had been problems with the Claimant completing six hours per day in the office. Sickness absence during the three-month period had been extremely high. Between the three months 9 September to 6 December she had 22 days sickness and there had been further sickness subsequently. As to expected output: in view of the poor attendance it was very difficult to assess whether the Claimant had been producing the volume of work agreed. It had been difficult to assess the time taken on individual audits. The audit files had been maintained as agreed however.

104. His conclusion was that the Claimant had been experiencing major difficulties in adhering to the agreed hours and indeed her start time had to be set back at her request. She had asked for a longer break time. Her high sickness absence was perhaps indicative of the fact that the Claimant was finding it difficult to meet all her work and personal commitments. The arrangement would therefore not appear to be working well for her and it certainly was not working satisfactorily for the internal audit team. Mr Hammond did not believe that it could continue because the operational impact on the team was too great. Mr Hammond made some proposals as to how the relationship could continue going forward. The first was a part time job, 0.675 FTE, 9.15 to 14.45 each day in the office with a 30-minute lunch break. Option 2 was the same but with an additional 7 hours work from home that would amount to 0.864 FTE. In both cases salary and benefits would be pro-rata'd. He made it clear to the Claimant that he was not prepared to increase the amount of home working over the 7 hours per week. Accommodating more than 7 hours in a small team would put too great an imposition on the rest of the team. So Mr Hammond's position was that he offered her part time working. Mr Hammond gave the Claimant four days to make her choice between these two options.

105. On 2 December 2013 the Claimant had written to Sue Grant asking for a meeting to discuss her work related concerns with Mr Hammond. Sue Grant responded to the Claimant on 10 December. She said it would be inappropriate for her to meet and discuss these issues as the secretary and registrar. Instead she proposed that the Claimant meet with Nigel Gibbins, the deputy director of HR, who had heard the flexible working appeal. The possibility of mediation would be looked at. She recommended that the Claimant allow Mr Gibbins to hold a facilitated meeting with Mr Hammond. The Claimant responded that same day. The Claimant said she contacted Sue Grant directly because the grievance policy suggested that Mr Hammond's line manager should be contacted. She said she would prefer to speak with someone outside HR owing to loss of confidence. The Claimant would think about it and get back to her following a meeting with one of the bullying and harassment advisors. The allegation in the issues is that Sue Grant refused to hear the Claimant's complaint. That is not quite correct in that Sue Grant referred the matter to Mr Gibbins for the Claimant to take further.

106. The Claimant and her union representative consulted Min Rodriguez-Davies, the head of equality, on 17 December 2013. The Claimant did not bring a formal bullying and harassment complaint at any time thereafter.

107. Mike Rainey, the occupational health advisor, reported on 6 December 2013. He found no medical evidence to indicate the Claimant was unfit for her current role.

The issues were primarily employee-relation matters. Resolution of the apparent tension between her and her manager should be resolved by management, not occupational health, he suggested. This may need to escalate to formal mediation. There was no medical evidence to indicate the Claimant required longer breaks as indicated in the management referral. However, from a clinical perspective, the Claimant's was a high-risk pregnancy and she needed to mobilise regularly to help reduce the risk of complications. The Claimant needed a pregnancy risk assessment and a workplace stress risk assessment.

108. The Claimant alleges in the issues that Mr Hammond disregarded these recommendations. The occupational report came out by email on 12 December 2013. The email was addressed to Mr Hammond and Fran Shaw. Mr Hammond was off sick on 12 and 13 December. He then went on annual leave from 14 December until the New Year.

109. On 9 January 2014 the Claimant met with Fran Shaw, together with her union representative. Fran Shaw consulted with Sue Grant as to what had been said and made suggestions having also consulted Mr Hammond. The work pattern would be 26 hours office based and 11 hours based each week at home. It was proposed that she would work from another office in the McLaurin building. This was a location away from the internal audit. She would no longer be required to submit a weekly worksheet to Mr Hammond but would of course still be required to submit work to him as appropriate. She would have to attend weekly team reviews. It would be necessary for Mr Hammond and her to determine the audit she would undertake up until her maternity absence, the baby being due in May. By email the same day the Claimant accepted these proposals. It was intended that this arrangement would be a permanent contractual one, at least in terms of the hours. Fran Shaw confirmed by further email on 9 January that she would now progress her contract amendment letter.

110. On 3 February 2014 the Claimant reminded Fran Shaw, copying Mr Hammond, that the pregnancy and stress risk assessments still had not taken place. Fran Shaw asked Mr Hammond to complete them. Mr Hammond attached a risk assessment for pregnant and breastfeeding employees by email dated 6 February 2014. In terms of the workplace stress risk assessment he suggested the Claimant start by identifying her stressors.

111. It does seem to the Tribunal that Fran Shaw's actions on 9 January themselves did address concerns raised in the occupational health report even though they were not in the form of specific risk assessments. On 6 February 2014 the Claimant came back and suggested some changes to the risk assessment. At this time the Claimant was off sick with pregnancy related absence throughout February and also eight days of March 2014. There was then a period of annual leave. At around this time, then, the Claimant was absent between 31 January and 12 March with pregnancy related absence. Between 17 and 28 March 2014 the Claimant was working reduced hours for three days per week at four hours per day. She was absent between 1 and 4 April with pregnancy related absence. Between 7 April and 2 May she had 18 days annual leave and on 6 May she began a period of maternity leave.

112. We do not find that Mr Hammond refused to carry out any of these risk assessments. He was on annual leave for the rest of December 2013. On 9 January

2014 the Claimant was moved to the McLaurin building and her request for flexible working confirmed by Fran Shaw together with Sue Grant. He was essentially overruled by Fran Shaw and Sue Grant in respect of his position on flexible working and the Claimant was moved away from him, save for essential work-related meetings. The university had sought to address the matters of stress by acting in this way. It is perhaps surprising in those circumstances that the Claimant then sought a stress risk assessment on top of what had already been done. It is right that no pregnancy risk assessment had been done. Mr Hammond attended to this when reminded to do so by both the Claimant and Fran Shaw. There may have been a delay by him in that regard. We do not however find he refused to do anything.

113. In the issues, complaint is made of Fran Shaw for failing to act on or investigate the Claimant's complaint of unfair treatment by Mr Hammond. This is said to be on 9 January 2014. The Tribunal does not really understand this complaint. On the contrary, Fran Shaw confirmed the flexible working pattern that the Claimant wanted and made it clear it was permanent and that the contract would be amended. She, on a temporary basis at least up until the oncoming maternity period, ensured that the Claimant would be working from a separate office. It had been made clear to the Claimant by her union, by the head of equality and by the Respondent generally that if she wanted to make a formal complaint against Mr Hammond, she could. She did not make a formal complaint against him on 9 January 2014. The criticism of Fran Shaw here is not fair. Furthermore there was no criticism of Fran Shaw at that time. On the contrary, there was an email of thanks.

Idea Software

114. An issue arose on 29 January 2014 in respect of Idea Software. Idea Software enabled particular research which might be relevant to an audit to be conducted. Idea Software had initially been obtained in July/August 2010 before the Claimant arrived in November 2010. A single user licence using a shared dongle was then purchased. It was agreed at that point that the software would be loaded on to one computer only. The upgrade took place in March 2013 when the Claimant was into a maternity period. The updated software was loaded on to Mark Allen's laptop. The Claimant had indirect use of the software in that she could ask a colleague to conduct a search, using it as appropriate. The Claimant was asking for her own licence. Mr Hammond looked into it. The original cost had been £50 for each licence. The quote he received for a third licence on 30 January 2014 was £1,320.00 with an annual maintenance cost of £335.00. Mr Hammond's view was that that cost was prohibitive. We accept from Mr Hammond that the cost is the explanation for the reason that no independent licence was obtained for the Claimant. We accept that given his budget that cost was prohibitive. There was no functional obstacle to the Claimant using the software. She would however have to ask to borrow a colleague's computer or ask the colleague to perform the search for her pursuant to her instruction.

115. In an email dated 20 January 2014 Mr Hammond suggested that the Claimant do not attend a meeting of the Council of Higher Education Internal Auditors (CHEIA). Those meetings were held in central London. Ordinarily Mr Hammond would

encourage all members of the team to attend meetings and if funds were available he would recommend the whole team go to the National Conference each year. The email said that as the Claimant had a restricted number of working days to complete the work she had been allocated before she began her maternity leave, it would be more useful for her to come into the office on Friday and continue with her productive time rather than attend the district meeting. He would feed back, as in the past, if there was any relevant information and let her have any copies of handouts from the meeting. The Claimant says that this was clear pregnancy and maternity discrimination. It seems to the Tribunal that the reason for Mr Hammond's decision here was that the Claimant was behind in terms of her expected output. He did not want her to become further behind. The reason was not that she was pregnant. If the Claimant had been on schedule or ahead of schedule in terms of work output, there would be no reason to suggest she would not attend the meeting.

116. In terms of email and other communication between the Claimant and Mr Hammond in January 2014, we do see exchanges of emails in respect of the Idea Installation request. In those exchanges there are references to audit matters. We note also what Mr Hammond told us in evidence. On 9 January 2014 when he was told by Sue Grant and Fran Shaw that the Claimant would be moving location and have her flexible working contractually confirmed and varied, he was also instructed by Sue Grant and Fran Shaw that until the Claimant went on maternity leave he should restrict his contact with the Claimant to the minimum required to ensure that internal audits were completed. He was not clear, he tells us, at that point what he was managerially responsible for in connection with the Claimant and that became more confusing as time went on. He tells us he felt undermined. Certainly his decision in respect of flexible working had just been overturned in that way. The Claimant had been moved to another building in the university. Fran Shaw told us that they wanted to ensure a period of breathing space between Mr Hammond and the Claimant with view to future relations when the Claimant returned back from maternity leave. If there was less frequent communication between Mr Hammond and the Claimant it seems that this was down to management instruction. It was not Mr Hammond himself treating the Claimant less favourably. We see no evidence that an audit conducted by the Claimant was materially adversely affected by this position. We note in the allegation that at the same time as suggesting Mr Hammond failed to respond to her work related emails and address concerns, that he also micromanaged her. To us that seems inconsistent.

117. On 12 February 2014 Mr Hammond emailed Sue Grant in respect of the output and attendance position with the Claimant. There were two audits that the Claimant had started but not finished. He had a reply from the Claimant that indicated that she had not progressed far on one of them and that she felt it might not be easy for anyone else to finish that audit until she returned in late February. Bearing in mind that audit began in late December/early January, that was disconcerting as he had not been given details of those extensive delays during the weekly reviews. She had already booked 10 days to the audit concerned. He could not really leave it until the end of February for that audit to be completed and consequently that may have an effect upon the quality of what the internal audit would produce. He expressed his view in respect of the progress of those audits that those issues may be traced back to the flexible working arrangement agreed with the Claimant and maybe an indication that despite her assurances, her family commitments were having an effect on the level of output she can produce. We know that this had been Mr Hammond's view for some

time, but that observation was addressed to the progress on the audits that the Claimant had already been working on. On top of that he had learned that the Claimant had been signed off work for the next two weeks to return on 25 February. That meant he would have lost 16 of the 20 available working days in February for the Claimant. It was now likely that he would have to finish the two audits she had underway. The audits concerned were UKVIS and Commercial Debt.

118. In the Tribunal's view it would have been more sensible for Mr Hammond simply to report the fact that under the flexible working arrangement targets were not being hit. His assumption that this was connected to the Claimant's family obligations was something he need not have mentioned. It is the fact that as he expresses himself in that way, the possibility of discrimination arises.

119. The Claimant maintained her reservations about signing the pregnancy risk assessment. On 3 March 2014 Fran Shaw suggested that the paperwork be sent to the occupational health specialist so that he could see the areas of concern and could determine with both the Claimant and Mr Hammond reasonable solutions from a health a safety and operational perspective. The Claimant's concerns related to the number of days for an audit, rest breaks and the pace of work.

120. On 11 March 2014 Sue Grant circulated a request to those reporting to her for budgetary savings. Mr Hammond responded on or around the same day, saying he had a very limited budget and did not think there was anything left that could be reduced or that would be of significance that Sue Grant was looking for. In terms of salary costs he observed that Mark Allen and the Claimant were paid a high salary in comparison to others in the profession who were undertaking a similar role. That was a legacy of the recruitment that took place when the shared service with the University of Bedfordshire commenced. He said that if the Claimant were to decide not to return following her pregnancy, he could reduce the salary paid for that post and Mark Allen's post could be re-titled as senior internal auditor. That relied upon the Claimant not returning and unless they could provide her with a good severance package, which he did not think she would accept anyway, he was sure that she would want to return on her existing salary. The majority of the remainder of his budget went on the rental of the offices in the Innovation Centre.

121. This falls short of Mr Hammond proposing that the Claimant be selected for redundancy. His assumption was that she would be returning on her existing salary even if they could offer a good severance package. He did not think she would accept it anyway. He was not proposing that she be made redundant. Of course, the Claimant only found out about this following disclosure.

122. In line with Fran Shaw's recommendation, occupational health was consulted. Mr Rainey, the occupational health advisor, records the Claimant's position that she was able to undertake her work tasks but had a preference to work from home as a way of minimising and managing her symptoms which she reported were exacerbated by her activities of daily living, presenting for work and using her office chair. In the absence of any medical evidence to the contrary, he believed the Claimant fit for her current role. However, given her reported ongoing discomfort and the length of time she had been absent from work it would be appropriate for her to engage with and adhere to the following short phased return to work plan: commencing Monday 17 March for two weeks the Claimant was to work four hours a day, Monday, Wednesday and

Friday only, it being anticipated she returned to her substantive role 31 March 2014; her workstation should be assessed to ensure it was up correctly and met her needs and maximise comfort; the manager should carry out a pregnancy risk assessment and review the potential risk; the work being undertaken, management should discuss with the Claimant the job tasks, activities, adjustments and accommodation.

123. Mr Hamond agreed to allow the Claimant to work from home but come into the office for meetings and audit testing as needed. The Claimant asked to take annual leave from 7 April and maternity leave from 6 May. Mr Hammond agreed. Whilst a display screen equipment assessment was completed on 21 March 2014, it seems that the Claimant and Mr Hammond could not agree the terms of a pregnancy risk assessment.

124. It was on 19 March 2014 that Fran Shaw wrote a contractual letter confirming the flexible working arrangement.

Mediation

125. On 28 October 2014 Fran Shaw confirmed that the flexible working arrangement would continue upon return. The Claimant was asked about Keep in Touch (KIT) days and mediation, which she had previously mentioned in connection with Mr Hammond. Mediation took place on 3 December 2014. The mediation was conducted by Kay Robertson. She drew up a workplace mediation settlement agreement which included the details of how the Claimant and Mr Hammond would deal with each other. There was an element for Mr Hammond to investigate whether sufficient budget for the Idea Software training could now be enjoyed by the Claimant. Indeed he was successful in obtaining a licence and training for the Claimant to use the Idea Software. In the issues it is alleged by the Claimant that Mr Hammond repeated his position that she was incapable of performing her role whilst working flexibly because she had young children. That is not said by Mr Hammond in his email responding to the draft settlement agreement on 5 December 2014. We have seen typed notes in preparation for the mediation which appear to set out Mr Hammond's requirements, either written by him or recording what he said. There is no reference in those to the suggestion that the Claimant was incapable of performing her role whilst working flexibly because of young children. We have already found that the Claimant had articulated that position previously but we do not see that it was repeated during the mediation with view to preventing the flexible working arrangement operating. We accept the evidence from Mr Hammond at this point that he accepted that the university had made its decision. It is likely, however, that Mr Hammond asked when was the home working going to be done. He never did change his view that it was not a good idea to do the work early in the morning or late at night.

126. The Claimant raised the issue about a qualification in IT audit. She first asked about funding for it in June 2014. On 19 June 2014 Mr Hammond informed her that there would be no support for that then but it could be reconsidered once she had demonstrated a sustained period of good attendance and satisfactory performance. The matter came up again in the appraisal in March 2015. Mr Hammond explained that although the opportunity may arise to undertake non-technical audits within the IT area, for the immediate future expertise would need to be bought in for the technical work as the team did not have the required knowledge and experience to

undertake it. His position of June 2014 remained in place, that is to say the matter could be reconsidered once there had been demonstrated a sustained period of good attendance and satisfactory performance.

'Dog with a bone'

127. On 18 March 2015 the Claimant learned that she had had feedback from Andrew May, the client for the audit report on major estates projects, in which the Claimant had been described as being "like a dog with a bone" in the manner in which she had dealt with an issue in the audit.

128. It seems that the Claimant was not at first familiar with the idiom. She regarded being compared to a dog as a very bad insult, as she put it in an email dated 19 March 2015. Mr May in his written feedback said that the Claimant had focused on arguably non-material matters that did not have a significant risk impact and suggested that she perhaps look into ranking the impact in the future. Mr Hammond informed the Claimant that in his verbal feedback Mr May had used the expression "dog with a bone" making that point. The idiom was explained to the Claimant. It did not have the racial or sexist connotation that she thought.

129. The 18 December 2014 was the last day of the Claimant's maternity leave. She took annual leave to 5 January 2015 when she returned to work. On 27 March 2015 Mr Hammond wrote a report entitled "Staff poor performance" in relation to the Claimant. It was in respect of her performance in January 2015. He produced it for the information of Sue Grant and Fran Shaw for their information and so that they were aware of his position should it be required going forward. The Claimant did not see this at the time and saw it for the first time through disclosure.

Performance concerns following return to work on 5 January 2015

130. From 5 January 2015 to 18 March 2015 accounting for the Claimant's actual annual leave, sickness absence and attendance at a training course there were 45.5 days available for the completion of planned audits. Given that the maximum time allocation for each audit is 15 days there was time in the period for completion of fieldwork and draft reports for at least three audits. In the period the Claimant had completed one audit in relation to which she had booked 22.7 days, had started and dropped the follow up audit which had to be completed by Mark Allen and had an audit underway to which she had already booked 10.8 days without there being a sign of imminent completion. Mr Hammond would have to continue with this audit in her absence. In the same period the second internal auditor, Mark Allen, had completed one planned and one unplanned audit and had fully completed two other audits. In addition he had started work on two audits, which had been cancelled by the audit committee. The first audit that had been allocated to the Claimant upon her return was the management of major estates projects. This had been chosen because it ought to have been relatively straightforward according to Mr Hammond. It was not expected that she would take nearly an extra eight days to complete the audit. So once again there were performance concerns aired by Mr Hammond three months into the Claimant's return to work.

131. Mr Hammond had meetings with the Claimant on four dates during this period. He would have discussed with her the progress of the audits. The information he

conveyed to Fran Shaw and Sue Grant was factual, the writing of the report was a management action open to Mr Hammond to take.

Without prejudice discussions March/April 2015

132. At the same time as Mr Hammond was compiling this report, moves were afoot to seek to agree a without prejudice settlement with the Claimant. Sue Grant authorised HR to make an offer of settlement. On 26 March 2015 this was developed by Fran Shaw in April 2015 who emailed the Claimant on 23 April 2015 seeking to agree a settlement agreement with view to a mutually agreed termination of employment. The Claimant was off sick for this period. On 30 April 2015 Fran Shaw noted that a further sick note for a month had been provided and she stated she had not heard from the Claimant in connection with a settlement so was assuming she did not wish to progress. That meant regrettably that they would have to consider the effect of her continued absence on the service and the management report would be prepared and sent to the secretary and registrar. The fact that this without prejudice discussion was going on is not the subject of one of the Claimant's allegations. Indeed, on 30 April 2015 the Claimant emailed Fran Shaw stating that having been in discussion with Mr Hammond that morning she could not see any sign of improvement in their working relationship and she was forced to consider the option of a settlement. She continued leaving the job at that time was also an extremely difficult decision for her because her family relocated to Hatfield and they enrolled their children at a local school. She took up the job for the long term. It also raised concerns for her in terms of securing alternative employment because the job search would have to be restricted to Hatfield and surrounding areas. However, she continued, she had no choice but to consider leaving the university as she could not continue to work in an environment where there was a complete breakdown of trust and she believed that her manager had been deliberately setting her up to fail. She therefore asked Fran Shaw to set out the terms of the settlement proposal. As at 17 April 2015 she said she would have to get better in terms of health before considering the matter leading to Fran Shaw sending the email on 30 April when she had heard no more.

'Lack of trust' – 13 April 2015

133. Coming then back to the table of allegations, the Claimant alleges that on 13 April 2015 Mr Hammond refused to apologise to the Claimant for offence caused for refusing to accept that the Claimant was offended and distressed. There was a meeting between the Claimant and Mr Hammond on 13 April 2015. The Claimant was in a low mood. She had been thinking about work constantly and was stressed about getting work done. She said that she often woke up in tears. The Claimant said she did not mean that she was not coping with the home/work balance. She said she was upset with the working relationship with Mr Hammond. She said that she woke up at times thinking she did not want to come into work because of the stress caused by the working environment. She explained that she did not want to come back after maternity leave but felt the job meant so much in terms of a personal need and that she put so much into doing the job that she felt she could not now walk away.

134. The Claimant felt that in respect of the major estates audit Mr Hammond had changed her report to Andrew May to the extent it was unfair that she should personally receive adverse feedback. Mr Hammond reiterated that he had supported

the Claimant and had taken the blame for the recommendations that were received in the report. Mr Hammond also reiterated that although Mr May had issues with the substance, he also raised the manner in which the audit was conducted. The Claimant was insistent that Mr Hammond had forced her to include a recommendation in the report and it was this that Andrew May was picking up on in his feedback. As a consequence, she felt it was wrong that she should be blamed. It seems the Claimant would not accept Mr Hammond's explanations. The Claimant stated she felt strongly that she was unable to trust Mr Hammond owing to what she explained was her perceived treatment in the office previously.

135. Mr Hammond asked the Claimant directly how they could take the working relationship forward if there was a strong and evidenced lack of trust. Mr Hammond commented that it was very difficult to see how that would be possible. The Claimant agreed that it would be difficult but because her job was important to her she was going to see how it went, one day at a time. The Claimant said she was surprised that Mr Hammond had not initiated discussion on her absence when the meeting had begun. She stated she would have expected an apology based upon the details of how upset she had been in the emails exchanged when she first went off in the sickness period. Mr Hammond said he did not feel he could apologise as he was not aware of anything that he had actually done wrong as the Claimant's line manager to which the Claimant responded: "Well that says it all". Mr Hammond then refused to apologise because it was his position there was nothing to apologise for. This relates to a difference in perception of matters leading to the feedback from the major estates audit. The Tribunal notes that this allegation does not relate to the 'dog with a bone' comment which is dealt with above in any event. Further the Tribunal neither sees anything that Mr Hammond should have apologised for nor that failure to apologise might amount even arguably to discrimination.

136. In this meeting Mr Hammond did say that there were things that the university could offer and had offered in the past that might help if the Claimant thought she was not coping, for example part time working. Mr Hammond recorded the meeting as saying that only the Claimant could make that decision on her personal circumstances. As stated above, the Claimant said this did not mean she was not coping with the work/home balance. She saw the problem as a working relationship with Mr Hammond. It had been Mr Hammond's position for some time that part time working would be available if that would help the Claimant cope. We know that the Claimant did not want part time working. On this occasion we do not see that Mr Hammond said the Claimant was struggling to deal with work and look after four little children. His position was that if she was struggling with full time work, then part time was an option.

<u>Fran Shaw and Paul Hammond 22 April 2015</u>

137. The Claimant takes issue with the meeting that took place between Fran Shaw and Paul Hammond on 22 April 2015. Fran Shaw purported to summarise Mr Hammonds' concerns and advised him of the next steps. Reference was made to the disagreement concerning the feedback from Andrew May. Mr Hammond's concerns were that the Claimant had stated to him in person and in emails that there was a total breakdown of trust as far as she was concerned and that the Claimant's high absence was impacting on the small team in terms of pressure and workload resulting in an inability to deliver the level of assurance sought by the supervising

audit committee. Of 76 potential working days between the beginning of January and 22 April 2015 the Claimant had been off for 22 days. The sickness absence accounted for 29% of available time. There was, it seemed, a breakdown in relations between the Claimant and Mr Hammond. There was resourcing pressure, there were wider university concerns in terms of audits getting done and there was a potential for further sickness absence. Fran Shaw recorded the next steps as being to contact the Claimant in connection with potential settlement once again. She would also indicate that pressures created by the current position and that in the absence of an imminent improvement in the current position consideration would have to be given to termination of employment. A short timeframe would be given to the Claimant with response to a settlement offer. The details of the settlement exchanges are recorded above. Indeed, following the difficult meeting that was held between the Claimant and Mr Hammond on 13 April 2015 the Claimant left work with a headache and then was signed off for stress for the subsequent 10 days. The meeting on 22 April 2015 was a management meeting open to the managers to hold. It was essentially descriptive of the present factual situation.

Stage 3 dismissal procedure

138. Sue Grant told us in evidence that given that there appeared to be a total breakdown of relationship between Mr Hammond and the Claimant, she took the decision that a hearing should be heard at stage 3 of the disciplinary procedure. There was not a procedure as such for contemplating dismissal for some other substantial reason in the form of a collapse of trust and confidence. The decision was taken to treat the matter as though it were at stage 3 of the disciplinary procedure. This is not an entirely comfortable use of the disciplinary procedure because this was not a disciplinary matter in the sense of misconduct.

139. On 12 May 2015 Sue Grant wrote to the Claimant stating that as a result of the effect of her long term and continuing sickness absence her line manager had prepared a management report for consideration. Having read the contents of the report she decided to convene a formal hearing in line with stage 3 of the university's formal disciplinary policy and with particular reference to staff long term ill health absence. Later on in the letter the Claimant is told that she would read in the management report that in addition to the issues of long term absence, Mr Hammond reported that there had been a fundamental breakdown in the working relationship between him and yourself. The Claimant would be given opportunity to respond to the points and to present her own case at the hearing. As the meeting was being held under stage 3, one possible outcome was that employment would be terminated.

140. There is no doubt that there is a confusion here between misconduct and long term ill health absence and fundamental breakdown in the working relationship and the difficulty is that there was no procedure designed to deal with fundamental breakdown in the working relationship and the Respondent was essentially borrowing concepts from other procedures. However, in all the circumstances it was entirely appropriate for the Respondent to hold a meeting with the Claimant to consider her future employment, the possible outcome of which was termination of employment.

141. The disciplinary hearing took place on 27 May. It was conducted by Sue Grant. Sue Grant felt she had to chair it as she was the senior member of staff in the university. There are significant difficulties with this decision. Sue Grant had been

consulted for some time as to the HR issues in the case. Indeed, in many ways she had been pulling the strings. For example, it was her decision to seek authorisation from the Vice Chancellor to make an offer of settlement. The offer of settlement was three months' salary. Sue Grant had been involved in the decision to move the Claimant to the McLaurin building and indeed to overrule Mr Hammond to formalise the flexible working agreement. This last matter was of course favourable to the Claimant. On the other hand, Sue Grant had had detailed involvement for an extended period of time and simply was not in the position to bring a fresh pair of neutral eyes on to the issue. We understand that this was something of an unprecedented case. We understand that ordinarily Sue Grant sits on these disciplinary hearings. However, she was too familiar with the decisions that had been taken and indeed had taken many of them herself.

142. In the disciplinary hearing on 27 May 2015, the Claimant informed Sue Grant, in answer to the question given the clear breakdown in the working relationship between the Claimant and her line manager and her lack of trust what did she want from the hearing, the Claimant replied that she could not work in the internal audit team and so wanted to transfer out of the team. In her decision Sue Grant says that she had given careful and due consideration to all the verbal evidence and discussions which took place during the hearing and the written material. It was very clear to her that the trust and working relationship between the Claimant and Paul Hammond had fundamentally and irretrievably broken down. That was acknowledged by both. The employment relationship could not continue. The Claimant did not want to work in the internal audit team, the position to which she had been appointed.

143. Given the above Sue Grant decided that the outcome from the hearing must be to dismiss on the grounds of some other substantial reason, specifically a fundamental and irretrievable breakdown of the working relationship and a breakdown of trust.

144. The Claimant was contractually entitled to two months' notice. During the notice period Sue Grant would ask HR to work closely with the Claimant to try to seek reasonable alternative employment for the Claimant within the university. She would like to extend the period of notice of dismissal to increase the opportunity for finding another post. Her last day of employment therefore would be 2 September 2015. Accordingly, notice was extended by one month. In total the Claimant was given three months' notice. She would not return to the internal audit during that period. There would be an attempt to identify alternative work for the Claimant to undertake during the notice period and Fran Shaw would be asked to liaise. There was a right of appeal.

145. Whilst we have expressed our view that Sue Grant should not have heard this, the decision she arrived at seems otherwise one entirely open to her. The issue in the case essentially is, was there alternative employment for the Claimant to do?

<u>The Appeal</u>

146. The Claimant appealed on 15 June 2015. On analysis, her only appeal point really would have been to find her alternative work prior to giving notice. In the appeal the Claimant rightly pointed to the difficulty of mentioning long-term sickness in the letter inviting her to the disciplinary. As we have already stated, this was a strange use by

the Respondent of its procedure. There did, however, have to be a meeting and the Claimant did have to have the opportunity to state a case. All of that happened.

147. In her notice of appeal the Claimant sought to raise all kinds of allegations of bullying and discrimination against Mr Hammond and less favourable treatment. However, in reality, given her acceptance that she could no longer work in internal audit the only issue she could appeal about is being found alternative employment as opposed to being dismissed. Her letter of appeal contained far more than that but not relevantly so.

148. By letter dated 13 July 2015 the Claimant's appeal was rejected. The appeal was conducted by three governors of the university: Sir Graeme Davies, who acted as chairman for the committee; Professor Jackie Hunter and Mr Colin Gordon. It was clear to the committee that there was a clear breakdown in the relationship between the member of staff and her line manager. The appellant agreed with that statement and while she and management might not agree how that breakdown occurred, it was nevertheless apparent that the Claimant would be unable to continue to work in the internal audit department. One of the concerns raised by the appellant was that she felt she was subject to harassment and bullying. The committee noted that there had not been a formal complaint raised which meant that neither an investigation nor any hearing had been conducted to test any evidence. The committee therefore felt it would be outside its remit to make any comments on the issue. The appellant had raised her contentions that she was subject to discrimination be it on the basis of her pregnancies, her gender or any disability. The committee stated that it had carefully reviewed all of the arguments and evidence but could not find there to be any persuasive evidence to support those assertions. The committee noted that the Claimant remained very stressed. However, it did not find that discrimination had occurred on any of the grounds she contended. They did not find any discrimination in the way the university's procedures had been applied.

149. It was clear from the discussions with the appellant that there were limited options in these circumstances given that the Claimant could not work in the internal audit team. The university had provided the Claimant with a supernumerary post in order to provide her with the opportunity to apply for any suitable positions that might arise within the university. Should she be unable to apply for and/or fail to be the successful candidate in another role, the appellant's appointment would end on 2 September 2015. The length of notice appeared reasonable to the committee and the appellant did not put forward any arguments to suggest the contrary. There was no compelling evidence from the appellant to show that the decision implemented was disproportionate to the situation. The committee found that the proceedings before - and the decision of - Mrs Grant was fair and reasonable.

150. In evidence, Sir Graham did purport to uphold the procedure by reference to the disciplinary procedure. As we have already said, there was no procedure governing dismissal for irretrievable breakdown. Accordingly any reference to the misconduct or incapability procedure was by analogy only.

151. In evidence, Sir Graham emphasised that the effort to find alternative employment was that facilitated by the extended notice period and the creation of a supernumerary post in which the Claimant could work during that period.

152. Indeed it was explained to us in evidence by management that it is not usual for staff in professional positions to switch jobs. There would have to be application by the person seeking employment to establish that they were suitable for the post.

Grievance not progressed

153. The Claimant sought to raise a grievance in a letter dated 13 August 2015. By letter dated 7 September 2015 Naomi Holloway, the human resources director, stated she did not propose to go through the individual points in the grievance letter given that the concerns she had expressed were all listened to at the original hearing with the university secretary and registrar and subsequently at the appeal in front of the board of governors. She considered that the Claimant had been given ample opportunity to have her argument heard and that the formal disciplinary process applied was thorough and fair. She saw no reason to go over the same ground again via the university's grievance procedure, particularly now as the Claimant's employment had come to an end. The Tribunal agrees with the Respondent's response here that there would have been a duplication of issues. Those matters had been aired and considered.

Subsequent appointment of Mark Allen to Senior Internal Auditor Position

154. The Claimant asserts that appointing Mark Allen to the senior internal auditor position was discriminatory against her. Mr Hammond tells us that following the termination of the Claimant's employment with the university he re-advertised the internal auditor post that was vacant. To help to bring staff costs down and to bring the salary in line with salaries paid elsewhere in the sector, he lowered the grading to a Grade 6 and tweaked the requirements of the job description and person specification slightly. Mr Hammond had aired a similar idea to Sue Grant when she was looking for savings, a matter the Claimant would only have discovered following disclosure. At the same time he changed the name of Mr Allen's post to senior internal auditor without changing any terms or responsibilities including no increase in pay rates and grading. The change was titular only. Neither post had any increase of responsibility and both the senior and the internal auditor would have been expected to report to him directly. The point was that with the downgrading of the other post Mr Allen's post had to be described differently. Mr Hammond says he would have taken the same action had Mark left the university instead of the Claimant. Be that as it may, this decision did not impact on the Claimant's position in any way given the events concerning her and the fact that she had left the university. The advert for the internal auditor had a closing date of 14 October 2015 suggesting that the advert was posted after the Claimant's departure on 2 September 2015.

Application for the role of improvement planning officer

155. On 27 March 2014 the Claimant applied for the role of improvement planning officer. She was unsuccessful in her application. Jill Sadler of HR was responsible for monitoring the recruitment. The Respondent does not offer a transfer system as such. There has to be application. All we know about this is that the Claimant's application was unsuccessful.

156. The Claimant tells us in her statement that she was not short listed. The Claimant was told that there were a large number of very good candidates. Her application

was to leave the internal audit department and join the improvement and planning team instead. The Tribunal finds it likely that the Claimant was not as suitably qualified as others for the position.

CONCLUSIONS

Allegation 1

From September 2011 the second Respondent undermined the Claimant's performance following the approval of the flexible working arrangement on a trial basis. This is said to be direct discrimination or harassment related to sex.

157. The first point is that Alan Harley, the previous head of internal audit, had significant concerns about the Claimant's performance. It was not just the second Respondent, Mr Hammond. It seems to the Tribunal that these concerns as to performance were genuine. They were documented. When Mr Hammond took over the management of the Claimant there remained concerns about performance. Those were genuine. The concerns of Mr Hammond were similar to those of Mr Harley. It is right that Mr Hammond worked alongside the Claimant whilst Mr Harley was in charge. Mr Harley, however, independently arrived at the concerns he had. It was not a case simply of being primed by Mr Hammond. The probationary reviews and the appraisals evidenced these concerns. Both Mr Harley and Mr Hammond were doubtful that the flexible working arrangement with a significant period of home working would work. The difficulty for the Claimant is that she never proved that this arrangement could work by producing the required amount of work in the required time. This was both in terms of quality and output. The Claimant did not comply with the agreed start and finish times. This did not help her position. She did not comply with her output targets. The Tribunal does not find any undermining of the Claimant's performance by Mr Hammond. Accordingly there was no discrimination, whether direct or in the form of harassment.

Allegation 2

It is said that in June 2012 Mr Hammond denied the Claimant career progression by deleting the senior internal auditor role. This is said to be direct discrimination on the grounds of race or sex.

158. Mr Hammond shows an entirely plausible economic reason for deciding to delete the post of senior internal auditor and recruit a further internal auditor at the Claimant's level. There is no prima facie evidence of less favourable treatment on the grounds of race or sex.

Allegation 3

It is said that in his conduct of the meeting of 30 August 2012 the second Respondent subjected the Claimant to direct discrimination and harassment relating to race, sex and pregnancy.

159. This meeting between the Claimant and Mr Hammond followed the Claimant seeing her draft appraisal compiled by Mr Harley. The Claimant was taking issue with the accuracy of data put into a spreadsheet detailing the time audits took. The Claimant believed that Mr Hammond was introducing weekly monitoring processes specifically in relation to her. Mr Hammond's position was that he was introducing it in respect of all auditors. He suggested that if she wanted the appraisal changing she should speak to Mr Harley and have it amended. It appears that the Claimant did not refer it back to Mr Harley. The Claimant expressed her perception of matters to Mr Hammond in that meeting but we do not find that Mr Hammond subjected her to any discrimination, whether by way of direct discrimination or harassment. This was principally a difference in views about the way in which time and output were being recorded. Furthermore, Mr Harley was the owner of the appraisal even if it had taken into account data that had been prepared by Mr Hammond, that data had been prepared in good faith. Mr Hammond peer reviewed the Claimant's work on behalf of Mr Harley.

Allegation 4

The fourth allegation is that from September 2012 the second Respondent criticised and undermined the Claimant's performance. This was said to be direct discrimination or harassment relating to sex.

160. It is true that in accordance with his responsibilities Mr Hammond reviewed the performance of the Claimant. Where she did not produce audits in time or to satisfactory quality, this was commented upon by Mr Hammond. However, Mr Hammond did nothing to prevent the Claimant from achieving the output and quality of work required. On the contrary, he provided assistance and frequently finished off the work the Claimant had not completed. A weekly review system was in place for matters to be reviewed and discussed because Mr Hammond was introducing weekly reviews he felt able also to withdraw the requirement that the Claimant fill in weekly timesheets of home working.

Allegation 5

It is said that Alan Harley and Fran Shaw on 9 August 2012 refused to formalise the flexible working arrangement after the pattern had been worked for a year. This is said to be direct discrimination and harassment relating to sex and/or pregnancy/maternity.

161. The Respondent's position was that the flexible working that had been agreed was in the form of a trial. It had not been agreed permanently at that stage. Neither Mr Harley nor for that matter Mr Hammond were of the view that the flexible working had been operating successfully because of failure to meet output and quality targets. There was no obligation on the Respondent to agree a permanent alteration if there was belief that the arrangement was not working satisfactorily.

Allegation 6

That on 12 November 2012 the Claimant was told it was unlikely that she would be able to continue the existing work pattern on return from maternity leave. This is said to be direct discrimination or harassment relating to sex/pregnancy/maternity.

The position was stated by Fran Shaw in an email on 13 November 2012. It was explained that it could not be guaranteed that the same arrangements would be available to the Claimant on her return from maternity absence. The matter would need to be agreed with Mr Hammond closer to her return to work. It is right that the guarantee was not given. The reason for it was that the manager of internal audit was not persuaded that the arrangement was working. That is a position open to him to take. It did not involve less favourable treatment or harassment. The arrangement had always been regarded as a trial by management. Management was far from convinced it was working.

Allegation 7

That in anticipation of her return from maternity leave the Claimant was required to re-apply for flexible working on 11 June 2013. This is said to be direct discrimination or harassment related to sex/pregnancy/maternity.

162. The Claimant chose to fill in the formal flexible working request. The hours she asked for were different from that which had been agreed under Mr Harley leading up to her maternity leave. It was not discriminatory for the Claimant to re-apply for flexible working. The points made above apply that the previous had been a temporary arrangement operating by way of a trial. Management was not persuaded that it was necessarily working. If the Claimant was required to re-apply in this formal way then we do not see that as either direct discrimination or harassment. It was the requisite process.

Allegation 8

That on 25 June 2013 Mr Hammond refused the flexible working request.

163. We know that Mr Hammond wrote to the Claimant saying he did not think that the proposal was operationally feasible. First, he did not think there was enough work which could be done from home. Secondly, the team was very small and he did not think it could be accommodated. Thirdly, the Claimant had been working to a similar arrangement under Alan Harley and it was not felt that the arrangement had been a success. Both he and Mr Harley had felt the Claimant was not turning round the volume of work that would be expected. Mr Hammond did envisage a possibility of part time working to assist the Claimant insofar as she was not able to work full time.

Allegation 9

At the same time Mr Hammond suggested that the Claimant was unable to perform her work flexibly because she was a mother and had taken into account the Claimant's absence with a pregnancy related illness.

164. Following Mr Hammond having set out his position in writing in this way there was a meeting on 2 July 2013 at which the points were aired. There was then exchange of submissions, one by the Claimant; the other by Mr Hammond. Mr

Hammond remained convinced that the arrangements proposed were not practicable. There was insufficient work of the sort that could be done at home. There was an impact on the rest of the team. Internal audit was a customer facing operation and he was trying to increase the visibility of the team at the university. In the Tribunal's view Mr Hammond was entitled to express these views. He had performance concerns with the Claimant and with the arrangement that had been temporarily agreed. His position was not harassing or directly discriminatory. It is right that Mr Hammond did not understand how the Claimant would be able to perform the hours from home. He was aware that she had three young children. He expressed this point on numerous occasions throughout the history of the matter. As we have said above, he did not need to emphasise the fact that the Claimant was a mother of three young children. He was entitled, however, to ask when and how the work would be done.

Allegation 10

On 15 July 2013 Mr Hammond refused the flexible working request.

165. Mr Hammond in our judgment was entitled to refuse that request. His refusal was not discriminatory. He had honestly arrived at the view that the flexible working arrangement had not worked and was unlikely to work in the future. The nature of the work he fundamentally believed required presence at the university. He was entitled to hold those views.

Allegation 11

The appeal panel on 5 September 2013 required the Claimant to work a trial period. This is said to be direct discrimination on the grounds of race or sex.

166. As found above, the policy expressly did envisage a trial period. Therefore, as a matter of policy it was open to the Respondent. Furthermore, on the facts of the case, given the unsatisfactory performance and experience associated with the trial under Mr Harley, it was a reasonable course for them to take. It was not discriminatory in any way. There are no comparator cases put before us which suggest any less favourable treatment in the Claimant's case.

Allegation 12

The Claimant suggests that the terms of the arrangements for flexible working set her up to fail. This is said to be direct discrimination, harassment relating to sex/maternity/pregnancy.

167. The success criteria in the Tribunal's view were fair. The Claimant's concern was that Mr Hammond would be monitoring them and determining whether they had been met. The success criteria indeed were modified and expanded upon by Mr Gibbins and Sue Grant for the purposes of clarity so as to enable a positive discussion about the trial at its end. That would have to be with the second Respondent because he was the line manager. Mr Gibbins proposed a meeting for the Claimant accompanied by her union rep together with the second Respondent and Fran Shaw or himself to discuss through the points arising from the success

criteria. It was hoped that the meeting would take place on 30 October 2013. The Claimant however declined the meeting. She said she would continue to work towards the terms set out and await the decision on completion of the trial period. The Claimant cannot fairly assert she was being set up to fail when a meeting had been set up to talk through the success criteria and how they would be evaluated which she then declined. There is no evidence here of direct discrimination or harassment at all.

Allegation 13

168. That Nigel Gibbins and Sue Grant did not invite the Claimant to a meeting held between them with Mr Hammond to discuss her concerns.

169. It is right that there was a meeting between Mr Gibbins and Sue Grant to discuss how the trial period would be monitored. It is the Claimant's assumption that Mr Hammond was there. It is not clear to the Tribunal that was the case. In any event, management is entitled to meet to discuss responses to issues raised by its employees. There is no legitimate expectation on the part of the Claimant to attend the meeting. The Claimant was in fact invited to the meeting subsequently which she declined. There is no evidence here of direct discrimination relating to race or sex.

Allegation 14

Nigel Gibbins and Sue Grant refused to hear the Claimant's complaint regarding the second Respondent.

170. Nigel Gibbins and Sue Grant did not refuse to hear the Claimant's complaint regarding the second Respondent being in charge of evaluating her performance under the success criteria. A meeting was specifically set up with Mr Hammond for these matters to be considered. Mr Hammond remained her line manager. That was not going to change. The Claimant declined to attend the meeting.

Allegation 15

The Claimant suggests there was a secret meeting between Fran Shaw, Sue Grant and Mr Hammond on 14 November 2013 convened to discuss a chronology document proposing formal disciplinary action against the Claimant. She alleges this is direct discrimination or harassment related to race, sex, pregnancy/maternity.

171. Fran Shaw did produce a paper setting out the chronology of matters going back to the Claimant's appointment. It gave details of attendance and illness including pregnancy related absence. It recorded Mr Hammond's view as to the inadequacy of output and the quality of work. It described Mr Hammond's frustration at the position the department found itself in. Fran Shaw made recommendations which included a proposal to have a six week action plan which would include a statement that failure to reach agreed targets would lead to the possibility of a first written warning under a capability procedure. The paper was sent to Sue Grant, Nigel Gibbins and Theresa Stadden. Mr Hammond was not copied into it. There are no minutes of the meeting but it is entirely likely that Sue Grant and Fran Shaw would regularly discuss the Claimant and other HR matters.

Fran Shaw was acting in accordance with her HR responsibility here. This was a management document. It was entirely open to her to prepare the document and share it with other members of management. It purported to be essentially descriptive of a chronology and the perceived problem and proposed a remedy. The Claimant discovered the document through disclosure. She knew nothing about it at the time of course. There is no harassment nor is there any less favourable treatment on the grounds of a protected characteristic. This is HR doing its job describing a difficult situation. In the event there was no disciplinary process relating to capability.

Allegation 16

That on 28 November 2013 Mr Hammond told the Claimant she was speaking rubbish in a meeting.

172. Whilst it is likely that the Claimant and Mr Hammond spoke on 28 November 2013, we have no independent corroboration one way or the other that Mr Hammond said to her she was speaking rubbish. Even if he did, and we do not find that he did, saying that someone was speaking rubbish is not of itself discriminatory.

Allegation 17

It was said that Mr Hammond on 28 November 2013 discriminated directly against the Claimant on the grounds of race or sex and/or harassed her by referring her to occupational health and questioning her ability to undertake her role flexibly as a mother of young children.

173. It is right that Mr Hammond made a referral concerning the Claimant's occupational health on that occasion. Since returning to work at the beginning of September 2013 the Claimant had been absent for 22 days owing to illness. That prompted this occupational health referral. In addition to referring to the fact that two of the agreed terms relating to flexible working related to start times and length of breaks, Mr Hammond mentioned what he regarded must be a very stressful situation regarding her childcare. The flexible working arrangement required the Claimant to work at home each night in addition to the responsibility of caring for three small children. Mr Hammond was concerned about how the Claimant's responsibilities at work combined with the needs in her personal life could affect her health. He was also concerned about performance. Mr Hammond had on several occasions in the course of the history of this matter aired his concerns as to whether it was possible to perform the home working element of flexible working agreement comfortably at home when the Claimant had extensive childcare responsibilities. The Claimant's position had consistently been that she could perform the required work either in the early hours of the morning between 4am and 6am or after the children had gone to bed. Mr Hammond himself was never persuaded that this was ideal. The Claimant had never maintained that she was working at home consistently for example between the hours of 9.00am to 5.00 pm. To us, it is legitimate that Mr Hammond had concerns about output and quality of work. The mere fact that the Claimant was a mother of three small children would not necessarily impact on that. To that extent Mr Hammond was introducing a potential irrelevancy which exposes him to criticism of taking into account the

Claimant's maternal status. However, as we say, he was rightly concerned about output and quality of work. Had there been no issues in that regard, he would not be making these points. The reason why he made the referral was, in addition to concerns about the Claimant's health, was concern about the output and quality of her work in the circumstances the Claimant found herself in.

Allegation 18

Mr Hammond in a meeting discriminated against the Claimant directly on the grounds of sex or race and/or harassed her by saying "sod you Sharmain"

174. There were difficult discussions between the Claimant and Mr Hammond on 5 December 2013. An issue arose as to how many days were going to be attributed to the Claimant's audit on home and international student recruitment when assessing the trial period. There is no independent corroboration anywhere for the suggestion that Mr Hammond said "sod you Sharmain" to the Claimant. In the absence of such independent corroboration, we are not in a position to conclude whether this was said. The Claimant does not prove this allegation. We have no reason to disbelieve Mr Hammond over the Claimant.

Allegation 19

That on 10 December 2013 Sue Grant discriminated against the Claimant directly on grounds of race or sex or harassed her by refusing to hear the Claimant's complaint against the second Respondent.

175. The Claimant had written to Sue Grant asking for a meeting to discuss her work-related concerns with Mr Hammond on 2 December 2013. She replied on 10 December stating it would be inappropriate for her to meet and discuss these issues in her capacity as secretary and registrar. Instead she proposed that the Claimant meet with Nigel Gibbins, the deputy director of HR, who had heard the flexible working appeal. The possibility of mediation would be looked at. She recommended the Claimant allow Mr Gibbins to hold a facilitating meeting with Mr Hammond. The Claimant replied the same day stating she thought she had complied with the grievance policy by going direct to Sue Grant, that she would prefer to speak with someone outside HR. The Claimant would think about it and get back to Sue Grant following a meeting with one of the bullying and harassment advisors. The Claimant and her union representative consulted Min Rodriguez-Davies, Head of Equality, on 17 December 2013. The Claimant did not bring a formal bullying and harassment complaint at any time thereafter. The Claimant did not take up the offer of a meeting with Mr Gibbins or pursue the matter further with Sue Grant. Sue Grant did not discriminate against the Claimant here.

Allegation 20

That on 9 December 2013 Mr Hammond discriminated against the Claimant on the grounds of sex or pregnancy/maternity or harassed her in a meeting to review performance against flexible working targets communicating his decision that the trial period was unsuccessful and suggesting part time working with a deadline to accept.

176. On 6 December 2013 Mr Hammond did invite the Claimant to a meeting on 12 December to discuss the trial period. The Claimant confirmed the meeting, said she wanted a copy of the decision and supporting papers in advance. In the event the Claimant decided not to attend the meeting. She said in an email to her union representative on 9 December that she discussed with Fran Shaw that she really did not want to go through another meeting to discuss the flexible working arrangement in light of this stressful situation in the office. Fran Shaw had agreed to send her proposals for the working arrangement going forward. The Claimant would respond to those once received. Accordingly, on 9 December 2013 Mr Hammond wrote to the Claimant saying it was unfortunate that there could not be a two-way discussion. He had addressed the success criteria in terms of hours of work. Over the course of a three-month trial the Claimant had arrived late on a number of occasions. She had exceeded the break time on a number of occasions without making it up either in the office or at home. She had recently requested a start time of 9.15 rather than 8.30 owing to childcare issues that had been agreed on a temporary basis. Further she indicated she needed more than 20 minutes break because of her pregnancy. There had been problems with the Claimant completing six hours per day in the office; sickness absence had been extremely high; there had been 22 days sickness between 9 September and 6 December and there had been further sickness subsequently. As to expected output: in view of the poor attendance it was very difficult to assess whether the Claimant had been producing the volume of work agreed. It had been difficult to assess time taken on individual audits. His conclusion was that the Claimant had been experiencing major difficulties in adhering to the agreed hours and indeed her start time had to be set back. He said that her high sickness absence was perhaps indicative of the fact that the Claimant was finding it difficult to meet all her work and personal commitments. The arrangement did not appear to him to be working satisfactorily and was not working for the internal audit team. He expressed his view that he did not believe it could continue. He did offer part time working: 0.65 or 0:864 FTE hoping that that would accommodate the Claimant's requirements. Mr Hammond gave the Claimant four days to choose between these two options.

177. The reason why Mr Hammond concluded that the arrangement was not working related principally to output of work. He was entitled to that view. He had never been persuaded during the course of the operation of two periods of the Claimant's flexible working that it worked. That he held that view did not amount to less favourable treatment or harassment. Mr Hammond was entitled to hold the view that the arrangement was not working. In the event he was overruled by his managers, but he was entitled to hold that view. Flexible working arrangements are designed to facilitate productive working. Work still has to be productive. Mr Hammond saw no evidence that the Claimant was producing satisfactorily. His suggestion of part time working was a bona fide position he arrived at unpersuaded that home working was being productive, that to him was a solution. Again, that was open to him to suggest. Indeed, it is the Tribunal's experience that a typical indirect sex discrimination case brought before the Tribunal is where a mother of young children applies for reduced hours so as to accommodate childcare responsibilities and is refused. The Claimant's position in this case is the reverse. It might be thought that Mr Hammond's four-day deadline was not particularly helpful. That said, it was entirely ignored by the Claimant. The deadline in any event was not discriminatory.

Allegation 21

That on 12 December 2013 Mr Hammond disregarded recommendations set out in an OH report regarding the Claimant's high risk pregnancy and high levels of stress and refused to carry out a risk assessment. This is said to be direct discrimination on the grounds of sex or pregnancy or harassment.

178. On 6 December 2013 the occupational health advisor reported that he found no medical evidence to indicate the Claimant was unfit for her role. The issues were primarily employee relations ones. There may need to be a formal mediation. There was no medical evidence to indicate the Claimant required longer breaks. The Claimant was a high risk in terms of pregnancy and she needed to mobilise regularly to help reduce the risk of complications. She needed a pregnancy risk assessment and the workplace stress risk assessment. The occupational report came out by email on 12 December 2013. It was addressed to Mr Hammond and Fran Shaw. Mr Hammond was off sick on 12 and 13 December. He then went on annual leave until the following term.

179. Events perhaps took over. On 9 January 2014 the Claimant met with Fran Shaw who had consulted Sue Grant. They decided to approve the Claimant's request for flexible working and to make it contractually permanent. She would be office based for 26 hours and home based for 11 hours each week. It was proposed that she would work from the McLaurin building in order to create some space between her and Mr Hammond. Indeed this was more home working than the Claimant had asked for.

180. Sue Grant and Fran Shaw had decided in effect to put a foot through the issue. It had the effect of overruling Mr Hammond.

181. It is right that on 3 February 2014 the Claimant reminded Fran Shaw, copying in Mr Hammond, that pregnancy and stress risk assessments still had not taken place. Fran Shaw asked Mr Hammond to complete them. Given the intervention of Sue Grant and Fran Shaw, the Tribunal can perhaps understand why the risk assessments did not take place. Those actions did address the concerns raised in the occupational health report even though they were not in the form of specific risk assessments. The Claimant and Mr Hammond then could not agree the terms of the pregnancy risk assessment. The pregnancy risk assessment never was agreed. We do not find that Mr Hammond refused to carry out any of the risk assessments. At first, he had been off on sick, then annual leave and then the intervention by Fran Shaw and Sue Grant moved the goalposts somewhat. Once reminded, Mr Hammond sought to complete the pregnancy risk assessment but it was not capable of agreement. He did not disregard recommendations, he did not refuse to carry out risk assessments, essentially the immediate management of the Claimant had been taken out of his hands save for the purposes of work supervision. He did not discriminate against the Claimant in this regard.

Allegation 22

That on 9 January 2014 Fran Shaw failed to act on or investigate the Claimant's complaint of unfair treatment by Mr Hammond.

182. The Tribunal does not really understand this complaint. On the contrary Fran Shaw confirmed the flexible working pattern that the Claimant wanted, indeed it exceeded that and made it clear it was permanent and that the contract would be amended. On a temporary basis, at least up until the oncoming maternity period, Fran Shaw ensured that the Claimant would be working from a separate office. It had been made clear to the Claimant by her union, by the head of equality and by the Respondent generally that if she wanted to make a formal complaint against Mr Hammond she could. She did not make a formal complaint against him on 9 January 2014. The criticism of Fran Shaw is not fair. Furthermore, there was no criticism of Fran Shaw at the time. On the contrary, there was an email of thanks.

Allegation 23

The Claimant makes a generalised allegation of discriminatory conduct against Mr Hammond following the approval of the flexible working arrangement. This is said to be direct discrimination, harassment and victimisation.

183. Mr Hammond did not discriminate against the Claimant in respect of refusing a third licence in respect of Idea Software. The original licences had cost £50.00 each. The third was quoted at £1,320.00 with an annual maintenance cost of £335.00. Mr Hammond's reasonable view was that the cost was prohibitive. That was the reason at that stage for not giving her a third licence. The Claimant nonetheless had access to the Idea Software by using her colleagues' computers or asking them to conduct a search.

184. It was open to Mr Hammond in his email dated 20 January 2014 to suggest that the Claimant did not attend the day meeting of the Council of Higher Education Internal Auditors in London. Whilst ordinarily he would encourage all members of the team to attend, it was a matter of fact that the Claimant was significantly behind in her output targets. This had nothing to do with pregnancy and maternity discrimination. It was down to the fact that the Claimant was behind in terms of her expected output. The reasoning in respect of both these matters was explained at the time. There was evidence of communication between the Claimant and Mr Hammond in terms of email exchanges over this period. The content of those exchanges included references to audit work as well as the Idea Software. We note the fact that at this point Mr Hammond felt undermined by the fact that Sue Grant and Fran Shaw had overruled him on the issue of flexible working and had moved the Claimant to another venue. He tells us, and we can understand, that at this point it was unclear to him what he was managerially responsible for in connection with the Claimant. Fran Shaw told us that they wanted to ensure a period of breathing space between Mr Hammond and the Claimant with view to future relations when the Claimant returned back from maternity leave. If there was less frequent communication between Mr Hammond and the Claimant it seems that this was down to management instruction. It was not Mr Hammond himself treating the Claimant less favourably, harassing her or victimising her. We see no evidence that any audit conducted by the Claimant was materially adversely affected by the situation at this time.

185. We note in this allegation that at the same time as suggesting Mr Hammond failed to respond to her work-related emails and address concerns, she contends that he also micromanaged her. To us that seems inconsistent.

Allegation 24

That on 12 February 2014 Mr Hammond directly discriminated against the Claimant on the grounds of sex and race or harassed her by reporting to management that her family commitment was affecting her performance on the flexible working arrangement.

186. The Claimant informed Sue Grant on 12 February 2014 that the Claimant was behind in audits. There were two audits that the Claimant had started but had not finished. He gave the detail of the lack of progress and the difficulties that were caused. He did express his view once again, in respect of the progress of those audits, that the problems may be traced back to the flexible working arrangement agreed with the Claimant, and may be an indication that despite her assurances, her family commitments were having an affect on the level of output she could produce. We know that that was his concern. In addition to this we had learned that the Claimant had been signed off work for the next two weeks to return on 25 February. It was now likely that he would have to finish the two audits she had underway.

187. Once again it may have been more sensible for Mr Hammond simply to report the fact that under the flexible working arrangement targets were not being hit rather than speculating that this would be down to the Claimant's family commitments. He did not need to say that. He simply needed to report the fact that the output was not being completed. The reason why he was making these points was performance. It was not discrimination. His primary concern was the timetable he had agreed with the audit committee and the fact he was not going to meet it.

Allegation 25

That Mr Hammond on 11 March 2014 suggested the Claimant be selected for redundancy and proposed that Mark Allen, a white male colleague, be made senior internal auditor. This is alleged to be direct discrimination on the grounds of race or sex and/or harassment.

188. In response to a request on 11 March 2014 for savings ideas from Sue Grant, Mr Hammond responded that he had a very limited budget, did not think that there was anything left that could be reduced of any significance. In terms of salary costs he observed that Mark Allen and the Claimant were paid a high salary in comparison to others in the profession. He said that if the Claimant were to decide not to return following her pregnancy he could reduce the salary paid for that post and Mark Allen's post could be re-titled as senior internal auditor. That relied upon the Claimant not returning and unless they could provide her with a good severance package which he did not think she would accept anyway, he was sure that she would want to return to work on her existing salary. This falls short of Mr Hammond proposing that the Claimant be selected for redundancy. His assumption was that she would be returning on her existing salary even if they could offer a good severance package. He did not think she would accept it anyway. He was not proposing that she be made redundant. In any event, the Claimant only found out

about this email following disclosure. She knew nothing about it at the time. His speculations did not amount to discrimination.

Allegation 26

That on 3 December 2014 Mr Hammond discriminated against the Claimant directly or by harassment connected with sex/pregnancy/maternity by suggesting that the Claimant was incapable of performing her role whilst working flexibly because she had young children.

189. This was the day of the mediation. That is not said by Mr Hammond in his email responding to the draft settlement agreement on 5 December 2014. We have seen typed notes in preparation for the mediation which appear to set out Mr Hammond's requirements, either written by him or recording what he said. There is no reference in those to the suggestion that the Claimant was incapable of performing her role whilst working flexibly because of young children. We have already found that the Claimant had articulated that position previously but we do not see that it was repeated during the mediation with view to preventing the flexible working arrangement operating. We accept the evidence from Mr Hammond at this point that he accepted that the university had made its decision. It is likely, however, that Mr Hammond asked when was the home working going to be done. He never did change his view that it was not a good idea to do the work early in the morning or late at night. That is what he meant previously when adopting the position that homeworking in the Claimant's case did not represent a solution. The allegation is rejected.

Allegation 27

That on 13 February 2015 the Second Respondent dismissed the Claimant's interest into moving into IT Audit work. This is said to be direct discrimination or harassment in connection with sex/pregnancy/maternity

190. The Claimant raised the issue about a qualification in IT audit. She had first asked about funding for it in June 2014. On 19 June 2014 Mr Hammond informed her that there would be no support for that then but it could be reconsidered once she had demonstrated a sustained period of good attendance and satisfactory performance. The matter came up again in the appraisal in March 2015. Mr Hammond explained that although the opportunity may arise to undertake non-technical audits within the IT area, for the immediate future expertise would need to be bought in for the technical work as the team did not have the required knowledge and experience to undertake it. His position of June 2014 was reiterated, that is to say the matter could be reconsidered once there had been demonstrated a sustained period of good attendance and satisfactory performance. The Second Respondent reasonably believed that there had not been a sustained period of good performance. That was the reason for not sanctioning a move into IT audit work. This was not a position from harassment or discrimination.

Allegation 28

That the Second Respondent told the Claimant that the Head of Estates had compared her to a 'dog with a bone'. This is said to be direct discrimination or harassment connected to sex or race

191. On 18 March 2015 the Claimant learned that she had had feedback from Andrew May, the client for the audit report on major estates projects, in which the Claimant had been described as being "like a dog with a bone" in the manner in which she had dealt with an issue in the audit. It seems that the Claimant was not at first familiar with the idiom. She regarded being compared to a dog as a very bad insult, as she put it in an email dated 19 March 2015. Mr May in his written feedback said that the Claimant had focused on arguably non-material matters that did not have a significant risk impact and suggested that she perhaps look into ranking the impact in the future. Mr Hammond informed the Claimant that in his verbal feedback Mr May had used the expression "dog with a bone" making that point. The idiom was explained to the Claimant. It did not have the racial or sexist connotation that she thought. There was no discrimination or harassment here.

Allegation 29

The Second Respondent's report to management dated 27 March 2015 containing allegations of under-performance had not been discussed with the Claimant and hinted at possible disciplinary action. This is said to be direct race or sex discrimination or harassment

192. On 27 March 2015 Mr Hammond wrote a report entitled "Staff poor performance" in relation to the Claimant. It was in respect of her performance in January 2015. He produced it for the information of Sue Grant and Fran Shaw for their information and so that they were aware of his position should it be required going forward. The Claimant did not see this at the time and saw it for the first time through disclosure. It was perfectly legitimate for Mr Hammond to produce a management report in this way. It was setting out his concerns to his managers. There was no discrimination or harassment here.

Allegation 30

On 13 April 2015 the Second Respondent refused to apologise for the Claimant for offence caused and refused to accept that the Claimant was offended and distressed by the comment. This is said to be direct discrimination or harassment connected to race or sex.

193. This concerned the meeting in which the Claimant indicated a lack of trust in Mr Hammond. The Claimant said she was surprised that Mr Hammond had not initiated discussion on her absence when the meeting had begun. She stated she would have expected an apology based upon the details of how upset she had been in the emails exchanged when she first went off in the sickness period. Mr Hammond said he did not feel he could apologise as he was not aware of anything that he had actually done wrong as the Claimant's line manager to which the Claimant responded: "Well that says it all". Mr Hammond then refused to apologise because it was his position there was nothing to apologise for. This relates to a difference in perception of matters leading to the feedback from the major estates audit. The Tribunal notes that this allegation does not relate to the 'dog with a bone' comment which is dealt with

above in any event. Further the Tribunal neither sees anything that Mr Hammond should have apologised for nor that failure to apologise might amount even arguably to discrimination or harassment.

194. It should also be made clear that Mr Hammond never stated he could not work with the Claimant. It was the Claimant who made it clear that there was a fundamental lack of trust on her part.

Allegation 31

On 13 April 2015 the Second Respondent told the Claimant she was incapable of coping with the demands of her role and pressed her to move to part-time working. Direct discrimination or harassment related to sex/maternity/pregnancy is alleged.

195. In this same meeting Mr Hammond did say that there were things that the university could offer and had offered in the past that might help if the Claimant thought she was not coping, for example part time working. Mr Hammond recorded the meeting as saying that only the Claimant could make that decision on her personal circumstances. As stated above, the Claimant said this did not mean she was not coping with the work/home balance. She saw the problem as a working relationship with Mr Hammond. It had been Mr Hammond's position for some time that part time working would be available if that would help the Claimant cope. We know that the Claimant did not want part time working. This is likely to have been for financial reasons. On this occasion we do not see that Mr Hammond said the Claimant was struggling to deal with work and look after four little children. His position was that if she was struggling with full time work, then part time was an option. There is nothing discriminatory in that position. We have commented above that a common sex discrimination claim seen in the Tribunals is indirect sex discrimination for refusing part-time working for women with childcare responsibilities. The Claimant's position is the reverse of that.

Allegation 32

That on 22 April 2015 the Second Respondent and Fran Shaw held a meeting to discuss the Claimant's sickness absence from 20 March 2015. There was a proposal for settlement or termination with no other options discussed. This is said to be direct discrimination or harassment connected to sex or race.

196. Fran Shaw purported to summarise Mr Hammonds' concerns and advised him of the next steps. Reference was made to the disagreement concerning the feedback from Andrew May. Mr Hammond's concerns were that the Claimant had stated to him in person and in emails that there was a total breakdown of trust as far as she was concerned and that the Claimant's high absence was impacting on the small team in terms of pressure and workload resulting in an inability to deliver the level of assurance sought by the supervising audit committee. Of 76 potential working days between the beginning of January and 22 April 2015 the Claimant had been off for 22 days. The sickness absence accounted for 29% of available time. There was, it seemed, a breakdown in relations between the Claimant and Mr Hammond. There was resourcing pressure, there were wider university concerns in terms of audits

getting done and there was a potential for further sickness absence. Fran Shaw recorded the next steps as being to contact the Claimant in connection with potential settlement once again. She would also indicate that pressures created by the current position and that in the absence of an imminent improvement in the current position consideration would have to be given to termination of employment. A short timeframe would be given to the Claimant with response to a settlement offer. The details of the settlement exchanges are recorded above. Indeed, following the difficult meeting that was held between the Claimant and Mr Hammond on 13 April 2015 the Claimant left work with a headache and then was signed off for stress for the subsequent 10 days. The meeting on 22 April 2015 was a management meeting open to the managers to hold. It was essentially descriptive of the present factual situation. Fran Shaw's position was a reasonable managerial one open to her given the Claimant's position that there had been a breakdown in the relationship. There was no discrimination or harassment here.

Allegation 33

The decision that Claimant should be subject to a disciplinary hearing is alleged to be direct discrimination or harassment or victimisation, connected to race sex/pregnancy/maternity.

197. There was no breach of the Equality Act 2010 here. That it was the Claimant's position that there was a total breakdown in the relationship with her line manager made it reasonable for there to be a formal meeting to consider the position. The problem needed to be stated and the Claimant needed to have the opportunity to state a case. A procedure modelled on the disciplinary procedure at stage 3 was a reasonable one to follow because the termination of the employment relationship on the basis of irretrievable breakdown was a clear possibility in all of the circumstances

Allegation 34

That the conduct of the disciplinary hearing involved direct discrimination, harassment or victimisation connected with race, sex/pregnancy/maternity

198. There was no less or unfavourable treatment connected with any protected characteristic here. The hearing was conducted relevantly to the problem of the broken down relationship between the Claimant and Mr Hammond. The Claimant had the opportunity to state her case.

199. We have found it inappropriate that Sue Grant chaired the panel. That fact makes the dismissal procedurally unfair. Sue Grant was too close to the history of the matter to be independent. Sue Grant did not discriminate, victimise or harass the Claimant in that regard, however. Her decision to sit was made in good faith but was wrong. She sat because she is the head of the non-academic staff. She should, however, have brought someone in who was unconnected with the previous history.

Allegation 35

That the outcome of the disciplinary hearing, being dismissal, was direct discrimination, harassment, or victimisation connected to race, sex/pregnancy/maternity and was unfair

200. The dismissal was procedurally unfair for the reason given in the preceding paragraphs. The decision to dismiss was in no sense discriminatory or victimising. The reason for it was that the employment relationship had irretrievably broken down. That position was not discriminatory, harassing or victimising in any way whatsoever. The decision was entirely feasible given the fact of the breakdown in relationship between the Claimant and Mr Hammond.

Allegation 36

That the outcome of the appeal hearing, confirming the dismissal, was direct discrimination, harassment, or victimisation connected to race, sex/pregnancy/maternity and was unfair

201. The reasoning of Sir Graeme Davies' appeal panel was fair and open to it. It was in no sense discriminatory, harassing or victimising. They placed reliance, rightly, on the fact that the Claimant had raised no formal allegation of discrimination under the Equalities Procedures within the University. It is the Tribunal's decision that the appeal did not cure the liability defect of Sue Grant chairing the first instance panel. The Appeal Panel's reasoning does go to remedy, however. That the Appeal Panel endorsed the mechanism of the combination of an extended notice period with a supernumerary post to enable the Claimant to seek redeployment does go the issue as to whether there was any other mechanism that might have led to the Claimant securing another job at the Respondent.

Allegation 37

That the refusal to hear the Claimant's grievance amounted to direct discrimination, harassment or victimisation in connection with race, sex/pregnancy/maternity

202. The Claimant sought to raise a grievance in a letter dated 13 August 2015. By letter dated 7 September 2015 Naomi Holloway, the human resources director, stated she did not propose to go through the individual points in the grievance letter given that the concerns she had expressed were all listened to at the original hearing with the university secretary and registrar and subsequently at the appeal in front of the board of governors. She considered that the Claimant had been given ample opportunity to have her argument heard and that the formal disciplinary process applied was thorough and fair. She saw no reason to go over the same ground again via the university's grievance procedure, particularly now as the Claimant's employment had come to an end. The Tribunal agrees with the Respondent's response here that there would have been a duplication of issues. Those matters had been aired and considered. There was no discrimination here.

Allegation 38

That Mr Hammond reinstated the post of Senior Internal Auditor and appointed the white male, Mark Allen to it amounted to direct discrimination or harassment on the grounds of sex or race

203. The Claimant asserts that appointing Mark Allen to the senior internal auditor position was discriminatory against her. Mr Hammond tells us that following the termination of the Claimant's employment with the university he re-advertised the internal auditor post that was vacant. To help to bring staff costs down and to bring the salary in line with salaries paid elsewhere in the sector, he lowered the grading to a Grade 6 and tweaked the requirements of the job description and person specification slightly. Mr Hammond had aired a similar idea to Sue Grant when she was looking for savings, a matter the Claimant would only have discovered following disclosure. At the same time he changed the name of Mr Allen's post to senior internal auditor without changing any terms or responsibilities including no increase in pay rates and grading. The change was titular only. Neither post had any increase of responsibility and both the senior and the internal auditor would have been expected to report to him directly. The point was that with the downgrading of the other post Mr Allen's post had to be described differently. Mr Hammond says he would have taken the same action had Mark left the university instead of the Claimant. Be that as it may, this decision did not impact on the Claimant's position in any way given the events concerning her and the fact that she had left the university. The advert for the internal auditor had a closing date of 14 October 2015 suggesting that the advert was posted after the Claimant's departure on 2 September 2015. There was no discrimination against the Claimant in any of this.

Generally on harassment

204. Whatever the Claimant's perceptions, the concerns of Mr Hammond that the Claimant was not performing and the belief by the Respondent that the employment relationship had irretrievably broken down were held in good faith. It would not be reasonable to regard the Claimant as harassed in respect of any protected characteristic.

Generally on victimisation

205. The Respondent concedes that the Claimant's email to Mr Hammond dated 30 January 2014 was a protected act. The Respondent does not concede that the Claimant's requests for flexible working were protected acts. The Tribunal does not have to decide whether they were or not because none of the Respondents' decisions subjected the Claimant to detriments because the Claimant did a protected act. The reasons why for the Respondents' decisions, as set out above, were not because of any actual or potential protected act.

REMEDY

206. By reason of the finding of unfair dismissal because Sue Grant sat on the original disciplinary panel, a remedy hearing is confirmed. In the absence of there being any genuine alternative to the mechanism adopted by the University to seek to find the Claimant redeployment within the University, which did not result in any new employment, (and that is the issue the Claimant will have to consider), the remedy would simply be a basic award for unfair dismissal.

_____

Employment Judge Smail

Date: …15/2/18……..

Sent to the parties on: .....

.....
For the Tribunal Office

APPENDIX 1: SCHEDULE OF ALLEGATIONS

SCOTT SCHEDULE

Pursuant to the Order of Employment Judge Smail

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
1	From Sept 2011	R2	Undermining C's performance following the approval of the flexible working arrangement on a trial basis	Sex	Direct Harassment	Para.4	N
2	June 2012	R2	Denial of Career Progression- deletion of Senior Internal Auditor role	Race Sex	Direct	Para.1	N
3	30.08.12	R2	Conduct of meeting	Race, Sex Pregnancy	Direct Harassment	Para.2	N
4	From Sept 2012	R2	Criticising and undermining C's performance	Sex	Direct Harassment	Para.4	N
5	09.08.12	Alan Harley, Fran Shaw	Refusal to formalise flexible working arrangement after working this pattern for a year	Sex, Pregnancy/Maternity	Direct Harassment	Para. 4	N
6	25.11.12	R2	Told unlikely to be able to continue existing work pattern on return from maternity leave	Sex Pregnancy/Maternity	Direct Harassment	Para.5	N
7	11.06.13	R2	Required to re-apply for flexible working arrangements	Sex, Pregnancy Maternity	Direct Harassment	Para.5	N
8	25.06.13	R2	Refusal of flexible working request	Sex, Pregnancy/Maternity	Direct Harassment	Para.5	N
9	25.06.13	R2	Suggested that C is unable to perform while working flexibly because she is a mother; tried to stop flexible working arrangement while C was sick with	Sex Pregnancy/Maternity	Direct Harassment	Para.4	N

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
			pregnancy related illness				
10	15.07.13	R2	Refusal of flexible working request	Sex Pregnancy/Maternity	Direct Harassment	Para.5	N
11	5.09.13	Philip Waters/Sue Grant	Required to work a trial period despite there not being a trial period requirement in the University flexible working policy	Race Sex	Direct	Para.22	N
12	09.09.13	R2	Arrangements for flexible working trial period	Sex Pregnancy/ Maternity	Direct Harassment	Para.6	N
13	17.10.13	Nigel Gibbins Susan Grant	Not inviting C to the meeting held with R2 to discuss C's complaint regarding R2	Race Sex	Direct	N/A	Y
14	25.10.13	Nigel Gibbins Susan Grant	Refusal to hear C 's complaint regarding R2	Race Sex	Direct Harassment	Para.6	N
15	14.11.13	Fran Shaw Susan Grant R2	Secret meeting convened to discuss a chronology document following C's pregnancy announcement to R2; labelling of C, proposals set out for formal disciplinary action	Race Sex Pregnancy/Maternity	Direct Harassment		Y
16	28.11.13	R2	Conduct in meeting, told C she was	Race, Sex	Direct Harassment	Para.7	N

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
			speaking "rubbish"				
17	28.11.13	R2	Referred C to Occupational Health questioning her ability to undertake her role flexibly as a mother of young children	Race, Sex	Direct Harassment	Para.8	N
18	05.12.13	R2	Conduct in meeting: "Sod you Sharmain"	Race, Sex	Direct Harassment	Para.7	N
19	10.12.13	Susan Grant	Refusal to hear C's complaint regarding R2	Race, Sex	Direct Harassment	Para.7	N
20	09.12.13	R2	Meeting to review performance against flexible working targets Decision that trial period was unsuccessful Suggestion of part time working - deadline to accept	Sex Pregnancy/Maternity	Direct Harassment	Para.8	N
21	12.12.13	R2	R2 disregarded recommendations set out in OH Report regarding C's high risk pregnancy and high levels of stress; refused to carry out risk assessment	Sex Pregnancy	Direct Harassment	Para.17	N
22	09.01.14	F Shaw	Failure to act on or investigate C's complaint of unfair treatment by R2	Sex Pregnancy/Maternity Race	Direct Harassment	Para.9	N
23	From	R2	Conduct following approval of flexible working arrangement; Failing to	Sex	Direct Harassment	Para.10	N

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
	09.01.14		respond to C's work-related emails and address concerns re: audits in progress, act on OH reports, preventing C from attending a regional team meeting, refusing to provide C with essential software, micro-managing C's work	Pregnancy/Maternity	Victimisation		
24	12.02.14	R2	Report to management that C's family commitment is affecting her performance on the flexible working arrangement.	Sex Race	Direct Harassment		Y
25	11.03.14	R2	Suggested C be selected for redundancy as a means of departmental savings; proposed white male colleague being made Senior Internal Auditor	Race Sex	Direct Harassment		Y
26	03.12.14	R2	Suggestion that C is incapable of performing her role whilst working flexibly because she has young children	Sex Pregnancy/Maternity	Direct Harassment	Para.11	N
27	13.02.15	R2	Dismissed C's interest in moving into IT Audit work	Sex Pregnancy/Maternity	Direct Harassment	Para.12	N
28	18.03.15	R2 + Head of Estates	Comment of colleague and conduct of weekly review meeting – R2 telling C a colleague had compared her to "a dog with a bone"	Race Sex	Direct Harassment	Para.13	N

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
29	27.03.15	R2	Report to senior management with allegations of under performance by C. Issues raised had not been discussed with C. Report hinted at possible disciplinary action.	Race Sex	Direct Harassment		Y
30	13.04.15	R2	Refusing to apologise to C for offence caused Refusing to accept that C was offended and distressed by the comment	Race Sex	Direct Harassment	Para.13	N
31	13.04.15	R2	Telling C that she was incapable of coping with the demands of her role Pressing her to move to part time working	Sex Pregnancy/Maternity	Direct Harassment	Para.15	N
32	22.04.15	R2, Fran Shaw	Meeting convened to discuss C's sickness absence from 20 March 2015; proposal for settlement or termination; no other options considered	Sex Race	Direct Harassment		Y
33	Not known	R1+R2	Decision that C should be subject to a disciplinary hearing	Race Sex, Pregnancy, Maternity,	Direct Harassment Victimisation	Para.16	N
34	27.05.15	R1	Conduct of disciplinary hearing	Race, Sex, Pregnancy/Maternity	Direct Harassment Victimisation	Para.16	N
35	01.06.15	R1	Outcome of disciplinary hearing	Race, Sex Pregnancy/Maternity	Direct Harassment Victimisation Unfair Dismissal/Automatically	Para.19-24	N

No.	Date	Person Involved	Less Favourable Treatment/ Detriment	Protected Characteristic	Type of Discrimination	Paragraph of Original Claim	Amendment Required
					unfair dismissal		
36	07.07.15	R1	Conduct and outcome of Appeal Hearing	Race, Sex Pregnancy/Maternity	Direct Harassment Victimisation Unfair dismissal/Automatically unfair dismissal	Paras. 19-28	N
37	13.08.15	R1	Refusal to hear C's grievance	Race, Sex Pregnancy/Maternity	Direct Harassment Victimisation	Paras.25-26	N
38	Not known	R2	Denial of progress - reinstating Senior Internal Auditor position and appointing a white male colleague	Sex Race	Direct Harassment	Para. 2	N