EMPLOYMENT TRIBUNALS

Claimant: Mr F Nwokedi

Respondents: 1. Wondrwall Limited
2. Daniel S Burton

Heard at: Manchester **On:** 24, 25 and 26 September 2018

Before: Employment Judge Whittaker
Mr J Flynn
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondents: Miss L Amartey, Counsel

JUDGMENT having been sent to the parties on 25 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. At a Preliminary Hearing which was held on 22 March 2018 Employment Ross had discussed with the parties, including the claimant in person, the claims which arose from the particulars which the claimant had supplied at paragraph 9.2 of his claim form. The Preliminary Hearing took place in person. The claims which were identified at that Preliminary Hearing were set out on page 1 at paragraphs 1.1, 1.2 and 1.3 of the Case Management Order. At paragraph 1.2 three financial claims were identified. At paragraph 1.3 two claims were identified relating to the failure to provide payslips and failure to provide a written statement of particulars of employment.

2. At paragraphs 2-8 inclusive there was a note of discussions which took place with the claimant about possible claims of discrimination and dismissal on the grounds of having made a protected disclosure.

3. On the first day of the hearing of the claims of the claimant at the Manchester Employment Tribunal on 24 September 2018 there were extremely lengthy discussions with the claimant about claims of discrimination on the grounds of age and race, and a claim that he had been dismissed on the grounds of having made a

protected disclosure. In his witness statement and in the particulars which the claimant had provided in his Claim Form the claimant had not made any attempt at all to identify how he alleged that he had made a protected disclosure by reference to section 43B of the Employment Rights Act 1996. Lengthy and careful discussions took place with the claimant in order to explain to him and enable him to understand the need to be able to prove that he had made a protected disclosure if he was then to continue to suggest that he had been dismissed as a result of making such a disclosure. The claimant confirmed that he had not at any stage given any consideration to the law relating to protected disclosures and that he had never considered the provisions of section 43B. The Tribunal, at length, discussed with the claimant each of the six possible grounds on which he could allege that he had made a protected disclosure under section 43B.

4. A detailed discussion took place with the claimant about each of those six potential grounds set against the circumstances which the claimant was alleging amounted to having made a protected disclosure. As a result of those lengthy discussions the claimant confirmed that the only basis on which he was alleging that he had made a protected disclosure was under paragraph (d) of section 43B, namely, "that the health or safety of any individual has been, is being or is likely to be endangered". The claimant indicated that he was alleging that the data gathering system which was the product being developed by the respondent company had not been properly tested and that any data which might be collected by the product being developed by the respondent company would not be securely stored. It was clear, however, that the product had never actually been sold to any purchaser and that the data gathering product of the company was a product which was only in development at the time of the employment of the claimant.

5. The claimant alleged that he had told the owner of the company, Mr Burton, "time and time again", that the data which would/might be collected by the product would not be securely stored and that on that basis the information could fall into the hands of criminals which, in the opinion of the claimant, would then put the occupants of any houses in which the system was installed at risk. It was in this way that the claimant alleged that the health and safety of home owners and their families might be "endangered". The claimant alleged that the home owners and their families might be at risk of burglary if, for example, the data indicated that people, in particular children, were alone in the property.

6. The claimant, however, was unable to provide any evidence as to how any data which might be collected by the product of the respondent company would or could end up in the hands of criminals.

7. Furthermore, the Tribunal discussed at length with the claimant how this alleged protected disclosure had in any way caused or contributed to the dismissal of the claimant. The claimant alleged that when he had raised his concerns that he had been told that it was not his place to raise those issues and he suggested that his relationship with Mr Burton had in some way "changed" after raising those issues. Miss Amartey told the Tribunal that there was absolutely nothing about any such protected disclosure or alleged changes in the attitude of Mr Burton either in the particulars supplied by the claimant in his claim form or in the claimant's witness statement. In short, the claimant said nothing at all about what he was now saying to the Tribunal for the first time. The claimant was asked why this was and was unable to provide any

explanation whatsoever. Miss Amartey indicated that if the claimant was now to be permitted, orally, to provide this missing information which would be absolutely essential to a claim of the claimant in respect of a protected disclosure that she would then need to apply for an adjournment as it would substantially affect the basis upon which the claims of the claimant were being pursued. She indicated, fairly in the opinion of the Tribunal, that she had prepared the case of the respondent on the basis of the information which had to date been supplied by the claimant which was in effect nothing at all, including no consideration or evidence in respect of section 43B.

8. In light of the comments made by Miss Amartey the Tribunal indicated to the claimant that if the matter was adjourned that there was at least the possibility of a claim for costs being made against him. The Tribunal explained that it was his responsibility in his claim form or in his witness statement to include all the evidence that he wanted to bring in connection with such a claim. These discussions with the claimant again took some time.

9. The Tribunal retired to give the claimant the opportunity to consider whether, in all the circumstances, he now wished to give additional and substantial evidence to support a claim in respect of a protected disclosure or whether, in the circumstances, he wished to concentrate on what he himself had said was his "principal claim" which was that he had been dismissed for asking for payslips and asking for a statement of written particulars of employment. The Tribunal, after an adjournment, was told very clearly by the claimant that he understood the risks of an adjournment and that he wished instead to concentrate on his principal claim and he then told the Tribunal that he therefore wished to withdraw any claim relating to a protected disclosure and having been dismissed on the grounds of having made a protected disclosure. The Tribunal indicated to the claimant that if he withdrew it that the claim would then be dismissed in accordance with the Rules of Procedure. The claimant was again given an opportunity to reflect on what the consequences of his withdrawing such claims would be and he confirmed once again that he wished to withdraw the claims. The claims were therefore withdrawn and they were dismissed by the Tribunal.

10. At paragraphs 2-6 of the Case Management Order made on 22 March 2018 there were also notes which had been recorded by Employment Judge Ross about the claims, if any, which the claimant intended to bring under the Equality Act 2010 relating to age or race. The claimant had then been ordered to provide a schedule of particulars of any such claims, and to provide a copy of that schedule to the Tribunal. The Tribunal had never received any such particulars or information from the claimant. However, at pages 55 and 56 of the documents which comprised a bundle of some 262 pages which was presented to the Tribunal, the claimant confirmed that the particulars which he had prepared to comply with paragraph 6 of the Case Management Order of Employment Judge Ross were those particulars which were included at pages 55 and 56. Following discussion with the claimant, these were marked "A-G".

11. In those additional particulars the claimant had not identified what type of discrimination claim he was pursuing, and neither had he identified the protected characteristic on which he was relying in connection with each of the six paragraphs which the Tribunal labelled A-G. The Tribunal therefore took a significant period of time to discuss with the claimant the need to identify the relevant sections of the

Equality Act 2010 in order to enable the Tribunal not only to identify the claim but also to identify the issues which the Tribunal would need to decide.

12. The Tribunal therefore firstly considered with the claimant the allegation at "A". The claimant indicated very clearly that this was an allegation of direct age discrimination. The claimant alleged that Mr Lufkin was allowed to work at home because Mr Lufkin was significantly older than the claimant, but the claimant also accepted that the reasoning given to him for the claimant not being allowed to work from home in contrast to Mr Lufkin was because the respondent company was not making enough money to be able to oblige Mr Lufkin to work in the office in the way that the claimant was, and that Mr Lufkin was allowed to work from home on other projects for his personal benefit. The claimant said that he was not allowed to work on his own projects whilst at work. The claimant alleged that Mr Burton, the Managing Director of the respondent company, had said that Mr Lufkin should be allowed to work from home on other projects because Mr Lufkin had a family to support which the claimant did not. After significant discussion with the claimant, he identified that this was a claim of direct age discrimination in his opinion because he believed that he was obliged to work in the office and not permitted to work from home because of the difference in age between Mr Lufkin and the claimant.

13. The Tribunal pointed out that the claimant had been obliged by Orders of Employment Judge Ross to identify the date of each allegation of discrimination which the claimant was pursuing. On page 55 at "A" the claimant had identified a single allegation of June 2017. The Tribunal pointed out that this was an allegation, therefore, which was out of time, and explained to the claimant the obligation to make a claim in an Employment Tribunal within three months of an incident occurring, unless the claimant was able to demonstrate that it was just and equitable for that timescale to be enlarged. The claimant suggested to the Tribunal that he could give evidence to indicate that discussions about working from home had taken place later in 2017. The Tribunal was suspicious that the claimant had, against the background of discussions with him about the application of time limits, now for the very first time indicated that there were other discussions later in the year which might have taken place within the relevant time period. Not surprisingly Miss Amartey indicated that if the claimant was to be allowed to now provide additional particulars of other incidents and other dates that she would object, and that if permission was given to the claimant she would apply for an adjournment, and that may then give rise to an application and a possible order for costs against the claimant. The possibility of an order for costs was explained to the claimant, with an explanation that at all times the Tribunal had a discretion as to whether to order costs or not. The Tribunal therefore offered the claimant the opportunity to consider whether or not he wished to bring additional "claims" relating to this allegation and applicable to different dates. The claimant was told that in evidence he may be able to provide supporting evidence of other dates, but that they would not be considered as "claims".

14. After lengthy discussions with the claimant, he indicated that he did not wish the Tribunal to register any other claims other than the one relating to June 2017, and that he would consider whether or not when he gave evidence he wanted to give any other supporting evidence relating to earlier and later incidents, when the claimant again would allege that he had requested the ability to work at home and had been refused, in circumstances where the claimant believed that that also amounted to age discrimination. The claimant confirmed very clearly that he understood that if he gave

that evidence it would simply be supporting evidence but it would not be evidence of any claim on which the Tribunal would make any ruling or possibly award compensation. The Tribunal therefore confirmed that it would consider a single claim of direct age discrimination relating to an incident in June 2017 which on the face of it was out of time and which related to an application which the claimant said that he had made for permission to work from home.

15. The Tribunal then turned to allegation "B", which appeared on page 56. This was again registered by the Tribunal as a claim of direct age discrimination. The claimant alleged that in August 2017 he had been refused a contract of employment. He said that Mr Burton had refused him a contract because he was described by Mr Burton as only being a "young kid". He alleged, therefore, that he was treated differently to other employees of the company on the basis that he was refused a contract of employment because of his age. This was also registered as a claim of direct race discrimination. The claimant alleged that in view of his race he was regarded as "cheap labour" and that Mr Benson only regarded him as "cheap labour" because of his race and not just because of his age. On that basis the claimant alleged that it was because of his race as well as his age that the respondent company had refused to issue him with a contract of employment.

16. The claimant alleged that in connection with this particular allegation that it occurred in August 2017. The Tribunal also therefore pointed out to the claimant that having identified that date in accordance with the Order of Employment Judge Ross that this allegation was again on the face of it out of time, and that the Tribunal would therefore be required to consider whether the standard time limit of three months should be extended.

17. The claimant confirmed that the particulars supplied at "C" were not a claim under the Equality Act 2010.

18. The two allegations listed at "D" and "E" were both registered as claims of direct age discrimination. The claimant alleged that these two comments had been made to him because he was the youngest person in the office and that if he had not been of a particular age/age group that the comments would not have been made against him. The claimant alleged that these comments had been made within the last three months of his employment and so no issues in connection with time issues arose.

19. At paragraph "F" the Tribunal registered this as a claim of harassment on the grounds of the protected characteristic of race.

20. The particulars provided by the claimant at "G" which the claimant numbered as paragraph 7 related to a claim not of discrimination but in connection with a protected disclosure. The Tribunal has already dealt with these issues at length above in these Reasons.

21. These discussions with the claimant in order to clarify the particulars provided by the claimant, in particular at pages 55 and 56 of the bundle, took some 2 hours 20 minutes at the beginning of the hearing on 24 September 2018. The Tribunal then adjourned for lunch in order to give both parties the opportunity reflect on the discussion and outcome of what had taken place during that period of time. The Tribunal reconvened at 1.30pm in order then to hear evidence from the claimant.

22. As indicated, the Tribunal received a bundle of documents comprising some 262 pages. An additional page, numbered 263, was accepted by the Tribunal on the morning of Wednesday 26 September 2018. This was despite the fact that the evidence of the claimant and the respondent had closed. The claimant indicated that he had a document which he said was relevant to the truth of the evidence which had been given by Mr Burton the previous day. The claimant was not able to give any satisfactory explanation as to why he had not disclosed this document sooner, and the terms and tone of the Case Management Orders were explained again very carefully to the claimant. A copy of an email was nevertheless accepted by the Tribunal and considered by it. The conclusion of the Tribunal was that the document was not relevant to the claims and issues. The claimant purported to suggest that it indicated that the date of a particular discussion between Oliver McGuinness and a female representative of Swiss Re had taken place on a date different to that which had been specified by Mr Burton in his witness statement and which he had confirmed on oath. On examination of page 263 the Tribunal could find no evidence whatsoever to suggest that it related to the specific discussions which Mr Burton told the Tribunal had taken place in December 2017 and which had led to the suspension of the claimant. Nevertheless, despite the late production of the document the Tribunal accepted it and received it from the claimant, but after examination rejected it as being relevant to the particular factfinding exercise which the Tribunal was required to complete.

23. In addition to the bundle of documents the Tribunal heard sworn evidence from witnesses and considered written witness statements from others. The claimant gave evidence on oath by reference to a witness statement which comprised some eight paragraphs and was dated 30 August 2018. The claimant in addition to that statement referred the Tribunal to a list of various documents which he wanted the Tribunal to consider. Those were recorded by the Employment Judge in his handwriting on his copy of the witness statement of the claimant. The claimant in addition submitted an unsigned witness statement from his girlfriend, Ashley Chattaway. That statement was dated 29 August 2018. The Tribunal considered that statement but only gave it extremely limited weight bearing in mind that it was not signed and bearing in mind that, more importantly, Ms Chattaway did not attend to give that evidence on oath or to have it tested by cross examination.

24. For the respondent Mr Burton, the Chief Executive of the respondent company, and Mr Benson, the Chief Financial Officer of the respondent company, gave evidence on oath and by reference to written witness statements. In those statements they referred to various documents which were considered by the Tribunal. In addition the Tribunal received a signed witness statement from Mr Lufkin comprising some seven paragraphs and dated 21 September 2018. The Tribunal gave equal weight to this statement as it did to the statement of Ms Chattaway, bearing in mind that it was not given on oath and was not subject to or tested by cross examination.

25. Firstly, the Tribunal considered the claims which had been noted at paragraph 3 of the Case Management Order of Employment Ross which were claims relating to payslips and written particulars of employment. These were claims which were brought by the claimant under section 12 of the Employment Rights Act 1996 and referred to breaches by the respondent company of section 1 of the Employment Rights Act 1996 relating to the right of an employee to receive a statement of employment particulars, and a breach of section 8 of the Employment Rights Act 1996 which provides that an employee has the right to be given by his employer a written itemised pay statement.

It was accepted by all parties that the employment of the claimant began on 16 September 2016 and was terminated on 20 December 2017. As at the effective date of termination of the employment of the claimant the respondent company accepted that it had never issued a statement of main employment particulars pursuant to section 1 of the Employment Rights Act 1996, and neither had it at any time issued any itemised payslips to the claimant.

26. On the basis of those admissions by the respondent the judgment of the Tribunal was that those claims, brought by the claimant pursuant to section 12 of the Employment Rights Act 1996, succeeded. Pursuant to section 12 of the Employment Rights Act 1996 the Tribunal therefore makes a declaration to that effect. The Tribunal declined to consider the particulars which ought to have been included in any written statement of particulars of employment, as by the date of the Tribunal hearing in September 2018 the claimant had not been employed by the respondent company for some nine months. The only relevant particulars which the Tribunal needed to consider as part of the claims pursued by the claimant was the amount of salary which was to be paid at any material time by the respondent to the claimant, and that is dealt with in the Reasons of the Tribunal set out below.

27. Subsequent to the issue of proceedings in the Employment Tribunal, the respondent prepared and issued to the claimant payslips through its solicitors which appeared in the bundle at pages 208-223. The claimant did not give any evidence to the Tribunal to suggest that he disagreed with those particulars or to indicate that those particulars were wrong, other than to suggest that the amount of his gross pay was not accurately reflected by those payslips. The claimant made various representations to the Tribunal as to what he believed was his contractual pay expressed as an annual rate of pay. The Tribunal expresses its findings of fact in connection with that and the representations made by the claimant below.

28. The Tribunal then considered whether or not it was appropriate, pursuant to section 38 of the Employment Act 2002, to make any award of compensation to the claimant.

29. In her written submissions to the Tribunal at the conclusion of the hearing, counsel for the respondent had not addressed either the claims under section 1 or under section 8 or section 12 of the Employment Rights Act 1996. The Tribunal discussed with Miss Amartey the possibility, therefore, of the Tribunal awarding compensation under section 38 and indicated that it would consider whether to award two weeks or more pay to the claimant as a result of its findings in favour of the claimant under section 1/section 8/section 12 of the Employment Rights Act 1996. Miss Amartey did not make any submissions other than to say that she considered that there were special circumstances as to why any award of compensation should not be the possible maximum of four weeks' pay.

30. During the retirement to consider its judgment the Tribunal considered carefully the wording of section 38, reminding itself that an award could only be made in connection with any of the "jurisdictions listed in Schedule 5".

31. At the time that the Tribunal was considering this the clerk handed to the Tribunal a printout of Schedule 5 which had apparently been handed to the clerk by Miss Amartey following the closure of the case. The Tribunal was in any event

considering the content of Schedule 5. The Tribunal reminded itself that that list of jurisdictions limited the basis upon which the Tribunal could make any award of compensation to the claimant under section 38. Claims in respect of 1, section 8 or section 12 of the Employment Rights Act 1996 are not included in that Schedule, and the Tribunal therefore concluded that it had no jurisdiction to make any award of compensation to the claimant under section 38. The Tribunal therefore limited its judgment in favour of the claimant to simply making a declaration that there had been breaches of section 1 and section 8 of the Employment Rights Act 1996.

32. The Tribunal then considered the three monetary claims which were set out at paragraph 1.2 of the Order of Employment Judge Ross. They related to claims of accrued but untaken holidays, unpaid wages in the form of travelling expenses and the sum of £1,244 allegedly owed to the claimant in relation to an agreement made with Mr Burton at the start of his employment.

33. In his witness statement the claimant included no evidence at all in respect of his claim in relation to holiday pay. Furthermore, the claimant did not expand on this when he gave evidence or during the course of cross examination. The Tribunal was, therefore, left in the dark as to the manner in which the claimant was pursuing this allegation. The Tribunal gained some information as to the thought process of the claimant in what he said at page 57 under the heading "An estimation on what compensation I am seeking". The claimant made no reference to this statement when he gave evidence. It was clear, however, that what the claimant was seeking was compensation for holidays which he had taken when attending a summit in London. When giving evidence the claimant accepted, on oath, that he had booked holiday to attend this summit and that he had taken it as part of his holiday entitlement. The claimant did not give any evidence whatsoever to suggest that there was any agreement between himself and the respondent company that he should be paid for attending that summit other than being paid holiday pay. The claimant did not suggest that he had not been paid holiday pay. The claimant appeared to be suggesting that in addition to being paid holiday pay for the holidays that he had taken that he had some contractual entitlement to be paid over and above the value of holiday pay and over and above the value of his contract of employment. The claimant, however, gave no evidence to that effect to the Employment Tribunal at all. The Tribunal therefore concluded that it had no evidence on which it could find in favour of the claimant in respect of the claim which he had expressed to Employment Judge Ross as being that he is "owed money accrued but untaken holiday pay". The Tribunal therefore dismissed this claim on the basis that the claimant did not submit any evidence to support it or to support the alleged value of any such claim.

34. The Tribunal then considered the second of the claims in paragraph 1.2 of the Order from March 2018. This was a claim which was expressed by the claimant as being unpaid wages in the form of travelling expenses for two days' pay in 2016 when he was suspended. The Order is clear. It relates to an alleged process of suspension in 2016. The claimant gave absolutely no evidence whatsoever about any such incident in 2016. The claimant provided no particulars whatsoever to support a claim in respect of unpaid wages in the form of travelling expenses, either for two days or for any other period of time. In the absence of any evidence at all to support this claim, this claim was dismissed by the Employment Tribunal.

35. The Tribunal then turned to the third of the claims identified in paragraph 1.2, which was a claim for the sum of £1,244. The claimant did give evidence in connection with this claim. However, he modified the claim to indicate that it was a claim for £1,000 and not £1,244. Indeed the claimant, when being asked to clarify the figure of £1,244 which appears in the Order from March 2018, indicated that he could not really understand where that figure had come from either. He confirmed to the Tribunal that his claim was in the sum of £1,000. At page 74 in the bundle the claimant wrote to Mr Burton. This was in anticipation of him starting employment with the respondent company. The email is dated 19 July 2016 but the claimant did not begin his employment with the respondent until approximately two months later. The claimant clearly says that he is "excited to get involved". The claimant says that after consideration he can "live off with £1,000/month for the next six months". He puts forward a suggestion that it "would be great" if he could be paid £1,000 "up front" cover general living/relocation expenses. There was no written response to that but the respondent, Mr Burton, arranged for a payment to be made to the claimant on 16 September 2016 in the sum of £500. Evidence of this in the form of the cheque book of the respondent company appeared at page 77A. The Tribunal found it significant that this was dated 16 September 2016 when the claimant's employment began on that same date, 16 September 2016. This was the date which the claimant included at paragraph 5.1 of his claim form.

36. Mr Burton gave evidence to the effect that he interpreted the email at page as in effect a request for an advance of wages. The Tribunal accepted that wages in the form of salary are paid in arrears. In other words, either the claimant was going to be paid at the end of September for the days he worked in September, or alternatively he was going to be paid month by month. Acting on that interpretation Mr Burton paid the sum of £500 "up front" using the wording of the email from page 74, to the claimant.

37. The claimant accepted when he gave evidence that this amount was then subsequently deducted from his wages as and when they became due later in September 2016. The claimant never raised any objection to that deduction from wages. The respondent paid it on the basis that it was an advance in wages. There was no evidence at all, in the opinion of the Tribunal, to support any suggestion that there was an agreement that in addition to his contractual right to wages that the claimant was equally entitled to an additional contractual payment of £1,000. The email on page 74 does not even suggest any such agreement between the claimant and the respondent. It asks for a payment "up front" and that is what was made. The Tribunal therefore concluded that there was no contractual agreement or entitlement to a "further sum of £1,244" as set out in the Order of March 2008, or indeed a further sum of £1,000 which the claimant alleged at the hearing in September 2018 that he was entitled to. In the absence of any express or implied term in his contract of employment to any entitlement over and above his contractual right to wages, this claim on the part of the claimant was dismissed as there was no express or implied term in his contract of employment entitling him to any such payment as alleged or at all.

38. The Tribunal then turned to consider the claim pursued by the claimant under section 104 of the Employment Rights Act 1996. The claimant alleged that he had been dismissed for asserting a statutory right, namely the statutory right to be paid the minimum wage, the statutory right to be provided with a statement of main particulars of employment and the statutory right to be provided with payslips. The claimant

alleged that these were the reasons why he had been dismissed. By contrast the respondent argued that he had been dismissed for misconduct, even gross misconduct, and that that was the reason under section 95 of the Employment Rights Act 1996 why the claimant had been dismissed. That is a potentially fair reason for dismissal by contrast to dismissal under section 104 of the Employment Rights Act 1996. That was the essential factual disagreement which the Tribunal therefore had to resolve. What was, in the opinion of the Tribunal, the reason for the dismissal of the claimant?

39. After considering the relevant documents and hearing evidence from the witnesses the Tribunal made the following findings of fact in respect of the claim pursuant to section 104 of the Employment Rights Act 1996, namely:-

(a) In giving his evidence, not only in respect of the claim under section 104 but in respect of the claims of age and race discrimination, the Tribunal found the claimant to be an unreliable, inconsistent and misguided witness who in important and relevant parts of his evidence demonstrated an inflated and unjustified view of his position, his pay and the history of his relationship with the company.

(b) The Tribunal formed this view as a result of evidence which was given by the claimant on the following issues, namely:

(i) At page 8 of the claimant's witness statement the alleges that he joined the company in September 2016 as Head of Innovation for £65,000 back paid. At paragraph 7 of his witness statement the claimant alleged that he was promised a salary of £36,000. The Tribunal considered it important to note that the claimant used the word “salary”. There was no evidence whatsoever that the claimant had ever been appointed as Head of Innovation or indeed that he had ever held that position at any time during his employment. The claimant was issued with a business card at some stage during his employment, and this was included in the bundle at page 262A. It described the claimant as being involved in “business development”. There was no evidence at all to suggest that the claimant had at any time been appointed or even considered at the time of his employment in September for any other position. Indeed the only vague suggestion about that, as a possibility, was made in December 2017. Even then it is only described as a “possible future role”. The job title is mentioned but it is completely conditional on the position being reached when the sales team in the business can function without the claimant as part of the team. A reasonable interpretation of that wording is that that position may never ever be reached. It was nothing more than a possibility. It was never a promise that at any particular date in time the claimant would be given that role. It was only conditional on the basis of a particular stage being reached in the sales performance of the business. Even then when the possible title of Innovation Manager is mentioned, it makes it clear that the title may be granted to the claimant only when a position is reached in connection with sales. A reasonable and proper interpretation therefore would be that the

claimant would remain and active member of the sales team and it was only when that sales team, if ever, reached a particular level of performance that the claimant may be granted that particular job title. By contrast, however, the claimant very clearly indicates in his claim form that he was given that title from day one of his employment in September 2016. The Tribunal concluded that there was no evidence to support that clear statement made by the claimant. The job title was simply a possibility. It might never ever come to fruition.

(ii) The claimant in his claim form indicates that he was on a salary of £65,000 which would then be backdated. The Tribunal found no evidence to support any suggestion that it would at any time be backdated. The claimant agreed to join the company at a net monthly salary of £1,000. The claimant went on to suggest in his witness statement that he had then been offered a salary of £36,000. The Tribunal could understand the confusion which was caused by the respondent's completion of the document at page 80. This document was completed by Mr Burton on 9 May 2017. It indicates that the "annual income" of the claimant is £36,000. It does not say that that is an agreed salary. Mr Burton explained that this was a figure which represented anticipated on target earnings if, and only if, the product being developed by the respondent company went to market and if then as a result of levels of sales the claimant achieved, levels of performance would justify a certain level of salary but also as yet to be identified levels of commission on sales generated by the claimant. The Tribunal accepted that the information completed by Mr Burton on page 80 was misleading to say the least. It was, however, completed in conjunction with the claimant. The claimant did not object to it. However, it was not an indication that the claimant was, as a term of his contract of employment, now entitled to a salary of £36,000. It was again an indication given, the only reasonable indication in the opinion of the Tribunal, that at some stage, when and if the product was launched, and when and if certain levels of sales were achieved that the claimant's income would rise to anticipated earnings of £36,000. It was not a promise. It was a possibility. The Tribunal found that that was the only reasonable and sensible interpretation of the discussions which had taken place between the respondent and the claimant, and yet the claimant gave evidence to suggest that he had in fact now been promised a salary of £36,000. The Tribunal found that no such agreement was ever reached.

(iii) The Tribunal was significantly troubled by the use of inflationary and unjustified language in paragraph 2 of the claimant's witness statement. The claimant alleged that he was "forced" to work 40 hours a week and indeed repeated the use of that word by indicating that he was "forced to work for slave labour". The Tribunal found that these words were emotive and completely unjustified. Under cross examination it was pointed out to the claimant that he could at any time have resigned his employment

and found alternative employment, particularly bearing in mind that he was working in the centre of Manchester. He was being paid a net salary of £1,000 per month and it was pointed out to the claimant that he could have found almost any alternative full-time employment in the centre of Manchester which would have generated an income at that level. Furthermore, the claimant at page 74 had indicated that in July 2016 that he was "excited to become involved in driving Wondrwall to launch". If the claimant's view of his employment with the respondent company had genuinely deteriorated to the extent that in his opinion it became forced labour, then it was in the opinion of the Tribunal inconceivable that the claimant would then have continued to work up until the time that he was, in the opinion of the respondent, dismissed for gross misconduct. The Tribunal believed, therefore, that the use of this language by the claimant was unjustified, misguided and entirely inappropriate and it significantly influenced the view of the claimant in the opinion of the Tribunal.

(iv) It was accepted by the claimant that the electronic presentation at pages 248-258 in the bundle was a piece of work which had been prepared by the claimant. It was equally accepted that the claimant sent that to a very large insurance company, Swiss Re. He sent this document without the knowledge or approval of Mr Burton or any other representative of the respondent company. However, he did not send it to Swiss Re from his email address at Wondrwall. He sent it instead from a private email address "AFInsight". The Tribunal could never establish to its satisfaction what that name represented, but nevertheless the claimant accepted that it was one of his private email addresses. The claimant was asked why he had sent a document which obviously related to his employment from a private email address. The claimant told the Tribunal that his contact at that stage with Swiss Re was "in his own right". He was asked to explain what he meant by that. The claimant told the Tribunal that he was engaged in a loose conversation with Swiss Re about how he might "change the world" by reference to platforms and use of data. He asserted that his discussions at that stage with Swiss Re were not with the representative of Swiss Re in her capacity as an employee but because of her insurance connections. The Tribunal did not and could not accept that as a reasonable explanation. The document at page 248 was obviously work related and the claimant could give no satisfactory explanation as to why he had sent that document from his private email address. No reasonable individual could claim that he had discussions at Swiss Re in his own right or that he could send obvious work related documentation to Swiss Re simply because he was engaged in some form of loose conversation about how he might change the world by reference to platforms and use of data. The Tribunal considered this to be an entirely unreasonable and misguided explanation.

(v) The Tribunal also held a detailed discussion with the claimant about the document which appeared at page 192 onwards. Adonis, as explained by the claimant, was a platform which he was developing in relation to health and fitness. It had nothing to do with the respondent company at all. The claimant explained to the Tribunal that he had instructed external consultants to prepare this document for him. Nevertheless that was sent on the instructions of the claimant to his Wondrwall email account. The Tribunal questioned the claimant as to why that was. The claimant initially indicated that he did not have a private email account at that stage and so he had no alternative but to send it to his work related email account. The Tribunal found it difficult to believe that anyone at this stage, particularly someone who was so computer literate, did not have a private email account. When pressed the claimant then changed his story to indicate that he did have a private email account but that it was "not active". The Tribunal then went on to explore with the claimant whether he did have other private email accounts, and the claimant acknowledged that he did. It was pointed out to the Tribunal at page 229 that he had used other Gmail accounts, and that the email which he had sent right at the beginning, even before he took up employment with the company (Page 74) was sent by the claimant from morpheusideas@gmail.com. This clearly indicated that even before his employment with the respondent began that the claimant had an active email account. It was then pointed out to him that at page 229 the claimant had used another quite separate personal email address, and indeed more than one. The claimant then changed his story for the second time and indicated that on reflection the reason why the presentation at page 192 onwards had been sent to his Wondrwall account was simply an error. The Tribunal found the whole of the evidence of the claimant to be unreliable, inconsistent and not credible. This significantly affected the judgment of the Tribunal about the veracity of the evidence of the claimant in other areas.

(vi) The claimant made a number of references to him acting in his capacity as a philosopher. The claimant never explained what he meant by that but nevertheless he used it on a number of occasions to explain his conduct. For example, he indicated that when he prepared the document at page 248 onwards that that was something which he had prepared independently and he even went so far as to suggest that it was a document which, because he had prepared it independently, belonged to him as if it was his property. Ultimately when challenged about this the claimant acknowledged that it was a document which he had prepared in work and that there was no reasonable or sensible basis on which the claimant could suggest that it was something which was independent and which belonged to him in some way as being something which reflected his own views as a philosopher.

(c) By contrast the Tribunal found Mr Burton to be a straightforward witness. He answered questions without reference to his witness statement and without reference to documents. He answered them in a straightforward and clear manner. He expressed, in the opinion of the Tribunal, genuine feelings of frustration and annoyance at the conduct of the claimant and the refusal of the claimant to acknowledge that he had done anything wrong in sending what was, in the opinion of the Tribunal, documentation which was obviously and closely associated with the business interests of the company to external sources without the permission or even the knowledge of Mr Burton or any other senior representative of the company. The claimant continued to suggest that because he had created the documentation in question that he had the right to do that because the documentation belonged to him. This was despite the obvious interpretation which a reasonable person would put on the presentation at page 248 which the claimant sent to Swiss Re. At page 251 the name of the company is included. Furthermore, Mr Burton gave evidence that the phrase "intelligent living" which was included in this presentation prepared by the claimant was in fact a phrase which had been trademarked by the respondent company approximately three years ago. Mr Burton reasonably indicated to the Tribunal, therefore, that it was in his opinion almost ridiculous to suggest that this was a document which was not connected with the real and significant business interests of the respondent company. The Tribunal agreed with Mr Burton that the only reasonable and sensible interpretation of that document was that it related to sensitive company information which the claimant had sent to Swiss Re not using his Wondrwall email account but had actually sent it from his own email account despite suggesting to the Tribunal that he had no such accounts or no such active accounts. This again added significantly to the negative views which the Tribunal had of the claimant and the evidence which he gave.

(d) After considering the relevant documents and having considered therefore the different evidence given by the witnesses, the Tribunal made the following findings of fact in connection with the claim pursuant to section 104:-

(i) The Tribunal accepted paragraphs 42-49 of the witness statement of Mr Burton with one important exception. In paragraph 42 the respondent says that one of the consultants had told him that he had visited an insurance company for the first time. The insurance company in question was Swiss Re. The consultant was Oliver McGuinness. Mr McGuiness had been engaged by the company to seek to persuade insurance companies, hopefully leading insurance companies, to buy into the product which the company was developing. Under cross examination from the claimant Mr Burton agreed that the company had had other discussions with Swiss Re prior to 15 December 2017. He was very clear, however, in telling the Tribunal that 15 December 2017 was the very first time that any suggestion had been made that the claimant had been sending documents relating to the business affairs of the respondent company to external sources, including Swiss Re, from

his own private email addresses. In the opinion of the Tribunal, this did not affect the value or integrity of the other evidence given by Mr Burton in paragraphs 42-49. He readily acknowledged, when challenged, that that statement was not accurate, and he was happy to agree that it should be amended by the Tribunal to recognise that that was not the first discussion which had been held with Swiss Re. It was certainly, however, the very first time that Swiss Re told any representative of the company about information being sent to it by the claimant from his own private email addresses.

(ii) The timescale of the events which led to the dismissal of the claimant, particularly bearing in mind his claim under section 104 and that he did not have the required two years' period of continuous employment, was in the opinion of the Tribunal extremely important. The claimant had alleged that prior to 15 December 2017 he had on a number of occasions complained to Mr Burton about not being provided with payslips and not having had a contract of employment. The claimant, however, did not provide any evidence to back up that allegation, in particular copies of any emails which he had had allegedly sent to any of the senior representatives of the respondent company to back up that claim. The only evidence was the claimant saying that he had, on various dates, raised these issues with Mr Burton. By contrast Mr Burton in evidence categorically denied that any such discussions had taken place, and that the first time that the claimant raised the question of payslips and having a contract of employment was after Mr Burton had been told about the claimant sending information to Swiss Re from a private email account. As Mr Burton said at the beginning of paragraph 42 of his witness statement, Mr Burton learnt of this "early in the day on 15 December". It was not disputed that almost immediately Mr Burton rang the claimant and that as per paragraph 44 of his witness statement the claimant went to the offices of the respondent company for a face to face discussion with Mr Burton. It was at that face to face discussion that the claimant was told that he was being suspended whilst Mr Burton carried out further investigations. The only written evidence available, therefore, to the Tribunal of any requests for payslips or a contract of employment is the email at page 91. At the foot of that page there begins an email trail. The first email is one sent by Mr Burton to the claimant at 10:41 on 15 December, and this was after the face to face meeting at the offices of the respondent company when Mr Burton told the claimant that he was being suspended. In that email Mr Burton refers to the letter which has been sent to his home address by way of confirmation of suspension. That is the letter which appeared at page 94 which confirms the meeting/conversation on 15 December and confirms the suspension. There was no other evidence available to the Tribunal to substantiate the claims made by the claimant that he had on more than one occasion with Mr Burton and potentially with Mr Benson made other requests for a contract of

employment/statement of particulars of employment and/or wage slips. There was therefore a direct contradiction of evidence between that of the respondent and that of the claimant. The Tribunal has already indicated that it has significant doubts about the veracity of the evidence of the claimant. Furthermore, the claimant was someone who demonstrated a willingness to engage in email correspondence, and the Tribunal found it very surprising that if, as he alleged, the claimant had made repeated requests for payslips and written particulars of employment and they had been refused, that the claimant had never put anything about that at any time whatsoever into writing until after the claimant had been suspended on 15 December. The first written evidence of any such request was the email at page 91 sent by the claimant to Mr Burton at 11:34 in the morning. He does not, even in that email, indicate that he has now been asking for this for ages and ages and his requests, for example, have been ignored. He does not make any reference whatsoever to any previous requests or discussions having been made and rejected by the respondent company. The Tribunal found that to be evidence of significance. When replying in the email at the top of page 91 again Mr Burton does not refer to previous discussions or previous suggestions which Mr Burton has made to the claimant, for example, that there is no need for a written contract to be issued. Mr Burton does not say, for example, that he has been telling the claimant over and over again that this is not required. Neither Mr Burton nor the claimant make any reference whatsoever to any previous discussions, and the conclusion of the Tribunal therefore was that the first time that the claimant raised any question about not being issued with written particulars of employment and written information relating to his wages was the email which he sent on 15 December at 11:34. This finding of fact will be directly relevant to one of the claims of discrimination which was lodged by the claimant about which the Tribunal will set out its findings of fact and conclusions below.

(iii) The Tribunal then revisited and carefully reconsidered paragraphs 50-64 of the witness statement of Mr Burton and found that they represented the facts.

(iv) At page 60 Mr Burton indicated that he was extremely concerned about certain observations made by the claimant about sending documents to his private email account in case he ever left the company, and about the fact that the claimant never showed any contrition for what he had done. That was the picture which was painted by the claimant to the Employment Tribunal. The claimant did not offer any apology or indeed any recognition whatsoever that anything that he had done was wrong. He repeated to the Tribunal that he believed that he had some form of personal ownership of the documentation in question because he had created it, and he repeated his indication that in some way he had a right to this information because he had created it. The Tribunal took those views as expressed by the claimant into account.

(v) Whilst this is not a standard unfair dismissal case where the Employment Tribunal has to consider the provisions of section 98(4) of the Employment Rights Act 1996, the Tribunal believes it appropriate to comment that even if the claims of the claimant were for standard unfair dismissal then the fact that the claimant failed even at the Tribunal hearing to recognise the seriousness of what he had done, the position of the respondent company would have justified the decision taken by the respondent. The respondent company was at all material times in effect a shell company. It had an idea. It had a product which it was developing which the company very much hoped would be successful and which would produce an income for its investors. However, at all material times it was nothing more than a company which was developing the potential to do that. In those circumstances, keeping its cards close to its chest and protecting its ideas and protecting what Mr Burton very very clearly indeed told the Tribunal was what it believed was a unique position in the marketplace was, in the opinion of the Tribunal, or paramount importance to the company. This was expressed very clearly by Mr Burton, for understandable reasons, in the unanimous opinion of the Tribunal.

(vi) Whilst the Tribunal accepted that the company was trying to do its best in separating the grievances raised by the claimant from the disciplinary matters which were being considered by Mr Burton, it is only fair and reasonable for the Tribunal to say that the respondents, particularly Mr Burton and Mr Benson, caused understandable confusion on the part of the claimant. The Tribunal accepts that Mr Burton from the outset believed that what the claimant had done was extremely serious, and that the reasons for his dismissal had absolutely nothing to do with any requests or grievances relating to payslips or written terms of employment. The sole reason why the claimant was dismissed related to the sending of confidential information to his private email address and the failure by the claimant to recognise that he had done something wrong or to offer any contrition. Nevertheless, understandable confusion was caused by in particular the letters which were sent to the claimant by Mr Benson. The most confusing of those was the document which appeared at pages 97/98. Whilst the Tribunal accepted that Mr Benson was trying to do his best with the grievances, and whilst it accepted that Mr Benson and Mr Burton were doing what they felt was best to keep separate the disciplinary process from the grievance process, the Tribunal cannot find any reasoning as to why there was any suggestion in the email at page 97 about what might happen from 1 April 2018, and certainly what might happen in any future role “from 2019 onwards”. The claimant told the Tribunal that this persuaded him that he was being told that he would continue to be an employee of the company, and that in effect his career structure moving forward even into 2019 was being explained to him. The Tribunal understands that the claimant may have come to that conclusion, but the Tribunal is unanimously very clear indeed that this was a misunderstanding on the part of

Mr Benson and Mr Burton and a misguided attempt to set, as far as possible, the largest possible gap between the disciplinary process and the grievance process even though they were being handled by the only two senior representatives of the company, Mr Burton and Mr Benson.

(vii) In the opinion of the Tribunal, that is reflected by the email sent by Mr Burton to the claimant on 19 December at 10.03am. That is at page 117. It is clear from that email, written by Mr Burton, that he was aware of the work which Mr Benson was doing in connection with payslips, and in particular in connection with the request for a written statement of particulars. Indeed Mr Burton specifically refers to that. He equally deals with part of the grievance about shares, indicating that that was never ever discussed with the claimant. He is also indicating to the claimant that the email which was sent about terms of employment moving forward is “not negotiable and our final offer”.

(viii) The claimant, and indeed the Tribunal, were then extremely confused by the final sentence of that email, which refers to expecting the claimant to be in the office at 9.00am on 19 December or alternatively offering the claimant the opportunity to resign. Mr Burton was asked by the Tribunal to explain what he meant by that. Mr Burton indicated, very frankly, that at that stage he had decided that the claimant should be dismissed and that in effect if the claimant did turn up on 19 December then he was going to tell the claimant he was being dismissed, or alternatively he was offering the claimant the opportunity to avoid a decision about dismissal by resigning. However, the Tribunal agrees with the claimant that that sentence is capable of a number of different interpretations, and it is understandable that the claimant believed that what Mr Burton meant by “turning up at the office at 9.00am on 19 December” was that if he did so that the claimant's employment with the company would continue. That is a perfectly understandable and reasonable interpretation. However, Mr Burton was adamant that that is not what he meant. The Tribunal accepted his explanation but equally accepted what the claimant said about how he understandably came to a different conclusion.

(ix) The claimant did not go to work and therefore on that basis Mr Burton took the alternative decision, which was that he would dismiss him by letter. That letter of dismissal was dated 19 December. However, the decision to dismiss the claimant was actually communicated to him by email, and that email appeared at the bottom of page 123A. It was an email sent not in the morning of 19 December but at 2.38pm. During its deliberations the Tribunal noticed that in fact exactly the same email had been sent by Mr Burton at 2.43pm (see the bottom of page 119). The Tribunal never noticed this previously but there is only five minutes difference between one time and the other. The claimant did not, however, deny receipt of emails indicating to him clearly in the

afternoon of 19 December that he had been dismissed. The claimant was then sent the letter of dismissal which appeared at page 124, which is dated 19 December 2017.

(x) Somewhat unusually the letter of dismissal was actually prepared by Mr Benson and not by Mr Burton. This was extremely confusing to the Tribunal bearing in mind that Mr Benson had been dealing with the grievance. Nevertheless Mr Burton was adamant that the decision to dismiss had been his and that he had taken that decision effectively as the owner and Chief Executive of the company. There was no evidence to suggest anything different, and the Tribunal accepted that it was his decision and his alone even though the letter had been prepared by Mr Benson. He even signed it.

(xi) The Tribunal also noted that at page 122, on the day before dismissal, the claimant had sent an email at 5.22pm specifically asking for payslips. This was a document which the claimant had considered carefully because it was delivered to the respondent before the decision was taken to dismiss the claimant. However, the Tribunal was satisfied that this did not form part of the decision to dismiss. The Tribunal noted that the email was sent to Mr Benson and not to Mr Burton. The Tribunal accepted that Mr Burton ultimately was responsible for instructing external accountants to prepare emails and that that was not the responsibility of Mr Benson. The Tribunal was satisfied that despite the fact that this request had been made prior to the decision to dismiss, that it formed no part of the reasoning of Mr Burton and that there was no evidence to suggest that it had.

(xii) The Tribunal acknowledged, therefore, that at the time the decision was taken to dismiss the claimant, 19 December, that the respondent company, both Mr Burton and Mr Benson, were aware that the claimant had requested written particulars of employment and that he had requested detailed wage slips. However, the Tribunal was unanimously satisfied that those requests played no part in the decision taken by Mr Burton to dismiss the claimant and that the decision was taken solely on the basis of the nature of information which the claimant had improperly sent about the respondent company to his private email address. The Tribunal was readily persuaded by the evidence given by Mr Burton about his genuine sense of frustration and annoyance at the steps which had been taken by the claimant and his failure to acknowledge any wrongdoing on his part in doing so.

(e) On that basis the Tribunal could find no evidence to substantiate the claim of the claimant that he had been dismissed pursuant to section 104 because he had asked for payslips and written particulars of employment. The claimant clearly believed, because of the proximity of his requests for such information, that it had formed part of the reasoning of Mr Burton. Mr Burton, however, denied that categorically in his witness statement and

> the Tribunal found Mr Burton to be an honest, clear and persuasive witness. The Tribunal accepted that there was no evidence to suggest that the requests made by the claimant had formed any part of the reasoning of Mr Burton. The unanimous decision of the Tribunal, therefore, was that the claimant's claim under section 104 should be dismissed.

40. Finally, the Tribunal considered the claims of discrimination and harassment which the claimant set out at pages 55 and 56 to which the Tribunal has referred earlier in these Reasons. The Tribunal confirms that it marked those claims as paragraphs A-G. Paragraph G was withdrawn by the claimant. It related to an alleged protected disclosure. Furthermore, the claimant confirmed that paragraph C was not a claim. The Tribunal was therefore left to determine the claims at A, B, D, E and F.

41. The Tribunal firstly considered whether or not the claims at A and B were out of time. One claim related to an event in June 2017 and the second, at paragraph B, related to a claim in August 2017. Both, therefore, were claims which were outside the standard three month limit which applies to claims under the Equality Act 2010. The claimant did not provide any evidence at all as to why he had not lodged these claims within the relevant three month limit. The only observations which the claimant offered, which was not evidenced, was contained in written submissions which he submitted at the conclusion of his claim. The Tribunal reminded itself that those submissions were not evidence. The claimant in those written submissions, on the final page, page 3, indicated that he felt unable to raise a grievance about discrimination issues because he felt outnumbered and ultimately had no voice recordings and it will be his word against theirs. The claimant indicated that with limited resources he could not visit a solicitor every time he felt slighted and that the only time he had investigated his employment rights was when he was suspended. The claimant, in limited words, also confirmed verbally when elaborating on those written submissions, that he was ignorant of the law and ignorant of any relevant time limits until such time as he was suspended, and only then had he begun to investigate what his employment rights were. The Tribunal acknowledged that this was the explanation which was being put forward by the claimant even though he led no evidence and had no evidence to support it. In any event, the Tribunal did not believe that that was a reasonable excuse and did not believe, therefore, that it was just or equitable to extend time beyond the usual three month limit. The claimant gave no explanation as to why he had not researched the legal position earlier. He was very clearly computer and internet literate. He had successfully researched the position at a later date, and in the opinion of the Tribunal could and should have done so earlier. His explanation about effectively being his own witness is not an uncommon situation for employees and did not amount to a reasonable explanation for delay in the opinion of the Tribunal. The decision of the Tribunal, therefore, was that those claims would be dismissed as having been presented out of time.

42. The claimant presented as someone who was extremely computer literate. He was capable of producing substantial documents on computers. The claimant, in the opinion of the Tribunal, effectively defeated his own argument. When the claimant was suspended he then decided to investigate his employment rights because he felt that he had been wronged. However, the claimant was equally alleging that he had been the victim of discrimination, and in those circumstances the Tribunal believed that someone who had been the victim of discrimination ought to have considered what their employment rights were in order to do something about it. Many, many claims, if

not the majority of claims, for discrimination are submitted without voice recordings. The Tribunal has extensive experience of dealing with discrimination claims even where there is no independent supporting evidence. The Tribunal believes that it would have been reasonable and proper for the claimant to have investigated his employment rights in connection with discrimination, and believes that even a cursory search of the internet would have given him the relevant information in exactly the same way that the claimant was able to obtain that information when he was suspended. The claimant indicated that he had been able to contact and take advice from ACAS immediately. The claimant would have been able to do that at the time of these alleged allegations of discrimination. The Tribunal believes that it would have been reasonable and proper for the claimant to have done that.

43. In the circumstances, therefore, the Tribunal did not believe that it was just or equitable to extend time, and the claims at A and B were therefore dismissed as having been presented out of time.

44. Nevertheless, if the Tribunal was found to be wrong about the time issue, the Tribunal went on to consider the essential merits of the claim at A and B. It was disturbing to the Tribunal that in connection with A the claimant repeated his allegation that he had been required "to work for slave labour". The use of that wording was entirely inappropriate and unreasonable in all the circumstances. The claimant alleged that he had asked to work from home and that that had been refused on the basis of his age. The claimant was not able to provide the Tribunal with any evidence at all other than his verbal evidence to substantiate these requests, which he said that he had made of Mr Burton on a number of occasions. Mr Burton denied receiving any such comments and indeed denied having received any requests from the claimant to work flexibly, and in particular having received requests from the claimant to work from home. There was, therefore, a complete disagreement between the evidence of the claimant and the evidence of Mr Burton. The Tribunal has already commented on what it believed generally about the evidence of the claimant and the evidence of Mr Burton. The initial burden of proof in connection with a discrimination claim is on the shoulders of the claimant. The Tribunal was therefore satisfied that the claimant had failed to meet the necessary burden of proof. The claimant had not proved on the balance of probabilities that he had made these requests and that they had been refused, or that the claimant had been told in any circumstances at all that he was a child.

45. Paragraph A was a claim of direct discrimination. The claimant is required to identify a comparator. The comparator that he identified was Mr Lufkin. Section 23 of the Equality Act 2010 requires a comparator to have identical circumstances and characteristics other than that of the protected characteristic. In the opinion of the Tribunal Mr Lufkin was not an appropriate comparator. Mr Lufkin did not live close by in Manchester. More importantly he was living in Surrey and the distance between the home address of the claimant and the home address of Mr Lufkin was not therefore the same. Furthermore, it was recognised and agreed between the respondent company and Mr Lufkin that Mr Lufkin was working on his own projects in addition to the work for the respondent. That was not the case with the claimant. The claimant was employed full-time to work for the respondent. These were significant differences and on that basis the comparator identified by the claimant was rejected by the Tribunal as being an appropriate comparator for the purposes of a claim of direct discrimination. For this reason as well the claim was dismissed.

46. There were other reasons why Mr Lufkin was not an appropriate comparator. He was not, at the time of the comparisons which were being made by the claimant, a paid employee of the respondent company, whereas the claimant was. The ability, therefore, of the respondent company to control the actions of Mr Lufkin by comparison to the actions of the claimant was very different. This again was a significant difference between the circumstances of the two people concerned.

47. The Tribunal then considered the claim at B. The claimant alleged that he had made a request for a written contract of employment in August 2017. The Tribunal has already in these Reasons expressed its findings of fact, which are that it does not accept that the claimant made any request for a written statement until late December 2017. Again the burden of proof was on the claimant. He had to substantiate, on the balance of probabilities, that he had made this request and then that it had been refused on the grounds of age. The Tribunal is satisfied that no such request was made. The claimant therefore failed to meet the burden of proof.

48. The Tribunal was furthermore fully satisfied that Mr Burton never made any such comments relating to the age of the claimant or the fact that he did not have children and others had. There was no supporting documentation which the claimant could refer to. The Tribunal has already referred to the alleged request which was made by the claimant. He made no reference whatsoever to having made previous requests, or any reference to them having been refused on the grounds of age. In that email the claimant made absolutely no reference to these alleged comments on the part of Mr Burton. Furthermore, Mr Burton did not repeat any of these allegations, although of course it may have been surprising if he had put them into writing. Nevertheless the written evidence available demonstrated to the satisfaction of the Tribunal that the only request which was made was in December 2017 and that even at that stage the claimant made no reference to having made repeated earlier requests or that these had allegedly been rejected on the grounds set out at page 56. The Tribunal therefore rejected these claims on the basis that firstly they were not true, and secondly that the claimant had in any event, even on his own version of events, failed to satisfy the relevant and necessary burden of proof to substantiate that the age of the claimant was at any time a relevant factor. The claim was dismissed.

49. The Tribunal then went on to consider the claim at paragraph D. In respect of the claims at D and E and F the claimant alleged that these comments had been made during the last three months of 2017, and no submission was made by the respondent to suggest that these claims were out of time. The claimant was unable to identify any specific dates in any event. The Tribunal accepted the claims as therefore having been presented in time.

50. The Tribunal makes identical findings of fact in connection with both the allegations at D and E. Again the claimant had the burden of proof. Mr Burton was adamant that the claimant had never made any such comments. The Tribunal repeats its findings in connection with the evidence of Mr Burton and the unsatisfactory evidence of the claimant. The claimant had never at any stage made any complaint about these comments, and there was not a single email in which he had alleged any impropriety on the part of Mr Burton during any part of his employment relationship which lasted well over a year. Despite the claimant now alleging that he had been significantly disturbed by these comments to the point that he was raising them as acts of discrimination, the Tribunal equally noted that the claimant had made no prior

reference to these allegations. He was not alleging that he had even raised them verbally by way of objection or comment to Mr Burton, and there was certainly no evidence or even suggestion by the claimant that he had evidence in writing, including in any emails.

51. The Tribunal also noted that the claimant made no reference to either of these comments in his witness statement. The Tribunal made allowances for the fact that the claimant was unrepresented, but nevertheless the Tribunal observed the claimant as being someone who was well prepared to present and argue his point of view, including prepared and extensive questioning of Mr Burton. The claimant therefore had not actually led any evidence about these allegations other than including them on page 56. The claimant suggested to the Tribunal that he did not understand that he needed to do that and that all he needed to do was to set out these allegations in broad terms in order to comply with the order of Employment Judge Ross. Nevertheless the Tribunal could only deal with the evidence that it was actually presented with. The claimant did not provide any context whatsoever in connection with either of these allegations. He was told that he would have the opportunity to do that. He did not take that opportunity. He did not explain what went before or what went on after either of these allegations in order to put them into any form of context. Without context, taken alone, the Tribunal would have been unable to conclude that either of these comments at D and E were comments which were made because of the protected characteristic of age. There was a variety of reasons as to why comments of that nature may have been made. The Tribunal was not satisfied that the claimant had proved, on the balance of probabilities, that these comments had been made, or that they had been made on the grounds of the protected characteristic of age.

52. The Tribunal turned finally to the allegation at paragraph F. This was a claim which the Tribunal registered as a claim of harassment on the grounds of race. It was denied very strongly by Mr Burton. Mr Burton indicated that they had never employed anyone who was “brown”. Mr Benson confirmed that. Mr Benson confirmed that the manufacturers of the product which is at the heart of the business of the respondent company were in Poland. The claimant indicated that this remark had been made about people in India that the company employed to translate some of its documents. However Mr Burton, when challenged, immediately said to the Tribunal very confidently that the two people that he employed were a lady in France and a lady in Germany. On that basis he was very clear in indicating that they employed no men to do translations and that both of the people they did employ were white women. The claimant did not seek to challenge that evidence when it was given to Mr Burton when he was being cross examined by the claimant. Again there was a complete contradiction of evidence between the claimant and the respondent. Repeating its observations about the evidence of the relevant witnesses the Tribunal found that the claimant had not satisfied the burden of proof to show that this comment had been made. The claim was therefore dismissed on that basis.

53. A complaint of harassment under section 26 of the Equality Act 2010 would require the claimant not only to prove that the comment had been made but also that it had created for him an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant brought and presented no evidence at all to the Tribunal to indicate what effect this comment had had upon him, or more importantly that it had had the effect on him which is required by the legislation. In the absence of any such evidence the Tribunal would therefore have been unable to find in favour of

the claimant because he had not produced evidence to substantiate an essential part of the definition under section 23 of the Equality Act 2010.

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Employment Judge Whittaker

_____10th December 2018_____

Date

REASONS SENT TO THE PARTIES ON

14 December 2018

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FOR THE TRIBUNAL OFFICE

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