EMPLOYMENT TRIBUNALS

Claimant: Miss Carol Smith

Respondent: Amalgamated Euro Products UK Ltd

Heard at: London South (Croydon)

On: 22-25 October 2018 & in chambers on 26 October & 11 December 2018

Before: Employment Judge Tsamados
Ms C Bonner
Mrs M Foster-Norman

Representation
Claimant: Mr Leong, Solicitor
Respondent: Mr M Mirzaee, Director

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1) The Claimant was unlawfully dismissed on grounds of disability and unfairly dismissed;

2) The Claimant's other complaints of sex and disability discrimination and harassment were presented outside the relevant time limits and so the Tribunal has no jurisdiction to hear them.

3) The Claimant is entitled to damages for breach of contract in respect of the agreement to increase her salary by £4,000, the amount of which is to be determined.

REASONS

Claims and Issues

1. By a Claim Form presented to the Employment Tribunal on 20 August 2017, the Claimant, Miss Carol Smith, brought complaints of disability and sex discrimination, unfair dismissal, and entitlement to outstanding holiday pay and notice pay, against her ex-employer, the Respondent, Amalgamated Euro Products Ltd. The Respondent entered a Response in which it denied the claim in its entirety.

2. By way of background, the Claimant in fact presented two Claim Forms to the Tribunal. The first of these was presented on 20 August 2017 and was rejected by Employment Judge ("EJ") Freer on 25 August 2017 on the ground that the Claimant's Acas Early Conciliation certificate named Amalgamated Euro Products Ltd UK Ltd as the prospective Respondent, whereas the Claim Form named the Respondent as Mr Mike Mirzaee, a director of the named limited company. Following that rejection, the Claimant submitted the second Claim Form in identical terms to the first but naming the limited company as Respondent. That Claim Form was accepted by the Tribunal and in due course the Respondent presented its Response. However, the second Claim Form was submitted outside the requisite time limits whereas the rejected first Claim Form was submitted in time.

3. A Preliminary Hearing took place on 1 March 2018 in front of EJ Andrews to reconsider the rejection of the first Claim. After hearing submissions, E J Andrews decided to overturn the rejection decision and to accept that the Claim was presented on 20 August 2017. On this basis, she recorded that the Respondent accepted that the non-discrimination claims are all in time, but depending on the dates of the alleged acts of discrimination, it may be that some parts of those claims are out of time. If so, she directed that this is an issue that shall be addressed at the full hearing. A copy of this decision is at pages 31 and 32 of the bundle.

4. EJ Andrews went onto set out a series of Case Management Orders in which she identified the claims and issues and made orders for preparation of the case for full hearing. These are set out at pages 32-37 of the bundle. The claims and issues are as follows:

    4.1 Unfair Dismissal: the respondent accepts that the Claimant was dismissed and says the reason was redundancy. The Claimant says that redundancy was not the real reason for the dismissal and was in any event substantively (as it was a sham) and procedurally (as there was no individual consultation and an unfair selection pool) unfair. At our hearing, the parties indicated that the Respondent accepted that the dismissal was procedurally unfair;

    4.2 Disability: the Claimant's alleged disability is Hepatitis C. The Respondent does not admit that Claimant is disabled;

    4.3 Direct disability discrimination: the alleged less favourable treatment was the Claimant's dismissal. The Claimant will rely on a hypothetical comparator, namely a person of equivalent seniority without Hepatitis C;

4.4 Breach of duty to make reasonable adjustments: the PCP relied upon by the Claimant is a requirement that she worked full-time. The adjustment sought was being allowed to work part-time – either 3 or 4 days per week. The alleged substantial disadvantage was an adverse impact on her health;

4.5 Harassment related to disability: the unwanted conduct was comments made by Mr Mirzaee;

4.6 Direct sex discrimination: the alleged less favourable treatment was preferential treatment namely better career development and sales leads by Mr Mirzaee of male colleagues;

4.7 Harassment related to sex: the unwanted conduct was comments made by Mr Mirzaee;

4.8 Money claims: holiday pay and unpaid wages pursuant to an agreement in November 2016 between the Claimant and Mr Mirzaee to increase the Claimant salary to £30,000 per annum. At our hearing, the parties indicated that they had settled the holiday pay complaint.

Preliminary matters

5. The full hearing was listed for five days. On the morning of the first day, it was apparent by 10 am that one of the Tribunal members was not in attendance and upon enquiry was unable to attend for the entire five day hearing. The Tribunal office then undertook an urgent search for a replacement member although given the short notice this appeared unlikely to succeed.

6. I brought in the parties and explained the position to them. I expressed my concern that it might not be possible to find a replacement member for either part or all of the five days and that the hearing might have to be postponed. I advised the parties that further five day hearing slots were now being listed for October 2019 onwards. I sought their agreement to proceed with the hearing in front of a two person panel.

7. Mr Mirzaee had already indicated through my clerk that he intended seeking a postponement of the hearing in any event and so not surprisingly was not agreeable to proceeding with a two person Tribunal, although the Claimant was.

8. Fortunately, the Tribunal office was able to find a replacement member and allowing time for that member to arrive and prepare, the hearing commenced at 12.55 pm on the first day.

Respondent's postponement request

9. Mr Mirzaee then made his request for the hearing to be postponed and provided the Tribunal with a letter dated 21 October 2018 which set out the reasons why.

10. He had previously made an application for postponement on 11 October 2018 on the basis that the Respondent's solicitors ceased to act on 8 October 2018, he had not been able to find alternative legal representation and was unable to represent the Respondent himself due to heavy stress, lack of expertise and because the Claimant was legally represented. This request was refused by Regional Employment Judge Hildebrand on the basis that Mr Mirzaee had not provided reasons for the solicitors ceasing to act or proof of his ill-health.
11. In support of his renewed application, Mr Mirzaee explained that the solicitors were funded by an insurance policy and the insurers would not fund them further. The solicitors offered to continue directly, but the Respondent could not afford to pay them. Mr Mirzaee approached a firm of HR advisers, Citation, who were more affordable and willing to act but they needed time to consider the documentation. He said that he could represent the Respondent himself, but his conscience would not allow him to do so because the jobs of 13 people were at risk and so the Respondent should be allowed to legally defend itself. As to his health position, he explained that this was work-related stress, given the long hours he works and financial concerns. He said that he could not move his neck without difficulty and by the afternoon might not be able to move it at all. I asked him if he had medical evidence in support but he referred to the evidence already provided to the Tribunal with his previous request. He said that this indicated he had been taken to hospital by ambulance in August 2018. He had his heart and blood pressure checked twice but the hospital could not find anything wrong. However, the hospital told him it was due to stress, to take it easy, to go home and to take care of himself. Similarly, his doctor told him that it was probably stress.

12. Mr Mirzaee also expressed concern that the case was not sufficiently ready for hearing in that the bundles and witness statements had been belatedly exchanged and the Claimant's witness statement raised more allegations than identified by the Claimant in her further particulars (which the Claimant has provided in a "Scott Schedule" and which is in the bundle). I asked him to identify those further matters which he did as arising at paragraphs 4, 19, 22, 33, 37, 60, 61 and 62.

13. In reply, Mr Leong for the Claimant explained that they were ready to exchange witness statements on 12 October 2018 but the Respondent had delayed. He submitted that the second application for postponement was the same as the first one, ie that Mr Mirzaee does not have lawyers and on the medical grounds as before. The medical evidence is from August 2018 and there is nothing to support that he is unfit as of October 2018. A postponement could result in a hearing not being relisted for a further year. The Claimant was taking time off work this week. Whilst he appreciated that Mr Mirzaee is stressed, the Claimant is stressed as well.

14. The Tribunal then adjourned to consider the Respondent's request and on recommencement I gave our decision as follows:

    14.1 The Respondent's application is refused. The application has not raised anything more than in the previous application;

14.2 Whilst the Respondent does not have legal representation anymore, the bundle has been agreed and witness statements have been exchanged albeit belatedly. The issues were identified and the Case Management Orders set in March 2018. There is no requirement to be legally represented at these hearings and the Employment Tribunal is empowered to ensure that the parties are on an equal footing if one party is unrepresented;

14.3 Mr Mirzaee states that he suffers from stress and neck pain but has not produced any medical evidence in support beyond the discharge statement dated 22 August 2018. This does not give a medical diagnosis or state that he is unfit to attend Employment Tribunal proceedings;

14.4 If he has physical effects from stress or neck pain then the tribunal can modify its proceedings as far as possible to assist, for example by taking additional breaks;

14.5 The prejudice to the Claimant if the hearing were to be postponed would far outweigh the prejudice to the Respondent in continuing, given that it is unlikely that a new hearing date could be found before October 2019 by which time we would be 2½ years away from the date of the Claimant 's dismissal. We are concerned that to have this case unheard for a further 12 months would be likely to exacerbate the stress that Mr Mirzaee already describes.

15. I explained the Tribunal procedure, order of proceedings, the standards and burdens of proof applying to each complaint and set about time-tabling the course of the hearing. We then adjourned until the second day to allow reading time.

Evidence

16. We heard evidence from the Claimant and on behalf of the Respondent from Mr Mike Mirzaee and Mr Ashley Clements-Smith by way of written statements and in oral testimony. The Respondent also provided a written statement from Ms Marian Bula but she was not present to give evidence. I explained that this would affect the weight if any that the tribunal gave to the contents of her witness statement.

17. We were provided copies of an agreed bundle of documents. This was divided into two sections. The first consisted of pages 1-126 and I refer to as "B1" where necessary. The second section consisted of additional pages for insertion into the main bundle (but not so inserted), which I refer to as "B2" where necessary. During the course of the hearing, the Respondent provided some pages taken from Companies House's website regarding the Respondent company and another company called Foundation Brands Ltd, which I refer to as "R1" where necessary. In addition, the Respondent provided a small bundle containing copies of Mr Clements-Smith's written statement of employment particulars and CV, and Mr Mirzaee's notes taken

at Mr Clements-Smith's employment recruitment interview, which I refer to as "R2" where necessary.

18. During the course of the hearing I also undertook online research of Companies House's website with the parties' knowledge and provided them with copies taken of documents from that website. These related to the Respondent company, Foundation Brands Ltd, another company called EPI Commercial Group Ltd and Mr Mirzaee's company directorships.

19. The Claimant provided a copy of her Schedule of Loss on the last day of evidence.

20. At the end of the evidence we heard submissions from both representatives.

Findings of Fact

21. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided to us and we have borne it all in mind.

22. The Claimant was employed by the Respondent, initially as an Office Manager, from 10 April 2013. In November 2016, she was promoted to the position of New Business Development Manager. Her employment ended on 6 April 2017.

23. Whilst we were told in both the Claim Form and the Response that the Respondent is a manufacturer of cosmetics and skin and hair products, it would more correct to describe it as a wholesale distributor of such products. Indeed Companies House records use the standard industrial classification code of "Wholesale of perfume and cosmetics" to describe the Respondent company. Further, we note from various e-mails in the bundle that a number of products are listed, namely Reseed, Figurite, Lola Make Up by Perse, Cinere and Cinerex (for example at B1 87).

24. The Respondent is a small business and at the time did not have an HR function or support. We understand that now it has employed an HR support company called Citation and they have put in place more sophisticated policies and procedures (although we have had no sight of them).

25. We were referred to the Claimant's contract of employment dated 28 June 2013 which is at B1 50-52. This is more correctly a Written Statement of Employment Particulars (pursuant to section 1 of the Employment Rights Act 1996) which was issued to the Claimant by the Respondent near to the start of her employment. It defines her job title as Office Manager and sets out her duties. Whilst it records her start date as 29 April 2013, both parties indicated that the Claimant commenced employment on 10 April 2013. The document also contains basic disciplinary and grievance procedures. The Response refers to separate disciplinary, capability and grievances procedures. However, we were not referred to these or provided with copies of them. The

document also contains a basic sick pay policy limited to payment of Statutory Sick Pay ("SSP").

26. The material terms of the Claimant's employment are as follows. She was employed to work from 9.15 am to 6.15 pm Monday to Friday with an hour for lunch (40 hours per week). She was originally paid £25,000 pa which was increased to £26,000. At the time of her dismissal she was receiving a monthly salary of £2,166.67 gross, £1737.51 net (wage slips at B1 77-80). We will deal with an alleged agreement between the parties to increase her salary by a further £5,000 later on in this Judgment.

27. The Respondent's Operations Manager is Mr Mike Mirzaee who is also a director of the Respondent company. Whilst the majority shareholder is a Canadian company called Amalgamated Products Canada Corporation (holding 75% or more of the shares), the "owners" of the Respondent company, as the Claimant and Mr Mirzaee refer to them, are Mrs Debaji and Mr Gorgi who are mother and son (although Mr Mirzaee said in evidence that Mrs Debaji was his "boss" and Mr Gorgi was "the sole owner"). Mrs Debaji and Mr Gorgi live in Iran and visit the Respondent's office once or twice a year. They speak limited English.

28. At the start of the hearing Mr Mirzaee gave an opening statement in which he set out his background, education and qualifications. We note that he is from Iran, he left there in 1981 and English is not his first language. He has a Master's Degree from the UK in Marketing. Our observation of Mr Mirzaee is that he is very competent and eloquent in spoken English and that he read easily from the documents in the bundle. He has experience of working in the UK and Canada in a number of employments and in running his own businesses.

29. We also note that he is a director of Foundation Brands Ltd which is a company that was taken over so as to distribute the Lola brand on behalf of the Respondent. We further note that the sole shareholder of Foundation Brands Ltd is a company called EPI Commercial Group Ltd of which Mr Mirzaee is one director and he has held a majority shareholding in that company since 25 January 2017. The other director is Mrs Debaji.

30. For the majority of the time that the Claimant was employed by the Respondent it was based in premises in Fulham. This consisted of a small open plan office (about half the size of the Tribunal hearing room) with a kitchen and toilet off it. The Claimant was in that office and at the relevant times worked with Mr Clements-Smith, Ms Karolina Garlicka and Ms Louise Conner. Mr Mirzaee had a separate office. There was also a warehouse at which three more staff were employed, although we were not told whether it was in the same building or elsewhere.

31. The Respondent moved to new premises in February 2017. This consists of a larger open plan office (slightly larger than the size of the Tribunal hearing room but a triangular shape) with desks set at different angles. There are several glass-sectioned rooms off the open plan area, one of which is the former accountant's room and one much smaller. Mr Mirzaee again had a separate room. The warehouse is within the same building.

32. The staff employed during the relevant times were as follows: Mr Mirzaee, Operations Manager; Mrs Louise Conner, the Marks &Spencer Account Manager for Lola; Mr Mohammed Kirmani, Mr Tony Valeria and Mrs Carol Ensico, who all worked in the warehouse; Mr Ashley Clements-Smith, Digital Communications and Social Media/Web Hosting/Graphic Designer; Mrs Parvaneh Abuiye, the part-time Accountant; Mrs Karolina Garlicka, Field Sales/Trainer for Reseed and Cinere; and Mrs Estrella Corral, Lola by Perse Brand Manager, NPD Development/ Trainer and Procurement. The Respondent therefore employed 4 men and 6 women.

33. Mr Mirzaee's evidence was that at the time of her dismissal, the Claimant was solely responsible for the Figurite brand as a business development project but she also assisted with some content writing and other duties as laid out in her contract. Mr Mirzaee's further evidence was that he was in charge of Reseed and Cincere and that Ms Coral was in charge of Lola. He also said that the Claimant was responsible for other brands as well as Figurite. When pressed he said that the Claimant was 70% responsible for Figurite but also dealt with Reseed, Cinere and Lola. We found his testimony inconsistent and at odds with paragraphs 12 and 3 of the Response (B1 25-26).

34. Mr Clements-Smith gave evidence that the Claimant worked on a number of different brands including Lola, but by the end of her employment she was working solely on Figurite and refused to work on anything else. Mr Clements-Smith gave further evidence that when Ms Conner left, she gave him her list of sales leads for Lola (retailers), from which he kept the two he already had some connection with and gave the rest to the Claimant (approximately 10).

35. The Claimant's evidence was Figurite was not the main part of her duties and that her job was to find sales leads for all of the brands marketed by the Respondent, promoting and raising brand awareness and copy writing. She referred us to a number of e-mails in which she had been seeking sales leads for Lola during February and March 2017 (B2 68a to 88a and 66a).

36. On balance of probability we accept that the Claimant was not working solely on the Figurite brand at the time of her dismissal.

37. The Claimant was diagnosed with Hepatitis C in 2000. We refer to her disability impact statement at B1 3-39 and an extract from her medical notes at B1 40. In her written evidence, the Claimant stated that she no longer has Hepatitis C, following successful treatment. In evidence, Mr Mirzaee accepted on behalf of the Respondent that the Claimant was a disabled person for the purpose of parts of the disability discrimination and harassment claims relating to disability, although its knowledge of this disability at the relevant times was denied. We find that the Claimant was a disabled person at the relevant times. In her impact statement she sets out the symptoms of her Hepatitis C, including pain, insomnia, fatigue and depression. We will deal with the Respondent's knowledge of the Claimant's disability later on in our Judgment.

38. The Claimant rarely took sick days off work because of her condition, but during March to July 2016 she took time off work to attend regular hospital appointments. At B1 67-75 there is evidence of her appointments on 11th and 14th March, 5th and 6th April, 4th, 6th and 31st May, 20th June and 13th July 2016. These appointment letters were provided to Mr Mirzaee by the Claimant at the time, but she redacted the details of the nature of the appointments and the clinics attended, so that the Respondent would not have known from these the nature of the appointments.

39. In her Claim Form, the Claimant stated that whilst she did not use the words *"Hepatitis C"* to the Respondent, she told Mr Mirzaee that she had a chronic illness that had caused liver damage and that her health was at risk of serious further deterioration. In her witness statement, the Claimant stated that that she told Mr Mirzaee that she had a chronic liver condition that can cause liver sclerosis and/or liver cancer. In oral evidence she stated that she had told Mr Mirzaee this on a number of occasions. We do not find any material difference in her evidence so as to cause us concern.

40. The Respondent, through Mr Mirzaee, denied that the Claimant had said anything more to him than she was tired, particularly at the time that she requested to work from home (a matter dealt with later on in our Judgment).

41. When she was cross examined as to why she had not provided a GP letter to the Respondent setting out her medical condition, the Claimant said that there is a certain stigma around Hepatitis C and people think that you will not turn up for work, or you are going to be ill and also fear that they may catch the disease. She stated that she had told Mr Mirzaee on one occasion, when she was very ill, that she feared she was going to die and on another occasion that she was exhausted and *"hanging on by a thread"*. She gave oral evidence that she had said to him, when she was taking time off for the hospital appointments, that if she was the type of person who was *"throwing a sickie"* she would have started doing this from the beginning of her employment and he would have seen it. She further told him that she had never taken time off before then and did so (now) because she needed to go to hospital.

42. Mr Mirzaee denied that these conversations took place and that there was any stigma attached to Hepatitis C and that his mother had it.

43. The Tribunal is aware from its own experience that there is a stigma attaching to Hepatitis C, namely that the condition is thought to be connected to HIV or AIDS and/or is highly contagious. The Tribunal also accepts that there would be reluctance by the Claimant to be explicit to her employer as to the exact nature of her condition.

44. Mr Mirzaee's evidence was that he was aware that the Claimant was attending a large number of hospital appointments but he did not know what they were for. When he had asked the Claimant what was wrong she did not respond explicitly but said she was dealing with it. When I asked Mr Mirzaee whether a reasonable employer might believe that a person attending so many hospital appointments over a short space of time, having previously had an excellent attendance record, might have a serious health condition,

he responded that having asked her about her health condition and not told the reason why, he respected her privacy. Whilst he accepted that she told him that she said she was tired, he said in oral evidence that this could have been for a number of reasons, that we all get tired and, in effect, this did not alert him to the existence any serious health condition. We note that in the Response, the Respondent admits that the Claimant told Mr Mirzaee that she was undergoing hospital treatment for a condition, but did not specify what the condition was.

45. Mr Clements-Smith gave evidence that in mid-2016 he recalled having a conversation with Mr Mirzaee. This was during the period that the Claimant was taking a lot of time off work. He said that did not know why and during a meeting, in passing, he asked Mr Mirzaee why. He further stated that Mr Mirzaee simply responded that he honestly did not know. Mr Clements-Smith also stated that in a subsequent conversation with the Claimant he told her that she should let Mr Mirzaee know what was happening (ie why she was taking time off work). In oral evidence he stated that he also said to her, that as her employer, she needs to let Mr Mirzaee know the position. He further stated that the Claimant had told him that she was tired and that was all. Whilst we accept his evidence, of course there is no reason why the Claimant would tell him anything as to her health condition and indeed he accepted that there was no reason for her to tell him.

46. Weighing up the evidence we find that there is a straight conflict of evidence between the Claimant and Mr Mirzaee and that Mr Clements-Smith simply adds that Mr Mirzaee told him he did not know what was wrong with the Claimant and that he was aware that she had complained of tiredness at work. Given our concerns as to Mr Mirzaee's credibility (as set out below) and our view that the Claimant was a credible witness (also set out below), on balance of probability we accept the Claimant's evidence.

47. We then considered whether the Respondent ought reasonably to have known that the Claimant had a disability from the Claimant telling Mr Mirzaee that she had a chronic liver condition that could get much worse, that she suffered from exhaustion and tiredness and later on in her employment had requested to work from home/part-time work. We took into account that the Respondent had made reasonable enquires as to the specific condition and that for good reasons the Claimant had declined to tell Mr Mirzaee.

48. Indeed, paragraph 6.19 of the Equality & Human Rights Commission Employment Statutory Code of Practice states that an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially. Further, paragraph 6.20 states that there is nothing legally preventing a disabled person keeping a disability confidential from an employer, but doing so is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not

be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

49. However, we find that the Respondent ought reasonably to have known from the information provided that the Claimant had a disability and, certainly at the point she requested homeworking/part-time working (dealt with below), to have enquired further. We therefore find that the Respondent had constructive knowledge of a disability that was chronic, long-lasting and debilitative, with the prospect of becoming worse and even terminal, that the Claimant required a large amount of time off to attend hospital appointments and that she wanted to work less hours because of her exhaustion/tiredness. The Respondent, through Mr Mirzaee, ought reasonably to have known that a chronic liver condition would cause exhaustion/tiredness.

50. The Claimant has set out the various incidents that she relies upon as sex and disability discrimination and harassment within the Scott Schedule at B1 46-47, some of which it is alleged occurred on specific occasions and some of which it is alleged occurred throughout her employment. We thought it best to deal with these chronologically one by one and we set the evidence below and our conclusions further below (the references are to the box numbers in the Scott Schedule):

Direct Sex Discrimination

Box 14

51. The Claimant alleges that after Mr Clements-Smith commenced employment (in October 2014) on numerous occasions Mr Mirzaee shouted at female employees in the general office and this continued throughout her employment. She gives two specific incidents by way of example.

52. The first is that on one occasion, the date which she could not recall, she opened the window because the office was very stuffy and hot, and the ambient noise from outside masked some of the sounds from within the office. She then heard Mr Mirzaee shouting from within his office but could not make out what he was saying. She went to his office and opened the door and he shouted *"I am calling you"*.

53. Mr Mirzaee denied shouting as alleged or at all. He accepted that he raised his voice on occasions to both male and female staff because they work in a busy sales environment and sometimes the Claimant and the other employees talk over him so he raises his voice to be heard.

54. The second example was in early January 2017, when the Claimant returned to work after the New Year bank holiday, in which Mr Mirzaee told her that he was ending her arrangement to work from home one day a week. When she questioned his decision, he shouted at her *"don't question me when I tell you something"*.

55. Mr Clements-Smith gave evidence that Mr Mirzaee never shouted at anyone and in oral evidence he said that Mr Mirzaee was a *"really calm guy"*. Mr Clements-Smith worked 3 days in the office.

Box 9A

56. This relates to an incident which occurred primarily between the Claimant and Mr Clements-Smith. The Claimant alleges that it happened shortly after Mr Clements-Smith commenced employment, which was in October 2014.

57. Mr Clements-Smith was in a meeting with Mr Mirzaee, in the latter's office. This meeting lasted some time. Mr Clements-Smith had left his personal mobile phone on his own desk in the open plan office. Whilst he was in the meeting, his phone rang repeatedly and it was disturbing the Claimant and other members of staff who were in the open plan office from working. So the Claimant put his phone in his desk drawer without looking at the screen.

58. Mr Clements-Smith and Mr Mirzaee said in evidence that it was common knowledge that anyone could come into Mr Mirzaee's office at any time, the implication being that if the phone was repeatedly ringing, the Claimant or someone else could have brought it into Mr Clements-Smith.

59. When the meeting ended and Mr Clements-Smith came out of Mr Mirzaee's office, the Claimant told him that his phone had been ringing and she put it in his desk drawer. Mr Clements-Smith then became very agitated and swore at the Claimant using the words *"for fuck's sake Carol"* and "*why didn't you tell me?"* The Claimant responded to Mr Clements-Smith that it was not her job to answer his phone.

60. Mr Clements-Smith had reacted in this manner because it was his wife ringing him and there were nine missed calls showing on the phone. He explained to the Tribunal that his wife rarely calls him at work and that at that time their baby son was very ill with heart problems. He therefore feared the worst. The Claimant was unaware of this at that time.

61. He continued to swear at the Claimant who told him on several occasions not to talk to her like that.

62. Mr Mirzaee was in the kitchen area of the open plan room. He intervened and his evidence was that he told them both repeatedly to stop it. Mr Clements-Smith's evidence was that Mr Mirzaee could see he was getting upset and told the Claimant to *"leave it".* The Claimant's evidence was that Mr Mirzaee did nothing and did not hear what had happened. She went outside and sat on the stairs because she found the incident threatening.

63. Mr Clements-Smith said he broke down and told the other members of staff about his son and his concerns as to the nature of the phone calls.

64. After phoning his wife, Mr Clements-Smith then went to the Claimant and apologised to her for his behaviour. The Claimant subsequently found out the position regarding his son. Whilst the Claimant said in oral evidence that later on Mr Clements-Smith told her it was not his wife phoning but an alarm,

this was never put to Mr Clements-Smith, who by this time had finished evidence and left the Tribunal building. We therefore make no finding on this point. The Claimant did not swear at Mr Clements-Smith and he accepted this in evidence. Mr Clements-Smith readily admitted in evidence that he was very upset at the time and *"lost it"*.

65. The Claimant stated in her witness statement that following the incident, Mr Mirzaee required her to admit she was partly in the wrong or she would be given a warning. On this basis she reluctantly said she was in the wrong by telling Mr Clements-Smith not to speak to her in the manner that she did. In the Scott Schedule she states that Mr Mirzaee told her that if she did not accept she was in the wrong, he would have to *"write me up*" or similar words, which she took to mean he would discipline her. Mr Mirzaee denied saying this. He said that the Claimant came to him the day after the incident and said that although Mr Clements-Smith had apologised, his behaviour was wrong. Mr Mirzaee said that he told the Claimant that both parties exacerbated the position and to let it go. He accepted that whilst he did not say them, the words attributed to him by the Claimant would refer to some sort of disciplinary warning. Mr Clements-Smith's oral evidence was that the Claimant never apologised to him, although he added that she did not need to. No disciplinary action was taken against Mr Clements-Smith for his behaviour.

Box 10

66. The Claimant relies on events in June 2015 in which she alleges that Mr Mirzaee compelled her and Marian Bula to work an additional half hour each day with no explanation of why and with no extra pay. She points to Mr Clements-Smith as her comparator who was not required to work an additional half hour each day.

67. Mr Mirzaee's evidence is that from 1st June 2015 he asked the Claimant and Marian to work an extra 30 minutes at the end of each day so that they could catch up on their work. He said that the Claimant often stated that she did not have enough time to finish her tasks. He further stated that this was not to do with her sex and he also stayed late each night. He explained that Mr Clements-Smith had an hour and half commute home and often left at 5 pm and that he also worked at home on Saturdays to catch up on his work.

68. The Claimant and Ms Bula sent an email to Mr Mirzaee dated 4th June 2015 (at B2 94a) expressing their unhappiness with the proposal and with his refusal to hold a meeting with them to discuss the matter. The email states that Mr Mirzaee told them that the reason he was making the change was that they were not getting their work done on time. They complained that Mr Clements-Smith was exempt from this arrangement and that Mr Mirzaee had said that was because he did his work on time. They offered an alternative proposal as to hours.

69. Mr Mirzaee said in his witness statement that he subsequently let the issue go and the Claimant and Marian did not actually work the additional half hour. When asked why he did not deal with the matter as a grievance he said in

oral evidence that he did not need to because he did go any further with the proposal.

70. The Claimant's position is that she and Ms Bula did work the extra half hour for 6 months. Mr Mirzaee pointed us to records contained within the bundle which he referred to as "DOBs", which he said set out what each employee has done at work on a daily basis and the time on which it was sent to him, ie the time that they finished work each day. He relied on these to show that the Claimant never worked the extra half hour. We were referred to the DOBs at B1 123-126. However, these documents were not for the period June to December 2015 (when the Claimant stated she worked the extra half hour) and so did not assist us. It appeared that Mr Mirzaee had included the wrong DOBs by mistake. He did state that he had the correct DOBs at his office and would bring them to the Tribunal the following day. However, he did not do so. Mr Clements-Smith said in oral evidence that whilst the Claimant and Ms Bula did work the extra half hour each day it was not for long. However, he could not recall how long for.

Box 11

71. The Claimant alleges that at the Christmas party in 2015, Mr Mirzaee bought alcohol for male staff members and that female staff members were told that the company would not purchase alcohol because the "owners" are Muslim. Mr Mirzaee's evidence was that whilst it was true that the Respondent did not purchase alcohol for staff, he had only bought drinks for Mr Clements-Smith and another staff member called Adriano because they were buying rounds of drinks for each other all evening. Mr Clements-Smith confirmed this in his written evidence and it was not challenged.

Box 13

72. In January 2017, Ms Conner's employment was terminated by the Respondent as a result of it losing the Marks & Spencer account for Lola, for which she was Account Manager. The Claimant alleges that on dismissal, Ms Conner's sales leads were distributed to Mr Clements-Smith by Mr Mirzaee and not to her, the reason being because he was a man. In consequence, she further alleges that she was deprived the commissions and opportunities for recognition and advancement that these leads could have occasioned.

73. Mr Mirzaee's evidence in his witness statement was that prior to leaving, he was aware that Ms Conner passed some of her contacts to Mr Clements-Smith but this was not his decision and he left it to her. His further evidence was that the Claimant got some of Ms Conner's sales leads but she did not manage them adequately or generate any business for the Respondent.

74. Mr Clements-Smith's evidence in his witness statement was that Mr Mirzaee had nothing to do with the distribution of Ms Conner's sales leads and the Claimant knows this. He also stated that at the time Ms Conner left, they were working together and so naturally she handed her list of contacts to him. He further stated that he took two contacts from the list and offered the rest, around ten retailers, to the Claimant, as he did not have time to work through

them all. In addition he stated that the Claimant had plenty of chances to gain commission as they all did, but she just was not able to generate the sales. We were referred to email correspondence between Ms Conner and Mr Clements-Smith at B2 46a & b dated 13 January 2017. In particular, one from Ms Conner to Mr Clements-Smith in which she states:

"Hi Ashley, sales leads attached as requested, all have been updated with recent communications. Let me know if you need anything else."

Box 12

75. The Claimant's allegation arises from a meeting with Mr Mirzaee in his office on 7 February 2017.

76. In her witness statement she stated that on 7 February 2017, Mr Mirzaee called her into his office and asked her if she was happy working. She asked him why and he repeated the question several times. She said she was frustrated and demotivated because she always seemed to be overlooked and treated differently from other employees. He said it was as if she didn't want to be there (at work). She also said she did not like the way he spoke to her and that she felt he was unfair towards her and treated other employees more favourably. She told him that when she joined the company she was very enthusiastic, but little by little lost the drive she once had because he wasn't fair. He then said fine *"you can go now, I know what to do"*.

77. She further stated in her witness statement that she felt uncomfortable and took these words to mean that Mr Mirzaee planned to get rid of her. She asked him what he meant and he said she would see. He said he was reviewing everyone's jobs, so now he knows what to do. She replied *"you called me and asked me whether I am happy or not and when I give you an honest answer you say this. It sounds like you're threatening my job"*. At this point, Mr Mirzaee said *"I want someone to be in here"* and called Mr Clements-Smith to be his witness. The Claimant said that she objected to this, not understanding why he wanted a witness. She said to him that she would prefer Ms Abuiye to be present if she had to call a witness and so he called her into his office too. He said that Mr Clements-Smith was on his side and Ms Abuiye was on her side.

78. She further stated that Mr Mirzaee told them that that she had said that he was threatening her. The Claimant was shocked because this is not what she said at all. She denied this and Mr Mirzaee repeated what had been said by them in what she thought was a confidential meeting. She said to him *"why you discussing this in front of my colleagues like this, it is embarrassing and there is no need for them to be here"*. She said it was a prime example of how he treated her differently.

79. Mr Mirzaee then asked the two witnesses if they felt he treated the claimant differently and directed the question to Mr Clements-Smith. She interrupted and said "*why are you asking him that, what you think he is going to say, especially as I think he is the prime example of you showing favouritism"*.

80. The Claimant further stated that Mr Mirzaee kept going over the things that were said in the meeting. She was close to tears and felt completely humiliated and outraged that he felt the need to bring all these things up in front of her colleagues and was trying to make out that she was a liar.

81. Mr Mirzaee said in his witness statement that he did have a meeting with the Claimant on 7 February 2017, but he cannot remember the topic of discussion. He stated that the Claimant suddenly accused him of threatening her and so he stopped the meeting and asked Mr Clement-Smith and Ms Abuiye to come into the room as witnesses given this accusation. He alleged that the Claimant said she did not want Mr Clement-Smith to be her witness and chose Ms Abuiye instead. So Mr Mirzaee said to her *"let's have them both present"*. He further stated that he cannot recall whether he used the words that Mr Clements Smith was *"on my side"* and Ms Abuiye could be on the Claimant's side. He added that if he did so this had nothing to do with the claimant sex. He asserted that both witnesses were neutral observers to the conversation and that was why they had been called into the meeting. He alleged that the Claimant raised a serious allegation that he had threatened her and he wanted the two individuals to witness the remaining part of the meeting.

82. Mr Clements-Smith deals with this incident at paragraph 15 of his witness statement. In cross examination, he stated that Mr Mirzaee had asked him to bear witness for him and for Ms Abuiye to bear witness for the Claimant or words to that effect. He added that he did not really know what the matter was about, but he could see that the Claimant and Mr Mirzaee were clearly agitated. He further stated that the Claimant said to Mr Mirzaee words to the effect *"you are embarrassing me"* because she thought the two of them had been called in to embarrass her. Mr Mirzaee responded that this not his intention. Mr Clements-Smith stated that the Claimant did not look embarrassed but looked *"pissed off".* He was not aware that such a practice of calling in witnesses had happened before.

Box 15

83. The Claimant alleges during staff meetings throughout her employment, Mr Mirzaee consistently ignored ideas from female members of staff and shut them out of the decision-making process. When she came up with an idea it would be dismissed by Mr Mirzaee, but when Mr Clements-Smith repeated the idea, in the same meeting, it would be accepted and he would be commended.

84. The Claimant deals with this in slightly more detail in paragraph 33 of her witness statement but this focuses on one particular meeting where she raised an idea and it was ignored, but when Mr Clements-Smith repeated the similar idea moments later Mr Mirzaee said it was a great idea.

85. Mr Clements-Smith deals with it at paragraph 16 of his witness statement and states that it is untrue.

86. Mr Mirzaee deals with this at paragraphs 26 and 27 of his witness statement and also denied the allegation. In oral evidence he said there were weekly

meetings, there was no agenda and no minutes were taken and that it was simply untrue that contributions by female members of staff were ignored. It was a round table and there was no chair. Everyone present was able to say what they felt, they discussed pros and cons and outcomes and that most of the matters that the Claimant wanted were taken on board.

Sexual Harassment

Box 5

87. The Claimant alleges that in September 2016, Mr Mirzaee referred to a female colleague as *"pussycat".* Mr Mirzaee's witness statement evidence is that he was referring to a woman called Malos, who worked for the graphic department in Iran. He stated that Malos means pussycat in Persian (Farsi) and that she did not mind him using this name for her. We note that the allegation was denied in the Response.

88. Whilst Mr Mirzaee accepted using the word to refer to the female colleague, his explanation is that it was not meant in an offensive manner but was purely as that person's pet name.

89. The Claimant asserts that this name has sexual connotations, given that in the United Kingdom a slang word for a vagina is *"pussy"*. Mr Mirzaee gave oral evidence that he was unaware of that meaning of the word *"pussy"* and that given the Claimant's explanation as to what it meant it is not a word he would use again.

Box 7

90. The Claimant alleges that in or around September 2015, when directed to find a field sales person, she asked Mr Mirzaee about the job description and he replied words to the effect that *"it doesn't matter as long as she has long legs"*. Witnesses to this remark were Mr Clements-Smith and possibly Ms Bula. This incident was only raised for the first time in Scott Schedule. There is no evidence that the respondent recruited for a sales person in September 2015. Mr Mirzaee did not recall making such a remark or that there was such a recruitment in his witness statement although he said in oral evidence that it did not happen. We note that he did not raise the evidence at paragraph 14 of his witness statement with the Claimant, although we take the view that this is of less consequence given that he was unrepresented by the time of the hearing. Mr Clements-Smith did not give any evidence on the matter.

Box 6

91. The Claimant alleges that in 2016 she asked Mr Mirzaee if there was a screwdriver in the office and he replied with words to the effect, was she *"ready to screw"*. This allegation is not raised in the Claimant's witness statement and only arises in her Scott Schedule. Mr Mirzaee states that he does not recall this incident at paragraph 15 of his witness statement but adds that if he had made such a remark it would have been an attempt to be humorous and not to cause offence. It was not raised in oral evidence.

92. Whilst the Claimant alleged in evidence that she had conversations with Mr Clements-Smith about sexual comments that he had made, this was not put to him, apart from one in March 2017 which was raised for the first time in cross examination and which he denied.

Box 9

93. The Claimant alleges that on an unknown date Mr Mirzaee made the comment *"only Ashley and Tony work hard"* to Ms Abuiye. She asserts that it was not a coincidence that he singled out only male employees as hard workers; he perceived the male employees as better employees because they are men, and this comment was the expression of that belief.

94. This is one comment made on an unknown date. In her witness statement at paragraph 31 she relies on this as direct sex discrimination. In her Claim Form it is referred to as harassment and in the Scott Schedule it is referred to as harassment. Mr Mirzaee at paragraph 24 of his witness statement stated that he has not made such comment. Mr Clements-Smith does not refer to in his witness statement.

Box 8

95. The Claimant alleges that in or around September 2016 following the start of Ms Bula's maternity leave, Mr Mirzaee said on several occasions that he did not want to employ any more women in case they got pregnant and they (presumably the Respondent) found the financial cost imposed by employing pregnant members of staff to be irritating. The Claimant has only raised this allegation in her Scott Schedule and not her Claim Form. Consequently it was not addressed in the Respondent's Response. Mr Mirzaee dealt with it in paragraph 23 of his witness statement and denied saying this.

Box 4

96. The Claimant alleges that throughout her employment, Mr Mirzaee referred to women as *"bitches"* or *"that bitch".* In particular, she alleges that he referred to two women (whom she names) in this manner. On one occasion she alleges that he asked her to call the two women about a work issue by stating *"can you call the bitches for me"*. She further alleges that on many occasions when the two women came up during conversations or meetings he referred to the two women as *"the bitches".*

97. In her Claim Form, and her witness statement at paragraph 29, the Claimant stated that Mr Mirzaee subjected her and other female staff to these comments.

98. Mr Mirzaee said in oral evidence that these allegations are totally false. However, in his witness statement he stated that he does not recall making such remarks (at paragraph 13) and in the Response the allegation is denied (B1 27 at paragraph 27). He refers to an e-mail that the Claimant's sent to him on 2nd April 2015 and at B1 81. In this e-mail the Claimant says:

"I've finally spoke to that Bitch in Italy. She said they could possibly fit you in but she would need to check the date with her boss and come back to me."

99. In his response to her e-mail also at B1 81, Mr Mirzaee says:

"Thanks keep me updated.

Thank you kindly."

100. At paragraph 52 of her witness statement, the Claimant accepted that it was wrong of her to refer to another woman as a *"bitch"* but there was a distinction between calling women in general *"bitches"* and her as a woman specifically calling a specific woman *"that bitch"*.

101. Mr Clements-Smith said in evidence that he says never heard Mr Mirzaee use the word *"bitch"* and that the Claimant herself rarely swears.

Disability

Disability Harassment

Box 1

102. The Claimant alleges that in May or June 2016, Mr Mirzaee asked her during a meeting in his office if she had *"sorted out"* her *"health situation"* yet, otherwise he would find someone else to do her job. This allegation is raised at paragraph 28 of her Claim Form at B1 15. At paragraph 37 of its Response, the Respondent denies allegation (at B1 28).

103. At paragraph 43 of her witness statement, the Claimant sets out further detail of her allegation. That at the time she was attending hospital appointments, Mr Mirzaee would make comments to Mr Clements-Smith that he thought she had another job and was trying it out or was going to job interviews. She further alleged that Mr Mirzaee was discussing her health issues and that his actions made feel degraded. She then sets out the remarks relied upon in her Scott schedule as raised in her Claim Form.

104. Mr Mirzaee denied the allegation as raised in the Scott Schedule at paragraphs 34 and 43 of his witness statement. His evidence is that he asked the Claimant if she was okay as she kept him in the dark about what was wrong. She told him everything was fine. That was the extent to which they discussed her health.

105. In cross examination, Mr Mirzaee denied her allegations, he repeated that he had meeting with the Claimant and he did ask about her health but did not say what is attributed to him. We have already made finding as to the extent to which there was a discussion as to the Claimant's health or reasons for attending with Mr Clements-Smith.

Box 2

106. The Claimant alleges that in July to August 2016 Mr Clements-Smith told her that Mr Mirzaee had told him that he believes she was going to job interviews. This is set out at paragraph 43 of her witness statement and at paragraph 27 of her Claim Form (at B1 15).

107. The Respondent denied the allegation at paragraphs 36 and 37 of its Response (at B1 28). Mr Mirzaee denied the allegation at paragraphs 40 and 41 of his witness statement. He stated that he did not discuss the Claimant's health condition with anyone, but he did tell Mr Clements-Smith that the Claimant was taking time off for hospital appointments. In cross examination he stated that everyone in the office knew that the Claimant was taking time off.

108. Mr Clements-Smith denied her allegation at paragraph 7 of his witness statement and stated that that he knew nothing about the Claimant's medical condition. He further stated that he had a very brief conversation with Mr Mirzaee in which he asked him why the Claimant was taking so much time off and Mr Mirzaee said he did not know. He further stated that the Claimant never told him why she was taking time off, but he did say to her she should let Mr Mirzaee, as her employer, know what was going on and that in other employments you were expected to provide something (as proof) as to why you needed time off. He added that the Claimant did say she was tired, but that was all. The first he knew of her ill-health was when he read her witness statement.

Reasonable adjustments

109. The Claimant's case is that she asked Mr Mirzaee if she could work part time or part-time at home. It took him nearly two months to speak to the bosses in Iran. He then told her that they would not allow it and the best he could offer her was to work one day a week at home. She accepted this because it was better than nothing. She says that later on he instructed her to return to working five days a week in the office. This is at paragraph 41 of her witness statement.

110. In her further particulars at B1 44 paragraph 9, the Claimant identifies that she made the request in or about November 2016. However, in oral evidence she said that it was in June or July 2016 and that she asked on more than one occasion. She also stated that her travel to and from work was about 40 minutes each way and she wanted to work part-time working at home so that she could rest.

111. The policy practice or criterion ("PCP") she relies upon is the Respondent's requirement that she had to attend work physically. This flows from the cited reasonable adjustment relied upon as being allowed to work either part-time or to work from home for some part of the week. However, the PCP was identified at the case management hearing as the requirement to work full-time and the reasonable adjustment being allowed to work part-time – either 3 or 4 days a week (at B1 33). The alleged substantial disadvantage was an adverse impact on her health.

112. In his witness statement, Mr Mirzaee stated that around September 2016, the Claimant mentioned that she was feeling tired during the week and that she would work better from home one day a week on Fridays. He said she did not request working from home 3 to 4 days a week as alleged. He further stated that he agreed and purchased a laptop to assist her in working from home. He said that this was not done is a reasonable adjustment at the time, but he thought it related to her work/life as opposed to tiredness related to a disability. He said that he would have to review the situation in January 2017. This was due to the fact that the Respondent was moving to new premises and needed to review everyone's work responsibilities and some might leave because he missed salary payments on a number of occasions.

113. He further stated that in January 2017 he reviewed the arrangement and informed the Claimant he needed her to start working in the office again. He explained the rationale as follows: there were three key-holders, the Claimant, Mr Clements-Smith and himself; he was going to be away a lot trying to establish sales overseas; Mr Clements-Smith had a long way to commute and could be late at times and therefore there was chance the office would not open on time; the Claimant was the only person who knew all aspects of business and he needed her to be present to deal with them in the office; if she had continued to work at home one day a week, at times there would have been no one in the office to take telephone calls. He further stated that the Claimant was unhappy with this and questioned why other people work from home and she could not. He said that Mr Clements-Smith was the only person who worked from home which he had stipulated at the beginning of his employment in his contract due to childcare and his son's medical condition.

114. Mr Clements-Smith confirmed in evidence that he originally worked part-time 4 days per week. He said that he agreed this with Mr Mirzaee when he commenced his employment. Whilst contractual, it was a verbal agreement. He explained that he was used to working on his own and working late at home and so it later became the case that he would work one day at home on Fridays. He said that he had a two hour commute and it became accepted that because of his train times he would come to arrive at 9.10-9.15 (although his contract said 9 am – to 5.30 pm). We were referred to his written terms of employment at R2.

115. In oral evidence, the Claimant said that the arrangement started but first she wanted two Fridays to herself and so she took those as holiday and then the arrangement commenced and she worked about 2-3 Fridays at home. She accepted that Mr Mirzaee told her that the arrangement would be reviewed in January 2017. However, when they came back to work after the Christmas/New Year break she states that he simply said no more working from home and did not provide a reason. She attempted to discuss the matter but he said no. A few days later she made a further attempt to discuss it and Mr Mirzaee said *"I need you here"* and shouted at her *"when I tell you something you should not question me"* and she replied *"don't talk to me like that"*. Mr Mirzaee denied this.

<u>Direct disability discrimination and unfair dismissal</u>

The events leading to the Claimant's dismissal

116. In about July 2016, Marks & Spencer terminated its contract with the Respondent for the supply of the Lola brand. This was a huge blow for the Respondent because Marks & Spencer was the only high street retailer stocking the Lola brand.

117. From August 2016 onwards the Respondent started to face worsening financial difficulties. Mr Mirzaee said in oral testimony that by this stage he was concerned as to what the Company could do and that somehow it had to bring in sales. The Response stated that the Respondent had failed to sign new retainers with other clients such as on Barrett, Debenhams, House of Fraser and Boots. Mr Mirzaee further stated in testimony that the Company owners had started to say that they were not prepared to inject any further money into the Company and that it had to make its own way.

118. Mr Mirzaee referred to us to the Respondent's accounts which are at B1 88-102 from which he said it was clear that the Respondent had been losing money from 2013 onwards. He said that it was therefore imperative to start cutting costs to make the Company profitable in the hope of breaking even in 2018/19.

119. The Respondent's abbreviated accounts at B1 88-90 are for the year ending 31 March 2015. They show a loss of £441,829 in 2015 and a loss of £291,497 in 2014. The abbreviated accounts at B1 91-93 are for the year ending 31 March 2016. They show a loss of £655,372. The unaudited financial statements for 31 March 2017 at B1 94-102 show a loss of £538,004. These accounts were not challenged by the Claimant's solicitor beyond an assertion that they showed a general position. On the face of it they show that the Respondent Company was operating at an increasing loss year on year.

120. As a result of the worsening financial position, Mr Mirzaee said that the Respondent made a number of staff redundant. Mr Kirmani, one of the warehouse staff was made redundant at Christmas 2016 due to the result fall in the warehouse workload. We note that the Claimant asserted that Mr Kirmani was dismissed to sickness however there is no evidence to support this. Mrs Conner was made redundant on 11 January 2017, given that she was the M&S Account Manager. We note from the bundle, the exchange of emails between Mr Mirzaee and Mrs Conner in this regard at B1 116-120.

121. By December 2016, as the situation had not improved, Mr Mirzaee alleged that he held a meeting with the Claimant during which he advised her that the business was struggling financially and that her role may be made redundant in the coming months. He said in evidence that he felt terrible telling the Claimant this and informed her that if this did happen, she would be welcome to apply for a Field Sales Manager role (which he clarified in later evidence was with Recede and Cinere) or an Office Manager role and in all likelihood she would be offered one or other of these positions. He further alleged that the Claimant replied that she was not interested in these roles. She said she was not interested in performing sales and returning to an Office Manager role would be a demotion. Mr Mirzaee explained his witness statement that the field sales job was a way to open small pharmacy doors, which in turn

would bring in business and support the field sales role and that the office management position would have helped open up his time so that he could do sales job himself.

122. The Claimant accepted in evidence that Mr Mirzaee had mentioned in passing in the past that there could be a possibility of redundancy, but she was assured that her job was safe. However, she denied that there had been a meeting at which Mr Mirzaee offered her the chance to apply for Field Sales or Office Manager roles as he claimed.

123. The Claimant relies on the meeting on 7 February 2017 as we have set out above in support of her contention that the dismissal is both discriminatory on grounds of disability and unfair.

124. In March 2017, Mr Mirzaee alleged that he undertook a review of which particular brands were operating at a loss. It became clear that sales figures for the Figurite brand were no longer a profitable source of income. He therefore decided to reduce the Respondent's output of the Figurite brand. He did consider stopping the brand completely but at that time the Respondent still had one customer (John Bell & Croyden) which it had an agreement with to continue to stock the brand. He stated that this brought in approximately £200 a month in sales. As a result, he stated that the Respondent identified that the Claimant's role as Brand Manager of the Figurite brand could potentially be redundant.

125. On 31 March 2017, Mr Mirzaee sent an email to all staff advising that he could not pay the full wages for March due to non-payment by some of the Respondent's customers (B2 48a). The Claimant stated that Mr Mirzaee said that he would pay £700 and the rest would follow.

126. The Claimant alleged in her witness statement that she told Mr Mirzaee that this would place her in a difficult financial position and that she would incur bank charges if her direct debits did not go through. She stated that Mr Mirzaee said that she could resign now if she wanted, he would pay what she was owed. She responded saying that she did not understand why he would say such a thing. She further stated that he repeated several times that she he could leave and that he would sell his car in order to pay her. She told him that she could not afford her fares to travel to work if he did not pay her then she would work from home until she was paid in full. She felt his comments were an attempt to get her to resign.

127. The Claimant further alleged that on 3 April 2017 she text Mr Mirzaee at 8:45 am to remind him that she would be working from home for the reasons that she explained on 31 March 2017. We were not shown a copy of this text. She stated that he replied saying that she should check her bank account (for payment of the outstanding wages) and so he expected her to be in work on time. She said that she checked her account, the money had been paid, and so she made her way to work although it was not possible for her to arrive in time by then, as well Mr Mirzaee knew. The Claimant said that she cannot understand how Mr Mirzaee had mysteriously got the money to pay her and her colleagues. Further, given his comments about her resigning she felt that the financial issue was orchestrated to get her to leave.

128. None of this was put to Mr Mirzaee in evidence and whilst it is documented in the email that the Respondent faced financial difficulties in meeting its staff's salaries, we make no further findings on this matter.

129. On 6 April 2017, Mr Mirzaee held a meeting with the Claimant. The Response describes this as a meeting at which the Respondent discussed a business reorganisation. In his witness statement, Mr Mirzaee stated that he explained the impact of the downfall in sales of the Figurite brand. As the Claimant was the only person assigned the brand, he told her that unfortunately she had to be the one to be made redundant. He said to her that he only had to give her two weeks' notice but he would pay her until the end of the month. He also stated that he told her that she had the company laptop and so she still had four weeks to get something concrete (in work terms) for the Company. He said that at the meeting the Claimant was very emotional and so was he. At our hearing Mr Mirzaee became very emotional and said to the Claimant directly that he could not do anything further.

130. The Claimant alleged in her witness statement that Mr Mirzaee told her that her that he had to let her go due to financial reasons, but did not characterise it as a redundancy. She further alleged that there was no decrease in business or change in the organisation structure could warrant the deletion of her role. Furthermore, she alleged that shortly after she was dismissed the Respondent advertised for a new Account Manager position which covered very similar duties her own.

131. One of the reasons Mr Mirzaee stated for dismissing her was that the Respondent was discontinuing the Figurite brand. However, the Claimant said that he knew that this was untrue and the brand continues to this day. She believes that it was unfair to make her redundant. She was not consulted. There were no selection criteria and she believes it was a sham redundancy.

132. Mr Mirzaee wrote to the claimant by email dated 10 April 2017 confirming its decision. This letter is at B1 55. The contents are as follows:

"Dear Carol,

I hope you are doing well. As per our meeting on the 6th Thursday April 2017, I am confirming following points;

We will be discontinuing the Figurite Brand as stands

- *As you are aware of our financial position the company can no longer support your position as Account manager*
- *You will be paid for the month of April 2017 in full*
- *You will be paid any holidays due from 2016*
- *You will be paid any commission is due for Hitan and Wowcher*
- *You will be paid the difference in your salary for the last three months as account manager*

- *As promised if in the meantime any of the projects you comes to fruition and they can support your wages I will gladly take you back as account manager*

I would like to thank you for your services in the last few years and wish you luck in your future endeavors (sic). I will gladly give any references if needed for further employment.

Please let me know if you have any further concerns or queries.

I am in tomorrow will be available if you like to come in and pick up your personal items. Thereafter I will be back on the 28th April and you can come in then.

In the meantime I might be in touch to ask any work related questions.

Thank you.

Kind Regards"

133. We note that there is also shorter version of this email in the form of a letter from Mr Mirzaee to the Claimant at B2 17a.

134. In cross examination, Mr Mirzaee was asked what he meant by stating in the email letter that the claimant would be paid the difference in her salary for the last three months as account manager.

135. His response was that it was the difference between the promised salary of £30,000 per if she was successful in obtaining business and the £26,000 per annum that she was paid for a period of three months in the sum of £1000. This has not been paid to the claimant, but Mr Mirzaee accepted that he would pay it. However, he would not accept that the Respondent was in breach of contract by not paying it. He appeared to be making a concession to pay the claimant £1000 in three monthly instalments. On this basis it was not possible to record that the claim had been settled between the parties.

136. Also during cross examination, Mr Mirzaee was asked to explain the last bullet point of the email letter. He responded that if she was successful in obtaining business for the respondent example with Holland and Barrett he would take her back regardless of when.

137. We understand that the Claimant was provided with a redundancy statement setting out monies due to her.

138. The Claimant stated in evidence that she believed that others should have been in the pool for selection. In oral evidence she suggested Ms Garlika, who dealt with sales. Mr Mirzaee stated in oral evidence that Ms Garlika dealt with field sales, primarily at John Bell & Croyden (a retail chemists) where she went twice a week to sell products and in addition she holds events and is qualified to do hair and skin analysis. The Claimant accepted in evidence that she was not qualified to do this.

139. The Claimant also asserted that she could have been slotted into an account manager role or the Respondent could have considered making the field sales person (presumably Ms Garlika) redundant. She was not offered any suitable alternative employment.

140. She also alleged that the Respondent employed a brand manager a few days after she left her employment. She further alleged that the Respondent advertised for an account manager. These are positions that she said she could have undertaken.

141. The Claimant also stated that she was also offered no right of appeal against dismissal or the right of accompaniment to the meeting in the first place.

142. Mr Mirzaee stated in his witness statement that he did consider swapping the Claimant with another employee and offering her one of the two other roles. These are referred to in the Response as the New Business Development roles. However he decided that this would not be appropriate for the business. He said that the remaining two New Business Development Managers forged excellent relationships with their clients and there was a high risk that a change of brand manager damaging to client relationships and business prospects.

143. Mr Mirzaee denied in his witness statement that he advertised for another Account Manager role as the Claimant alleged.

144. Mr Mirzaee stated in his witness statement that the only post that the Respondent has advertised for was for a Field Sales and Account Manager. One of the requirements was the need to have established connections in the cosmetics retail industry in the UK and beyond. He further stated that the Claimant had already said she did not want to undertake field sales. Further he said that she did not have any established relationships with the cosmetics retail industry. Mr Mirzaee said in oral evidence that this was not the same or even similar to the Claimant's job and referred us to the advertisement for the new position at B2 52a for "Field Sales Rep (High-End Cosmetics Company)" which states:

"We are looking for someone with extensive sales experience working in the cosmetics industry. You will have a proven track record in producing and placing products in spas, beauty salons and retail outlets. You will have established good connections in high-end retail industry."

145. We note that this position is also advertised on a website from which a page has been reproduced at B2 43a. This indicates that the position is with Foundation Brands Ltd and not the Respondent Company, that the job title is Sales and Accounts Manager – Cosmetics and the description states that it is *"An exciting Full Time Field Sales and Accounts manager position…"*

146. We further note that there is an advertisement for the position at B2 25a which sets out the requirements in some detail. In oral evidence Mr Mirzaee said that this advertisement appeared on 25 April 2017.

147. In cross examination, the Claimant suggested that she had established connections in the cosmetics retail industry but Mr Mirzaee said this was not the case and if it was then why didn't the Claimant apply for the position. The Claimant responded that Mr Mirzaee had just dismissed her and if he was genuinely interested in keeping her he would put the brought it to her attention. Mr Mirzaee replied that they were still in touch, had an amicable relationship and his email made it clear that she could come back.

148. Mr Mirzaee said in oral evidence that the Respondent was not successful in recruiting to the position.

149. The Claimant stated in oral testimony that she believed that she was dismissed by the Respondent because of her attendance at the hospital appointments, her request to work at home and because she called in sick with a migraine just prior to the meeting on 6 April 2017.

150. This was a matter that came out for the first time in her re-examination. The Claimant said in response to my questioning that she believed she called in sick on either 4 or 5 April 2017, that she text Mr Mirzaee and told him words to the effect that *"I've got a migraine I can't come in*", to which she did not get a reply. Mr Mirzaee stated in response that he did not recall this but he accepted that the Claimant probably did because she always informed him of her whereabouts.

151. The Respondent's case is that the Claimant was made redundant and it accepts that it was procedurally unfair. Mr Mirzaee said in his witness statement that he accepted that the Respondent did not follow the correct process. But he added that the Respondent is a small company employing 12 people, he conducted all HR related matters and at that time did not have dedicated HR support. He was unaware of the procedure which he should have followed. However, he said that he believed that the Claimant's dismissal was justified. He stated that this was not a sham redundancy as alleged. He had no reason to want to dismiss the Claimant other than the fact that the brand she was in charge of was no longer profitable.

152. The Respondent's position is that the Claimant was employed solely to work for the Figurite brand, the brand was no longer making any money, it was being discontinued and the Company had financial constraints.

153. Whilst in its Response, which was drafted by its then solicitors, it has pleaded "SOSR", Mr Mirzaee said in oral evidence he had no idea what this meant and that he believed that he was making the Claimant redundant.

154. On 14 July 2017, the Respondent paid the claimant the sum of £2,700 in respect of her redundancy payment. This was not disputed.

155. There was some discussion in evidence as to the Claimant's job title. Mr Mirzaee said in evidence that her job title was Brand Manager. He said that the term Accounts Manager now meant something different in the Respondent Company. He was taken to the dismissal email at B1 55 and a shorter version of it in the form of a letter at B2 17a, in which he referred to the Claimant's job title as Account Manager. He responded that this was a mistake and clarified that part of the roles of Accounts Manager and Brand Manager are the same thing.

156. The Respondent's case is that the Claimant was made redundant because her sole responsibility at the time of her dismissal was as Figurite Accounts Manager. However we have found that it was not. It therefore follows that if she was chosen on this basis her selection for redundancy was unfair.

157. The Respondent's case is that it consulted with the Claimant. Mr Mirzaee stated in his witness statement that the Claimant was warned that the Respondent was struggling financially and there was a risk that her role might be made redundant in the coming months. He stated that he felt terrible about this and told her that she could apply for positions as Field Sales Manager or Office Manager and that in all likelihood she would be offered one or other. He further stated that the Claimant replied that she was not interested in Field Sales and returning to an Office Manager role would be a demotion for her. He explained that the Field Sales job was a way to open small pharmacy doors which would in turn bring business and support the Field Sales role. The Office Manager position would have helped open up his time to do the Field Sales job himself.

158. The Claimant denied this and stated in her witness statement that Mr Mirzaee merely mentioned in passing that there was a possibility of redundancy in the past, but that her job was safe. She denied being offered alternative positions. In any event even on his evidence these were not hard and fast offers but merely an opportunity to apply at a time when he says he advised that he job was possibly at risk of redundancy.

159. We note that the Field Sales Accounts Manager position was with a separate company and not working for the respondent.

Money claims

160. The Claimant alleged that Mr Mirzaee entered into a verbal contract to pay her an increase of £4,000 from £26,000 to £30,000 per annum in November 2016. Mr Mirzaee respondent accepted that he agreed this if the Claimant proved successful in the role. However, in his email to the Claimant at B1 55 he agreed to pay her the difference in her salary for the last 3 months as an Account Manager. In oral evidence he said that this was in the sum of £1000.

Credibility

161. The Respondent was represented by solicitors certainly from the point at which the Response was drafted and submitted. Those solicitors continued to act for and represent the Respondent until 8th October 2018. In the Response (B1 17-30), the Respondent denied the Claimant's claim in its entirety, in particular no admission is made as to disability (B1 24 paragraph 2.2) and further, the Respondent denied all incidents relied upon by the Claimant as amounting to sex and disability discrimination and harassment (paragraphs 27-39).

162. In his witness statement, Mr Mirzaee stated *"I do not recall"* in respect of the Claimant's allegations of discrimination and harassment which by then had been particularised in the Scott Schedule (at paragraphs 13 and 14). Further, he admitted using the word *"pussycat"* but in effect he denied that it amounts to harassment (at paragraph 16). He could recall in respect of the allegation that he said to the Claimant *"are you ready to screw"*, but qualified his response by saying that if he said it, it would have been in an attempt to be humorous as opposed to causing offence (at paragraph 15). In respect of

the allegation that he stated that he did not want to employ any more women in case they got pregnant or that he found the cost imposed by pregnant staff to be irritating, he stated *"I did not say this to the Claimant or any other employee"* (at paragraph 23). In respect of the allegation that he made comments to the effect that only male members of staff work hard and specifically *"only Ashley and Tony work hard"* he stated *"I have not made such comments"* (at paragraph 24). He stated that he could not recall the particular incidents that the Claimant alleges at box 14 of her Scott Schedule but he denied that he constantly shouted at female employees (at paragraph 30).

163. In his oral evidence, Mr Mirzaee went further than his written evidence and stated that (save for use of the word "pussycat") none of the allegations were true. When the disparity of his written to oral evidence was pointed out to him, he initially said that the phrases *"I do not recall*" and *"it did not happen"* meant the same thing. When pressed further, he stated that English was not his first language and he had made a mistake in using the words *"I do not recall"* and what he meant to say was these incidents did not happen. On a number of occasions later on in his oral evidence he was quick to deny events rather than stating that he did not recall them and on one occasion said *"it did not happen and I don't recall"* and on another *"I don't remember because I didn't say it"*. I explained to him the significance of inconsistency of evidence in determining credibility. In the end he did say that he had made a mistake and that once the Tribunal had pointed this out to him he corrected it.

164. We were very troubled by the inconsistency between the Response, drafted at a time that the Respondent was legally represented, by his witness statement, which appears to have been drafted by the solicitors, but in any event Mr Mirzaee swore on oath that he had written it, had read through it recently and it was true to the best of his knowledge and belief, and by his oral evidence.

165. We considered whether the fact that English was not his first language was a factor. However, we heard him conduct the Respondent's defence of the case and give evidence over a 4 day hearing and our opinion was that he was very fluent and had a good grasp and understanding of English. We also took into consideration that he has a post graduate qualification which he obtained in this country and that he has been employed and conducted businesses in the UK. In addition, he has lived and worked in Canada and the UK since 1981. But we also took into account that in his witness statement he made the distinction between matters that he could not recall, one matter that whilst he could not recall it, if he had said, it would have been in jest and one matter that he categorically denied. This denotes a level of sophistication and understanding of English which is at odds with his explanation that he thought not recalling something and it not happening meant the same. As a result, on balance of probability, unless otherwise indicated we do not consider his evidence to be credible.

166. On the other hand, we found the Claimant to be a consistent throughout her evidence and to be a credible witness.

Relevant law

167. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

168. Section 13 of the Employment Rights Act 1996:

'(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…'

169. Section 15 Equality Act 2010:

'1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'

170. Section 20 Equality Act 2010:

'(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to

whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 3 (services and public functions)	*Schedule 2*
Part 4 (premises)	*Schedule 4*
Part 5 (work)	*Schedule 8*
Part 6 (education)	*Schedule 13*
Part 7 (associations)	*Schedule 15*
Each of the Parts mentioned above	*Schedule 21'*

171. Section 21 Equality Act 2010:

'1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.'

172. Section 26 of the Equality Act 2010:

'(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.'

Conclusions

Time limits

173. As indicated by EJ Andrews at the preliminary hearing, there are time limit issues as to the Claimant's discrimination and harassment complaints.

174. Section 123 governs time limits under The Equality Act 2010. It states as follows:

"(1) [Subject to section 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

…(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

175. The Claimant presented her ET1 to the Tribunal on 20 August 2017 and her employment ended on 6 April 2017. The Claimant notified Acas under the Early Conciliation scheme on 21 June 2017 and the Certificate was issued on 21 July 2017. Allowing for the extent to which the time limits are paused during Early Conciliation this would mean that the earliest that any of the discrimination complaints would be in time would have to be in relation to matters which took place on or after 22 March 2017.

176. However, an act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

177. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a

sequence of individual incidents were evidence of a *"continuing discriminatory state of affairs"*.

178. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to extend time. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. The Tribunal must weigh up the reasons for and against extending time and explain its thinking. Tribunals have been directed to consider the checklist contained with section 33 of the Limitation Act 1980, suitably modified, although a Tribunal will not make a mistake as long as it does not omit a significant factor.

179. The factors to take into account under the Limitation Act 1980 (as modified) are these:

    179.1 the length of, and reasons for, the Claimant's delay;

    179.2 the extent to which the strength of the evidence of either party might be affected by the delay;

    179.3 the Respondent's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;

    179.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;

    179.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

180. The Tribunal should also consider whether the Respondent is prejudiced by the lateness of the complaints, ie whether the Respondent was already aware of the allegations and so not caught by surprise, and whether any harm is done to the Respondent or to the chances of a fair hearing by the element of lateness.

181. Where the delay is because the Claimant first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account.

182. If the delay was because the Claimant tried to pursue the matter in correspondence before rushing to an Employment Tribunal, this should also be considered.

183. Turning to consider the complaints before us.

184. The complaint of direct disability discrimination is as to the Claimant's dismissal and so this complaint was brought in time.

185. The complaint of failure to make reasonable adjustments relates to her request to work part-time either 3 or 4 days in the office. The Respondent allowed her to work 4 days in the office and Fridays at home. This continued until it was withdrawn in early January 2017.

186. Mr Leong submits that this as a situation where the Respondent has failed to do something. Section 123 (4) states that in the absence of evidence to the contrary, a Respondent (as in this case) is to be taken to decide on a failure to do something when it does an act inconsistent with doing it, or if it does no inconsistent act, on the expiry of the period in which it might reasonably have been expected to do it. He submits that this is either early January 2017 when the arrangement was ended or 6 April 2017 when the claimant was dismissed because she has asked repeated for a discussion as to why the arrangement had been ended but one never took place. We find that the withdrawal of the arrangement was the failure to do something because it was an act inconsistent with allowing the arrangement and so this complaint is clearly out of time.

187. There are a number of complaints of direct sex discrimination set out at boxes 9A, 10, 11, 12, 13, 14 and 15 of the Scott Schedule. They range from dates in October 2014 to 7 February 2017. Whilst the Claimant does state that the allegations at box 15 occurred throughout her employment she did not provide evidence as to a specific incident which occurred on or after 22 March 2018 (the earliest date on which a complaint could be in time).

188. Mr Leong submitted that it was just and equitable to extend time to allow these complaints to be heard on the basis of the evidence that the Claimant gave as to having made previous grievances and got nowhere as well as the symptoms of disability in the impact statement.

189. Our concern was that this was not evidence from the claimant and the evidence that we did hear was not presented in this context, ie as being an impediment to bringing her complaints earlier. Further, we were not provided with any evidence to address the factors which we are directed to consider within the Limitation Act. For example, we are not aware particularly how if at all the Claimant's disability stopped her from bringing a claim sooner, how the alleged failure of the Respondent to deal with grievances prevented her from bringing a claim sooner or as to what her knowledge was as to time limits and what advice, if any, she was given. We do know that she has been represented by solicitors since the commencement of these proceedings. Whilst we acknowledge that there is the issue of the degree to which a claimant is prejudiced by being denied the opportunity to proceed with what might be meritorious complaints, we have nothing substantive to go on as to why this Claimant could not have brought her complaints within the requisite time limits.

190. The complaints of harassment both related to the protected characteristics of disability and sex are set out in boxes 1 to 4 and 6 to 9 of the Scott Schedule. They range from dates in late 2013 onwards to September 2016. Again, these are complaints that fall short of 22 March 2017. We heard no submissions as to these complaints, but we can see that Mr Leong's submissions as to extending time on a just and equitable basis would equally

apply (in the absence of anything else). Therefore we repeat our considerations as set out in the paragraph above.

191. However, we have gone on to consider and make findings on all of the complaints in as far as they might stand as relevant to the complaints of discriminatory and unfair dismissal which are in time and which we have to determine.

Discrimination

Burden of Proof

192. Under section 136 of the Equality Act 2010:

> *'…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision….'*

193. This wording whilst slightly different from that used in the previous legislation (section 54A of the Race Relations Act 1976 and section 63A of the Sex Discrimination Act 1975) is identical in terms of its meaning.

194. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

195. With regard to the previous legislation, the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258 set out guidance on the stages which an Employment Tribunal should follow. Although these guidelines were expressed in terms of a sex discrimination case, the same would apply to the other types of discrimination.

196. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

197. The full guidelines (as adapted for the Equality Act 2010) are as follows:

    196.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of

discrimination against the Claimant which is unlawful under the 2010. These are referred to below as 'such facts'.

196.2 If the Claimant does not prove such facts s/he will fail.

196.3 It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "s/he would not have fitted in".

196.4 In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

196.5 It is important to note the word 'could' in section 136(1). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

196.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

196.7 These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010.

196.8 Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

196.9 Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent.

196.10 It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act.

196.11 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC.

196.12 That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

196.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

198. We have also looked at the events in question as a whole as well as individually so as to form an overview of the situation that the Claimant faced at work during the relevant times.

199. We set out below our findings with regard to the various elements of the claim.

Disability Discrimination

200. We have already indicated that the Respondent accepts that the Claimant was a disabled person within section 6(1) and Schedule 1 of the Equality Act 2010 ("EQA").

Reasonable adjustments

201. Under sections 20 and 21 EQA, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

202. The adjustment has to be reasonable. In considering whether an employer has met duty to make reasonable adjustments, the tribunal must apply an objective test. Although we should look closely employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entitled.

203. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result. We have already indicated that the Respondent ought to have reasonably known that the Claimant was disabled and further given the nature of her disability a requirement to attend work physically on a full-time basis would have placed her at a substantial disadvantage because of her disability.

204. From our above findings we conclude that the Claimant made a request to work from home and that belatedly Mr Mirzaee allowed the Claimant to work at home one day a week on Fridays. However, this arrangement was ended after one month in early January 2017. Mr Mirzaee stated that in effect it was not practical for business reasons because he was the only key-holder in the office on Fridays. However, it is clear that he did not explore other options, such as allowing the Claimant to work at home on another day or requesting that Mr Clements-Smith attend work that day (notwithstanding his concerns about Mr Clements-Smith being late) and to work at home on another day or that someone else could be given a key. We therefore find that the Respondent failed in its duty to make reasonable adjustments but as we have indicated above this complaint was brought out of time.

Sex Discrimination

205. It is unlawful to treat a worker less favourably because of a protected characteristic under section 13 EQA. Discrimination is by reference to comparative treatment of someone not sharing the protected characteristic where there is no material difference between the circumstances relating to the worker and the comparator.

206. Turning to the various complaints of direct discrimination made by the claimant, with reference to the boxes of the Scott Schedule.

Box 14

207. Whilst we accept that behaviour can be so frequent as to be difficult to provide specific details of, the Claimant has only given one example in the general office and one example in Mr Mirzaee's office and she does not indicate whether there were any witnesses. The first example on balance of probability is one where Mr Mirzaee has shouted at the Claimant but the Claimant herself gives the explanation for this and Mr Mirzaee stated that if he shouted it was just to be heard. The second example is at odds with our observation of Mr Mirzaee's demeanour and Mr Clements-Smith's evidence.

208. So on balance of probability we find that this complaint if it were brought time is in the event not made out.

Box 9A

209. On the balance of probability we find that the incident happened as the Claimant describes and that Mr Mirzaee did not intervene appropriately. Whilst we can understand that Mr Clements-Smith was naturally very concerned and agitated, and that he did subsequently apologise to the Claimant for his behaviour, this was not an excuse for it. Mr Mirzaee took a partisan approach. He silenced the Claimant when the most that she had done was to complain that she was being sworn at, having innocently put the telephone in a drawer, because it kept ringing. He then made her apologise under pressure of disciplinary action. He took no action against Mr Clements-Smith. However, as we have indicated above this complaint was brought out of time.

Box 10

210. There is no dispute that the Claimant and Ms Bula were asked to work the extra time, that they were unhappy about it and that Mr Clements-Smith was not required to do so. However, the dispute is as to whether it was implemented or not.

211. On balance of probability given Mr Clements-Smith's evidence we find that the arrangement was implemented but are unable to determine for what period. This puts in doubt Mr Mirzaee's position that there was no grievance requiring investigation and resolution, certainly for the period that the arrangement was in place. The distinction between the way that the Claimant and Ms Bula were treated and the way that Mr Clements-Smith was treated does not appear credible and the more obvious explanation would appear to be on grounds of sex. We therefore find that this complaint would have succeeded but as we have indicated above this complaint was brought out of time.

Box 11

212. On the balance of probability we accept the Respondent's evidence and find that this does not amount to unlawful sex discrimination. The differential treatment complained of is not because of sex but because of the situation described by the Respondent which relates to the purchasing of rounds of drinks. We therefore find that this complaint is unsuccessful but in any event was brought out of time.

Box 13

213. On balance of probability, in particular on considering the email correspondence and the evidence of Mr Clements-Smith, it is clear that Mr Mirzaee had no involvement in the distribution of Ms Conner's sales leads. The complaint therefore fails but in any event was brought out of time.

Box 12

214. It appears to us that the issue of sex discrimination is not the meeting or what was said in the meeting but the calling in of two witnesses by Mr Mirzaee,

one male to bear witness for him and one female to bear witness for the Claimant, which the Claimant states was intended to embarrass and humiliate her. We can see that see that bringing others into the meeting and discussing what had just occurred would cause embarrassment and humiliation to the Claimant.

215. However, this would be the case regardless of the gender of the witnesses and so we then considered whether the Claimant's case was that it was simply the fact of calling in of a witness, initially Mr Clements-Smith and then at her behest, Ms Abuiye, that was discriminatory, given that it was not necessary and this had not happened before.

216. This was clearly an unpleasant meeting and was dealt with in an unprofessional way by Mr Mirzaee, but we struggled to see how the bringing in of witnesses in this way amounted to sex discrimination. It does appear that the need to bring witnesses into the meeting arose from Mr Mirzaee's concern that the Claimant was accusing him of threatening her, although we appreciate the Claimant more likely than not said that he was threatening her job rather than her. We therefore find that the complaint is not made out but in any event was brought out of time.

217. However, we do have concerns about the wider implications of the meeting and why Mr Mirzaee was questioning the Claimant's happiness in working for the company and the ensuing conversation which in essence indicated that the Claimant was raising concerns that she was being treated less favourably to others and cited Mr Clements-Smith as the prime example.

Box 15

218. We find that the Claimant makes a general allegation with nothing specific cited to support it other than one general example in her Scott Schedule which is then given a specific example in her witness statement. The Respondent denies the allegation and Mr Mirzaee gives specific examples in his witness statement evidence to refute the allegation. We considered whether we could draw an inference from his behaviour at the meeting on 7th February 2017. However, we did not feel even with this that there was enough to shift the burden of proof to the Respondent and so the complaint fails but in any event was brought out of time.

<u>Harassment</u>

219. Harassment is defined under section 40 EQA. A person "A" harasses another "B" if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider perception of B, the other circumstances of the case and whether it is reasonable for the conduct have that effect.

220. The Claimant has made a number of complaints of harassment related to her sex and disability. We have already made findings above and below we set

out our conclusions in relation to each by reference to the boxes in the Scott schedule.

Sex Harassment

Box 5

221. On balance of probability we find the following. The word *"pussycat"* was not said to the Claimant or about her, it was said about a work colleague. It was a nickname. The word was *"pussycat"* and not *"pussy".* This derives from a Farsi word. The word *"pussy*" can of course be offensive in certain circumstances given it is a slang word which means vagina. However, Mr Mirzaee did not say this. Whilst one might wonder why Mr Mirzaee would refer to the colleague by a pet name in front of the Claimant, it is difficult to find that it is reasonable for this word to fall within the definition of harassment given the wider circumstances. We therefore find that this complaint fails but in any event was brought out of time.

Box 7

222. Whilst we have expressed concerns about Mr Mirzaee's credibility on balance from our findings we conclude that this complaint is not made out and fails but in any event was brought out of time..

Box 6

223. We conclude as follows. Mr Mirzaee does not recall making the remark and so he could have said it. His explanation of it being an attempt to be humorous is not enough to displace the inference that the remark was meant by way of sexual innuendo. On balance it not the sort of comment that a man would make to another man given that it is usually sexual innuendo directed by a man to a woman. It is more obviously conduct having the purpose of effect defined under section 26 EQA. We bear in mind that the Claimant found the comment offensive and it is reasonable for this conduct of have that effect. We therefore find that the complaint succeeds but was brought out of time.

Box 9

224. Based on the very scant evidence provided it is not possible to make a determination that this comment was made even on balance of probability. The complaint therefore fails but in any event was brought out of time.

Box 8

225. We find as follows. Initially Mr Mirzaee employed the Claimant. The Respondent employed four women to three men at the material time of September 2016 and at present we are told that the Respondent has ten female employees with one on maternity leave. We do not know the ages of the women to know if they are/were of childbearing age. There are no witnesses to the alleged remarks. The primary facts do not support the comment being made notwithstanding our general concerns about Mr

Mirzaee's credibility as at least he is consistent as to his position with regard to this allegation. The complaint is therefore not made out and fails but in any event was brought out of time.

Box 4

226. We are faced with the position where we have an allegation which is inconsistently denied and not recalled by Mr Mirzaee. We then have the Claimant's e-mail which indicates that perhaps the use of the word was in common use between at Mr Mirzaee and the Claimant at least. But the Claimant's distinction is that she is talking about a particular woman and not women generally as alleged. Of course the use of such words in the workplace is unprofessional and offensive whether used generally or specifically.

227. We find on balance of probability that the burden of proof passes to the Respondent on the primary facts and that the Respondent's evidence is not credible particularly given his reply to the Claimant's e-mail which does not even question the Claimant's use of the word but appears to accept it in a matter of fact way as if it is a commonplace word for referring to women or a particular woman. The complaint therefore succeeds but was brought out of time.

Disability Harassment

Box 1

228. We find on balance of probability that the primary facts are not made out and the complaint fails but in any event was brought out of time.

Box 2

229. We considered what might have motivated Mr Clements-Smith's advice to the Claimant if he knew that the Claimant was attending hospital appointments? We thought that either he did not know that the Claimant was attending hospital appointments or that Mr Mirzaee had told him that he thought she was attending job interviews. We also noted that his alleged conversation with the Claimant was in July to August 2016 whereas her last appointment was 20th June 2016.

230. We considered whether the Claimant had established primary facts. We also considered whether we could draw inferences from Mr Mirzaee's evidence that he told Mr Clements-Smith that the Claimant was attending hospital appointments and the latter's evidence that he did not know of the Claimant's medical condition. This is consistent with Mr Clements-Smith with knowing that the Claimant was attending hospital appointments and his advice to her, in which he expresses concern that she should provide evidence of what she was off for which is also consistent with Mr Mirzaee saying to him that he thought she was attending job interviews. But it is equally consistent with this not being said by Mr Mirzaee. In any event this was not put to him in cross examination. On balance we thought it was too large a leap to make an adverse inference. We concluded that there was insufficient evidence to

support the Claimant's allegation and so the complaint fails but in any event was brought out of time. .

Direct Disability Discrimination and Unfair Dismissal

231. The Claimant alleges that she was dismissed because of disability and/or her dismissal was unfair.

232. We were concerned by the sequence of events which have been related to us as to the Respondent's financial difficulties and the Claimant's interactions in Mr Mirzaee both in the past and in the months prior to her dismissal on 6 April 2017.

233. The Respondent was aware that the Claimant had a disability and the ways in which impacted upon her health. She had taken some time off to attend hospital appointments. She had requested to work part-time or from home. Whilst she was accommodated, this was withdrawn without explanation at the time and she had continued to press for a discussion about the matter.

234. There was the interactions between the Claimant and Mr Mirzaee over pay in which he repeatedly told her that she could resign.

235. There was the very difficult and unpleasant meeting with Mr Mirzaee 7th February 2017 in which he questioned the Claimant's enthusiasm and desire to be at work and when she answered honestly he then said words to the effect that he now knew what to do. This certainly struck us as an odd meeting and the words amounted to a threat in the sense the Claimant attribute to them. Mr Mirzaee's actions in calling others into a private meeting in the way that he did were most unprofessional and distressing for the Claimant.

236. We then have the Claimant's absence a day or two before the meeting on 6 April 2017 because of a migraine. On balance we accept that this happened given Mr Mirzaee's evidence and his general lack of credibility when stating that he did not recall an incident happening.

237. Whilst we do not doubt that the Respondent faced financial difficulties and needed to either increase sales or reduce expenditure through dismissing staff, we are concerned by these events, the suddenness of the meeting on 6 April 2017, the lack of the use of the word redundancy by Mr Mirzaee or the Respondent at the time, the equivocal nature of the Response which refers to a reorganisation, the lack of any consultation or semblance of a redundancy process in the sense of prior warning, discussion, offering alternative employment at the time of the dismissal when Mr Mirzaee was contemplating recruitment a Field Sales & Accounts Manager, or even to mention it to the Claimant, and the lack of any right of appeal.

238. However, the most compelling factor is the Respondent's explanation that the Claimant was chosen for redundancy because she solely dealt with the Figurite Brand and the decline in revenue from that brand. This is not made out on the evidence before us and so calls into question the genuineness of the reason given for the Claimant's dismissal.

239. There was also the advertisement for the Field Sales and Accounts Manager less than 3 weeks after the Claimant's dismissal which was not brought to her attention. Whilst this may have been a position with a different company, it is one in which Mr Mirzaee is the sole director and these companies are closely connected to each other. Whilst we accept that in law the companies are not associated employers, this was not a matter raised as a bar by the Respondent and in the circumstances of the business arrangements between the two companies we cannot see why this fact alone would stop Mr Mirzaee and the Respondent at least offering the Claimant the opportunity to apply rather than having to dismiss her. The extent to which she would have been successful is more of matter for determination at the remedy hearing.

240. Taking the above into account as well as forming an overview of the events and also considering our general findings, we find that the primary facts could support a finding that the Respondent, in the absence of any other explanation, dismissed the Claimant because of her disability. In then considering the Respondent's explanation for dismissing the Claimant we do not accept that the Respondent has satisfied the burden of proof in showing us that it did not unlawfully discriminate against the Claimant on grounds of disability. In other words the Respondent has not shown that disability had nothing at all to do with her dismissal.

241. We therefore find that the Claimant's dismissal was an act of unlawful discrimination.

242. With regard to the complaint of unfair dismissal we find that the Respondent has not shown a potentially fair reason for dismissal given our finding of unlawful discrimination and so the dismissal is automatically unfair.

Damages for breach of contract

243. From our findings, we conclude that there was an agreement between the Claimant and the Respondent to pay her an increase of £4,000 per annum and that whether this was conditional or not is not reflected in the e-mail at R1 55. We are unclear how the Respondent calculated the offer to pay the Claimant £1000 or as to how the Claimant quantifies this as £4,000 rather than a pro rata amount. These matters will have to be decided at the remedy hearing.

244. However, we note the knock on effect on the Claimant's entitlement to accrued holiday pay and statutory redundancy payment.

Remedy hearing

245. We will ask the Tribunal office to liaise with the parties with a view to fixing a date for a one day remedy hearing for the first convenient date after 7 May 2019. If the parties are able to resolve this matter without the need for a remedy hearing they should let the Tribunal know straight away.

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Employment Judge Tsamados

Date 3 March 2019