



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107419/2018

**Heard in Edinburgh on 2-3 May 2019, 7-10 May 2019, 16 and 17 May 2019,
2123 May 2019, 3 June 2019, 5-6 June 2019, 5 July 2019, 8 July 2019 and 12 July
2019**

**Employment Judge Jane M Porter
Tribunal Member Ms L Brown
Tribunal Member Mr T Lithgow**

Ms K O'Donnell

**Claimant
Represented by Ms R White,
Barrister**

Times Newspapers Ltd

**Respondents
Represented by Mrs Callan,
Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal (i) to dismiss the claimant's claims of direct discrimination, harassment and victimisation; and (ii) to dismiss the claimant's claim of unfair dismissal.

Introduction

1. The claimant was employed by the respondents as a Sub Editor on 1 January 2004. The claimant's employment ended with the respondents by reason of redundancy on 12 January 2018. At the time of her redundancy the claimant's job title was Night Editor.
2. In these proceedings the claimant claims that she was unfairly dismissed. She also claims discrimination under the protected characteristic of gender reassignment.
3. The claimant's claims are resisted and there were Preliminary Hearings in the matter on 20 August 2018, 23 October 2018 and 22nd February 2019. At the PH on 20 August 2018 it was determined that the hearing in this case should be split between liability and remedy.
4. There was a hearing on liability in the matter on 2 to 3, 7, 8, 9, 10, 16, 17, 21, 22 and 23 May 2019 and 3, 4, 5 June 2019 and 8 and 12 July 2019. At the Hearing the Tribunal heard evidence from the claimant; James Martin of the Scottish Trans Alliance; Christine Burns, Trans Leader; Jane Frances Fae of Trans Media Watch; Robin Ash, former Sub Editor of the respondents; Martin Barrows, former Health Editor of the respondents; Mike Prowse, former Deputy Night Editor of the respondents; Enid Shelmardine, former Sub Editor of the respondents and Tom Wills, former Data Journalism Editor of the respondents. For the respondents evidence was heard from Simon Pearson, the Register and Obituaries Editor of the respondents; Ed Gorman, former Deputy Head of News of the respondents; Craig Tregurtha, the Managing Editor of the respondents; John Witherow, the Editor of the

respondents; Keith Blackmore, former Deputy Editor of the respondents; Lindsay MacIntosh, Deputy Home News Editor of the respondents; Jeremy Watson, former News and Deputy Editor of the respondents; Amy Graham, HR Director of Editorial and Technology with the respondents; Jeremy Griffin, Executive Editor of the respondents; Emily Hayes, Head of HR Scotland with the respondents; Magnus Llewellyn, Scottish Editor of the respondents; Elizabeth Harris, Associate Managing Editor of the respondents; Hannah Rock, Chief Night Editor of the respondents; Bob Tyrer, Executive Editor of the Sunday Times; Emma Tucker, Deputy Editor of the respondents; Magnus Linklater, former Scottish Editor of the respondents and Alan Hunter, Head of Digital with the respondents. Louise Newman, former deputy managing editor of the respondents, gave evidence by a question and answer procedure, which was agreed by all parties to avoid the necessity of giving evidence by videolink. All other witnesses gave evidence in chief by witness statements which were provided to the Tribunal in a bound volume.

5. The parties referred to productions in 6 volumes that were numbered **1** to **2281**.
6. The parties produced a Joint List of Issues. The claimant produced a Scott Schedule detailing all the claims of discrimination that she brings in these proceedings. The Scott Schedule is to be found at **82**. In their determination of this case, the Tribunal considered it appropriate to make reference to each claim of discrimination as articulated in the Scott Schedule.

7. There was a Minute of Amendment produced by the claimant on the 3rd May 2019. The Minute of Amendment included a case of direct discrimination. After hearing parties, the Minute of Amendment was allowed by oral judgment of that date.
8. The claimant produced a further Minute of Amendment on the 4th of June 2019. The Tribunal heard from parties on this Amendment on the 8th June 2019. In terms of an oral judgment of that date the amendment was refused.
9. The Tribunal met to deliberate upon the evidence on the 25th July 2019. After such deliberation the Tribunal made the undernoted essential Findings in Fact.

FINDINGS IN FACT

10. The claimant was employed by the respondents as a Sub Editor of News with effect from 1 January 2004 (**106**).
11. The claimant was in the process of transitioning when she commenced her employment with the respondents. The claimant stated in evidence that she was given very good support by the respondents whilst completing her transition. The claimant was paid full pay whilst absent from her employment with the respondents for surgery although elective surgery was not covered by the respondents' sickness policy. The Tribunal accepted the evidence of Louise Newman that the rationale for the decision to pay the claimant full pay was because the respondents considered that the decision to undergo the surgery was one which the claimant had no choice over.

12. On 23 February 2006 the claimant emailed Anne Spackman, then Comment Editor with the respondents who was an individual closely involved with the claimant's transition. The claimant then stated: *"Hi Anne I've now spoken with Ben (yesterday) and Simon (Pearson) today, both of whom were, as you predicted, entirely thoughtful, compassionate and helpful. I explained to Simon our plan for disclosure and he agrees that early afternoon (just after conference perhaps) on Tuesday 28th February would be an appropriate time to send the email as he will be in the office. It will give people a little time to (be) bored with it before I arrive at 7pm as usual. I would appreciate it if the email comes from your office topped and tailed by you as we discussed. The four week period of digestion and cogitation (if any) will therefore expire on 28th March, this also being the date upon which my name changes etc ... thanks again (835 to 836).*
13. On 28 February 2006 an email was sent by Anne Spackman to all individuals whom the claimant considered should be advised of her transition. The email stated that the claimant has a medical condition known as Gender Dysphoria, that a month from that date the claimant's name would be Katherine and her gender female and that during the "transition period" of a month she would be happy to answer any questions relevant to her gender transition and its impact. **(837 to 838)**.
14. There was evidence led by the respondents of discrimination training given to their employees, including the claimant and the witnesses before this Tribunal. The Tribunal accepted that such training had taken place but that, insofar as the protected characteristic of gender reassignment was concerned, the training only consisted of information to the effect that gender reassignment is a protected

characteristic under the Equality Act 2010. There was an LGBT committee within the respondents but no evidence was led of their activities nor indeed whether the claimant was part of that committee.

15. The claimant's evidence was that in the period 2004 to 2007 she was acting up to the role of Late Night Editor, a senior role reporting operationally to the Editor. The claimant's evidence was that she requested her Line Manager Simon Pearson for a title and additional pay to compensate her stepping up to the responsibility of her role. The claimant's evidence was that in response to this request Simon Pearson told her that she "*should be grateful for our tolerance*". The claimant could not pinpoint the date that this alleged remark was made, and in the Scott Schedule the remark is referenced as having been made between 2004 and 2007. The Tribunal believed the evidence of Simon Pearson that no such remark took place. In reaching this decision, the Tribunal accepted the evidence of Simon Pearson that as a Manager he places importance on the pastoral care of the staff. The Tribunal also noted that the claimant did not raise this issue with the management of the respondents, nor did she submit a grievance about this remark.

16. In accepting the evidence of Simon Pearson, the Tribunal had regard to an email sent by the claimant to Louise Roughton (Louise Newman) on 20 February 2009 **(1321)** which stated "*Finally Louise I wish to thank you in particular for your compassion and all that you have done to make this less painful than I ever hoped. I know that there are many other people who also did much on my behalf, and I would like to write to them. These are the people whom I know to have helped*". There followed a list of people which included Simon Pearson. Further, on 24 February 2009 **(1322)** the claimant emailed Simon Pearson among others and

stated: "As I return to work after the surgery and recovery that has been the final phase of my transition I wish to tell you of my deep gratitude to all of you who have given of your time, wisdom and compassion in helping to remove all obstacles that may have hindered me following of this path and remaining a Times journalist. Your support has made an incalculable difference to my life and to the lives of my family."

17. The Tribunal considered it unfortunate and ill advised that Simon Pearson 'dead-named' the claimant in his witness statement, which was prepared by the respondents' solicitors. The 'dead-naming' of the claimant, however, did not change the Tribunal's perception of Simon Pearson as a whole.

18. Insofar as the issue of the claimant's increase in salary in the period 2004 to 2007 was concerned, the Tribunal accepted the evidence of Simon Pearson that he was not particularly impressed by the claimant's work performance. Simon Pearson was particularly unimpressed with the claimant's performance in "conference" - being a twice daily meeting at which senior employees have the opportunity to put forward potential newspaper articles. According to Simon Pearson the claimant was a repeated poor performer at conference as her potential articles were badly researched and presented. For her part, the claimant stated that the conference was male dominated and that to be a transwoman in these circumstances was to experience sexism and a range of comments and behaviours that were very distressing. There was evidence for the claimant that there was a 'boys club' within the respondents who would speak over, patronise and bully women. The claimant also stated that Simon Pearson was not a fan of the Scottish edition of The Times

anyway and that accordingly there were real difficulties in selling Scottish stories at conference.

19. Notwithstanding the claimant's evidence on this issue, the Tribunal found support for Simon Pearson's perception of the claimant's performance at conference by the evidence of Craig Tregurtha. For these reasons the Tribunal concluded that esto the respondents failed to provide the claimant with remuneration and a title appropriate for her status in the period 2004 to 2007, such promotion and salary increase were due to the respondents' perception of the claimant's own performance at work and for no other reason. The Tribunal did not accept the evidence of the existence of a 'boys club' during the claimant's employment with the respondents. To this end the Tribunal observed that throughout the claimant's employment with the respondents there was a significant number of senior women in power, many of whom gave evidence at this Tribunal and then refuted the existence of such a 'boys club'.

20. The claimant claims that in 2007 Simon Pearson resisted her promotion to "Chief Sub Editor Scotland" and, further, resisted that she be given a pay rise. The Tribunal accepted the evidence of Simon Pearson that whilst he would not personally have put the claimant forward for promotion in 2007 he would have had regard to the views of Magnus Linklater, then the Scottish editor. The Tribunal also accepted the evidence of Simon Pearson that he must have played a part in recommending the claimant for a pay rise on appointment to the position of "Chief Sub Editor" on 1 January 2008. (844 to 848). The claimant's salary then increased to £52,000 (848).

21. At this time the claimant was commuting to Scotland to see her children. In early May 2008 she requested to work a 9 day fortnight to assist her in her commute and was granted this request. The claimant did not sustain any wage loss in working a 9 day fortnight. In a Note dated 13/05/08 of **849** Louise Newman records that the claimant was *“thrilled at 9 day fortnight proposal”*.
22. It is the claimant’s position that in October 2009 David Jack, the Scottish Night Editor moved to another section of the paper and she became the full time acting Night Editor of the Scottish edition of the respondents. The claimant’s position is that she was denied the title of Night Editor or any raise in salary at this time and had a considerably greater workload than her predecessor who had run the edition with a staff of 5. However, the Tribunal accepted the evidence of Simon Pearson that although staff cuts were made the claimant still had access to a Picture Editor and that overall she did not have a greater workload than her predecessor. Further the evidence of Simon Pearson (supported by Craig Tregurtha) was accepted that the claimant’s repeated poor performance at conference hindered her promotion at this time.
23. The claimant was given a good appraisal by the respondents for the period 2010 to 2011. The appraisal is to be found at **851 to 861**. In evidence Simon Pearson agreed that aspects of this appraisal could be described as “glowing”. In the appraisal Simon Pearson stated: *“Katherine O’Donnell has had an excellent year, playing an increasingly prominent role in the development and production of the Scottish edition. She is held in high esteem by Magnus Linklater, the Scotland Editor and his senior colleagues. She works long hours particularly when as is increasingly the*

case she deputises for David Jack, the Scotland Night Editor. I am grateful for all her hard work and example she sets colleagues. (853).

24. In completing the appraisal Simon Pearson articulated his concerns regarding the claimant's performance at conference and communication with colleagues. In particular, he stated: *"I do not believe she has been as successful in developing relations with the various departments in the news room. She sits at a desk on the very outer edge of the news room. I am not convinced that she works at the Home news desk, picture desk or designers as closely as she might." ... "For all the mutual appreciation she enjoys with her colleagues in Scotland, the undoubted hard work Kathy puts into the Scotland edition – she should be commended for the very long hours she works – and the efficient manner in which she brings out the paper, I believe her personal effectiveness is seriously impaired at times by her poor performance at afternoon conference where she "sells" the Scottish schedule. She is not always on top of her brief and sometimes stumbles through the schedule. I often find myself struggling to understand the stories she is trying to sell. I think she also tends to sell stories that are not worth mentioning at conference. ... She needs to work on her conference skills and develop her relationships with other departments in the news room. ... Kathy undoubtedly should be commended for all her endeavours but I believe there are areas in which her performance can be improved with benefits for herself and the paper. And while conference should not be the key indicator in which she is judged it is likely to loom large in the minds of those who make the decision on her status." (859-861)* Simon Pearson's comments were reflected in his overall rating of the claimant which, in a scale of 1 to 5 (5 being "far exceeds expectations") was 3 "achieves expectations".

25. In the claimant's appraisal, Simon Pearson quoted the comments of Magnus Linklater in stating: "*I strongly recommend that she be given the title of Scottish Night Editor to reflect the reality of a role she routinely performs.*" (861). Following on from this, Simon Pearson contacted Magnus Linklater by email on 3 August 2011. That email stated: "*I think it might be helpful if I try to explain my position over Katherine O'Donnell's future in the wake of her appraisal on Monday in an attempt to clear up any confusion. It is not within my gift to promote Katherine to Scotland Night Editor. I suspect that any such move would be decided between you, the Editor and Anoushka Healy, the Managing Editor although I would expect to be consulted ... I told Katherine on Monday that I thought it very unlikely in the present climate that any promotion would be forthcoming in the short term. It seems that no money – or at best very little – is being made available for promotions. I have a backlog, including that of my Deputy Night Editor, that stretches back nearly 18 months. I did not rule out a promotion but I made it clear that in my opinion it was not a realistic prospect at this time. I did not say at any stage during the appraisal on Monday that Katherine was not up to the job but I did say there was work to be done. I made it very clear that you were delighted with the contribution she made to the Scotland edition and that I would emphasise this in my written appraisal, but that I had a number of reservations which meant I would award her a solid grade rather than an outstanding one. Katherine's performance at conference is not merely irritating, it is a major flaw in her overall performance and is, in my opinion, one of the main reasons why stories from Scotland only rarely make the main edition. There have been many occasions when I have been simply unable to fathom out the nature of the story Katherine is selling at conference. This is the face of Scotland*"

in London. It is an important task, central to her role, and should not be underestimated.”

26. The claimant’s evidence was that in August 2011 Simon Pearson blocked Magnus Linklater’s recommendation that she be promoted to Night Editor and given a salary increase. The Tribunal accepted the evidence of Simon Pearson on the reasons why the claimant was not promoted to Night Editor at this time. These reasons were akin to those reflected in the claimant’s appraisal and Simon Pearson’s email to Magnus Linklater of 3 August 2011, namely that he did not think she was suitable for the increased responsibility of Night Editor because of her performance at conference and her inability to select and discuss appropriate stories for the Scottish edition of The Times.
27. The Tribunal accepted the evidence of Louise Newman that the claimant raised the issue of her pay with Anoushka Healy, who asked her to handle the situation as she had a friendly relationship with the claimant. The Tribunal also accepted the evidence of Louise Newman that, after discussing the matter with Simon Pearson, she decided not to give a pay rise to the claimant at this time as the claimant’s salary was correct for her position within the respondents. The Tribunal accepted the evidence of Louise Newman that her decision on the issue of the claimant’s salary was discussed with Anoushka Healy who confirmed that she was happy with that decision.
28. The claimant gave evidence that in November 2011 whilst in afternoon conference she overheard Keith Blackmore then the Deputy Editor of The Times and the Deputy Head of News Ed Gorman make a joke about trans women in India who were then

on the news as murder victims. The claimant's evidence was that the 2 men referred to such victims as making a "lifestyle choice" and that she was so deeply shocked by this that she had to leave the room and involuntary vomit. The claimant took no further action at that time in relation to those comments. The Tribunal heard evidence from both men to the effect that it would have been out of character for them to make such a comment and they would have certainly recollected the incident had the claimant left the conference upset by their remarks. The claimant's explanation for not making a complaint or raising a grievance about this comment was that she did not raise this matter with Anoushka Healey, then Group Managing Editor, as she considered Anoushka Healey to be another "isolated" woman in power. She also stated in evidence that she did not raise this issue at the time as she felt that it would put her job in danger or at the very least would be detrimental to her prospects and career.

29. In determining that on balance the remark did not take place as alleged by the claimant, the Tribunal observed that the claimant is a very articulate woman who showed considerable bravery in raising difficult and sensitive issues with the management of The Times throughout her career with them. Against that background, the Tribunal found it incredible that an incident such as this would not have been the cause of a complaint let alone a grievance to any member of the management staff at the relevant time of the incident. The claimant eventually raised the issue with Amy Graham on 16 May 2016, some 4½ years later.
30. In May 2012 the claimant approached Anoushka Healy as she was struggling to balance visiting her children in Scotland at the weekend with working in London.

The claimant had financial difficulties with travel and living costs at the time, and spoke to Anoushka Healy regarding the possibility of taking voluntary redundancy. In evidence the claimant accepted that she had no right as such to voluntary redundancy as her role was not redundant. The Tribunal accepted the evidence of Craig Tregurtha (who had recently been appointed as Executive Managing Editor, and who was effectively Anoushka Healy's Deputy) that it was his idea to offer to relocate the claimant to Scotland. He discussed this idea with Anoushka Healy as he thought this might assist the claimant if she was struggling with the commute between Edinburgh and London. The Tribunal accepted the evidence of Craig Tregurtha that the suggestion to move the claimant to Scotland was for the purpose of assisting her with her personal difficulties. In evidence, the claimant accepted that the offer of a transfer to Scotland was an action by the respondents to accommodate her needs and to retain her as an employee within the business.

31. The offer to the claimant was on the basis that the claimant would retain her London salary and would continue to work a 9 day fortnight. The terms of the offer are to be found in a letter from Anoushka Healy to the claimant dated 21 May 2012 (867). On the 26th June 2014, two years after the claimant's move to Scotland the claimant emailed Craig Tregurtha and stated: *"Dear Craig, I am reminded that it is two years since I was appointed Night Editor, Scotland, five years since I became the acting night editor and ten years since I joined the staff of the Times. The Scottish edition is, I am told, a success. Moving production to Edinburgh has been seamless and has given us a clear commercial advantage. I understand that Angus – and before him Magnus-has been pleased with my contribution to the paper. Two years ago, while still working as acting night editor, living in London and commuting to Scotland*

to look after my children, I concluded that I could no longer afford to live that way, either financially or in good health, and tendered my resignation to Anoushka Healy. I was- and remain- hugely grateful for the company's counter offer of a move to Scotland, as it offered a small relief to my finances from the stresses of constant long-distance travel.” (890-891)

32. All parties accepted in evidence that the move to Scotland required the respondents to create a role for the claimant that had not previously existed. For these reasons the relocation was subject to a six month trial period and relocation costs were not offered to the claimant **(867)**.
33. The claimant initially moved to the Glasgow office of The Times. However, in November 2012 she was subject to threats and abuse from young men whilst walking to the station to go back to Edinburgh. As a result of this, Angus MacLeod, then Scottish Editor of the respondents made arrangements for the claimant to be taken by minibus from the Glasgow office to the train station **(872)**. The claimant subsequently moved to the then new Edinburgh office of the respondents.
34. The claimant received confirmation of her job title as Night Editor on the 21 May 2013. **(876)**. Prior to this the claimant's job title had been Chief Sub Editor. The Tribunal accepted the evidence of Craig Tregurtha and Hannah Rock that in practice the claimant's main duties and responsibilities did not change following confirmation of her job title. Craig Tregurtha gave evidence that the Chief Sub Editor and Night Editor can be the same role, and that the job title was changed for the claimant simply to keep her happy as she was one of the longest serving members of staff for the Scottish edition. The Tribunal also heard evidence that after the claimant

moved to Scotland there were production changes in London; further, evidence was given by Elizabeth Harris that after John Witherow became editor of the Times in 2013 job titles in London were streamlined, leaving the job titles in the Scottish office inconsistent with everywhere else. In concluding that the claimant's job title and role was unique to the Scottish Office, the Tribunal also had regard to the evidence of Hannah Rock who stated that although there were aspects of the claimant's job that were inconsistent and went beyond the role of Chief Sub Editor, the role of Night Editor in London had considerable extra responsibility than did the claimant's role in Scotland.

35. On 22 August 2013 the claimant emailed John Witherow on the issue of coverage of a story on Chelsea Manning. The email stated: "*I note with deep appreciation that our online reporting of Manning's transition has abided by this guideline – and it makes me very proud indeed of this paper.*" (1060). In December 2013, the claimant raised issues regarding a piece published by The Times about a woman who had been gored by a stag. The claimant took issue at the fact that the piece highlighted the issue that the victim of the goring, Dr Kate Stone, is transgender. The Tribunal accepted that this was a relevant issue raised by the claimant. However, the Tribunal also accepted the evidence of Lindsay MacIntosh that the victim was open about her gender identity and that there were interviews by her on her website on the issue of her gender, and for these reasons alone Lindsay MacIntosh considered it appropriate to raise the issue of the victim's gender within the article.
36. In July 2014 the Editor of The Times in Scotland, Angus MacLeod, was undergoing chemotherapy. The claimant gave evidence that Angus MacLeod told her that he

had a meeting with Craig Tregurtha and Jeremy Griffin at which a proposal by him to appoint the claimant as acting Editor in Scotland was strenuously opposed. The claimant gave evidence that Angus MacLeod told her that at that meeting Jeremy Griffin stated that “under no circumstances” should the claimant be appointed to this role. In evidence, Jeremy Griffin denied making such a remark.

37. The evidence of Craig Tregurtha, and Jeremy Griffin was that the claimant was not appointed as acting Editor at this time as there was a better candidate for the role namely Lindsay MacIntosh, the then Scottish Political Editor. It was established in evidence that Lindsay MacIntosh had excellent political contacts which could be relied upon in the lead up to the Scottish Referendum on Independence. In evidence, the claimant herself said that Lindsay MacIntosh was an excellent political editor and stated that when she stepped into the role of deputy role of the Scottish edition of the Times she did well. For these reasons the Tribunal accepted the evidence of Jeremy Griffin that he did not make the remark reported to the claimant by Angus Macleod; and that instead, Lindsay MacIntosh was appointed as acting editor solely because she was the better candidate.
38. Further and in any event, the claimant’s recollection of Angus Macleod’s comments to her do not accord with an email from Angus MacLeod to Craig Tregurtha on 15 July 2014 (893) in which he stated (about the claimant): *“I do not think it has been “de facto” the case that she has acted as Editor over recent months – that is news to me. I also do not think anyone has ever said she is the most senior person in Scotland after me ... this may relate to her apparently telling the trainees recently that she was “Angus’s deputy” – again, news to me.”* This email was in response to an email from the claimant to Craig Tregurtha in which she expressed concern over

conversations she had had with Angus MacLeod regarding Craig Tregurtha and Jeremy Griffin's reaction that she be appointed acting Editor.

39. In deciding that Lindsay MacIntosh was appointed acting Editor in July 2014 due to the fact she was the best candidate for the job, the Tribunal also had regard to an email from Angus MacLeod to Lindsay MacIntosh of 20 September 2014 (911) in which he stated: "*Lindsay. Another day, another massive story. How lucky we have been to have had your dedication and ability to call on these past few weeks. You have developed quickly into a superb political journalist and while the going has been tough I hope you have enjoyed a story which you will remember whatever you do in the future. Thank you for your magnificent efforts on behalf of the paper. I realise now that an unknown hand must have been guiding me when I asked you to take on the burden. It is probably the best decision I have ever made. Angus*"
40. There was a meeting between the claimant and Craig Tregurtha on 30 July 2014. The meeting followed on from an email of 15 July 2014 from the claimant to Craig Tregurtha in which the claimant mentioned the new appointment of Lindsay MacIntosh as acting editor and told Craig Tregurtha that Angus Macleod had advised her that both Craig Tregurtha and Jeremy Griffin had been opposed to her appointment. The claimant then stated: "*I am very deeply disturbed to learn in these circumstances that I do not have your confidence or that of Jeremy. I have had years of excellent assessments and confidence from both the present Scottish Editor and his predecessor. There has been no hint that I was considered unsound and many editions of the paper have been edited by me without complaint or adverse comment-indeed, to the contrary.*" (893-894)

41. Unbeknowns to Craig Tregurtha, the claimant recorded this meeting. The recording of the meeting together with a transcript of the meeting is to be found at pages **895 to 904**. In the course of the meeting Craig Tregurtha referred to the claimant as Chief Sub Editor in Scotland. When the claimant corrected him by saying “*No it’s the Night Editor Scotland*”. Craig Tregurtha stated “*It’s not*”. The Tribunal accepted the evidence of Craig Tregurtha that this was a genuine mistake on his part and that indeed that (to the best of his belief) he subsequently apologised.
42. The Tribunal accepted the evidence of Craig Tregurtha that at the meeting on the 30th July 2014 he did not promise to resolve the claimant’s demotion as his understanding was that there had been no demotion as the claimant’s role did not change as a result of the appointment of Lindsay McIntosh as acting editor.
43. On 12 August 2014 the claimant emailed John Witherow, Editor of The Times regarding a proposal to publish an opinion piece on trans issues by a journalist called Carol Sarler. The claimant expressed concern regarding the publication of such a piece given the history of Carol Sarler’s journalism on trans issues (**1065**). The ensuing email exchange can be found at **1063-1067**. As a result of this exchange the article by Carol Sarler was not published in The Times. The claimant stated in evidence that she did not receive a reply directly from John Witherow to her comments on the Carol Sarler article and that from this point onwards John Witherow stopped speaking to her. The Tribunal accepted the evidence of John Witherow, however, that due to pressures of work he rarely has the opportunity to speak to any of the Scottish journalists; that he would not usually have had any contact with the claimant nor would he have had any cause to speak to her; and that nonetheless he

had respect for her views and her position as can be seen by his reaction to her suggestion that the Carol Sarler article be withdrawn.

44. The claimant made a significant error during production of the Scottish edition of The Times on 23 April 2015. Emily Hayes (then Bayne) the HR Business Partner carried out an investigation into this incident which involved the first 2 paragraphs of a headline story being omitted from the first 6,000 copies. The claimant freely admitted the error and the investigation report is to be found at **912 to 928**. As a result of this error Les Snowden provided additional support to the claimant by placing new Sub Editors in London to work on the Scottish edition.
45. There was a meeting 2 months later between the claimant, Les Snowden and Emily Bayne, following which Les Snowden emailed the claimant to summarise the meeting (email of 22 May 2015, **page 931 to 932**). In that email Les Snowden stated: *“I stressed that I appreciate your desire to get involved in and shape our coverage but went on to say that the whole role as Night Editor was to ensure the Scottish edition gets off in good order and on time. I also expect you to liaise with London regarding our production needs, ensure there is appropriate cover when you are off and manage the subs in London. We then discussed the fact that there had been 4 major errors on your watch since I joined The Times in mid January ; the rogue splash published to 7,000 Scottish readers; the wrong Alexander appearing in a stand first; the SNP being described as anti austerity in a headline; and a double Andy Murray story. I said I recognised that the workload and culture of the Scottish operation had changed, but stressed I could not accept it was “impossible to do your job without errors”. I also said that I thought the production culture in London had*

changed dramatically since you worked there. I argued that I had recognised you needed additional support, and this had resulted in an additional sub and revise support. I added that I was happy to look again at the nature of the additional support, adapting where necessary. ... I said that I need to be confident that there is the capacity to handle all of the Scottish content required to build a truly Scottish Times and to respond to late breaking news. You agreed on all of the above, and we also agreed that too many mistakes had been made between 10.30pm and the 11pm deadline. The front page will sell a paper and it must be free of errors. ... Finally I stressed that while this was not a disciplinary meeting – and I very much appreciated your contribution to the meeting – we had to establish clear expectations on both sides. And that these must be met. We cannot make so many mistakes and we must hit deadlines.” In evidence, the claimant described Les Snowden as a fine Editor whom she liked and respected.

46. Between June 2015 and around January 2016 the claimant suffered from depression. The respondents (via Emily Hayes) supported her in this time (**1325 to 1334**). In evidence the claimant accepted that she was well supported by the respondents at this time.

47. In February 2016 the claimant emailed Rebekah Brooks, CEO of News UK to raise issues regarding an opinion piece published in The Sunday Times on trans children by Jeremy Clarkson (**1078 to 1079**). Rebekah Brooks immediately took action to forward this message to a number of individuals in the employee of News UK who provided suggested responses on her behalf (**1076 to 1094**). On 8 February 2016 Rebekah Brooks replied to the claimant stating: “Dear Katherine Thank you for your

email and for taking the care and time to write to me. Newspapers and their columnists provoke debate and individuals are encouraged to express strong opinions. Of course there are occasions when deep offence is caused by one of our writers. I will pass on your complaint to the Managing Editor as this is an editorial matter. ...” (1093)

48. On 8 February 2016 Bob Tyrer, Executive Editor of The Sunday Times wrote to the claimant and stated: *“Dear Katherine Rebekah has shared your thought provoking letter with us at The Sunday Times. I am sorry that Jeremy Clarkson’s column distressed you so deeply. I think there is much to discuss when freedom of opinion clashes with the fears and sensitivities when people feel vulnerable but please allow me a couple of days to consider this matter more deeply before sending you a proper reply. Perhaps you and I can then meet to see what can be learnt for the future.”* (1088) Bob Tyrer subsequently met the claimant on Monday 16 May 2016 (1086 to 1087) and the Tribunal accepted his evidence that they then had a helpful and informative conversation. Bob Tyrer subsequently met Alana Avery from All About Trans whom he was introduced to via the claimant and had discussions with her about the activities of All About Trans.
49. Les Snowden subsequently left the employment of the respondents to work for the Sun. There was an email exchange between the claimant and John Witherow on 29 April 2016. The claimant initiated the email exchange (936 to 937) and in a lengthy email stated inter alia: *“I have been heartened by your interest in our efforts and the investment that has been made by the company over the past 16 months and which, under the guidance of Les Snowden, has yielded outstanding results in terms of advancing our readership and revenues. I understand that you, Emma and others*

will be in Scotland next week to interview candidates for the post of Editor. I have not put my name forward because I have reason to believe that to do so may be both futile and humiliating." The claimant went on to explain why she had reached that view.

50. In response, John Witherow stated: *"Thanks Katherine just so I am clear are you saying that you want to apply for the Scottish Editor's role? If so can you let me know by Tuesday afternoon. In relation to the other points you have raised, I will ask Amy Graham in HR to pick up with you directly."* The claimant responded by stating: *"Dear John many thanks. I'll wait to hear from Amy for clarity I'm saying that while the circumstances described remain unresolved I feel that I would be at an insurmountable disadvantage in applying for the Scottish Editor's role having already been rejected without explanation from the role of de facto Deputy. This would seem to make the question of application redundant. So no I will not be applying this time."* (935 to 936)

51. A meeting between the claimant and Amy Graham, HR Director took place on 16 May 2016 in London (964 to 966). In that meeting the claimant summarised her 2 key issues, being assurance that her career was not damaged, that she could continue in her role, and, further, that she felt a pay rise was long overdue. The claimant then stated that a pay review was promised by Craig Tregurtha at the claimant's meeting with him in July 2014. At the meeting with Amy Graham the claimant also raised for the first time the comment made by Ed Gorman and Keith Blackmore on transgender during conference in 2011 and the issue of the respondents being "a boys club". She also mentioned for the first time the alleged

comment made by Simon Pearson around 2007 that the claimant should be grateful for the respondents' tolerance.

52. Following the meeting with Amy Graham, a further meeting took place on 28 July 2016 at which the claimant, Craig Tregurtha and Amy Graham were present. Handwritten typed notes of this meeting are to be found at pages **979 to 1000**. The Tribunal accepted the evidence of Amy Graham that she felt the focus of this meeting was on pay. Following the meeting, Craig Tregurtha and Amy Graham gave consideration to the claimant's pay. In doing so, they observed that the claimant was already on a good salary but also considered the fact that a new Scottish Editor was about to commence and it was important that he came into a team that were content and could support him.
53. Accordingly, and as a result of those discussions, Craig Tregurtha wrote to the claimant on 16 August 2016 and advised her that her salary would increase from £59,900 to £66,549 with effect from 1 August 2016. On 18 August 2016 Amy Graham wrote to the claimant and stated: *"I am pleased to let you know that Craig has increased your salary by 10% effective August 1st. This is in addition to the company's 1% annual salary uplift. A letter confirming details will follow shortly. During our meeting you expressed to me and Craig that you felt satisfied you had been heard. Therefore I now consider the matters discussed as closed."* (**1016 to 1018**). In response to this email, the claimant emailed Amy Graham stating that this was *"welcome news"* and thanking her for her help and consideration during the process (**1017**). The claimant did not raise anything further or express that there were any issues outstanding from her meetings with Amy Graham and Craig Tregurtha.

54. Following a recruitment process, Magnus Llewelin was appointed Scottish Editor. The Tribunal accepted the evidence of Craig Tregurtha generally that had the claimant applied for the post of Scottish Editor and had she been the correct candidate he would have been proud to make her the first trans woman Senior Editor of a national newspaper.
55. On 20 July 2016 Lindsay MacIntosh (who was at that point acting Scotland Editor) emailed the Scottish team and stated: *“Magnus Llewelin will be starting as Editor on August 29th. He will spend a few days in London first before joining us in Scotland. I plan to take a few days off here and there before he starts. Jeremy Watson will fill in for me with news desk help from Ian Marland and Nick Drainey where possible. Please could you circulate this to your teams Kathy and Keith and let anyone else know who needs to. Thank you for all your patience over the last few months, Lindsay.”* As a result of this email, the claimant contacted Craig Tregurtha by email dated 10 August 2016. In that email, the claimant referred to a meeting she had had with Craig Tregurtha in the preceding week. In the email, the claimant stated: *“When I returned from London I received an email from Lindsay saying she had been off for a long weekend and once again appointing Jeremy Watson to edit. I took Lindsay aside and pointed out the seniority structure of which she said she had been unaware, and asked her to contact you directly for confirmation of this. She said that she would speak to Jeremy and explain. She also asked that I take a collegiate approach to editing over the weekend and not assert myself too strongly which I said I was happy to do not wishing to embarrass her or hurt Jeremy’s feelings. I’ve forwarded below emails between myself and Lindsay. ... Jeremy appeared over the course of Friday, Sunday and Monday to be*

still under the impression that he was editing alone and that I was working to his direction. While I asserted myself in terms of choice and splashes and op-ed so that the paper still got what I felt to be right – I was careful not to seek a confrontation and was collegiate and courteous.” (1007). The claimant followed this email up with a further email later that day to Craig Tregurtha (1007) in which she stated: *“Lindsay tells me that she has spoken with him again and there won’t be any further issue.*

56. Magnus Llewellyn commenced as Scottish Editor on 29 August 2016. The Tribunal accepted the evidence of Lindsay MacIntosh that as he had, as she put it, “beaten me to it” and as they were henceforth going to work closely together she contacted him and had lunch with him in Glasgow where he still worked as Editor in Chief of The Herald Group. On 1 August 2016 Magnus Llewellyn emailed Lindsay MacIntosh and stated: *“Looks like I’ll be in London from the Tuesday to Thursday in my first week. So if you are around on Monday 29th perhaps I can make some of the troops then? I am expecting to fly down on Monday evening and get back either lateish on Thursday or early on the Friday.”* Lindsay MacIntosh replied and then stated: *“Monday 29th is ideal. Do you want a lunch or do you just want to meet us all in the office? I suggest Edinburgh (for either) The Edinburgh office doesn’t have much communal space but we can room into the one bit that does exist. It makes it easier for getting the paper out later in the day - and most people live in Edinburgh.” (1002 to 1003)*

57. The claimant was not on the rota to work on 29 August 2016. Accordingly Magnus Llewellyn did not see her that day. The Tribunal accepted the evidence of Magnus

Llewellyn that he not contact anyone directly about his visit but simply spoke to whoever was in the Edinburgh office on 29 August 2016.

58. The claimant later contacted Craig Tregurtha to express her concerns that Magnus Llewellyn had not met with her on 29 August 2016. Craig Tregurtha responded by telling the claimant that she should not worry that she had not met him that day.
59. Prior to Magnus Llewellyn's visit to the Edinburgh office on 29 August the claimant had emailed Lindsay MacIntosh to express her surprise that Magnus Llewellyn had not been in touch with her directly. The claimant then requested Magnus Llewellyn's email address. Lindsay MacIntosh responded to that request by providing Magnus Llewellyn's email address (**1018 to 1018A**)
60. The claimant did not contact Magnus Llewellyn directly to meet him. Other individuals such as Keith Anderson, Sports Editor did contact Magnus Llewellyn and met him in advance of the commencement of his employment with the respondents.
61. In January 2017 the claimant posted comments to a Facebook forum about a published interview by Michael Gove (then employed by the respondents as a journalist) with President Trump. The comments stated: "*Am I alone in struggling to find the objectivity in Gove's Trump interview? I read it and to me it appears to be partisan. Now, I was off yesterday and played no part in preparing it or the decision to put it on the front. But I feel deeply uncomfortable about it. Should I be?*" The comment was seen by 147 people, mainly journalists. The claimant commented further on the forum stating: "*It just doesn't appear that journalism was even contemplated, let alone committed.*" ... and "*I'm afraid that I almost puked when I read that line in the PG. It's so cowardly because it dismisses all of the very real*

concerns with Trump that many people want addressed. History will not treat this failed opportunity kindly.” (1030 to 1033). When it was drawn to their attention, Jeremy Griffin and Craig Tregurtha both felt the comment was inappropriate. Magnus Llewellyn was in the Head Office in London in January 2017 when the claimant’s comments on the Facebook forum were brought to his attention by Jeremy Griffin. Magnus Llewellyn also felt that the comments were inappropriate, and also considered them to be disrespectful of the claimant’s colleagues.

62. After consideration of the comments, the Tribunal formed that the view that the opinion that the comments were inappropriate had nothing whatsoever to do with the claimant’s transgender status. The Tribunal accepted the evidence of Craig Tregurtha, Magnus Llewellyn and Jeremy Griffin that whilst all 3 felt the comments to be at best inappropriate at no point did any individual call for the claimant to lose her job over this incident. Instead, the matter was left with Magnus Llewellyn (with the support of Liz Harris) to take further action.
63. Magnus Llewellyn raised the matter of the Facebook comments with the claimant when he returned to the Edinburgh office. He advised her that this was the type of action for which she could be disciplined as she was potentially bringing the respondents into disrepute. Magnus Llewellyn advised the claimant that this type of behaviour was unprofessional but decided not to discipline her because it had not occurred before. Instead, he warned the claimant not to do it again.
64. In March 2017 Magnus Llewellyn brought in Ian Marland (who was a regular freelancer) to run the news desk. The fact that the claimant was in the office later

that day was overlooked by him in error. The claimant took issue with the fact of Ian Marland having a more senior role than her on a day when she was in the office. Magnus Llewellyn acknowledged to the claimant that an error had been made and apologised to the claimant for the error. Magnus Llewellyn then advised the claimant that she should then have been editing the paper as she was the third most senior member of staff behind himself and Jeremy Watson.

65. Magnus Llewellyn gave evidence to the Tribunal that in October 2017 there was another error on the rota. On that occasion Mike Wade was on the rota to edit despite the claimant being in the office. On realising the error, Magnus Llewellyn emailed the claimant on 22nd October 2017 to apologise and to make it clear that she was editing the paper. Magnus Llewellyn was on holiday at the time and his email to the claimant stated: *“Kathy I had no idea you were in today. If you are in then you are editing .. it is as simple as that. Apologies for the mix up which I suspect comes from the rota being drawn up before your return to work. Magnus”* (1054 to 1056). The Tribunal accepted that the error of October 2017 was simply (as Magnus Llewellyn said) a mix up. Insofar as the reference was to the rota being drawn up before the claimant’s return to work, the evidence of Magnus Llewellyn was that in the period August 2016 to 12 January 2018 (when the claimant’s employment with the respondents ended) he worked alongside the claimant for around 6 months only as the claimant was signed off work for 2 periods of sickness absence in the course of which she had 2 surgical procedures.
66. The Tribunal accepted the evidence of Magnus Llewellyn that the issues around the rota in March and October 2017 were simply errors. The Tribunal also accepted

the evidence of Magnus Llewelin that following the October 2017 error he asked Jeremy Watson to ensure this oversight did not occur again.

67. Insofar as any issue of seniority was concerned, the Tribunal accepted the unchallenged evidence of Lindsay MacIntosh that neither Magnus Llewelin, Jeremy Watson or herself ever covered the claimant's role as they would not have had the necessary skills set to do so. No individual in the Edinburgh office had the necessary experience in production in order to take over the claimant's role. Indeed, on the days that the claimant was absent from the Edinburgh office her position would be covered by a "casual" possessing the necessary skills sets. The Tribunal also accepted the unchallenged evidence of Lindsay MacIntosh that during her period as acting Editor it was never established whether the claimant or Jeremy Watson was more senior as she considered such a distinction not to be relevant. Insofar as she was concerned the Edinburgh had a collegiate approach in producing the paper during her temporary appointments as acting editor. In all of these circumstances the Tribunal concluded that at no time was the claimant's seniority or her role within the respondents undermined.

68. On 3 August 2017 the claimant sent an email to both John Witherow, Editor and Emma Tucker, Deputy Editor of the respondents. The email raised concerns regarding columnists of the respondents having pieces published which in the words of the claimant were "*without any visible expertise and an ignorance that can mislead or at best disappoint readers who might hope to come away better informed.*" (1105 to 1106). Emma Tucker replied to the claimant that day stating: "*Hi Kathy – thank you for sending this note. It's incredibly useful and interesting to get your thoughts*

on this subject which as you say is provoking a lot of debate at the moment. I have read it carefully and note all that you have clarified. In particular I take your point about trans teenagers – my own teenagers talk about gender issues trans issues all the time. It's a subject in which they are much better versed than their parents. Thanks for writing. All the best. Emma." **(1105)** Some of the claimant's issues were with articles written by Janice Turner, a freelance journalist published in The Times and accordingly Emma Tucker asked the claimant at that time whether she could pass the claimant's comment on to Janice Turner. After obtaining the permission of the claimant, the claimant's comments in her email of 3rd August 2017 were forwarded to Janice Turner. Janice Turner responded to the claimant by email of 5 August 2017 **(1108 to 1109)**.

69. The claimant alleged in her evidence that the failure of John Witherow to respond to her email of 3 August 2017 in person was an act of discrimination. The Tribunal observed however that the claimant's email of 3 August 2017 was addressed to both John Witherow and Emma Tucker. Further and in any event the respondents accepted the evidence of John Witherow that due to pressure of work as Editor of the respondents he is unable to respond to many of the emails addressed to him personally and instead delegates to others to respond to such communications.
70. The respondents published numerous articles on transgender whilst the claimant was in their employment. The Tribunal accepted the evidence of the respondents, however, that the quantity of such articles was no more or less than that of their main broadsheet competitors. The Tribunal accepted the evidence of John Witherow that had some of the articles come to his attention he would not have allowed them to be

published. However, the Tribunal accepted the reasons given by John Witherow as to why some articles should not have been published- namely, that some had an insufficient storyline and other, humorous, articles were simply not amusing. In all the circumstances the Tribunal considered that it was not in a position to make a finding that articles on transgender published by the respondents during the claimant's employment were transphobic. The Tribunal considered this to be the position as they accepted that it was arguable (as put in cross examination) that the published articles in question could not solely be categorised as representative of the respondents as many presented as opinion pieces, that they related to matters of legitimate and topical public interest and debate and that they were supported by research.

71. In reaching this conclusion, the Tribunal also had regard to the respondents' evidence that the Independent Press Standards Organisation (IPSO), had not upheld any complaints on the content of any articles on transgender published by the respondents during the claimant's employment. To this end whilst the claimant's submissions to the effect that IPSO does not receive complaints from sectors of society or groups of individuals, it is still open to any individual or organisation to complain about any significant inaccuracy expressed in any published article.
72. On 9 November 2017 the claimant met with Magnus Llewellyn and Elizabeth Harris, Associate Managing Editor at the Edinburgh office. Elizabeth Harris's notes from her meeting with the claimant can be seen at pages **1152 to 1154**. Ms Harris's script was prepared in advance and is to be seen at page **1151**. This script states: "*We need to reduce our costs on the paper and make the way we produce the Scottish*

edition more efficient. The first proposal is to centralise news subbing and production in London. We believe this will make the production of the Scottish edition more efficient. I will explain how that could work in a moment but I am sorry to say if this proposal goes ahead the role of Night Editor Scotland will no longer exist. This means you are now at risk of redundancy. We are proposing that a Chief Sub Editor will be responsible for the news subbing production and quality of the Scottish edition on all platforms each night in London. The Chief Sub Editor will work with the Scottish Editor to produce the flat plan and to produce all editions and they will use the pool of down table Sub Editors in London to support them in doing this work. We believe this is a more efficient way of working and having the print and digital work split between London and Scotland. We also believe it will improve the quality of the edition to have production sub editing and revising overseen by a Chief Sub Editor in London rather than have this process split between Edinburgh and London. This is also how we produce the Irish edition and The Sunday Times Scottish edition. ... We will consult with you on this proposal for 30 days. If this proposal goes ahead and an alternative job cannot be found either at The Times or News UK then I am sorry to say that you will leave The Times for reason of redundancy on 11th December 2017. The second proposal to reduce costs is that we want to consolidate the 2 offices in Scotland. This means we are planning to close the Edinburgh office. From February next year Times Scotland people will work from the News UK office in Glasgow. I will be speaking to the team about that later today so for now I would appreciate your discretion.” The Tribunal accepted the evidence of Elizabeth Harris that these points were put to the claimant.

73. The Tribunal accepted that (as submitted by the claimant) there was very little paperwork around the redundancy exercise. However, Tribunal accepted the evidence of Elizabeth Harris that the closure of the Edinburgh office was part of a wider structure, the pressing requirement to save costs being at its essence. The Tribunal accepted the evidence of Elizabeth Harris that the reasons for the proposed change to the Scottish News Production Team was the same as that for London – in other words to integrate production across all platforms, increase the amount of people working in the production hubs and to reduce down time. Further, the evidence was accepted that cross platform working is far more difficult to implement when Production Teams are based in several locations. In these circumstances the claimant's role within the respondents, together with the roles of two 'casuals' were the only roles in jeopardy, as they were involved on the production side of the Scottish edition of the respondents.
74. The other influential factor in the redundancy exercise, and the timing of that exercise, was that the lease of the Edinburgh office was up for renewal.
75. In implementing the redundancy exercise, Elizabeth Harris had in mind that the production of the Irish edition of The Times had recently moved from Ireland to London. This decision had proved to be both efficient and cost effective.
76. In all of these circumstances the Tribunal accepted that the reasons for the restructure and redundancy exercise were not in any way connected to the claimant's transgender status.

77. On the 9 November 2017 Elizabeth Harris wrote to the claimant confirming what was discussed at a meeting that day (**1179 to 1181**). In that letter Elizabeth Harris confirmed that she would meet with the claimant again on the 10 November 2017.
78. Elizabeth Harris met with the claimant on 10 November 2017. The notes of that meeting are to be found at page **1184**. The claimant advised her at that meeting that she did not wish to speak to her directly but wished correspondence to go via her Barrister Robin White. The claimant advised that she had already emailed both Elizabeth Harris and Magnus Llewelin to inform them of this fact. The email is to be found at **1185 to 1188**.
79. The Tribunal accepted the evidence of Elizabeth Harris that she was surprised that the claimant refused to consult with her directly as no decisions had been made at that stage regarding the claimant's redundancy.
80. The claimant decided not to return to her employment with the respondents during the redundancy process (**1215 to 1216**).
81. There were communications between Robin White and Elizabeth Harris in the course of which Elizabeth Harris asked whether the claimant would consider any suitable vacancies in Glasgow or would consider relocating to London (**1189 to 1192?**).
82. On 24 September 2017 the respondents received a reply from Robin White which contained a number of questions regarding the redundancy proposal and set out her position that the claimant's seniority, authority, role and resources had been progressively undermined and sidelined since mid 2014 (**1219 to 1239**). The

respondents replied to Robin White on behalf of the claimant by email of 13 December 2017 (**1245 to 1252**). The letter concluded by stating: *“Alternative roles. Finally, I would like to remind you of our offer of a job as a Chief Sub Editor with The Times in London. Your terms and conditions would remain the same. ... I have checked again with HR and I’m afraid there is only one vacancy based in Glasgow. It is for a Sales Manager in Commercial. I appreciate it is a very different job to your current one but if you would like more information let me know.”* In evidence, the claimant stated that the respondents were well aware that as her children were in Scotland she could not move to London to take up the role of Chief Sub Editor. However, the Tribunal accepted evidence on cross examination of the claimant that, whilst the respondents were aware that the reasons for the claimant returning to Scotland in 2012 centred around her children, the claimant had also shared the ages of her children with the respondents’ HR (**1330**) and therefore the respondents would be aware that as at late 2017 the claimant’s children were in their mid to late teens.

83. An extension to the consultation period was agreed between Elizabeth Harris and Robin White (**1254**) to 29 December 2017. Meantime, the claimant sent an email to all her colleagues on 21 December 2017 stating: *“Dear colleagues I leave The Times tomorrow after 14 years. It’s been an adventure. Look after each other and take good care of my Scottish edition.”* (**1253**).
84. On 24 December 2017 Elizabeth Harris received an email from Robin White providing comments upon her detailed email of 13 December 2017 (**1264 to 1278**). Under the heading “Discrimination” the claimant stated: *“I have not stated that the*

decision to centralise news production was “based on my status as transgender”. I said that an ill informed, lazy and expedient process to centralise news production driven in part by a Scottish Editor trying to cover up his overspending blunder and an incompetent process that deliberately excluded the single member of staff best qualified to comment on it provided an excuse for executives to rid the company of an employee who was perceived by some as a whistleblower, a troublemaker and asker of awkward questions, a social embarrassment and an impediment to what has turned into an all out editorial assault on trans people and their rights.” The claimant went on to provide an analysis of The Times coverage of trans issues including: *“Analysis demonstrates that a disproportionate weight of coverage in The Times and Sunday Times has been based on the repetition of untruths originated and propagated by groups and by individuals who make no pretence of their antipathy to the very existence of trans people. Again and again the same rent a quote names appear – individuals whose credentials and qualifications to speak are woeful and collapse under scrutiny; some with long and disturbing histories of lying about misrepresenting and publicly abusing trans people.”* (1275). The claimant’s letter concluded with the statement: *“Had I not already been the subject of a redundancy proposal, I would have been left with no choice but to resign in order to make my concerns public. As things stand today when I leave employment by the company I shall be making public my views on the paper’s coverage of trans issues and I will be highlighting my efforts to warn the CEO and the Editors of The Times and The Sunday Times and executives on The Sun of my concerns of the publication of known falsehoods and the institutional trans phobia running riot throughout the company.”* (1276)

85. On 3 January 2018 Elizabeth Harris extended the consultation for the final time to 8 January 2018 (**1279 to 1284**). In her letter, Elizabeth Harris responded to all points raised by the claimant and refuted all allegations made by the claimant of discrimination or institutional trans phobia within the respondents. (**1279 to 1284**). The claimant responded via Robin White by email of 5 January 2018 (**1285 to 1292**). Elizabeth Harris responded to that email on 8 January 2018 (**1297 to 1298**) which she reiterated the rationale behind the decision to restructure Scottish production and addressed again the allegations of discrimination made by the claimant.
86. Elizabeth Harris invited the claimant to attend a final consultation meeting which was held by telephone on 11 January 2018. Notes from this meeting are to be found at **1303**. The claimant was advised that her employment would terminate by reason of redundancy on 12 January 2018 and was advised of the right to appeal. The meeting was followed up by letter of 11 January 2018 which advised the claimant she was being made redundant on 12 January 2018, that her redundancy payment would be £54,826.19 gross and that her payment in lieu of notice would be £22,626.68 gross.
87. The claimant did not appeal the decision to make her redundant.
88. The Tribunal accepted the evidence of Elizabeth Harris that the decision to move production from Edinburgh to London has resulted in significant savings for the respondents. Further, the Tribunal accepted the evidence of Elizabeth Harris that restructuring for the purpose of cost savings programmes is an ongoing issue within the respondents. In all the circumstances the Tribunal accepted the evidence of Elizabeth Harris that centralising the Scottish production work in London was about saving money and making The Times newspaper more efficient.

89. There was unchallenged evidence that since 2013 100 journalists have been made redundant within the respondents.

90. On the 9th June 2018 the claimant submitted her ET1.

Observations on the Evidence

91. The claimant's case included allegations that there was a culture of discrimination in the workplace generally. In deliberating and formulating the Findings in Fact above, the Tribunal found there to be insufficient evidence of such a culture.

92. In submissions, the claimant stated that there was a culture of dishonesty within the respondents. Firstly, the Tribunal observed that this was not put to the respondents' witnesses in cross examination. Secondly, in deliberating and formulating the Findings in Fact above, the Tribunal found no evidence of such a culture.

The Law

Direct Discrimination

93. Section 13 of the Equality Act 2010 ("the Equality Act") provides:

"A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others."

94. It is not necessary to point to an actual person as being more favourably treated although how others have in fact been treated may be relevant evidence from which an inference of discrimination may be drawn. The Tribunal should construct if necessary a hypothetical comparator whose relevant circumstances are not materially different to the claimant's except for the protected characteristic.
95. The Tribunals do not have to construct a hypothetical comparator if they are able to make findings as to the "*reason why*" the treatment occurred without doing so. This is clear from the cases of **Shamoon v Chief Constable of the RUC 2003 ICR 337 HL**, **Stockton on Tees Borough Council v Aylott 2010 ICR 1278 CA** and **The Law Society and others v Bahl 2003 IRLR 640**.
96. The protected characteristic need not be the only reason for the treatment (**Owen and Briggs v James 1982 ICR 618**; **O'Neill v Governors of St Thomas More Roman Catholic School and another 1997 ICR 33 EAT**.) A further protected characteristic needs to be a "substantial" reason for the treatment in question.

Harassment

97. Section 26 of the Equality Act 2010 provides:

"Harassment

(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 ...*

(1) *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, and further*

(b) *The conduct has the purpose or effect referred in sub-section (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.*

(2) *In deciding whether conduct had the effect referred to in sub-section*

(1)(b) each of the following must be taken into account –

(a) The perception of B;

(b) the other circumstance of the case; and

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

98. There are 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that as the prescribed purpose or effect and (iii) which relates to a relevant protected characteristic.

99. In deciding whether the conduct has the effect referred to in section 26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B) each of the following must be taken into account: (i) the perception of B, (ii) the other circumstances of the case and (iii) whether it is reasonable for the conduct to have that effect (section 26(4)). The test has both subjective and objective elements to it. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harasser has on the claimant. The objective part requires the Tribunal to ask itself whether it was reasonable for the complainant to claim that the harasser's conduct has that effect. In **Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT** Mr Justice Underhill then President of the EAT held that in assessing effect “*One question that may be material is whether it should reasonably have been apparent whether the conduct was or was not intended to cause offence (and more precisely to produce the*

prescribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”

Victimisation

100. Section 27 of the Equality Act provides:

“27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act or

(b) A believes that B has done or may do a protected act

Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegations (whether or not expressed) that A or another person has contravened this Act’

101. A's motivation may be subconscious. The key question is why B was treated in the way he or she was. The protected act need not be the only reason for the detrimental treatment but it must have a "significant influence" of the decision to act in that way (**Nagarajan v London Regional Transport 1991 ICR 877**). "Significant" means "more than trivial" (**Igen v Wong 2005 ICR 931**).

Burden of Proof under the Equality Act

102. Section 136 of the Equality Act 2010 provides for shifting burden of proof. It is firstly for the claimant to prove facts from which a Tribunal could decide that there has been a contravention of the Equality Act. This is often done by drawing inferences from the established facts. If he or she succeeds in doing that then the burden shifts the respondents to prove that the reason for the treatment is not one prohibited by the Act. The respondents do not have to justify the treatment or show that it acted reasonably although such matters may go to the credibility of the reason put forward.

103. In **Hewage v Grampian Health Board (2012) UKSC 37** Lord Hope gave the following guidance on the issue of the shifting burden of proof: *"Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors (2011) ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in this case. It is regrettable*

that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance.” (para 32)

104. In **Chief Constable of Kent Constabulary v Bowler EAT 0214/16** Mrs Justice Simler emphasised: *“Although a two stage approach is envisaged by s136 it is not obligatory. In many cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatever in the adverse treatment, the case fails.”*(para 23). and *“It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal by a tribunal; or they may be explanations that arise from a tribunal’s own findings.”* (para 97).

Time Bar

105. S123 of the Equality Act 2010 provides: *“123 Time Limits 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.”*

106. The “just and equitable” discretion is generally seen as a wide discretion, the exercise of which is difficult to challenge on appeal.

Unfair Dismissal

107. The Employment Rights Act 1996 (the “ERA”) sets out the right not to be unfairly dismissed. It is for the respondents to prove that they had a potentially fair reason for dismissal in terms of section 98(1). In the present case it is contended that the reason for dismissal was redundancy.

108. If the Tribunal is satisfied there is a potentially fair reason for dismissal, it must then assess whether in the circumstances (which include the size and administrative resources of the respondents) the decision to dismiss for that reason was fair or unfair. Section 98(4) provides that the determination of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

109. The test of fairness is really one of reasonableness and the law recognises that different employers acting reasonably may make different decisions based on the same circumstances. It is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have “substituted its own view” for that of a reasonable employer. Rather the question for the Tribunal is whether the decision to dismiss (including the procedure adopted) fell within the “range of reasonable responses” open to a reasonable employer. If so the dismissal is fair. It is only if the decision to dismiss falls outside that range that the dismissal is unfair (see for example **Iceland Frozen Foods Limited v Jones 1983 ICR 17**).

110. A failure to follow a fair procedure may cast doubt on the reason for dismissal or may in itself mean that the reason to dismiss was not reasonable. However the Tribunal must assess the overall fairness of the procedure and not merely whether there was a failure to comply with the contractual procedure or the ACAS Code.

111. Insofar as redundancy is concerned, S139(1) of the Employment Rights Act 1996 provides: *“139 For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to- (a) the fact that his employer has ceased or intends to cease- (i) - to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”*

The parties both provided full written submissions. The undernoted is a summary of such submissions, which was provided by the parties themselves.

Submissions for the Claimant

112. The Claimant brings claims of Direct Discrimination, Harassment and Victimisation related to her protected status as a person who has undergone gender reassignment. Additionally she claims unfair dismissal in respect of her redundancy in 2018, which she also says was a discriminatory dismissal.

113. She claims that The Times, certainly once it came under the Editorship of John Witherow, had a culture hostile to trans individuals, which can be seen from her treatment (deadnaming, 'one camp or the other') but also from the journalistic output of the paper, in which material was produced deliberately to advance an anti-trans agenda by misrepresentation and distortion of material, contrary to good journalistic standards and the industry regulatory standards to which The Times subscribes. This culture/agenda is a significant reason, the Claimant says, which provides facts from which the tribunal could conclude that she was subject to discrimination related to her protected characteristic of gender reassignment, and so the burden of proof shifts to The Times to show that events were to no extent because of that.

114. The Claimant has suffered in a number of ways including: being poorly rewarded for the work she did; denied appropriate recognition as 'Night Editor' of the Scottish Edition of the paper; having to argue against the inappropriate coverage of trans issues; and ultimately, dismissed by way of an alleged redundancy that was in fact unfair and discriminatory.

Submissions for the Respondents

115. C commenced her employment with R on 01/01/04 as a sub-editor based in London. She had not transitioned and had not, at that stage, indicated to R her intention to do so. She transitioned in 2006 and was entirely satisfied with the support she received from R in the workplace.

116. C received annual pay rises in line with those agreed with the staff representatives, normally in July of each year. On 28/04/04, C moved to a 9 day fortnight which increased her hours. Her pay increased in recognition of this in July 2004. On 01/01/08, C was appointed Chief Sub-Editor of The Times, Scotland and she received a pay rise accordingly. She received a further pay rise in line with the annual increase in July 2008. From around October 2009, C alleged she acted as Night Editor on the Scottish edition of The Times. The job titles within the newspaper industry, and R is no exception, are imprecise so that the duties of a Chief Sub Editor and those of the Night Editor of The Times in Scotland are not markedly different (see C's evidence in re-examination). In May 2012, C requested to be made voluntarily redundant. Instead, she was offered and accepted a transfer to Edinburgh on her current terms and conditions for which she was "hugely grateful".
117. In July 2014, the Scottish Editor was seriously ill and a caretaker editor was appointed. C complained she should have been appointed and the then Head of News had said "under no circumstances" was that to occur. R appointed the Scottish political correspondent as she was the best candidate particularly in view of the forthcoming Independence referendum. C had a meeting with Craig Tregurtha, Managing Editor, on 30/07/14 which she recorded covertly to discuss the caretaker role and her pay as Night Editor on the Scottish edition. She alleged she had been "upbraided" by Mr. Tregurtha. The recording did not support her allegation in any way.
118. On 12/08/14, C sent an email to the Editor objecting to an article by a writer she considered to be transphobic. The Editor delegated the matter to the then Assistant

Opinion Editor. The proposed article was not published. C alleged this was a protected act (PA4).

119. Between October 2015 and 2016, C suffered depression which did not involve time off work. She was entirely happy with the support she received from R. There was a vacancy for the post of Deputy Editor, Scotland in April 2016. C emailed the Editor on 29/04/16 stating that she could not put herself forward for the post as she considered that she had been passed over when the caretaker role was filled. The Editor told her to let him know prior to the vacancy window closing if she wished to be considered. C alleged that this was a further protected act (PA1). In evidence, C accepted that she did not want this role. It was submitted the email at pages 933-934 could not be construed as an allegation that a person had contravened the EqA 2010 and was therefore not a protected act.

120. In May 2016, C met the Head of HR to discuss the email to the Editor. C alleged for the first time that in November 2011 the then Deputy Head of News and Deputy Editor had made transphobic remarks about an incident involving transgender women in India. Both men had left R's employment in September 2013 and had no involvement in any further acts complained of by C. C produced no contemporaneous evidence in support of her allegation. In view of her allegation of "upbraiding" by CT which was completely unsupported by the recording, it is clear that C was not a reliable witness and the allegation should be dismissed as it was not made out on the evidence.

121. On 28/07/16 C met the Managing Editor and Head of HR to discuss her concerns. C relied upon this as a further protected act (PA3). The meeting dealt with C's

issues to her satisfaction and she received a substantial pay rise with effect from 01/08/16. It was submitted that this effectively drew a line under all her previous issues and they were therefore substantially out of time.

122. Subsequent allegations included having to ask the Managing Editor to remind her colleagues of her seniority in August 2016, being ignored by the incoming Scottish Editor in August 2016, alleging the Executive Editor called for her to be sacked when she made derogatory remarks on Facebook about an article written by Michael Gove, being missed off/not down as the Duty Editor on the Sunday editing rota on 05/03/17 and 22/10/17, and receiving a response from the Deputy Editor rather than the Editor to her email of 03/08/17. The evidence either did not support the events alleged (e.g. being ignored by the Scottish Editor in August 2016) or were not in any way connected to her transgender status.
123. C took sick leave from 17/11/16 to 03/01/17 and 18/05/17 to 04/09/17 for unrelated physical reasons. She was well supported throughout those absences.
124. C relied heavily on R's coverage of transgender issues as showing a culture hostile to trans individuals. The number of articles on transgender issues published by R was in line with the number of such articles in other "broadsheet" newspapers. The content of the articles complained of by C was very largely a matter of opinion or opinion as to the accuracy of the facts underlying the articles. No complaints in respect of transgender issues have been upheld by the Independent Press Standards Organisation (IPSO) against The Times. Any restriction of R's Article 10 right to the freedom of expression has to be proportionate to the legitimate aim pursued. To decide that the very publication of articles which caused C offence

could reverse the burden of proof would have to be very carefully made out as being proportionate, otherwise it would have a “chilling effect” on the freedom of the Press. None of the articles relied upon were directed against C personally and there is a fundamental difference between the function of R as a newspaper pursuing the essential function necessary in a democratic society of expressing views freely, and acting as her employer in its managerial role. The burden of proof did not pass to R, and even if it did, R discharged that burden on the facts.

125. In respect of the redundancy, it was part of a rolling programme of cost savings which brought together various “hubs” into the London premises so as to promote efficient use of staff and resources. C had originally been located in London and it was to assist her personally (rather than there being a business need) that she relocated to Edinburgh. The premises in Edinburgh were closing in any event. She was offered a post on the same terms and conditions in London, together with assistance with relocation expenses, and was informed of vacancies in Glasgow (none being suitable for her skills set). The redundancy was not a sham, it occurred. C was consulted over the period of two months in great detail. During consultation, C stated that she would set about a campaign against R in its coverage of transgender issues. That is an improper use of the tribunal process.

126. C’s claims of unlawful discrimination as acts of direct discrimination, harassment or victimisation were all groundless and should be dismissed. The burden of proof did not pass to R. C did not establish a comparator (actual or hypothetical) for the purposes of her direct discrimination claims. In respect of harassment, C did not establish that her complaints were related to her transgender status nor the alleged

effect on her. As to victimisation, C failed to establish that those accused of detrimental treatment of her were aware of the alleged protected acts, or that the detriments were causally connected to those acts. Finally, her dismissal was by reason of redundancy and was in no way or in any part because of her transgender status. Her dismissal was well within the band of reasonableness test and was fair in all the circumstances of the case.

Discussion and Decision

127. In reaching their determination of the issues in this case, the Tribunal considered it apt to address each claim as set out in the Scott Schedule. Accordingly the claims as set out in the Scott Schedule (**in the words of the claimant in the Scott Schedule, replicated in italics**) are rehearsed below numbered A1-A27 and PA1 – PA4.

128. The relevant factual findings are referenced to the paragraph numbers in this judgment, which are set out in bold.

Direct Discrimination and Harassment Claims

129. *(A1) The claimant alleges that her daily role was as late-night editor and late chief sub, yet she was paid only as downtable sub editor. (Paragraph 6 ET1).* In this respect the claimant claims direct discrimination and harassment.

130. In answering this allegation, the Tribunal made reference to their Finding in Fact that esto the respondents failed to provide the claimant with remuneration and a title appropriate for her status in the period 2004 to 2007, such promotion and a salary increase was due to the respondents' perception of the claimant's own performance at work and for no other reason (**paras 18 and 19**). As the Tribunal were in a position to make positive findings on evidence they did not consider the burden of proof provisions to be applicable

131. *(A2) The claimant alleges that she repeatedly raised the above with her line manager in London, Simon Pearson, who refused to act even when other staff in similar roles were accorded promotions and pay rises, despite knowing that she was enduring financial hardship as a result. (Paragraph 6 ET1).* In this respect the claimant claims direct discrimination and harassment.

132. In deliberating this issue, the Tribunal had regard to their findings that the claimant was not promoted or given a salary increase in the period 2004 to 2007 due to the respondents' perception of the claimant's performance at work, particularly at conference (**paras 18 and 19**). The Tribunal also had regard to the fact that Simon Pearson must have played a part in recommending the claimant for a pay rise on appointment to the position of "Chief Sub Editor" in January 2008 (**para 20**). As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

133. *(A3) The claimant alleges that Simon Pearson told her she should be 'grateful of our tolerance'. (Paragraph 6 ET1).* In this respect the claimant claims direct discrimination and harassment. The Tribunal accepted the evidence of Simon

Pearson, and found that no such remark was made (**paras 15 and 16**). Accordingly the Tribunal did not proceed to apply the burden of proof provisions.

134. (A4) *The claimant alleges that she was offered role of 'Chief Sub Scotland' by Scotland Editor Magnus Linklater but the title and pay rise was resisted by Simon Pearson until Magnus Linklater intervened and insisted. She also alleges during this time others were given pay rises and promotions without resistance. (Paragraph 7 ET1).* The claimant claims direct discrimination and harassment arising from these allegations.

135. The Tribunal accepted the evidence of Simon Pearson that whilst he would not personally have put the claimant forward for promotion in 2007 he would have had regard to the views of Magnus Linklater, the then Scottish Editor. The Tribunal also accepted the evidence of Simon Pearson that he must have played a part in recommending the claimant for a pay rise on appointment to the position of "Chief Sub Editor" on the 1st January 2008 (**para 20**). In these circumstances the conclusion of the Tribunal is that the claimant was not discriminated against in this respect. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

136. (A5) *The claimant alleges that she had a considerably greater workload than her predecessor (as Night Editor) as the deputy (deputy Night Editor / Chief sub), sub-editor and picture editor were withdrawn by Simon Pearson (Paragraph 8 ET1).* The claimant claims direct discrimination and harassment in respect of these allegations. The Tribunal accepted the evidence of Simon Pearson that although staff cuts were made the claimant still had access to a Picture Editor and that overall she did not

have a greater workload than her predecessor (**para 22**). As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

137. (A6) *The claimant alleges that she was denied a pay rise or title commensurate with the night editor role. (Paragraph 8 ET1)* The claimant claims direct discrimination and harassment in respect of these allegations. The Tribunal accepted the evidence of Simon Pearson that the reasons why the claimant did not get a pay rise or title commensurate with the night editor role were because it was considered that she was not suitable for promotion due to her performance at conference and her inability to select and discuss appropriate stories for the Scottish Edition of the Times (**para 22**). As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

138. (A7) *The claimant alleges that Magnus Linklater's recommendation that she be given the title Night Editor Scotland was again denied by line manager Simon Pearson. (Paragraph 9 ET1).* The claimant claims direct discrimination and harassment in respect of these allegations. The Tribunal had regard to their findings in **para 26** in determining that the respondent's decision not to give the claimant the title Night Editor Scotland at this time was due to reasons other than her transgender status. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

139. (A8) *The claimant alleges that she wrote to Anoushka Healy (Managing Editor) re the above and no action was taken. (Paragraph 9 ET1). The relevant e-mail was dated 18.8.2011 and there was a subsequent meeting between the claimant and*

Louise Newman (Assistant Managing Editor) at Anoushka Healey's request on 18.8.2011 at which the complaint was repeated but Anoushka Healey still took no action. The claimant claims direct discrimination and harassment in respect of such allegations.

140. The Tribunal had regard to their findings in **para 26**. Further, the Tribunal accepted the evidence of Louise Newman that Anoushka Healey often entrusted decisions such as this to her at this time; and that after discussing the matter with Simon Pearson and having regard to the need to make savings within the respondents, Louise Newman took the view that a pay rise for the claimant was not necessary as the claimant was on the correct salary for her position within the respondents. The Tribunal also accepted the evidence of Louise Newman that her decision on the issue of the claimant's salary was discussed with Anoushka Healey who confirmed that she was happy with it (**para 27**). As the Tribunal was in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

141. *(A9) The claimant alleges that Keith Blackmore and Ed Gorman cracked jokes about trans women in India – who were in the news as murder victims – making “a lifestyle choice”. (Paragraph 11 ET1).* The claimant claimed harassment in respect of this allegation. The Tribunal found that such remarks did not take place as alleged by the claimant. (**para 28, 29**) and accordingly did not proceed to consider the burden of proof provisions.

142. *(A10) The claimant alleges that she asked to be made redundant but was instead offered an unsupported move to Scotland. (Paragraph 10 ET1).* In submissions, the claimant withdrew this allegation.
143. *(A11) Claimant says she finally received confirmation of her job title as Night Editor (Scotland). (Paragraph 12 ET1).* The Tribunal did not consider this to be an act of discrimination.
144. *(A12) The claimant alleges that she did not receive a reply from John Witherow in response to her email about Carol Sarler's article but acknowledges that the piece was dropped. (Paragraph 24 ET1)*
145. The claimant stated that this allegation was an act of harassment. The Tribunal accepted the evidence of John Witherow that due to pressures of work he rarely has the opportunity to speak to any of the Scottish journalists but that nonetheless he had respect for the claimant's views and her position as can be seen by his reaction to her suggestion that the Carol Sarler article be withdrawn **(para 43)**. As the Tribunal were in a position to make positive findings on the evidence in this respect, they did not consider the burden of proof provisions to be applicable.
146. *(A13) The claimant alleges that after the above, John Witherow effectively ceased to speak with her. (Paragraph 24 ET1)* The claimant claims harassment in respect of this allegation. The Tribunal accepted the evidence of John Witherow that he would not usually have had any contact with the claimant nor would he usually have any cause to speak to her **(para 43)**. As the Tribunal were in a position to make positive findings on the evidence in this respect, they did not consider the burden of proof provisions to be applicable.

147. (A14) *The claimant alleges that Jeremy Griffin instructed that ‘under no circumstances’ was the claimant to be caretaker editor while Angus Macleod was undergoing chemotherapy because the senior Management of the Respondents (Jeremy Griffin, John Witherow, Craig Tregurtha) would not want the Editor of the Times in Scotland to be seen to be a person with the protected characteristic of gender reassignment. The Claimant concludes that this was direct discrimination because: (i) a more junior correspondent with no managerial experience was appointed; (ii) the Claimant had proved her ability to act in place of the Scottish Editor on many previous occasions; (iii) of the respondents’ coverage of ‘trans’ issues in its media, and (iv) the other acts of discrimination on this ground that she has suffered.”* The claimant claims direct discrimination and harassment in respect of these allegations.

148. The Tribunal accepted the evidence of Jeremy Griffin that he did not make such a remark (**paras 36, 37**). The Tribunal drew no conclusions from the respondents’ coverage of ‘trans’ issues (**para 70**). As the Tribunal were in a position to make positive findings on the evidence in this respect, they did not consider the burden of proof provisions to be applicable.

149. (A15) *The claimant alleges that when she raised the instruction above with Craig Tregurtha he upbraided her for claiming to be night editor and promised to resolve her demotion, which he did not. (Paragraph 13 ET1)* This allegation was withdrawn by the claimant in submissions.

150. (A16) *The claimant alleges that the claimant was obliged to ask Craig Tregurtha to remind Lindsay McIntosh and Jeremy Watson of her seniority as she was being*

treated as junior to Jeremy Watson and denied the role of duty editor. (Paragraph 17 ET1) The claimant was asked to clarify how she was treated as junior and the relevant dates of events here. In her replies to F&BPs, the claimant has referred to two emails to illustrate this (the email chain 9.11.2016 entitled 'Scotland Structure' and the email chain of 22.10.2017 entitled 'Editing and Seniority' between the claimant and Magnus Llewellyn. The first email refers to an email Lindsay McIntosh had sent in or around August 2016 appointing Jeremy Watson to edit whilst she was on leave and an email sent by Jeremy Watson to Roger Boyes on 8 August 2016 saying he would be editing in Scotland that day. The second email refers to the claimant being told on 22 October 2017 that 'Mike' was editing. The claimant claims direct discrimination and harassment in respect of these allegations.

151. The Tribunal accepted the evidence that, insofar as the incident of August 2016 was concerned, the claimant followed up her initial email to Craig Tregurtha with a further email which stated: *"Lindsay tells me that she has spoken with him (Jeremy Watson) again and there won't be any further issue."* (para 55). From this, the Tribunal understood that the claimant herself had resolved the issue of seniority between herself, Lindsay McIntosh and Jeremy Watson in a satisfactory manner. The Tribunal accepted the evidence of Magnus Llewellyn that the issue of Mike Wade editing instead of the claimant was an error by him which was corrected by email dated 22nd October 2017 (para 65). As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

152. (A17) *The claimant alleges that from this point onwards she was more and more often obliged to defend the responsibilities of her role and her seniority and says her*

role was being undermined and minimised. (Paragraph 17 ET1) The claimant was asked to set out each of the alleged incidents she relies on here and, in her F&BPs reply, the claimant clarified that she was referring to the same two emails immediately above. The claimant also asserted that the above behaviour was noticed and commented on by the respondent's staff. In her replies to F&BPs she said that her job title, as it appears on the staff rota prompted members of staff (eg Philip Short) to ask if she'd been demoted. The claimant claims direct discrimination and harassment in respect of these allegations.

153. The Tribunal found in fact that any issues around the claimant not being given her rightful place in the rotas were simply errors (**para 66**). The Tribunal also found that the claimant had a unique role in the respondents which could not be covered by Magnus Llewellyn, Jeremy Watson or Lindsay McIntosh and that a 'casual' had to be brought in with the necessary skills sets when the claimant was on holiday (**para 67**). As the claimant had a unique skills set within the respondents, it was never established who was more senior within the Edinburgh Office as a collegiate approach with all different skills sets was required in producing the paper. In all of these circumstances the Tribunal found that at no point was the claimant's role undermined or minimised. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

154. *(A18) The claimant alleges that subsequent to Rebekah Brooks initial response, and further complaint from the claimant, no further action was taken by Rebekah Brooks. (Paragraph 25 ET1) The claimant claims direct discrimination and harassment in respect of these allegations.*

155. The Tribunal found that Rebekah Brooks immediately took action to respond to the claimant's comments. The Tribunal found that Rebekah Brooks passed the claimant's comments to the Sunday Times Executive Editor Bob Tyrer, being the appropriate person to deal with the matter as the article in question was published in the Sunday Times. Bob Tyrer met with the claimant and thereafter, at the claimant's suggestion, met with Alana Avery from "All About Trans" (**paras 47,48**). The Tribunal therefore considered there to be no force in the claimant's allegations that no further action was taken by Rebekah Brooks. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

156. *(A19) The claimant alleges that when Magnus Llewelin was appointed Scottish Editor, he met with other senior staff before taking up his post but made no contact with the claimant. (Paragraph 18 ET1)* The claimant claims direct discrimination and harassment in respect of this allegation.

157. The Tribunal accepted the evidence of Magnus Llewelin that he came into the Edinburgh Office on the 29th August 2016. He did not contact any employee in advance about his visit but simply spoke to any employee who was present on that day. It was a matter of agreement that the claimant was not on the rota to work on the 29th August 2016. The Tribunal accepted the evidence of Lindsay McIntosh that she had provided the claimant with Magnus Llewelin's email address and, further, that the claimant did not contact him directly to introduce herself, unlike other journalists such as Keith Anderson, Sports Editor (**paras 54,55,56, 57,58**). As the

Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

158. (A20) *The claimant raised A19 with Craig Tregurtha by e-mail. No action was taken, rather she was told 'not to worry'. (Paragraph 18 ET1)* The claimant claims direct discrimination and harassment in respect of these allegations.
159. The Tribunal were of the collective opinion that the words of Craig Tregurtha in telling the claimant not to worry did not amount to an act of discrimination.
160. (A21) *The claimant alleges that she was told by Magnus Llewellyn that a comment she had made in a private capacity on a closed, invitation-only forum of journalists had been reported by Jeremy Griffin. (Paragraph 19 ET1)* The claimant claims direct discrimination and harassment in respect of this allegation.
161. The Tribunal found that Craig Tregurtha, Magnus Llewellyn and Jeremy Griffin were collectively of the opinion that the claimant's comments were inappropriate; and that the claimant could have been disciplined for such comments but instead was warned not to make similar comments in the future (**para 61,62,63**). As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.
162. (A22) *The claimant alleges that Magnus Llewellyn told her that Jeremy Griffin had called for her to be sacked. (Paragraph 19 ET1).* The claimant claims direct discrimination and harassment in respect of this allegation. The Tribunal found that this did not happen (**para 62**) and therefore the burden of proof provisions are inapplicable.

163. *(A23) The claimant alleges that she was obliged to seek clarification of her position when she was told in a text message sent by Magnus Llewellyn that freelance news editor Ian Marland was the Duty Editor. (Paragraph 20 ET1).* The claimant claims direct discrimination and harassment in respect of this allegation.
164. The Tribunal accepted that this was an error on the part of Magnus Llewellyn in respect of which he apologised **(para 64)**. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.
165. *(A24) The claimant alleges that, following an email she sent regarding articles about trans people, she received a reply from Emma Tucker, but not from John Witherow. (Paragraph 26 ET1).* The claimant claims harassment in respect of this allegation.
166. The Tribunal found that the email in question was addressed to both Emma Tucker and John Witherow; and that due to pressure of work as the Editor of the respondents John Witherow is unable to answer all emails addressed to him. **(paras 68,69)**. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.
167. *(A25) The claimant alleges that she had to question Magnus Llewellyn on why another, less senior staff member was Duty Editor on a day when the claimant was working. (Paragraph 22 ET1).* The claimant claims harassment in respect of this allegation.
168. The Tribunal accepted that the evidence of Magnus Llewellyn that the issues around the rota in March and October 2017 were simply errors. The Tribunal also accepted

the evidence of Magnus Llewellyn that following the error on the rota of October 2017 Magnus Llewellyn spoke to Jeremy Watson to ensure that this error would not happen again. **(paras 66)** As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

169. *(A26) The claimant being put at risk of redundancy.* The claimant claims direct discrimination in respect of this allegation.

170. The Tribunal accepted the evidence of Elizabeth Harris that the closure of the Edinburgh office was part of a wider structure, the purpose of which was to save costs. **(paras 72-76)**. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

171. *(A27) The claimant's dismissal on the grounds of redundancy. (Paragraph 27 ET1).* The claimant claims direct discrimination in respect of this allegation.

172. The Tribunal accepted the evidence of Elizabeth Harris that the respondents' restructure and redundancy exercise were not in any way connected to the claimant's transgender status. **(paras 72-76)** As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

Victimisation Claim

PA – Protected Act D- Detriment

173. (PA1) Claimant alleges that she sent an email to John Witherow setting out the incidents set out in paragraphs 1-14 of the claimant's ET1 and explaining that in the light of these experiences she felt unable to apply for the role of Scottish Editor as she had no confidence that she would receive fair treatment (Para 15 ET1)(D1) Claimant alleges that she was obliged to ask Craig Tregurtha to remind Lindsay McIntosh and Jeremy Watson of her seniority as she was being treated as junior to Jeremy Watson and denied the role of duty editor (Para 17) (D2) Claimant alleges that from the above point onwards the claimant was more and more often obliged to defend the responsibilities of her role and her seniority. Her role was being undermined and minimised (Para 17). The claimant was asked to set out each of the alleged incidents she relied on here and, in her F&BPs reply, the claimant clarified that she was referring to the same two emails above at A1. The claimant also asserted that the above behaviour was noticed and commented on by the respondent's staff. In her replies to F&BPs she said that her job title, as it appears on the staff rota prompted members of staff to ask if she'd been demoted. The claimant has now confirmed that the staff she is referring to here is Philip Short (see above A17). (D3) Claimant being put at risk of redundancy (Para 27) (D4) Claimant being dismissed (Para 27).

174. The Tribunal agreed with the respondents in concluding that the email by the claimant to John Witherow of the 29th April 2016 was not a protected act as there was no connection between the email and the rights contained within the Equality

Act 2010. Further and in any event, in their Findings in Fact the Tribunal concluded that the events categorised as detriments by the claimant did not happen as averred by her. Separately, the Tribunal concluded that esto such events took place, they were unconnected to the email to John Witherow of the 29th April 2016. As the Tribunal were in a position to make positive findings on the evidence, they did not consider the burden of proof provisions to be applicable.

175. (PA2) *Claimant alleges that she had a meeting with Amy Graham in London and that during this meeting she raised experiences of transphobic behaviour and concerns that she felt the repeated and inexplicable denials of pay and title had been related to her status as trans. (Para 15 ET1). (D1) Claimant alleged that she was obliged to ask Craig Tregurtha to remind Lindsay McIntosh and Jeremy Watson of her seniority as she was being treated as junior to Jeremy Watson and denied the role of duty editor. (Para 17). (D2) Claimant alleges that from the above point onwards the claimant was more and more often obliged to defend the responsibilities of her role and her seniority. Her role was being undermined and minimised. (Para 17) The claimant was asked to set out each of the alleged incidents she relied on here and, in her F&BPs reply, the claimant clarified that she was referring to the same two emails above at A16. The claimant also asserted that the above behaviour was noticed and commented on by the respondent's staff. In her replies to F&BPs she said that her job title, as it appears on the staff rota prompted members of staff to ask if she'd been demoted. The claimant has now confirmed that the staff she is referring to here is Philip Short (see above A17)(D3) Claimant being put at risk of redundancy (Para 27)(D4) Claimant dismissed (Para 27)*

176. The Tribunal were of the view that the claimant's meeting with Amy Graham on the 16th May 2016 was capable of constituting a protected act as in that meeting the claimant did raise allegations of transphobic behaviour. However, in their Findings in Fact, the Tribunal found that the reasons for each and every event categorised by the claimant as a detriment were in no respect influenced by the protected act of the claimant's meeting with Amy Graham. As the Tribunal were in a position to make positive findings in fact on the evidence, they did not consider the burden of proof provisions to be applicable.

177. *(PA3) Claimant alleges that she had a meeting with Amy Graham and Craig Tregurtha during which she raised experiences of transphobic behaviour and concerns that she felt the repeated and inexplicable denials of pay and title had been related to her status as trans. (Para 15 ET1)(D1) Claimant alleges she was obliged to ask Craig Tregurtha to remind Lindsay McIntosh and Jeremy Watson of her seniority as she was being treated as junior to Jeremy Watson and denied the role of duty editor. (Para 17) (D2) Claimant alleges that from the above point onwards the claimant was more and more often obliged to defend the responsibilities of her role and her seniority. Her role was being undermined and minimised. (Para 17)The claimant was asked to set out each of the alleged incidents she relies on here and, in her F&BPs reply, the claimant clarified that she was referring to the same two emails above at A16.The claimant also asserted that the above behaviour was noticed and commented on by the respondent's staff. In her replies to F&BPs she said that her job title, as it appears on the staff rota prompted members of staff to ask if she'd been demoted. The claimant has now confirmed that the staff she is*

referring to here is Philip Short (see above A17).(D3) Claimant being put at risk of redundancy (Para 2) (D4) Claimant dismissed (Para 27)

178. The Tribunal found that at the meeting with Amy Graham and Craig Tregurtha on 28th July 2016 the claimant did make allegations of contraventions of the Equality Act 2010 and that accordingly this meeting did constitute a protected act. However, in their Findings in Fact the Tribunal found that either the events or detriments alleged either did not happen at all or such events or detriments were in no respect influenced by the protected act of the meeting on 28th July 2016. As the Tribunal were in a position to make positive findings in fact on the evidence, they did not consider the burden of proof provisions to be applicable.

179. *(PA4) Claimant alleges that she sent an email to John Witherow protesting the content of a comment piece by Carol Sarler that was being prepared for the next day's paper. (Para 24 ET1) The claimant alleges that she did not receive a reply from Mr Witherow, but the Sarler piece was dropped. (Para 24) The claimant alleges that subsequent to this, the claimant noted that Mr Witherow effectively ceased to speak with her. (Para 24) The claimant alleges that she wrote to Rebekah Brooks and alleges that after being referred to the Sunday Times Managing Editor and writing again to Ms Brooks, no further action was taken by Brooks (para 25) The claimant was put at risk of redundancy(para 27) The claimant was dismissed (para 27).*

180. The Tribunal found that the email from the claimant to John Witherow of 12th August 2014 was a protected act, given the content and context of that communication. However, the Tribunal found that John Witherow usually would not have had any

contact with the claimant or cause to speak to her; and that due to pressures of work he rarely had the opportunity to speak to any Scottish journalists in any event. Further, in their Findings in Fact the Tribunal found that either the detriments alleged by the claimant did not happen as stated by her, or there were reasons other than the making of a protected act for these events or detriments to have taken place. As the Tribunal were in a position to make positive findings in fact on the evidence, they did not consider the burden of proof provisions to be applicable.

Time Bar

181. In view of their conclusions reached on each element of the claimant's claims of discrimination (as set out in the Scott Schedule) the Tribunal did not consider it necessary to determine the question of time bar.

Conclusion - Discrimination

182. It is for all these reasons that the claimant's claims of direct discrimination, harassment and victimisation are dismissed.

Unfair Dismissal

183. The Tribunal concluded that the claimant's dismissal was wholly or mainly attributable to the fact that the respondents intended to cease to carry on their business in the Edinburgh Office and the fact that the requirements of their business for employees to work in production in Edinburgh had ceased all in terms of s139 of

the Employment Rights Act 1996. The Tribunal concluded that accordingly the reason for the claimant's redundancy was a genuine reason **(para 73-75)**.

184. The Tribunal noted that the claimant did not appear to be taking issue about her selection for redundancy. On the facts as found the Tribunal found such selection to be reasonable, given that all of the individuals involved in production in the respondents' Scottish Office were selected for redundancy. Further, in considering whether the claimant's dismissal was unfair, the Tribunal considered that the respondents' consultation with the claimant was reasonable in all the circumstances **(paras 78-86)**.

185. Finally, the Tribunal noted that alternative employment was offered to the claimant by way of a job as a Chief Sub Editor with the respondents in London. In all the circumstances the Tribunal found such an offer to be reasonable **(para 82)**.

Conclusion - Unfair Dismissal

186. It is for all of these reasons that the Tribunal dismisses the claimant's claim of unfair dismissal.

Date of Judgement: 20th August 2019
Employment Judge: Jane Porter
Date Entered in Register: 21st August 2019
And sent to Parties