EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Portelli	**v**	**London Legal + Imaging Solutions Limited**

Heard at: London Central
22 – 30 May 2019

Before: Employment Judge Hodgson
Ms S Samek
Ms L Moreton

Representation

For the Claimant: in person
For the Respondent: Mr D Brown, counsel

JUDGMENT

1. **The claim of unfair dismissal succeeds.**
2. **The claim of direct discrimination because of age succeeds.**
3. **The claim of unlawful deduction from wages succeeds. The respondent will pay 5.5 hours wages, such sum to be determined if not agreed.**

REASONS

Introduction

1.1 By two claims, the first presented on 2 April 2018 and the second presented on 26 August 2018 the claimant alleged unfair dismissal and age discrimination, and failure to pay wages.

The Issues

2.1 The claimant alleges he was unfairly dismissed. The respondent alleged he was dismissed for some other substantial reason, or in the alternative, a reason related conduct. The respondent alleges the dismissal was reasonable.

2.2 The claimant alleges direct age discrimination, it being his case that he was dismissed because he was an older person. In the case management discussion of 20 December 2018, I recorded the claimant stated he was dismissed because he was older and therefore more expensive than the people who replaced him. There are two allegations of direct discrimination:

2.2.1 allegation 1: by suspending the claimant from work, it being the claimant's case he was suspended on 22 December 2017; and

2.2.2 allegation2: by dismissing the claimant.

2.3 The claimant alleges unlawful deduction from wages.

2.4 There are two claims: case numbers 2201871/2018 and 2205855/2018. We may refer to them as claim 1 and claim 2, as necessary. Both claims are to be heard together. The respondent conceded in cross-examination that there are no time points which are relevant. It follows we do not have to identify which specific allegations are in which specific claim form.

Evidence

3.1 The claimant gave evidence. In addition, he called Ms Katy Potelli and Mr Steven Portelli.

3.2 The respondent called Mr Graham Wilson and Mr Richard Chapman.

3.3 The respondent provided a bundle of documents. The claimant provided a supplementary bundle. The respondent produced a chronology. We also received at the start of the hearing a reading list and the cast list.

3.4 Both parties gave oral submissions, and supplemented them with written submissions, which were provided by email for our consideration in chambers.

3.5 On day 4, the respondent produced two letters showing the pay increase for Ms Jemma Lowe and Mr Grant Lowe from August 2018. It was the respondent's case that the letters were relevant, but that the respondent had not understood the relevance until cross-examination and had not understood that there was an issue as to either individual’s pay as compared to the claimant’s pay.

The hearing

4.1 The parties agreed the issues were as set out in the previous case management hearing.

4.2 On day one, we adjourned and read all of the statements.

4.3 On day 2, we agreed a timetable. It was noted the claimant had referred to without prejudice documentation in his claim form. The respondent did not ask us to formally exclude this, but drew our attention to it. It was the respondent's case that there were without prejudice discussions, but they were irrelevant to the matters we needed to decide, and that they should not have been referred to by the claimant. The respondent simply requested that we ignore it. We confirmed that we do not consider it relevant and we have ignored it.

4.4 The respondent also noted that the claimant had referred to numerous matters about various alleged wrongdoings, and sexual relationships. It was the respondent's position that this evidence was irrelevant. The respondent did not request that we exclude the evidence from the witness statements. It was alleged that the irrelevant information was extensive, but requested that we simply ignore any irrelevant evidence. We agreed this approach.

4.5 On day 2, we sought clarification from the respondent as to the potentially fair reason. The respondent's primary case is that there was a breakdown of mutual trust and confidence that amounted to a substantial reason. The respondent specifically confirmed, in the alternative, the claimant was dismissed for a reason related to conduct. We should note that during submissions on day 4, we invited the respondent to give specific submissions on the alleged conduct related reason. However, no specific submissions were given on the conduct related reason. We enquired whether reliance on a conduct related reason was being withdrawn, but Mr Brown confirmed that the respondent continued to place reliance on a conduct related reason in the alternative to the primary argument.

The Facts

Introduction

5.1 The respondent company provides services to law firms. It specialises in handling legal documents. Part of the service offered includes printing, particularly of bundles of documents.

5.2 The respondent employed the claimant for seventeen years, from 2001 until his dismissal in April 2018. At the time of his dismissal, the claimant managed the print room. He was responsible for eighteen employees, seven of whom were either managers or supervisors who assisted him. His title was production manager. During the week, production was

divided into three shifts: morning, afternoon, and night. The claimant managed the morning shift which ran from 07:00 to 15:00. The morning shift had supervisor Mr Lawson and four other individuals, including Ms Jemma Lowe. The afternoon shift, which ran from 14:00 to 14:30 was managed by Mr Grant Lowe.

5.3 The claimant's line manager was a director, Mr Graham Wilson. When Mr Wilson joined the company in January 2014, he was initially managed by the claimant; following promotion, he became the claimant's line manager at the end of 2014.

5.4 There were a number of senior directors. There were two joint managing directors, Mr Ray Lawson and Mr Mark Sprules. There were three other directors, Mr Terry Chesney, Ms Elaine Munn, and Mr Graham Wilson, the operations director. These five people have been collectively referred to as the directors.

5.5 The claimant was close friends with Mr Chesney. They had met at infant school. The claimant was Mr Chesney's best man in 2002. However, prior to the claimant's dismissal, the friendship had soured, but we do not have any details of this.

5.6 The company expanded. In 2015, the company moved to new premises at Birchin Court, which were closer to many of the large law firms which were the respondent's clients. It is apparent the respondent company continued to seek new business. On occasions, clients would visit and would be shown the operation. The claimant was not normally involved in directly selling services to new clients, albeit clients may be shown around the print operation.

5.7 Both the claimant's wife, Mrs Katie Portelli, and his father, Mr Steven Portelli, were employed by the respondent. Mrs Katie Portelli had been a temporary worker for approximately eight years and became part-time accounts assistant to Ms Elaine Munn in September 2014. When the claimant was dismissed by letter on 4 May 2018, Mrs Portelli reached the conclusion she could not continue working for the respondent and resigned. The claimant's father, Mr Steven Portelli, had also started working for the respondent in January 2001. He is a reprographics operator doing digital printing, scanning, and deliveries. He was managed directly by the claimant. He continues to be employed.

5.8 The claimant did not initially have any contract of employment. He was given a statement of terms of employment on 15 January 2016.

5.9 In addition, there was a handbook which gives further details. The claimant acknowledged receipt of a handbook on 5 January 2019 (R1/596). The handbook stated:

> **In the event that information in this Handbook conflicts with terms and conditions as stated in your Contract of Employment, your Contract will take precedence.**

5.10 The handbook was available on the company's website. We have not seen a full copy, but have seen extracts. It is clear that there have been a number of versions. We do not know how the book is amended, what records are kept of the amendments, or how any amendments are communicated.

5.11 We have been taken to a number of sections which are relevant. There is a section on overtime (R1/612). There is a phone policy (R1/611). There is an email and Internet policy which provides that that the respondent's systems should not be used to operate a business. There is a dress code policy.

Circumstances leading up to the claimant's dismissal

5.12 It is the claimant's contention that the respondent has never told him the reason for his dismissal and has never adequately set out any details of the alleged conduct which it relies on to say there has been a breakdown in mutual trust and confidence. The respondent's primary case to us, as put in submissions, is that any conduct of the claimant is in some manner "incidental" to the alleged breakdown in mutual trust and confidence. It is said that the respondent relies on the fact of the breakdown.

5.13 The respondent has not sought to put its case on the basis that there was clear conduct which caused the breakdown. We have heard from two witnesses for the respondent, Mr Graham Wilson, who was the claimant's direct line manager, and Mr Chapman who is not employed by the respondent. Mr Richard Chapman is a director of Lighter Business Solutions Ltd, trading as Lighter HR, a human resources and support consultancy service whose services were engaged by the respondent. He can only give evidence about his involvement and his approach to the appeal against dismissal.

5.14 Whilst Mr Wilson states that he took the final decision to dismiss the claimant, it is clear that there were discussions with the other directors extending over a long period.

5.15 The evidence we have been given concerning the reason for dismissal is limited and incomplete. Mr Wilson has identified, in his oral evidence, that there were discussions with other directors. Those discussions were directly relevant to the action taken by the respondent, in relation to the claimant's grievances, the general treatment of him, the management of him, and ultimately the dismissal. Save for Mr Wilson confirming the fact of the discussions, we have no evidence as to the number of discussions and the content of the discussions, although those discussion were directly relevant to the respondent's management of the claimant and his dismissal. Mr Wilson was unable to recollect any detail of the discussions.

He was unable to point us to relevant emails, memoranda, or minutes. As to the discussions between the directors concerning the claimant's dismissal, and the rationale for their approach, we have sought confirmations to whether there is any documentation. We are told that there is nothing in the bundle which is relevant.

5.16 It is apparent that Lighter HR became involved no later than when the claimant lodged his first grievance. It was involved in the hearing which led to the dismissal. A consultant, Mr Richard Chapman, conducted the appeal against dismissal. Whilst in his letter to the claimant, he indicated the decision to refuse the appeal was his, in his oral evidence he maintained that he merely recommended that the appeal be refused; however, to which director or directors he made his representations was unclear, how we made the representations, and how we communicated them was also unclear. Mr Chapman could not recollect any detail. He was unable to tell us whether there was a single email exchange. As to any meetings, he could not identify the date, those present, or the content. Whilst he believed there were emails, they were not produced on disclosure. His evidence was that he had made no attempt to find or identify any relevant email. He alleged he had made handwritten notes. In relation to at least one important document prepared by him, he said he destroyed it.

5.17 It follows that in relation to the dismissal, and grievance, the respondent employed, and utilised, the services of the consultancy firm, Lighter HR Solutions Ltd. As to the discussions between the directors, which are clearly relevant to the ultimate decision and the involvement of the HR firm, there is no adequate evidence at all. We do not have the retainer. We do not have any statement of the parameters of the involvement of the HR company. We have no record of any advice given, or any discussions undertaken. It was never suggested to us that there was no relevant documentation. Mr Chapman's evidence asserted uncertainty, although he conceded, in all probability, that there were relevant documents and relevant emails. Similarly, Mr Wilson did not seek to persuade us that there were no relevant emails passing between the directors. Any suggestion that there is no relevant documentary trail would, in the view of this tribunal, be fanciful. Indeed, the respondent has not sought to defend its lack of disclosure on the basis that there is nothing to disclose. The reality is, that there are numerous relevant documents which have simply not been disclosed. In the case of Mr Chapman, he admits he did not look for the documents.

5.18 It is the respondent's assertion that there is a breakdown in the trust and confidence between the claimant and the respondent. That breakdown in trust and confidence is not limited to the claimant's interaction with, or his relationship with, Mr Wilson. It is, on the respondent's case, a breakdown which extends to the respondent’s directors generally. In that context, the discussions that they had are entirely relevant. There is no way of understanding the respondent's reason for dismissal absent the relevant evidence. There can be no doubt that the continuing discussions were

relevant to any alleged conclusion that there had been a breakdown of mutual trust and confidence. The respondent has chosen to produce none of that evidence. Mr Wilson's evidence is essentially silent. None of the other directors have given any evidence at all.

5.19 To the extent there is an explanation for this it is that, in some manner, the claimant's alleged conduct is simply incidental. We have sought to understand the nature of this submission. We confirmed that it appeared to be the respondent's case that the claimant behaved in such a way that his conduct caused a breakdown of mutual trust confidence.

5.20 To the extent evidence was given, it is firmly rooted in the alleged unreasonable conduct of the claimant. However, as the case has been advanced before us, there has been no consistency in the way it has been presented. The respondent has not been consistent as to the reason for dismissal, or the interpretation of its own procedure. The meeting of 25 April 2018 that led to the claimant's dismissal has been described in the second response as a disciplinary meeting. Mr Wilson, in his oral evidence, confirmed it was a disciplinary meeting. However, the submissions advanced have been on the basis that it was not a disciplinary meeting. Mr Brown has gone as far as to say that we should treat the respondent's own evidence, as given by Mr Wilson, as having little weight. He invites us, as we understand it, to accept the veracity of Mr Wilson's evidence in relation to all matters except those which appear to be in conflict with the way the case is advanced in submissions. As to exactly what parts of his evidence we should give weight to, and what parts we should not, there is no clear explanation.

5.21 It is necessary for this tribunal to consider the facts which are relevant to the claims. It follows from what we have said, that this has been an extremely difficult task. The reality is this: the key relevant evidence, which demonstrates the reason for dismissal, is, at least in part, to be found in the meetings between the directors, the discussions with the HR company, and the decisions which feed into the action taken by Mr Wilson. We have received no direct oral evidence on those matters. It is clear that documents must exist, and that they have been withheld by the respondent.

5.22 We have received some evidence which indicates alleged dissatisfaction with the claimant's conduct. However, much of the evidence we have is not contemporaneous.

5.23 When an employer dismisses an employee, a decision is taken. The exact reason for that dismissal will occur in a context. However, the exact reason for the dismissal is to be found in the thought processes of the individual, or individuals, who take the decision. Those thought processes can be explicit and rational. They can also be irrational and subconscious. In order to identify and understand, the reason it is necessary to consider the thought processes of the individual or individuals who take the decision. In that context, it is normal for the employer to identify the

relevant factual circumstances which were important in reaching the decision, and thereafter to explain the rationale. As part of that process, any investigation, any discussions, and any disciplinary or other action, should normally be explained.

5.24 The task of the tribunal is to identify the relevant factual circumstances in order to turn its mind the question of the reason for dismissal. The tribunal is not confined to accept the reason advanced by the respondent, or the reason advanced by the claimant. In the context of misconduct, the respondent's honest belief that there has been misconduct will normally establish the reason for dismissal, provided the tribunal accepts that it was an honest belief and it was the true reason for dismissal. The approach, including any investigation or approach to a disciplinary, will then go, in an unfair dismissal case, to the question of reasonableness. However, it cannot be assumed, even where there is a reasonable belief in misconduct, that it is the sole or the principal reason for dismissal. It is merely one possibility. It is for the tribunal to take a view as to what the true reason is.

5.25 This particular difficulty was addressed by the Court of Appeal in **Kuzel**.[1] That case makes it plain that it may be necessary to draw secondary inferences when deciding the reason for dismissal. It should, however, be noted that the drawing of secondary inferences from primary facts has its limitations. Where an employer has failed to give evidence, for example about discussions prior to dismissal, it may be possible, and necessary, to draw a secondary inference from the failure to give evidence. When the evidence, for example, demonstrates a decision has taken place prior to a disciplinary hearing. Whilst a secondary inference may be drawn, it is not possible to go further and say that the decision must have been taken at a specific meeting, at a specific point in time, or to infer the exact nature of any discussions. One cannot infer a primary finding of fact. The secondary inference, the fact that something has occurred, must be divorced from the detailed circumstances of its occurrence.

5.26 In this case it is absolutely apparent there has been the most serious failure to identify the circumstances relevant to dismissal. Whilst it is possible to identify a number of strands and themes, it is very difficult to understand whether those are a post dismissal rationalisation, a deliberate attempt to mislead, or representative of true concerns which existed at the time. To the extent that there is a coherent chronology of relevant events, that is discerned almost entirely from the claimant's account. It cannot be assumed that, at any time, the respondent was being frank and open with the claimant.

5.27 Having noted the limitations of the evidence in this case, we should set out, as far as we are able to, a history of the relevant key events.

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[1] See *Kuzel v Roche Products* [2008] ICR 799.

The dress code

5.28 Up to at least 2016, it was common practice for the claimant to wear casual clothes including T-shirts, tracksuits, and shorts. In 2016, the directors wanted to introduce more formal attire. Mr Wilson says the claimant resisted when pressed to wear smarter attire. His evidence suggests in 2017 that there were further attempts to require the claimant to wear smart attire. It is said that he refused and was deliberately difficult; we do not accept there is evidence of this refusal. There is some evidence there was a discussion on 16 February 2016 (R1/906). This was an email to the other directors concerning Mr Wilson's discussion with the claimant. He asked for their views. As regards the discussion with the claimant, the email merely says, "I mentioned that the attire is not really appropriate for a senior manager since we have consultants and clients coming into the office on a regular basis." The email records the claimant asked about uniform and stated he would meet in the middle if required, but he did not have the money that month.

5.29 There is no evidence this was followed up until 19 May 2017, when there was a client visit. Mr Wilson sent an email saying the claimant must be working contractual hours (07:00 – 15:00) and wearing the correct attire. The claimant did not refuse to wear the correct attire. Whilst his written reaction is described as belligerent, it is clear that he is requesting training if he is to host a meeting, otherwise he would feel he was being chucked "under the bus." While some of the claimant's language is direct, there is no refusal, and it is difficult to see it as belligerent. It is direct, but not, in our view, rude.

5.30 As to Mr Wilson's assertion at paragraph 13 of the statement that there is a refusal to were smart attire, that is not reflected in the email. Mr Wilson's evidence that the claimant then flouted the requirements thereafter is not supported by any credible evidence. As regards uniform, on 25 October 2017, the directors sent a further email. This acknowledged previous flexibility, but went on to say as from 30 October that all senior managers should be dressed smartly and business-like at all times. There was a further email on 9 November reiterating the need for smart and business-like attire. It is apparent that there were then various emails concerning the attire of other members of the firm. The respondent's evidence identifies no specific email from the claimant which is said to be inappropriate. The respondent identifies no specific refusal. On 10 November, the claimant specifically stated that he would purchase the latest uniform requirements that weekend and be dressed appropriately on the Monday. He had bought dark blue/black jeans, as previously required, although it appeared that they were no longer acceptable. It is clear from the claimant's email of 10 November 2017 that he was confirming that he would comply with the request.

5.31 On 16 November 2017, the respondent wrote to the claimant confirming two basic requirements: first, he work the full contracted hours; second, he wear appropriate business dress whilst on duty. It confirms that by 13

November, the claimant was wearing shirt and trousers, but said the next day that he changed out of that during the shift. The letter goes on to say, "We feel that some formal business training may be beneficial to you and we hope will better equip you to manage your time and resources, give insight into what is expected from a manager, and allow you access to more up-to-date management techniques." It follows that the respondent then introduced an assertion that the claimant's approach to management required training. The training course identified was "moving into management" and is clearly a basic course. There is no doubt that the claimant found that course inappropriate and the request formed part of his subsequent grievance. He suggested that if he were to go on a management course, it should be one suitable to his level of expertise, and a basic course was not appropriate.

5.32 It was accepted in oral evidence by Mr Wilson that the claimant then complied with the dress code at all times. That is not reflected in Mr Wilson's written evidence and he is critical of the claimant for not specifically confirming the position on 24 November 2017, although it is clear that he did respond in detail and said that he did not believe the criticism of him, in relation to dress requirements, was fair. The claimant gave a detailed explanation. This response is not referred to Mr Wilson's evidence. That response appears at page R1/951. It is unclear when it was dated, but it is clear it is in response to the letter of 16 November. Why the respondent has chosen to make no reference to this clear confirmation that he would comply, is not explained.

5.33 The reality is by mid-November, the claimant was fully complying with the dress code. Moreover, he made it clear that he believed that he was being "isolated, singled out and treated differently to [his] peers without a valid reason."

Overtime

5.34 The other matter identified in the directors' memo of 25 October 2017 was the claimant's working hours. It is common ground that client needs are prioritised. As a result, lunch hours are sometimes worked. Overtime is claimed. The respondent's evidence on this has been poor and inconsistent. Mr Wilson resiled from an assertion that there was a two-year ban on overtime. The reality is that many individuals, on a number of shifts, worked overtime, including overtime for the lunch breaks.

5.35 A common practice had developed which was that rather than claiming overtime, if the lunchbreak were worked, the employee would leave early. It is apparent that the directors wanted to stop the claimant leaving early. The letter of 25 October specifically says, "The usual overtime payments for any authorised work carried out beyond this time still stands." It does nothing to explain the nature of authorisation. It does not suggest the claimant should not claim overtime. The letter of 16 November 2017 does not clarify the matter further. We were referred to the overtime policy in the handbook. The policy does say, "All overtime must be authorised in

advance by your manager." However, this was not the practice concerning the claimant. The overtime policy is not set out in the statement of Mr Wilson. During his oral evidence, we sought clarification from Mr Wilson, but his evidence was contradictory, equivocal, and confusing. He acknowledged that on a number of occasions, particularly after October 2017, the claimant sent emails to him confirming that he would be working his lunch hour. His evidence fell short of suggesting that it would be necessary for him to confirm either orally or in writing that the overtime was agreed. Ultimately, he stated that it was not a requirement that the claimant must email before starting the overtime, or that it must be approved by him. As to approval of overtime, it was clear the practice was for retrospective approval. For those who are managed by the claimant, the claimant would be expected to sign off authorisation on the overtime form submitted to accounts. The claimant would submit a similar form, but there was never any requirement that it should be presented to Mr Wilson prior to the overtime being incurred. The form was simply placed in what has been described as a blue folder. Those forms were taken to administration and passed on to Mr Wilson. It is not clear that Mr Wilson insisted on seeing them. He told us his practice would be then that he would sign them, and at that point the authorisation would occur. It follows that the practice was always that authorization of the claimant's overtime would occur retrospectively, that practice is not properly reflected in the handbook, but nevertheless it did occur and it was the policy adopted by Mr Wilson.

5.36 The respondent has not sought to argue that any claim for overtime is false, albeit as part of the respondent's evidence, it has been suggested that the claimant was not on the premises, but that has not been pursued as an argument. Mr Wilson suggested that there is no way of monitoring whether the claimant was working. However, he accepts there was CCTV which was kept for at least two weeks. There is no doubt that checks could have been made following the submission of the overtime claims.

5.37 It is apparent the claimant submitted overtime requests. The claimant made several requests for overtime for lunch hours worked, from 16 November 2017. He did not claim for every day. He completed the same form that he had completed for 17 years. A number of the requests were paid. However, the respondent refused to pay some of the overtime.

5.38 The refusal was by email of 20 December 2017 (R1/980) it made direct reference to the memo 25 October 2017, but appears to vary the position. It states:

> **Further to our memo dated 25th October 2017, it has come to our attention that you have been claiming overtime for many of your lunch breaks and only a handful of these were correctly authorised, which is by a Director. You are aware that any overtime you claim cannot be authorised by a member of your team, or by a cross.**
>
> **We would just like to clarify that it is not appropriate for you to routinely claim overtime for your lunch break, so please do not continue to do this as we would much prefer you to take your contracted lunch break. We**

> **allow flexibility for you to take lunch when you choose and we would still expect you to take a break during your working day - perhaps at a quieter time if the traditional lunchtime period is particularly busy? As a gesture of goodwill, we will pay overtime for eight hours claimed in this period, but you should note that the company is unable to continue this practice.**
>
> **Occasionally, we all choose to have lunch at our desk if there are things we would like to get done, and that is personal choice, but the company cannot pay overtime for this as we do not want to inadvertently incentivise people to not take necessary breaks.**
>
> **Many thanks for your assistance in this matter.**

5.39 There is no explanation for why the practice which had occurred for 17 years is being unilaterally changed. It does not explain what it means by "it is not appropriate for you to routinely claim overtime." It goes on to say that as a gesture of goodwill 8 hours would be paid. This left 5.5 hours unpaid and there is no specific explanation for this. In particular, it does not say that it will not be paid because it was not authorised. It does not say it will not be paid because it was not worked. It is not clear whether the respondent is seeking to change the contractual position. The email does not identify which claims were said to be legitimate and which were not. This is important because it appears that the claimant did send emails stating he would be working his lunch hour for all but two of the lunches. It appears that those two coincided when Wilson was away, and therefore presumably not available.

5.40 Mr Wilson's written evidence, at paragraph 25, says the reason for refusing the 5.5 hours overtime was because it was not pre-approved. It goes on to say that it had been made clear there must be no claim for overtime without a director's approval. Neither of those statements is true. It was not said at the time that the reason for refusal was that it had not been pre-approved. There had been no express requirement for director approval. Moreover, in his oral evidence, Mr Wilson accepted that the only approval ever given was by signing the form received after the event. His evidence at paragraph 25 is untrue and misleading.

5.41 It is clear that the respondent's position in relation to overtime was modifying and the claimant was being discouraged from claiming overtime, despite the fact that it had previously been indicated the normal provisions would pertain.

<u>The claimant's grievance</u>

5.42 As indicated above, there are a number of occasions when the claimant's raised his concerns informally and suggested he believed he was being treated inappropriately. He sought resolution. It is apparent that those informal requests were ignored. The claimant raised a formal grievance on 22 December 2007 (R1/630). He gave a hard copy of the grievance to Mr Wilson at 09:25. He sent an email version to all directors on the same day. Before considering the content of the grievance, we should deal with a number of matters.

5.43 After 22 December, the claimant did not return to work. Initially there was a holiday period. From early January he submitted a doctor's certificate. At some point he was suspended. He remained suspended until his dismissal.

5.44 There is no doubt that he was suspended. The fact of suspension is referred to in the second response. The email from Ms Elaine Munn of 14 February 2018 refers to extending his suspension. However, there is no letter of suspension. The reasons for suspension are not set out in any contemporaneous document.

5.45 In the first response, the respondent accepts that the claimant was suspended, but it does not say when, or by whom. The first response is as follows:

> **...the Respondent confirms that it did suspend the Claimant whilst facilitating the grievance process. The decision to suspend was made due to the grounds of the Claimant's grievance being particularly sensitive, complex and of a personal nature. The Respondent wanted to ensure the grievance could be investigated without bias but also wanted to remove to remove the Claimant from a situation that the Respondent was concerned, may be making him feel uncomfortable. The Claimant remained on full pay and continued to receive his contractual benefits during the period of suspension.**

5.46 Mr Wilson's evidence on the point is limited. He records that Lighter HR were engaged to deal with the grievance. At paragraph 35 he says, "Following advice from Lighter HR, a decision was made by the directors to allow Lea to remain on paid leave until the conclusion of the grievance. The directors felt it was important to address and resolve the issues before the return to work." This would make it sound as if it was the claimant who decided that he wished to remain on paid leave. This evidence is, at best, incomplete and misleading. The contemporaneous evidence, and the pleaded case, are that the claimant was suspended. What is clear is he was suspended because of the fact he had raised a grievance. It is to that grievance we now turn.

5.47 We do not need to record the full content of the grievance. There were approximately 16 separate points identified. We need only record the key themes. It is apparent that the claimant's principal point is that he was being bullied. He cited various matters in support which included the following: repeatedly changing the dress policy, including initially stating dark jeans were acceptable, which was later retracted leading to expense; by Mr Wilson on 14 December 75 accusing him of negligence without proper reason; by reducing his pay rise in 2016; by the directors failing to respond to his emails; by requiring him by letter of 16 November 2017 to attend an inappropriate management course; by unreasonably accusing him of non-compliance with dress code requirements; by Mr Wilson failing to answer his request for overtime clarification; by Mr Wilson undertaking, unnecessarily, aspects of the claimant's job; the approach to overtime; and by receiving a number of accusations late in a shift.

5.48 It follows that there were complaints raised by the claimant. The difficulties with regard to dress and overtime, and particular the negative way he believed he had been approached by the respondent, were key concerns. Nevertheless, he concludes his grievance as follows, "To conclude, I would like the situation to be resolved amicably so we can all work in tandem together for the remainder of my career at London legal."

5.49 The grievance was dealt with by Ms Christina Lukavicute, who is described as a HR consultant for Lighter HR. Mr Wilson's evidence says that she chaired it. In her outcome letter of 6 February 2018, she states that she heard the grievance. The meeting occurred on 22 January 2018. It was proposed that he should return to work from 19 February, before doing so there would be a "facilitated meeting" to "discuss how you will work together going forward." The exact role of the consultant remains unclear to us.

5.50 As to the grievance outcome, we would summarise it as follows. It is apparent that she does identify that there are management practices which could be improved. It is also apparent that having reached a number of conclusions, she made requests of the directors, which were refused. The exact nature of all of this, however, is not clear. She specifically rejects the "grievance claim that you have been subject to workplace bullying."

5.51 The claimant stated that he could not attend the meeting on 15 February 2018 as he was looking after his children. A facilitated meeting did occur on 19 February chaired by another consultant, Ms Erica Hameed of Lighter HR. Three directors, including Mr Wilson, attended. There are notes from the meeting of 19 February 2018. The notes are brief and read as follows:

> **Meeting was held to discuss LP's return to work following an initial absence due to sickness and then paid absence during the grievance process. The Directors noted that most of the issues that LP had raised had not been upheld, and they were concerned that there may be ongoing ill feeling on LP's part that has not been resolved. The LL Directors acknowledged LP's appeal that had been lodged. LP said that he was ready and willing to return to work. LL Directors stood firm on their decision not to pay overtime and raised concern that similar situations with regards to company policy or instructions being challenged by LP may continue going forward. LP repeated his issue with the overtime deduction and how he felt it was unfair. There was some debate about the overtime. There was then a general agreement that they were at a stalemate**

5.52 It is clear the claimant was ready to return to work. He repeated his view that he felt reduction of overtime was unfair.

5.53 In his evidence, Mr Wilson stated, "basically, it felt that Lea wanted to return to work on his own terms as before. It was evident there was a stalemate which was confirmed by Lea and that the parties cannot move forward." It is difficult to reconcile this evidence with the notes from the

meeting. It is clear the claimant was willing to move forward. It is unclear what is meant by a stalemate.

5.54 In his evidence, Mr Wilson recorded the claimant had raised concerns that members of staff had been informed he was not returning to work. His evidence states, "There was no truth to this whatsoever." We find that Mr Wilson's evidence in this respect is also misleading, and untrue. It is clear that staff had made comments about the claimant not returning. The claimant was not allowed to return at that point. The claimant's email and access pass were both cancelled.

5.55 The claimant had already appealed the grievance outcome. It is apparent that he was not allowed to return to work and the appeal against the grievance outcome was scheduled for 12 March 2018.

5.56 The grievance appeal outcome was sent on 22 March 2018. We have not heard from the HR consultant. The letter represents that it was the consultant who made the decision. We do not need to set out details of the approach, or the outcome. It is apparent that the claimant's arguments were not accepted. The conclusion was as follows:

> **Having investigated your Grievance further and reviewed the additional information provided by you and London Legal, I do not see evidence that you are bullied at work or being treated differently than other members of the staff. Therefore, your Grievance Appeal is not upheld.**
>
> **The Grievance Outcome letter has a number of suggestions for improving the management practices, processes and communication at London Legal. I agree with the Grievance Outcome Letter conclusion as I also do not see evidence of a deliberate attempt by the employer to victimise or bully you but rather that there is a need for improvements in the above-mentioned areas.**
>
> **You explained in the Grievance Appeal Hearing that you wanted to find middle ground with the Directors and resolve the issues. You said that you wanted to get back to work as soon as possible. We hope that this letter has provided you with more clarity on the areas you had concerns about.**

5.57 In reaching the conclusion, the consultant appears to simply accepted representations made by the respondent.

5.58 At paragraph 51 of his evidence, Mr Wilson states:

> **Following the conclusion of the grievance process, the directors believed that the relationship with Lea had deteriorated to such an extent that his continued employment could be detrimental and destructive to the business.**

5.59 Whilst it is clear that there were discussions between the directors, there is no attempt to identify which directors were involved, the information considered, and the conclusions reached. He goes on at paragraph 51 to state the following:

> **Some of the factors that led to this view were: Lea's refusal and challenges to adhere to clothing and working hours requirements, working his contractual hours, not leaving work early, claiming overtime and it was not working, refusal to engage anyone during his lunch break, challenging management instructions, his excessive emails and his difficult behaviour. It appeared that Lea began challenging all management instructions and become increasingly and a real challenge to manage.**

5.60 There is also reference to the claimant retaining company information, although which information was of concern has not been identified. It is said of lesser concern was his use of a company phone number with regard to a gambling business. Mr Wilson's evidence fails to set out that the gambling site was known to Mr Chesney, who would use it himself. There is no suggestion that he used the website during company hours, or accessed it on any company equipment. The sole concern appears to be that in setting up the domain, his company phone was recorded, although there is no suggestion that the company phone appeared on any website for the public. In any event, Mr Wilson made it plain that this concern was not pursued and was in no part a reason for his dismissal. Further, no reliance was placed on the company information. We observe that to the extent that these matters were later relied on in the invitation to the hearing which led to his dismissal, there can be no doubt that they are potentially conduct related matters which would require investigation.

5.61 As to the discussion on 12 January 2018, this occurred when the claimant was off ill. Mr Wilson telephoned him. Following this discussion, Mr Wilson made a note for himself which he emailed to the other directors on 12 January. The relevant part of his note reads as follows:

> **What was SSP and I mentioned that this was Statutory Sick Pay and I need to send his certificate over to Paycheck so that they can work out the SSP.**
> **He then said that we caused the stress and now we are not paying him.**
> **He then said that he knew we had paid people in the past when they have been off When I asked who they were he said I should stop being on the fence and I know who they were.**
> **He said he was ready to come back to work and then I sent him a text stressing him out.**
> **I said that he had not notified us if he was coming back. He replied that he said he would ring me, and it was still within my work hours so why was I then sending him a text which would have the direct purpose of stressing him even more. I mentioned that last week he had rung me by 10:00 to advise me that he would not be in but we had not heard anything by 14:04 so I texted him to ensure the correct cover for Monday if needed.**
> **He also said that how could we not pay him when the five of us were responsible for him being off with stress in the first place. (He stated this a few times). He also mentioned that we had gone out of our way to stress him out**
> **He said he would not deal with the three of us anymore (his words were it is a waste of time dealing with the three of us and he would only deal with the ones making the decisions) He said he has already rung Ray and Mark. He said he will now only deal with Ray & Mark**
> **He said just keep fucking him as it is all being noted and I am (Not sure if this was I am or you all) only making it worse, I asked him to repeat what he said and he said "Just keep Fucking me"**

5.62 The claimant accepts that this account is broadly true, but notes that at the time he was stressed and filled with anxiety. It is apparent that the claimant did continue to deal with Mr Wilson and all the other directors.

5.63 The respondent cites no other evidence of the claimant's refusal to deal directors.

5.64 There is no indication in the respondent's evidence that there was any specific investigation thereafter. The claimant was invited to a meeting by letter of 24 April. He was given less than 24 hours' notice.

5.65 The letter is not described as an invitation to a disciplinary hearing, albeit it is made clear that dismissal is contemplated. There is suggestion that a decision has already been made, as the letter states, "We feel the working relationship has deteriorated to such an extent that you cannot be retained without unacceptable disruption to the company." It is not clear that the claimant is being invited to give an answer to any allegations. The purpose of the meeting is not spelled-out. We note that there are at least two potential aspects of misconduct relating to unauthorised possession of property, and misuse of the company's "email and Internet policy." neither of which were investigated in any meaningful way, or ultimately, relied on. The closest the letter comes to explaining its purpose is when it says, "This hearing itself will also give you the opportunity to respond to our concerns."

5.66 The letter reads as follows:

> **I am writing to invite you to a hearing which will take place on Wednesday 25 April 2018 at 10.30 in the Lighter HR Solutions offices at 27 Clements Lane, London EC4N 7AE. The following gives you some background to the reasons for this hearing.**
>
> **As you are aware from correspondence and conversations over the last few months, there have been a number of disputes between you and the company which we have been unable to resolve. As a result, the company has concerns about your ongoing employment relationship with them.**
>
> **Despite numerous communications and conversations, we have been unable to resolve the issues raised in your grievance of 22 December 2017.**
>
> **As such, we feel the working relationship has deteriorated to such an extent that you cannot be retained without unacceptable disruption to the Company. We now want to deal with this matter through a formal process. This hearing itself will also give you the opportunity to respond to our concerns.**
>
> **More detail may be discussed at the hearing, but our concerns are:**
>
> - **Your ongoing dispute with us around our application of company rules, policies and processes;**
> - **Your working relationship with the Directors of London Legal;**
> - **Your issues with how you feel you are treated by the Company and our differing opinion on this.**
>
> **In addition to the above, we would like to discuss our concerns that:**

• You are in unauthorised possession of the Company's property. The company handbook states that "on no account may any Company or Client information stored in any form or system be copied or removed (including by electronic transfer) from the premises of the Company without prior permission from a Company Director''. We have concerns that you (or someone on your behalf) have printed hard copies of a large number of emails and other correspondence and taken this from the premises without prior permission.
• It has recently come to light that you may have breached the Company's Email and Internet Policy by using your company mobile phone to access and set up a gambling website on which "to operate a business, or ..... for personal gain". We would like to discuss this further at the hearing.

The meeting will be attended by me, one other London Legal Director and a Consultant from Lighter HR Solutions. Notes will be taken at this meeting and will be available afterwards.

I do need to make you aware that the seriousness of this situation, means that it is possible that the outcome of this hearing could be dismissal.

**You have a right to be accompanied to this meeting by a colleague or a trade union representative and we would recommend that you take up this right. If you decide to bring a colleague, then please make us aware as soon as possible so that we can make any necessary work arrangements to ensure
their availability.**

If you have any questions at all then please let me know.

5.67 The meeting went ahead on 25 April 2018. The disciplinary hearing notes are brief. Mr Wilson took the decision to dismiss.

5.68 The respondent has criticised the claimant for suggesting that the directors were lying. The main reason for this is the claimant's reference in this meeting to Mr Wilson lying about the gambling website. It is clear that the claimant's understood Mr Wilson to be suggesting that the respondent knew nothing of the gambling website. In fact, Mr Chesney did know about the website and used it. It was Mr Chesney who told Mr Wilson about the website. Mr Wilson did not acknowledge this in the disciplinary hearing, and that is undoubtedly why the claimant considered that Mr Wilson was being untruthful. On the balance of probability, we accept that Mr Wilson was deliberately misleading claimant. He failed to acknowledge Mr Chesney knew of the website, that is why the claimant took the view that Mr Wilson was lying. We view the notes to this meeting with some caution. They are not verbatim, and we are not satisfied that they accurately capture the nature of the discussions.

5.69 The claimant was dismissed by letter dated 4 May 2018. That letter was hand-delivered to him. It is common ground that the explanation was brief the relevant part of the letter reads as follows:

> **...In the letter inviting you to the hearing you were informed of the issues and concerns the Company have and you were also advised that the outcome of the meeting could be the termination of your employment.**
>
> **We have reviewed the information and given careful consideration to all that was said during the hearing. We have reached the conclusion that the Company's employment relationship with you has broken down and there has been a loss of trust and confidence between both parties. This makes your ongoing position with the Company untenable.**
>
> **We have unfortunately therefore come to the conclusion that we have no choice but to terminate your employment with immediate effect. You will receive your final salary payment on 27 May 2018 and your P45 will be issued to you shortly after this date. This final payment will be comprised of normal pay up to today's date, payment for 12 weeks' notice as a payment in lieu of notice, and any outstanding annual leave which you have accrued but not taken.**
>
> **You have a right to appeal this decision...**

5.70 This letter makes no attempt to identify the specific factual matters relied on in reaching the conclusion that there had been a breakdown of mutual trust and confidence.

5.71 The claimant appealed the dismissal (R1/833). In his appeal he made it clear that he was always willing to work with the company to resolve his grievances. He alleged the decision to dismiss was predetermined. He stated that the breakdown of communications, and loss of trust and confidence, was only on the company's part. He alleged Mr Wilson lied to him concerning his knowledge of the website.

The appeal

5.72 Mr Richard Chapman, a director of Lighter Business Solutions Ltd, was involved in the appeal. At the time, the claimant understood that it was Mr Chapman who was to make the decision on the appeal. It is now apparent from the evidence that he did not make the decision. However, the exact nature of his role is unclear.

5.73 In his written evidence he says, “I understood and agreed it would be advisable for me to consider the appeal to remove any bias and prejudice from the process.” However, paragraph 23 of his statement he says, “I made my recommendation to Mr Lawson and Mr Sprules that M Portelli’s appeal should fail on all three grounds.” He could give no detail of that discussion when questioned about it. This appears to directly contradict the initial part of his statement which would suggest that he was to make the decision. We have considered his letter of 1 June 2018, inviting the claimant to the appeal hearing. In that letter, he states: “We have made arrangements for both Ray Lawson and Mark Sprules is to be in attendance, however the hearing will be chaired by me.”

5.74 Ultimately, the appeal was dismissed. The outcome letter was written by Mr Chapman on 15 June 2018. It states, "Your dismissal appeal was heard by me…" It concludes by saying, "I have considered all that you said within the dismissal appeal hearing and it is not only the content of what you have said that the evident ill feeling towards the company that you displayed that supports their decision that the ongoing relationship between you and the company has become untenable… I therefore reject your appeal against your dismissal."

5.75 Mr Chapman's oral evidence was that he made recommendations and it was the respondent's decision to reject the appeal. As to when that decision was taken, by whom, and in what circumstances he was unable to assist. Mr Chapman suggested that his letter could be read in such a way that it was clear he was not making the decision to dismiss. We find it cannot. The letter is clear. It should be given its plain meaning. It is clear that Mr Chapman represented that he was to make, and had made, the decision to refuse the appeal. He made no reference whatsoever to the fact that he had merely made some form of recommendation. He did not explain that the decision had in fact been taken by the most senior managers of the company. Neither in his written evidence, nor any of the contemporaneous documents, does he suggest that the decision to refuse the appeal was anything other than his. We find that his letters were materially misleading. We have no doubt that the attempt to mislead was material, deliberate, and cynical. His attempt to suggest to the tribunal that the letters were not deliberately misleading, and could be interpreted as indicating that he had not made the decision, but merely recommended an outcome, was in our view misleading and disingenuous.

5.76 We need not dwell on the appeal. There were significant difficulties with the approach. Mr Chapman was extremely unclear as to his role or his approach. His review of the relevant documentation was limited. He looked at the invitation to the disciplinary hearing and the dismissal letter. He considered the disciplinary meeting notes. He did not review the nature of the investigation underpinning the original disciplinary. He did not consider whether the claimant had been given sufficient information to deal with the allegations. He told us that he wished to approach the matter with an open mind. It is apparent, from his evidence, that he based his views largely on content of the discussion at the appeal hearing. He considered his perception of the claimant's attitude at the appeal hearing. He appears to have assumed that demonstrated the relationship between the parties at the point of dismissal, as opposed to reflecting the claimant's unhappiness post dismissal. His approach is questionable, but we do not need to consider it further. The reality is that he did not make the decision to refuse the appeal. It is likely that the appeal was refused by Mr Sprules and Mr Lawson, although we simply do not know. It may have been that they discussed the matter with the other directors. The only thing we can say with certainty is that Mr Chapman did not take the decision to refuse the appeal, despite representing to the claimant that he both would, and had, made the decision.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)

6.5 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

6.6 Direct discrimination is defined in section 13 of the Equality Act 2010.

6.7 Section 13 - Direct discrimination

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.8 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.9 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.10 Section 23 refers to comparators in the case of direct discrimination.

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.11 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision. …**

6.12 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd** [2003] IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong** [2005] IRLR 258. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We

also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc** [2007] IRLR 246. The approach in Igen has been affirmed in **Hewage v Grampian Health Board** 2012 UKSC 37

Appendix

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

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

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

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

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

Conclusions

7.1 We should first consider the claim of unlawful deduction from wages. The claimant submitted overtime requests for a number of hours from 16 November 2017. The respondent accepted that any payment was due at the end of December 2017, and that the claim has been brought within the relevant time period.

7.2 It is clear that 8 hours was paid, and 5.5 hours was not. It is respondent's position that the 8 hours were paid as a matter of goodwill.

7.3 We have considered the contractual position. In its letter of 25 October 2017, the respondent made it clear that the normal provisions relating to overtime would continue. The claimant was entitled to claim overtime if he worked his lunch and did not take off compensatory time in lieu. That had been the accepted position for at least 17 years. Therefore, in principle, he was entitled to claim overtime. As noted in our finding of fact, it is unclear why the respondent refused to pay the overtime. Before us, there has been only one defence advanced, that is that the overtime was not authorised. It follows that it is not suggested that he had no right to claim overtime, or that he did not work overtime. Whilst the evidence demonstrates there was a suggestion at one point that he had not worked the overtime, that is pursued, or relied on.

7.4 As it is accepted that the overtime was worked, we have to consider the arrangements in relation to authorisation. The claimant's statement of employment says nothing about overtime. It does refer to the handbook for further details of statutory and contractual obligations plus information about policies, paid holidays and benefits. The handbook does refer to overtime. It is unclear whether the reference to overtime should be given the status of the contractual term. There is reference to overtime only being paid when unauthorised, but the method for authorisation in relation to the claimant is not set out in detail. The practice adopted over many years was any overtime would be authorised by the signing of the overtime form. There was never a requirement for the claimant to have any overtime pre-authorised. Mr Wilson's evidence was that authority was given after the event in all circumstances. The claimant did the overtime. He claimed it on the form which he had used for approximately 17 years. There was no reason for Mr Wilson to refuse authorisation. In relation to each of the claims from around 16 November, Mr Wilson did not authorise any of them, yet a number were paid. There was no good reason for Mr Wilson to refuse any authorisation. The claimant did not fail to comply with the policy which was in force. He was entitled to payment. He must be paid as 5.5 hours overtime.

Unfair dismissal

7.5 It is accepted the claimant was dismissed by letter of 4 May 2018. It is for the respondent to establish its reason. The respondent asserts that his

reason was a substantial reason, or in the alternative, was a reason related to conduct.

7.6 A reason is set of beliefs held by, or a set of facts or circumstances believed by the employer which caused the employer to dismiss. It is for the respondent to establish its reason. In the context of dismissal the alleged conduct is often clear; in those circumstances there are two questions. The first is whether the respondent actually believed that the conduct occurred. The second is whether that conduct caused the dismissal. That belief, for example that there was misconduct, goes to establishing the reason. In the absence of some factual basis demonstrating actual conduct relied on it may be hard to establish the relevant belief. It may not be enough to simply believe that a person is guilty of misconduct in the absence of some factual basis on which that belief is founded. If there is no factual basis, there may be no conduct to which the reason can relate. Similarly, when considering a substantial reason, it may be that the belief is enough to establish the reason, but in order for a reason to be substantial, it may need substance and that substance must be founded in the factual matters relied on when establishing the relevant belief.

7.7 An abstract belief that there has been a breakdown in mutual trust and confidence, may not be enough to establish a substantial reason.

7.8 In this case, while it has been submitted that, in some manner, the factual background is incidental and not relevant, that submission is not sustainable, when the relevant factual circumstances are considered.

7.9 The reality here is that the respondent's allegation that there has been a breakdown of mutual trust and confidence is firmly grounded in the alleged behaviour of the claimant. There is no doubt that it is the claimant’s behaviour that is alleged to be inappropriate conduct.

7.10 The respondent has not put forward a consistent reason for dismissal, we need to examine the various ways in which it has been put.

7.11 First, in the invitation to the hearing of 24 April 2017 states the respondent has been unable to resolve the issues raised in the claimant's grievance and then states, "As such, we feel the working relationship has deteriorated to such an extent that you cannot be retained without unacceptable disruption to the company.”

7.12 The reason is put differently in the dismissal letter of 4 May. It simply says, "We have reached the conclusion that the company's employment relationship with you has broken down and there has been a loss of trust and confidence between the parties." It asserts his position is untenable.

7.13 In the response to the second claim, the reasons are set out at length between paragraphs 45 – 49.

> **45. The Respondent took the view that the Claimant's belligerent conduct, unmanageable attitude, disrespect and personal attacks towards Directors, non-acceptance of the findings of grievances outcome and access to and collation of confidential information had resulted in a breakdown of communication, trust and confidence between the parties.**
>
> **46. The Respondent wrote to the Claimant on 25 April 2018, requiring him to attend a disciplinary meeting, primary on the grounds of a breach of trust and confidence between the parties. The Claimant was warned that a possible outcome was dismissal.**
>
> **47. The Claimant attended the disciplinary meeting accompanied on 25 April 2018. The meeting was chaired by Graham Wilson, director and Erica Hameed of Lighter HR attended as support. It was put to the Claimant that because the issues remained unresolved (according to the Claimant) that the employment relationship had become untenable. Further, due to the nature of ongoing correspondence - which was highly unprofessional - that the relationship with the Directors had broken down. Concern was also expressed with the confidential material stored and provided during the grievance appeal process - to which the Claimant responded that it was 'some' of the evidence that he had in his possession. Specifically, how the Claimant had obtained the confidential material whilst he was off work - the Claimant refused to provide an explanation.**
>
> **48. An ancillary matter was put to the Claimant in that he was using his company mobile phone to conduct a gambling business-the Claimant stated that Mr Wilson was aware of this, which Mr Wilson denied. The Claimant also asserted that the disciplinary meeting and discussion was 'pointless'.**
>
> **49. The Claimant was invited to respond to the allegations - the Claimant relayed that he had nothing to add that hadn't already been said - the Claimant refused to engage with the process or provide any response to the allegation that the relationship had broken down.**

7.14 Mr Wilson's statement contains no clear statement of the reason for dismissal. At paragraph 51 he states the following:

> **51. Following the conclusion of the grievance process, the directors believed that the relationship with Lea had deteriorated to such an extent that his continued employment could be detrimental and disruptive to the business. Some of the factors that led to this view were: Lea's refusal and challenges to adhere to the clothing and working hours requirements, working his contractual hours, not leaving work early, claiming overtime when he was not working, refusal to engage anyone during his lunch break, challenging management instructions, his excessive emails and his difficult behaviour. It appeared that Lea began challenging all management instructions and had become increasingly difficult and a real challenge to manage...**[2]

7.15 There is then reference to his calling the directors liars, retention of company property, and use of his mobile phone in a gambling business. At least in relation to the latter two, Mr Wilson confirmed in his evidence he placed no reliance. At paragraph 62, he summarised reason as follows:

[2] We have set this out again for ease of reference.

> **62. After Lea left, I discussed the matter with Ms Hameed, and we were surprised with Lea's complete ignorance and refusal to engage with us; in a way it did further demonstrate that the relationship had indeed broken down. Ms Hameed also concurred that in her view the relationship between Lea and the directors had been destroyed and that there was clearly no confidence or trust remaining between the parties, she even stated that Lea doesn't trust us at all. Given that Lea had refused to engage in the meeting, refute or challenge allegation, I took the view that the relationship between Lea and the directors had been irreparably destroyed, and took the decision to dismiss Lea.**

7.16 It is unclear why he asserts that the claimant refused to engage in the meeting or refused any allegations. That is an interpretation of the meeting which is unsustainable.

7.17 In his oral evidence, Mr Wilson relied on a number of matters as justification for dismissal; they were particularly as follows: the claimant's alleged unreasonable behaviour/conduct/attitude; the claimant's refusal to deal with three directors; the claimant sending an excessive number of emails which took up Mr Wilson's time and prevented him doing other duties; his continuing employment would have been disruptive; and not adhering to (unspecified) company policies. Later in his oral evidence he also referred to the following: things the claimant said about the directors; and documents the claimant obtained from the company (unspecified).

7.18 As to the factual basis for these allegations, there is little or no detail in Mr Wilson's statement. Nevertheless, the claimant explored the matters with him in cross-examination and we should record what factual matters Mr Wilson relied on in support of his general assertions.

7.19 In relation to the claimant's alleged unreasonable behaviour and poor attitude, he specifically referred to three separate email chains. We will deal with each of them.

7.20 The first email exchange started at R1/1117. Mr Wilson sent the claimant an email on 12 December 2017. He stated he had undertaken a spot check on the latest batch of completed job sheets and that there were failings on the completion of the "binder checklist document." He noted the failure to sign the document may seem minor. He did not specifically require the claimant to rectify it, but it is clear that he was asking the claimant to comply. The claimant accepted the criticism and said he would create a new checklist. Mr Wilson then sent a further email saying he did not want another checklist. This led to further email exchanges where it is clear the claimant was trying to resolve the position and Mr Wilson was unhappy with the resolutions proposed by the claimant. Pausing there for a moment, we note that one of Mr Wilson's complaints is the excessive number of emails sent by the claimant. We asked Mr Wilson why he did not go and speak to the claimant, but who gave no reasonable or satisfactory answer. What is clear is that Mr Wilson became more unhappy, and critical. By 14 December he is referring to the claimant as being negligent for not following or enforcing correct procedures. Mr Wilson's language has become increasingly strong and

critical. It would be fair to say that the claimant's response is defensive. He does question Mr Wilson's response, but nevertheless states that he will comply. There is no doubt that this email exchange demonstrates a degree of unhappiness. However, to the extent it demonstrates unreasonableness, it is apparent that it is Mr Wilson's approach which is the more unreasonable.

7.21 The second chain of emails relied on starts at R1/1093. There is an email from the claimant on 9 November 2017 when the claimant suggests that he should have a production meeting with the two shift managers before Christmas. He says, "If this is okay I would like to go for a bite to eat/drink when Grant gets in at 14:30. Obviously there will be a cost to the company of a few hours overtime plus meals/drinks." It is evidence to us Mr Wilson accepted that this was a perfectly reasonable proposal by the claimant. The meeting was appropriate. Having the meeting in a social context, with something to eat and a few drinks, was acceptable. However, he did not agree to it but returned by saying that the only problem was the timing of the meeting. He suggested it should be from 7 to 8 and the claimant should swap a shift to the afternoon shift and have the morning. The claimant responded that the managers discussed it and identified the best time. Mr Wilson then suggested that the meeting could be held at 07:00 in the morning. The claimant asked for clarification and stated if the overtime was a problem, he would be happy for the company to owe him a few hours which could be taken off at a time convenient. There were further emails. The final resolution is unimportant. Mr Wilson confirmed that his concern was he did not want to pay overtime. We cannot accept that this is evidence of the claimant being belligerent or unreasonable. The meeting was necessary. Having the meeting in a social context was agreed. The claimant was flexible as to timing. He did not want to change shift, that was not unreasonable. He did not insist on overtime, and was happy to take compensatory time off. It appears that Mr Wilson wanted to insist on his solution, which was the claimant should not be paid overtime to changes shift. This is not evidence of unreasonableness on the claimant's part.

7.22 The final exchange of emails relied on by Mr Wilson begins at R1.1078 of the bundle. On 11 July 2017, the claimant sent Mr Wilson an email. He stated he liked to catch up with the other two managers on an extended meeting with no time constraints. He again suggested that they have a meal and a few beers. He referred to the obvious cost and sought permission. Mr Wilson accepted in his following email that he did not have any difficulty with the issue as such. It accepts that there were two managers, but if they had a drink, could not run a shift afterwards and says, "So it is a quandary!" We understand that this meeting, ultimately, never took place, but the email exchange continued. The claimant set out two specific proposals and costings on 14 July 2017. Mr Wilson's proposal was the claimant should completely change shifts. The discussion dragged on. Mr Wilson could have insisted on the claimant changing his hours, no doubt he could have imposed it, and that would have been the end of it. The reality is the three managers covered a long

period during the day. There would have to be flexibility, and in all likelihood some form of overtime. The reality is Mr Wilson wished to save a few hours overtime and perhaps that, in context, was unreasonable.

7.23 It follows that the evidence cited by Mr Wilson during his cross-examination does not support a conclusion the claimant had behaved unreasonably. It was Mr Wilson who most clearly demonstrated unreasonableness. As to the two proposed meetings, they were infrequent; it is difficult to see why Mr Wilson took such a negative approach.

7.24 Mr Wilson complains about the claimant taking up his time by sending excessive emails. It is the claimant's case that in fact Mr Wilson ignored most of his emails. Mr Wilson accepts that he did ignore a number of the claimant's emails. Again, as the details were not set out in Mr Wilson statement, we looked at a number of the exchanges. As to the three emails exchanges referred to above, Mr Wilson could have avoided the email exchange by speaking to the claimant and reaching a resolution. The email exchange was were largely caused by Mr Wilson's approach.

7.25 Mr Wilson's allegation is that the claimant sent up to a hundred emails a month. This works out at around 4 or 5 a day. The claimant sent emails about members of staff, work-related issues, and in response to those sent by Mr Wilson. The number is not great. In any event, it is apparent that Mr Wilson ignored a number of the emails from the claimant.

7.26 We were taken to one exchange which started on 5 July 2017. The claimant sent an email to directors (R1/737) suggesting an annual bonus and referring to an annual fishing competition. It enquired whether the respondent would pay for that, as it had done in the past. He received no reply and sent a chasing email on 12 July. He still received no reply and on 14 September, he asked for any feedback. On 19 October he again noted he had received no reply and made enquiry about the proposals for the Christmas bonus. It was not until 19 October 2017 that the directors responded, in a somewhat curt manner, saying that all bonuses, rewards, and incentives would be discussed by the company directors and communicated at the appropriate time. This is cited as an example of the claimant sending unreasonable emails. It is, in fact, an example of the respondent failing to deal with the most routine correspondence.

7.27 As to the allegation the claimant did not comply with company policies, there appear to be two policies relied on. The first is the dress code policy. We have explored the detail of this in our finding of fact. The reality is that the respondent changed its position on the dress code policy. The requirements were initially unclear to the claimant. He bought clothes to comply, particularly dark jeans. The policy was then modified. The claimant bought clothes to comply with the policy and thereafter complied fully from approximately mid-November. There may have been some delay at the beginning of November, but the suggestion that he refused to adhere to the policy is unsustainable and unfair.

7.28 The other policy relied on concerns overtime. The claimant fully adhered to the policy as communicated and as understood by him. It was the respondent that breached his contract by refusing to pay the overtime legitimately worked. As part of that refusal, it indicated that the claimant should avoid claiming overtime and implied, inappropriately and without justification, that he was routinely claiming overtime when it was not legitimate for him to do so. We do not say that it was not open to the respondent to modify its policy. However, if it is going to criticise the claimant for not obtaining advanced authorisation for overtime, it must put in place a clear and unambiguous procedure. Instead, what the respondent did was arbitrarily modify the procedure which had been adopted for many years, fail to make any change clear, and simply refuse to pay overtime which in fact been legitimately worked. The claimant did not breach the policy.

7.29 The respondent relies on the claimant suggesting the directors were liars. To the extent any evidence has been given about that, it relies heavily on the transcript from the appeal against dismissal. However, when we consider the thought process of Mr Wilson, when he dismissed, it could not have been in his mind what the claimant may or may not say at a subsequent appeal.

7.30 As regards the evidence which existed at the time, there was the discussion on 12 January, where it would be fair to say that the claimant was rude. However, that was an isolated incident. It was not open to Mr Wilson to conclude that, thereafter, the claimant would not deal with other directors. He continued to deal with Mr Wilson. If Me Wilson had exercised a neutral attitude towards the claimant, he should have recognised that the claimant was under stress, that he was unhappy, and that anything he said should be viewed in that context. Moreover, Mr Wilson was in a unique position to recognise that the claimant had a legitimate point when he said that he should be paid as overtime. We do not accept Mr Wilson ever believed the claimant had reached the view that he would not deal either with Mr Wilson or two of the remaining 4 directors.

7.31 As regards printing off confidential information, and misuse of his mobile phone, Mr Wilson did not rely on those at all, as he admitted during his evidence.

7.32 Mr Wilson's evidence at paragraph 12 of this statement states that the claimant blatantly disregarded the request to wear smart attire. He goes on to say "he just dug his heels in." That evidence is entirely unsustainable and not founded on any fact. The reality is, the claimant's may have expressed a degree of unhappiness. He may not have responded as quickly as the respondent would have liked. However, he did comply with the policy and wore the appropriate attire from the middle of November. That is not acknowledged in the evidence of Mr Wilson, or in any other

document that we been taken to. There is no evidence the claimant just dug his heels in. The evidence is the opposite; he cooperated.

7.33 The respondent also places reliance on the claimant's response to the grievance. It is difficult to understand the respondent's position. The claimant had raised a grievance. On the respondent's case the grievance had been considered independently and a decision reached. That decision was not entirely supportive of the respondent's position. Mr Wilson's evidence at paragraph 44 refers to the claimant requiring payment of overtime, sickness pay, and an apology together with the relaxation of clothing and the overtime policy. He says absent that the claimant "would remain unhappy." Even taken at its height, why that is a part of the claimant returning to work, or why it should be taken to be a breakdown of the mutual trust and confidence, or why that breakdown should be attributed to the claimant's conduct, all remain uncertain. The claimant is not required to agree that the overtime is not payable. If the respondent does not agree, it should set out the position, and that is an end to it. It is of course open to the claimant then to bring a claim to a tribunal. Had he done so, it is clear that he would have been successful. We have found the respondent's view is wrong. Ultimately, we may be right or wrong about that. That is the decision we have made on the evidence we have received. The respondent cannot require the claimant to accept its view. Indeed, the law makes it plain that dismissal for the assertion of a statutory rights is an automatic unfair dismissal. That is not a claim pursued before us, but we note the point simply to illustrate that employees are not required to accept the respondent's position. The employee may sue the employer. The claim may be successful or unsuccessful. That in itself cannot undermine the mutual trust and confidence between the parties.

7.34 As regards the other matters asserted, we do not understand why Mr Wilson maintains that the claimant required a relaxation of the dress policy. He did not. He was complying with the policy. The claimant did not require a relaxation of the overtime policy. He had simply applied the policy as it had always existed. It was the respondent wish to change it.

7.35 All of this is put forward in the context of the respondent's assertion that the claimant remained unhappy in relation to the grievance, and that unhappiness in some way undermined the mutual trust and confidence. That assertion is not sustainable. In any event, at all times the claimant made it absolutely plain that he wished to continue working for the respondent. While he was unhappy with a number of matters, and whilst he believed he had been bullied, his approach was constructive and conciliatory.

7.36 An employee should be able to disagree with an employer, without the employer saying that the mutual trust and confidence is destroyed. This is particularly so when there is legitimacy in the employee's complaints, and when a reasonable employer should have recognised that legitimacy.

7.37 It follows we have identified and considered in detail the allegations levelled at the claimant by the respondent which are said to support its contention that there was a breakdown in the relationship. We do not accept that there is evidence that the claimant acted in a fundamentally destructive, unreasonable, and belligerent manner, as alleged by the respondent. There is ample evidence that there was provocative treatment by the respondent. It does appear that the respondent targeted the claimant in relation to his dress code. Others continued to receive overtime and it is apparent that the claimant's request for overtime, and his claiming overtime, proved problematic. Reasonable emails went unanswered.

7.38 There is one aspect of the respondent's treatment which is particularly concerning. In the letter of 16 November 2017, there is serious criticism of the claimant's general approach to management, but the reason for that, and why it was raised at this time, is unclear. There is reference to the company moving on quite rapidly since the claimant joined and an assertion that he may be finding it "difficult to keep up with the pace of change." He is to be sent on the most basic management training course. It is clear the claimant saw that as unwelcome and hostile. The respondent has not explained why it took that action. There can be no doubt that it was reasonable for the claimant to see it as unwelcome, and potentially hostile.

7.39 As we previously noted, the actual reason for dismissal may sometimes depend upon what secondary inferences can be drawn from primary findings of fact. We are satisfied that there is clear evidence that at least Mr Wilson had developed a negative view of the claimant, and developed a negative managerial style in relation to the claimant. Rather than simply speak to the claimant, Mr Wilson sent a number of negative and sometimes increasingly hostile emails, as we have described. There is at least some evidence that the claimant was viewed as being someone who would not keep up with the pace of change. There was a negative view of the claimant. The is no clarity for why there was a negative view, how far it was shared with the other directors, and the full rationale. As we have observed, it is clear we have not received much of the relevant evidence, as it has been deliberately withheld from us.

7.40 What we can say is that it was Mr Wilson's negative view of the claimant's which caused him to dismiss. We have arrived at that view both by reference to his actual evidence, and what can be reasonably inferred about the directors general view of the claimant.

7.41 The next question is whether the respondent acted reasonably in treating that reason as a sufficient reason to dismiss. There are a number of problems with this. It is respondent's case that there was a breakdown of mutual trust and confidence, but there is no objective basis for saying that the claimant caused a breakdown of the mutual trust and confidence. We have considered carefully the behaviour relied on. We do not accept that

the claimant behaved in such a way that in any sense his behaviour was calculated to or likely to destroy the mutual trust and confidence.

7.42 We should recognise that there is evidence of the respondent behaving in ways which were likely to, or calculated to, fundamentally undermined the mutual trust and confidence between the parties. We should highlight a number of aspects of the respondent's behaviour which demonstrate poor industrial practice, and which could undermine mutual trust and confidence.

7.43 The respondent was entitled to impose a dress code. However, its approach was hostile and unclear. The respondent continued to allege the claimant was obstructive, even when he complied with the policy fully.

7.44 The respondent's approach to claimant seeking overtime was heavy-handed and ultimately breached his contract. Whilst the respondent could change its policy, to do so without being clear as to exactly what was required from claimant was always likely to damage the relationship. Asserting that he had, in some manner, falsely claimed overtime, when he had not, is likely to be destructive.

7.45 Requiring the claimant go on a basic management training course, whilst asserting that in some manner he had failed to keep pace, was unreasonable. It was likely to damage the relationship.

7.46 When the claimant filed his grievance, suspending him without proper explanation it was likely to damage the relationship. It is clear the respondent referred to suspending him. Suspension may sometimes be neutral. It cannot be seen as neutral in the circumstances. Had the respondent approached him and discussed whether he would prefer to remain on paid leave, that may have been acceptable. However, it is difficult to see how the claimant could have interpreted the respondent's actions as anything other than hostile.

7.47 The handling of the grievance is questionable. It cannot be assumed that employing HR firm guarantees independence. It can be seen that the outcome of the grievance relied largely on the assertions made by the respondent.

7.48 To the extent there was a breakdown in the trust and confidence, that largely occurred because of the respondent's behaviour to the claimant. Nevertheless, the claimant did continue to seek a positive resolution.

7.49 As regards the approach to the dismissal, we cannot accept that the hearing on 25 April 2018 was anything other than a disciplinary hearing. It includes specific matters of conduct and to the extent that there was an assertion of a breakdown of mutual trust and confidence, that simply hid the assertion of misconduct on the part of the claimant which we have explored above.

7.50 We have had regard to the 2015 ACAS code. That was specifically raised with the parties and with the witnesses.

7.51 Paragraph 5 provides that there must be a proper investigation. There was no investigation into the alleged allegations of conduct. There was a total failure of investigation.

7.52 Paragraph 9 makes it plain that the employee must be given proper details of alleged conduct. In relation to the conduct identified, the allegations were not clear. Other conduct was hinted at and not set out at all. There was no attempt to include any relevant documentation particularly in relation to the allegations concerning confidential information and use of this phone. As regards the other allegations concerning his unreasonable conduct which are clearly based upon his sending emails, his attitude towards the dress code, and his claiming overtime, none of that is detailed; none of the evidence was identified. He was given less than 24 hours' notice and there was no possibility that he could prepare a response.

7.53 The hearing itself was seriously flawed. It did nothing to rectify the deficiencies in the letter inviting him to the hearing. It was not systematic and appears to have proceeded on the basis that in some manner he should justify behaviour which had not been identified. Moreover, when the claimant did challenge the evidence in relation to the website, Mr Wilson was materially misleading, and the claimant was justified in suggesting that he was being lied to. The procedure adopted is his hopelessly flawed and materially unreasonable.

7.54 As regards the appeal, it is again suggested that because a HR consultancy firm was involved, in some manner it was independent. The reality is that Mr Chapman misled the claimant. He indicated initially that he was making the decision and that was the position he maintained in his letter refusing the appeal. The reality is Mr Chapman did not make the decision at all. As regards his approach to the appeal, that was again hopelessly flawed, as we have explored above. He appeared to proceed on the basis that he was forming an independent view based on the claimant's attitudes at the time of the appeal. He failed to identify any of the deficiencies in the original process. He did not identify what the specific allegations were against the claimant. In any event, whatever view he reached, he did not make the decision.

7.55 It follows for the reasons that we have given that this dismissal must be unfair. No reasonable employer would have dismissed in the circumstances. To the extent there is any breakdown in the mutual trust and confidence between the parties, that was caused predominantly by the attitude of and action of the respondent. No reasonable employer would dismiss because of any breakdown in relations caused substantially by its own actions. Any reasonable employer would have sought to recognise the difficulty and taken remedial action. In any event, the procedure adopted by the respondent was unfair. To the extent there was

misconduct, and to the extent the respondent believed there was misconduct, there was no satisfactory factual basis supporting the conclusion. Further, at the time any conclusion about misconduct was reached the investigation was inadequate and was not an investigation open to a reasonable employer.

7.56 We next turned to the allegation of age discrimination.

7.57 We remind ourselves that it is rare to find direct evidence of discrimination. We also remind ourselves that it may not always be necessary to construct a comparator. Disputes can often be avoided by focusing on the reason.

7.58 We accept that it is not sufficient to find a difference in treatment and a difference in a protected characteristic. There has to be something which suggests that the reason for the difference in treatment is the protected characteristic.

7.59 We also note that unreasonable behaviour will not, in itself, be evidence of discrimination, but where there is a failure of explanation for unreasonable behaviour, that failure of explanation can lead to an inference of discrimination.[3]

7.60 Not all cases will require consideration of the reverse burden. This is particularly the case where there is a clear explanation which demonstrates the reason for dismissal. However, there are occasions when it is essential for the reverse burden to applied carefully. This is particularly the case when there is said to be no evidence which directly demonstrates that a protected characteristic was a material fact.

7.61 We first will consider the allegation that the dismissal was an act of age discrimination.

7.62 It is for the claimant to point to facts from which it could be concluded that the dismissal was because of the protected characteristic. The protected characteristic does not have to be the sole reason, it merely needs to be a material reason. The claimant can point to any facts, whether established by his own evidence, or the evidence of the respondent. In considering whether the burden shifts, we can have regard to those inferences which we could legitimately draw. That involves considering what secondary findings of fact, that is what inferences, we could draw from the primary findings of fact.

7.63 In relation to the dismissal, it is clear that the dismissal occurred. It follows that the treatment which is said to be detrimental is established. That is the first stage. The second stage is to consider whether the primary findings of fact could lead to an inference of the relevant discrimination. We consider that evidence now.

[3] See the guidance of Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paras 100-101.

7.64 Central to the claimant's case has been an assertion that when he left his employment on 22 December, two younger individuals were promoted. The first was Ms Jemma Lowe who is said to have taken over his managerial position in the print room. The second is Mr Grant Lowe who was promoted to a managerial position the claimant says was denied to him.

7.65 We have heard most evidence regarding Ms Jemma Lowe. It is the treatment of her that we concentrate on. We have not needed to consider in detail Mr Lowe's position.

7.66 Mr Wilson's written evidence is that Ms Lowe was promoted to senior digital print reprographics operator. Throughout these proceedings, the claimant has asserted that she was promoted to take on his management of the morning shift. That has been denied throughout. Moreover, at the case management discussion, he asserted that the reason why she was promoted was because she was both younger and less expensive. That was specifically recorded in the case management discussion. Mr Wilson's evidence stated, categorically, that Ms Lowe "has not undertaken any of [the claimant's] formal role or responsibilities." The evidence of both Ms Katie Portelli and Ms Steven Portelli contradicted Mr Wilson's evidence. The evidence of both describes Ms Lowe immediately taking on the claimant's managerial role. She moved into the office he occupied. She occupied the desk he sat at. On 9 March 2018, she broke into the claimant's desk-pod, removed all of his items, and replaced them with her own. From 22 December 2017 she took over his role in answering phone calls, emailing clients, and organising incoming and outgoing jobs. She took over direct responsibility for managing Mr Steven Portelli, telling him what jobs he would do and when. Mr Steven Portelli also refers to Mr Grant Lowe as now managing the print room and scanning department. Whilst we accept that evidence, we do not need to go into it further.

7.67 Mrs Portelli is wholly supportive of Mr Steven Portelli's evidence, albeit she resigned when the claimant was dismissed.

7.68 During the course of cross-examination, Mr Wilson conceded that his statement was inaccurate. He could give no explanation for that inaccuracy. There was no basis on which he could assert that she had not undertaken the claimant's formal role or responsibilities. He sought to suggest that she had undertake some of those duties prior to the claimant leaving, but he accepted that her position had materially changed. Whilst he did not accept that she was formally appointed to the claimant's role, there can be no doubt that his suggestion that she had not undertaken any of his formal role and responsibilities was materially misleading. We have considered whether that error could be inadvertent. We have concluded that there is no possibility of it being inadvertent. This was a cynical and deliberate attempt to mislead the tribunal as to the role and status of Ms Lowe. Moreover, his statement fails to deal with the circumstances in which her role changed, or the circumstances in which she received an

increase payment. During cross-examination, he agreed that she had received an increase in salary from approximately £26,000 to £28,000. No supporting documentation been included in the disclosure. The day after Mr Wilson finished his evidence, we were presented with two letters, both dated 3 August 2018. One was to Ms Lowe, the other to Mr Philip Lawson. The letter to Ms Lowe records her new title and an increase in salary from £26,460 to £28,000. It was suggested to us that it was not known that the level of pay was material or in issue. We do not accept that explanation. Ms Lowe's role, any promotion, and any increase in salary was obviously relevant. In any event, it was put firmly in issue at the case management discussion, when the claimant made reference to expense.

7.69 The reality is, the respondent has produced evidence which materially misled us as to the role of Ms Lowe. Moreover, the respondent has withheld what could reasonably be seen as cogent evidence. Whilst it has produced one letter, we have no other documentation in support which confirms the rationale relating to any decision to promote her. She has not been called. If she had not taken on the claimant's role, she would have been in a position to give details of her role by simply giving evidence. The respondent could have called that evidence but has chosen not to.

7.70 We do not accept Ms Lowe is a direct comparator. There was no one in the same position as the claimant but of a different age. She is, however, an evidential comparator and was understood to be so by the respondent.

7.71 In a situation when the treatment of a specific individual is cited as clear evidence of age discrimination, the evidence given in relation to that person must be scrutinised carefully. The mere fact that she took over fundamental key elements of his role may not in itself be enough to turn the burden. Somebody had to do his work. The mere fact that it is undertaken by somebody younger who may coincidently be cheaper, may not be sufficient. That points simply to a situation where there was a difference in treatment and a difference in protected characteristic. There must be something more.

7.72 In this case, the respondent has withheld material documentation. It has failed to explain the basis on which she was promoted, and it is highly probable that relevant material in relation to that has also being withheld. However, the fact that the respondent has given untruthful evidence and sought deliberately to mislead the tribunal as to her role cannot be ignored. Deliberately, cynically, and materially misleading a tribunal as to the circumstances of somebody cited as an evidential comparator is very likely to result in a tribunal concluding that that deliberate misleading is evidence from which the relevant discrimination could be inferred. That is the case here. The burden shifts.

7.73 Whilst that is the most obvious reason why the burden shifts. It is not the only reason. There is other evidence from which the burden could shift.

We will set that out in a moment. We should note that a tribunal should, when considering whether the burden shifts, keep in mind at all times the totality of the evidence before us. Whilst it may sometimes be argued that each individual fact may not in itself be sufficient to turn the burden. There are times when the accumulation of detail is such that it could be legitimate to draw the relevant inference.

7.74 We have particular regards the following facts. Much of the respondent's approach to the claimant, his grievance, the disciplinary, and the subsequent appeal is unreasonable. We have already considered the nature of the unreasonableness when looking at the claim of unfair dismissal. More importantly for the discrimination claim is whether there is any explanation, because a lack of explanation for unreasonable conduct is a matter from which an inference can be drawn.

7.75 When dismissing the claimant, there was a total failure to investigate, he was not told in any or sufficient detail the conduct which was in issue. To the extent that there was relevant evidence, that was not gathered or given to him. The letter inviting him to a disciplinary appears to indicate a pre-judgement. The approach taken at the disciplinary did nothing to address any of the previous deficiencies and did nothing to suggest that there was no predetermination. The letter of dismissal failed to set out an adequate reason.

7.76 It is apparent that much of the conduct relied on rested on inadequate foundations. The respondent continued to criticise the claimant raising issues in relation to overtime. It continued to take the view that he, in some manner, was obstructive in relation to the dress code. Neither of those had foundation. Other allegations in relation to use of his phone and retention of confidential information were raised. However, they were not materially investigated, and had little or no foundation. He was materially misled as to the respondent's knowledge of his operation of the gambling website.

7.77 All of this was unreasonable conduct. Have we received an explanation? The answer to that must be no.

7.78 As to the failures of procedure, the respondent suggested, in some manner, that the hearing leading to the dismissal was not a disciplinary hearing. It is directly contradicted by Mr Wilson's oral evidence, and the reference to disciplinary proceedings in his own statement. In the second response, the meeting is described as a disciplinary meeting. To the extent that the explanation is put forward, it is based on no evidence. The respondent's submissions have gone as far as to say that we should ignore Mr Wilson's evidence that it was a disciplinary hearing. It follows that to the extent any explanation is advanced at all, it is advanced in the face of, and in contradiction, of the respondent's own evidence.

7.79 For the reasons we have given, there is ample evidence of unreasonable conduct in relation to the disciplinary procedure.

7.80 The conduct of the appeal was also unreasonable. We have explored this above. The claimant was misled as to who would hear the appeal. Mr Chapman represented, in the decision letter, that he had made the decision, when he had not. The appeal itself was flawed and failed to consider, in any meaningful way, the appropriateness of or the rationale for, the original dismissal. In any event, we have no evidence at all from the individuals who made the decision to refuse the appeal, we cannot even be sure who they are. All of that is unreasonable. Have we received an explanation for it? The answer is no.

7.81 Mr Chapman was unable to remember any detail of the nature of the advice he gave, he could not recall how the advice was given. He did not know whether he attended any specific meeting. He could not recall whether there were any emails. He did nothing to check the position. There is a total failure of explanation.

7.82 We have considered whether there is any documentation which could indicate that age was a factor. We have considered the letter of 16 November 2017. There is a reference to the business having moved on rapidly. There is reference to the claimant "finding it difficult to keep up with the pace of change." There is then reference to having remedial management training at the most basic level. We accept that this is not a direct reference to age. However, the language employed comes uncomfortably close to suggesting a stereotype of someone who has been employed for a long time being set in his or her way. Whilst that does not necessarily make a reference to a stereotype based on age, it is at least an inference that could be drawn.

7.83 We cannot wholly ignore the fact that the treatment of the claimants as we described has been, at times, hostile and unexplained. Viewed in the context of all the evidence, it is a further matter from which we could draw an inference.

7.84 It follows, for all the reasons we have said, that the burden shifts. That is to say there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened a relevant provision of the act. We must hold that the contravention occurred unless there is an appropriate explanation which demonstrates the provision was not contravened. That is to say in no sense whatsoever was the alleged contravention a part of the reason.

7.85 We should note that there are two allegations of discrimination. The second allegation is that the suspension on 22 December was an act of age discrimination. Viewed one way, this allegation cannot succeed, as it is not clear the claimant was suspended on 22 December. That is the allegation which is recorded, and that is the allegation the defendant has resisted. That specific allegation cannot succeed. The claimant has not sought to rely upon suspension at any other time. As we have noted, it is unclear why the claimant was suspended, and when. However, to decide

as a separate point that the suspension was an act of age discrimination would require an amendment. It is not necessary for us to do so. What is clear is that, subject to any explanation, we could find a dismissal was an act of discrimination and that dismissal clearly arises at the end of the set of circumstances which lead up to it.

7.86 Has the respondent proven its explanation? The respondent must prove its explanation on the balance of probability. Where there should be cogent evidence, the respondent should produce that evidence.

7.87 The explanation advanced by the respondent is that there was a breakdown of mutual trust and confidence caused by the claimant's action. Put another way, the explanation relies on the respondent having put forward a clear, truthful, explanation of the claimant's dismissal founded on cogent evidence.

7.88 Here the reality is that the respondent has deliberately sought to obscure its true reason. We have already observed that there were conversations between the directors which were material to the decision to dismiss. Whilst we know that those conversations exist and occurred, we have received no oral evidence. We have received no written evidence. We have already noted it is likely that there were emails which would have been of assistance. Instead, the respondent has relied an allegation of breach of mutual trust and confidence and cited the conduct of the claimant. We have explored the nature of that conduct and noted the inappropriate behaviour of the respondent in the way the respondent sought to misrepresent the claimant's conduct. The respondent has materially misled us in relation to relevant evidence concerning Ms Lowe. We have not needed to consider Mr Lowe's position, as it is not material to either the respondent's decision, or deliberation. It follows that we do not accept the respondent has established an explanation. There is insufficient evidence of the claimant behaving in a way which would materially damage mutual trust and confidence. We therefore cannot, on the balance of probability, conclude that was the true reason. There is clear evidence that there were discussions about which we received no evidence. To the extent that Mr Wilson suggests that the decision was made by him, in isolation, following the disciplinary hearing, that is unsustainable. It is untrue. There is cogent evidence which should be available which we have not been given, and this includes the evidence relating to Ms Lowe’s position, about which we were misled. In all the circumstances we conclude that this respondent, on the balance of probability, has not established its explanation.

7.89 Finally, we should note that the respondent has not sought to advance any argument that dismissal was a proportionate means of achieving a legitimate aim.

7.90 One possibility would be that the true reason was not age, but expense. However, during the course of his evidence, Mr Wilson specifically confirmed that the claimant's salary, that is the cost of the claimant, played

no part whatsoever in the reason for dismissal. It follows that the respondent has not sought to advance any justification argument.

7.91 It follows for all the reasons we have given that we must find that the dismissal amounted to direct age discrimination

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Employment Judge Hodgson

Dated: 5 September 2019

Sent to the parties on:

5 September 2019

For the Tribunal Office