Case Number: 3305299/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Lisa Forrest	v	Triplelift UK Limited

Heard at: Watford

On: 22, 24, 25 and 26 July , 5 August (in private) and 8 August 2019

Before: Employment Judge Hyams

Members: Ms G Binks
Mr D Sutton

Appearances:

For the claimant: Mr J Heard, of counsel
For the respondent: Ms K Hosking, of counsel

JUDGMENT

1 By consent, the claimant is entitled to two weeks' notice pay. That is the sum of £1,817.30 gross.

2. At the time of the commencement of this claim, the claimant had been given no statement of her terms and conditions of employment compliant with section 1 of the Employment Rights Act 1996 ("ERA 1996"). In the circumstances, applying section 38 of the Employment Act 2002, the claimant should receive 4 weeks' pay, which, given that the cap in section 227 of the ERA 1996 applies, is £1956.00.

3. The respondent underpaid the claimant commission in the sum of £10.71 gross.

4. The respondent failed to pay the claimant sick pay in the sum of £142.96 (gross).

5. The respondent did not discriminate against the claimant because of her sex, harass her within the meaning of section 26 of the Equality Act 2010 ("EqA 2010"), or victimise her within the meaning of section 27 of that Act, in any way.

6. There was a material factor within the meaning of section 69 of the EqA 2010 for the difference in the pay of the claimant as compared with that of her two named comparators.

REASONS

Introduction

(1) The claim

1 In these proceedings, by the end of the hearing, the claimant claimed

1.1 that she was discriminated against by the respondent because of her sex,

1.2 that she was harassed within the meaning of section 26 of the Equality Act 2010 ("EqA 2010"),

1.3 that she was victimised within the meaning of section 27 of that Act,

1.4 equal pay: she claims, and the respondent accepts, that she did work which was like work to that of two male fellow employees of the respondent (Mr Harry Charalambous and Mr Richard Keen), and they were (as stated below) paid more than her;

1.5 breach of contract or unlawful deductions from wages (1) as a result of being paid only statutory sick pay while working at home from 5-11 October 2017, and (2) in respect of commission entitlements; and

1.6 that she had not been given a statement that satisfied the requirements of section 1 of the Employment Rights Act 1996, so that if any of her claims succeeded, then she was entitled to a payment under section 38 of the Employment Act 2002 ("EA 2002").

2 During the course of the hearing, the respondent accepted that the claimant was entitled to notice pay of £1817.30 gross (from which the respondent would be required to deduct income tax under the Pay as You Earn regulations) on the basis that (1) the common law has the effect that an employee is entitled to a reasonable period of notice, (2) a reasonable period of notice was in the claimant's case 1 month, and (3) the claimant had been paid only 2 weeks' notice pay. It was also accepted by the respondent that the claimant's claim under section 38 of the EA 2002 had to succeed in the circumstances. The

correct weekly figure was that which applied when the claim was commenced, and that was £489.

(2) The issues

3 At a preliminary hearing conducted by Employment Judge Bedeau on 26 September 2018, an order was made for the provision by the claimant of further information about the claim, and for the parties to agree a list of issues after such further information had been provided. The claimant's further information was provided on 24 October 2018. The parties then filed an agreed "Draft List of issues to be decided by the Tribunal". It was clarified at the start of the hearing that issue number 2 in that list should have added to it as the legal claim that the claim was of harassment as well as direct discrimination because of sex. It was also clarified to us that the claimant's claim for equal pay was based on the proposition that she did like work to that of her two comparators. It was, further, stated that the respondent accepted that the work that those two comparators did was like work, and it was confirmed that the defence of the respondent to that claim for equal pay was that there was a material factor within the meaning of section 69 of the EqA 2010 for the difference in pay.

4 The list of issues was a long one. It was at pages 59-65 of the hearing bundle. It was a little difficult to follow in some respects. We do not set out the list here, as it would have lengthened an already very long set of reasons unnecessarily. We return to it below where relevant. In a nutshell, the claimant's claim was that she had been discriminated against because of her sex in that she had been treated less favourably in a number of ways before 12 September 2017, when she had stated a grievance about the way in which she was treated as compared with her male colleagues, that she had then been victimised in a number of small ways as a result of stating that grievance, that she had then been dismissed in part because she had stated her grievance and that the dismissal was also tainted by discrimination because of her sex for the reasons stated in rows 29, 30, 32 and 34 of the tabular part of the list of issues. In deciding whether or not the claimant had been discriminated against to any extent because of her sex or victimised, we applied principally the burden of proof test in section 136 of the EqA 2010 and the principles in the case law to which Mr Heard referred us in paragraph 8 of his written closing submissions. We also took into account the line of cases including *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

<u>The evidence</u>

5 We spent the morning of 22 July 2019 reading the witness statements and such documents in the bundle of documents put before us as we were able to read in the time available. The bundle consisted of 490 numbered pages, but among those pages there were a number of additional pages. We heard oral evidence from the claimant and, on behalf of the respondent, from (1) Mr John Stoneman, the respondent's General Manager, who was at all material times the claimant's

line manager, (2) Mr Kunal Shah, who was employed by the respondent as its Campaign Support Manager, (3) Ms Stephanie Fogle, who at the material time was employed by the respondent's parent company as VP of People, and (4) Ms Raphaëlle Tripet, to whose role we refer further below. We heard oral evidence from the claimant in the afternoon of 22 July and the whole of 24 July.

6 The claimant's mother, Ms Rosemary Kuah, made a witness statement the contents of which were accepted by the respondent.

7 We heard oral evidence from Mr Stoneman during the whole of 25 July 2019. We heard oral evidence from Ms Fogle, Mr Shah and Ms Tripet during the first part of 26 July 2019. We received written submissions supplemented by oral submissions during the late afternoon of that day.

8 Having heard that evidence and considered those submissions, we made the findings of fact set out below. There were many conflicts of evidence on critical issues, and we refer in our description of our factual findings below to a considerable amount of evidence before stating how we resolved those conflicts of evidence. Some findings of fact (which needed to be made in any event, as they concerned factual matters which were relied on by the claimant both to show that there was conduct extending over a period and to show that there was a discriminatory culture in the respondent's operations) are stated under the heading "The facts", and others are stated in paragraphs 111-119 below, where we state our conclusions on the liability issues in the claim so far as necessary, i.e. on those elements in respect of which the claim was in time.

The facts

(1) The parties

9 The claimant was employed by the respondent from 2 May 2016 until, on 16 November 2017, she was dismissed by the respondent on 2 weeks' notice, terminating on 30 November 2017. She was not required to work her period of notice.

10 The claimant was employed as the respondent's "Sales Manager, Europe". She was the respondent's first employee to be employed in the respondent's European sales team. The respondent is a subsidiary of a company established in the United States of America ("US") during 2013. That company (which we call "Triplelift", referring to the claimant's employer as "the respondent") had developed some software which Mr Stoneman described as a platform which Triplelift and in the United Kingdom ("UK") the respondent sold to what it called "publishers". Those publishers were organisations which had websites on which it was possible to place advertisements. Mr Stoneman gave as examples of publishers who had already, by the time that the claimant started to work for the respondent, bought the Triplelift platform, (1) the National Rail website, and (2) the Daily Mail website.

11 Traditionally, advertisements have been of the sort that one sees in printed form in for example newspapers. It was Mr Stoneman's evidence (and the claimant's evidence was to the same effect) that the Triplelift platform enabled advertisements placed on publishers' websites to look more as if they were part of the website than a traditional advertisement would normally look. The placement of such advertisements on a website was described by the parties as "native" advertising. In addition, the Triplelift platform was able, in part by using cookies on a digital device accessing the publisher's website, to allow advertisers (who came to the respondent via advertising agencies) to "bid" for a particular slot on a website page on an individual basis. This was all done almost instantaneously, by computer programmes. The respondent and Triplelift made a percentage of the advertiser's revenue. The more money the advertiser made, the more money Triplelift and the respondent made.

12 Mr Stoneman made two witness statements. His first was the main one, and the second was a reply to an aspect of the claimant's witness statement. Where we refer below simply to Mr Stoneman's witness statement, we refer to his first witness statement.

13 Mr Stoneman's witness statement contained this beguilingly simple statement of what the respondent does, which he told us was something of an oversimplification, but which was nevertheless helpful:

> "2. The Company [i.e. Triplelift] is an advertising technology company with its headquarters in the United States of America. We have a platform that specialises in enabling and optimising native internet advertising, which is a type of digital marketing.
>
> 3. In simple terms we have people talking to publishers (websites) to find and secure the advertising space that they want to fill, then we have people talking to advertising and media agencies to drive them to use our platform for their end clients. Between the agencies and the publishers are two bits of technology that link to form a chain; us, being the supply side platform (SSP) and the demand side platform (DSP).
>
> 4. Lisa Forrest [i.e. the claimant] was the first sales executive that we hired. Her formal job title was European Sales Manager and her role was to build relationships with the advertising and media agencies to pitch our technology platform to them as a place to buy advertising space."

14 We clarified with Mr Stoneman that what he called the Triplelift "technology platform" consists of software only: it has no element of hardware. The respondent put before us a helpful further description of the respondent's business, the content of which was agreed by the claimant in so far as that content described the respondent's business. It was consistent with what is said above about the respondent's business.

15 The claimant came to the respondent having developed expertise in the selling of "native" advertising. She approached Triplelift as a result of seeing on its website that it was recruiting salespeople to work in the UK. She was impressed by the Triplelift platform and was keen to work for the respondent.

16 The respondent had by then been established as a UK company, but Mr Stoneman and the other persons working in the UK for (ultimately) Triplelift were employed by Triplelift. The claimant was engaged under Triplelift's US terms. Mr Stoneman's first witness statement contained in paragraph 6 a description of how employees were employed by Triplelift and then the respondent, in the following terms:

> "When the Company first started in the UK, all employees hired were employed by the US entity, Triple Lift Inc. That is why Lisa Forrest has an offer letter with the US entity, and in US format, which is at page 74 of the bundle. I accept that she was not given a UK contract of employment however and this was an oversight. When others joined the team after Lisa, they were however given UK employment contracts as the UK entity became up and running. Lisa then was also employed by the UK entity.."

(2) The claimant's salary and that of her comparators

17 When the claimant was appointed by Triplelift, Mr Stoneman asked her what salary she was receiving, and she replied (her reply being at the bottom of page 73 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle). He then went to Triplelift's Taina Oquendo with that information and asked for "a package to improve" on it (see the top of page 73). The claimant was then employed on a salary of £45,000 per year with the possibility of earning commission up to £24,000 per year, as stated in the letter from Triplelift to the claimant of 13 April 2016 at page 74. That letter stated that the terms of the claimant's employment were not stated in that letter but, rather, in Triplelift's "Employment Agreement", of which there was a copy at pages 76-87. That document stated that the claimant's employment was "at-will", i.e. that she was entitled to no notice on its termination. However, Triplelift's employees were entitled at the time of the offer of employment to the claimant to paid time off under its "Paid Time Off (PTO) Policy" at pages 68-70. That was dated 1/1/16 and included a statement that employees were entitled to "5 days per year of paid sick time". That document was superseded by a document dated 1/1/17, of which there was a copy at page 71. There was in that replacement document no reference to sick pay.

18 Mr Charalambous started to work for the respondent on 13 June 2016. He was employed formally by the respondent. We were, during the hearing, given a copy of his contract of employment, dated 11 May 2016. Clause 8 provided for a notice period of one month ("or such longer period as is required by statute"). Clause 17 was to the effect that Mr Charalambous was entitled only to statutory

sick pay. Mr Charalambous' basic annual salary was (as stated by clause 11) £67,000. Clause 12 provided for an eligibility "to receive £37,000 in annualized commissions at 100% achievement of agreed-upon goals".

19 Mr Keen was employed by the respondent under a contract dated 30 August 2016, as from 3 October 2016. That contract contained terms to the same effect as clauses 8 and 17 of Mr Charalambous' contract of employment. Mr Keen's "basic starting salary" was (see clause 11) £75,000 per year. Clause 12 provided that Mr Keen was "eligible to receive £45,000 in annualized commissions at 100% achievement of agreed-upon goals".

20 There were at pages 325-328 documents stating the education and experience of Mr Charalambous and Mr Keen (described in the index as their "resumes"). That of the claimant was at pages 323-324. The claimant graduated in 2011 with a 2:1 degree in Psychology. Mr Charalambous graduated with a 2:1 degree in Business Studies apparently either in 2006 or before then. Mr Keen graduated in 2007 with a 2:1 in Business Studies (Strategy and Entrepreneurship). It looked as if Mr Keen had experience in digital marketing from 2009 onwards, and as if Mr Charalambous had such experience from October 2008 onwards. However, neither of them had direct experience of "native" advertising. The claimant's experience of such advertising was, however, gained only from June 2015 onwards, with Adyoulike, which Mr Stoneman said was a direct competitor of the respondent.

21 Mr Stoneman told us that what the respondent paid Mr Charalambous and Mr Keen was directly related to the salaries which they said they were receiving in the roles which they left to go to work for the respondent. Mr Stoneman said that if the claimant had refused to state what her current remuneration was, and had asked for £65,000 per year, then he would have asked Triplelift to pay that to her.

(3) The parties' evidence about the events about which the claimant complains which preceded her dismissal

22 The claimant's evidence in paragraph 4 of her witness statement was that she had "started to experience bullying and derogatory behaviour from certain male colleagues such as Richard Keen which were not in line with their behaviour with other male colleagues". The matters about which she complained were stated in subparagraphs a-g of that paragraph. The first three subparagraphs concerned alleged acts of Mr Keen.

<u>Paragraph 4a of the claimant's witness statement</u>

23 The first was that he had shouted at the claimant after he had, in December 2016, opened a window in the office which all of the respondent's London office staff shared and she had asked him to shut it. The key things alleged were that he had called her "stupid" and "idiot". In addition, as the claimant continued at

the end of that subparagraph:

> "Once we had moved office and I was not sat near the window, Harry Charalambous and Richard Keen would make a point to open the window as soon as I walked into the office."

24 As indicated above, neither Mr Keen nor Mr Charalambous gave evidence to us. However, both Mr Stoneman and Ms Tripet gave evidence about this aspect of the case. Mr Stoneman had this to say about the matter:

> "[W]e were initially in a very small office, which had terrible airconditioning and a window only on one side. Some places in the room were hotter than others or cooler than others at different times. If you sat next to the window, you would be cold, at other times you would be roasting. Harry and Richard were always opening the window because they were hotter, and I knew this happened whether Lisa was in the office or not. I was not actually in the office when the alleged incident happened. But I understand that Lisa has reacted badly to Rich opening the window. Lisa complained about this in a 1 2 1 with me which must have been around December 2016 although I cannot be certain as it was so long ago. She complained that Richard was doing it on purpose. I was pretty sure that it was not the case, but I asked him anyway. He confirmed to me that he only opened the window when it was hot. This was raised once or twice only, and in my view it was not a big issue. Certainly I did not see it as such an issue where I needed to sit the team down and give them a serious talking to. I do not recall Lisa ever complaining that Rich had called her stupid or an idiot as she is claiming."

25 Ms Tripet's evidence on this aspect of the matter was this:

> "1. I joined Triplelift UK in early June 2016, just after Lisa Forrest joined. At that time, the Company was very small, probably no more than 10 people and we were in a very small office with I think possibly 4 desks in it. We moved, I think, to a slightly bigger office at the start of July 2016.
>
> 2. I joined initially as country Manager, France but I have recently been promoted to Director of Sales for Europe. I had previously worked with John Stoneman and I regarded him as a good and fair manager.
>
> 3. Our new office was bigger but it had terrible air conditioning with only two windows. I sat next to Lisa and Harry Charalambous and Kunal Shah sat opposite us. There were always issues around whether the window was open or closed and Lisa was very particular about the room temperature. It would depend on her mood whether she would ask or not ask if she could have the window open. It also depended how many people were in the room. Sometimes in the room it would be really hot or cold. I was however not in the office at the time of the incident that she has said was discrimination."

26 Ms Tripet said (and we accepted) that she had been a manager in her previous employment. In her witness statement, she said these additional things about the claimant:

> "4. Lisa had an issue with authority in that the way she talked to John Stoneman, the General Manager, in front of all of us, was often not appropriate. Her mood meant that sometimes she could be very joyful and at other times aggressive. For example, if Lisa wanted to go to a particular event, and John said that he did not think it was really worth her while, she would argue with him. Lisa seemed to me to be difficult to manage and John did come to me to ask for some support on how best to handle her.
>
> ...
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> 9. Lisa was not the easiest person to get on with and she did not put a lot of effort in, and in a small team, if you do not do that, then you cannot expect your colleagues to come out with you. Lisa and I did however have a professional relationship. Lisa would overreact quite often to not getting her own way in the office, and as I said, she often showed disrespect to John. She would fall out with members of the team, and although John encouraged her to improve her working relationship, I do not believe that she tried to repair the relationship with other team members.
>
> 10. The fall outs she had were triggered by her erratic behaviour which was at times unprofessional. I do think that most of the time it was down to her behaviour; she stirred the pot and isolated herself from the rest of the team. There were times when we had team drinks, Christmas parties, but she was not able to build the relationships, and often put herself in this victim position.
>
> 11. Lisa was a good performer. The issue was not that she was doing her job well, but it was the way in which she did it that created problems."

27 We record here that Ms Tripet said the following additional relevant things in her witness statement about the claimant and the claimant's case.

> "5. I do remember that there was an issue between Lisa, Richard and John about sales account ownership. In a sales job, all sales people have to be ok with account ownership changing all the time depending on so many factors. This happens quite often, and my experience at the Company is that there is a fair way of approaching this. I was aware that Richard and Lisa were competing for one account and that there was a discussion in the office. Lisa began to shout and would not stop, and John was not able to stop her. I do remember John telling her to shut up

and sit down but that was just to try and get it back under control. Everyone was witnessing this and it was not good for the office atmosphere. It made everyone keep their heads down.

6. I understand that Lisa believed there to be a "lads' culture". At the start, the team was small, 3 women, 3 men to start with, which became 4 when Richard Keen joined. At the time, my work was really focussed on taking care of the French accounts and Elisa Huh was looking after existing clients.

7. But even though Harry, Rich and Kunal built a strong relationship, Elisa and I also did. I never found that there as any discrimination at all. My belief is that Lisa did not build a strong relationship with them.

8. I do not believe that there is discrimination as Lisa has claimed. It is a very fair place to work. For example, I was promoted last April 2018 ahead of Harry and Richard on merit."

28 We found that evidence of Ms Tripet to be somewhat unbalanced, as she made no mention of the fact that (as Ms Fogle found, as we describe below, and as Mr Stoneman's evidence made clear), Mr Keen's conduct towards the claimant was sometimes open to criticism. Nevertheless, we did accept that Ms Tripet genuinely thought that the claimant took issue with fellow employees at times in an abrasive way.

29 As for the claimed exchange with Mr Keen of December 2016, we concluded that there had been an angry exchange between the claimant and Mr Keen about the fact that the window had been opened by Mr Keen, but we also concluded from what we had heard (including all of the evidence to which we refer below) and on the balance of probabilities that Mr Keen would have called a man in the same circumstances (i.e. with whom he did not get on in the same way as Mr Keen sometimes did not get on with the claimant) the same things as the things he called the claimant. We also concluded that he would have said those things in the same way.

Paragraph 4b

30 In paragraph 4b of her witness statement, the claimant said that in June 2017, Mr Keen had asked her to pay the bill for a team lunch, which was to be paid for by the respondent and which she could then claim back on expenses, which was, she said "incredibly embarrassing as I could not afford to pay due to high expenses from moving houses". Mr Keen then said, according to the claimant, that she had not paid for one (i.e. a team lunch) yet and it was not as if they were paid badly by the respondent. The claimant was not cross-examined on that evidence, but she did not give evidence that Mr Keen knew, or might reasonably have been expected to know, that she would be embarrassed by that request.

Paragraph 4c

31 The third allegation in paragraph 4 was to the effect that Mr Keen had, during the second office move in the summer of 2017, initially inadvertently started to take the plug for the claimant's computer monitor out of its socket and then, when she warned him that her monitor was flashing and she was using it to write an email to a client, removed the plug completely. When she asked him to put the plug back in, he (according to the claimant) 'sat back and laughed and said "no".' The claimant's witness statement continued:

> "I did get upset at this point and shouted at him saying that he was being derogatory. He continued laughing and said he was just trying to help another colleague move."

32 Mr Stoneman gave evidence on this, in paragraphs 19 and 20 of his witness statement:

> "19. In August 2017, we moved to a bigger office upstairs in the same building, this time with better air-conditioning and at various times that day we pretty much carried our own kit upstairs. I was not in the office that day, but I became aware of an issue about a plug. I understand that Rich had been routing round to find the plug to his computer and had unplugged the wrong one. In fact he had unplugged her computer monitor. I learnt from Raphaelle Tripet, France Country Manager that Lisa had reacted very badly to this, shouting at Rich and accusing him of doing it on purpose.
>
> 20. I came in to the office the next day and Lisa immediately raised it with me, saying that he had done it on purpose. I said that I would be surprised if it was done maliciously, but I'd speak to him. I then spoke to him and asked him if he had done it on purpose, and he was surprised I had asked that question. He explained that he had mistakenly pulled out the wrong plug and as soon as he had realised what he had done he put it back in. I reported this back to Lisa, who begrudgingly accepted it and moved on. Frankly, this was not the sort of thing that I thought I would have to deal with, and there was no reason to take it further."

33 We concluded that Mr Keen had indeed laughed when he realised that he had pulled out the plug for the claimant's monitor. However, we were unable to come to the conclusion that he had done so because the claimant was a woman. We concluded that he would have done the same to a man whom he did not like.

Paragraph 4d

34 The claimant complained in paragraph 4d of her witness statement that she had in July and August 2017 had responsibility for an agency with whose staff she

had been "building relationships", Periscopix, taken away from her and in her view wrongly given to Mr Keen. The same thing had happened in relation to the ultimate client Mentholatum, which, the claimant said, had been "booked by one of [her] friends at The7Stars agency". The claimant's evidence on this continued:

> 'I spoke to John Stoneman about Periscopix in a one-to-one and asked him what the best way to handle it was. I said to Mr Stoneman that if I was going to hand over the account, I would happily do it but in a professional manner rather than Richard Keen contacting my clients without my knowledge. John Stoneman advised me not to hand over the account as Mr Keen had previously refused to give over some of his accounts to the new starter, Max Bromfield. John Stoneman said that Richard Keen had set a precedent for not keeping accounts strictly within patches. He told me not to hand over the account to Richard and to continue representing them and said that he would deal with Richard Keen. When I came back from a client meeting in August 2017 where I found out that Richard Keen had contacted my client without my knowledge, I went to John Stoneman later that day privately, in confidence that he would support me on this matter given our previous conversation about it. I was shocked that he shouted and swore at me. It was John Stoneman's decision to hold a meeting in front of the entire office. During this meeting, John Stoneman belittled me and sided with Richard Keen. When I was asked if I was happy with the resolution of Richard Keen taking part of the account, and myself keeping the rest, I said that I was not happy. I explained the reasons why. This is where John Stoneman lost his temper and swore at me, raising his voice and shouting at me to "shut up" loudly and aggressively.'

35 The claimant had not complained in the details of her claim, included as expanded and clarified, about the manner in which The7Stars account work had been managed by Mr Stoneman. He dealt with that in his second witness statement, stating that the claimant had originally had "ownership" of the agency, but that nothing came of it and "the opportunity was closed on 23 September 2016". Mr Keen had then, in February 2017, been able to secure a "first piece of business with the7Stars in February 2017", and that "at least by that time, his right to having ownership of the account would be based on his activity with them". We accepted his evidence in that regard. Thus we concluded that there was nothing remotely unreasonable about the manner in which Mr Stoneman had dealt with the issue of the "ownership" of The7Stars account.

36 As for the Periscopix account, the claimant's complaint was twofold: firstly that she should have retained responsibility for the account rather than Mr Keen being permitted to have it, and secondly that Mr Stoneman had spoken to her inappropriately, in a manner in which he would not have spoken to her if she had been male. Mr Stoneman dealt with that situation in his first witness statement and, in regard to the allocation of responsibility for the account as such, in more detail in his second witness statement. As for the latter, his evidence was this:

"3. Periscopix had originally been an independent performance agency but it was bought in 2015 by a larger independent agency called Merkle. ... [I]t was not until 10th May 2017 that an account for Periscopix was set up by me which would suggest that this was the first time that a revenue-producing opportunity had arisen. ...

4. In August 2016 Merkle was acquired by Dentsu Aegis, an agency holding company. When Richard Keen joined Triplelift in October 2016, because he had previous working relationships with Dentsu Aegis, he was given Dentsu Aegis as his "patch". Dentsu Aegis covered a number of agencies within its group and he had been working with one of them on the brand Diageo. He was then informed by Dentsu Aegis that the Diageo work would be bought not by Carat which was the agency in the Dentsu network he had been working with but through Periscopix, which as it came under the heading of Dentsu Aegis, was within Richard's patch.

5. Lisa's assumption appears to be that Periscopix was an independent agency, and if that were the case I would have supported her owning the relationship, even if nothing was set up on Salesforce to that effect. [Salesforce was the software programme by means of which the respondent and Mr Stoneman were able to monitor sales activity and its success; its effectiveness depended on it being updated daily, by the sales staff, including the claimant.] But because it was part of Dentsu Aegis, and Diageo was one of their major advertisers, it was legitimately Richard's responsibility.

6. I learnt that Lisa was rude to Richard around this issue and that their discussions had broken down. Lisa complained to me and I stepped in to sort it out.

7. I had to look at who deserved the credit for the campaign and in doing so, I had to take into consideration the work that Rich had already put in for Diageo. I didn't overlook Lisa but explained that Rich could have the credit for Diageo, but that Lisa could then have Periscopix, carved out of Dentsu Aegis. As I said, aside from Diageo, the existing work, no revenue came out of Periscopix."

37 Mr Stoneman's evidence in chief about what happened when he, the claimant and Mr Keen discussed the matter was in paragraph 25 of his first witness statement, which was in these terms:

'The discussion over Periscopix took place, as most conversations did, in a "huddle" where the 3 of us sat down together in our open plan environment. Both Lisa and Rich laid out their claim for the account. When I made the

> decision which Lisa viewed as going against her, she became very worked up, with no regard to her surroundings, which I regarded as very disruptive and aggressive. This was in front of other junior members of staff, which I thought was unprofessional and it surprised me. She started shouting at both Rich and me and not despite trying, I could not get her to calm down and she was not listening. I do accept that I told her to shut up, but I did not shout and I was not aggressive to her, with the sole purpose of saying it being to put the brakes on the discussion as it was getting out of hand. Had Richard behaved in the same way, I would have said the same thing as I cannot have people shouting in the office in that way. I explained that this was my decision, and that was the end of the matter.'

38 Mr Stoneman denied swearing at the claimant. He was adamant that he would have said what he said to a man, and that he would have said it in the same way. It was put to him that he had told the claimant that she and Mr Keen had to "fucking sort it out", but he firmly denied that.

39 The cross-examination of Mr Stoneman on this aspect of the evidence showed that he recalled that that it was originally agreed by him with the claimant that the claimant would have ownership of the Periscopix account, but that he subsequently came to know that Periscopix was now part of Dentsu Aegis. Mr Stoneman said that Mr Keen had previously developed Diageo as a client. He then said to Mr Keen that he (Mr Keen) should speak to the claimant, so that she could hand over her contacts at Periscopix to enable Mr Keen to do his work for Diageo via Periscopix, and that he expected the claimant and Mr Keen to agree between them the manner in which the transfer should occur. It was only when he heard from the claimant at the end of August 2017 about the situation that he realised what had happened. He said that he arranged for a "huddle" in the open plan office that they all shared because he thought that it would result in the discussion remaining a courteous one.

40 Given all of the evidence which we had heard (including that of Ms Fogle to which we refer below), we accepted Mr Stoneman's evidence that he did not swear at the claimant in relation to the transfer of ownership of the Periscopix account. We also accepted his evidence about the sequence of events, as set out in paragraph 39 above. We accepted too the evidence which Mr Stoneman gave about the "huddle", i.e. the reason why he sought to sort out the difference of opinion between the claimant and Mr Keen in the open plan office and not in a separate venue. We also concluded that Mr Keen treated the claimant in the manner in which he would have treated a man in comparable circumstances.

<u>Paragraphs 4e and f, read with paragraph 9</u>

41 In paragraphs 4e and 4f of her witness statement, the claimant complained that Mr Shah had

41.1 after a meeting in June 2017 for "weeks" failed to do something for her (namely create what the respondent called a "deal ID", which only Mr Shah could do) in a timely fashion for Intel, a major client of the respondent;

41.2 prioritised the requests for supporting work made by male colleagues of the claimant (i.e. Mr Keen, Mr Charalambous and Mr Bromfield);

41.3 been aggressive towards her;

41.4 frequently not looked at her when she sought to engage him in conversation about work-related matters and that he would instead look at his computer monitor screens(s) or his mobile telephone in order "to disengage from the conversation"; and

41.5 failed to go to client events which she organised and instead went to client events organised by Mr Keen, Mr Charalambous or Mr Bromfield. One particular event was a leaving drinks event for an employee by the name of Timnit Abraha, who worked for Havas, which took place on 3 August 2017. It was the claimant's evidence that Mr Shah had gone to drinks events on that evening organised by Mr Keen, Mr Charalambous and Mr Bromfield, but not the one for Ms Abraha.

42 Mr Shah denied in any way treating the claimant less favourably because she was a woman. He was, he accepted, angry towards her after he had learnt that she had said in a team meeting on 25 July 2017 that he was responsible for some of her campaigns losing about £3,000 per day in revenue. That team meeting and the manner in which Mr Stoneman had acted at its end was also the subject of paragraph 9 of the claimant's witness statement, where the claimant said that she was "reprimanded for bringing up this information". Mr Shah had at the time of that meeting been in New York, after winning an internal prize for his good work for the respondent at a company-wide event the preceding week, at which the claimant had also been present. He had in fact done the work for Intel about which the claimant complained, having sent an email with the required work referred to in paragraph 4f of the claimant's witness statement to the relevant agency direct on 20 July 2017, copying the claimant into that email (page 147).

43 There was also a trail of emails at pages 156-166 showing that Mr Shah was fully engaged in working with the claimant and Intel, at least in August 2017.

44 Mr Shah also gave evidence that he did not deliberately not look at the claimant when she spoke to him; he simply had to continue to work while she spoke to him, since, he said, if he had stopped work every time someone came to ask him a question then he would never get his work done. He did the same to all of the sales staff who spoke to him, he said. We found it hard to believe that Mr Shah

treated Mr Keen and Mr Charalambous in the same way, and concluded on the balance of probabilities that Mr Shah had treated the claimant differently, and less favourably, than them in this regard.

45 Mr Shah also gave evidence that he went to one drinks event only on 3 August 2017, and that it followed an informal invitation made to him and Ms Huh at the end of an event organised by the respondent called a "Native Academy", at which they had been present on behalf of the respondent. That was part of a global initiative of Triplelift. Mr Shah and Ms Huh had had something like a stall on the ground floor of an advertising agency at which members of the latter's staff could talk to them about native advertising and take an online course, the winner of which would get a prize. Mr Shah and Ms Huh had then, as the event was finishing, been invited by the agency's staff who had helped organise the event to go for a drink, and they had done so. He had then gone home, he said. It would in fact have been very difficult for him to go to any more than one event, as they took place at different locations across London, he said. We accepted Mr Shah's evidence in this regard.

46 The claimant relied in paragraph 9 of her witness statement on the fact that Mr Shah had corresponded with Mr Charalambous and Mr Keen using what the respondent called "slack messages" (or "slack channel messages") (i.e. messages which were not sent via email but in a more informal way, and apparently via a different digital route) during that period (see pages 278-282 and pages 287-290 respectively), but not her (as could be seen from page 272), as showing how she was "ostracised from [her] male colleagues and talked about in a derogatory manner between all of them".

47 We took into account the at times disrespectful language in the slack channel messages between Mr Shah and Mr Charalambous at pages 276-277 and Mr Keen and Mr Shah at page 290, where Mr Keen called the claimant "an absolute dick head", saying too that he "really had to bite [his] tongue" on 25 July 2017 when the claimant (according to Mr Keen) "threw [Mr Shah] under a bus ... in the team meeting regarding Intel". We noted that at page 289, Mr Keen had written this:

> "I say she threw you under, she ended up throwing herself under as we all picked her apart for not taking responsibility for her campaigns - especially John".

48 Mr Stoneman did not recall the meeting of 25 July 2017; all that he could do is say in cross-examination that

48.1 it was probable that revenue would have been talked about in one of the meetings of the sort that the claimant said happened on 25 July 2017;

48.2 he would have cared just as much as the claimant would have done

about losing £3,000 per day in revenue, in part because the commission of both of them would be affected by such a loss;

48.3 Mr Shah would also have cared just as much as the claimant about such a loss of revenue, since his commission would be affectedly negatively by such a loss; and

48.4 if he (Mr Stoneman) felt that he had to reprimand the claimant then it would have been about the way in which she asked the question, i.e. rather than the fact that she had asked the question.

49 We concluded that to the extent that the claimant was treated less favourably by Mr Shah than he treated Mr Charalambous and Mr Keen, it was purely because she got on less well with him than they did, and that it was in no way a result of her gender. We accepted that there was evidence from which we could infer that the claimant had been treated differently because of her gender, namely the evidence referred to in paragraph 44 (and to some extent paragraphs 46 and 47) above, but Mr Shah satisfied us on the balance of probabilities that he had not treated the claimant less favourably because of her gender. Rather, if there was friction between them, then it was the result of a personality clash and not to any extent because of the claimant's gender.

50 By way of background to our assessment of the evidence of the claimant concerning the manner in which she was spoken to by Mr Stoneman, we concluded there was a need to manage clients' expectations about delivery and timescales and that the claimant was at fault in that regard during the two-week period preceding 25 July 2017. That was because there had been a week-long event held by Triplelift in New York at which the whole of the London office staff had been present and because Mr Shah had stayed on in New York (as described in paragraph 42 above). We noted that at page 278 Mr Charalambous had said in a slack message to Mr Shah that Mr Keen had said that "John went ham to Lisa for being rude to you", and that "ham" was, according to Mr Shah, short for "hard as a motherfucker". Thus, there clearly was independent evidence that Mr Stoneman had been critical towards the claimant about the manner in which she had criticised Mr Shah. However, we concluded that Mr Stoneman would have treated a man in comparable circumstances in precisely the same way.

Paragraph 6 of the claimant's witness statement

51 We accepted that what was said in paragraph 6 of the claimant's witness statement happened, namely that she had said to Mr Stoneman early in 2017 that she was looking towards promotion but that she was concerned that if she achieved it then that would result in an increase in the negativity of her colleagues toward her, but also we accepted Mr Stoneman's evidence that he said in response to the claimant that she should work to build harmonious

relationships with her colleagues.

Paragraph 7 of the claimant's witness statement

52 In paragraph 7 of her witness statement, the claimant said this:

> 'I was also talked down to on several occasions with constant derogatory comments from Richard Keen. This behaviour towards me from Richard Keen was acknowledged by Mr Stoneman, and he assured me that Mr Keen would have to change his behaviour if he wanted to continue to work at the company, as it would not be tolerated. He also said to me that these male colleagues had big egos and in their eyes, I was "a little girl that has come from a company that no one has heard of" who was "outperforming them".'

53 Mr Stoneman denied saying that. He pointed out that the claimant came to the respondent from the employment of one of its main competitors, so that he would not have been likely to say the alleged words. He also said that he did not say to the claimant that Mr Keen would have to change his behaviour if he wanted to continue to work for the respondent. He said that he would on each occasion that the claimant complained about another employee of the respondent, ask that other employee for a response to the complaint, say that they needed to work together and then give feedback to both parties. He agreed that Mr Keen had stopped doing things about which the claimant complained, as he (Mr Stoneman) had explained to Mr Keen in a 1-1 meeting with him that he (Mr Keen) needed to stop getting involved in arguments with the claimant, and that Mr Keen had "taken that on board". He said in cross-examination that as time went by, members of the team became very cautious about how they approached the claimant "as they were worried about how she might kick off an issue." We accepted that evidence of Mr Stoneman.

Paragraph 8 of the claimant's witness statement

54 The claimant referred in paragraph 8 of her witness statement to the fact that she had in January 2017 asked Mr Stoneman, during a review with him of her performance, for an increase in her salary. She said that he said that he would have loved to give her a pay increase as she was, she said he said, "the most consistent member of the team and was also praised on good team work feedback from other regional offices, [but] unfortunately" she had not been with the respondent long enough to be "considered for a pay rise at the time". Mr Stoneman accepted that he had not given the claimant a pay rise, but he said also (and we accepted, not least as there was no evidence to the contrary before us) that Mr Keen and Mr Charalambous also did not get a pay rise, for the same reason. That was in the circumstances a complete answer to the claimant's complaint of disparate treatment because of her gender in this regard, bearing in mind that Mr Charalambous started working for the respondent only a short period of time after the claimant did.

55 Also in paragraph 8 of her witness statement, the claimant said this:

> "This is despite other colleagues Matteo Tortella and Shanti Franchina being given significant pay increases at the company after 3 months of service. I responded by approaching the subject that I was being paid less than my male colleagues despite this great feedback that I was being given. Mr Stoneman responded by saying that the only way I would make money was by starting my own company."

56 We did not need to come to a conclusion about the accuracy of the final words of that passage, as we saw them as being neutral and in no way probative of anything. Mr Stoneman said that he did not see how the claimant could have known that she was being paid less than Mr Keen and Mr Charalambous. Given that we accepted Mr Stoneman's evidence that the claimant did not refer to gender discrimination in any way before she sent her email of 12 September 2017 to which we refer below, and assuming that the claimant referred to the fact that she was being paid less than her sales colleagues, we accepted that the claimant did not at that time refer to her "male" colleagues as such but instead referred to Mr Keen and Mr Charalambous by name. As for the situations of Ms Franchina and Mr Tortella, not only was one of them female, making the comparison of little evidential weight if only for that reason, but also they were taken on as interns so that if they did indeed receive a pay increase after 3 months (which was not challenged by the respondent), then that pay increase was given in circumstances which were not comparable.

<u>The claimant's pay increase</u>

57 On 8 September 2017, the claimant was informed by Ms Fogle by email that she was to receive a pay increase to reflect "the hard work and efforts" that she (the claimant) had made: see page 155. The increase was to a base salary of £47,500 and potential commission of £25,200. Mr Charalambous received an email to a very similar effect: see page 155A. (No email to the same effect to Mr Keen was in the bundle.)

58 The pay rise was an annual one. Mr Stoneman said in oral evidence (and we accepted) that he had never known of anyone at the respondent firm not receive a pay rise. It was contended on behalf of the claimant that the fact that she received a pay rise on 8 September 2017 meant that there was no genuine concern on the part of the respondent about what had happened before then. We could not accept that contention in the circumstances as we found them to be.

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

59 The claimant sent a grievance to Mr Stoneman on 12 September 2017. It was at

pages 168-169. It started with a statement that the claimant was "going through a lot of stress inside and outside of work at the moment" and included a statement that "I have highlighted previously that I believe there is bullying in the office and gender discrimination."

60 Mr Stoneman did not deal in his witness statement with the question whether the claimant had in fact previously referred to "gender discrimination", but in cross-examination he was sure that the claimant had not before then stated that she thought that she was the subject of gender discrimination. He agreed that the claimant had previously complained about bullying. He said that the claimant had, apparently out of the blue, alleged in an open meeting on 5 April 2017 which had taken place away from the respondent's one-room offices that she had been bullied. That was the meeting after which the slack message exchange at page 253 occurred. That exchange was in these terms:

> "**Lisa Forrest** 3:12 PM BST
> that was a bit harsh calling me out like that. I'm upset because they said this 2 weeks ago, and wasn't told that he couldn't make it until I accepted because hadn't received a reply. This is also the 4th time I've invited him to drinks, but specific ones we've organised specifically to meet them, and yet again Harry's agencies have taken priority
>
> **John Stoneman** 3:19 PM BST
> We talked as a group yesterday about the issues around negativity - and frankly since I've been in the office today, it feels like once again you've been a big source of negativity. In the last hour complaining about your computer and screen saying 'you didn't sign up for this' and then your general tone in that exchange with Kunal. Your attitude yesterday at the offsite was poor. You turned up late despite me specifically saying that I wanted people there on time. You sat with a sullen face for the opening half hour, you were constantly on your mobile phone, and you even completely switched off at one point so that you had no idea what the discussions was about. So no this is not harsh, this is my reality. You need to think really hard about the impact of your actions across the office. I'd rather talk about this face to face in the 1-1 tomorrow than over Slack.
>
> **Lisa Forrest** 3: 19 PM 11ST
> I also can't make tomorrows 1-1 I'm in brighton. Can we rearrange today?
>
> **John Stoneman** 3:20 PM BST
> Yes, let's do it at 4pm then.
>
> **Lisa Forrest** 3:25 PM BST
> sure"

61 That exchange resulted from the fact that Mr Stoneman had organised an off-site

meeting for the London office staff so that their whole focus was on what was said at the meeting, and that at it the claimant had complained that Mr Shah not gone to a drinks event that she had organised. Mr Stoneman had taken her to task for complaining in that way, and she had responded by defending herself, after which he had written the long message in the middle of the sequence, which was self-explanatory. The claimant's oral evidence was that she had decided for herself not to go to the start of the meeting and had decided that she should respond to an email from Intel before she did so. Mr Stoneman's evidence in that regard in cross-examination was this:

> 'The appropriate thing to do was to come to me at the right time and say I have just had an email from Intel, can I take care of this and I would have said: "Absolutely". But she did not do that.'

62 As for Mr Stoneman's criticism of the claimant's complaint about Mr Shah not going to drinks events with her, he said that he did not recall taking her to task on that occasion for the manner in which she spoke about Mr Shah, but that:

> "It was always about Lisa's tone. She was very aggressive in the office."

63 We noted that this failure to remember the matter about which Mr Stoneman took the claimant to task was similar to the failure to remember on his part what it was that he had taken the claimant to task for on 25 July 2017.

64 The claimant was cross-examined about the stress "outside of work" that she had then been experiencing, in particular by reference to her medical records. At that time she lived in Notting Hill. She was, she told us, arrested outside her house during the carnival at the end of August 2017. She also told us that the arrest had been the subject of a successful civil suit against the police, that the arrest had been highly traumatic, and that it remained a distressing event for her to recall. It was, quite clearly, distressing for her to tell us about it. The medical records showed that it had affected her ability to work: a number of passages at page 394 onwards showed that the claimant had found it hard to focus at work because of the trauma surrounding her arrest. At page 404, for example, this was recorded:

> "Grievance at work then fired from job as was finding work difficult with police incident."

65 We noted too that at page 394 it was recorded that she told the doctor who made the note on the left hand side of the page in relation to a consultation on 18 October 2017 that she thought "work [was] planning to sack her shortly – has been invited to a 'without prejudice' meeting." However, at no time before these proceedings did the claimant tell the respondent about her arrest at Notting Hill Carnival in August 2017 and its effect on her.

66 The email of 12 September 2017 at pages 168-169 focused in the main on the apparently slow response of Mr Shah to requests that the claimant had made to him on the day before for support in relation to her "campaigns". Mr Shah accepted that he had on one occasion "snapped at" the claimant and had asked her if she wanted to manage an account herself. We noted, however, that the claimant had evidently made a number of requests to Mr Shah on the day before (apparently about 6 campaigns of hers), and that her complaint about his initial failure to respond was that he had not started to respond to her request until 2.30pm.

Paragraph 14 of the claimant's witness statement

67 On 2 October 2017, the claimant was asked by Ms Franchina for help with sending an email to one of her (the claimant's) clients. The claimant then discussed with Ms Franchina a follow-up email to go to the client, and advised Ms Franchina about what to say in the email. The claimant then discovered that Ms Franchina had ignored her (the claimant's) advice. The claimant then took Ms Franchina to task about that. It was the claimant's evidence in paragraph 14 of her witness statement that Mr Stoneman had then called her name and told her 'in a very stern tone to "sit down".' The claimant's witness statement continued:

> "I did this, not wanting to cause a scene in the office, but in response to an email he sent me that afternoon, I stated that I felt he 'undermined' me in the way he talked to me."

68 The email which Mr Stoneman sent that afternoon was at page 179, and it was in these terms:

> "Lisa,
>
> I don't think you were speaking in an appropriate fashion to Shanti then. You were being way too strong with her in a public forum, which is not fair for a junior member of the team. If you have an issue then the appropriate thing to do is to speak to either Kunal or Elisa as her line managers.
>
> John"

69 Mr Stoneman's evidence on this exchange was in paragraph 36 of his witness statement, which included this passage:

> "We were all in the office, and Lisa was very aggressive towards Shanti. I did not like the way she was behaving. She was standing next to Shanti, shouting and with aggressive body language. I am afraid that I cannot recall what the topic was, but I do remember that this was yet another incident where Lisa's aggressive behaviour was unacceptable. I stepped in to ask

her to stop, asking her to sit down. I do not accept that this was discrimination. I was protecting another member of staff which I would do for anyone, no matter the sex of those involved."

70 We accepted that evidence of Mr Stoneman about the exchange between him and the claimant, and the reason for it. We were satisfied on the balance of probabilities that the claimant had spoken to Ms Franchina in a way that Mr Stoneman thought was inappropriate and that he had spoken to the claimant in the same way that he would have spoken to a man about the situation.

Ms Fogle's investigation of the claimant's grievance

71 Ms Fogle told us that she had given Mr Stoneman three options for the investigation of the claimant's grievance. The first was for him to carry out that investigation. The second was for an external counsel to be instructed to carry it out. The third was for her to carry it out. Mr Stoneman chose the third option. Ms Fogle said that she then took the earliest opportunity to come over to London to interview the staff, including the claimant. She did that on 25-27 September 2017. Her notes of her investigation were in the bundle at pages 173-178. We considered those notes very carefully. One thing (among a number) that stood out from them were the frequent references to there being something of a "lad culture" (that having been said by both Ms Eden Stoneman, Mr Stoneman's daughter, and Ms Franchina). That culture focused in part on a common interest in music and football on the part of (it appeared) Mr Keen, Mr Charalambous and Mr Shah.

72 Ms Fogle's final conclusions on the grievance, stated at the time, were in the email from her to Mr Stoneman and Mr Eric Berry, at pages 171-172. Having heard the evidence to which we refer above, it was in our view a balanced and fair assessment of the situation.

73 Ms Fogle did not believe that there was gender discrimination and stated that conclusion in that email. However, she accepted that she had, when she first spoke to the claimant, asked the claimant whether the respondent was the right place for the claimant to work. Her own notes (at pages 174-175) contained this record of what she had said to the claimant at the end of her interview with her:

"I told her:
Hearing there are some trust issues; that she doesn't trust that PS [i.e. the team of which Mr Shah was a part] is building relationships with her clients; that she doesn't trust that PS is doing their job
That issues continue to repeat

She deserves to work in an environment where she's happy; her frustration is evident
Think about how she wants to bridge the gap

Think about if this is the right environment for her
Talked about squatting rights and how, as a team grows, we need to give up some of the things we've done in the past
Told her that I take her concerns seriously, as does the company
And that we're looking into them and will get back to her".

74 Ms Fogle spoke to the claimant on 3 October 2017 and told her what conclusions she had come to. She followed that up with the email at page 186. The claimant's evidence was that Ms Fogle "brought up the subject of me leaving Triplelift several times and said that I should consider whether I want to work at Triplelift". Ms Fogle accepted that she had done that and said that she had often done it before, that often the employees to whom she had made that suggestion had adjusted their own approach and remained in their employment, and often they had resigned. She said that what she was doing amounted to an invitation to the claimant to take stock of the situation and see whether it was bringing her joy (with the implication that if it was not, then it was not a good idea to remain in the employment).

75 Ms Fogle said that she had never heard the term "victimisation" before reading it in connection with this case, but that she was aware that there was in the US a law against (and she recalled this word) "retaliation". She was sure that she had not treated the claimant less favourably in what she concluded by way of retaliation.

76 We accepted Ms Fogle's evidence in these respects. She was very careful not only as far as what she was saying was concerned but also about the manner in which she said it. However, while in another set of circumstances that factor could have caused us to doubt the evidence of a witness, here we found that Ms Fogle was genuinely doing her best to tell us the truth. In that regard we noted that her report at pages 171-172 and her notes of her investigation at pages 173-178 were by no means a whitewash and contained material that was plainly capable of being relied on by the claimant.

<u>The events immediately preceding the claimant's sickness absence and her final week of work for the respondent</u>

77 On 2 October 2017, Mr Stoneman held a meeting at which he told the staff of the respondent at a meeting that he called the "London Q4 Kick Off" that each morning for the following period, starting the next day, they would have what he called a "Hustle", in a team meeting starting at 10.00am and lasting for 30 minutes, during which each member of the team would have to tell him what specific action they were going to take that day to bring in revenue. The meeting was going to take place in person at the office unless someone could not attend in person, in which case they would attend via a screen using software of the same sort as Skype. The claimant attended the one on the next day late. Mr

Stoneman sent an email to her at 10:24 (page 185) saying that she had just missed the meeting and that he was looking for her to tell him about one action that she was going to take that day to help increase revenue for the following day. He said that he would put it in the shared document that he told us was open to all in the London team on a shared drive, to which they could all make changes.

78 On 4 October 2017, the claimant was at a client breakfast meeting, so she did not need to attend that morning's Hustle at 10.00am. It was the claimant's evidence that on the following say, 5 October 2017, she was in the office at 10.09am, and Mr Stoneman sent her the email at page 187 in which he wrote to her:

> "We are having the revenue standup every morning at 10am, are you coming in?"

79 It was Mr Stoneman's evidence that the claimant was not in the office at that time, which is why he sent the email. It was the claimant's case that that email was sent with a view to gathering evidence to justify her dismissal for poor performance, and that that evidence was being gathered by way of victimisation for her having asserted that she was being discriminated against because of her gender. This was a direct conflict of evidence on which we had to come to a conclusion. We thought very carefully about it. There was no response from the claimant to the email at page 187, but there was instead a further email from Mr Stoneman to the claimant, at page 188, sent at 10:47, to which she responded 5 minutes later. The email from Mr Stoneman was in these terms:

> "Hi Lisa
> Following on from my earlier note, I really need you to be present and engaged during the daily Revenue Standup. I scheduled it to run daily at 10am to make sure that everyone has plenty of time to get in to the office, and be well prepared for it.
>
> Unfortunately on the two occasions this week that you have been in the office for the meeting you have arrived after the start, and it was clear today that you weren't prepared. I'd like you to address this going forward please. If you need any clarity on what is required, please let me know.
>
> And as we agreed on Tuesday before your Sainsbury's meeting on Wednesday, if you are going to be with a client at that time – which of course takes precedent – please make sure you have submitted your daily revenue action ahead of time, either in the running notes document, or in the London-Paris Slack channel.
>
> If any of this is unclear please let me know, but this meeting is a crucial piece of our attempts to make sure there is more communication across the

team, and that information is being cascaded to everyone effectively.

It will be great if you can make a solid contribution every day.

Thanks
John"

80 The claimant's reply was this:

You're right, I feel terrible today and not been feeling well all week. Shouldn't have come into the office feeling this way.

Will head home now.

Lisa"

81 It was the claimant's evidence (in paragraph 17 of her witness statement) that she thought that Mr Stoneman's email of 10:09 of that morning at page 187 was "odd" but that she had "ignored it". Mr Stoneman's very clear oral evidence was that at the time that he sent that email, the claimant was not in the office. It would indeed have been odd if she had been present in the office when he sent it. There was no room for a mistake about the claimant's physical presence in the office at that time. We concluded that it was inconceivable that the claimant, who habitually defended herself strongly against criticism, would have ignored the content of the email at page 187 sent at 10:09 if she had in fact been present in the office at that time. We concluded that she arrived shortly afterwards and that she recognised the justification of the criticism in the email.

82 The claimant was then absent from work from 5 October 2017 onwards. She wrote at 10.41pm, i.e. late in the evening of that day, to Mr Stoneman (page 189):

"Following the events of the last few weeks, the doctor has recommended that I am signed off of work for the next four weeks.

I know this is a busy quarter and don't want to let the company down. Would you like me to see how I cope with working from home?"

83 He replied:

"I'm really sorry to hear this. Let me speak to Stephanie to see what is the best way to proceed here to support you in your recovery."

84 In fact, at no time did Mr Stoneman get back to the claimant on the issue of whether the claimant should try to work from home. Instead, he left it to Ms Fogle to do so, and she did so only after the claimant had been off sick for a week.

85 We saw that on 6 October 2017, Mr Stoneman had written to Ms Fogle (page 190):

> "While Lisa mentions that she does not want to let the company down, and asks us if we would see how she copes working from home, I do not think that this is a viable option.
>
> Can we discuss this at some stage please."

86 The next development was that Ms Fogle wrote to the claimant the email of 13 October 2017 at pages 196-197, which so far as relevant to the question of the claimant being given credit for working at home merely dealt with pay and sick pay arrangements, stating that the claimant would be treated as having used up her allowance of eight days' PTO, i.e. personal time off, and that after that she would be paid statutory sick pay for the remainder of the time off.

87 Ms Fogle's email of 13 October 2017 concluded with this passage:

> 'Following our meeting last month, I am aware there is a loss of trust between you and John. While I do not agree with your assessment of the situation, I wondered whether you may welcome an opportunity to discuss your situation openly. We can discuss all options including when and how we could assist you in returning to work or whether you would indeed like to remain employed by Triplelift. I confirm that absolutely no decision has been made on any of the options at the present time. We would like to hear your thoughts on each of the possibilities and then take some time to agree a way forward.
>
> If you would like an open conversation, then I will require the discussion to be on a "without prejudice" basis. This means that the conversation is considered to be confidential – it cannot be referred to later in any correspondence or procedures. If you do not want to speak on a without prejudice basis, then please let me know and I will consider the offer closed.'

88 The claimant responded to that email on 13 October 2017 (page 208) and again on 23 October 2017 (page 206), among other things asserting that she should have been given paid time off for five days of sickness. She was then absent because of sickness until 1 November 2017. On 2 and 3 November 2017 she was on holiday. She returned to work by going to a conference in Lisbon on behalf of the respondent. On the first day of that conference, 6 November 2017, Mr Stoneman sent her the email at page 218 asking her to report from the conference on a daily basis, and to follow up two inquiries that had come in while she was absent from work because of sickness. The claimant acknowledged receipt of that email shortly afterwards (see the same page), saying that she would "look into it" when she had "a spare moment". In fact, she never did

respond directly to that email.

89 Later on that day, Mr Stoneman sent a further email to the claimant, asking her to complete a template "for the 2018 Bottoms Up process", which was the forecast of income for the next year which Mr Stoneman had first asked for from the other members of the London office team on 21 October 2017 via an email copied to the claimant, and which he had given them until 3 November 2017 to complete. He asked the claimant to respond "by Wednesday". It was his oral evidence that the process should not have taken more than a couple of hours to do (although he said in paragraph 47 of his witness statement that it should have taken "no more than an hour to complete"), and that the claimant knew well that he had to send the information to Mr Eric Gordon, of Triplelift, by the date that he sought the information from the claimant, i.e. by (it appeared) the end of Wednesday 8 November 2017.

90 The claimant did not respond to Mr Stoneman's request to complete the "2018 Bottoms Up" template at any stage. She sent one slack message with a very small piece of information (page 220C) but that was all by way of updates about the Lisbon conference. The claimant's evidence was that she had introduced Ms Tripet to some French contacts that she (the claimant) had made in Lisbon, but Ms Tripet's evidence was that she had received no communication from the claimant at all during the conference, or after it, from the claimant, about that conference or any French contacts that the claimant had made at it.

91 The claimant said in oral evidence that she had not previously been required when she had attended an international conference for the respondent to report daily. She said in oral evidence that she had "a whole update prepared" in notes on her mobile telephone for Mr Stoneman to give him when she returned from work but that she "never had a chance to give him that update". However, she returned to work on 13 November 2017 and was in London on that day, as she described in paragraph 28 of her witness statement. She said nothing about the following day, 14 November 2017, in that statement. She said in paragraph 29 of that statement that she had on 15 November 2017 messaged Mr Stoneman to say that she was going to work at home on that day so that she could have a "without prejudice conversation" with Ms Fogle as requested by Ms Fogle at 2.30pm on that day, but that Ms Fogle did not call her on that day. Instead, at 2:47pm on 15 November 2017, the claimant received an invitation from Mr Stoneman to attend a one-to-one meeting at 4:00pm on the next day, 16 November 2017. She went to that meeting and was informed by Mr Stoneman and Ms Fogle, whom Mr Stoneman brought into the conversation via laptop video link, that her employment was being terminated. The reasons were stated in a letter which she was given and which was read out to her.

92 The letter was at pages 223-224. The reasons given for the termination were in seven bullet points, namely:

92.1 "Inappropriate behaviour towards your peers and junior team members"

92.2 "Disruptive behaviour during team meetings"

92.3 "Consistently late attendance"

92.4 "Failure to communicate to your manager on revenue activities"

92.5 "Failure to keep sales pipeline up to date"

92.6 "Failure to comply with a request to provide a daily overview and learnings from the conference attended last week. You provided a few updates, but not a daily report as requested; and"

92.7 "Failure to comply with a request to complete a revenue forecast for 2018."

The commission payments which the claimant claimed had not been made

93 By the end of the hearing, it appeared that the parties were in agreement that applying the respondent's approach to the calculation of commission, the claimant had been underpaid commission in the sum of £10.71. The difference between the parties related to the manner in which the figures were calculated and related to the date or dates when the dollar/pound exchange rate was applied. The entitlement to commission arose from the document at page 90, and that referred to sums in dollars. The claimant had previously been paid using the respondent's method of calculation, and we concluded that the same method as had been used previously should be used now. Accordingly, we concluded that the appropriate amount to award the claimant by way of lost commission was the sum of £10.71.

(4) Mr Stoneman's evidence about the reason for the claimant's dismissal

94 Mr Stoneman's oral evidence (and this was not in his witness statement, where he merely said that the reasons in the dismissal letter, set out at page 223, were the real reasons for the claimant's dismissal) was that he was of the view that the claimant had, by the time of the Lisbon conference, become disengaged from the respondent. He said that she had "checked out" and that he did not know why that was but that he and the respondent had had "concerns about her during the year and when she stopped doing things I had asked her to do we reached the point where her employment was untenable."

95 When it was put to him in cross-examination that what the claimant did not do while she was at Lisbon was not such as to justify dismissal normally, he said that while he would not normally dismiss an employee for not doing things during one week that they should have been doing during that week, here, the reason

for dismissing the claimant "was a combination of everything that had happened during the course of the year."

96 When it was put to Mr Stoneman that the fourth and fifth bullet points set out in paragraph 92 above were about keeping him up to date with Salesforce information and that he had helped other members of staff to keep their Salesforce information up to date, so that it was objectively wrong and unfair to criticise the claimant in that regard, Mr Stoneman said that keeping the Salesforce information up to date was of critical importance, and that the assistance that he had given in that regard to others was of a mechanical sort only (evidenced by the slack message at page 221).

97 In addition, it was put to Mr Stoneman that the fact that Ms Franchina had written an email to the claimant on 17 November 2017, i.e. just after the claimant had been dismissed, to thank the claimant for the help that she had given (see page 226), meant that it had been wrong to criticise the claimant for the manner in which she spoke to Ms Franchina on 2 October 2017 as we describe in paragraphs 67-70 above. Mr Stoneman remained firm, despite that email, in his evidence that he had treated the claimant in the manner in which he had on 2 October 2017 in the same way that he would have treated a man in the same or similar circumstances.

98 Mr Stoneman was asked in cross-examination about the existence of a lads' culture, or boys' club, and his response was this:

> "My interpretation of that was that you had a group of men who talked loudly about football and music but that was all. I certainly do not think that there was a lads' culture."

99 We asked Mr Stoneman whether he participated in discussions about football and music, and he said that the football team that he supported was not one of those which were usually the subject of discussion by Mr Keen, Mr Charalambous and Mr Shah, and that he was "out of the loop" as far as the discussions about music were concerned.

100 Mr Stoneman's witness statement dealt at the end of paragraph 49 briefly with the situation of Mr Bromfield (dealt with in row 30 of the tabular list of issues; it was claimed that it was discrimination because of sex and victimisation to dismiss the claimant in part for consistent late attendance, given that Mr Bromfield was frequently late and was not dismissed for that). Mr Stoneman said this in that paragraph:

> "Max Bromfield was also dismissed a couple of months after Lisa also for not exhibiting the right behaviours and for performance related issues."

101 We asked Mr Stoneman about the circumstances of Mr Bromfield, and it was

clear that the reasons for dismissing Mr Bromfield included his frequent late attendance.

Entitlement to sick pay; the impact of the failure to give the claimant a document satisfying the requirements of section 1 of the ERA 1996

102 Since the claimant was given no written contract of employment or statement of entitlement to sick pay, it was necessary to apply a conventional analysis of the application of the law of contract in determining what was the claimant's contractual entitlement to sick pay. The initial position was that the claimant was entitled to pay in accordance with Triplelift's PTO policy at pages 68-70. That policy was altered as from the following year (via the new policy document at page 71), but there was no evidence before us to show that that alteration was brought to the claimant's attention. Indeed, it was clear that the respondent had failed completely to grapple with the claimant's contractual terms.

103 The letter of appointment at page 74 stated that the employment of the claimant was "contingent upon execution of the Company's Employment Agreement". The claimant signed such an agreement: it was at pages 76-87. It stated nothing about PTO.

104 There was no evidence before us that the claimant had had her attention drawn to either the document at pages 68-70 or that at page 71. The first one was not expressly incorporated, and it was evidently written about, and was applicable only to, employment in the US.

105 In the absence of an express entitlement to contractual sick pay, in the UK there is a right only to statutory sick pay.

106 The difficulty caused to the claimant by the failure to give her a statement satisfying the requirements of section 1 of the ERA 1996 was most acute in this context. Given that difficulty, we concluded that the claimant should receive four weeks' pay and not two as a result of that failure.

107 That was not, however, relevant to the issue of the contractual entitlement of the claimant to sick pay. In the latter regard, we could not see any alternative to a conclusion that the claimant had failed to put before us evidence on the basis of which we could conclude on the balance of probabilities that she had an entitlement to up to eight days' contractual sick pay. Accordingly, while the respondent owed her sick pay, it had in the circumstances underpaid her by not paying her eight days' statutory sick pay (bearing in mind that the respondent had not paid the claimant for the first three days of the period after the ending of the PTO for which the respondent had paid the claimant). That was £142.96.

The reliability of the parties' evidence

108 Both parties made cogent submissions about the reliability of the evidence, in particular Mr Heard on behalf of the claimant in reply to Ms Hosking's closing submissions. However, the evidence of both parties was in some respects flawed. Those flaws were not determinative as far as we were concerned. Our conclusions were reached on each element individually, and by reference to the evidence on each point, and we thought very hard and carefully about each one.

Our conclusions on the various elements of the claimant's claims, i.e. our conclusions on liability, in so far as they are not already stated above

(1) Jurisdiction to hear the claims of discrimination contrary to the EqA 2010

109 As submitted by Ms Hosking on behalf of the respondent, the claim was out of time in respect of events occurring before 2 November 2017 unless they were either part of conduct extending over a period or it was just and equitable to extend time under section 123(1)(b) of the EqA 2010.

110 The claimant put no evidence before us on the basis of which we could conclude that it was just and equitable to extend time in any respect. We considered carefully whether we could conclude that there was conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010. We were unable to see such a link between the events on which the claimant relied in saying that there was such conduct beyond accepting Ms Hosking's submission, in paragraph 160 of her written closing submissions, that it is only the acts of Mr Stoneman that might be sufficiently linked to form conduct extending over a period. Given our conclusions stated above about Mr Stoneman's conduct before 2 November 2017, namely that it was in no respect discriminatory because of the claimant's sex to any extent, we did not find that there was any conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010 as far as the claim of sex discrimination was concerned. Accordingly, we determine below only the elements of the claim in the list of issues concerning sex discrimination at pages 59-65 which post-dated 1 November 2017.

(2) The claim of discrimination because of sex

111 We gave anxious consideration to the claims of sex discrimination and victimisation. We concluded, and were unimpressed by the fact, that there was something of a "lad culture" or "boys' club" in the respondent's workplace, but Mr Stoneman satisfied us that he was not in any way part of it.

112 We asked ourselves whether the claimant had proved facts from which we could conclude in the absence of an explanation from the respondent that she had been discriminated against by being dismissed because of her sex. We were

unable to conclude that she had done so.

113 We also concluded that if she had done so then we would have found that the respondent had, through the evidence of Mr Stoneman and Ms Fogle, satisfied us on the balance of probabilities that in relation to her dismissal, the claimant had not been treated less favourably than a man would have been treated to any extent because of her sex. We concluded that the true or real reason why Mr Stoneman decided that the claimant should be dismissed was that by November 2017 she was no longer engaging in the manner in which she had done before September 2017. In that regard, we noted that the claimant had (see paragraph 65 above), on 18 October 2017, foreseen the possibility that she might be dismissed, but she had nevertheless not responded at all to Mr Stoneman's request for her 2018 sales forecasts (see the first sentence of paragraph 90 above) or for a daily update on the Lisbon conference, nor had she (despite, as noted in paragraph 91 above, having an apparent opportunity to do so) given him any kind of feedback from that conference even after she had returned to work in the week after the conference.

114 We concluded that the claimant's difficulties arising from her arrest at the Notting Hill Carnival at the end of August 2017 resulted in her not being able to work properly, and that Mr Stoneman dismissed her in part for that reason (without knowing about the arrest and its effect on the claimant) and in part because of the ongoing friction between the claimant and some of her colleagues. In short, we found that what he said were the reasons for her dismissal were the real (conscious) reasons for her dismissal, and he satisfied us on the balance of probabilities that the claimant's gender played no part in his decision that she should be dismissed.

115 We also found that the one act of Mr Stoneman which post-dated 2 November 2017 which was claimed to be sex discrimination (namely on 6 November 2017 asking the claimant to give him a revenue forecast by 8 November 2017) was in no way less favourable treatment of the claimant because of her sex.

(3) The claim of victimisation

116 Similarly, we concluded that Mr Stoneman did not react negatively to the fact that the claimant had complained in her email of 12 September 2017 and to Ms Fogle orally of gender discrimination. We found this aspect of the case even harder to decide than the claim of discrimination because of sex. Nevertheless, we came to the same, equally clear, conclusion that Mr Stoneman had satisfied us on the balance of probabilities that he had not dismissed the claimant or acted detrimentally towards her before 2 November 2017 to any extent because she had made the allegation of gender discrimination. Equally, we concluded that none of the three acts of claimed victimisation (referred to in paragraph 157 of Ms Hosking's closing submissions) in respect of which the claim was in time were detriments within the meaning of section 27 of the EqA 2010: we accepted

that Mr Stoneman in (1) on 3 November 2017 asking for the claimant to give daily updates from the Lisbon conference and (2) on 6 November 2017 to provide by 8 November 2017 a revenue forecast for 2018, and then (3) holding a meeting with her on 16 November 2016 for the first time since she returned to work, were in no way the result of the fact that the claimant had alleged that she had been the subject of gender discrimination. That is for the following reasons.

116.1 We accepted that the claimant had put facts before us from which we could draw the inference that Mr Stoneman had victimised the claimant by requiring her to give daily updates from the Lisbon conference, namely the fact that such daily updates were not the norm as far as the respondent was concerned. However, we accepted Mr Stoneman's evidence that he had done that because the claimant had not been as engaged in the manner in which she had been previously and because he wanted her to demonstrate that she was still committed to the respondent, and he satisfied us on the balance of probabilities that the fact that the claimant had complained of gender discrimination had not caused him to require those daily updates.

116.2 We were satisfied by Mr Stoneman's evidence against the factual background as we found it to be that the other two claimed acts of victimisation were not done to any extent because the claimant had complained of gender discrimination.

117 We state in paragraph 76 above our conclusion on Ms Fogle's motivation in treating the claimant in the manner in which she did. As shown by what we say there, we came to the conclusion that she did not subject the claimant to a detriment to any extent because the claimant had alleged that she had been the subject of gender discrimination. For the avoidance of doubt, while Ms Fogle denied saying to the claimant (as claimed by the claimant) that the claimant was "emotional", given that Ms Fogle referred in paragraph 2.17 of her witness statement to the claimant as having used "emotive language", we accepted that she probably did indicate to the claimant in some way that she thought that the claimant was being emotional. However, we concluded that she did not do so to any extent because the claimant had made a complaint of discrimination because of sex.

(4) The claim of harassment within the meaning of section 26 of the EqA 2010

118 By the end of the hearing, the only claim of harassment that was pressed expressly was that Mr Shah had harassed the claimant as asserted in paragraphs 67-75 of Mr Heard's closing submissions. Otherwise, the claim of harassment was coterminous with the claim of sex discrimination. Given our conclusions stated above, that claim could not succeed.

(5) The claim for equal pay

119 We were unimpressed by the pay differential between the claimant and her colleagues Mr Keen and Mr Charalambous, but we accepted Mr Stoneman's evidence that he simply paid the claimant what she was happy to accept, and that while objectively speaking there was no justification for the differences in their pay, there was in the circumstances a material factor within the meaning of section 69 of the EqA 2010.

120 In conclusion, the claimant's claims succeed, but only in part.

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Employment Judge

Date: 9 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE