



EMPLOYMENT TRIBUNALS

Claimant: Miss S McPherson

Respondent: Cote Restaurants Limited

FINAL HEARING

Heard at: Birmingham **On:** 2-5 & (deliberations in private) 6 & 9 December 2019

Before: Employment Judge Camp **Members:** Mrs RA Forrest
Mr PJ Simpson

Appearances

For the claimant: in person

For the respondent: Mr S Jagpal, non-legal representative (consultant)

RESERVED JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Introduction

1. The claimant was employed as the General Manager of the Côte Brasserie restaurant in the Mailbox in central Birmingham from 10 June 2016 to 19 January 2018. Her employment was ended by dismissal and the reason given for dismissal was, essentially, poor performance. Her case is that she was dismissed because she is a woman.

Claims and Issues

2. This is a direct sex discrimination and sexual harassment claim. In summary, the claimant alleges: that, throughout her employment, but in particular from around June 2017 onwards, she was badly treated by her line manager, Mr A Cunningham, who was an Area Manager; that that bad treatment culminated in her dismissal; and that the reason for that bad treatment was that (using the words the claimant used in her closing submissions), "*Mr Cunningham did not feel women are as capable as men and treats them as disposable and throw-away.*"

3. The precise complaints and the issues arising in this case were identified at a preliminary hearing that took place on 11 January 2019 before Employment Judge Broughton. In the written record of that preliminary hearing, the Employment Judge stated, *“I now definitively record that the issues between the parties which will fall to be determined by the Tribunal are as set out in the Annex to this Order which in the interests of fairness and proportionality, can no longer be subject to change.”* Nevertheless, at the start of this hearing, we asked the parties to confirm whether they agreed that what was set out in the annex to the written record of that preliminary hearing (“Annex”) was indeed accurate and complete. When doing so, we made clear that we might be willing to consider, if either side asked us to, addressing additional complaints and issues, Judge Broughton’s comments notwithstanding. Both the claimant and, through its representative, the respondent confirmed they accepted that what was in the Annex was indeed accurate and complete.
4. There is a copy of the Annex attached to this decision, for ease of reference. It accurately sets out the issues that are before us, albeit that we will put one or two of the issues into our own wording later in these Reasons.
5. We note that we did not deal with any remedy issues at this hearing. Had we resolved any of the complaints in the claimant’s favour, there would have to have been a separate remedy hearing.
6. The claimant’s sexual harassment complaints are identified as being about the following allegations:
 - 6.1 Mr Cunningham adopting an aggressive and unsupportive approach to managing the claimant and female managers generally;
 - 6.2 those matters identified as allegations of direct discrimination;
 - 6.3 Mr Cunningham questioning the claimant about her relationship with a male manager (this is also a complaint of direct discrimination);
 - 6.4 Mr Cunningham making inappropriate comments about the appearance of a female employee, a Ms G Numm, latterly a Birmingham Supervisor;
 - 6.5 Mr Cunningham adopting a ‘boys club’ mentality as evidenced by WhatsApp messages;
 - 6.6 Mr Cunningham telling the claimant to stop being so sensitive;
 - 6.7 subjecting the claimant to a public dismissal process.
7. The direct sex discrimination complaints are about these allegations:
 - 7.1 Mr Cunningham not involving the claimant/asking politely when staff were needed to provide cover elsewhere and taking her best staff. There are two named comparators: Mr R Driver and Mr T Morgan, both General Managers of other restaurants;
 - 7.2 Mr Cunningham not involving the claimant in recruitment and transfer decisions. The only individual mentioned in the Annex in relation to this allegation is a Mr O Davies, an Assistant General Manager (“AGM”);

- 7.3 Mr Cunningham not supporting the claimant on promotion or disciplinary decisions by supporting her male Assistant Manager (Mr J Reynolds) rather than her and by only disciplining Mr A Parry (an AGM) after the claimant's concerns were also raised by a male Supervisor, Mr K Kobin;
 - 7.4 not allowing the claimant to use her discount during the Christmas period. The only comparator named in the Annex is someone whose first name is Andras;
 - 7.5 Mr Cunningham asking the claimant inappropriate/personal questions about a possible relationship with a colleague. The comparator is Mr Morgan;
 - 7.6 not helping the claimant in relation to alleged poor performance. The named comparators are Mr C Shepherd (an AGM), Mr Morgan and Mr J Andrew (latterly AGM in Birmingham);
 - 7.7 the process followed leading up to and following the claimant's dismissal, including location of meetings and the time to prepare. The named comparator is a Mr R Price, a General Manager;
 - 7.8 not offering the claimant an opportunity to resign/have a good reference. The named comparators are Mr Price and a Mr A Parry, an AGM;
 - 7.9 dismissing the claimant. The named comparators are Mr Shepherd, Mr Morgan and Mr Andrew.
8. At the start of the hearing, before we have read most of the papers, we had a short discussion with the claimant and the respondent's representative. During those discussions, the claimant confirmed that her claim was first and foremost about her dismissal. Her other complaints, and the other allegations she makes about Mr Cunningham that are not complaints of harassment or direct discrimination, are relied on mainly as ammunition to support the direct sex discrimination complaint concerning dismissal.

Time limits

9. The claimant went through early conciliation between 1 March 2018 and 15 April 2018 and presented her claim form on 30 April 2018. Unfortunately, the name she gave on her claim form for the respondent was significantly different from the name on her early conciliation certificate and her claim was rejected. She applied, successfully, for reconsideration of the decision to reject her claim, on the basis that she had intended to claim against the company named on her early conciliation certificate. However, because the decision to reject her claim form originally was assessed as correct, her claim form was, pursuant to rule 13(4), deemed to have been presented on 20 June 2018. This means that every, or almost every¹, complaint she is making was presented outside of the primary time limit set out in section 123 of the Equality Act 2010 ("EQA").
10. The fact that some or all of the claimant's complaints were potentially out of time and that the Tribunal would be considering time limits issues, including whether time should be extended on a "*just and equitable*" basis, was highlighted by

¹ See paragraphs 176 to 179 below in relation to a possible complaint about the claimant's appeal against dismissal.

Employment Judge Broughton in the list of issues. During our discussions with the parties at the start of the hearing, the Employment Judge went through time limits in detail with the claimant, explaining: that the claim had been presented outside of the primary time limit in EQA section 123 because it was deemed to have been presented on 20 June 2018; that she would have to persuade us that it was just and equitable to grant an extension of time.

11. The claimant gave almost no evidence on time limits issues. In her witness statement, all she said was (paragraph 77): “*These allegations are not out of time. The disciplinary meeting on the Friday 19th January 2018 was the final event and culmination of these ‘dripping tap’ events that happened across the entirety of my employment and management under [Mr Cunningham]*”. In other words, the case she was putting forward was that there was “*conduct extending over a period*”. She did not seem to have addressed her mind to the fact her claim was out of time even if “*the date of the act to which was the complaint relates*” (EQA section 123(1)(a)) was 19 January 2018. She added nothing relevant to these issues in her oral evidence.
12. In her oral closing submissions – and we note that submissions are not evidence – the only relevant additional thing the claimant said was that she had made a mistake when she submitted the claim form and had put the wrong name on it. It is self-evident that she did not deliberately name the wrong respondent, but why she made this mistake is not so. There was no explanation at all in the evidence.
13. As to whether it would be “*just and equitable*” to extend time, we adopt the summary of the law in the EAT’s decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283 at paragraphs 9 to 16. More fundamentally, time limits are there to be obeyed and the burden is on the claimant to show that it is just and equitable to extend time. Time limits in the Employment Tribunals are very short – just 3 months for most things, compared to 3 years for personal injury claims and 6 years for contractual claims. Many people involved in employment rights think they are too short. But whatever our views on that are, we are obliged to apply the law as enacted by Parliament. Extending time should be the exception, not the rule. We do not mean by this that there has to be something exceptional before we will extend time. All we mean is that if a tribunal usually extends time, even where there is no particularly good reason for any delay and simply because there is no prejudice to the respondent, that would be ignoring the decision of Parliament that 3 months is the appropriate basic time limit for discrimination claims. It would also effectively mean the respondent had to prove it would be significantly prejudiced by extending time, something respondents won’t be able to do in most cases where a claim is weeks or months, rather than years, out of time.
14. In short, the claimant has failed to satisfy us that it would be just and equitable to extend time. The reality is that the claimant has put nothing before us in support of an extension. The only thing in her favour is the fact that the respondent cannot point positively to prejudice, beyond the possibility that the cogency of evidence may have been ever so slightly less than it would otherwise have been. Given that the burden is on her to show it is just and equitable rather than on the respondent to show prejudice, her claim therefore fails. Because of time limits, it would fail even if all her complaints were otherwise valid.

The law

15. The law applicable to the claimant's direct discrimination and harassment complaints is to be found, first and foremost, in the wording of the relevant sections of the EQA, in particular sections 13, 23, 26, and 136.
16. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.
17. So far as concerns the burden of proof, there is a helpful summary of how [the predecessor to] EQA section 136 ("section 136") operates in Islington Borough Council v Ladele [2009] ICR 387, at paragraph 40(3), which we adopt.
18. Section 136 invites us to look for, "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place. The threshold to cross before the burden of proof is reversed under section 136 is a relatively low one: "*facts from which the court could decide*". However, it is not reversed simply by: unexplained or inadequately explained unreasonable conduct; a difference in treatment and a difference in status²; apparent incompetence. See: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility, but that it has in fact occurred: see South Wales Police Authority v Johnson [2014] EWCA Civ 73, at paragraph 23.
19. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.
20. We note that in a direct discrimination complaint, there must be less favourable treatment and not merely unfavourable treatment. Subject to section 136, we have to be satisfied that the claimant was treated worse than someone else in the same circumstances – a 'comparator' in accordance with EQA section 23 – was or would have been treated. Merely proving that the respondent treated the claimant badly is, by itself, not enough.
21. The law of harassment is summarised Richmond Pharmacology v Dhaliwal [2009] ICR 724, at paragraphs 7 to 16, read in conjunction with paragraphs 86 to 90 of the judgment of Underhill LJ in Pemberton v Inwood [2018] EWCA Civ 564.

Factual background

22. By way of background, we refer to a Chronology document produced by the parties. We understand it originated as the claimant's document; in any event, it contains everything the claimant wanted it to. It seems to be an agreed document, not in the sense that the claimant and respondent agree that everything set out on

² i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

the face of it is true and accurate, but in that it sets out what each side thinks the relevant events are and what the claimant is alleging and what the respondent's response to the claimant's allegations is.

23. We also note a Cast List produced and agreed between the parties.
24. The documentary evidence before us consisted of a file of over 400 pages, including some extra pages that were added by the claimant at the start of the hearing, without objection from the respondent's representative. We could not and did not read every page, but only those parts of documents within the file to which we were referred during the hearing.
25. We had witness evidence from the claimant herself and from the following witnesses for the respondent: Mr Cunningham; Miss A Kent, no longer employed by the respondent, but at the relevant time a Training Manager; Mr A Cipollaro, an Operations Manager, who dealt with the claimant's appeal against dismissal; Mrs L Turner, another of the respondent's General Managers who had Mr Cunningham as her line manager; Ms B Moorecroft, also a General Manager and also line-managed by Mr Cunningham; Mr D Wanfor, a Regional Operations Director, overseeing fifty-three restaurants and five Area Managers, including Mr Cunningham.
26. We formed the impression that, on the whole, the witnesses were being honest with us. But that does not mean that what we were told was true and accurate, merely that they believed it to be so. So far as concerns the two main witnesses – the claimant and Mr Cunningham – there was little to choose between them. There are many factual disputes, but it has not been necessary to resolve many of them and where we have made decisions about the facts and preferred one side's version of events to the other's, it has been because of things other than the 'performance' of anyone at the witness table.
27. The respondent operates a chain of restaurants. In the words of Mr Cunningham, from his witness statement, it "*prides itself on offering the best food and service on the high street to our guests*", and has "*a culture of exceeding guests' expectations*". The respondent thinks of itself as having its own particular culture and way of doing things.
28. Each restaurant has a General Manager. Below a General Manager in the hierarchy there are AGMs, Assistant Managers, Supervisors, and waiting staff. Every restaurant also has Head Chefs and others that work in the kitchen. Above General Managers, there are Area Managers. Mr Cunningham was the claimant's Area Manager at all relevant times. Mr Cunningham was responsible for seven or eight restaurants, including the claimant's Birmingham restaurant.
29. The first allegations the claimant makes relate to October/November 2016: the allegation that Mr Cunningham commented inappropriately on the possibility of a relationship between the claimant and Mr Morgan. It is alleged that he had said at a work function, where the claimant and Mr Morgan were socialising together, something like, "*You two look awfully close; I think something is going to happen between you two*". Various things, which we shall go through later, allegedly happened between then and July 2017.

30. July 2017 is potentially significant because it is when the first particular thing the respondent identifies as a performance issue with the claimant occurred. It is the respondent's case that there were a number of performance-related issues that were raised by email, and otherwise informally, with the claimant between then and the date she was dismissed.
31. There was a particular incident on or around 8 November 2017. It is important from the point of view of the claimant's claim because it is the last clearly identifiable incident about which the claimant makes a complaint of discrimination prior to the disciplinary and dismissal process. It is potentially important from the respondent's point of view too, because it is part of something that was relied on by the respondent in relation to the claimant's dismissal.
32. In short, there was a meeting between the claimant and Mr Cunningham in a branch of Costa Coffee. The meeting followed a disagreement between them about how a customer complaint relating to a wedding party should have been dealt with. During the meeting, there seems to have been a verbal altercation between them.
33. Birmingham's sales figures for December 2017 were significantly below budget. Budgets were set on the basis of previous year's sales and the Birmingham restaurant had achieved very good sales in December 2016.
34. Without any prior warning, Mr Cunningham wrote to the claimant, in a letter he hand-delivered on 13 January 2018, inviting her to a disciplinary meeting to discuss nine matters, including poor December sales. The letter included the following, "*As you have a relatively short period of employment with the Company, we will consider whether your employment may be terminated following the meeting, alternatively a warning may be given.*"
35. The meeting took place on 19 January 2018 and was chaired by Mr Cunningham. At the end of the meeting he announced his decision to dismiss her. That decision was confirmed in a letter dated 21 January 2018.
36. In an email of 23 January 2018, the claimant, for the first time, complained of discrimination and harassment by Mr Cunningham. She appealed against dismissal on 26 January 2018. As part of her appeal, she produced statements or letters from three Birmingham colleagues, all at one time Supervisors: Ms Numm; Ms C Tuyisinge; Mr M Margarit.
37. The appeal was dealt with by Mr Cipollaro, then Regional Operations Manager. The appeal took place on 7 February 2018. Mr Cipollaro gave his decision rejecting the appeal by a letter dated 26 February 2018.

Findings of fact relevant to each complaint

38. We shall now go through the facts relevant to each of the issues, taking them in approximately the order they appear in the Annex. The first issue is, "*Did the respondent engage in unwanted conduct as follows:*" and there then follows a list of allegations, each of which we shall now address.

Mr Cunningham adopting an aggressive and unsupportive approach to managing the claimant and female managers generally – female managers generally

39. We have found it difficult to engage with this as a general allegation. The claimant has made various specific allegations, many of which appear as freestanding allegations of direct discrimination and/or of sexual harassment and we shall deal with those individually and separately.
40. The allegations of aggression relate to how the claimant perceived Mr Cunningham's actions and demeanour on particular occasions. Although that may well have been her perception, there is little or no objective, corroborative evidence of any substance suggesting that that was how he was perceived by others.
41. The only other individual, who, on the evidence, has complained about something that could be characterised as aggression was Ms Numm. Mr Cipollaro spoke to her on the telephone following the claimant appealing against her dismissal. That telephone call was recorded and we have an agreed transcript of the call. In that transcript, Ms Numm mentions one conversation in which Mr Cunningham allegedly raised his voice, but that was just a single occasion. She also stated that she would not expect him to behave like that as, "*When Adrian [Mr Cunningham] comes to the restaurant he is always very polite with us and always asks us how we are and everything like this*". Judging from what she told Mr Cipollaro in the telephone conversation, the great majority of Ms Numm's allegations against Mr Cunningham are based largely or wholly on what the claimant told her.
42. So far as concerns the allegation of Mr Cunningham behaving in this way towards other female managers than the claimant, there is no substantial evidence of this at all. Such evidence as there is, taken as a whole, points the other way.
43. The claimant alleged that Mr Cunningham failed to provide adequate support to a trainee manager, Miss J Thompson, who complained about lewd and sexist comments by two chefs at the Birmingham restaurant. On 12 September 2017, Miss Thompson emailed Mr Cunningham to tell him what had happened. In relation to this allegation, in the document attached to the claim form containing details of the claimant's claim, which we shall refer to as the "Details of Claim", the claimant stated, "*I am fully aware that no documented conversations took place with the chefs in the restaurant. This shows Adrian's lack of respect for female managers, he condones this boys club mentality and he doesn't reprimand male employees*". When giving evidence, the claimant did not explain the source of this 'full awareness', nor what she meant by "*documented conversations*".
44. In Mr Cunningham's witness evidence, he confirmed that he had spoken to Miss Thompson and that she had said that she did not want a formal process, but wanted to bring it to his attention as the comments made her feel uncomfortable. He added that, "*I arranged for her to finish her training in Leamington Spa, as she had requested. I informed the Area Chef for Birmingham, Zoltan, who followed up on the allegations with the named chefs and reprimanded them.*" This account of events was not challenged in cross-examination, and we accept it, having no good reason to do otherwise.

45. We note that the Employment Judge took pains to remind the claimant during her cross-examination of Mr Cunningham that if she was wanting us to make particular findings about things that Mr Cunningham did, or did not do, she would have to put her allegations to him and challenge things to the contrary in his witness statement. This point was made in very clear terms to the claimant when she had reached what she had initially stated was the end of her cross-examination of Mr Cunningham. After the Employment Judge had told her this, she resumed her cross-examination of him and asked a number of further questions.
46. The claimant's own evidence, in paragraph 72 of her witness statement, that, "*I know first-hand AC [Mr Cunningham] did not have any informal chats or discussion with any staff members about their behaviour towards [Miss Thompson]*" does not contradict anything that Mr Cunningham told us. He did not allege that he had personally spoken to the individuals who had allegedly behaved inappropriately towards Miss Thompson. She said nothing to us to challenge what Mr Cunningham had told us, which was to the effect that the reason the matter had not been taken further was that Miss Thompson did not want it to be taken further.
47. The claimant also relied heavily on a text message sent by Miss Morgan on or around 26 July 2017, in which she stated that Mr Cunningham "*hates me at the mo*" and when asked why, sent a message saying "*Shit MDs [Mystery Diners – the respondent engages individuals to attend at its restaurants incognito and report on them to the respondent], complaints. Usual*", and then a follow-up message stating, "*Even Callum says he sends really shitty emails to me compared to Cheltenham*". We do not think this provides the support for the claimant's allegations about Mr Cunningham mistreating other female managers that she submits it does.
48. This was an informal exchange of messages on one day. Miss Morgan was commenting that she felt hated by Mr Cunningham, "*at the mo*", suggesting that that was not always the case. The reference to "*Callum*" is presumably to a Mr Brooke, who was AGM of the respondent's Cheltenham restaurant. The message suggests he had told Ms Morgan, and that Ms Morgan had told the claimant by text message, that around that time Mr Brooke thought Mr Cunningham sent more unpleasant messages to Ms Morgan than those he sent to the Cheltenham restaurant. We don't know how Mr Brooke would know this. Presumably, he would not be privy to most emails sent to Ms Morgan, nor to emails sent directly to the General Manager at Cheltenham, a Mr R Driver.
49. Even if we gave more weight to this evidence than we think we should do, and decided it was proven, on the balance of probabilities, that at that time, Mr Cunningham did indeed send more "*shitty*" emails to Ms Morgan than those he sent to the male General Manager at Cheltenham, this would still provide very thin support indeed for the allegation that Mr Cunningham tended generally to mistreat female managers.
50. Another part of the claimant's evidence relating to treatment of other female managers is a paragraph in her witness statement (paragraph 62) where she seeks to explain why other female managers were not treated badly. In that paragraph, she also states that Ms Morgan "*has had similar interactions and*

harassment from [Mr Cunningham]”, but the only corroborative evidence she puts forward are the text messages we have just referred to.

51. To an extent, it appears to us that the claimant is trying to have it both ways: on the one hand, suggesting that Ms Morgan was safe from being subjected to detrimental treatment because of her sex because (paragraph 62 of the claimant’s witness statement) she, “*has ... been working for Cote for numerous years*”; on the other, the claimant suggests Ms Morgan was not safe from detrimental treatment in the form of victimisation because she still works for the respondent, which is how she explained Ms Morgan’s apparent reluctance to give any evidence supporting her to Mr Cipollaro in relation to her appeal against dismissal, or to give any obvious support to this Tribunal claim.
52. The claimant cross-examined several witnesses asking why Ms Morgan was not giving evidence for the respondent. The same point could be made against the claimant herself. She lived with Ms Morgan for 6 months; they were apparently friendly.
53. Ms Morgan not giving evidence is not something we count in the claimant’s or the respondent’s favour. There are a number of possible reasons why Ms Morgan might be reluctant to give evidence and why the claimant and the respondent might have taken a tactical decision not to call her. We can only deal with this case on the basis of the evidence we have. We cannot properly assess whether, if Ms Morgan gave evidence, she would support the claimant or the respondent, or whether her evidence would be neutral. In the absence of evidence from her, we give no weight to the claimant’s vague and general suggestions that Ms Morgan had indicated that Mr Cunningham had not treated her very well. We note that no specific allegations of mistreatment of Ms Morgan were put to Mr Cunningham by the claimant.
54. Much the same can be said about the claimant’s evidence relating to things Mr Morgan (no relation) had allegedly told her. We have nothing from Mr Morgan. The evidence relating to interactions between Mr Morgan and Mr Cunningham are lacking in detail. None of it was along the lines of allegations that in specific circumstances, Mr Morgan told the claimant a specific thing that Mr Cunningham had done or said. This lack of detail means we cannot sensibly test the accuracy of evidence the claimant gave about what Mr Morgan had told her, in particular whether Mr Morgan was himself being accurate, or whether the claimant may have misunderstood. Again, specific allegations about what Mr Cunningham allegedly did or said to or in relation to Mr Morgan were not put to Mr Cunningham in cross-examination.
55. Returning to what evidence there was of an aggressive and unsupportive approach to female managers generally, two women other than the claimant have complained about Mr Cunningham’s behaviour. These are two of the people from whom the claimant produced evidence of a sort in relation to her appeal, the evidence consisting of letters/personal statements: Ms Numm and Ms Tuyisinge. We also have the statement from Mr Margarit. None of them gave evidence at this Tribunal hearing either. The evidence from all three of them, but particularly that from Mr Margarit and Ms Numm, includes much that appears to come from things the claimant told them, rather than things they observed themselves.

56. The transcript of the telephone call between Ms Numm and Mr Cipollaro is quite informative. It illustrates why we need to look critically, and approach with caution, letters or statements of the kind produced by Ms Numm, Ms Tuyisinge and Mr Margarit for the claimant's appeal. The picture painted by the transcript is rather different from that painted by Ms Numm's letter, written only shortly beforehand. For example, what appears in the letter to be an allegation to the effect that Mr Cunningham treated male and female managers differently, turns out, when the transcript is taken into account, to be much more an allegation that Mr Cunningham treated the claimant badly, compared to the way he treated others, who happened to be men.
57. We note in relation to this what the claimant put in her claim form: that Mr K Kobin (a Birmingham Supervisor) and Mr Margarit had, "*witnessed Adrian's behaviour towards me vs ... the Head Chef for Cote Birmingham*". Again, the allegation is that the claimant was mistreated compared to someone else, a man, and that that was what staff at Birmingham had witnessed. (We also note the suggestion in the same part of the claim form that evidence was going to be forthcoming from a Mr Elsmore, and that we have no such evidence). Mr Margarit's statement, similarly, seems to be a complaint about the bad way he thought Mr Cunningham treated the claimant, for whom he evidently had a great deal of respect.
58. This highlights a problem with the claimant's evidence as a whole: that what it proves is no more than that Mr Cunningham did not (or came not to) like her personally or respect her professionally, rather than that he had a general issue with his female subordinates.
59. Ms Tuyisinge's letter is all about Ms Morgan, not the claimant. We have already commented about the lack of evidence from Ms Morgan herself. Ms Tuyisinge states, "*Personally my experience with Adrian was limited, he seemed to dislike me and when speaking to me, would never look at me*". Although she does also state, "*From witnessing his interactions with [others] ... I can honestly say, there was a visible distinction in the way female members of staff were spoken to and treated compared to the male counterparts*", that opinion of hers would need to be tested in cross-examination before we could give it any significant weight. Her answers to questions such as how many "*interactions*" did she witness (bearing in mind her "*limited*" experience of Mr Cunningham), and what specifically was it about them that made her say there was a difference between the way he treated men and women, and other questions along those lines, might well put a different complexion on her evidence. Also, none of Ms Tuyisinge's allegations was put to Mr Cunningham during this hearing.
60. We think we should not give very much weight at all to these personal statements and letter, given the lack of witness evidence at this hearing from the individuals who produced them. We cannot know whether they would present the same evidence if they knew it was being put before an Employment Tribunal for the purposes of a trial, where deliberately not telling the truth is a criminal offence, nor how well their evidence would stand up in cross-examination.
61. In paragraph 90 of her witness statement, the claimant makes further allegations about things Ms Morgan allegedly told her. In relation to those allegations, we repeat what we have already stated about how the lack of evidence from Ms Morgan herself means we give this little weight, particularly when the allegations

were not put to Mr Cunningham. In that paragraph, the claimant also alleges that Mr Cunningham was dismissive of “*Monika*” the (female) General Manager of the respondent’s Cambridge restaurant. We are not satisfied that those allegations are true either. They weren’t made in the claimant’s claim form, which is surprising given the detail that is in it; they were not put to Mr Cunningham in cross-examination; from the other evidence, we know that no disciplinary or performance management action was ever taken against Monika (whose surname is Stawierej) by Mr Cunningham; Mr Cunningham’s evidence that he had personally promoted Ms Stawierej to General Manager was not contradicted in cross-examination; Ms Stawierej has never, to our knowledge, made a complaint about him.

62. In addition, we note the following evidence, which we accept, not least because it was not challenged by the claimant to any significant extent and much of it is not in dispute:

62.1 Mr Cunningham has managed a number of female General Managers other than the claimant during her time with the respondent, namely Ms Stawierej, Ms Morgan, Ms Moorecroft, and Ms Turner;

62.2 there was no evidence before us that any female General Manager other than the claimant herself ever complained to the respondent about Mr Cunningham’s behaviour;

62.3 we heard directly from two female General Managers that they personally had had no issues at all with Mr Cunningham – Ms Moorecroft and Ms Turner. Of course, we take into account the fact that they still work for the respondent and still work under Mr Cunningham, and are therefore not independent and impartial, but they attended this hearing, withstood cross-examination, and nothing else emerged during the hearing that gave us a particular reason to doubt their honesty on this issue;

62.4 Mr Cunningham was personally responsible for the promotion of two women to the position of General Manager: Ms Stawierej and Ms Morgan;

62.5 one of the claimant’s complaints which potentially falls into the category of Mr Cunningham being “*unsupportive*”, and which we will explore in more detail later in these Reasons, relates to the fact that the claimant was dismissed for poor performance, whereas others in charge of poorly performing restaurants were not. She refers to two restaurants that were in what the respondent refers to as ‘intensive care’ (a term we shall explain) – Leamington and Peterborough – and the fact that their General Managers were not disciplined and so were, in a sense, given support that was not given to the claimant. However, Leamington had two General Managers during the period it was in intensive care and one of them was a woman: Ms Turner. Whatever ‘support’ was given to male General Manager colleagues of restaurants in intensive care by them not being disciplined was therefore given to a female General Manager too;

62.6 similarly, in the Details of Claim, at the top of its second page, the claimant refers to two female General Managers – Ms Morgan and a Ms N Meszaros – not being penalised for poor sales figures for December 2017, in the way that the claimant was.

63. In conclusion, we are not satisfied that Mr Cunningham had an aggressive and unsupportive approach to “*managing ... female managers generally*”.

Aggressive and unsupportive approach to managing the claimant

64. We will now go through the claimant’s particular allegations of aggression and lack of support towards her personally from Mr Cunningham that are not part of some other free-standing claim of discrimination made in the list of issues in the Annex. We take these allegations from the Chronology.
65. There are some allegations made in the claim form that appear neither in the Chronology, nor in the list of issues, nor in the claimant’s witness statement. We don’t propose to address those, because they were not raised during this hearing in any way, shape or form.
66. The earliest dated relevant allegation is that Mr Cunningham made an unannounced visit to the Birmingham restaurant to count stock, that the claimant was unaware whether this was a normal part of the respondent’s procedures and asked him about this, and he replied stating, “*I’m your Area Manager and I can do whatever I want*”.
67. This is not an allegation made in the Details of Claim, although it was made in the claimant’s witness statement. In the statement, it is also alleged that Mr Cunningham said, “*I’m big and you’re small and there is nothing you can do about it*”. The allegation was put to Mr Cunningham in cross-examination.
68. This is one of a small number of allegations in relation to which there is potentially some overlap between what the claimant and the respondent are alleging. On the second-last page of the claimant’s Details of Claim, she complains that, “*When I was recruited I was told I would have full autonomy of the restaurant including staff.*” It is part of the respondent’s case that the claimant expected to have more autonomy and independence than she in fact had and resented what she saw as undue interference in ‘her’ restaurant. Miss Kent gave some evidence about this, which we accept because it wasn’t challenged in cross-examination and to an extent is in line with what the claimant herself was saying. In her witness statement, Miss Kent stated:

On many occasions Sian [the claimant] would speak to me about how unhappy she was that Adrian had employed someone for her restaurant without Sian having the final say. She felt that Adrian went behind her back to do this and couldn’t understand why he wouldn’t let her run her restaurant the way she wanted to. I spoke with Sian about this myself and each time I would reiterate that manager recruitment in Cote is completed by the senior leaders. That was Cote policy. Sian couldn’t understand this, and it was something she was always unhappy about...

I believe Sian didn’t enjoy reporting to Adrian because she didn’t like reporting into an Area Manager. Sian told me she wanted to be able to make all the decisions in Birmingham and the Area Manager to stay out of it. In Sian’s eyes, she wanted to run Birmingham as an independent business, it was hers and no one had any rights to say otherwise.

69. We are prepared to accept that Mr Cunningham said, perhaps jokingly, something along the lines of "*I am an Area Manager and I can do what I like*". It was a reasonable response to what might be seen as a rather insubordinate query about whether Mr Cunningham was allowed to do an unannounced stock-take in a restaurant in his own area. We are not satisfied that he said, "*I'm big and you're small [etc]*", because that would really have stuck in the claimant's memory and given this, we would expect her to have mentioned it in the claim form. We are also not satisfied that whatever was said was said in any nasty or inappropriate way.
70. There is a specific allegation in the Chronology given the date December 2016: "*The claimant alleges that [Mr Cunningham] told her to find cover to support a new opening site (Worcester) stating, 'you have to.'*" This specific allegation is not made in the claim form, nor was it part of the claimant's evidence in her witness statement or otherwise. It was not put to Mr Cunningham. Accordingly, we disregard it.
71. The next allegation in the Chronology which does not form part of a free-standing allegation of discrimination is an allegation that in or around January/February 2017, a conversation took place between the claimant and Mr Cunningham about potentially promoting Mr Margarit to the position of Supervisor. The claimant alleges Mr Cunningham said, "*Why do you want an army full of Supervisors, don't put it in their heads they can move up, it's not Cote*".
72. This is an allegation made in the claim form and in the claimant's witness statement. The specific allegation about these specific alleged comments was not put to Mr Cunningham during cross-examination.
73. We accept that Mr Cunningham might well have said, at some stage, something along the lines that Birmingham had enough Supervisors and that what it needed was an AGM. The respondent's case is that that was indeed Mr Cunningham's view at a particular time.
74. We do not accept that Mr Cunningham said, "*don't put it in their heads [etc]*". It would make no sense for him to have said that, as it was not what he thought. Mr Cunningham himself had a track record of encouraging people to move up; while the claimant was still employed, Mr Margarit was promoted, with Mr Cunningham's agreement; the respondent had a practice of encouraging people to be moved up – it very much was the 'Cote way'.
75. The next allegation is that, in April 2017, the claimant was asked to support the opening of the Shrewsbury restaurant, "*which was said to be non-negotiable, putting the claimant under immense pressure*". This allegation is referred to in the claim form.
76. We do not accept that this allegation is accurate. It was not made in the claimant's witness statement, nor was it put to Mr Cunningham in cross-examination, certainly not in terms. The only documentary evidence we have in relation to this issue of providing support for other restaurants, and providing cover for the Shrewsbury restaurant in particular, is a series of emails of 11 April 2017 between Mr Cunningham and the claimant. It supports the respondent's and not the claimant's version of events, the respondent's version of events being that General Managers, the claimant included, were expected to give up staff to

provide cover to other restaurants that needed them, but that this was never requested in an unpleasant and dictatorial way.

77. There is an allegation that in or around June 2017, Mr Parry had just been hired as an AGM and that there was a discussion between the claimant and Mr Cunningham: the claimant expressed concerns about him having been hired; Mr Cunningham's response about what that meant for other managerial staff was, "*I will just move them, I'm the Area Manager and you're not and there's nothing you can do about it, I make the decisions and you don't*". This allegation is made in the claim form, although not in the claimant's witness statement.
78. We don't accept the allegation. On the evidence before us, it would make no sense for Mr Cunningham to have made this comment, given that Birmingham did not have an AGM at the time, and that the claimant did not suggest to us that she had an alternative candidate for AGM in mind amongst her existing managerial staff, meaning there would be no question of moving other staff to make way for Mr Parry. She also did not suggest to us that any of her managers had to move – and why would they, given that there was vacancy for an AGM at the time, which Mr Parry filled? It appears to us that what the claimant wanted was to have another Supervisor and not to have an AGM at all.
79. Closely connected with this allegation, and with a separate allegation that is made in relation to someone else too and which we shall deal with later, the claimant also seems to have been complaining that she was not involved in the recruitment of Mr Parry. However, she accepted in cross-examination that General Managers were not involved in the recruitment of AGMs within the respondent, as a matter of policy. We also refer to and repeat Miss Kent's evidence about this – see paragraph 68 above.
80. Chronologically, the next significant event that is potentially part of this allegation of aggression and lack of support relates to the customer complaint about the wedding party. We shall deal with this separately, later in these Reasons.
81. The claimant makes one or more allegations to the effect that Mr Cunningham shouted at her for allowing Ms Numm and Mr Kobin, who were in a relationship, to go on holiday together. In the Chronology, the allegation is made about January 2018, but there also seems to be an allegation made about July 2017. There is a potentially connected allegation to do with these two people being on holiday at the same time in the Details of Claim, but that seems to be a different allegation and is not followed up in the witness statement, or otherwise in the evidence. Similarly, a related allegation about Mr Cunningham shouting at the claimant is not made in the claim form.
82. From an email Mr Cunningham sent to the claimant on 7 July 2017, it appears that there was a telephone conversation between the two of them, on or around that date, where Mr Cunningham took the claimant to task for allowing Ms Numm and Mr Kobin to go on holiday together. It is clear from that email that, at the time, Mr Cunningham believed that the claimant had disobeyed an express instruction of his by allowing them to go on holiday at the same time.
83. The allegation made in the Chronology about Mr Cunningham shouting at the claimant in January 2018 is not made in the claim form. The allegation in the claim form is that Mr Cunningham refused to allow the claimant to have a trainee open

her restaurant exceptionally. In her witness statement, however, the claimant suggests that she never had a trainee open the restaurant and she makes a point about this. She also states in the same paragraph of her witness statement that at the relevant time, Mr Reynolds was available to open the business, but he left in May 2017, and the date of the allegation about letting a trainee open the restaurant seems to be July 2017.

84. On the evidence, whatever the actual rights and wrongs of what happened in relation to this holiday in July, the claimant gave the impression to Mr Cunningham that she had directly disobeyed an instruction he had given not to allow the two Supervisors to go off on holiday at the same time. We are sure he was cross and he may well have raised his voice on the telephone; it is not surprising he was and it would not be surprising if he did.
85. So far as concerns the allegation that there was a further incident of shouting in January 2018, it isn't in the claim form, and the allegation itself is very unclear. Similarly unclear is the allegation about having, or not having, a trainee open the restaurant. On the evidence we have before us, we are not satisfied that anything untoward occurred.
86. A further allegation that is potentially relevant to the complaint about aggression and lack of support and that seemingly dates from around July 2017 is an allegation that is put like this in the Details of Claim: "*Adrian told me on several occasions 'sales aren't everything' and you need to focus on mystery diners, when I then achieved a top 5 results (out of 92) in the company for mystery diners Adrian would comment 'yeah but how long is that going to last?'*." It is not in the Chronology, but it clearly forms part of the claimant's case because she cross-examined Mr Cunningham about it. However, she was not cross-examined about it, presumably because it was not mentioned in her witness statement. What the claimant says in her witness statement is, "*We went from bottom of leader board for mystery diners to top and not once did he reference it, or say 'well done' in an area meeting*".
87. The claimant putting an allegation in cross-examination is not evidence that that allegation is true. The claimant gave no witness evidence before us that the alleged comment in the Details of Claim was said. Mr Cunningham denied saying it. The allegation is not proved.

AC questioning the claimant about her relationship with a male manager

88. We move on now to the harassment complaint concerning Mr Cunningham inappropriately questioning the claimant about her relationship with Mr Morgan.
89. The claimant has been consistent in her allegations that Mr Cunningham asked her about a possible relationship with Mr Morgan on a number of occasions. The allegation was made in the Details of Claim, it was made during the appeal meeting with Mr Cipollaro, and it was made again in her witness statement (in paragraph 86). Two occasions seem to stick out in particular. The first is a meeting of General Managers in late 2016 to discuss Christmas and the second is during the summer of 2017.

90. As with the allegation about not consulting the claimant in relation to recruitment, there is an amount of common ground or overlap between what the claimant and the respondent are saying in relation to this.
91. In paragraph 19 of Mr Cunningham's witness statement, he stated that the claimant, "*came across as very guarded and reserved. It was as though she didn't want to discuss anything other than work related matters. ... This meant that I didn't really get to know Sian as a person, as I have done with other staff. Generally, the Managers I meet will conclude business and talk about their daily lives, how their weekends were, their relationships, and things like that.*" It seems to be common ground that on a particular occasion, fairly early on during the claimant's employment, Mr Cunningham (and possibly Mr Wanfor as well) verbally encouraged the claimant to be more open and outgoing.
92. In her witness statement, the claimant refers to the first occasion where Mr Cunningham allegedly made inappropriate comments about the possible relationship between her and Mr Morgan: "*[Mr Morgan] was lovely to me and we got on really well. He made me feel really comfortable at this new job, we clearly fancied each other.*" The claimant doesn't seem to be disputing that on that particular occasion, she and Mr Morgan danced closely together. Mr Cunningham concedes that he did make some kind of remark.
93. It is clear that the claimant herself did not like discussing non-work issues at work. We can imagine how an innocent and well-intentioned question, or gentle teasing, about her personal life from Mr Cunningham, which would not come across as inappropriate to most people, might come across quite differently to her.
94. The respondent has been a little inconsistent in relation to what it says about this allegation. In its response form, it stated, "*In September 2016... the claimant had been observed by many to be getting along very well with a co-worker, Tim at the launch party for the Christmas menu. It was the subject of speculation between managers. Adrian directly asked the claimant if they were an item, and the claimant was firm in saying 'No' and 'Don't ask again'. Adrian had not meant to cause offence, and did not raise the subject ever again.*" In his witness statement, however, Mr Cunningham referred to the event as having happened in September 2017, and said nothing about making comments at that event. He then stated, "*Following the launch event, I made a visit to other restaurants and to Birmingham. During the visit, I asked Sian whether she and Tim were seeing each other. I was simply making general conversation. She became quite defensive and irate and asked if I had had this conversation with Tim. I said I hadn't to which he replied, 'please don't', which is why I didn't.*"
95. Broadly, we prefer the claimant's evidence about this. The respondent initially seemed to agree that Mr Cunningham questioned the claimant about the relationship at an event in September 2016, just as the claimant alleges he did. What is in the response form in relation to this fits comfortably with the claimant's own evidence in paragraph 82 of her witness statement. Based on what is in her witness statement, on that occasion, she does not seem to have told Mr Cunningham to stop making comments. We don't think he would or could reasonably have known she did not like those kinds of comments being made at that time.

96. From Mr Cunningham's own witness statement, he seems to agree with the claimant that there was a subsequent occasion where he raised Mr Morgan with her and that that occasion was when he was visiting the Birmingham restaurant. He also agrees with her that on that occasion, she very clearly indicated to him that she did not like being questioned about Mr Morgan.
97. We accept, then, that there were two occasions of note where Mr Cunningham questioned the claimant about Mr Morgan. We also accept that on the second of these occasions, the claimant told Mr Cunningham that she had a boyfriend who was not Mr Morgan. Mr Cunningham does not recall her saying this, but there is no particular reason why he would. She recalls this conversation as being in or around June 2017, and that fits with her evidence that she and Mr Morgan stopped dating in or around April 2017.
98. We also accept the claimant's evidence that there were other occasions between September 2016 and June 2017 where Mr Cunningham spoke to her about Mr Morgan and their possible relationship. Although Mr Cunningham does not think he did, given that we think the conversation where she clearly told him she did not want to discuss this was in or around June 2017, and given that he was not told in September 2016 that she felt this way, we can well imagine that it is something that he would have raised. Perhaps he would have raised it as (from his point of view) an 'ice-breaker'. We note his evidence about how he found the claimant reserved and how difficult he found it to get to know her. He may well have felt that this was at least one thing other than work that he could talk to her about. We also accept that this made the claimant feel uncomfortable and that she probably attempted to communicate this discomfort to Mr Cunningham. But that message only got through when they had the significant discussion in or around June 2017.
99. Although the claimant now recalls repeatedly telling Mr Cunningham that she didn't want him asking her about Mr Morgan, during the hearing of her appeal against dismissal, in February 2018, the minutes record her as having said she told him she didn't feel comfortable talking to him about that issue only, "*In summertime last year*".
100. The other aspect of this where the claimant's and respondent's cases are rather different relates to what happened after June 2017. In the appeal hearing, what the claimant says is no more than that after she had told Mr Cunningham she didn't feel comfortable talking about it, "*he then asked again*". In the claim form, there is no detail in relation to this at all. It is only in the witness statement that the allegation is made that, "*I told him to please stop asking me personal questions about my relationships because it was making me very uncomfortable. After this, his behaviour then stepped up and became worse.*" During the claimant's evidence, we tried to, but could not, get to the bottom of what, specifically, the claimant was referring to by "*his behaviour then stepped up and became worse*". When the Employment Judge asked her about this towards the end of her evidence, she described the meeting which we have identified as being in June 2017 as the "*last time*" Mr Cunningham asked her about her relationship with Mr Morgan. In conclusion on this point, we are not satisfied that anything significant happened in terms of questioning about her relationship with Mr Morgan after the meeting in June 2017.

Making inappropriate comments about a female employee's (GN) appearance

101. The comments about Ms Numm's appearance were allegedly made in late 2016. In the claim form, the claimant alleges that what Mr Cunningham said was, "*she is easy on the eye, she would do well because she is not exactly bad to look at*". During the appeal meeting, the claimant alleged that Mr Cunningham, "*made several comments, several times, about Garoly [Ms Numm] is easy on the eyes, she's not exactly bad to look at.*" In her witness statement, the claimant alleged that Mr Cunningham also said, with reference to Ms Numm, that Mr Kobin was "*punching above his weight there*".
102. In paragraph 23 of her witness statement, Miss Kent stated that this allegation about Mr Cunningham making the comments was "*completely untrue*". Even if we assume that Miss Kent had correctly identified the occasion when it is alleged these comments were made as being a particular occasion when she was present in the Birmingham restaurant to hear – or not hear – them being said, she did not suggest that she stood with Mr Cunningham for the entire evening and never left his side. How can she possibly know what he might have said when she wasn't there?
103. It is conceded by the respondent that Mr Cunningham made overt comments about how Miss Numm looked, albeit not those the claimant alleges he made (in paragraph 43 of his witness statement, he stated, "*I said she 'looked fab, very sassy'.*"). The claimant has consistently made this allegation and Ms Numm confirmed in her telephone interview with Mr Cipollaro that the claimant had made it to her, albeit that this may have happened after the claimant was dismissed. The comments the claimant recalls could reasonably be characterised as sexist and lecherous, but not so outrageously so as to make it inherently unlikely that they were said. There is no particular reason for the claimant to have made these particular comments up. It seems to us that if she was going to make something up to bolster her claim, she would surely have come up with something much more obviously offensive.
104. In addition, we can see no reason why, over a year later (which was the earliest point in time when he would have been aware of the claimant's allegation about these comments) Mr Cunningham would remember exactly what he had said on a particular occasion in late 2016. We question how he would be able to remember that he did not say what he is alleged to have said.
105. Further, Mr Cunningham's account of the conversation between him and claimant about Ms Numm is that after he had said that Ms Numm, "*looked fab, very sassy*", "*Sian asked, 'what do you mean?'. I replied, 'she looks the part' ...*" We should mention that the word "sassy" is part of the respondent's corporate vocabulary. Within the respondent, it is a term routinely applied both to women and to men. It is used to mean smart and presentable and (something like) 'on trend'. Within the respondent, it does not appear to have the sexist connotations that it normally has. Given that the word 'sassy' was so very much part of the respondent's corporate vocabulary, it is implausible that the claimant would, in late 2016, have asked Mr Cunningham what he meant by it.
106. We therefore find Mr Cunningham's recollection of the conversation unreliable.

107. Although the claimant may have slightly exaggerated what was said, by, for example, referring at the appeal hearing to multiple occasions when such comments were made, we are satisfied, on balance, that Mr Cunningham did indeed say something like, “*She is easy on the eye; she will do well*”.

AC adopting a ‘boys club’ mentality as evidenced by WhatsApp messages

108. This allegation is not made out as a matter of fact. In practice, it goes no further than that Mr Cunningham participated in a managers’ WhatsApp group and sent a particular message. The claimant was not in the group, but a number of women were. Mr Cunningham did not set it up; it was set up by a woman. No one else has complained about anything to do with the group, so far as we are aware. The particular message, which seems to be something the claimant heard about after she was dismissed and in any event was not something she was aware of at the time, was a single cartoon that Mr Cunningham shared. It was shared as part of a discussion about house spiders. It consists of a drawing of a spider with the caption, “*When you fall asleep, spiders rub their willies on your face*”. We would describe the cartoon as childish rather than as ‘boys club’.

AC telling her to stop being so sensitive

109. In the Details of Claim and in her witness statement, the claimant suggests Mr Cunningham told her to stop being so sensitive, or words to that effect, on multiple occasions. However, the only specific occasion we know about was (allegedly) at the meeting in a branch of Costa Coffee on 8 November 2017. That meeting took place before a head office meeting involving all or most General Managers nationally. It was about a difference of opinion between the claimant and Mr Cunningham concerning how a customer complaint to do with a wedding party was dealt with.

110. From what is set out in the Details of Claim, the claimant seemed aggrieved about the following things:

110.1 being asked by Mr Cunningham to write a report on the incident that had led to the customer complaint, which she considered to be a waste of time because Mr Cunningham had already decided to refund to the guest the service charge which had been paid;

110.2 that the meeting in Costa Coffee followed the claimant sending an email to Mr Cunningham expressing her frustration and that “*as soon as he arrived [at Costa Coffee] he said ‘you’ve thrown me under a bus with that email and you’ve made me look stupid’, he ... gritted his teeth and said aggressively ‘why did you put this in writing?? I’ve told you about that before!!’*.” There is a similar account of what happened in the claimant’s witness statement, from paragraph 39.

111. It seems to be common ground that, on or around 6 October 2017, about a month after the claimant’s restaurant had catered for a large wedding party, the woman who had paid for it telephoned the respondent’s head office a number of times to complain. The complaint was in very strong terms and, amongst other things, she accused the claimant, specifically, of having ruined the day. Mr Cunningham telephoned the complainant and then gave her a refund of the service charge and

refunded some items that allegedly had been charged for but which shouldn't have been charged for.

112. On 8 November 2017, the claimant sent an email to Mr Cunningham complaining, on our reading of the email, about three things:
 - 112.1 the fact that the refund had been made at all. The claimant has suggested that this was not what she was upset about, but it is clear to us that she was;
 - 112.2 the fact that Mr Cunningham had not consulted her before agreeing to refund the money. But we understand that Mr Cunningham needed to deal with the customer complaint very quickly and that this left little or no time to speak to the claimant first;
 - 112.3 the fact that she had been asked to write a report about it, when the decision to refund had already been made. However, once again, we understand why the respondent wanted to know the claimant's version of events, regardless of their impact on what happened vis-à-vis the customer, so that lessons could be learned.
113. The claimant was evidently very angry and upset about this – she must have been to have sent this email a month after the incident occurred.
114. That was the background to the meeting in Costa Coffee.
115. At the meeting in the coffee shop, which was called to deal with this issue, if not before, the claimant said, amongst other things, that the customer should have been told to, "fuck off". Obviously, she did not mean this literally, but (to us) equally obviously, what she meant was that the customer's complaint should have been rejected and that she should not have been given a refund.
116. In her witness statement, as well as accusing Mr Cunningham of making the "you've thrown me under a bus there" comment, she alleges that in response to her own comment, "*this was my reputation as a manager*", Mr Cunningham said "*Stop being so sensitive and get over yourself*".
117. We don't think Mr Cunningham said such things. It would make no sense for him to have complained about being thrown under a bus and made to look stupid by the email, given that it was not copied to anyone else. We accept that he may have said, in response to what seems to us to have been an overreaction by the claimant, "*stop being so sensitive*", or something like that. We are not satisfied that anything particularly derogatory was said, nor that anything that was said was said in an aggressive or inappropriate way.
118. We note that we heard quite a lot of evidence about what allegedly happened later on 8 November 2017, after the meeting in Costa Coffee. However, it seems to us that none of that is relevant to what we had to decide. For example, the claimant's later alleged use of the 'c-word' formed no part of the disciplinary allegations against her, and neither Mr Cunningham, nor (from his own evidence) Mr Wanfor, nor Mr Cipollaro, were aware at any relevant time of the allegation that she had used it.

Subjecting her to a public dismissal process

119. The final complaint of sexual harassment that is not, in terms, also a complaint of direct sex discrimination concerns the fact that the disciplinary and dismissal meeting was in a public place.
120. There is no dispute that the claimant was dismissed in a public place. All three of us on this Tribunal panel are familiar both with the Mailbox and with New Street Station / Grand Central. The respondent originally proposed that the meeting be in Tom's Kitchen, in the Mailbox. This is a public restaurant, close to the claimant's restaurant, and we can well understand why she did not think it a suitable place to hold her disciplinary. The respondent then proposed it be held in the Pret A Manger restaurant in New Street Station / Grand Central. This is almost as public a venue as could possibly be found in central Birmingham that it is conceivable anyone would propose. It is in the middle of a busy public thoroughfare, in the main open ground floor area of Grand Central. It is not a fully enclosed space – there are just glass walls around most of it, it has no ceiling or doors, and anyone passing can see right in. It is, in January, cold and always noisy, with train announcements going off frequently.
121. It is also common ground that one man – Mr Price – was to have had his disciplinary in a side area in a hotel in the Mailbox, near the claimant's restaurant, which was not the one he worked in, and that another man's – Mr Parry's – disciplinary / probationary review meeting took place at a quiet time, in the quiet area of the restaurant in Birmingham.

Direct discrimination – AC not involving the claimant / asking politely when staff were needed to provide cover elsewhere and taking her best staff

122. This allegation is another one that is not made out on the facts.
123. We refer to what was stated earlier in relation to the allegations about asking for staff to cover Shrewsbury in April 2017. We also note a reasonably polite email exchange in September 2017 between Mr Cunningham and the claimant about providing staff to cover other restaurants. There is no documentary evidence of rudeness. There is a dearth of evidence from or about the claimant's chosen comparators – Mr Morgan and Mr Driver – and specific allegations of less favourable treatment of the claimant and of more favourable treatment of those comparators were not put to Mr Cunningham. We are not satisfied that the claimant was badly treated, or was treated significantly differently from others in this respect.

AC not involving her in recruitment and transfer decisions

124. The allegation now being put forward is different from that originally made. As already mentioned, the claimant accepts that General Managers were not involved in recruitment or transfer decisions. The claimant's complaint has become that in relation to the transfer to her restaurant of Mr Davies, others knew he was transferring-in before she was told about it.
125. The two specific people the claimant identified as having known about it before she did were Mr Davies himself and his General Manager: Ms E Humphreys. We are not surprised that they would know before the claimant, and that they would

be the first to know. The claimant accepted that she could give no further examples of this happening to any other General Manager – male or female. And why would she know? We are afraid that her case here seemed to be based on nothing more than an assertion that it would not have happened to someone else.

AC not supporting the claimant on promotion or disciplinary decisions

126. There are two allegations. The first relates to Mr Reynolds, an Assistant Manager in Birmingham, and the second to Mr Parry.

127. What happened in relation to Mr Reynolds is not really what the claimant alleges happened. She had suspicions that Mr Reynolds was regularly taking cocaine. She took those suspicions to Mr Cunningham. He told her to get some more evidence. When challenged in cross-examination as to what further evidence she could get, he said something along these lines: *“Something more than that the claimant had been told that he took cocaine on his nights out”*.

128. The claimant alleges she subsequently told Mr Cunningham, in terms, that Mr Reynolds had confessed he was a cocaine addict to her and that Mr Cunningham dismissed this. In the claim form, the claimant stated that Mr Reynolds had:

admitted to me and several team members that he had a cocaine problem. I emailed Adrian my concerns about keeping Jonathan [Mr Reynolds] in the business, his constant mood swings and that he was extremely difficult to work with. Following this, Adrian came into the restaurant to discuss Jonathan, he asked me to go into the small office and shut the door, he told me I couldn't prove it and said, “maybe you should go back to management school to learn how to deal with difficult people”.

129. We have a copy of the email. The claimant now concedes that she may well not have sent it to Mr Cunningham, but it looks, at the very least, like a draft that she was potentially intending to send. It does not mention Mr Reynolds's alleged cocaine problem. We think it is inconceivable that if Mr Reynolds had confessed his problem to her, and Mr Cunningham were reluctant to support dismissing Mr Reynolds from the business without better evidence of Mr Reynolds's cocaine use, the claimant would not have mentioned this confession to Mr Cunningham in this email. In short, the claimant's evidence on this issue is not credible and is unreliable.

130. We also note the following from the Details of Claim, *“I could have documented discussions with Jonathan, but I needed Adrian's support to progress any further.”* We have no evidence that the claimant ever had any documented discussions with Mr Reynolds. She told us in evidence that she made no notes of any discussions with Mr Reynolds, nor with anyone else in relation to this issue.

131. As to whether the *“maybe you should go back to management school”* comment was made, we are not satisfied that it was. This is entirely one person's word, the claimant's, against another's, Mr Cunningham's. We have already found that her recollection was not accurate on a closely related issue, namely whether she had told Mr Cunningham about the alleged confession of drug misuse by Mr Reynolds.

132. It appears to us that this issue was not handled particularly well either by the claimant or by Mr Cunningham. If the claimant had wanted him to do something,

she needed to produce for him more than just vague allegations. She should have been documenting the problems and discussions she was having with Mr Reynolds and she wasn't. Mr Cunningham should have advised her to do this in terms and he didn't.

133. Part of this allegation is that there was a contrast between the way in which Mr Cunningham allegedly failed to support the claimant and the way he allegedly supported Mr Morgan when Mr Morgan had problems with one of his subordinates – Chris Shepherd. That is not made out either. The claimant was making contradictory allegations in relation to Mr Shepherd. On the one hand, she had alleged that, consistent with the way in which she was treated, Mr Shepherd should have been disciplined or dismissed. On the other hand, she sought to contrast the alleged fact that Mr Cunningham facilitated Mr Morgan taking action against Mr Shepherd with what happened in relation to Mr Reynolds. We have no evidence from Mr Morgan and the claimant did not claim to know the details of what happened in relation to Mr Shepherd. Based on the respondent's evidence, which we accept on this point because the claimant is in no position to contradict it, Mr Morgan wanted to dismiss Mr Shepherd but was not allowed to do so; Mr Shepherd was not disciplined and remains with the business to this day.
134. There is, then, no evidence of a male general manager being treated differently from the claimant in relation to taking disciplinary action against a subordinate. The claimant's bare assertion that this was or might have been so does not constitute evidence.
135. The allegation concerning Mr Parry is that Mr Cunningham only disciplined and dismissed him after concerns the claimant had previously raised about possible theft were raised by a man, Mr Kobin.
136. The claimant's allegation here is somewhat distorted. What happened as a matter of fact – and this is not substantially in dispute – is that the claimant had suspicions that Mr Parry, an AGM in Birmingham, was guilty of stealing cash. She took those suspicions to Mr Cunningham. Mr Cunningham told her to investigate. She delegated the investigations to Mr Kobin, because he was adept at using the relevant computer systems. Mr Kobin obtained documentary proof that there was theft and that Mr Parry was responsible. The claimant may then have phoned Mr Cunningham to say that this evidence had been obtained. The next time Mr Cunningham visited Birmingham, it so happened that the claimant was not there. Had she been there, she would presumably have presented the evidence to Mr Cunningham. As she was not there, that evidence was presented by Mr Kobin instead. On seeing the evidence, Mr Cunningham agreed that disciplinary proceedings should be instigated against Mr Parry.
137. The key fact is that the evidence was not presented to Mr Cunningham until he attended the claimant's Birmingham restaurant. It was not a case of the claimant presenting something to Mr Cunningham and being ignored, and then Mr Kobin presenting the same thing and Mr Cunningham taking notice.

Not allowing the claimant to use her discount during the Christmas period

138. On 28 December 2016, at 14:16 hrs, the claimant emailed Mr Cunningham stating, "*I am going to London today for a show tonight, I've booked a table at cote Kensington at 4pm. Am I able to use my discount ?*". Mr Cunningham replied at

15:07 hrs, *“Discount shouldn’t be applied, you should be booking with restaurant in advance and them confirming. I have no problem if we are looking after each other in our area. Regarding your booking if that restaurant bends the rules then so be it”*.

139. Mr Cunningham was not the Area Manager for the respondent’s Kensington restaurant. He had no power to allow the claimant, or anyone else, to use their staff discount contrary to the established policy outside of his area. The established policy was that discounts could not be used in December.
140. The claimant’s allegation has therefore evolved into an allegation that Mr Cunningham did not take it upon himself – without being asked to do so by the claimant – to contact the General Manager of the Kensington restaurant, in the less than two-hour period he had between her emailing to let him know that she was booked and the time of the booking, to ask whether they would bend the policy in the claimant’s case. This is not an allegation made in the claim form and is not before the Tribunal. In any event, there is no evidence that Mr Cunningham had ever done such a thing for anyone else.
141. The people the claimant was relying on as comparators in relation to this allegation were in a different situation. They were allowed by Mr Cunningham to use their staff discounts contrary to policy within his area – and Mr Cunningham made clear in his email to the claimant of 28 December 2016 that he would have done the same for her.

AC asking inappropriate / personal questions about a possible relationship

142. The facts relevant to this allegation of direct sex discrimination have already been covered when dealing with the allegations of sexual harassment.

Not helping her in relation to alleged poor performance

143. The sixth allegation of less favourable treatment is of Mr Cunningham not helping the claimant in relation to alleged poor performance compared to the way in which, it is alleged, Mr Shepherd, Mr Morgan and Mr Andrew were helped.
144. The claimant has withdrawn Mr Shepherd as a comparator for the purposes of this part of her claim. She confirmed this at the hearing. However, we do note that, even in her witness statement (in part of which Mr Shepherd was seemingly being withdrawn as a comparator), she continued to complain that he was given an opportunity to improve and she wasn’t, but at the same time that she was not permitted to discipline Mr Reynolds, whereas (supposedly) Mr Morgan was permitted to take action against Mr Shepherd.
145. The allegation is, essentially, that male managers were not disciplined for their poorly performing restaurants whereas the claimant was.
146. Mr Morgan was AGM at Peterborough, which was a newly opened restaurant that was in ‘intensive care’. We accept the respondent’s evidence that “intensive care” is a term applied only to newly opened restaurants that are not doing as well as anticipated. The claimant did not dispute that evidence and conceded that she was in no position to contradict it. Peterborough was doing badly in terms of figures for net sales compared to what had been projected. Mr Wanfor explained that, essentially, projecting sales was educated guesswork (our expression; not

his). The situation at Peterborough was quite different to that of Birmingham, which was an established restaurant with several years of sales figures on which to base sales targets. Moreover, Mr Morgan was only the AGM and not the General Manager.

147. Mr Morgan then became the General Manager for West Bridgford. We don't know precisely when, but it was some way into 2017. West Bridgford was not doing well in terms of actual sales verses budgeted sales, but it was not doing as badly as Birmingham. More importantly, Mr Morgan was a newly installed General Manager at the relevant time, whereas the claimant had been in post for a year at the point in time when Birmingham started to perform badly, and for nearly 18 months in December 2017 when it fell particularly short of target.
148. Mr Andrew was also in a dissimilar position to the claimant. He was never a General Manager at any relevant time. He was Assistant Manager and then (we think) holding AGM at Leamington when it was in intensive care. We understand, from the respondent's evidence (again not substantially challenged by the claimant), that expectations of AGMs and of General Managers are quite different.
149. We should add that there is no real evidence of any particular performance failings of Mr Andrew or Mr Morgan, just bare allegations from the claimant, made for the first time in her oral evidence.
150. Mr Driver was mentioned by the claimant in connection with this allegation, but was not used as a comparator within her claim. Apparently, Mr Driver was put on some kind of performance improvement programme, but we don't know why, or whether his circumstances were remotely comparable to the claimant. Presumably, when she put her claim in, she didn't think they were, or she would have named him as a comparator.
151. Mr Cunningham told us, without contradiction from the claimant, that nobody with less than two years' service had ever been put by him on a performance improvement programme, so Mr Driver must have been in a materially different position from the claimant in having at least two years' service. Moreover, consistent with Mr Wanfor's evidence that performance improvement programmes only started to be used relatively recently, Mr Driver must have been put on a performance improvement programme after the claimant was dismissed.

The process followed, leading up to and following her dismissal, including location of meetings and the time to prepare

152. We have already outlined the facts relating to the location of the meeting.
153. So far as concerns time to prepare, the claimant was told on Saturday, 13 January 2018, by letter, that a disciplinary hearing was to be on the following Friday: the 19th. It was initially to have been at 10 am. That would have been adequate and reasonable notice were it not for the fact that the claimant was going on holiday, from the 15th, returning on the 18th. On 14 January 2018, the claimant emailed Mr Cunningham pointing this out and asking if the meeting could be put back. Mr Cunningham refused, although he did move the meeting from 10 am to 4 pm.
154. The comparator chosen by the claimant in relation to this is Mr Price. Unfortunately, although we have a copy of the letter inviting Mr Price to a

disciplinary hearing, the date given for the hearing on that letter is plainly wrong: the letter is dated 14 August 2017 and was sent at 16:47 hrs on that day; it states that the hearing is to be on 14 August 2017 at 10 am. We know that the hearing must actually have been scheduled for a time after 14:23 hrs on 16 August 2017, because that was the date and time of an email from Mr Price responding to the invitation, which was clearly sent before the meeting was due to be held. Our best guess is that Mr Price's disciplinary hearing was scheduled for Thursday, 17 August 2017, because the invitation says it is to be held on a Thursday.

155. On the limited evidence we have about this, the main difference between Mr Price's disciplinary and the claimant's in terms of timing is that (so far as we know) he was not about to go on holiday when notified of his disciplinary and therefore potentially had a day or two more than the claimant to prepare. He also seems to have had a formal investigatory meeting, although we have no more information about this than that a meeting, labelled an "investigatory meeting", took place on 14 July 2017 and that notes were taken. That information appears from the invitation to his disciplinary.
156. What happened at the claimant's disciplinary meeting itself does not seem to be materially in dispute. We have the meeting notes, and we refer to them. Mr Cunningham went through all of the allegations in the letter inviting the claimant to the disciplinary meeting, and we refer to that letter. He adjourned for 15 minutes or so before telling her he had decided to dismiss her with immediate effect and with pay in lieu of notice.
157. As the claimant had less than two years' service, we are not directly concerned with how fair the disciplinary and dismissal process was, nor with whether the decision to dismiss was pre-determined. However, because much was made of it during the hearing, we are going to make a finding as to whether there was indeed predetermination. Our conclusion is that there was. We reach that conclusion mainly for the following reasons:
 - 157.1 there had been no build up to dismissal. If what Mr Cunningham was wanting to do was to take appropriate action in relation to performance concerns, rather than just dismiss the claimant, we think there would have been at least some formal or informal warnings that disciplinary action might be taken if there was no improvement. The respondent has tried to persuade us that a handful of unconnected emails about unconnected issues, sent over a period of months, each about a particular issue, and with no hints that that issue was potentially a disciplinary matter, are informal warnings of a kind. Our view is that they do not even come close to being so;
 - 157.2 the whole process was unnecessarily rushed, and done in such a way as almost guaranteed the claimant would not give of her best in the disciplinary hearing. The Employment Judge asked Mr Cunningham why he felt the need to dismiss the claimant at that time. The gist of what Mr Cunningham said in response was that he did not want to keep her there because there was a need to have the business perform better and that extending the process was opening the business up to further poor performance. We found this unconvincing. The claimant had performed well up to the summer of 2017. Her appraisal in May 2017 was generally positive. The particular thing she was told to improve in her appraisal was her mystery diner scores

and she succeeded in doing so, to such an extent that Birmingham was top in the whole company for mystery diners. There was a dip in sales performance versus targets towards the end of the year, especially in December, but the claimant was being judged against the very high standards she herself had set the previous year. The idea that keeping her in place for an extra week or month or two would significantly damage the business is fanciful and we don't think Mr Cunningham thought it would;

157.3 Mr Cunningham gave us the clear impression that he simply did not believe in performance management. In oral evidence, he told us something to the effect that if a General Manager needed performance management, then they were not a suitable person to be a General Manager. He evidently did not even consider a performance improvement plan, or anything else, as an alternative to dismissal;

157.4 we asked Mr Cunningham what the claimant could possibly have done or said to keep her job. He had initially suggested that she was insufficiently remorseful during the disciplinary hearing, but then seemed to accept that she was remorseful, and changed what he was saying about her to her not being genuinely remorseful. His ultimate answer was that what she could have said to make him change his mind was to come up with specific ideas and plans as to how she was going to improve on each of the things for which she was being disciplined and dismissed. But he did not ask the claimant questions at the disciplinary hearing that were at all likely to illicit anything like that as a response;

157.5 to us, the disciplinary charges the claimant faced, with the possible exception of sales performance decline, were very thin indeed. For example, one of the nine things explicitly referred to was, "*Inappropriate reaction to guest complaint and including the use of expletives to Area Manager as to how guests should have been spoken to*". The way that charge was formulated, suggests that Mr Cunningham thought the claimant meant the complainant should literally have been told to "fuck off" in so many words. That was manifestly not what she meant and Mr Cunningham cannot have genuinely thought that that was what she meant.

158. However, we have formed the view that Mr Cunningham's concerns about the claimant's performance were genuine and that there was some basis for them in fact. In particular:

158.1 her sales were significantly below target in four out of the six months from July to December 2017;

158.2 whatever the rights and wrongs of the actual situation, Mr Cunningham was given the impression that in July 2017 and in December 2017 the claimant had wilfully disobeyed instructions that Mr Cunningham had given her, in relation, respectively, to allowing two Supervisors to go off on holiday at the same time as each other and to (as would have appeared to have been the case to Mr Cunningham) permitting or condoning rewarding two managers with £112.00 worth of wine, contrary to an instruction not to allow any spending on managers;

158.3 there was an overreaction to the wedding complaint, which manifested itself in the claimant suggesting (by saying that the customer should have been told to “fuck off”) that the customer should not have been given a refund, even of a service charge, which, the claimant agreed in evidence, was not something that the customer had ever been obliged to pay in the first place;

158.4 most of the other charges were at least factually accurate.

159. Nevertheless, the dismissal was predetermined and unfair. If the claimant were able to bring an unfair dismissal complaint and had brought one, she would have won it hands down.
160. The claimant may also be making a complaint about Mr Cunningham telling her, after dismissing her, that she was not to contact or visit any of the respondent’s restaurants for six months. This meant that she was not able to say goodbye to her team in the way she had wanted to.
161. The respondent conceded that this was a mistake. Mr Cunningham explained to us that he had been working to the policy of his previous employer. We accept that explanation. Although we understand the claimant’s scepticism about it, there was no evidence to the contrary.

Appeal against dismissal

162. Although the claimant has not in terms made a complaint about discrimination in relation to the appeal against dismissal, she confirmed during the hearing that her case was that Mr Cipollaro held a stereotypical view of her as over-sensitive because she is a woman, and (presumably; she did not say in so many words that this was her case) that this was why, allegedly, the, “*appeal process was careless and incompetent [and] there was a failure to properly investigate [the claimant’s] complaints*” (claimant’s witness statement, paragraph 54).
163. The claimant put in her appeal on 26 January 2018. On 31 January 2018, Mr Cipollaro asked the claimant for the names of the potential witnesses who she had mentioned in her appeal letter, and the claimant wrote back the following day stating that she was unable to provide them. The claimant then sent the personal statements and letter from her three witnesses over the following few days.
164. The appeal hearing / meeting took place on 7 February 2018 and we refer to the minutes of that meeting, with the claimant’s additions to them.
165. Following the meeting, Mr Cipollaro spoke to Mr Cunningham, Mr Wanfor, and Ms Morgan. Ms Morgan was unwilling to comment on the claimant’s allegations. In his witness statement, Mr Cipollaro said that she did not support the claimant’s allegations. That appears to be true. But it also appears to be the case that she did not contradict the claimant’s allegations either.
166. In his decision letter of 26 February 2018, Mr Cipollaro referred to having spoken to female managers [plural], but he had in fact only spoken to Ms Morgan. He also mentioned having spoken to Mr Z Petyus in the letter (Mr Petyus being a back-of-house Area Manager). We are not satisfied that he did so because Mr Cipollaro did not mention having done so in his witness evidence.

167. We accept Mr Cipollaro's evidence that he tried to speak to Ms Numm and Mr Kobin before making his decision. We know he spoke to Ms Numm shortly after making the decision and we have a transcript of the call, which we have already mentioned. One of the first things he said in that transcript was that he had been trying to get hold of Ms Numm for quite some time.
168. By an email of 23 February 2018, the claimant complained that Mr Cipollaro was taking too long to reach his decision, longer than he had said he would. The email ended, "*Please advise the outcome by close of business Monday (26 February), due to the length of time this has taken so far, I will be starting the early conciliation process on Tuesday.*" Mr Cipollaro made his decision at the end of February, before he had managed to speak to Ms Numm or Mr Kobin, in part because the claimant was pressing him for a decision.
169. Unfortunately, we do not have any notes of any of Mr Cipollaro's conversations with anyone other than the transcript of his conversation with Ms Numm. Apparently, he did make notes, but the notes were lost when he moved house, which he did shortly after he made the decision.
170. We refer to the appeal decision letter, which speaks for itself. We note it was conceded that the venue for the disciplinary hearing "*wasn't the correct one*" in the letter and Mr Cipollaro apologised for the decision to hold it at Pret A Manger in Grand Central.

Not offering her an opportunity to resign / have a good reference

171. The comparators put forward in relation to this complaint are Mr Price and Mr Parry.
172. The respondent's substantially unchallenged evidence, which we accept, is that it only offers standard references, whatever the circumstances, and that it would give a standard reference to anyone, whether they had been through a disciplinary hearing or not. The claimant confirmed in closing submissions that she was not suggesting she had been refused a reference by the respondent.
173. The claimant's case seems to be that two men were offered good references if they resigned. There is no real evidence to support this. There is a Facebook Messenger exchange with Mr Price, but all that shows is that he thought he had to resign in order to get any reference at all. He might have been told this, but that does not mean it was true. Had the same been said to the claimant: first, we doubt very much she would have responded by resigning; secondly, it would have been to her detriment if she had responded by resigning because she would then not have got her notice pay and she would have been in no better position in terms of getting a reference.
174. We note that the claimant could not have been prevented from resigning in advance of the disciplinary had she wanted to do so.

Dismissing her

175. The final allegation of less favourable treatment concerns dismissal. There is no dispute that the claimant was dismissed, nor that no other General Manager, male or female, has been dismissed by Mr Cunningham.

Is there a Tribunal complaint about the appeal?

176. The only way any part of the claimant's claim might have been presented within the relevant time limits would be if there was a complaint about the decision to reject the claimant's appeal against dismissal. That decision was communicated to the claimant on 1 March 2018. Because of the six-week period of early conciliation (1 March to 15 April 2018) a claim presented on 30 June 2018 about something that happened on 1 March 2018 would be in time.
177. Although, as mentioned above, the claimant made allegations against Mr Cipollaro in her witness statement, she has never asked for, let alone been given, permission to amend her claim. Absent an amendment, the claim that is before the Tribunal is the one in the claim form. The claim form does not contain a complaint about the appeal. The appeal is not mentioned in the agreed list of issues in the Annex either, except as something from which, allegedly, an inference of discrimination could be drawn in relation to other things. Again as mentioned above, even the claimant herself, when discussing time limits in her witness statement, suggested that, "*The disciplinary meeting on the Friday 19th January 2018*", i.e. dismissal rather than the rejection of her appeal against dismissal, "*was the final event*".
178. The case of Baldeh v Churches Housing Association of Dudley & District Ltd [2019] UKEAT 0290_18_1103 is said by some to support the proposition that any discrimination claim about dismissal necessarily, by implication, includes a claim about any unsuccessful appeal against dismissal. We think that is a misreading of it. Baldeh is very much a decision on its own facts, and to the extent it has wider implications, they are for cases where dismissal is said to be an act of disability discrimination other than direct discrimination.
179. The case set out in the list of issues is all about Mr Cunningham and his alleged prejudice towards the claimant because she is a woman. The potential complaint about the appeal decision would be about something different: Mr Cippolaro and his alleged prejudice towards the claimant because she is a woman. That potential complaint is simply not before the Tribunal.

Decision on the Issues

180. We shall deal with the sexual harassment claim first, because it incorporates all of the direct discrimination complaints.
181. The first issue that has to be dealt with in any sexual harassment case is whether there was particular conduct and whether it was unwanted. We have already made findings about what happened. To the extent we have found that anything that could be characterised as mistreatment occurred – for example, dismissal – it was clearly unwanted by the claimant.
182. The next issue identified in the list of issues in the Annex is, "*Was the conduct related to the claimant's protected characteristic?*" The question is essentially: was the reason the claimant was treated in the way she was anything to do with her being a woman? Although technically not the same issue as the issue in the direct discrimination claim of whether any less favourable treatment was because of the protected characteristic of sex, on the facts of this case the two issues are indistinguishable. We shall deal with them now.

Related to sex / because of sex

183. Based on the findings of fact, the only conduct that is potentially to do with the protected characteristic of sex on the face of it is the comments about Ms Numm and, possibly, Mr Cunningham telling the claimant not to be so sensitive.
184. The comments about Ms Numm are related to sex. Given our findings about what was said, this can't sensibly be disputed.
185. So far as concerns telling the claimant "*to stop being so sensitive and get over herself*", although we doubt Mr Cunningham would have told a man to stop being so sensitive, we think he would have said much the same thing, and probably using more robust and potentially more offensive language, when talking to a man in the same situation. People do sometimes use different vocabulary when talking to men and to women, but that does not make this related to sex.
186. We move on, then, to the other allegations. The first of these is the allegation about Mr Cunningham adopting an aggressive and unsupportive approach. We have already highlighted the fact that we are not satisfied that Mr Cunningham adopted an aggressive and unsupportive approach to female managers generally. We would summarise the evidence in relation to this as indicating that only one person suffered from lack of support: the claimant herself. We are not satisfied that even the claimant herself had particular aggression directed towards her by Mr Cunningham.
187. For no particular reason that we can identify, there seems to have been a falling-out between Mr Cunningham and the claimant, and a deterioration in their relationship, from around July 2017 onwards. We are not satisfied that Mr Cunningham behaved at all badly towards her before then.
188. There is no substantial evidence of bullying or anything like that of any other female manager at all. It seems to have been personal towards the claimant. It is an obvious point, but the claimant has always been a woman, so the change in Mr Cunningham's behaviour towards her is unlikely to be accounted for by her sex.
189. We did initially wonder whether the claimant's case was that the reason Mr Cunningham changed towards her was him finding out that she had a boyfriend around June 2017. However, her case was that he had always treated her badly. In addition, she did not in her own evidence state that he behaved badly towards her because he found out she had a boyfriend and when she was cross-examining Mr Cunningham on the subject, the Employment Judge made a point of telling her that if she was saying there was a particular reason why Mr Cunningham was asking her about her relationship with Mr Morgan (the Employment Judge had in mind that it might be her case that Mr Cunningham was interested in her) she had to put it to him and ask him about it, and she did not put anything forward. She also did not put this forward as an explanation for his treatment of her in closing submissions.
190. In short, to the extent the claimant's allegations are made out on the facts, the reason Mr Cunningham treated her in the way he did was that he had come personally to dislike her and had lost all respect for her as a manager. We don't know why this was, but there is no real evidence that it was because she was a

woman and there is evidence that Mr Cunningham did not have a negative attitude towards his female subordinates generally: see paragraph 62 above .

191. The next thing relied on as harassment in the list of issues is the list of things that are also relied on, in the alternative, as allegations of direct discrimination. Most of them, too, are not made out on the facts.
192. The first is Mr Cunningham not involving the claimant or asking her politely when staff were needed to provide cover elsewhere and taking her best staff. We repeat paragraph 123 above.
193. The next two allegations are of Mr Cunningham not involving the claimant in recruitment or transfer decisions and him not supporting the claimant on promotional disciplinary decisions. Our above findings of fact do not provide any factual basis for these allegations and certainly not for any suggestion that what happened had anything to do with the claimant's sex. See paragraphs 125, 134 and 137 above.
194. So far as concerns the allegation about not allowing the claimant to use her discount during the Christmas period, we repeat paragraphs 140 and 141 above.
195. The next allegation is about Mr Cunningham asking allegedly inappropriate personal questions about the claimant's possible relationship with Mr Morgan. We repeat what we have already said about the claimant not putting her case forward on the basis that the reason Mr Cunningham was making these comments was that he was romantically interested in her. If he was not doing it for that reason, we think he was most probably doing it to her and not to Mr Morgan because he had very little else to talk to her about that was not directly related to work. With Mr Morgan, he probably had a number of other things. Asking someone about a possible relationship with a colleague is not inherently related to sex. People can, and do, ask men and women about such things. In conclusion, we do not think that this conduct was related to sex, or at least the evidence does not support a finding that it was.
196. The next allegation is not helping the claimant in relation to alleged poor performance. The claimant's comparators were not in a comparable position to her. We repeat our findings that we think this was a personal issue applicable to the claimant only. Of course, one does not, technically, need comparators for a harassment claim. However, the basis of the claimant's allegation that this alleged treatment was related to her sex is, essentially, that men in a comparable situation to her were treated differently. We are not satisfied that men in a comparable situation to her were treated differently, and without that, there is nothing of substance on the evidence showing that it was anything to do with the claimant being a woman.
197. Exactly the same goes for the allegations relating to the disciplinary and dismissal process and to dismissal itself. We repeat that there is evidence positively pointing towards Mr Cunningham not having anything against managers who were women and that he was personally responsible for promoting women to the position of General Manager. As for any complaint about the appeal, the evidence of Mr Cippolaro being prejudiced against women is completely non-existent.

198. The allegation about offering the claimant an opportunity to resign or to have a good reference is, as above (paragraphs 172 and 173), not made out on the facts. Any difference of treatment here was potentially to the claimant's advantage.
199. In relation to almost all of the claimant's allegations, we can make a general point, which is that insofar as she can point to anything at all on the facts, it is to her being treated in one way and a male manager being treated in another. In all instances, the male manager she refers to was not in a similar situation to her. But in any event, even if a male manager was treated differently in a comparable situation, that is not, in and of itself, something from which an inference should be drawn that the claimant being a woman and her comparator being a man was any part of the reason for the treatment.
200. That is the end of the allegations of harassment that are also made as allegations of direct discrimination. Returning to those made just as harassment allegations, the next in relation to which we have not already dealt with the question of whether it was "*related to*" or "*because of*" sex is the allegation about the WhatsApp group and Mr Cunningham adopting a 'boys club' mentality.
201. The evidence falls a long way short of establishing that Mr Cunningham adopted a boys club mentality generally, or that the WhatsApp group was a boys club, or that, if it was, he was responsible for this. So far as concerns the spider cartoon that he shared with the WhatsApp group, we do not think that the cartoon itself, or Mr Cunningham sharing it, was anything to do with the protected characteristic of sex just because the cartoon's caption references male genitalia.
202. We have already dealt with the allegations about Mr Cunningham telling the claimant to "*stop being so sensitive*" and about Mr Cunningham subjecting the claimant to a public dismissal process. In short, there is no substantial basis in the evidence connecting these with the fact that the claimant is a woman.
203. In summary, the only treatment the claimant is making a Tribunal claim about that we are satisfied was related to the protected characteristic of sex was Mr Cunningham's comments about Ms Numm. Later in these Reasons, we shall explain why we do not infer from Mr Cunningham having made those comments that his treatment of the claimant was or could be related to or because of sex.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and if not, did the conduct have that effect?

204. In our view, the only treatment that crosses the threshold that needs to be crossed for it potentially to constitute harassment is holding the disciplinary, and dismissing the claimant, in a public restaurant in New Street Station / Grand Central. As we think, for reasons explained immediately below, that this conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, we do not need to consider whether it had that effect.
205. The decision to hold the disciplinary in that place, given that Mr Cunningham conceded he knew Birmingham and that within Grand Central itself – and between the Mailbox and New Street Station – there are numerous other locations that would have been more suitable, is explicable only by utter incompetence on the

part of Mr Cunningham or by malice towards the claimant. We think the latter is more likely than the former. We struggle to think of a location where the meeting could, physically and permissibly, have taken place that would have been less suitable.

206. We do not think that any of the other treatment the claimant complains about had the purpose of violating the claimant's dignity [etc] and the claimant did not suggest to Mr Cunningham that that was its purpose. It comes nowhere near actually having that effect. In relation to the comments about Ms Numm, we note:

206.1 they were not made about the claimant herself;

206.2 although they were sexist and inappropriate in the context within which they were made, they are not of the most offensive kind;

206.3 they are the kind of remarks that, although most definitely not for the workplace, are commonplace and not inherently offensive in and of themselves, depending on the context within which they are made and the way in which they are made;

206.4 on the evidence, they were a 'one-off's';

206.5 the claimant did not complain about them at the time, nor are we satisfied that she was at all offended by them at the time.

Less favourable treatment

207. The next issue is an issue that arises in relation to the allegations of direct discrimination. It is whether the claimant was subjected to less favourable treatment: whether the respondent treated her less favourably than it treated or would have treated relevant comparators under EQA section 23.

208. Based on the findings we have already made, we are not satisfied that there was any less favourable treatment except, possibly, in relation to the process followed in the lead up to the claimant's dismissal and how she was dismissed, including the location of meetings and the amount of time she was given to prepare.

209. We have just used the word "*possibly*" in relation to this, because we have already explained our decision is that the reason why Mr Cunningham treated the claimant badly in this respect was that there was a personal issue between him and the claimant. We think Mr Cunningham would have treated someone else with whom he had a similar personal issue in the same way. The correct comparator would be someone in the same circumstances as the claimant, including being someone who had fallen out with Mr Cunningham and with whom Mr Cunningham had fallen out, and who was a General Manager, but who was male. There is no good reason to think that such a person would have been treated any differently from the claimant.

210. It may be helpful for us to give a little more detail in relation to some of the particular allegations of less favourable treatment.

210.1 In relation to the asking of personal questions about a possible relationship with Mr Morgan, we think that asking someone about a possible relationship with a colleague is not less favourable than asking them about some other

aspect of their personal life. On the evidence, Mr Cunningham would discuss non-work things with other General Managers. The claimant was uncomfortable discussing such things in that way. Seemingly, other General Managers were not discomfited by this. We think that someone with a different personality from the claimant, asked the things she was asked in the way she was, would not have felt uncomfortable.

210.2 In relation to not offering the claimant an opportunity to resign, as already explained, had the claimant been offered a reference in return for resigning and had she taken up that offer, she would have ended up worse off than she is. This was not, then, less favourable treatment, but, if anything, more favourable treatment.

210.3 In relation to dismissal (including any complaint about the appeal), none of the claimant's comparators were in the same position as the claimant. She was the only General Manager who Mr Cunningham had ever dismissed and no possible comparators were even mentioned in connection with any complaint about the appeal against dismissal. Her circumstances seem to have been unique and we are not satisfied that a man in a truly comparable position to her would have been treated better.

Burden of proof

211. The next issue identified in the Annex is the question (which we have put into our own words so that it more closely matches the wording of EQA section 136): has the claimant proved facts from which the Tribunal could conclude that unlawful discrimination had taken place and, in particular, that the claimant's treatment was because of the protected characteristic of sex? The list of issues in the Annex continues, "*In this regard the claimant also relies on what she says was a failure to properly investigate her discrimination complaints (at appeal) and her earlier complaints and those of another female manager*", identified as Miss Thompson.
212. We have largely already dealt with the question posed. The short answer is: no.
213. So far as concerns what happened with Miss Thompson's complaint, we have made our findings and we refer to them: see paragraphs 44 to 46 above. On the limited evidence we have, it seems that Miss Thompson's complaint was not taken further as Miss Thompson herself did not want it to be. The only thing supporting the notion that Mr Cunningham did anything or failed to do anything in relation to Miss Thompson's complaint because of a negative attitude towards women is the claimant's suggestion that this was the case.
214. As to what happened in relation to the claimant's appeal, we cannot infer from Mr Cipollaro's actions that Mr Cunningham did what he did because the claimant is a woman. To put it another way: even if we were satisfied that Mr Cipollaro was himself guilty of unlawful discrimination, that would not provide a basis, as a matter of logic or as a matter of law, for a finding that Mr Cunningham was a discriminator.
215. If there is a complaint before the Tribunal relating directly to Mr Cipollaro himself – and, as explained above, we don't think there is – it is one in relation to which the claimant is asking us to infer that the reason there was, allegedly, "*a failure to properly investigate her discrimination complaints (at appeal)*" and that (according to her witness statement) the "*appeal process was careless and incompetent*" was

because Mr Cipollaro held a “*stereotypical view*” of the claimant as “*over-sensitive*” because she is a woman. There is no basis in the evidence for us to draw any such inference.

216. There are all sorts of potential reasons why, if we were to decide that Mr Cipollaro did indeed handle the appeal process carelessly and incompetently and failed to conduct proper investigations, he behaved like this. In terms of likelihood, that he did so because of anything to do with the claimant’s sex is a very long way down the list. What the claimant is asking us to do is to infer the reason for less favourable treatment from the mere (alleged) fact that there was less favourable treatment. There would be no better reason for inferring it was because of the claimant’s sex than that it was because of any other protected characteristic of hers, i.e. no reason at all.
217. We also see no basis from inferring that Mr Cipollaro did have a stereotypical view of the claimant as an oversensitive woman. There are grounds for being critical of his investigation and it probably would have been inadequate if the claimant had two years’ service and were bringing in an unfair dismissal claim. But the evidence gives us no good reason to think that he would have conducted a more thorough investigation if the claimant were a man.
218. There is another allegation for us to consider in relation to the possible drawing of inferences that we have not previously mentioned, namely, the allegation – which is not a freestanding claim – that in or around November 2016, during a visit with Mr Wanfor to the Birmingham restaurant, Mr Cunningham said, “*You can run around naked if you want*”.
219. The context in which such a remark might have been made was a conversation criticising the claimant for being too reserved and encouraging her to be more outgoing. In that context, it is a remark that could be made to a man or to a woman and could be said in a joking and inoffensive way, or in a completely inappropriate, overtly sexual way. It is highly unlikely that if this remark was said, it was said in an overtly sexual way. The claimant suggests it was said in front of Mr Wanfor and related to her supposedly needing to come out of her shell. At worst, it was ill-advised. Even if we were to assume in the claimant’s favour that it would not have been said to a man in a comparable situation, it is a logical leap too far to suggest that we can infer from an ill-judged remark in November 2016 that the reason for treatment in 2017 and 2018 is something to do with the claimant’s sex. In particular, we could not conceivably infer that the claimant was sacked in 2018 because she is a woman from that remark, particularly given the evidence pointing towards Mr Cunningham promoting women to managerial positions, which we mentioned earlier.
220. Similarly, we have considered whether Mr Cunningham having commented on Ms Numm’s appearance in late 2016 is something from which we could conclude, in accordance with EQA section 136, that subsequent mistreatment of the claimant that is alleged to be direct sex discrimination was because of the protected characteristic of sex, in accordance with EQA section 13. We have decided that it isn’t, for much the same reasons as those given in the previous paragraph in relation to the “*you can run around naked*” comment.

221. Based on our findings of fact, the only relevant things the claimant complains about that could be classified as mistreatment are her dismissal and the dismissal process. We have already decided that this happened because, in simple terms, Mr Cunningham came, by mid to late 2017, personally to dislike the claimant and to doubt her professional competence. On the evidence, he did not feel like that about her during the first year or so of her employment, nor did he have a similar view of any other female General Manager. In these circumstances, there is no discernible proper basis for connecting his decision that he was going to dismiss the claimant with his slightly lecherous remark about a female Supervisor a year or so earlier, and we could not safely conclude from him having made that remark that the reason for him making that decision was anything to do with the claimant being a woman.
222. We are accordingly not satisfied that any of the treatment the claimant complains about that we have decided she was subjected to as a matter of fact was because of the claimant's sex, or because of the protected characteristic of sex more generally.

Summary

223. All of the claimant's complaints fail because:
- 223.1 the Tribunal does not have jurisdiction to decide them because of time limits;
- 223.2 in many instances, we do not accept the claimant's case on the facts;
- 223.3 in relation to the harassment claim, only one of the complaints is about unwanted conduct that was related to the protected characteristic of sex (a comment made about the appearance of one of the claimant's subordinates in late 2016), and that conduct did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the claimant;
- 223.4 in relation to the direct discrimination claim, none of the treatment the claimant is making her claim about was less favourable treatment or was because of the protected characteristic of sex.

Employment Judge Camp
16 January 2020

ANNEX

ISSUES

1. Section 26 Equality Act 2010: Harassment related to sex

1.1. Did the respondent engage in unwanted conduct as follows:

- 1.1.1. Adrian Cunningham (AC) adopting an aggressive and unsupportive approach to managing the claimant and female managers generally
- 1.1.2. Those matters identified as allegations of direct discrimination below
- 1.1.3. AC questioning the claimant about her relationship with a male manager
- 1.1.4. Making inappropriate comments about a female employee's (GN) appearance
- 1.1.5. AC adopting a 'boys club' mentality as evidenced by WhatsApp messages
- 1.1.6. AC telling her to stop being so sensitive
- 1.1.7. Subjecting her to a public dismissal process

1.2. Was the conduct related to the claimant's protected characteristic?

1.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.5. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

2. Section 13: Direct discrimination because of sex

2.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely

- 2.1.1. AC not involving the claimant / asking politely when staff were needed to provide cover elsewhere and taking her best staff (Richard Driver / Chris Morgan)
- 2.1.2. AC not involving her in recruitment and transfer decisions (Ollie Davies)
- 2.1.3. AC not supporting the claimant on promotion or disciplinary decisions
 - supporting her male assistant manager (Jonathan Reynolds) rather than her

- only disciplining Adam Parry after the claimant's concerns were also raised by Kustas Kobin (male)

- 2.1.4. Not allowing the claimant to use her discount during the Christmas period (Andras []).
 - 2.1.5. AC asking inappropriate / personal questions about a possible relationship (Tim Morgan)
 - 2.1.6. Not helping her in relation to alleged poor performance (Chris Shepherd, Tim Morgan, Joseph Andrew)
 - 2.1.7. The process followed leading up to and following her dismissal, including location of meetings and the time to prepare (Ricky Price)
 - 2.1.8. Not offering her an opportunity to resign / have a good reference (Ricky Price / Adam Parry)
 - 2.1.9. Dismissing her (Chris Shepherd, Tim Morgan, Joseph Andrew)
- 2.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the comparators identified above and/or hypothetical comparators who were male managers in similar circumstances.
- 2.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? In this regard the claimant also relies on what she says was a failure to properly investigate her discrimination complaints (at appeal) and her earlier complaints and those of another female manager, JT
- 2.4. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

3. Remedies

- 3.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 3.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.
- 3.3. There may also fall to be considered whether any adjustments should be made for failure to comply with any relevant ACAS Code.

4. Time/limitation issues

- 4.1. Bearing in mind the effects of ACAS early conciliation some or all of the claimant's allegations are potentially out of time, so that the tribunal may not have jurisdiction. The respondent suggested these were best addressed at the final hearing.
- 4.2. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

4.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?