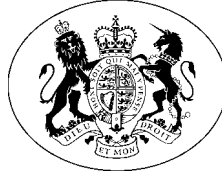


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# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondents***

Miss R Power

**AND**

Secure Code Warrior Limited

## OPEN PRELIMINARY HEARING

**Heard at:** London Central

**On:** 11- 14 February 2020

**Before:** Employment Judge Brown

**Members:** Mrs H Craik  
Mr D Clay

### Representation

**For the Claimant:** In person

**For the Respondent:** Mr T Bourne-Arton, of Counsel

## JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondent did not subject the Claimant to sex discrimination.
2. The Respondent did not subject the Claimant to sex-related harassment.
3. The Respondent did not victimise the Claimant.

## REASONS

### Preliminary

1. The Claimant brings complaints of sex-related harassment, direct sex discrimination and victimization against the Respondent, for whom she worked as an independent contractor.

2. The parties had agreed a List of Issues. They were as follows. The issues which were struck through had either been withdrawn by Claimant or not permitted to proceed; the Claimant had sought permission to amend her claim to include them, which had been refused. As is clear from the List of Issues, some of the issues were part of the Claimant's narrative, rather than separate heads of claim.

|   | What was said or done  | By Whom         | Date       | What type of discrimination it is alleged to be / or if only narrative / or if claim not permitted to bring | Why it is alleged to be discrimination   |
|---|--|-----------------|------------|---|--|
| 1 | Excluded from team strategy session in the US which other male contractors were invited to | Pieter Danhieux | 23/01/2018 | Direct Sex discrimination   | All staff and male contractors (David Du Pre who I believe I was comparatively discriminated against) involved in sales and customer facing work were invited to a strategy workshop in San Francisco. Rachel was not invited even though the partner strategy she was working on was intrinsically linked with the topics that were discussed as partner sales were lower than desired and Rachel's strategy was to boost sales in the coming |

|   |   |                 |            |                           |   |
|---|---|-----------------|------------|---------------------------|---|
|   |   |                 |            |                           | periods   |
| 2 | Excluded from team meetings/business updates which all other perm and contractors were invited to | Pieter Danhieux | 06/02/2018 | Direct Sex discrimination | Rachel's contracted work involved understanding the companies current performance so as to define the partnership strategy going forward. Understanding business updates and team performance was paramount to that. However Pieter wouldn't allow Rachel attend these meetings as he didn't want her being disruptive and was told she wasn't needed there. Even though the other male contractor David Du Pre was allowed attend. Pieter does not like women particularly strong women challenging his thinking |

Case Numbers: 2205424/2018

|   |   |                            |            |                         |   |
|---|---|----------------------------|------------|-------------------------|---|
| 3 | Inaccurate and offensive feedback provided to me by Pieter Danhieux   | Pieter Danhieux            | 14/02/2018 | Sex-related Harrassment | <p>Accused of stealing revenue from other sales staff even though I was on a fixed rate contract and over ruling the head of marketing on a draft document for Microsoft. I explained all of the above to Pieter who agreed it was a miscommunication on his behalf</p> <p>A miscommunication for which he had apologised in email to me and the sales team on 18/01/18 but continued to spread the negative feedback to his board who reiterated that inaccurated feedback to me nearing the end of my contract.</p> <p>Yet again at this stage I was told not to be disruptive or upsetting people.</p> |
| 4 | <del>Concerns around inaccurate feedback and feeling harrassed/intimidated raised to Chairman John Fitzgerald</del> | <del>John Fitzgerald</del> | 14/02/2018 | Narrative               | <del>Discrimination was reported directly to one of the founder/directors of the company and nothing was done to address it</del>   |
| 5 | <del>John Fitzgerald raises in writing my concerns to board but they are never</del>                                | <del>SCW Board</del>       | February   | Narrative               | <del>None of the board acknowledge John's note or ever reached out to me to discuss</del>   |

|   |  |                 |            |   |   |
|---|--|-----------------|------------|---|---|
|   | addressed  |                 |            |   |   |
| 6 | Accused by Pieter Danhieux of collusion using the examples from the previous inaccurate feedback reported on 14th February | Pieter Danhieux | 07/03/2018 | Direct Sex Discrimination Sex-related Harrassment | <p>On one of my final calls with Pieter I asked him to talk me through the business strategy as the business performance over the last 2 months had been less than expected.</p> <p>Pieter got extremely defensive and told me as CEO he didn't do strategy which I found highly surprising. He then went on to accuse me of colluding against his Executive Management Team. When I asked him to provide examples he provided the inaccurate feedback provided back at the start of February which I reminded we had agreed was inaccurate. I also highlighted to him that for something to be collusive their would need to be a personal benefit to me and as I was on a fixed rate contract their was no benefit to me except to help his business be successful so I can get future work with them</p> |

or a recommendation.

My question had obviously made Pieter uncomfortable as he didn't have the answer. But to make such a strong accusation against an independent contractor could have destroyed my reputation and business.

Pieter does not like strong women and when they challenge him he insults and threatens them. Even though David Du Pre the male contractor's performance was worse than mine he was never subjected to this verbal abuse or threatening

|   |   |                        |                   |  |   |
|---|---|------------------------|-------------------|--|---|
| 7 | <p><del>Agreed to not extend contract due to strained relationship with Pieter Danhieux</del></p> | <p>Pieter Danhieux</p> | <p>07/03/2018</p> | <p>Identified as an issue but not a claim, and that it relates to compensation</p> | <p><del>At this stage I agreed not to even discuss a planned contract extension due to Pieter's unreasonable behaviour forcing me out of the business even though I had performed strongly and brought in more sales that period than David Du Pre the other male contractor who continues in the business.</del></p> <p><del>Pieter couldn't have had issues with my performance as he had commented on the quality of work and the improvement in sales. I had out performed the other male contractor. But was still excluded from meetings, treated more harshly and given less opportunity to be successful than the male contractor David Du Pre. The only difference was gender and the growing evidence that Pieter Danhieux does not like strong women you can only succeed in his business if you are submissive to him in all ways</del></p> |
|---|---|------------------------|-------------------|--|---|

Case Numbers: 2205424/2018

|   |   |                        |                   |   |  |
|---|---|------------------------|-------------------|---|--|
| 8 | <p><del>Raised concerns about collusion accusation, bullying and future success of business with CTO and co-founder of Matias Madou in face to face meeting in presence of female CFO Nicole Fitzgerald</del></p>   | <p>Matias Madou</p>    | <p>09/03/2018</p> | <p>Narrative</p>  | <p><del>Discrimination and false accusations of collusion were reported directly to one of the founder/directors of the company and nothing was done to address it</del></p>   |
| 9 | <p>Had an intimidating slack conversation were Pieter used aggressive and offensive language including "you got balls", "I'm letting you know that move was very collusive, "understand the consequences of your actions" and "you'll see" which left me fearing for my reputation as a contractor as well as to whether Pieter would pay my contract.</p> <p>I subsequently had a panic attack at the Microsoft office due to my shock and upset at the conversation</p> | <p>Pieter Danhieux</p> | <p>13/03/2018</p> | <p>Direct Sex discrimination<br/>Sex-related<br/>Harrasment</p> | <p>Pieter used sexually offensive terms insuating that as a woman I couldn't have the strength of character to do something challenge that I must be masculine and "have balls".</p> <p>He then continued his campaign of harrasment by threatening me and making me fearful of the future and my contract</p> |



|    |   |                  |            |  |   |
|----|---|------------------|------------|--|---|
| 10 | Formal grievance raised against Pieter Danhieux for sexual discrimination and harrasment and for the other directors (John Fitzgerald and Matias Madou) failing to act when I raised my concerns to them  | SCW<br>Directors | 16/03/2018 | Narrative  | N/A   |
| 11 | Forced to wait a week before being given opportunity to discuss my concerns with Eddie Sheehy the Non Exec Director and independent HR consult Susie Kaye. At this stage was advised grievance would be following standard ACAS procedure with Eddie as investigating officer with the support of Susie | Eddie Sheehy     | 23/03/2018 | Narrative (possibly relevant to an ACAS adjustment in relation to handling of a grievance) | Eddie Sheehy who went on to investigate my claim noted to John Fitzgerald that my claim was an irrelevance and a distraction. Therefore Eddie showed no urgency in dealing with my claim even though he had been aware of my concerns since John's note in February                 |
| 12 | Put on Leave of Absence without consultation leaving my colleagues and clients at SCW thinking I had done something wrong as no communication issued to address my absence.   | Eddie Sheehy     | 23/03/2018 | Victimisation  | Even though I had expressed my desire to complete my contract in a professional manner and had been completing all my work accordingly Eddie put me on LOA without advising my colleagues or clients so as to put me in a negative light and save the reputation of Pieter Danhieux |

Case Numbers: 2205424/2018

|    |  |              |            |               |   |
|----|--|--------------|------------|---------------|---|
| 13 | Accused of failing to do a handover by Eddie Sheehy even though he had put me on Leave of Absence and told me he would come back to me with a plan about handover which he never did                     | Eddie Sheehy | 29/03/2018 | Victimisation | Even though I was following Eddie's instruction he continued to paint me in a negative light and demean my work and professionalism   |
| 14 | <del>Raised concerns to Eddie Sheehy that I was worried that he was focusing on undermining my contract and painting me in a negative light rather than dealing with the grievance review properly</del> | Eddie Sheehy | 29/03/2018 | Narrative     | <del>Rather than dealing with the claim in a professional manner Eddie sought to undermine me and place blame on me without looking to understand my claim</del>  |
| 15 | <del>Grievance report received on unbranded paper with no input from independent HR person Susie Kaye who had supervised all interviews.</del>   | Eddie Sheehy | 19/04/2018 | Narrative     | <del>Report did not address full context of grievance, findings were inaccurate compared to written evidence and even though some elements of grievance were held up no seperate apology direct from Pieter Danhieux was received</del> |
| 16 | <del>Appeal request submitted</del>  | Eddie Sheehy | 19/04/2018 | Narrative     | <del>N/A</del>  |
| 17 | <del>Received interview notes from grievance review</del>  | Susie Kaye   | 23/04/2018 | Narrative     | <del>N/A</del>  |

|    |   |                             |            |           |   |
|----|---|-----------------------------|------------|-----------|---|
| 18 | <p>Responded to grievance notes expressing shock that:</p> <ol style="list-style-type: none"> <li>1. Nicole Fitzgerald also expressed that she had been sexually discriminated by Pieter Danhieux and it wasn't looked into further</li> <li>2. Interview bias with Eddie Sheehy leading questions and providing false information about what I had said</li> <li>3. That Eddie Sheehy failed to address key documentation the independent HR Susie Kaye had asked him to provide and review</li> <li>4. That Pieter Danhieux seemed to have been prepped/coached for his interview and raised items contrary to UK legal employment practises</li> </ol> | Eddie Sheehy and Susie Kaye | 25/04/2018 | Narrative | Wider claims of sex discrimination by another female employee raised but were swept under the carpet as part of the investigation |
| 19 | <p>No report or feedback was ever shared from the independent HR contractor Susie Kaye despite her taking minutes, requesting documentation and being actively involved in the investigation</p>  | Susie Kaye                  | 25/04/2018 | Narrative | It would seem that another woman's view were ignored or withheld as part of the investigation                                     |

Case Numbers: 2205424/2018

|    |   |                |            |               |  |
|----|---|----------------|------------|---------------|--|
| 20 | <del>Initial introduction to David Thompson responsible for appeal review</del>   | Susie Kaye     | 08/05/2018 | Narrative     | N/A  |
| 21 | Ignored by David Thompson until 22nd May despite chasing him via voicemail and email  | David Thompson | 22/05/2018 | Victimisation | <p>The appeal process was dragged out which prevented me from getting new contracts of work and attend events as I had introduced my contacts to SCW and may need them to testify to my strong performance. This was raised to SCW.</p> <p>Additionally I felt like the time was being dragged so I wouldn't be able to bring my claim to tribunal</p> |
| 22 | <p><del>First interview with David Thompson were I raised again I was looking for an apology and for Pieter to be trained to prevent this happening to other employess.</del></p> <p><del>Despite request David Thompson refused to record meeting and insisted on taking written notes</del></p> | David Thompson | 26/05/2018 | Narrative     | <p><del>Independent HR person refused to record as I later realised so he could bias the minutes of the meeting and their would be no audit trail</del></p>  |
| 23 | Inaccurate minutes issued and clarified with David Thompson   | David Thompson | 30/05/2018 | Victimisation | Biased minutes issued showing favour to Secure Code Warrior and highlighting the   |

Case Numbers: 2205424/2018

|    |   |                |            |               |   |
|----|---|----------------|------------|---------------|---|
|    |   |                |            |               | independent was not independent   |
| 24 | Second interview with David Thompson ended with me in tears and having a panic attack as I felt interviewer was manipulating conversation and had already made his decision   | David Thompson | 13/06/2018 | Victimisation | Interviewer manipulated interview and misrepresented facts to confuse me and tried to force me to say things                                |
| 25 | Inaccurate minutes shared including information that was never discussed and then fact that I was laughing and joking during the meeting which was contrary to the fact I had left the meeting in tears                                 | David Thompson | 18/06/2018 | Victimisation | Biased minutes issued showing favour to Secure Code Warrior and highlighting the independent was not independent                            |
| 26 | <del>Abandoned appeal process as I became aware that independent David Thompson was just taking steer from Eddie Sheehy which was against ACAS grievance policy that a new manager from SCW should have been appointed for appeal</del> |                | 20/06/2018 | Narrative     | <del>I felt SCW &amp; David Thompson were delaying procedure so 3 months would pass and I wouldn't be able to bring claim to tribunal</del> |
| 27 | Tribunal claim submitted  |                | 25/06/2018 | Narrative     | N/A   |

Case Numbers: 2205424/2018

|    |   |                           |            |                              |  |
|----|---|---------------------------|------------|------------------------------|--|
| 28 | Independent advised me he was progressing with his report taking my non response as confirmation that minutes were agreed and advising that he would request Pieter apologise. No apology was received  | David Thompson            | 27/06/2018 | Victimisation                | Despite my emails to the independent advising of the inaccurate minutes he was going to prepare a report on my claim which was vastly inaccurate and to which he never sent me a signed copy |
| 29 | <del>Advised David Thompson not to take the minutes as agreed as I felt they were vastly inaccurate</del>   | <del>David Thompson</del> | 28/06/2018 | Narrative                    |  |
| 30 | <del>Had to close my independent business Power Start Consulting as the claim had dragged on so long which prohibited me from finding other contract work with my key contacts as they all wanted to know what had happened at Secure Code Warrior which I couldn't discuss with them while the grievance was open. Additionally Secure Code Warrior had a tracker on me at Companys House which alerted them to any of my new directorships so I was</del> | <del>N/A</del>            | 31/07/2018 | Claim not permitted to bring |  |

|    |   |  |                      |                                |   |
|----|---|--|----------------------|--------------------------------|---|
|    | <p>fearful of what they might do/say to any company who appointed me a director</p> <p>I therefore had to get a job outside the financial services and start up space to ensure I could remain working without being impacted by my claim</p> |  |                      |                                |   |
| 31 | <p>David Thompson report shared with ACAS consiliator accusing me of colluding with the Fitzgerald and finding no discrimination.</p> <p>The report was not signed and was PDF'ed by SCW solicitor at Laytons rather than by independent</p>  |  |                      | <p>Claimant withdrew claim</p> | <p>As the document was not signed or pdf'd by the supposed author I have concerns that it has been edited by others to paint me negatively and scare me into settling or closing my claim</p> |
| 32 | <p>Eddie Sheehy approached Nicole Fitzgerald and asked her was there anything she could do to convince me to make this go away</p>  |  | <p>End of August</p> | <p>Victimisation</p>           | <p>Eddie approached one of my support people and other victim of sexual discrimination to intimidate me and try to get my to close my claim</p>   |

|    |  |  |  |  |
|----|--|--|--|--|
|    | and advised her that if independent report came out it would look bad on her   |  |  |  |
| 33 | <p><del>33a: In response to the Subject Access request, the respondent left out correspondence with Susie Kaye and documentation between Mr Thompson and Mr Sheehy.</del></p> <p><del>33b: Access to the Claimant's grievance was shared with Fatima Beydoun in the sales team.</del></p> <p>33c: Is Mr Sheehy's email to Mr Thompson on 20 June 2018 describing three emails criticising the Claimant's performance when the Respondent had told the Claimant in response to her SAR that such emails did not exist. The Respondent said that</p> |  | <p>Claim not permitted to bring</p> <p>Claim not permitted to bring</p> <p>20/06/2018</p> <p>Victimisation</p> | <p><del>Documentation highlighting a request by John Fitzgerald to investigate the alleged false feedback against Rachel Power were withheld. This could support arguments surrounding governance failure.</del></p> <p><del>Additionally the data privacy breach to internal employees could bias the independence of the grievance process</del></p> |



it had only stated the emails could not be found, not that they did not exist.

- 34 Time-limit issues: are claims in time; are claims part of a continuing state of affairs; is it just and equitable to allow in the claims that are out of time

3. The Tribunal heard evidence from the Claimant. Also for the Claimant, it heard evidence from John Fitzgerald, co-founder and former Chairman of, and investor in, the Respondent; and Nicole Fitzgerald, a former employee of, and investor in, the Respondent. Mr and Mrs Fitzgerald are married.

4. For the Respondent, the Tribunal heard evidence from: Pieter Danhieux, co-founder and CEO of the Respondent; Matias Madou, Director and Board Member; Fatemah Beydoun, the Respondent's Vice President of Customer Success in the Respondent's Sydney office; Eddie Sheehy, Non Executive Director of the Respondent and grievance officer; Susie Kaye, Human Resources Consultant; and David Thompson, also a Human Resources Consultant and the grievance appeal officer.

5. There was a 2 volume bundle of documents. The parties made written and oral submissions. The Tribunal reserved its judgment.

### **Findings of Fact**

6. The Respondent company was founded by John Fitzgerald and Pieter Danhieux as a "startup" company in England and Wales in 2013. It is what is known as a "Fintech" company.

7. Matias Madou joined the Respondent in June 2017. He had previously founded his own company, CVBA Sensei Security ("Sensei"), which was also a Fintech company. The Respondent acquired Sensei and the companies merged on 6 June 2017. Mr Madou thereafter became one of the Directors of the Respondent company and a Board member. At that point, the Board consisted

of Mr Fitzgerald as Chairman, Mr Danhieux as Chief Operating Officer and Mr Madou.

8. By July 2017 the relationship between Mr Fitzgerald and Mr Danhieux had deteriorated. Around that time, Mr Danhieux sought to appoint David Du Pre as a Sales Manager and Director for the Europe, Middle East and Africa region. Mr Fitzgerald and Mr Madou did not, initially, support the appointment. Mr Danhieux renegotiated with Mr Du Pre and he was offered a fixed term contract at a lower salary, which he accepted. He was therefore employed on a six month fixed term contract and was given the title of Regional Director for EMEA. Mr Madou was content with this arrangement.

9. Eddie Sheehy was appointed as a non Executive Director in late 2017. Mr Sheehy became a Board member. He sought to broker an ongoing harmonious working relationship between Mr Fitzgerald and Mr Danhieux.

10. In about December 2017 Mr Fitzgerald approached the Claimant with a view to her joining the Respondent. Before Mr Du Pre's eventual appointment, Mr Du Pre had been interviewed by the Board and his prospective peers in the Respondent company. The Claimant was not interviewed by the Board, nor by her future colleagues. Mr Danhieux told the Tribunal that, for the sake of his ongoing professional relationship with Mr Fitzgerald, he agreed to Mr Fitzgerald's proposal to employ the Claimant.

11. The Claimant was appointed on a three month fixed term contract to undertake the following work, "Manage strategic partnerships (Accenture and Microsoft) and turn them into effect revenue-generating partnerships. Success will be measured by the number and size of opportunities added to the global funnel (recorded in Salesforce by a regional sales person using the Lead Source and Lead Source Comment fields). Build a strategic partnership plan that can be presented to the Board of Directors for review and approval at the March 2018 Board of Directors meetings in London".

12. The Claimant's contract said that she should report biweekly to the CEO, Peter Danhieux, on progress on the above topics. It also said that the scope of the Claimant's services could be further agreed in detail between the parties.

13. While Mr Danhieux told the Tribunal that he accepted the Claimant's appointment for the sake of ongoing company relationships, the Tribunal found that, in fact, neither Mr Danhieux nor Mr Madou was happy about the appointment. Mr Danhieux told the Tribunal that he believed that the future sales direction of the company should be focused on direct sales. He did not support Mr Fitzgerald's sales approach, which was to pursue strategic partnerships with Accenture, Microsoft and other large IT businesses.

14. Mr Madou had told the Tribunal in his witness statement that, when either of his co-founders brought someone into the organisation, he would fully support their decision. However, the Tribunal did not accept that evidence. It was clear from Mr Madou's oral evidence to the Employment Tribunal that he was very unhappy about the selection process for the Claimant, including the fact that she

had not been interviewed by him or other employees at the company. It was plain that he felt resentful about the Claimant's appointment.

15. The Claimant started work on 12 January 2018. Mr Danhieux, who was to be her line manager, did little to introduce her to her colleagues and to explain the scope of her appointment to them. Mr Danhieux was based in the Respondent's Sydney, Australia, office, and he did not send any emails to his colleagues in other offices, introducing the Claimant, or describing her role.

16. On 16 January 2018 Mr Danhieux spoke to the Claimant by telephone. After this, he emailed some senior employees in the business, including Mr Du Pre, Angeli Castro, Head of Marketing and Fatemah Beydoun, page 81. He said that he understood that there was some confusion and questions around Ms Power and her three month assignment. Mr Danhieux said that that was totally his fault for not communicating on time and sufficiently; he confirmed that the Claimant's objectives were managing strategic partnerships for Accenture, GCHQ and Microsoft and turning them into effective revenue generating partnerships and building a strategic partnership plan by understanding what the Respondent currently did and advising on how it could do better.

17. The following week, the Respondent held a Marketing Sales and Customer Success meeting in San Francisco, starting on 23 January 2018. A number of Sales and Customer Success Executives in the company attended, including David Du Pre (Director for EMEA), Fatemah Beydoun, Angeli Castro, Christian Autenrieth (Sales Manager in the Americas) and Nicholas Balfasar (Senior Digital Marketing Automation Manager). Ardy Cruz (Enterprise Account Executive, Asia and Pacific region) attended remotely for some sessions.

18. On the evidence, Mr Du Pre was a Contractor, like the Claimant. The meeting had been arranged before the Claimant was appointed and started work but, nevertheless, some of the attendees were also recent appointees. Christian Autenrieth had signed his contract in December 2017. Mr Danhieux told the Tribunal that Mr Autenrieth's Sales Director, Stephen Allor, had invited him to the meeting and that Mr Autenrieth was one hour's flight away. It was not in dispute that Sean Madigan was a relatively junior employee, who also attended. Mr Danhieux told the Tribunal that David Du Pre had chosen to bring him, as he was relevant.

19. One of the sessions at the meeting was "Discussion on Go To Market Strategy – Land/Expand vs Big Land + Inbound v Outbound v Partners", page 84. There was a discussion about partners, in particular, during this session, page 88. Decisions were made with regard to the future of partnership agreements, including that there would be no internal competition regarding revenue recognition on partnership deals. There was a discussion about the percentage revenue that the company could hope to achieve through partnerships and how the company could create a model to incentivize success with partners. There was a discussion about which strategic partners should be sought.

20. On the face of it, those matters were relevant to the Claimant's role in the company at that time and to the issues which she might want to take into account in developing a partnership strategy. The Tribunal concluded that it might have been expected, therefore, that the Claimant would, either, have been invited to the San Francisco meeting to discuss those matters, or, have been invited, as Mr Cruz was, to attend that particular session by telephone.

21. The Claimant was not invited to attend that session, either in person or by telephone, but she was updated about it by Mr Danhieux in a discussion following the meeting.

22. On the evidence before the Tribunal, there was some disquiet among the sales representatives before the San Francisco meeting about the Claimant potentially proposing that there be internal competition between direct sales and partnership sales. It was not entirely clear to the Tribunal where this concern came from; there was no evidence that the Claimant had put such a proposal in writing, or had discussed it by email, for example with Mr Danhieux, her Line Manager. Mr Danhieux had told the Tribunal that he believed that Mr Fitzgerald was keen on promoting internal competition in this way. Mr Fitzgerald told the Tribunal that he believed that strategic partnerships with large IT providers, like Microsoft, would be the best way to grow revenue for the company. There was clearly a disagreement between Mr Danhieux and Mr Fitzgerald on this. The Tribunal accepted the Respondent's evidence that the Respondent's existing Sales Team was not happy about the prospect of partnership revenues being taken out of the calculation of sales people's revenue.

23. The Claimant told the Tribunal that she was not invited to Executive Team meetings and to "Team Awesome" meetings. She drew the Tribunal's attention to the attendee list for a Team Awesome meeting in February 2018, pages 138-139. There were 30 guests, including employees and independent contractors. The Claimant was not on the invitee list. There were a number of female attendees, including Fatemah Beydoun, Angeli Castro and Nicole Fitzgerald. Mr Danhieux was listed in the attendee list as the organiser, page 138.

24. The company was a small company at the time; Mr Danhieux told the Tribunal that the company had 30 full-time employees, with 6 to 7 contractors. In evidence to the Tribunal, he initially said that none of the contractors were invited to this Team Awesome meeting. Later in his evidence, he agreed that David Du Pre, Vijay Nagaraj, Stephen Allor and Anibal Ambertin were all contractors and all were invited. He then sought to draw distinctions between part time and full time contractors. Mr Danhieux's evidence was not very satisfactory on this. Furthermore, at other points in his evidence, he said that the Respondent was a small organisation and everybody in it was expected to collaborate. This implied that the Claimant should have been invited to meetings, to engage in this collaborative approach.

25. On 14 February 2018 the Claimant had a telephone meeting with Mr Danhieux. He raised with the Claimant some complaints which other members of staff had made about her. These included the suggestion that she intended to propose internal competition between direct sales and partnership revenue. Mr

Danhieux also raised an issue regarding the Claimant's proposed marketing of Mr Madou's Sensei product to Microsoft. The Claimant had been preparing slides for Microsoft about the Respondent's products, including the Sensei tool. On 25 January 2018 Angeli Castro had alerted Mr Madou, who was developing the Sensei product, to the Claimant's proposals. He, in turn, had alerted Mr Danhieux, pages 125-127. Both Mr Madou and Mr Danhieux had expressed their alarm. It appears that the Claimant then spoke directly to Mr Danhieux, who emailed her saying, "After understanding your goals with these drafts (presenting a concept to Microsoft and their partners to measure interest) and the fact it will be limited distributed I feel much more comfortable and making sure we can support you ...", page 125.

26. The Tribunal accepted the Respondent's evidence that Mr Madou and Mr Danhieux had been alarmed by what they understood to be the Claimant's intention to sell the Sensei product when it was not ready and was not compatible with Microsoft functions.

27. The Claimant told the Tribunal that the telephone call with Mr Danhieux on 14 February was hostile; she said that there had been unfair criticism of her and that she was accused of stealing revenue from other sales staff. It certainly appeared, from the email exchanges, that Mr Madou and Ms Castro had been quick to raise concerns with Mr Danhieux about the Claimant's activities.

28. The Tribunal noted that, when the Claimant was later asked in her grievance meeting about the telephone call with Mr Danhieux on 14 February 2018, she said, "I felt my feedback was a bit unfair and I was not sure how my relationship was with Peter", page 557f.

29. Later, in an email on 16 February 2018, the Claimant set out her Microsoft proposals in some detail to Mr Du Pre, including her proposals regarding Sensei, pages 149-150. Mr Madou, who was copied into the email, did not recall having received it, but told the Tribunal that he did not have any issues with what the Claimant was proposing at that stage.

30. However, it was quite clear from the correspondence in the bundle that, by early February 2018 at the very latest, the relationship between Mr Fitzgerald and Mr Danhieux was extremely poor. It appeared that, on 2 February 2018, Mr Fitzgerald told Mr Danhieux that he was very unsatisfied with his performance, ethics and effectiveness in carrying out his CEO duties. On 8 February 2018, Mr Sheehy and Mr Madou, the other Board members, wrote to Mr Fitzgerald regarding this, saying that he had implied that he had no confidence in Mr Danhieux's ability to run the company as CEO. They said that Mr Fitzgerald had done this without seeking prior Board input and consultation. They proposed that Mr Fitzgerald raise his concerns through a grievance process, page 140.

31. Mr Fitzgerald drafted a lengthy grievance document on 19 February 2018, describing the deterioration in the relationship between Mr Danhieux and Mr Fitzgerald over the previous 7 months and setting out why he believed that Mr Danhieux was unable to continue as CEO. In the document, he criticised Mr Danhieux's past performance and his strategic skills.

32. Also in his grievance document, Mr Fitzgerald said that Mr Danhieux did not understand the need for strategic partners. He set out the strategic partnerships which he said were currently being worked on by Mr Fitzgerald and the Claimant, pages 162-163. He further said that, in the previous week, Mr Danhieux had deliberately picked out the Claimant for personal negative feedback and had not done this with anyone else. Mr Fitzgerald said that this was an example of unequal treatment of individuals especially female ones, page 165.

33. The Tribunal concluded, from this document, that Mr Fitzgerald was attempting to remove Mr Danhieux as CEO of the company and was arguing that the company ought to pursue strategic partner alliances, when he knew that Mr Danhieux did not favour these alliances. Mr Fitzgerald stated plainly that he and Ms Power were pursuing strategic alliances, despite Mr Danhieux's lack of support for this approach.

34. Both Mr Sheehy and Mr Madou told the Tribunal that they read Mr Fitzgerald's detailed grievance and considered that it was full of half-truths and, indeed, lies. They decided that it could not be trusted and that they would not take it further as a grievance. It appeared that, as a result, it was proposed that Mr Fitzgerald be removed from the Chairmanship of the company.

35. Mr Sheehy made three alternative proposals for the future of the company, for the Directors to decide upon, in light of the relationship breakdown between Mr Fitzgerald and Mr Danhieux:

1. That John Fitzgerald leave the business
2. That Mr Danhieux leave the business
3. That both Mr Fitzgerald and Mr Danhieux leave the business.

36. On about 6 March 2018 the Claimant accepted an appointment as Director of a company KCS Limited. KCS Limited was the Fitzgeralds' investment vehicle, through which they had invested most of their life savings in the Respondent company.

37. On 7 March 2018 Mr Danhieux had a further telephone meeting with the Claimant. Mr Danhieux told the Tribunal that he said to the Claimant that she was not collaborating with other employees in the business and was causing a great deal of upset. The Claimant told the Tribunal that he accused her of colluding with the Fitzgeralds. It is clear that the telephone call was not a happy one and that, during it, the Claimant proposed that she would not stay in the company beyond the end of her three-month fixed term contract.

38. Mr Danhieux told the Tribunal that he did not know what the word "collusion" meant and had to Google it when the Claimant emailed him following the meeting, saying that she was shocked that any of the Executive Management Team would consider her behaviour to be colluding against them, page 228.

39. The context of this unhappy telephone call was that the relationship between Mr Danhieux and Mr Fitzgerald had broken down. Furthermore, Mr

Fitzgerald had relied on Mr Danhieux's treatment of the Claimant in his letter of grievance, in support of his argument that Mr Danhieux should not remain as CEO.

40. The Tribunal inferred that Mr Danhieux saw the Claimant as being allied to Mr Fitzgerald. While Mr Danhieux may not have used the word "collusion", the Tribunal concluded that he did say to the Claimant that she was not working with his Executive Management Team and implied that she was in conflict with Mr Danhieux and the Executive Management Team, in the same way as Mr Fitzgerald was in conflict with Mr Danhieux and the Executive Management Team reporting to Mr Danhieux.

41. On 8 March 2018 the Claimant travelled with Nicole Fitzgerald to see Mr Madou in Belgium. They did not tell Mr Madou that they were coming. The Claimant told the Tribunal that she went to visit Mr Madou as an independent contractor employed by KCS Limited, not in her role for the Respondent. She told the Tribunal that, at the start of their meeting with Mr Madou, she informed him that she was attending as an independent contractor of KCS. Mr Madou confirmed this in his witness statement.

42. In the meeting, Mrs Fitzgerald and the Claimant discussed the ways forward for the company, including the 3 options proposed by Mr Sheehy and a fourth option proposed by Mrs Fitzgerald. The fourth option was that Mr Danhieux step down as CEO, Mr Fitzgerald step down as Chairman, but that they both remain in the company with a new company structure. Mrs Fitzgerald prepared an analysis of the options, pages 328-333. She said that this would retain knowledge in the business, but would allow the company to hire a world-class CEO and an independent Chair and to restructure the Board with a minimum of 6 Directors; the 3 Co-Founders and 3 non-Executive Directors, page 333.

43. Mr Madou considered the proposals, but, on 10 March 2018, emailed Mrs Fitzgerald, expressing his annoyance that he had been subject to the surprise visit and saying that he was disappointed that the Claimant had joined the meeting. He said that he did not see any justification for the Claimant being so intimately involved in the issues, especially as she was on the Respondent's payroll as a contractor. He said that, previously, Mr Sheehy had made it very clear in emails that non-shareholder employees could not be given information about the situation that the CEO and Chair were in, page 234. He said that, as a result, he rejected the fourth proposal and would vote in favour of Mr Danhieux being retained in the company. He further said he did not want to share a Board with Mr Fitzgerald again.

44. The Respondent company uses a messaging system called Slack. On 13 March 2018 the Claimant updated Mr Danhieux about some work successes using the Slack system. Mr Danhieux congratulated her, but then went on to say on Slack, "So I heard from Matias that you asked for me to step down from the CEO role last Friday. Must admit, you got balls as a contractor". He then quoted from the Claimant's email of 7 March 2018 (page 228) where she said, "I can only reiterate my shock that any of the Executive Management Team would consider my behaviour to be colluding against them. As an independent business

advisor I take this very seriously so if anything happens in the next few weeks which your team believe is collusive please let me know. ...". He said, "I guess I am letting you know that that move was very collusive." Page 245.

45. There was a further exchange when Mr Danhieux said that he was sure that Ms Power had read Matias' response by now and that Ms Power understood the consequences of her actions. The Claimant asked what he meant by that and Mr Danhieux said, "You'll see". The Claimant asked him if he was threatening her and Mr Danhieux responded, "No. I am just letting you know that you cannot go and advise one of the Board to step down the CEO", page 246.

46. The Claimant told the Tribunal that she felt intimidated by Mr Danhieux's words and that she did not believe that he would have used the same words to a man. He said that he had used sexually offensive words to insinuate that, as a woman, Ms Power could not have the strength of character to do something challenging and that therefore, she must be masculine and "have balls". The Claimant told the Tribunal that she had a panic attack as a result of receiving these messages from Mr Danhieux.

47. Mr Danhieux told the Tribunal that the reason he used the words "you got balls" was to express his surprise and annoyance at what he saw as the Claimant's "front" in being involved in suggesting that he be removed as CEO when she was in no position in the company to do so.

48. The Claimant submitted a grievance on 16 March 2018, page 374. She had sent a draft of it to Mrs Fitzgerald on 14 March 2018, page 370.

49. In the Claimant's grievance she complained that Mr Danhieux's behaviour was, "1. Sexist – as per attached conversation with Pieter, which took place over Slack, he refers to me having "got balls as a contractor" which is highly offensive to me as a woman. To do it in a business context, even if only in an online context, is even more demeaning.

2. Discriminatory – I expect to be treated the same as any other Secure Code Warrior contractor. However, Pieter constantly treats me very differently: I have yet to meet Pieter face to face during my contract, even though he has been in London. Pieter had the opportunity to correct this when he took all SCW employees and contractors out to dinner on the 4<sup>th</sup> March. However he deliberately failed to include me. I'm the only "Head of/Director" function not to get invited to the EMT meetings or business updates which isolates me from the rest of the business and makes it much harder to do my job."

50. On 16 March 2018 Mr Sheehy emailed the Respondent's HR adviser, Emma Watson, seeking Ms Watson's advice and asking whether the Respondent could ensure that the Claimant did not attend work from the following Monday, page 371. Mr Danhieux also forwarded the Claimant's email to Ms Beydoun, page 372.

51. On 19 March, having sought advice from Ms Watson, Mr Sheehy acknowledged the Claimant's grievance and proposed that the Claimant attend an informal telephone meeting with Mr Madou and him, to discuss it, page 383.



On 20 March, Mr Sheehy suggested that the Claimant report to Mr Madou for the remainder of her contract and asked the Claimant to give her end of contract handover to Mr Madou, page 381. However, on 21 March 2018, the Claimant said that she had previously raised the bullying culture in the Respondent with both Mr Fitzgerald and Mr Madou, but that they had failed to address the matter. She said that she held them both liable for her discrimination and that there would be a conflict of interest if she reported to Mr Madou, page 380.

52. Following that email on 21 March 2018, Mr Sheehy told the Claimant that the Respondent did not require her to perform any duties while it was investigating the grievance and that she would be provided with paid leave of absence until the grievance could be heard. He said that the company would advise staff and clients that the Claimant was on leave from 26 March 2018, page 377. The Claimant's contract was due to expire on 31 March 2018, 5 days later.

53. The Claimant told the Tribunal that the Respondent failed to explain the Claimant's absence during this period to her colleagues and clients, which cast the Claimant in a negative light. She also told the Tribunal that Ms Beydoun could have been her manager for the remainder of her contract, or that she could have completed her contract without an allocated manager.

54. Mr Sheehy told the Tribunal that Ms Beydoun occupied an extremely important role, as she was head of sales in the Asia and Pacific Region, where the majority of the Respondent's sales team was based. Ms Baydoun was busy with customer success work in that role and was also the primary carer for a newly born baby. Mr Sheehy considered that it would not have been appropriate to add to Ms Beydoun's responsibilities at that time.

55. On 29 March Mr Sheehy emailed the Claimant saying that he understood that the Claimant had refused to give a handover to Mr du Pre, despite Mr Sheehy having raised it in the Claimant's interview with him. He said, "I am confused but as your contact ended today, let's leave it there." Page 390. The Claimant said that Mr Sheehy had told her he would get back to her about a handover, in their grievance meeting. The meeting notes recorded that Mr Sheehy said that someone would contact the Claimant with a handover plan, page 557I.

56. The Respondent appointed Susie Kaye, HR professional, to assist Mr Sheehy in the grievance process.

57. Ms Kaye and Mr Sheehy conducted a grievance investigation meeting with the Claimant on 26 March 2018, page 557C. The Claimant was accompanied by her solicitor. Mr Sheehy and Ms Kaye also interviewed Mr and Mrs Fitzgerald, Mr Madou and Mr Danhieux.

58. The Claimant told the Tribunal that she did not believe that Mr Sheehy took her grievance seriously and that much of her grievance meeting with him was taken up by his questions about the Claimant's directorship of KCS Limited.

59. On 18 April 2018 Mr Sheehy wrote to the Claimant, attaching his grievance decision, page 467. Mr Sheehy found that Mr Danhieux had said to the Claimant “you got balls as a contractor” and that Mr Danhieux now recognized that he should not have done so, but that he did not intend it to be perceived as “sexist” or offensive. Mr Sheehy said that English was Mr Danhieux’s second language and that Mr Danhieux had explained that he was amazed and surprised by the Claimant’s courage as a contractor by attending a meeting in which Mr Danhieux’s performance as a CEO was criticized, as Mr Danhieux believed it was inappropriate for a contractor to involve themselves in such a meeting. Mr Sheehy also said that he had concluded that the difference in treatment of the Claimant compared to other long-term employees and contractors was entirely the result of the Claimant being a short-term employee with a limited remit.

60. On 24 April 2018 the Claimant told Ms Kaye and Mr Sheehy that she wished to appeal against the grievance outcome, page 481. She said that 3 key matters had not been addressed in Mr Sheehy’s report:

- a. The Claimant’s concerns that Mr Fitzgerald and Mr Madou had failed in their fiduciary duties as directors by not addressing the Claimant’s discrimination and harassment concerns earlier.
- b. The fact that the Claimant had lost out on the opportunity of long term work with the Respondent and that there had been a verbal agreement regarding long term work.
- c. While Mr Sheehy had addressed the Claimant’s complaint about Mr Danhieux using the term “balls”, Mr Sheehy did not address his other messages, which the Claimant had considered threatening and defamatory, including Mr Danhieux accusing the Claimant of collusion.

61. The Respondent asked Ms Kaye to advise on a suitable grievance appeal officer. Dave Thompson, an HR Consultant who Ms Kaye knew professionally, was appointed.

62. On 3 May 2018 Ms Kaye wrote to the Claimant, confirming that Mr Thompson would be in touch with her shortly, page 495.

63. On 8 May 2018 Mr Thompson emailed the Claimant, apologising for not having done so earlier, explaining that he had been on annual leave. He asked the Claimant for her telephone contact details so that they could discuss a date for the grievance appeal hearing.

64. The Claimant emailed Mr Thompson on 10, 11 and 14 May 2018, but received no response. On 15 May 2018 the Claimant contacted Ms Kaye, saying that she had not heard from Mr Thompson and asking Ms Kaye for help in moving matters forward, page 567.

65. On 22 May 2018 Mr Thompson emailed the Claimant, saying that he had just returned from annual leave, but had left the Claimant a voicemail message a few days previously, page 569.

66. The Claimant attended a grievance appeal hearing with Mr Thompson at the Respondent's solicitor's offices on 26 May 2018. Mr Thompson did not record the meeting, but took his own notes of it, which he provided to the Claimant for her comments and amendments, page 572.

67. The Claimant told the Tribunal that she felt that Mr Thompson had manipulated the meeting, including getting the Claimant to say the word, "balls" and then making a note of her facial expression when she did so, page 605l. The Claimant strongly disagreed with Mr Thompson's assertion that she smiled while saying the word "balls". The Claimant told the Tribunal that she had not been told about her ability to be accompanied at the meeting and that she had a panic attack after the meeting, due to the stress of it.

68. The Claimant had a further telephone meeting with Mr Thompson on 13 June 2018. Mr Thompson sent the notes of the meeting to the Claimant, who made comments on them, page 601.

69. On 19 June 2018 the Claimant told Mr Thompson that she had commenced early Conciliation through ACAS, page 611. She then asked Mr Thompson whether he would be issuing his report the following day without the Claimant having signed off the minutes if their most recent meeting. The Claimant said, "That wouldn't seem very appropriate". Page 610. Mr Thompson responded saying that he agreed and that he would revert early next morning regarding the Claimant's comments on the minutes, page 610. The Claimant replied further saying, "I believe it is best we abandon this process and leave in the trusty hands of ACAS. I will not be signing off the minutes." Page 621.

70. The Claimant told the Tribunal that Mr Thompson had told her that he was progressing with the report and that he would ask Mr Danhieux to apologise. The Claimant said that she had never received an apology. Mr Thompson agreed that had intended to pursue an apology from Mr Danhieux but that this had not ultimately happened because the Claimant withdrew her appeal.

71. Mr Thompson told the Tribunal that he had taken a day off work to help his son move house just after he was initially instructed, which was why he was not able to contact the Claimant until 8 May 2018. He also explained that he had previously worked for a firm called Silverman Sherliker as an HR consultant, and that, during that time, emails to his Silverman Sherliker address were automatically forwarded to his email address at Outsourced HR Solutions. However, Silverman Sherliker had merged with Laytons LLP and, unbeknownst to Mr Thompson, this forwarding facility was no longer available. Mr Thompson was not aware that he was required to log into his Laytons LLP email account to access his emails. Mr Thompson said that he had gone on 2 weeks' pre-booked annual leave to Normandy and had only become aware on 18 May 2018 that the Claimant had been trying to contact him.

72. Mr Thompson told the Tribunal that he had asked the Claimant probing questions during their meeting and telephone call, in order to understand her complaints. He said that he was unaware that the Claimant had had a panic attack; she had not mentioned this to him. Mr Thompson said that his recollection

was that the Claimant had smiled when she repeated Mr Danhieux's use of the word "balls" and that Mr Thompson's genuine view at the time was that the Claimant was not embarrassed or uncomfortable in using the word.

73. Mr Thompson said that he had not been influenced by Mr Sheehy, but had asked Mr Sheehy clarificatory questions as Mr Sheehy had been the grievance officer. Mr Thompson told the Tribunal that he would have followed up all Mr Sheehy's answers had the Claimant not withdrawn her appeal.

74. On 7 June 2018 Mr Thompson emailed the Claimant explaining some matters he had asked Mr Sheehy to investigate further, and that Mr Thompson had asked Mr Madou to confirm Mr Sheehy's responses, page 394A. The Claimant responded saying, "Thanks for looking into so thoroughly (sic)".

75. Mr Sheehy told Mr Thompson that there were 3 emails evidencing that the Claimant had upset staff, as Mr Danhieux had alleged. In Tribunal, the Respondent pointed to the email from Ms Castro, copied to Mr Madou, on 24 January 2018, raising concerns about the Claimant's marketing of the Sensei product, page 126.

76. On 27 August 2018 Mr Sheehy spoke to Mrs Fitzgerald about the Respondent company, as the Fitzgeralds continued own a substantial part of the company. Mrs Fitzgerald made a note of the conversation. It commenced by Mr Sheehy and Mr Fitzgerald discussing the Respondent company and share value. Mr Sheehy then went on to discuss the Claimant's Tribunal claim. He said that, if the matter went to Tribunal, a lot of shareholder money would be spent on legal fees and that the Claimant would be very poor at the end of the case. He said that a small payout of about £600 was what the Claimant should expect, page 656-7. The Claimant told the Tribunal that she was distressed by the pressure Mr Sheehy had put on her through this telephone call, which she considered to be highly inappropriate.

77. Mr Sheehy told the Tribunal that, in the telephone conversation, he was giving an honest view to Mrs Fitzgerald about the position of the company and the potential outcome of the Claimant's claim.

78. It was clear from her evidence to the Tribunal that Mrs Fitzgerald felt that she was belittled and ignored by Mr Danhieux. The Claimant and Mrs Fitzgerald suggested to the Tribunal that Mr Danhieux behaved differently towards Ms Power and Mrs Fitzgerald because they were strong women, whereas other women in the company, for example Ms Beydoun and Ms Castro, were not strong women.

79. The Tribunal heard evidence from Ms Beydoun. It was quite apparent from Ms Beydoun's evidence to the Tribunal that she is a strong-minded individual, who is not afraid to say what she thinks. Ms Beydoun also has very considerable experience in the financial technology sector, particularly in Australia. She is a very high-profile female in that sector and has a formidable reputation. The Tribunal did not accept the Claimant's description of Ms Beydoun as not being able to stand up to Mr Danhieux. It accepted her evidence that she had

challenged Mr Danhieux on a number occasions; she was able to give examples of having done so.

### Relevant Law

Equality Act 2010

80. By s39(2)(d) &(4)(d) *Equality Act 2010*, an employer must not discriminate against an employee, or victimize an employee by subjecting him to a detriment.

81. By s40(1)(a) *EqA 2010* an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A's.

82. Direct discrimination is defined in s13 *EqA 2010*.

83. Victimisation is defined in s27 and harassment is defined in s26.

84. The shifting burden of proof applies to claims under the *Equality Act 2010*, s136 *EqA 2010*.

85. Time limits are set out in s123 *EqA 2010*, which makes provision for continuing acts.

### Direct Discrimination

86. Direct discrimination is defined in s13(1) *EqA 2010*:

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

87. Sex is a protected characteristic, s4 *EqA 2010*

88. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 *Eq A 2010*.

### Victimisation

89. By 27 *Eq A 2010*, “ (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

(2) Each of the following is a protected act—

....

(d) making an allegation (whether or not express) that A or another person has contravened this Act.”

### Elements of Direct Discrimination

90. Accordingly, for a Claimant to succeed in a direct sex discrimination complaint , it must be found that:

- (a) A Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;
- ( b) The less favourable treatment was because of sex;
- ( c) that the treatment in question constitutes an unlawful act such as a detriment.

91. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

#### Victimisation: Elements

92. For a Claimant to succeed in a victimization complaint, it must be found that:

- (a) A Respondent has subjected the Claimant to a detriment;
- ( b) That the Respondent did so because the Claimant had done a protected act or that the Respondent believed that the Claimant had done, or may do a protected act;
- ( c) that the treatment in question constituted an unlawful act such as a detriment under s39 EqA.

93. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

#### “Because”- Causation

94. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator’s reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase “by reason that” requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?.” Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

95. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. “Significant” means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

#### Burden of Proof

96. In approaching the evidence in a direct discrimination and harassment case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgement.

97. In, the EAT said, In *Laing v Manchester CC* [2006] IRLR 748 the EAT said at paras 73-75,

“73 No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure Limited v Griffiths-Henry* [2006] IRLR 865 (at paragraph 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.

74 Another example where it might be sensible for a tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at paragraphs 7–12, it must surely not be inappropriate for a tribunal in such cases to go straight to the second stage.

75 The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.”

98. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, Mummery LJ confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient.

#### Detriment

99. In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

100. In *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] IRLR 540 the House of Lords considered that the distress and worry caused by an employer's honest and reasonable conduct in attempting to settle litigation was unlikely to be a detriment.

#### Harassment

101. s26 Eq A provides

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection 1(b)

.....

.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

#### Discussion and Decision

102. The Tribunal asked the Claimant and the Respondent's witnesses about the Boardroom dispute, and whether it was the reason for the acts the Claimant complained of.

103. The Tribunal took into account all the facts before coming to its conclusions. For the sake of clarity, however, its conclusions on each issue are stated separately.

104. Allegation 1. Sex Discrimination. Claimant Excluded from Team Strategy Session in the US.

105. On the evidence, the Tribunal decided that the Claimant was excluded from a team strategy session in the US which she might reasonably have been expected to be invited to.

106. However, other females in the company, who were relevant to the discussions, were invited.



107. The Claimant compared herself with Mr du Pre, a contractor, who was invited to the session.

108. The Tribunal concluded that Mr du Pre was not in the same (or not materially different) circumstances as the Claimant and was not an appropriate comparator. He had been recruited by Mr Danhieux, not Mr Fitzgerald. He had also gone through an interview process prior to his appointment, which the Claimant had not. The Tribunal decided that Mr Danhieux and Mr Madou, as well as those reporting directly to them, saw the Claimant as Mr Fitzgerald's appointee. It was quite clear from Mr Danhieux and Mr Madou's evidence that they considered that the Claimant was in the company on a three-month short term contract, which they tolerated in the interests of the ongoing relationship with Mr Fitzgerald. However, they had no intention of incorporating her and her strategic plans into their future development of the company. At the start of her contract, Mr Danhieux failed to introduce the Claimant to the other employees, or to explain her role.

109. Messrs Danhieux and Maddou believed that the Claimant would promote revenue generation through strategic partnerships, which was not the way in which Mr Danhieux wanted the company to develop.

110. The sales team saw strategic partnerships as threatening their revenue.

111. These matters were discussed in the US meeting, in the Claimant's absence.

112. The appropriate comparator in the Claimant's sex discrimination claim was a man who had been appointed at Mr Fitzgerald's behest, to develop strategic partnerships. The Tribunal was satisfied that such a man would have been treated in the same way as the Claimant. On all the evidence, the Tribunal decided that the burden of proof did not shift to the Respondent to show that sex was not the reason that Miss Power was not invited. Other women were invited to the US meeting. The Tribunal did not accept that other women in the company failed to "stand up" to Mr Danhieux. Even if the burden of proof had shifted, The Tribunal was satisfied that sex was not part of the reason the Claimant was not invited – she was not invited entirely due to fact that she had been brought into the company to do something which the other Co-Founders did not support and had no interest in. On the evidence, the Tribunal was satisfied that this case was quintessentially about a Boardroom dispute, which the Claimant found herself caught up in, and not about sex discrimination, in any way.

Allegation 2. Excluded from Team Meetings/Business Updates which all other Perm and Contractors were Invited To.

113. The Tribunal concluded that the Claimant was sidelined and not included from the start of her employment. She was not invited to team meetings and business updates, when all other permanent employees and contractors were invited, male and female. For example, Fatemah Beydoun, Angeli Castro and Nicole Fitzgerald, all female, were invited to the Team Awesome meeting on 7 February 2018, page 138.

114. The Claimant may well have felt isolated and excluded. However, the Tribunal was satisfied that a man who had been introduced by Mr Fitzgerald to undertake work which the other co-founders and their sales teams did not support, have been treated in the same way. The burden of proof did not shift to the Respondent to show the reason for the treatment.

Inaccurate and Offensive Feedback Provided by Mr Danhieux on 14 February 2018. Sex-Related Harassment

115. On 14 February 2018 Mr Danhieux raised with the Claimant some complaints which other members of staff had made about her. These included the suggestion that she intended to propose internal competition between direct sales and partnership revenue. Mr Danhieux also raised an issue regarding the Claimant's proposed marketing of Mr Madou's Sensei product to Microsoft, about which Mr Madou and Ms Castro had alerted their colleagues at the end of January 2018, pages 125-127. Both Mr Madou and Mr Danhieux had expressed their alarm at the time.

116. The Tribunal accepted the Respondent's evidence that Mr Madou and Mr Danhieux had been alarmed by what they understood to be the Claimant's intention to sell the Sensei product when it was not ready and was not compatible with Microsoft functions.

117. The Claimant told the Tribunal that the telephone call with Mr Danhieux on 14 February was hostile; she said that there had been unfair criticism of her and that she was accused of stealing revenue from other sales staff. However, the Tribunal noted that, when the Claimant was later asked in her grievance meeting about the telephone call with Mr Danhieux on 14 February 2018, she said, "I felt my feedback was a bit unfair and I was not sure how my relationship was with Peter", page 557f.

118. On the evidence, the Tribunal concluded that the feedback was unwanted by the Claimant but that it was not related to her sex. The Claimant's colleagues had expressed their alarm about her activities and it was appropriate for Mr Danhieux to discuss this with the Claimant during their review meetings. This was nothing to do with sex. This claim failed.

Accused by Peter Danhieux of Collusion Using Examples from Previous Inaccurate Feedback on 14 March ( 7 March 2018 ). Direct Sex Discrimination / Sex-Related Harassment

119. On 7 March 2018 Mr Danhieux had a further telephone meeting with the Claimant, in which he told the Claimant that she was not collaborating with other employees in the business and was causing a great deal of upset. Mr Danhieux also said that the Claimant was working with the Fitzgeralds. The Claimant understood that he had accused her on colluding with the Fitzgeralds against him.

120. The Claimant was sufficiently distressed by the telephone call to propose that she would not stay in the company beyond the end of her three-month fixed term contract.

121. The context of this unhappy telephone call was that the relationship between Mr Danhieux and Mr Fitzgerald had broken down. Mr Fitzgerald had relied on Mr Danhieux's treatment of the Claimant in his letter of grievance, in support of his argument that Mr Danhieux should not remain as CEO.

122. The Tribunal inferred that Mr Danhieux saw the Claimant as being allied to Mr Fitzgerald. While Mr Danhieux may not have used the word "collusion", the Tribunal concluded that he did say to the Claimant that she was not working with his Executive Management Team and implied that she was in conflict with Mr Danhieux and the Executive Management Team, in the same way as Mr Fitzgerald was in conflict with Mr Danhieux and the Executive Management Team reporting to him.

123. Again, the Tribunal was satisfied that Mr Danhieux's treatment of the Claimant was not related to sex or because of sex. Mr Fitzgerald was attempting to have Mr Danhieux removed as CEO and had referred to the Claimant in his grievance against Mr Danhieux. Mr Danhieux would have treated a man, who he saw as allied with Mr Fitzgerald, in the same way.

#### Intimidating Slack Conversation. Direct Sex Discrimination and Sex-Related Harassment

124. On all the evidence, the Tribunal concluded that the reason Mr Danhieux sent these messages was his extreme annoyance at learning that the Claimant, who was a contractor for the Respondent company with a limited remit, had gone with Mrs Fitzgerald to visit Mr Madou, to encourage him to support a proposal to remove Mr Danhieux as CEO.

125. The Tribunal accepted Mr Danhieux's evidence that the reason he used the words "you got balls" was to express his surprise and annoyance at what he saw as the Claimant's "front" in behaving in this way, when she was in no position in the company to do so. He used a turn of phrase, which he did not associate with sex. The Tribunal found that the phrase was not one of a sexual nature – it was a colloquialism for defiant bravery.

126. Furthermore, the Tribunal found that the reason he said, "I'm letting you know that move was very collusive" was because he did believe that the Claimant was colluding with the Fitzgeralds to remove him as CEO.

127. This had nothing to do with sex, or the Claimant's sex, and everything to do with her behaviour in going to see Mr Madou.

#### The Claimant put on Leave of Absence without Consultation or Communication to the Claimant's Colleagues and Clients. Victimisation

128. It was certainly the case that, on 16 March 2018, having received the Claimant's grievance, Mr Sheehy sought advice from the Respondent's HR adviser about ensuring that the Claimant would not attend work thereafter. However, having obtained advice, on 20 March Mr Sheehy suggested that the Claimant report to Mr Madou for the remainder of her contract and asked the Claimant to give her end of contract handover to Mr Madou, page 381. It was only after the Claimant objected to reporting to Mr Madou on 21 March, that Mr Sheehy told the Claimant that the Respondent did not require her to perform any duties and that the company would advise staff and clients that the Claimant was on leave from 26 March 2018, page 377. The Claimant's contract was due to expire on 31 March 2018 in any event.

129. The Tribunal accepted Mr Sheehy's evidence that Ms Beydoun occupied an extremely important role, as she was head of sales in the Asia and Pacific Region, where the majority of the Respondent's sales team was based. Ms Baydoun was busy with customer success work in that role and was also the primary carer for a newly born baby at the time.

130. The Tribunal concluded that the reason that Mr Sheehy told the Claimant that she was not required to carry out any further duties was that she did not agree to reporting to Mr Madou and it would not have been appropriate to add to Ms Beydoun's responsibilities, by requiring her to become the Claimant's manager. This was nothing to do with the fact that the Claimant had done a protected act.

131. Furthermore, the period during which the Claimant was required not to undertake duties was extremely short. Her contract was coming to an end 5 days later. The Tribunal did not find that there was any detriment to the Claimant, within the meaning of *Shamoon*, in the Respondent not telling the Claimant's clients and colleagues the reason for the Claimant ending her work very slightly earlier than she was due to end her work in any event.

Accused of Failing to do a Handover by Mr Sheehy when he had told the Claimant that he would get come back her with a plan, but never did. Victimisation

132. The Tribunal did not find that Mr Sheehy had told the Claimant that he would get back to her with a handover plan. The meeting notes recorded that Mr Sheehy said that someone would contact the Claimant with a handover plan, page 5571.

133. On 29 March Mr Sheehy emailed the Claimant saying that he understood that the Claimant had refused to give a handover to Mr du Pre, despite Mr Sheehy having raised it in the Claimant's interview with him. He said, "I am confused but as your contact ended today, let's leave it there." Page 390.

134. The Tribunal concluded that Mr du Pre had asked the Claimant to give a handover, but the Claimant had failed to provide a handover. Mr du Pre asking for a handover was consistent with Mr Sheehy telling the Claimant that someone would contact her about a handover.

135. The Tribunal was satisfied that the reason that Mr Sheehy said that the Claimant had failed to give a handover was because she had, indeed, failed to do this. This was nothing to do with victimization.

Ignored by David Thompson until 22 May despite chasing him by voicemail and email

136. The Claimant presented her appeal on 24 April 2018, page 481. On 3 May 2018 Ms Kaye wrote to the Claimant, confirming that Mr Thompson would be in touch with her shortly, page 495. On 8 May 2018 Mr Thompson emailed the Claimant, apologising for not having done so earlier, explaining that he had been on annual leave. He asked the Claimant for her telephone contact details so that they could discuss a date for the grievance appeal hearing.

137. The Claimant emailed Mr Thompson on 10, 11 and 14 May 2018, but received no response. On 15 May 2018 the Claimant contacted Ms Kaye, saying that she had not heard from Mr Thompson and asking Ms Kaye for help in moving matters forward, page 567. On 22 May 2018 Mr Thompson emailed the Claimant, saying that he had just returned from annual leave, but had left the Claimant a voicemail message a few days previously, page 569. The grievance appeal hearing was held on 26 May 2018. This was one month and 2 days after the Claimant had notified the Respondent of her appeal.

138. The Tribunal did not conclude that Mr Thompson had “ignored” the Claimant until 22 May. He had contacted her on 8 May 2018. The Tribunal accepted Mr Thompson’s evidence that he had taken a day off work to help his son move house, just after he was initially instructed, which was why he was not able to contact the Claimant until 8 May 2018.

139. It also accepted his evidence he had previously worked for a firm called Silverman Sherliker as an HR consultant, and that emails to his Silverman Sherliker address had previously been automatically forwarded to his email address at Outsourced HR Solutions. However, Silverman Sherliker had merged with Laytons LLP and, unbeknownst to Mr Thompson, this forwarding facility was no longer available. Mr Thompson was not aware that he was required to log into his Laytons LLP email account to access his emails. Mr Thompson went on 2 weeks’ pre-booked annual leave to Normandy and only became aware on 18 May 2018 that the Claimant had been trying to contact him.

140. The Tribunal found that the reason that Mr Thompson had not responded to the Claimant’s messages as promptly as the Claimant would have liked was nothing to do with the fact that the Claimant had done a protected act. It was entirely explained by Mr Thompson’s two periods of pre-booked leave and his mistaken belief that emails were being forwarded to him at his Outsourced HR Solutions address. The length of time between appeal and the appeal hearing was, in any event, not unreasonably protracted and the Tribunal would not have concluded that the passage of that time was a detriment.

Inaccurate/Biased Minutes Issued by Mr Thompson.Victimisation

Second Interview: Mr Thompson Manipulating the Conversation  
Inaccurate Minutes saying the Claimant was laughing and joking  
Victimisation

141. Mr Thompson did not record the grievance appeal meeting, but took his own notes of it, which he provided to the Claimant for her comments and amendments, page 572. The Claimant had a further meeting with Mr Thompson on 13 June 2018. Mr Thompson sent the notes of the meeting to the Claimant, who made comments on them, page 601.

142. The Tribunal found that taking notes and providing them for comment, per se, rather than recording a meeting, did not amount to a detriment. A reasonable person would not consider themselves disadvantaged by notes being taken, when those notes could be commented upon. Taking notes, rather than recording meetings, is standard HR practice.

143. The Claimant told the Tribunal that she felt that Mr Thompson had manipulated the meeting, including requiring the Claimant to say the word, “balls” and then making a note of her facial expression when she did so, page 605I. The Claimant strongly disagreed with Mr Thompson’s assertion that she smiled while saying the word “balls”. The Claimant told the Tribunal that she had not been told about her ability to be accompanied at the meeting and that she had a panic attack after the meeting, due to the stress of it.

144. Mr Thompson told the Tribunal that he had asked the Claimant probing questions during their meeting and telephone call, in order to understand her complaints. He said that he was unaware that the Claimant had had a panic attack; she had not mentioned this to him. Mr Thompson said that his recollection was that the Claimant had smiled when she repeated Mr Danhieux’s use of the word “balls” and that Mr Thompson’s genuine view, at the time, was that the Claimant was not embarrassed or uncomfortable in using the word.

145. The Tribunal questioned Mr Thompson in some detail about his record of the meeting and his impression of the Claimant. It accepted his evidence that his genuine view was that the Claimant had smiled and was not uncomfortable about using the word “balls”.

146. The Tribunal accepted that Mr Thompson may have been incorrect in his impression – the Claimant may, in fact, have smiled out of embarrassment, for example. The Tribunal nevertheless found Mr Thompson to be a dispassionate, reliable witness. It accepted that he asked appropriate, searching questions and that he honestly recorded the answers he received. The Tribunal concluded that Mr Thompson did not manipulate the meeting, that he was not biased in his approach and that he did not provide inaccurate minutes.

147. These allegations failed on their facts.

Mr Thompson saying that his report was progressing, that the Claimant’s non response confirmed that minutes were agreed and that he would advise Mr Danhieux to apologise, but no apology was received.

Victimisation

148. On 19 June 2018 the Claimant told Mr Thompson that she had commenced early Conciliation through ACAS, page 611. The Claimant subsequently emailed saying, "I believe it is best we abandon this process and leave in the trusty hands of ACAS. I will not be signing off the minutes." Page 621.

149. The Tribunal accepted Mr Thompson's evidence that he had intended to pursue an apology from Mr Danhieux as part of the appeal outcome, but that this had not ultimately happened because the Claimant withdrew her appeal. It was clear from the Claimant's emails, at the time, that she did not want the appeal to progress any further.

150. The Tribunal found that the appeal was never concluded and that Mr Thompson's report was never issued because the Claimant withdrew her appeal. Mr Thompson's failure to complete the report was nothing to do with the fact that the Claimant had done a protected act.

Eddie Sheehy asking Nicole Fitzgerald if she could make the Claimant's case go away and advising her that the independent report would make her look bad. August 2018. Victimisation

151. On 27 August 2018 Mr Sheehy spoke to Mrs Fitzgerald about the Respondent company, as the Fitzgeralds continued own a substantial part of the company. During the call, Mr Sheehy said that, if the Claimant's claim went to a Tribunal hearing, a lot of shareholder money would be spent on legal fees and that the Claimant would be very poor at the end of the case. He said that a small payout of about £600 was what the Claimant should expect, page 656-7.

152. The Tribunal found that this was an honest and reasonable view of the possible consequences of litigation.

153. While the Claimant did not welcome it, the Tribunal considered that litigation is a stressful process, as are negotiations and discussions between the parties to litigation. Mr Sheehy was advising Mrs Fitzgerald about the possible consequences of the Claimant being unsuccessful in proposed Employment Tribunal proceedings.

154. The Tribunal concluded that Mr Sheehy expressing his honest view did not amount to a detriment; a reasonable employee would not consider themselves at put a disadvantage by learning of their employer's view of the possible outcome of proceedings. This claim of victimization must therefore fail.

Mr Sheehy's email to Mr Thompson on 20 June 2018 describing 3 emails criticising the Claimant's performance

155. Mr Thompson told the Tribunal that he had not been influenced by Mr Sheehy, but had asked Mr Sheehy clarificatory questions as Mr Sheehy had been the grievance officer. Mr Thompson said that he would have followed up all Mr Sheehy's answers, had the Claimant not withdrawn her appeal.

156. Mr Sheehy told Mr Thompson that there were 3 emails evidencing that the Claimant had upset staff, as Mr Danhieux had alleged. In Tribunal, the Respondent pointed to the email from Ms Castro, copied to Mr Madou, on 24 January 2018, raising concerns about the Claimant's marketing of the Sensei product, page 126.

157. The Tribunal considered that Mr Sheehy's reference to email evidence of dissatisfaction with the Claimant's performance did not amount to a detriment. His assertion would have been followed up by Mr Thompson, had the Claimant not withdrawn her appeal. Seeing that the Claimant withdrew her appeal, there was no outcome to the appeal. Mr Sheehy's assertion therefore came to nothing. A reasonable employee could not consider themselves at a disadvantage because of an assertion in the course of an investigation which never came to a conclusion.

158. The Claimant's claims therefore fail.

Employment Judge Brown

Dated: .....26 March 2020

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Sent to the parties on:

27/3/2020

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For the Tribunal Office