



EMPLOYMENT TRIBUNALS

Claimant: Ms C Pickett
Respondent: Silver Stream Trading Limited (1)
Mr T Gray (2)

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

On: 11, 12 and 13 November 2019

22 June 2020

23 and 24 June 2020 (deliberations)

Before: Employment Judge Adkinson

Ms J M Morrish

Dr G Looker

Appearances

For the claimant: Mr J Carter (Counsel) with Ms J Shingler (Counsel)

For the respondent: Mr M Blitz (Counsel)

JUDGMENT

For the reasons set out below the Tribunal unanimously concludes that:

1. The first respondent constructively wrongfully dismissed the claimant. The claim for breach of contract therefore succeeds. The claimant is entitled to 1 months' notice pay.
2. The first respondent owes the claimant 0.3 days holiday pay for the leave year that began on 1 January 2018. To that extent the claim for failure to pay holiday pay succeeds.
3. The claimant's claim for holiday pay for the leave year 1 January 2017 to 31 December 2017 was presented out of time. It was reasonably practicable for the claimant to present the claim in time. The Tribunal does not have jurisdiction to consider it. It is therefore dismissed.
4. In relation to the claimant's claims for direct discrimination because of gender reassignment:
 - 4.1. The following allegations are dismissed because the claimant has withdrawn them (the numbers refer to the individual allegations in the claimant's further and better particulars of 14

January 2019 and the text provides a brief summary of the allegation):

- 4.1.1. 3 (failure to provide a microwave),
- 4.1.2. 4 (requiring the claimant to clean the toilets),
- 4.1.3. 5 (failure to provide a company branded top that covered the claimant's midriff),
- 4.1.4. 9 (Mr Roulstone taking charge and making the claimant feel uncomfortable),
- 4.1.5. 15 (second respondent making sarcastic comments about the claimant's car),
- 4.1.6. 20 (not inviting claimant to a Christmas party),
- 4.1.7. 21 (telling the claimant she would need to be on call),
- 4.1.8. 23 (after the claimant arrived early, Mr Roulstone speaking to her about not coming straight into work but going to speak to someone at the neighbouring unit),
- 4.1.9. 24 (failure to make allowances for the claimant's decrease in strength),
- 4.1.10. 28 (excluding the claimant from the tea round),
- 4.1.11. 30 (not speaking to the claimant all day), and
- 4.1.12. 36 (linking an iPhone to the claimant's email account);

4.2. The remaining allegations against the first respondent that:

- 4.2.1. Date on or after 9 February 2018 are dismissed, and
- 4.2.2. Date before 9 February 2018 are out of time and it is not just and equitable to extend time. The Tribunal does not have jurisdiction to consider them. They therefore are dismissed;

4.3. The remaining allegations against the second respondent that:

- 4.3.1. Date on or after 15 February 2018 are dismissed, and
- 4.3.2. Date before 15 February 2018 are out of time and it is not just and equitable to extend time. The Tribunal does not have jurisdiction to consider them. They therefore are dismissed.

5. In relation to the claimant's claims for harassment because of gender reassignment:

5.1. The following allegations are dismissed because the claimant has withdrawn them (the numbers refer to the individual allegations in the claimant's further and better particulars of 14 January 2019 and the text provides a brief summary of the allegation):

- 5.1.1. 4 (requiring the claimant to clean the toilets),

- 5.1.2. 5 (failure to provide a company branded top that covered the claimant's midriff),
 - 5.1.3. 9 (Mr Roulstone taking charge and making the claimant feel uncomfortable),
 - 5.1.4. 15 (second respondent making sarcastic comments about the claimant's car),
 - 5.1.5. 20 (not inviting claimant to a Christmas party),
 - 5.1.6. 23 (after the claimant arrived early, Mr Roulstone speaking to her about not coming straight into work but going to speak to someone at the neighbouring unit),
 - 5.1.7. 24 (failure to make allowances for the claimant's decrease in strength),
 - 5.1.8. 28 (excluding the claimant from the tea round),
 - 5.1.9. 30 (not speaking to the claimant all day),
 - 5.1.10. 31 (numerous comments on the claimant's medical appointments), and
 - 5.1.11. 37 (a car with an unknown male sitting outside the claimant's house);
- 5.2. The remaining allegations against the first respondent that:
- 5.2.1. Date on or after 9 February 2018 are dismissed, and
 - 5.2.2. Date before 9 February 2018 are out of time and it is not just and equitable to extend time. The Tribunal does not have jurisdiction to consider them. They therefore are dismissed;
- 5.3. The remaining allegations against the second respondent that:
- 5.3.1. Date on or after 15 February 2018 are dismissed, and
 - 5.3.2. Date before 15 February 2018 are out of time and it is not just and equitable to extend time. The Tribunal does not have jurisdiction to consider them. They therefore are dismissed.

REASONS

Introduction

6. The claimant, Ms Pickett, brings claims for direct discrimination and harassment because of her protected characteristic of gender reassignment. The details of the claim that she brings under these headings are set out in the document headed "Further and Better Particulars" that she sent to the Tribunal and to the respondents on 14 January 2019. They number 40 in total. She also brings claims of constructive wrongful dismissal. She resigned with effect from 12 February 2018. She alleges that

the dismissal was also an act of discrimination. She also claims for unpaid holiday pay in respect of the 2017 holiday year and the 2018 holiday year.

7. In short, her case is that everything was fine until November 2017. In December 2017, she told respondents that she was transitioning. She says that everything deteriorated from that point onwards.
8. She presented her claim form on 12 July 2018. This followed a period of ACAS early conciliation with the first respondent between the dates of 8 May 2018 to 22 June 2018 and in respect of the second respondent on 14 May 2018 to 28 June 2018.
9. The first respondent, Silver Stream Trading Ltd, was her employer. The second respondent, Timothy Gray, was the director. The respondents deny all allegations of discrimination and harassment. They also deny that the first respondent wrongly constructively dismissed the claimant. In short, they say there is no watershed moment. Ms Pickett simply brings the complaints because she can accept she does no wrong and the things she complains about are the “rough and tumble” of working in a small business. They say it is only after the events that Ms Pickett has reinterpreted them as discrimination or harassment. They further say that, in any event, any claim from before 9 February 2018, insofar as it concerned Silver Stream, is out of time and any claim prior to 15 February 2018, insofar as it concerned Mr Gray, is out of time too.

The hearing

10. Ms Pickett was represented at the hearing by Mr J Carter, Counsel, with Ms J Shingler, Counsel.
11. The respondents were represented by Mr M Blitz, Counsel.
12. There was an agreed bundle of documents. On the first day of the hearing, Ms Pickett asked for permission to add to that bundle some police reports which had been disclosed to her just before the hearing by the police. She said they concerned complaints she had made alleging criminal conduct against both Silver Stream and Mr Gray. The respondents did not object. The Tribunal agreed that they could be added to the bundle. We have had full regard to the documents to which the parties have referred us.
13. The hearing was originally listed to take place on 11, 12 and 13 November 2019. Unfortunately, the 3 days were required just to hear the evidence in this case. The hearing required 3 more days to complete submissions, deliberations and to deliver judgement. Therefore, a further hearing was scheduled.
14. Because of the difficulty of matching up everyone’s availability, the earliest date available was 22, 23 and 24 June of this year.
15. In early 2020 there was a pandemic of a virus called Covid-19. So far as the Tribunal is concerned, it has had the effect of in-person hearings being suspended because of the risk of spreading infection.
16. As the relisted hearing approached, the Tribunal canvassed with the parties the possibility of conducting the hearing remotely, taking submissions through a video link. Ms Pickett agreed to this. The respondents expressed

a preference for an in-person hearing, though they did not positively object. The Tribunal decided that it would convert the hearing therefore to a remote hearing by video link. This would allow the hearing to conclude and allow the Tribunal to continue to use the resources it had already made available to the parties. It would avoid any further delay, which would be unwelcome given how long ago it was that the hearing last took place. Any further delay would impair the fairness of the process and was unnecessary because this an alternative means was available for receiving submissions. The Tribunal knew from its own listings no in-person hearing could have taken place before September 2020 and there was a real possibility it could not be until 2021.

17. Before the resumed hearing the Tribunal carefully re-read its notes.
18. On the first day therefore of the relisted hearing, the parties made their submissions by video link. The Judge and one lay member attended by video link. The other was unable to connect her video equipment to the link but instead they attended by telephone. They could hear clearly what was being said by both parties. Both the lay members were disconnected at one point but they re-joined quickly. The Tribunal stopped while they re-established connections. The parties repeated their oral submissions where they overlapped with a Tribunal member losing connection.
19. None of the parties expressed any concern about the resumed hearing or about the fact that one lay member attended by phone rather than by video.
20. The Tribunal then use the remainder of day 1 and days 2 and 3 to deliberate.
21. We have taken fully into account the parties' oral submissions.
22. Both parties had prepared and sent in detailed written submissions. We have taken those into account.
23. We are grateful to all parties firstly for agreeing to make submissions by video link and secondly for those detailed oral and written submissions.
24. At the resumed hearing but before making her oral submissions, Ms Pickett said that she did not seek findings of fact in relation to allegations 3, 4, 5, 9, 15, 20, 21, 23, 24, 28, 30, 31, 36 or 37 of the allegations of direct discrimination or harassment that she had made against the respondents. The Tribunal therefore formally dismisses those allegations on the basis that she has withdrawn them.

The issues

25. It is our understanding that we must decide the following issues:

Wrongful constructive dismissal

26.
 - 26.1. What was most recent act (or omission) that triggered or caused the Ms Pickett to resign?
 - 26.2. Did she affirm the contract after that act?
 - 26.3. If not, was that act or omission itself a breach of the implied term of trust and confidence?

- 26.4. If it was not a breach of the implied term, was it part of a course of conduct which taken together amount to breach of implied term of trust and confidence?
- 26.5. If yes to either of the preceding questions, did she resign in response to that breach?

Direct discrimination and harassment

- 27. Did Silver Stream on or after 9 February 2018:
 - 27.1. Treat Ms Pickett less favourably than it would treat others who do not have the protected characteristic of gender reassignment in the manner Ms Pickett alleges?
 - 27.2. If so, was that because of the protected characteristic of her gender reassignment?
- 28. Did Silver Stream on or after 9 February 2018:
 - 28.1. Engage in conduct in the manner that Ms Pickett alleges?
 - 28.2. If so was that conduct unwanted?
 - 28.3. If so, did it relate to the protected characteristic of the protected characteristic of her gender reassignment?
 - 28.4. If so, did the conduct have the purpose or (considering the her perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 29. Did Mr Gray on or after 15 February 2018:
 - 29.1. Treat Ms Pickett less favourably than it would treat others who do not have the protected characteristic of gender reassignment in the manner Ms Pickett alleges?
 - 29.2. If so, was that because of the protected characteristic of her gender reassignment?
- 30. Did Mr Gray on or after 15 February 2018:
 - 30.1. Engage in conduct in the manner that Ms Pickett alleges?
 - 30.2. If so was that conduct unwanted?
 - 30.3. If so, did it relate to the protected characteristic of the protected characteristic of her gender reassignment?
 - 30.4. If so, did the conduct have the purpose or (considering the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 31. If yes to one or more allegation, then are they part of a continuing act? If so, then all allegations are in time and the Tribunal must consider the same

issues in relation to allegations that precede 9 February 2018 in the case of Silver Stream and 15 February 2018 in the case of Mr Gray.

32. If not, then is it just and equitable to extend time so that claims that precede those dates are in time? If so, then the same issues arise in relation to those allegations.

Failure to pay holiday pay

33. Is the claim for holiday pay for the year 1 January 2017 to 31 December 2017 out of time? If so, was it not reasonably practicable to present the claim in time? If so, was it presented then in such time that was reasonable?
34. How much holiday was the claimant entitled to on resignation? How much had she taken? How much is she owed therefore?

Findings of fact

General observations

35. We begin with some general observations about the witnesses because these influenced how we weighed up the evidence.

Ms Pickett

36. We found that, generally, Ms Pickett was an unreliable witness. There are several reasons for this.

37. Firstly, we were struck how the grievance and complaints of sustained harassment or discrimination only came about because of the disciplinary proceedings. We acknowledge that, sometimes, victims of discrimination are unable to raise their complaints for some time because of actual or perceived fear of the consequences of doing so. We could detect no evidence that was the case here. There are no contemporaneous notes e.g. a diary nor even things like emails or texts to friends or family complaining of her treatment.

38. Secondly, we were struck that the grievance letter is very much presented as a defence to the disciplinary proceedings rather than as an independent complaint.

39. Thirdly, the grievance appears inconsistent with the complaints before the Tribunal in one important regard. In the proceedings before the Tribunal, complaints against Mr Gray date from December 2016 onwards. However, in the grievance Ms Pickett wrote:

“During the 2nd week of Tim’s absence. I was very uncomfortable and on the verge of quitting. I remember my parents telling me to ‘Stick it out, Tim will be back soon.’”

40. His absence was in both January and May 2017. We find it telling that her parents would advise her to await the return of a person harassing or discriminating against her so much that she names him as a respondent. The tenor is that his return would improve things for her. Either Ms Pickett had complained to her parents about work but not mentioned Mr Gray or Mr Gray was not really discriminating or harassing her as she alleged. If the former then we are puzzled why Ms Pickett would not mention his role in the alleged discrimination or harassment to her parents if matters were as

she now alleges. On balance, we conclude the only inference from this evidence is that Mr Gray was not acting in a discriminatory or harassing manner like she alleges at this time.

41. Fourthly, Ms Pickett is effectively reviewing and reinterpreting history. In her grievance for example she says of returning after the Christmas break in 2016 and shortly after sharing with Mr Gray that she was transitioning:

“Looking back, this is where the once friendly atmosphere slowly diminished.”

42. Fifthly and in our opinion significantly, we have the advantage of the police logs that show her communications with the police. Ms Pickett’s complaint was treated by the police as a potential hate crime. This came about because her solicitor, Ms S Yeomans, reported to the police on 19 February 2018:

“[Ms Pickett] reports [her] email address has been hacked into and that [she] had been forced to leave [her] place of work as [she] is transgender.”

43. In her lengthy statement to the police, which was taken by no later than 10 March 2018, Ms Pickett alleged among other things that someone has hacked and changed her home internet settings and that her iPhone location setting kept turning on randomly. She also alleged that there was an unrecognised phone attached to her account (This was allegation 36 which Ms Pickett withdrew at closing argument). The clear inference from the context was that she was suggesting that Mr Gray or Silver Stream were responsible for this. There is absolutely no evidence we have seen to even begin to support this. We think it highly improbable that the respondents would have gone to such lengths because there is simply no point to them doing so.

44. Ms Pickett also complained to the police as part of the investigation (and so it is plain from context that she believes that the respondents have a hand in this) that the respondents sent a car with darkened windows to sit outside her house with an unknown male occupant (this was allegation 37 which she withdrew at closing argument), deactivated her CCTV and were involved in an aggravated burglary on her next-door neighbour. We think these suggestions are fanciful. They are inherently implausible. There is no obvious benefit to the respondents from these acts. There is no evidence to support any suggestion the respondents were involved.

45. On 28 November 2018 Ms Yeomans contacted the police again to relay information from Ms Pickett. She reported that Ms Pickett had become aware of fire damage at the first respondent’s premises and wondered if this was a deliberate act by the respondents to say that a missing note pad (to which we come later) had been burnt in a fire. It seems Ms Pickett had suggested this herself. The police noted this as:

“yet another conspiracy theory.”

We agree. If the respondents wanted to destroy the note book then simply binning it or shredding it or (though we do not encourage such behaviour) lying about it would have been easier. We think that the suggestion one might cause fire damage to one’s own property to achieve this is so fanciful

and lacking in credibility we do not think a rationally thinking person would have raised it.

46. These reports to the police lead us to conclude that Ms Pickett's view of matters and judgment was certainly coloured by what are irrational beliefs. We reflect on the fact that these are numerous and serious allegations to the police. We find it difficult to conclude therefore that the remaining parts of her evidence of what happened before these reports to the police are not similarly tainted.
47. We are fortified in that conclusion by the evidence that Ms Pickett chose to put before us in her evidence-in-chief, in which she adopted her witness statement.
48. In her evidence-in-chief she told the Tribunal about:
 - 48.1. The location settings and the linked phone. This was allegation 36 which she withdrew;
 - 48.2. The car with darkened windows. This was allegation 37 which she withdrew;
 - 48.3. The next-door burglary and deactivation of the CCTV;
 - 48.4. Her changing of her number plates because she thought that Mr Gray was going to make a malicious call about her vehicle because he had asked her, before her employment ended, when she would get back her car;
 - 48.5. The hacking of her home internet settings;
 - 48.6. A fault on her landline on 10 May 2019 at the cabinet meant it would not ring;
 - 48.7. Someone on 10 June 2019 pulled up outside her home and typed on a device before making a phone call.
49. Because she chose to give evidence about these matters, and because some of them are clearly matters she reported to the police in relation to her criminal complaint against the respondents, she clearly believes that the respondents were behind these events. That is the only reason she would have put the evidence before us because otherwise it is completely irrelevant.
50. There is no evidence that even begins to support the suggestion the respondents are involved in any way in those matters. It is inherently implausible they would be involved. They derive no obvious benefit from such actions. For example, we cannot imagine why a respondent in an employment claim would burgle a claimant's next-door neighbour. The allegations have all the hallmarks of conspiracy theories. We note these are numerous and serious allegations. It leads us to conclude that Ms Pickett's view of matters is still coloured by what are irrational beliefs. We believe that these beliefs are pervasive and colour all her evidence to the Tribunal.

Mr Gray

51. On balance, but with some significant hesitation, we conclude that Mr Gray eventually told the Tribunal what he believed to be the truth. Often his

evidence was inherently plausible and accorded with evidence from Mr Roulstone and Ms Spencer. We recognise they are (in effect) his employees and Mr Roulstone is his father-in-law. However, we could detect no deliberate or innocent collusion.

52. Our main concern is that Mr Gray told the police as part of their investigations that he had installed on the work computers software (called Active Track) that took snapshots of the user's screen every 30 seconds or so. He said that this was how he had obtained information from Ms Pickett's email. He denied accessing the email account (a process we will call hacking from this point on because however he came to gain access, it was not with the permission of Ms Pickett). He repeated this in a prepared statement handed to the police under caution.
53. He maintained the same position in his evidence-in-chief.
54. In cross-examination though he admitted he did hack Ms Pickett's email account. He explained that her workstation computer had saved her password and so he could easily gain access. He did it as part of his investigation into alleged wrongdoing. He explained he then searched through it looking for invoices Ms Pickett had raised for work done on her own account that he believed was in breach of her employment contract.
55. It is apparent he at best deliberately misled and at worst lied to the police and to us in evidence-in-chief on a significant matter. He was prepared therefore to say things that were untrue but which were of benefit to him at that time. However, his admission to the Tribunal albeit under pressure was clearly significant and contrary to his interests. In our opinion it lends him some limited credibility. More persuasively for us though, his evidence broadly aligned with Mr Roulstone's and Ms Spencer's. It also appeared to tally better with what documents we have. We also take into account the complete lack of any complaints before the grievance and that Ms Pickett's parents suggest she stick with her employment pending Mr Gray's return. These match up better with the tenor of his evidence than with Ms Pickett's.

Mr Roulstone and Ms Spencer

56. We were satisfied that both Mr Roulstone and Ms Spencer did their best to tell us what they believed to be the truth. Conscious that they are employees of Silver Stream, we could nonetheless detect nothing that suggested they sought either consciously or unconsciously to mislead the Tribunal.

Background

57. Silver Stream was a small business. Mr Gray was the managing director. In practical terms he is the company. He made the business decisions, wooed clients and sourced the products. Mr Roulstone was Mr Gray's father-in-law. He was a former police officer. Silver Stream employed him as the office dispatch manager. His job was to make sure the orders were packed and dispatched. Silver Stream also employed Ms Spencer. She was not otherwise connected to Mr Gray or Mr Roulstone. Her job title was e-commerce administrator. She kept Silver Stream's website in order and did general administration. That said there was not a strict division of labour and people helped each other out and stepped into other roles as needed.

58. Silver Stream was an online trader under the name "Technology Outlet". They sold 3-D printers, filaments and accessories for the printers. The printers are technologically advanced and desirable products.
59. There were 4 employees when Ms Pickett resigned.
60. Silver Stream worked out of a 2-storey office on an industrial estate. The estate was a set of units in Coalville, North West Leicestershire. In their office they stored the products, such as printers, ready for dispatch by courier as required.
61. They did not have HR support or any relevant written policies.

Start of employment

62. Mr Gray met Ms Pickett when she went to visit him to buy a 3-D printer. At the time Ms Pickett was at university reading for a Masters in Engineering. Contact continued for a few years. After she finished university she worked with the company who sponsored her degree. That came to an end in May 2016. In June 2016 Ms Pickett and Mr Gray had a conversation and they agreed that Silver Stream would employ Ms Pickett. Ms Pickett had learned on her degree how to use CAD (computer-aided design). Before employment he sent occasional piece-work to her.
63. Neither Mr Gray, Mr Roulstone nor Ms Spencer knew nor suspected that Ms Pickett was transitioning.
64. Silver Stream and Mr Gray hoped that by taking on Ms Pickett they would be able to offer expert services on the sale and maintenance of 3-D printers and offer a side-line of CAD to customers. The idea was that customers who had a printer but needed someone to create the technical specifications of an item they wanted to print would then approach Silver Stream for them to design it. This would be done by Ms Pickett using CAD. The CAD would then be saved as a digital file and sent to the customer. They in turn would use it to instruct the printer in what it had to print.

The contract of employment

65. Though the contract of employment suggests her employment began in September 2016 (as does the ET3) Mr Gray accepted in evidence-in-chief it began on 1 August 2016.
66. The contract of employment provides:
 - "3. The Employer agrees to employ the Employee as a CAD and technical support. The employee will be expected to perform the following duties:
"The position is predominantly for CAD and 3-D printer technical support, there will also be at times when busy an element of assistance required in e-commerce and dispatch."
 - "4. The Employee agrees to be employed on the terms and conditions set out in this Agreement. The employee agrees to be subject to the general supervision of and act pursuant to the orders, advice and direction of the Employer.

“5. The employee will perform all duties that are reasonable and that are customarily performed by a person holding a similar position in the industry or business of the Employer.

“6. The Employer cannot unilaterally and significantly change the employee’s job title all duties. ...

“8. Compensation paid to the Employee for the services rendered by the Employer is required by this Agreement (“The Compensation”) will include a salary of £36,000 per year....

“10. The Employee understands and agrees that any additional compensation paid to the Employee in the form of bonuses or other similar incentive compensation will rest in the sole discretion of the Employer and that the Employee will not earn or accrue any right to incentive compensation by reason of the Employees employment.”

- 67. Clause 11 provided for the reimbursement of expenses.
- 68. Clause 18 provided that Ms Pickett’s normal hours of work and breaks would be from 9 am to 5:30 pm.
- 69. Clause 19 provided that Ms Pickett would have to work additional hours or hours outside her normal hours of work as necessary to meet Silver Stream’s business needs provided Silver Stream gave her reasonable notice.
- 70. Clause 22 provided that the holiday year coincided with the calendar year.
- 71. Clause 32 said:

“The Employee agrees to devote full-time efforts, as an Employee of the Employer, to the employment duties and obligations as described in this Agreement.”
- 72. Clauses 33 to 38 provided prohibitions on conflict of interest, non-competition and non-solicitation (“the restrictive covenants”). In particular, clauses 33 and 34 said:

“33. During the term of the employee’s active employment with the employer, it is understood and agreed that any business opportunity relating to or similar to the employer’s actual or reasonably anticipated business opportunities ... coming to the attention of the employee, is an opportunity belonging to the employer. Therefore, the employee will advise the employer of the opportunity and cannot pursue the opportunity, directly or indirectly, without the written consent of the employer, which consent will not be unreasonably withheld.

“34. During the term of the employee’s active employment with the employer, the employee will not, directly or indirectly, engage or participate in any other business activities that the employer, in its reasonable discretion, determines to be in conflict with the best interests of the employer without written consent of the employer, which consent will not be unreasonably withheld.”

73. The schedule to the contract of employment is a document entitled "Particulars of Employment". To all intents and purposes, these are identical to the information set out in the contract.
74. Mr Gray admitted that the contract of employment was based on a template that he had downloaded from the Internet. However, it is quite clear that he has modified it to reflect an employment relationship between Ms Pickett and Silver Stream.
75. The contract of employment does not provide any payment for or right to overtime. We conclude there was no agreement to her to do paid overtime. Therefore, she was not entitled to payment for any overtime that she did.
76. We conclude that the contract of employment reflected the relationship between the parties as they understood it to be. While we acknowledge that the contract we have seen is not signed, Ms Pickett admitted she read through it and signed it. Nothing suggests to us that this document improperly reflects the relationship between the parties. The job description appears to mirror both her job and duties. It confirms employment status and provides for payment of a plausible salary. The holiday year as set out in the contract matches the holiday year on which Ms Pickett has relied for the purposes of bringing a claim for holiday pay. That suggests that even Ms Pickett herself accepts that this contract reflects the relationship between the parties. There is nothing in the terms and conditions that is inherently implausible. Whether or not the terms and conditions relating to the restrictive covenants are enforceable as a matter of law (that is not for us to decide), they appear to be of the type of terms and conditions one routinely sees in employment contracts. We have seen nothing such as letters, emails or other communications that suggests that the terms and conditions on which Silver Stream employed Ms Pickett were different to those in this document.
77. Ms Pickett has suggested that there was some difference in the work hours between those actually worked and those provided for in the contract which undermines the credibility of the document we have seen.
78. We disagree. We note its use the words:
"...normal hours of work..."
which implies that there may be variations on those times. We do not think, however, that even if employees routinely finished work at 5pm (earlier on Friday) it means this contract does not reflect the terms and conditions between the parties. This is a small business without formal clocking on or off. Being routinely allowed to finish before contracted finishing time does not undermine the validity of the contract.
79. We conclude the contract was partly created to enable Ms Pickett to obtain a mortgage so that she could live closer to work. At the start she commuted for 2 hours each way every day. This is clearly uncomfortable and it is inherently plausible someone would find it unsustainable. The suggestion that Mr Gray asked her to move to Coalville to enable her to work overtime is in our opinion inherently implausible. A long commute would not prevent her from doing overtime though one might understand why she would not want to do any. The contract did not provide for payment of overtime so

there was no obvious direct benefit to her pay by agreeing to do overtime regularly. She needed a mortgage and non-guaranteed overtime would not help her with that. The contract would, however.

80. The contract does not provide any exemption for Ms Pickett to work on other 3-D printer projects or on private business except as set out in the restrictive covenants. Ms Pickett provided no evidence that Silver Stream consented to her doing things that may be prohibited by those clauses. We conclude they did not consent. We also conclude that she never asked either. Again, we have seen no evidence of her seeking consent. We do not accept that Silver Stream or Mr Gray would have automatically known of her working outside of her employment. There is no reason on the evidence to conclude that they would.
81. Miss Pickett did not read the job description as covering repairs. We believe that, objectively judged and considering the facts known to the parties at the time the contract was entered into, the job description and her duties was sufficiently wide enough to cover repairs under the phrase “technical support” if nothing else.
82. In 2016 Mr Gray went to a trade show at the National Exhibition Centre (“NEC”). He took Ms Pickett with him
“to provide a fresh pair of eyes”
and advise on the products available.

Disclosure of transitioning

83. In December 2016 Ms Pickett told Mr Gray that she was transitioning. This was at the end of the working day just as Mr Gray prepared to leave the office. She showed to Mr Gray a photo of her dressed as a woman. She explained that she was taking hormone tablets. Mr Gray was shocked. We accept that the seriousness of the disclosure did not sink in until he was on his way home. However, Mr Gray did not say:
“Oh well I didn’t really sign up for this mate.” or
“I do not have an issue with it, but if it starts affecting business, we will have to evaluate the situation.”
or anything like that.
84. Mr Gray did not say either that he would have to move Ms Pickett out of sight or stop her having contact with customers.
85. Ms Pickett has produced no contemporaneous note of this incident. More significantly, we noted that there was no grievance raised by Ms Pickett at the time, or indeed until after disciplinary proceedings started. The first time this is mentioned is over a year later, in the context of a defence to those proceedings. Mr Gray did not do anything to try remove Miss Pickett from her employment, which would have expected if his reaction had been as Ms Pickett alleged. As we set out above, her parents later encouraged her to remain employed when she considered quitting until his return. She agreed to this and it suggests to us that Ms Pickett did not believe Mr Gray said anything inappropriate at this meeting. Because Mr Gray was shocked,

we think it inherently more likely that he would have been quiet and stunned.

86. Ms Pickett did say to him that he should feel free to ask questions about the transitioning. Ms Pickett says this in her grievance letter. It also tallies with Ms Pickett coming across in her evidence as being very open about the transitioning process and wishing to help other people be comfortable with it and to understand it.

Events afterwards

87. That year, there was no office Christmas party.
88. It is our conclusion that this had nothing to do with Ms Pickett's protected characteristic. We accept Mr Roulstone's evidence on this. While he and Mr Gray may have discussed family arrangements for Christmas, being related, there was never any discussion about there being a Christmas party. This was a small business. It is not implausible there was never going to be a party. We think it inherently implausible that an employer would cancel a Christmas party for everyone because one person had the protected characteristic of gender reassignment.
89. Ms Pickett also complained that she was not paid a Christmas bonus. There was no bonus policy against which we could assess if she might have been entitled to one. There was no contractual entitlement to a bonus. We have seen nothing to suggest that a bonus was even within the contemplation of Silver Stream at any relevant time.
90. Mr Gray did not send a Christmas card to Ms Pickett. However, he did not send a Christmas card to anyone, including his own father-in-law, Mr Roulstone. We accept Mr Roulstone's evidence that he personally sent a card to Ms Pickett.
91. At the beginning of 2017, Mr Gray's sister fell seriously ill and passed away. This had an understandable and adverse effect on Mr Gray. As Mr Roulstone said, Mr Gray was:
"...in tears, emotionally wrecked."
Mr Gray left the business for several days and left Mr Roulstone in charge.
92. Mr Roulstone was an able man. However, he struggled to run the business on short notice. He was not a natural businessman and had limited knowledge about 3-D printers. He did the best he could.
93. He told Ms Spencer and Ms Pickett about Mr Gray. He asked the team to pull together. At this time Ms Pickett worked upstairs. He suggested that she move downstairs to share the office with Ms Spencer and him to promote cohesion. She declined. By being upstairs, neither Mr Roulstone nor Ms Spencer could observe her at work. We note this would provide a space in which she could work on her own business unobserved.
94. When asked later what she was working on, she commented that she was dealing with "stupid" customers. She was dismissive of customers who bought machines and were unable to use them or required help to put them into operation. Based on the evidence we heard, we conclude this was representative of a general attitude towards customers.

95. In the beginning of 2017, Ms Pickett was contemplating performing and increasing her own private work. She had access to her own equipment at home that was capable of performing laser cutting. This was not a service that Silver Stream could provide in-house. She was doing some of her own work in her lunchtime in the office. She used Silver Stream's computers to access her email which she used for conducting her business. She accepted this in cross-examination and accepted that she did not ask if it would be acceptable to Silver Stream if she did this. Ms Pickett alleges that Mr Gray had no issue with her providing laser cutting services to clients before December 2016 and so in effect he changed his mind. We do not accept this. Based on her own answers in cross-examination, we conclude that, rather, he did not know.
96. In January 2017 one of the products that Silver Stream was selling was a 3-D printer called a "Wanhao i3". The printer had an inherent design fault that meant there was a danger of it short-circuiting and catching fire. Ms Pickett told Mr Gray about this. Mr Gray was already aware of this fault because the manufacturer had told him. He therefore replied to Ms Pickett that he already knew of the fault. Mr Gray was not deliberately dismissive of Ms Pickett, however, like she alleges.
97. We conclude this is reinterpretation of events on Ms Pickett's part. Firstly, this is not mentioned in her grievance letter. We would expect to see mention of it if it occurred. Moreover, it seems to us inherently plausible that the manufacturers would have told Mr Gray and that he would have taken it seriously. This is because Mr Gray was setting up a business specialising in 3-D printers. It would be bad for business – especially one that is new – if the printers that he was selling were inherently faulty, and more so if he did nothing about it. This applies in a similar way to the manufacturer, so we accept that they had told Mr Gray. It therefore seems unlikely he would have ignored or not have been interested in the fault.
98. As we have said we do not think Mr Gray was deliberately dismissive. If Mr Gray did behave in any way that was perceived as dismissive, the impact of his sister's illness and death is a far more likely explanation.
99. Though she does not seek a finding on this point, we noted that Ms Pickett alleged that while Mr Roulstone was in charge, he was issuing orders, was abrupt and was "niggling" about everything including Ms Pickett being untidy. Having heard Mr Roulstone give evidence we find this easy to believe. He is a forthright, down-to-earth, individual. This was clearly not linked to Ms Pickett's protected characteristic of gender reassignment. The coincidence with his son-in-law being absent, the illness and death of his son-in-law's sister and being tasked with managing a business that traded in a product that he was not expert on was stressful and difficult. That is inherently plausible and plain from the evidence. We mention it simply because it is a specific allegation that did not stand up to scrutiny. There is no link to Ms Pickett's protected characteristic of gender reassignment. We think it a clear example of either conscious or sub-conscious (i.e. deliberate or accidental) reinterpretation of events to fit an understanding she has come to much later.

100. In March 2017 one of Silver Stream's customers, Mark Wilks of Suicide Mods, contacted Silver Stream because he had issues with "bed-levelling" which is part of the set-up of the printer to ensure it works properly. Mr Roulstone asked Ms Pickett to go there. Ms Pickett did so. She stayed very late into the night fixing the device. There was no requirement for her to do so. It was her own choice. She was not paid overtime for the work after hours. She was not entitled to overtime payment. We find as a fact that Mr Gray on Silver Stream's behalf did offer to pay Ms Pickett's petrol. We prefer the respondents' evidence generally but also note that the contract of employment contemplated in clause 11 the reimbursement of reasonable expenses but no overtime. Therefore, the evidence is consistent with the tenor of the contract.
101. By March 2017 there was not much CAD work coming in. Therefore, Ms Pickett was not working at her full capacity. Mr Gray decided that Silver Stream should try to create its own 3-D printer. He asked Ms Pickett to design and build it. We consider that such a task would reasonably fall with Ms Pickett's job description or other duties that might reasonably be expected of someone in her position. As such we conclude it was a reasonable request of an employer to an employee. We think in the circumstances it also had the benefit of providing her with work and avoiding a potential redundancy situation or need to reduce hours. Ms Pickett pushed Mr Gray for extra payment for the work. He offered her £50 per printer. Whether he called it "a tickle" we think does not matter. We conclude that offering to pay her a sum per printer sold was an additional bonus to which she was not otherwise entitled. In any event the project was unsuccessful.
102. In May 2017 Mr Gray himself fell seriously ill and had to take time away from the company. He had to go straight into hospital. Again, this came as a shock to him and particularly to Mr Roulstone. He left Mr Roulstone in charge again. Mr Roulstone had to make any difficult decisions. Mr Gray was away for several weeks. Mr Roulstone was left emotionally upset by it.
103. Mr Roulstone again spoke to Ms Spencer and Ms Pickett about this and the weeks ahead. Again, they suggested she move downstairs. Again, she refused. Again, therefore, the set-up was Mr Roulstone and Ms Spencer worked downstairs while Ms Pickett worked alone upstairs.
104. On 20 July 2017, Ms Pickett set up Ubiquitous Engineering Ltd with a view to continuing and increasing work that she was doing privately. She continued to do this in her lunch break and outside of the office.
105. In September 2017 there was another trade show at the NEC. This time Mr Gray went alone. He was meeting a potential customer there and that was the only reason for his attendance this time. He was neither marketing generally to others nor sourcing new products. As we noted he was the salesman of the company. On the evidence we can see no reason why he would take any member of staff with him to this event.
106. At about the same time, Ms Pickett alleges that Mr Roulstone would rebuke angrily her if he believed that she had not refilled a tape gun (i.e. used to dispense parcel tape when sealing boxes) and, occasionally, say

“I might [refill it] when you have transitioned.”

Ms Pickett alleges that in contrast Ms Spencer left empty tape guns for him to fill, and he did so without question.

107. We conclude this did not happen. Firstly, we find it incongruous and implausible that he would be angry and rebuking, but on the other hand say he would refill it on transitioning. Secondly after hearing the witnesses and considering our general views on plausibility, we find Mr Roulstone’s denial more plausible. Thirdly his evidence is supported by Ms Spencer who agreed she left empty tape guns occasionally but was shown how to refill them. After being shown she did not do it again. We cannot see any credible reason why he would behave differently towards Ms Pickett, if only because he would be making more work and stress for himself.
108. Ms Pickett remained obstructive and unhelpful during this time, often secluding herself upstairs away from Mr Roulstone and Ms Spencer.
109. In autumn 2017 Ms Pickett suffered chest pains while at work. Considering our observations about general credibility of the witnesses, we accept the evidence of both Mr Gray and Ms Spencer on what happened. Mr Gray told Ms Pickett that she should have it checked, but that she should not drive herself to the hospital. He enquired if anyone else could take her. If not, he suggested that she should get a taxi. Ms Pickett chose to drive herself anyway. We are reassured that this conclusion is correct because in her grievance letter Ms Pickett says that Mr Gray told her to go to the doctors and that she drove herself. However, she makes no mention in the otherwise full letter that he told her to do this.
110. In November 2017 Silver Stream had a customer called Kayad. They arranged for Silver Stream to print out plastic icicles for table centrepieces. However, they were not distributing the light properly. Ms Pickett says that they were about to cancel an order worth £3,600. Through her own business and without consulting Mr Gray, Ms Pickett arranged to cut new bases using her own laser cutter which would solve the problem. We do not accept that Mr Gray had no issue with this when he found out but then changed his mind. That is irrational and there is no motive for such behaviour. There is nothing to explain why he would change his mind. We do find that he was angry when he found out and wanted a 20% cut of the price. We cannot detect anything that shows this reaction was connected to her protected characteristic of gender reassignment. It was clearly connected to the fact that Ms Pickett had used contact with Silver Stream’s customer in the course of her own employment to source private work and therefore to develop her own business, and she had done this clandestinely and without the consent of Silver Stream. Whatever the legal effect of the restraint of trade clauses in her contract, Mr Gray understandably felt that she was breaching them. It was obvious, we think, that this work could be considered potential work for Silver Stream even if they had then to outsource it to Ms Pickett or to another business – the choice would be theirs.
111. In December 2017 Ms Pickett had an appointment for electrolysis. Mr Gray and the other employees of Silver Stream usually finished about 5pm.

However occasionally someone may have had to stay to wait for the courier who came about that time. On the day of Ms Pickett's electrolysis appointment, Mr Gray asked her to stay. We conclude that she had given no notice of her need to leave on time. It is consistent with her working away from others and her attitude towards customers and credibility in this case generally. We note that her contract of employment provided that she was to work until 5:30pm.

112. Ms Pickett lived the closest to the office. As a result she had a set of office keys. The office had an alarm that, if activated, would result in a phone call to a keyholder. Ms Pickett was the nominated keyholder. She admitted that although she could be called out she often slept with her phone silenced so she would not hear any call. We think that somewhat undermines the point of being a keyholder if she were uncontactable. In December 2017, Ms Pickett's car broke down. It ended up in a garage in Leicester. She left her set of office keys in her car. The effect therefore was that the keys to a building that contained expensive and desirable pieces of computer equipment were left unattended in a location to which neither she nor anyone else had ready access. It would obviously mean she would be unable to say with certainty where the keys were or deal with any call out.
113. When she got her car back, Mr Gray asked her to return the keys to him. He then handed them to the industrial estate's caretaker who lived in Hinckley (15 miles from Coalville) which is further away from the office than Ms Pickett's house. We readily accept the respondents' explanation for this. By leaving the office keys unattended and inaccessible Ms Pickett had potentially undermined Silver Stream's security. Ultimately there was nothing but hope that no-one took the keys from her car. By silencing her phone at night her services as being a keyholder were somewhat limited in any event. During the time that she had left her keys in a car in Leicester, she admitted that she was called out because the office alarm had been activated. As she herself admitted, leaving the keys in her car in Leicester meant that she was unable to deal with this call-out. The caretaker in Hinckley looked after other properties on the estate in any event. Even though he was further away, he was clearly dedicated to performing the role. Ultimately, we think that the answer to why the keys were taken from her is given by her own evidence.
114. In January 2018 Ms Pickett designed a new lid for a 3-D printer that Silver Stream sold, called the Raise printer. She made it at home using her own equipment and designed it herself. After seeing one, Mr Gray wanted to order more for machines he sold. They agreed that Silver Stream would pay Ms Pickett £150 per lid. She invoiced Silver Stream for the lids, and they paid. Ms Pickett told us she had to chase payment. She told us that Mr Gray would promise that Silver Stream would pay but then did not. She suggested there was
"several weeks delay."
115. However, the longest we could detect from the evidence was 13 days. We consider therefore that this is an example of an exaggeration and undermines Ms Pickett's credibility generally. We do not consider 13 days could be considered an onerous or unfair delay in the circumstances of

what is a business-to-business transaction. We cannot see on any level how it is related to the protected characteristic of her gender reassignment.

116. In January 2018 Ms Pickett was late for work because of roadworks. Mr Roulstone rebuked her. He enquired why she was late even though she lived the closest. This seems to us a reasonable query. What had earned Mr Roulstone's ire was that when Ms Pickett arrived she went over to another unit to chat with someone there, called Steve in a company called Suicide Mods. The exchange is entirely understandable. We readily accept that Ms Pickett was regularly late. She had refused to move downstairs when Mr Gray was unable to work which did nothing for team morale. Her stance over working on creating a 3-D printer suggested she was not willing to work as part of the team. She also worked on her own business though Silver Stream. It paints a picture of someone who was not prepared to work as part of the small team. Being late regularly is consistent with that picture. We are also fortified in our conclusion by the fact Ms Pickett did not mention this in her otherwise detailed grievance.
117. We do not accept Ms Spencer was the same in terms of tardiness yet treated more favourably. Firstly, we do not find that she was regularly late. Secondly, she was pregnant and suffering from extreme nausea and excessive sickness. Occasional lateness is entirely understandable. Thirdly she apologised rather than go off to another unit to talk to people there.
118. On 2 February 2018 Mr Gray and Ms Pickett were labelling pallets of filament. He said to her that his friend, who was a nuclear engineer with Rolls Royce, would:
"wipe the floor with her."
119. In her own further and better particulars, she describes this as:
"A very peculiar remark."
120. We accept Mr Gray's evidence that this was a flippant remark comparing the skills of his friend to those of Ms Pickett. We do not think its purpose was malevolent or that it had, or should have had, a malevolent effect on Ms Pickett.
121. That day Ms Pickett wen to her car to drive out to get some lunch. There were pallets in front and behind her car. She asked Mr Roulstone to move them. He did so. We do not accept that Mr Roulstone was difficult about it or surly about it either.
122. Later, Mr Gray asked her to help to finish the pallet's preparation. He then left her to it. We reiterate that he, the director and owner, was doing some of the work that clearly was not part of his job role. We cannot see how it is objectionable for Ms Pickett to be asked to do it or to be left to do it. While she says it was usually the role of Mr Roulstone or Ms Spencer there is no evidence that either they were instead sat around doing nothing or that it interfered with Ms Pickett completing some other task for which she was primarily employed, thereby increasing the pressure on her. We think this further demonstrated Ms Pickett's unwillingness to work as part of a team and how everyone was from time to time expected to collaborate generally. We note that Ms Pickett's complaint is inconsistent with her own evidence

in chief about “mucking in” e.g. fixing printers, unloading containers, operating printers, loading the courier’s van or taking parcels there, collecting items for the company and cleaning the toilets.

123. On 6 February 2018 Mr Roulstone and Ms Pickett were chatting. He asked her about her electrolysis treatment. She explained that she had had 200 hours by that time and had an hour’s treatment per week. Mr Roulstone replied

“Oh, so you’re serious then?!”

124. This was a genuine question and was not asked with any malevolent purpose. The conversation is part of Ms Pickett’s openness and willingness to discuss the transition. We accept Mr Roulstone’s evidence that he was surprised by the pain involved. We noted also that there was no response at the time to the comment either in the form of a grievance, a retort that the comment was offensive or upsetting or even to bring the conversation to an end. We also note that Ms Pickett had told Mr Gray she was happy to answer questions about the process and was very open about it.

125. Ms Pickett’s evidence is inconsistent. In her grievance she alleged that Mr Roulstone remarked on the cost. That appears in neither the further and better particulars nor her evidence-in-chief.

126. We also conclude that this is an example of reinterpretation. Ms Pickett wrote in her further and better particulars:

“The claimant would not have been concerned had this been simply an innocent friendly question, but in the context of the other treatment she was receiving, the general atmosphere in the office, it appeared that this question was not asked in the spirit of friendliness. In addition, Tony Roulstone would have known about the proposed disciplinary and so it is likely that he was checking whether I was serious about transitioning.”

127. It seems therefore that, absent context, the question came across as an innocent one. There was no evidence that Mr Roulstone knew about the forthcoming disciplinary process. We can see no reason why he would have known.

128. At about the same time, Mr Roulstone forcefully told Ms Pickett to make sure the door was completely shut. The door itself operated with an automatic locking mechanism. It displayed a light to show whether it was locked. There is consistent evidence from all of the respondents’ witnesses that Ms Pickett repeatedly failed to close the door. Given the significant value of the equipment in the office, it was obvious why the door had to be kept closed. It would be a security risk. More prosaically, there would be a draught. Mr Roulstone and Ms Spencer were working next to the door while Ms Pickett was working upstairs. We can understand why leaving the door open would be annoying.

129. Though it is not clear, it seems about this time that Mr Roulstone commented that he thought shorter hair suited Ms Pickett. Ms Pickett replied that she preferred longer hair. He did not say that she was too tall to be a woman. There was nothing malevolent in this conversation. We do not think it had a malevolent effect on Ms Pickett.

130. While this been going on, Mr Gray had become aware that Ms Pickett was running her own business. He had first become aware in November 2017, when a customer had phoned him to question a CAD order. The order had not been placed with and had not been done by or through Silver Stream. Instead it was work that Ms Pickett have been doing privately. He also said that he thought the Ms Pickett's lifestyle did not match with the salary that he was paying her.
131. He believed that Ms Pickett was breaching her contract because she was poaching potential customers or diverting away work that might come to Silver Stream. Even if he had in turn to decline it or sub-contract it, it was work that was of the type his business did or might consider doing. We do not have to decide if in fact there was a breach of contract, so we put that to onside. We are satisfied that the belief was genuine, whether or not it was legally unsound.
132. Mr Gray discovered that Ms Pickett have been doing her own work using the office computers. Although he tells us there was Active Track software installed on the computers which took snapshots of what was being displayed, based on his own evidence we are satisfied that what in fact he did was this: He went to Ms Pickett's workstation and logged in. Whilst on the workstation he accessed Ms Pickett's email because the password was saved onto the computer. He then went through the email to look for evidence of her trading with other people. The email account, however, contained a lot of sensitive personal information relating to Ms Pickett's transitioning. He also deleted the login history to hide his tracks. We accept Mr Gray's evidence that he did not read this sensitive personal information and that it was not his primary purpose for hacking her email account.
133. The employment contract did not entitle him to access any employee's personal email accounts. There was no policy in place that authorised him to do this. Mr Gray said that employees were warned that and knew that Active Track was installed on the computers. We reject this. We have seen no evidence that such warnings were in place. There is no warning that Silver Stream reserved the right to do this. Installation of that software did not amount to an entitlement to hack a personal email account. There was no consent from Ms Pickett for him to do this.
134. Mr Gray also discovered that Ms Pickett had been using the CAD software that Silver Stream had provided to carry out her private work. There was a dispute about how much the software cost and whether the software was specialist or not. We do not think that is to the point. It is clear the software was provided in order to facilitate Silver Stream's business and only Silver Stream's business. At no point did Ms Pickett ask for permission to use Silver Stream's resources for her own private work.
135. On 7 February 2018 Silver Stream suspended Ms Pickett and invited her to a disciplinary hearing 2 days later. We think that the allegation was clear:
"You have taken advantage of the company's customer and supplier contact for your own personal gain. It is understood that many opportunities to the business that you have been aware of having withheld from the company and subsequently you have engaged directly with these third

parties in order to offer your direct services to them. This has resulted in financial gain to you personally as imposed loss of business to Silver Stream Trading Ltd.”

136. There was no investigation meeting before giving her this letter. Furthermore, this letter did not include the evidence on which Silver Stream relied.
137. On 9 February 2018, the disciplinary hearing took place. Before the meeting, Ms Pickett handed to Mr Gray her grievance. The grievance says in the first paragraph:
“I also wish for these representations to be considered in the context of the proposed disciplinary.... However, it is clear that the attitude of the company towards me has changed dramatically as a result of a protected characteristic and is the real reason for the company/[Mr Gray] to want to terminate my employment.”
138. She accepted in cross-examination that the phrase “protected characteristic” was a legal phrase. She accepted that she had at this point taken professional advice and retained the services of a solicitor from this point onwards. She accepted this was where the phrase had come from.
139. At the disciplinary meeting itself Silver Stream had retained a Ms Fay Anderson, who was an independent human resources consultant, to conduct the meeting. Ms Anderson agreed to send to Ms Pickett the evidence upon which Silver Stream relied Ms Pickett confirmed that she wished for Mr Gray to read her grievance letter because
“I believe it will have an impact on the decision made.”
140. This confirms to us that the grievance was about a defence to the disciplinary proceedings more than anything else. We are fortified in that conclusion because nowhere did Ms Pickett actually address the allegation that had resulted in the disciplinary proceedings.
141. The meeting was adjourned by agreement to 12 February 2018.
142. After the meeting, Ms Anderson sent the evidence to Ms Pickett. She also changed the disciplinary meeting to a grievance meeting to be chaired by one of her colleagues, who was also an independent human resources consultant.
143. The evidence was documents from the email and the workstation. A number of them are invoices for work done by Ms Pickett’s company Ubiquitous Engineering. Some of those documents are the designs that Ms Pickett had done using Silver Stream’s CAD software. It is quite apparent from the printouts sent to Ms Pickett that Mr Gray would have been able to see the senders of emails to Ms Pickett and the emails’ subject lines from which it would in many cases be able to discern what the email may be about and what it contained.
144. On Sunday 11 February 2018, Ms Pickett resigned with immediate effect. Silver Stream did not receive the letter until the next day, however. In her resignation letter, she asserted that she had been constructively unfairly dismissed because of fundamental breaches of the duty of mutual trust and

confidence. This was a legal phrase that had come from her solicitor. In that letter, she complained about disciplinary process but also about the access to her personal email account. She said:

“I have just discovered that you have been covertly remotely monitoring not only the computer I have been using at work, but also my personal email account, over a protracted period of time. You have unlawfully process my data and, to my personal emails, my sensitive personal data. These are serious breaches of data protection legislation.”

145. Given the sequence of events and the paragraph that we have quoted above, we are quite satisfied that it was the discovery that Mr Gray had hacked her email account that triggered the resignation.
146. Overall, we conclude that Mr Gray’s conduct was born out of anger and frustration towards Ms Pickett, and a failure to understand or find out how to go about conducting a fair disciplinary process. He felt let down.
147. As part of a disciplinary process in preparation for this case, an issue arose in relation to Ms Pickett’s “personal diary”. This is not a diary as such but a standard stationary notepad of which Silver Stream kept a stock and which any employee was able to access. It was made available so employees could make notes relating to their jobs or roles. Ms Pickett has supplied photographs of the diary on her desk which she says that she took to show a friend how her workstation was set up. She says that she told Mr Gray prior to disciplinary where her diary was and that she required it. The respondents’ witnesses deny seeing it and cannot explain what has happened to it. Having looked at the photograph, it seems to us there is nothing particularly special about it or which stands out about this diary. It is unremarkable and we can understand why no-one might have a recollection of it. It would not be obvious that it contained relevant information to the disciplinary process or evidence against the respondents. We would expect that anyone would have kept such notes at home or on their computer, not in a book visible on the desk for one’s employer to see. We could see how it be the sort of thing that could easily be lost. We cannot determine what has happened to this diary. However, we are not satisfied there is any evidence of a malevolent motive underpinning its disappearance. In any event, it does not seem to have stopped Ms Pickett from putting forward her case.
148. About this time Silver Stream had placed adverts for an additional repair technician. The job included workshop-based repairs of 3-D printers, testing and evaluation of new products, the listing and resale of refurbished printers, keeping warranty parts in stock and assisting with deliveries. Neither the new role’s responsibilities and duties nor the qualifications and skills required CAD skills. The salary range was between £18,000-£25,000. We do not consider this to be the same job as that which Ms Pickett was doing. Firstly, we note that it is described as “additional repair technician”. Secondly, we note it did not require any CAD skills like those possessed by Ms Pickett. It is a step below Ms Pickett’s role.
149. Ms Pickett had shotguns and shotgun licences. Mr Roulstone reported to the police his concerns that Ms Pickett had access to shotguns after her

resignation. He was concerned about her mental health and her behaviour at the time. He was concerned that she might therefore do herself harm. Explaining his concern to us in evidence he talked vividly about his time as a police officer and turning up to a scene where he had to remove “someone’s brains from the ceiling”. Ms Pickett pointed out that Mr Roulstone waited a few days before making his report. On balance, we do not believe that the report was unjustified or malicious. The delay does not help as one way or the other. We conclude that Mr Roulstone was genuinely concerned and that he genuinely felt after careful consideration that he had no choice but to report it. Others may have acted differently. However, we are not satisfied his act was unreasonable. Ultimately it would have been up to the police to decide how to proceed with his report. We do not believe that their decision as to how to proceed is Mr Roulstone’s responsibility.

150. After Ms Pickett’s employment ended, she became aware that Mr Gray had told others about her attempting to cause him a loss and to steal from his company. There is email evidence that shows the comments that Mr Gray had put about. In an email forwarded by Mr James Preen to Ms Pickett on 11 April 2018, he included information have been provided to him. It was a quote from another email. We are satisfied that it was written by Mr Gray. It reads:

“Please do not take any queries from [Ms Pickett], [she] no longer works for or represents our company... Be very careful [she] goes into a few different guises, one being “Ubiquitous Engineering Ltd”. Open square bracket. She] failed to attend a disciplinary meeting for gross misconduct and theft and resigned on 12 February, there is a criminal investigation outstanding on [her],

“[She] is a thief and stole £1000.00s of company intellectual property, which we aim to recuperate. Please be aware.”

151. We are satisfied Mr Gray made other comments of a similar nature to other potential customers of Ms Pickett. It seems entirely consistent with the frustration that he felt towards Ms Pickett. We see no basis, however, for believing it is in any way connected with her protected characteristic. We make no observation on whether the comments are libellous. We can say we saw no evidence that Ms Pickett had stolen intellectual property from Silver Stream.

Holiday

152. When Ms Pickett’s employment came to an end on 12 February 2018, she had taken 3 holiday days for the 2018 leave year.
153. During the 2017 leave year, Ms Pickett had never asked to take more than the 20 days that her contract said, erroneously, was her entitlement (the law clearly entitles her to more). Silver Stream had never denied her the opportunity to take leave to which she was entitled during that leave year.

Law

Assessing evidence

154. The respondents drew our attention to the case of **Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)**. The case concerned

a commercial dispute in which the relationship broke down and the Court had to decide what had happened about 10 years' before. Leggatt J expressed observations in paragraphs [15]-[22] about the fallibility of memory.

"18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time..."

His Lordship then made remarks about in commercial cases one should base factual findings on inferences drawn from the documentary evidence and known or probable facts. He said at [22] that

"[It] is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

155. We have reminded ourselves that memory is fallible and can be influenced by emotions after the event, conscious or subconscious bias. We have reminded ourselves that even honest and confident witnesses can be mistaken. We have reminded ourselves context is important and that contemporaneous documents can provide a real insight about what happened.

156. However, we have also borne in mind the observations of the Court of Appeal in **Kogan v Martin [2020] FSR 3** at [88]-[89], an intellectual property case that turned on the recollections of individuals. The Court said

"88. ... We start by recalling that the judge read Leggatt J's statements in **Gestmin v Credit Suisse** and **Blue v Ashley** as an 'admonition' against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, ... **Gestmin** is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay **The Judge as Juror: The Judicial Determination of Factual Issues** (from **The Business of Judging**, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

"89. Secondly, the judge in the present case did not remark that the observations in **Gestmin** were expressly addressed to commercial cases. ... Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that

details of all their interactions over the creation of the screenplay would be fully recorded in documents. Ms Kogan's case was that they were bouncing ideas off each other at speed, whereas Mr Martin regarded their interactions as his use of Ms Kogan as a sounding board. Which of these was, objectively, a correct description of their interaction was not likely to be resolved by documents alone, but was a fundamental issue which required to be resolved.”

Constructive unfair dismissal

Case law

157. In **Western Excavating (EEC) Ltd v Sharp [1978] QB 761 EWCA** Lord Denning MR said that

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract because of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Implied term of trust and confidence

158. In every employment contract there is a term implied that the employer shall not without reasonable and proper cause conduct itself in manner calculated to or likely to destroy or seriously damage relation of confidence and trust between the employer and employee: **Omilaju v Waltham Forest LBC No2 [2005] ICR 481 EWCA**.

159. A breach of the implied term is by very nature repudiatory: **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA** and **Morrow v Safeway Stores [2002] IRLR 9 EAT**.

160. Breach of anti-discrimination legislation can be (but is not automatically) a breach of the implied duty of mutual trust and confidence: **Shaw v CCL Ltd [2008] IRLR 284 EAT**.

161. While bad practice by an employer is a factor to consider, it is not enough by itself to amount to a fundamental breach.

162. In **Omilaju** the court of appeal gave tribunals guidance about factors to consider when there are a series of acts and an employee alleges the final act in that series caused the employee to quit (what is called the final straw)

162.1. The final act should be an act in a series whose cumulative effect is to amount to a breach of the implied term.

162.2. "an act in a series" means, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

162.3. It need not be of the same character as preceding acts.

Role in resignation

163. A fundamental breach must play a part in resignation but need not be only or effective cause: **Wright v N Ayrshire Council 2014 ICR 77 EAT**.

Key questions

164. in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA** the court set out five questions the Tribunal should ask in a case for constructive unfair dismissal

164.1. What was most recent act (or omission) that triggered or caused the employee to resign?

164.2. Has the employee affirmed the contract since that act?

164.3. if no, was the act or omission itself a repudiatory breach?

164.4. if no, was it part of a course of conduct which taken together amount to breach of implied term of trust and confidence?

164.5. if yes to either of the preceding questions, did the employee resign in response to that breach?

Affirmation

165. A person must make up his mind soon after the conduct of which he complains about occurred: **Bournemouth University HEC v Buckland [2010] ICR 908 EWCA**. Although given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has really been an affirmation.

Objective assessment

166. The Tribunal must assess the matter objectively. The motives of the parties or their subjective intentions are irrelevant: **Leeds Dental Team v Rose [2014] ICR 94 EAT**.

Whether prior breach is a defence?

167. The respondents argued that if Ms Pickett were in repudiatory breach of contract herself before she resigned, then Silver Stream would have an absolute defence to her claim. They drew the Tribunal's attention to **Boston Deep Sea Fishing and Ice Company v Ansell (1889) 39 ChD 339 EWCA** in support of this proposition. In **RDF Media Group plc and aors v Clements [2008] IRLR 207 EWHC(QB)** the High Court (Mr Bernard Livesey QC) suggested this principle applied where the employee had resigned rather than where the employee had been dismissed.

168. Ms Pickett argued that this approach was incorrect. She argued that the contract of employment continues until an employer terminates the employee's employment. Therefore, the fact there may have been an

earlier repudiatory breach by the employer is not to the point, and the employee can still rely on the employer's own repudiatory breach in a claim for constructive wrongful dismissal. Specifically, in a claim for wrongful constructive dismissal, an employer may not defend the wrongful dismissal by pointing to a prior repudiatory breach by the employee. Ms Pickett referred the Tribunal to **Atkinson v Community Gateway Association [2015] ICR 1 EAT**.

169. The Tribunal appears to have 2 conflicting decisions. The Tribunal adopts the approach of the Employment Appeal Tribunal.
170. **Atkinson** is the more recent of the 2 decisions. It expressly considered this issue as part of its ratio. It expressly considered **RDF Media Group** in coming to its conclusion and declined to follow it.
171. The Appeal Tribunal's discussion and reasons in **Atkinson** show that its approach is supported by other persuasive authority.
172. We thus consider we are bound by **Atkinson** in any event.
173. If we are not bound by that case, we would still follow it. The Tribunal considers that as a basic principle of contract law a person's own breach of contract does not bring that contract to an end. Whether the contract ends because of that breach depends on the nature of the breach but also the innocent party's reaction when they become aware of it. By the same logic the innocent party remains bound by the contract until they accept the repudiatory breach as discharging the contract. That analysis accords with **Atkinson**. As we note **Atkinson** accords with other persuasive authorities cited within it.
174. **Atkinson** concerned a constructive unfair dismissal. In **Atkinson** the Appeal Tribunal said at [34]
"If the originally offending party was an employee who subsequently brought a constructive dismissal claim based on the employer's subsequent breach, the employment Tribunal would inevitably be invited to and would have to consider reducing compensation, if the dismissal were shown to be unfair, by 100% or by a lesser proportion as appropriate if it were established that, because of the employee's original breach he could and, if the employer had known about it, would have been fairly dismissed in any event."
175. There is no suggestion in **Atkinson** or the other cases referred to by the Appeal Tribunal that the employee's prior repudiatory breach would entitle the employer to withhold notice pay. In our opinion to reduce the compensation for wrongful dismissal because of prior conduct would be contrary to the principle that the prior conduct is not relevant to the question of whether a constructive dismissal by an employer is wrongful.

Failure to pay holiday pay

176. The **Working Time Regulations 1998 regulation 30** entitles a worker to bring a claim for a failure to pay holiday pay in respect of holiday to which they were entitled but had not taken at the end of their employment, as required by **regulation 14**.

177. Any claim must be made within 3 months of the date on which the entitlement fell due, or if it were not reasonably practicable to present the claim in time, to bring it within such time thereafter as was reasonable.
178. The claim was not alternatively pursued as a claim for unlawful deduction from wages under the **Employment Rights Act 1996 part II**.
179. **Regulation 14** (as in force at the time) provides as relevant:
“...(2) where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
“(3) the payment due under paragraph (2) shall be–
“(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
“(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–
“(a × b) – c
“where–
“a is the period of leave to which the worker is entitled under regulation 13 and regulation 13a;
“b is the proportion of the worker's leave year which expired before the termination date, and
“c is the period of leave taken by the worker between the start of the leave year and the termination date....”
180. **Regulation 14** does not provide for the rounding up or down of leave entitlement.
181. The regulations do not allow for the carry-over of leave a worker is entitled to under the regulations to which a person was entitled but did not take from one leave year to the next if the worker had an effective opportunity to take it but did not do so: **Kreuziger v Land Berlin c-619/16 ECJ** and **Max-Planck-gesellschaft zur Förderung der Wissenschaften EV v Shimizu c-684/16 ECJ**, unless an employer refused to allow an employee to take it: **King v Sash Windows aors [2018] ICR 693 ECJ** or in the case of illness: **Stringer aors v HMRC; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] ICR 932 ECJ**.

Discrimination and harassment

182. The **Equality Act 2010 section 39** prohibits an employer from discriminating against or harassing an employee. Discrimination could include dismissal.
183. **Section 108** extends the protection to relationships that have ended.
184. The **Equality Act 2010 section 7** identifies “gender reassignment” as a protected characteristic.

Direct discrimination

185. The **Equality Act 2010 section 13** provides (so far as relevant)
“(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...”
186. Whether treatment is less favourable is to be assessed objectively: **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT**.
187. Where there is no actual comparator, the Tribunal must construct a hypothetical comparator from the circumstances of the case to determine if there is properly discrimination (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 UKHL**; **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646 EWCA**) unless the reason for the conduct is plain **Stockton on Tees Borough Council v Aylott 2010 ICR 1278 EWCA**.

Harassment

188. The **Equality Act 2010 section 26** provides (so far as relevant)
“(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.
“...
“(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.”
189. The Tribunal should:
- 189.1. consider the 3 elements separately even though they overlap,
- 189.2. have regard to the context to assess if it was reasonably apparent what was the purpose or effect,
- 189.3. be sensitive to hurt that result from offensive comments or conduct but seek not to encourage a culture of hypersensitivity (see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**).

Burden of proof under the Equality Act 2010

190. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen**

Ltd aors v Wong aors [2005] IRLR 258 EWCA; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 EWCA; Hewage v Grampian Health Board [2012] ICR 1054 UKSC and Madarassy v Nomura International plc [2007] ICR 867 EWCA.

191. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage.
192. It is not enough for a claimant to show merely that they have been treated less favourably than the comparator and for them point to a protected characteristic: **Madarassy**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.
193. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.
194. If the claimant succeeds in showing that there is on the face of it unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.
195. Where there has however been unreasonable conduct, the critical question is whether the respondent would have behaved in the same way towards the comparator: see **Glasgow City Council v Zafar [1997] IRLR 228 UKHL(Sc)**.

Time limits

Reasonably practicable (holiday pay)

196. Under the **Working Time Regulations 1998 regulation 30** requires a claimant to present a claim within 3 months of either being denied holiday pay or being denied the opportunity to take holiday unless it is not reasonably practicable to do so, in which case it must be presented in such further period as the Tribunal thinks is reasonably practicable.
197. As to the approach to take, we understand the law to be as follows:
 - 197.1. The words should be given a 'liberal construction in favour of the employee' **Dedman British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**
 - 197.2. It is a factual question: **Wall's Meat Co Ltd v Khan [1979] ICR 52 EWCA**
 - 197.3. It is for the claimant to prove it was not reasonably practicable to present the claim in time.
198. The relevant test "is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to

expect that which was possible to have been done”: **Asda Stores Ltd v Kauser EAT 0165/07.**

Just and equitable (discrimination claims)

199. The **Equality Act 2010 section 123** requires a claim to be presented within 3 months of the act complained of, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. The factors in the **Limitation Act 1980 section 33** can be a useful aide but are not prescriptive: **Southwark London Borough Council v Afolabi 2003 ICR 800, CA.**
200. Those factors are:
- 200.1. the length of, and the reasons for, the delay on the part of the plaintiff;
 - 200.2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed...
 - 200.3. the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
 - 200.4. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
 - 200.5. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
201. the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
202. Ultimately the Tribunal has a broad discretion when weighing up all the circumstances, but length of delay and reasons for it are always relevant, as is the prejudice to the respondent if a claim that is out of time is allowed to proceed: **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 EWCA**

Conclusions

203. Based on the findings of fact set out above our conclusions are as follows.
- Wrongful constructive dismissal***
204. Ms Pickett resigned because she discovered that Mr Gray had hacked into her personal email. It was that hacking therefore that was the reason for the resignation.
205. She resigned very soon after becoming aware of this. There was no affirmation of the contract of employment by her.

206. Mr Gray had no entitlement to access her email. It was plainly private and confidential. We conclude that no reasonable employer in Mr Gray's or Silver Stream's position thinking about the situation for just one moment would have believed that they had any entitlement to hack her email. We believe that it was a gross and unjustified violation of her privacy. We cannot see how it would be any different to intercepting her private mail and going through it. If the respondent had wanted access to her email, then they should have sought access by lawful means. They did not.
207. We are therefore satisfied that this itself is enough to amount to the breach of the implied term of trust and confidence.
208. She resigned in response to the breach.
209. It follows therefore that Silver Stream wrongfully dismissed Ms Pickett.
210. The claim for wrongful constructive dismissal succeeds. Ms Pickett is entitled to 1 months' notice pay as set out in her contract of employment.

Failure to pay holiday pay

211. By February 2018 Ms Pickett had a solicitor advising her who, in the absence of evidence or a suggestion to the contrary, we must assume was giving her competent legal advice. Ms Pickett must therefore be taken to know of the impending deadline for bringing a claim. There is no evidence that it was not reasonably practicable for her to present the claim in time. The claim for the holiday year 1 January 2017 to 31 December 2017 is therefore out of time.
212. Even if it we extended time, we would have dismissed the claim in respect of the 2017 holiday year because we have been given no evidence that Silver Stream stopped her from taking holiday to which she was entitled under the **Working Time Regulations 1998**.
213. For the year commencing 1 January 2018, Ms Pickett had taken 3 days holiday. 43 days elapsed between the start of the year and 12 February 2018 when Silver Stream received her resignation.
214. Applying the formula in **regulation 14** we get
- $$\left(28 \text{ days} \times \frac{43 \text{ days elapsed}}{365 \text{ days in total}}\right) - 3 \text{ days taken} = 0.3 \text{ days}$$
215. Therefore, we award 0.3 days unpaid holiday.

Direct discrimination and harassment

Generally

216. We have set out in detail our findings of fact above.
217. We summarise our conclusions together rather than allegation by allegation for the sake of brevity and clarity. However, we considered each allegation individually and reminded ourselves that it does not follow that because one allegation succeeds or fails (as the case may be) it means that another should succeed or fail.
218. In short, on the facts found, we concluded that her gender reassignment played no role in anything that happened. It was not a motivating factor.

Re Silver Stream on or after 9 February 2018

219. We first considered the claims for direct discrimination.
220. There is no real-life comparator. We identified therefore a hypothetical comparator. We concluded that this would be someone in Ms Pickett's situation but who did not have the protected characteristic of gender reassignment.
221. We have concluded that if the hypothetical comparator were in Ms Pickett's situation, the comparator would have been treated the same.
222. The motivations for how Silver Stream's employees and director behaved were not because Ms Pickett had the protected characteristic of gender reassignment. It was as described in our findings of fact.
223. Therefore, in relation to each allegation, we conclude there were no facts proven by Ms Pickett from which we might conclude in absence of an explanation that she had been directly discriminated against as she alleged.
224. We can however go further and say that we are quite satisfied from the facts found that Silver Stream would have proven that her protected characteristic played no role in what happened.
225. We then considered harassment. We conclude that the facts found do not demonstrate any situation in which, absent explanation, we could conclude that Silver Stream had acted with either the proscribed purpose or that its conduct had the proscribed effect (as defined under the **Equality Act 2010 section 26**). More specifically we concluded that, however Silver Stream behaved, there are no facts from which we could properly conclude that absent explanation any of the alleged harassment was motivated at all by gender reassignment.
226. Therefore, there is no discrimination nor harassment after 9 February 2018 by Silver Stream. Any claim for discrimination or harassment from before that date therefore is out of time.

Re Mr Gray on or after 15 February 2018

227. We did a similar exercise for the allegations against Mr Gray personally. We used the same comparator.
228. We concluded that Mr Gray would have behaved the same towards the hypothetical comparator as he did towards Ms Pickett.
229. In our judgment there were no facts proven by Ms Pickett from which we might properly conclude in absence of an explanation that she had been directly discriminated against as alleged by her.
230. We can however again go further and say that we are quite satisfied from the facts found that Mr Gray would have proven that her protected characteristic played no role in what happened.
231. We then considered harassment. We likewise conclude that the facts found do not demonstrate a situation in which, absent explanation, we could properly decide that Mr Gray had acted with either the proscribed purpose or that his conduct had the proscribed effect (as defined under the **Equality Act 2010 section 26**). More specifically we concluded that, however Mr

Gray behaved, there are no facts from which we could properly conclude that absent explanation the behaviour was motivated at all by gender reassignment. He did not harass her as she alleges.

232. Therefore, there is no discrimination nor harassment after 15 February 2018. Any claim for discrimination or harassment from before that date therefore is out of time.

Is it just and equitable to extend time?

233. We do not think it is just and equitable to extend time.

234. Ms Pickett has provided no evidence that explains why she was unable to bring her claims in time. She had a solicitor advising her from the time of the grievance onwards so we must presume in the absence of evidence that she had access to competent legal advice and that she was aware of the time limits.

235. The respondents did nothing that might dissuade her from bringing a claim. They did not mislead her either as to her rights.

236. In closing submissions Ms Pickett suggested the delay was because she was awaiting her household insurer to grant an indemnity for legal representation. There is no evidence of that. Submissions are not evidence. In any event we do not see that as an excuse because we cannot see how it stopped her presenting her claim.

237. There is no disability advanced that could explain the delay. There is also no explanation why Ms Pickett did not act until after the start of the disciplinary process. There was no reason for her not to bring her claims earlier.

238. Even if we had extended time, based on the facts we have found, we would have concluded that Ms Pickett had failed to establish facts from which we might properly conclude that there had been either further direct discrimination or further harassment because of gender reassignment as she alleges. If we had had to go beyond that, we would have concluded furthermore that the respondents had shown the reason for any treatment was not connected to her gender reassignment.

Employment Judge Adkinson

Date: 3 July 2020

Judgment sent to the parties on

10/07/2020.....

For the Tribunal office

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