



EMPLOYMENT TRIBUNALS

Claimant

Ms N Lee

Respondents

- (1) Splunk Services UK Ltd
- (2) Julie Ward
- (3) Steven Gracey
- (4) Guy Bloch

Heard at: London Central

On: 10 – 13, 17 - 18 December 2019.

In chambers: 19 December 2019; 18 and 20 March 2020; 6, 8 and 9 July 2020.

Before: Employment Judge Lewis
Mr J Carroll
Mr D Kendall

Representation

For the claimant: Mr S Tibbits, Counsel

For the 1st – 4th respondents: Ms J Mulcahy, QC

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. The claimant was unfairly dismissed by the 1st respondent.
2. The 1st and 3rd respondents (but not the 2nd respondent) treated the claimant less favourably because of sex contrary to s11 and s13 of the Equality Act 2010:
 - By removing her CR and AY accounts, and doing so without consultation
 - By attempting to remove her CX account
 - By allocating CR and AY to Mr Dosanjh
 - By allocating CX to Mr Laws
 - By not assigning the claimant with large accounts such as AV and CV

3. The 1st respondent treated the claimant less favourably because of sex by failing to make a finding on the allegation of race and sex discrimination in relation to the EMEA Salesperson of the Year Award. This was also victimisation contrary to s27.
4. The 1st respondent did not otherwise treat the claimant less favourably because of her sex in the appointment of the grievance officer or the conduct of the grievance and grievance appeal procedures.
5. The 2nd respondent did not treat the claimant less favourably because of her sex in the appointment of the grievance officer or the conduct of the grievance and grievance appeal procedures.
6. The 1st and 4th respondents did not treat the claimant less favourably because of sex by not awarding her the FY2018 EMEA Salesperson of the Year Award.
7. The 1st and 3rd respondents did not treat the claimant less favourably because of sex or victimise her by failing to amend her sales targets to reflect the change in her accounts.
8. The 1st respondent did not victimise the claimant by:
 - Failing to appoint an experienced and impartial person to chair the claimant's grievance
 - Refusing at the grievance appeal stage to make findings on discrimination
 - Refusing to comply with or adequately respond to the claimant's SAR
 - Withholding or delaying commission payments
 - Not upholding any part of the claimant's grievances
 - Not returning the claimant's previous accounts to her.
9. The 2nd respondent did not victimise the claimant by
 - Failing to adequately investigate the issues raised in her grievance
 - Taking over the grievance investigations despite being personally conflicted
 - Refusing to adequately respond to or address the claimant's SARs.
10. The 3rd respondent did not victimise the claimant by
 - Maintaining an unrealistic sales quota for FY19.
11. The 1st and 3rd respondents did victimise the claimant by failing to offer her BQ.
12. The successful sex discrimination claims are in time.
13. The claim for equal pay against the 1st respondent (based on like work with Mr Dosanjh) succeeds.

REMEDY

14. It is proposed that the remedy hearing take place on a remote video platform, which will almost certainly be CVP.
15. Within 21 days of the date these Reasons are sent out to the parties, the parties must:
 - a. Notify the tribunal whether it has been possible to agree compensation. If not –
 - b. Write to the tribunal confirming they are willing and able to participate in a CVP hearing or similar
 - c. Provide a time estimate, indicating how much of the estimate is allowed for their evidence and submissions and how much has been allowed for tribunal deliberation
 - d. Agree as many dates as possible which both parties and any necessary witnesses could attend in the period October 2020 – end February 2021. Once these joint dates are notified, the tribunal will revert with confirmation of the dates to be fixed as soon as possible
 - e. Provide the tribunal with directions for preparation for the remedy hearing.

REASONS

Claims and issues

1. The claimant brings claims for race and sex discrimination, constructive dismissal and equal pay based on like work.
2. The issues were agreed between the parties and are attached to the end of these Reasons.

Procedure

3. The tribunal heard from the claimant and, for the respondents, from Julie Ward, Steven Gracey, Guy Bloch, Scott Lewis and Richard Timperlake. There was an agreed trial bundle of some 1379 pages.
4. As the parties knew and were advised during the hearing, there was insufficient time within the original allocation for the tribunal to finalise its decision. This was in part due to a double-booking by the administration. It had been planned for the tribunal panel to meet again in March 2020 (the first available date) to finish. Unfortunately restrictions due to the Pandemic meant this was not possible. The panel subsequently met remotely, but there were further delays (i) for the parties to be able to find and send clean electronic copies of all the documentation and (ii) because of technological difficulties in

the panel's meetings on 18 and 20 March 2020. Eventually, however, the panel was able to meet virtually with a full set of electronic documents and no impediments to the discussion.

5. The respondents were concerned that the tribunal, when working remotely, would not have access to the original hard copy files, where it might have marked up documents and made notes. The tribunal discussed this concern but did not think it caused any problem in reality. Very thorough notes were taken separately by the Judge as well as each non-legal member, including page references. Moreover, the tribunal had already worked on the decision for one full day at the tribunal with the hard copy papers. The tribunal did not consider any highlighting on the documents would add anything. Further, this has to be balanced against the effect of yet further delay before the panel could meet in person and the effect that would have, not only on the parties having to wait, but on the freshness of the tribunal's memory of what took place.

Fact findings

6. The 1st respondent is a US-based multi-national company. Its HQ is in San Francisco. It was founded in 2003 and has grown very fast. It has expanded from about 600 employees when the claimant started in 2013 to about 4,700 employees worldwide today. The 1st respondent produces software for monitoring, searching and analysing machine-generated data.
7. The claimant was originally recruited on 4 February 2013 as a regional sales manager ('RSM'). She worked within a UK sales team. The role of the claimant and other sales reps was to win customers and manage long-term relationships with a view to obtaining additional work in the future.

Remuneration

8. Clause 5 of her contract gave the claimant a basic annual salary (at that time £75,000) plus 'variable compensation' of \$75,000 for an annual OTE (on target earnings) of £150,000 for 2013. Clause 6 of the claimant's terms and conditions said:

'You will be entitled to participate in the Company's commission payments, which are paid on a monthly basis. The details of the commission plan can be found in the Company's commission policy document. Any entitlement to commission will be subject to the rules of the plan from time to time in force and the Company reserves the right to amend, change or cease the plan at any time.'

9. The commission arrangements were set out in an annual 'compensation plan' document. The 1st respondent's fiscal year ran from 1 February and was named retrospectively so that, for example, FY2018 would mean 1 February 2017 to 31 January 2018.

10. The claimant's remuneration package therefore comprised her base salary, the OTE and commission. The OTE was based on a 'quota' ie an individual sales goal assigned to her. If she hit the quota, she would be paid the OTE. The claimant also received commission. The commission rate varied according to the percentage by which she met or exceeded her quota.
11. On 1 March 2014, the claimant's job title changed to Global Account Manager (code S530). By the time she resigned, her basic salary and her OTE had each increased.
12. In the tax year ending 4 April 2018, the claimant earned \$977,376.11 in total. The previous year she earned \$508,111.28 and the year before that (y/e 5 April 2016), \$364,352.10.
13. Employees who had met their quota for at least 9 months during the previous financial year and who were in good standing were eligible for the 'President's Club'. This was an annual incentive trip for 'top performing participants'. The claimant won the 'Diamond award' for attending the President's Club 5 years in a row and was presented with a Rolex watch in February 2018.
14. The claimant had also been awarded EMEA Salesperson of the year for FY15. EMEA was the Europe, Middle East and Africa Region.
15. Clause 37 of the claimant's contract said

'Minor changes in these terms of employment will be notified in writing. You will be given at least one month's notice of major changes to these terms of employment and it will be taken that you have accepted the changes if you do not indicate to the contrary within that period of time.'

The 1st respondent's structure

16. The relevant structure of the 1st respondent was as follows. The claimant reported to the Director of Sales UK. From 1 November 2016 – 23 March 2018, this was Colin Ferguson. He was replaced by Steven Gracey (the 3rd respondent). Mr Gracey started in February 2018 and overlapped with Mr Ferguson for about 5 weeks. The claimant did not meet Mr Gracey before she went on unpaid leave on 12 February 2018 and the major changes were made as described below.
17. The Director of Sales UK reported to the Area Vice President for Sales UK and Ireland ('AVP'). This was Alan Banks from March 2017 to July 2018.
18. Mr Banks reported to Guy Bloch (the 4th respondent). Mr Timperlake replaced Mr Bloch in September 2018. Mr Bloch was the 1st respondent's Chief Operating Officer for EMEA. He tended to deal with Mr Banks and others at that level. Mr Bloch reported to the Head of Sales Worldwide, Susan St Ledger. She was based in the USA.

19. At the time of the tribunal hearing, Mr Banks was working for Mr Bloch, both having left the 1st respondent by then.
20. The claimant had few dealings with Mr Banks and never had a one-to-one meeting with him. She attended his mandatory Monday training sessions. Mr Banks was not a witness at the tribunal.
21. In June 2017, Mr Banks appointed Mr Lynskey as Enterprise Sales Director (UK). They had previously worked together in Marketo, LivePerson and Adobe. Mr Banks had also previously worked with Miss Ward at Adobe.

CR and AY

22. In FY18, the claimant had two large accounts, CR and AY. These had been her clients for several years (CR since 2015 and AY since 2013 when she started with the 1st respondent). CR had been classed as a global account since 2015. The respondent created an official Global Accounts Program in 2017 and CR was the nominated account for EMEA. Ms St Ledger was the executive sponsor and the claimant was Global Account Manager.
23. The claimant set the level of interaction between the 1st respondent and her two big clients. For example, there were nearly 80 meetings with AY's procurement team. The claimant ensured there was 'executive alignment' in that the 1st respondent's CEO met AY's CEO, Chief Operating Officer and Chief Digital Officer; the 1st respondent's Senior Vice President of Security Markets met AY's Chief Information Security Officer and so on. Similarly, the claimant arranged for all senior executives at the 1st respondent to meet key individuals in CR at their level.
24. In December 2017 as mentioned below, the claimant closed large deals for each of CR and AY. Although a large team was involved working on these deals, the claimant was the lead. The deals were the product of work built up by her and her team in previous years
25. On 31 January 2017, Mr Bloch had sent an email to the claimant and others:

'Now ... here is to the biggest EMEA deal of the quarter. Masterful job from building the campaign to maturing and closing the deal. It took a village to win AV trust and we are now on a safe path to adoption and success with one of the largest banks in the world. So proud of your game and accomplishment, Nadine and Team. Respect!'

Mr Bloch also emailed the claimant:

Nice job on CR this year Nadine. You teed up the account to a BIG FY18. Congratulations!'

26. On 13 April 2017, Mr Ferguson had submitted the following write-up for the claimant to President's Club:

'Nadine's impact in EMEA has been nothing short of incredible. Her FY17 contribution shifted the dial for all of EMEA and set standards in the team that everyone aspires to....Nadine always puts her customers first and is known for her ability to enable them to be hugely successful. Nadine has become part of the family at CR and they have all but given her, her own desk for the year ahead ...'

27. On 14 June 2017, the claimant was awarded a one-time spot bonus (£70,000 + 1500 RSUs). Mr Ferguson wrote 'This is a very extraordinary reward and is in recognition of the contribution you made to the business in FY18. The award was made 'in the spirit of recognising outstanding performance and contribution to Splunk.'
28. Mr Bloch says he knew the claimant was one of the top performers within the EMEA team even before he moved from the respondent's US office to EMEA in October 2012. He says senior leadership would occasionally discuss key individual contributors in each theatre (ie region) and the claimant would be mentioned as a top performer. This continued after he moved to EMEA.
29. Mr Bloch says there were two occasions when he had to step in because of difficulties the claimant was having with her accounts. He says the first was in December 2016, when the claimant contacted Mr Bloch to ask for help with another account, AV. Mr Bloch contacted the AV project manager ('E') and also met her when he was in New York with Ms St Ledger. Mr Bloch says that E asked him to remove the claimant from the account. He says he told E that was not how the company managed deals, but he would step in and assist. Mr Bloch says he then helped the claimant close the deal.
30. The other example Mr Bloch gave was in December 2017, when he says the claimant contacted him for help with two CR deals. Mr Bloch says they had reached the point where the deal could have fallen through, so he met 'Y' in Israel to help secure closing the transaction.
31. Our strong impression is that Mr Bloch has exaggerated any difficulties in the claimant/client relationship in these two instances. Both deals went through. We have heard much evidence in this case about the number of meetings required at all levels to push large deals through and about how clients tend to like meetings between executives at equivalent levels. It seems to us that Mr Bloch was using his networking skills to help push the deals through. On 14 December 2016, for example, there was a meeting with Ms St Ledger, Mr Bloch, the claimant and a couple of others including the CEO of AV, who was senior to E. E was not present.
32. In the tribunal, Mr Bloch was not even aware that following the meeting the claimant had fostered good relations with the CEO who had in turn introduced her to another C-suite executive in AV. Mr Bloch was unaware that the claimant ran a weekly global call to which E was always invited. He

accepted that E thought Splunk was expensive. He accepted it was appropriate for the claimant to engage at all levels

33. Most significantly, Mr Bloch took no action against the claimant on either occasion, let alone put her on any kind of coaching plan. He relayed client concerns and made suggestions as to the next steps to push the deals through. We do not accept that was 'coaching' as he now characterises it.
34. Mr Bloch's response to E's request that the claimant be removed from the account suggests this was not in fact a deal-breaker for E. It also suggests that such issues did arise from time to time with clients and sales reps, and Mr Bloch's reaction was to find out the problem and smooth things out.
35. On 1 August 2017, there was an email exchange between Mr Ferguson and Mr Banks about account allocations, which floated whether to move the claimant off AY so that she could 'double down' on CR. Mr Banks asked Mr Ferguson what he recommended. Mr Ferguson said, 'Lets move it. She will kick and scream but it's a distraction to CR.' He went on to say that the only possible negative was that the claimant was 'wired into the US and has built their trust. Matt will need to insert himself fresh'. Matt was Matt Spence, who had been appointed by Mr Banks in August 2017 and had worked with him previously at Adobe. Mr Spence was in Mr Lynskey's team. As previously mentioned, Mr Lynskey had been appointed by Mr Banks in June 2017 and also had worked with him previously.
36. On 2 August 2017, Mr Banks emailed Mr Ferguson, 'Made the call to keep AY with Nadine. We can revisit if she leaves post CR deal.'
37. Once / year, the respondent carried out a calibration. This was an internal management tool. It could affect how many RSUs a person would get and could affect their promotion prospects. On 18 August 2017, Mr Wagenknecht (senior HR Director for EMEA) emailed Miss Ward to pass on a question from Ms St Ledger and Ms Miller (VP US HR Business Partner) as to why the claimant was put in the bottom middle column of the calibration. Miss Ward replied:

'From my recollection they felt Nadine was going to hit or exceed target but it was more around her style/manner and also Colin believes that once this year is up she will leave.'
38. On being informed of this, Ms Miller replied 'Curious why Colin thinks she will leave after this year? Are we OK with her leaving or how is he thinking about retaining her?' Miss Ward replied 'My impression was that they were OK with her leaving at the end of the year but I want to ensure this is still the thought'. On 21 August 2017, Miss Ward emailed again:

'Just some more confidential context on Nadine from Alan and Colin. She will definitely exceed targets this year due to the CR account. However their feelings are that although she is a good sales person, sometimes there is a style/manner issue and she sometimes needs hand-holding. They would definitely like her to stay until the end of this year as she is working on CR. But

they both feel that she is not that happy and may be looking to leave to either set up in New York or join a small start up. There have been items already actioned as retention such as RSUs and bonus etc and she will earn a very high level of commission this year however their motivation they believe is not really to stay here. Alan's viewpoint is that she is a good sales person, but not 'great' and he will have some 1:1s with her to gauge her motivation and intentions but does not wish to throw any more retention items her way as she needs to decide if her motivation is to stay here or her preference to join small start up or move abroad. If to stay here then they will look for suitable career options/account allocations etc for her.'

39. The claimant denies that she had said anything about wanting to leave or being demotivated at that stage and there is nothing in writing from her which suggests it. However, Mr Ferguson had gained the impression that she might want to leave to pursue other avenues.
40. On 13 November 2017, the claimant went to a meeting in New York with Ms St Ledger, Mr Donald (US Regional Sales Manager) and Mr McEwan, the CIO of CR. Mr McEwan told the claimant, 'I know my team likes working with you, as I haven't any complaints, and I would have'.
41. On 5 December 2017, negotiations between the respondent and CR were at a critical stage. A meeting was held. Given the size of the deal, the claimant asked Mr Ferguson and Mr Banks to join the meeting. This was standard practice for very large deals. Y and two others attended for CR. The claimant was the only woman in the room. According to the claimant, Y said that Splunk software was no good and he could replicate all its functionality with Elk (a competitor product). The claimant referred to a study done by the respondent's engineering team which showed that Splunk was faster than Elk. Y stormed out the room, returned a few minutes later, slammed his laptop down on the table facing the claimant, leaned into the claimant and said 'You see this slide? This shows Elk is better'. The claimant knew Y was misinterpreting the slide as her team had created it. However, she thought it best to say nothing. Y said, 'That's right I'm the technologist in the room, I don't want to hear another f-ing word about this again'. Mr Ferguson and Mr Banks said nothing to support the claimant. Mr Ferguson later told the claimant he would ask Y to apologise to her for his behaviour, but this never happened.
42. We accept the claimant's account of this. In emails between the claimant, Mr Banks and Mr Ferguson shortly afterwards talking about figures on the proposal, Mr Ferguson mentioned in passing, 'I know there is a [lot] of posture and emotion from Y at the best of times'.
43. The claimant remained on the account. Shortly after this meeting, Y came back with a counter-offer.
44. On 22 December 2017, Mr Bloch sent an email in relation to the \$3.51m deal with AY, 'Tremendous! Congratulations, Nadine and Team! Another big win for UK and for EMEA! So exciting to see all these deals landing everywhere' On 29 December 2017, Mr Ferguson circulated an email: 'It's

with enormous pride I can share that CR closed today for \$9.1m. We also have \$2.8m in services due to close next week. Well done Nadine and team!!! Truly exceptional.' Mr Banks sent a personal email congratulating the claimant on the same day 'on a truly outstanding month/quarter/year. EMEA's biggest ever deal and AY secured as a strategic Splunk customer, doesn't get much better. Thanks for your professionalism and persistence in getting these deals over the line.' There was also an email from Mr Atanu in the pre-sales team: 'Enormous congratulations to the whole team, spearheaded by Nadine under pretty testing conditions!' On 20 January 2018, Ms St Ledger sent emails congratulating them on getting the complex CR deal over the line. Mr Banks sent the claimant another congratulatory email on the final 12m CR deal on 22 January 2018.

45. In addition, Mr Ferguson emailed the claimant (on a date unknown) to say that at the next training session, he would like her to talk through with the team 'how you've successfully navigated CR's Managing Director level org-engagement initiatives, messaging etc.'

Global accounts and global account managers

46. The 1st respondent states that a Global Account Manager does not necessarily always have global accounts. AY was not in the global accounts programme in FY18 but was nevertheless a very big client. The job description for S530 states:

'Sells the organisation's products or services and maintains relationships with existing global/international accounts. Typical responsibilities include expanding and developing a global or international account and providing customer service, rather than acquiring new accounts May be a team leader and provide professional leadership and coordination for team on a single, key, global account. Significantly higher average quota and/or territory. Accounts are key, tightly strategic, and have complex requirements. Responsible for significant key partner relationship management and development. Responsible for the master strategy for strategic accounts and ensures the strategy is executed.'

The claimant's leave of absence: (10) 12 February to 7 May 2018 inclusive

47. On 16 January 2018, Mr Ferguson emailed Julie Ward in HR and Mr Banks to put forward a proposal that the claimant be granted 6 months' leave.
48. The proposal followed a discussion about the possibility of leave between the claimant and Mr Ferguson. Mr Ferguson mentioned a person in France who had been granted unpaid leave and the claimant had said 'That's pretty cool. How do you get one of those?'
49. In his proposal, Mr Ferguson stated that his justification for the proposal was that the claimant had been a consistent high performer over the last 4 years and her work effort and ethic had been the highest he had seen in the UK. He added,

'I have increased concerns Nadine is approaching a period of 'burn out' and unless we formulate a plan with Nadine her health may reach a point, in the near future, where she would need a pro-longed period of recovery/sick leave. Nadine is a high valued sales person that we wish to stay in the business. If we do not find a solution for Nadine I fear she will become an imminent flight risk.'

50. The proposal said it should be agreed in writing by the end of February with the claimant. The proposed terms were 6 months leave starting at the end of March to recharge her batteries. Up till the end of March she would continue to work on the CR and AY accounts while the respondent arranged a new account manager. She would use the time also to provide a full handover which did not impact on continuity. During the leave, the claimant would retain employee benefits, receive commissions for sales prior to her leave and vest and exercise any applicable RSUs, ESSP and other options.
51. Mr Banks and Mr Bloch were receptive to the idea. After some discussion regarding the terms and particularly as to how RSUs would vest during the period, a three month period of absence was agreed.
52. Miss Ward set out the formal terms of leave in a letter dated 30 January 2018 under the heading 'unpaid personal leave of absence'. The letter stated that the claimant's contract of employment would continue through her leave. It went on:
- 'The organisation has offered you this unpaid leave of absence as a goodwill gesture, please keep the terms of this confidential. As discussed you will return to the same role, Global Accounts Manager, on 8 May 2018 and you will be informed of your FY19 Territory assignment and compensation plan separately.'
53. The claimant accepts that she remained a Global Account Manager right up to when she later resigned and left the company.
54. On 7 February 2018, the claimant signed the FY19 Sales Incentive Compensation Policy. The Policy document states that 'you will not be eligible to receive incentive compensation if you do not accept your Compensation package'. At clause 13(b), the Policy states that the 1st respondent reserves the right at its sole discretion to modify or revoke the Package, though 'Any such changes must be in writing from the VP Sales Strategy & Operations or his/her designee. This includes but is not limited to changes to sales assignment, accounts, goals, Quota, territory, target incentive amounts and other matters addressed in a Compensation Package and/or any Plan'. The FY18 Policy Terms at paragraph 13(b) say that the 1st respondent 'reserves the right in its sole discretion to modify, replace, discontinue, extend, supersede or revoke the Compensation Package, in whole or in part, at any time, with or without notice.' It says that Notice of Plan modification will be provided in writing.
55. The claimant told Mr Ferguson and Miss Ward that she was 'incredibly appreciative' of the opportunity, which she knew was an exception for the 1st respondent.

Handover Mr Ferguson to Mr Gracey

56. Mr Gracey started with the 1st respondent on 12 February 2018. He had worked previously with Mr Banks and Miss Ward at Adobe.
57. On Mr Gracey's first day, Mr Ferguson provided him with a slides presentation on how they had closed FY18 and the view on FY19 which he had presented at the last QBR. These set out how the team members had performed in FY18. The claimant's bookings were \$19,316k her performance against her quota was 283%, she had two '7 figure wins' (\$12m for CR and \$3.5m for AY) and two accounts with C-level engagement (CR and AY). Mr Gambetta, Mr Bainbridge and Mr Harper each had bookings in the \$2000k or \$3000k range and were 53-57% against their quotas. They each had a single 7 figure win, \$1.3m (CX), \$1.4m (AN) and \$1.4m (BQ) respectively. Mr Gambetta and Mr Bainbridge did not have accounts with C-level engagement. The only other person in the team, a woman (Ms Monaghan) had significantly lower figures again.
58. Mr Ferguson also set out the account allocation for FY19. The claimant was allocated CR, AY, CU and CX.

The recruitment of Mr Dosanjh

59. Mr Ferguson was not involved in the recruitment of Mr Dosanjh. Mr Dosanjh was head-hunted by Mr Gracey. Mr Gracey had worked with Mr Dosanjh previously and had known him for 11 – 12 years.
60. Mr Gracey met Mr Dosanjh on 14 February 2018 and had a detailed conversation with him about joining the 1st respondent. Mr Gracey told the tribunal that he was looking for someone to manage the CV account because Mr Bainbridge would be leaving at the end of April 2018. Mr Gracey said he also knew at that stage that the 1st respondent needed someone else to manage the AY account, and he had in mind that he could give both these to Mr Dosanjh.
61. On 15 February 2018, Mr Gracey emailed Joe Browne, the EMEA Recruitment Manager, and asked him to get Mr Dosanjh into the interview process for a senior sales role working in his team. He mentioned that Mr Dosanjh had worked with him and Mr Banks across HP Software, Adobe, Pivotal and Liveperson. Mr Browne replied, 'Sure I know Raj well'.
62. Mr Browne contacted Mr Dosanjh immediately ('long time no speak') and asked for his CV. Mr Dosanjh promptly sent it across. On 16 February 2018, Mr Browne asked for Mr Dosanjh's current package details. Mr Dosanjh supplied these (essentially £115k base with 5% salary increase pending; 50-50 plan OTE £230k; 40k RSUs vesting up to March 2019; £750/month car allowance and various benefits). Mr Browne had a preliminary telephone interview with Mr Dosanjh but did not complete any form or take any notes.

63. On 26 February 2018, Mr Gracey emailed Mr Browne to say he would be speaking to Mr Dosanjh that afternoon and had discussed the matter with Mr Banks. He wanted to check he could make an offer. 'Following our conversation late last week are we comfortable I verbally offer him' £100, 000 basic pay + £100,000 variable, with 1300 RSUs.
64. On 27 February 2018, Mr Gracey emailed Mr Banks to say 'He is sold. Wants a brief chat with yourself and Guy [Bloch] early next week to seal it. A welcome addition.' After receiving Mr Bank's congratulations, Mr Gracey emailed 'Raj will need CV + big bank + some betting/gaming. I am sure LP will counter but he seems committed to join and get stuck in with us.' Mr Banks suggested BQ and CV. Mr Gracey replied: 'Yep – that is my thinking too. He will be perfect for CR if NL does not return (many people are saying she will come back but request a new account set).
65. On 7 March 2018, Mr Dosanjh came to meet Mr Banks (for 30 minutes) and separately Mr Bloch (for 90 minutes). That evening Mr Gracey had dinner with Mr Dosanjh to talk to him about coming to work at the respondent.
66. On 8 March 2018, there were exchanges of emails regarding how much to offer Mr Dosanjh. Mr Gracey emailed Mr Banks, 'I had a detailed conversation with Raj last night. He's ready to resign tomorrow provided we can offer the following: 115k base; 100k variable; 500 car allowance per month; 1500 RSUs. Please advise if this is achievable (I don't think he will join for anything less).
67. Mr Banks replied, 'we can probably do 107,500/107,500 base/variable. Probably max RSUs would be 1,300. Car OK. I suggest you ask Joe to raise the offer at 110/110, 1500 RSUs, 500 car and wait for the push back. This'll give us some room for compromise.'
68. Mr Gracey then asked Mr Browne to offer Mr Dosanjh 100k base, 100k variable, 500 car allowance and 1500 RSUs. Mr Browne replied that he would need to get higher approval for the numbers. He also said 1500 RSU was above the 1300 maximum for the range. Mr Gracey responded by return, 'In the interests of time let's go with 1300 in that case and await push back (I think he will accept). This email was at 10.19 am.
69. At 16.19 on 8 March 2018, Mr Gracey sent the 1st respondent's 'interview evaluation summary' form to Miss Ward, saying they would like to make an offer to Mr Dosanjh. Miss Ward replied she knew of him and he had a great reputation, although he tends to stay only for a couple of years, achieve and move on. She added, 'However, I approve the offer as he is comparable to Peter Wisbey.'
70. He noted on the form he had worked with Mr Dosanjh at HP Software, Adobe and Pivotal. 'He is the perfect fit for Splunk in every regard.' Then under Hire Recommendation, 'Exceptionally qualified – MUST HIRE'. The form noted Mr Gracey and Mr Banks as the 'interviewers'.

71. On 9 March 2018, Mr Gracey emailed everyone to say he had spoken to Mr Dosanjh who 'respectfully requests an additional 300 RSUs. Upon confirmation, he will resign immediately.' A few hours later Mr Browne asked Mr Gracie to give him a call to explain the process regarding the RSUs. Mr Gracey replied, 'No need – he will sign as is. He is resigning on Monday'.
72. It is normal in the industry to ask to see a potential recruits P60 or contract of employment to verify the earnings they say they were getting at the previous employer. Miss Ward told the tribunal that the 1st respondent never asks for verification and does it on trust.
73. Mr Gracey said Mr Dosanjh was given this high salary for the following reasons. First, Mr Dosanjh's remuneration package with LivePerson was already higher than anyone in Mr Gracey's team. Mr Gracey said it had become clear during negotiations that LivePerson wanted to keep Mr Dosanjh and they put together an entirely new package to persuade him to stay. We cannot rely on this latter evidence. We were not told on what date LivePerson put together this allegedly new package or what it comprised. Nor were we shown any written evidence in support of this. All we have seen is Mr Gracey saying repeatedly in emails during negotiations 'I am sure LivePerson will counter'. For all we know, the new package was offered *after* Mr Dosanjh said he was resigning. We add that the 1st respondent did not seek any verification of Mr Dosanjh's current package or alleged new offer.
74. The second reason given was Mr Dosanjh's 'seniority' ie that he had been working in sales within the technology industry since 1996.
75. The third reason given was that Mr Gracey had been regularly in touch with Mr Dosanjh over the years and Mr Dosanjh was 'consistently overachieving'. Mr Dosanjh said he saw Mr Dosanjh's CV during the recruitment process which indicated he had negotiated some key deals - \$13m for a large bank, \$14.5m with a media company and \$3m with a betting and gaming company. The CV said that Mr Dosanjh had been top sales performer in LivePerson in 2015, the third top in 2016 and had achieved over 450% of his quota in 2017. The tribunal is not in a position to say whether this CV information was accurate or not. Nor was the 1st respondent. No verification process was followed.
76. Mr Gracey told the tribunal that Mr Dosanjh was probably in the top 1% of consistent performers throughout Europe. Again, we are not in a position to know whether this is exaggerated or not. We were not shown any independent written evidence in support of this.
77. By comparison, Mr Laws had been recruited the previous month by Mr Ferguson for £95,000 following his usual recruitment processes. Mr Gracey accepts that Mr Laws had been working in the industry at a high level for 24 years.
78. It is common in the industry to move around after only a few years of employment and to use personal contacts to bring people in. Indeed, the 1st

respondent had an employee referral programme offering incentives if employees introduced people who were ultimately recruited. The recruitment decision was handled separately.

79. In his interview for the claimant's later grievance, Mr Ferguson explained that he had undertaken unconscious bias training at the 1st respondent as well as in the past so that there is a particular way he recruits. All his new hires went through a panel interview of sales leaders, sales and presales and often specialists. Also Mr Ferguson did not negotiate salaries. He left it to Talent Acquisition, in order to avoid unconscious bias in the process.

Reallocation of CR and AY

80. During FY18, the claimant had only her two long-standing accounts, CR and AY, because at that time, both were very large.
81. There were internal discussions regarding how the claimant's account allocation would work while she was away. On 26 January 2018, Ms Petrova (Director of Sales Strategy & Operations, EMEA) emailed Mr Ferguson, Mr Banks and Miss Ward to say that the claimant 'cannot be assigned a new quota and territory upon her return. The best way to manage her LoA is as we discussed today – she keeps her accounts and quota and another RSD keeps an eye on them while she is away.' The claimant would be assigned a full-year quota at the start of the financial year and on her return, she would have the choice whether she wanted it pro-rated to take account of her leave of absence.
82. On 7 February 2018, Mr Ferguson had emailed the claimant to say, 'As discussed and promised below is your FY19 Territory. I promise to do what I can to make sure we keep the pipeline ticking along until you're back from your LoA'. The named accounts were CR, AY, CU and CX.
83. By email dated 7 February 2018, Mr Ferguson informed Mr Mason at AY that the claimant would be taking a couple of months off until the end of April. While she was away, Mr Ferguson said he could be available support for anything that was needed.
84. The claimant's first day of leave was 8 February 2018. (The first two days were holidays and unpaid leave was from the 12th.) The same day, Mr Ferguson emailed Mr Banks. He said that the vendor manager at AY had called him that day. She had asked for various changes because AY wanted to operate as a global account and were preparing themselves to run the majority of future requirements and platform from the UK. The email said:

'Specifically on the Account Lead – they've asked for a change here and someone more 'heavyweight' who can align with the execs in the bank. They have embarrassingly asked it to be me (they don't know I'm leaving yet). That said, Steve G will easily give them comfort.'

85. Mr Ferguson explained during his interview for the claimant's later grievance that in early January 2018, there had been a conference call between himself, the claimant and various other members of the 1st respondent. During the call, AY had requested local UK account management for FY19 as opposed to three different account management. Then in March 2018 at a handover meeting with the same AY contact and Mr Gracey, AY had requested that the entire team be replaced. This included Mr Wallbaum, the claimant and a third person, but only the claimant remained on AY at that point, so it only affected her.
86. This appears to be the meeting of 6 March 2018 which Mr Gracey said he attended. Then mid-March 2018, Y said in a telephone call with Mr Ferguson that he wanted a change in account management for CR. These two conversations appear to be the sole basis for the email which Mr Ferguson wrote on 21 March 2018.
87. On 12 March 2018, Mr Gracey spoke to the Executive Head of Infrastructure Systems at CR ('K'). The call was to introduce himself as Mr Ferguson's successor. Mr Gracey told the tribunal that this person 'hinted' that a change was needed. Apart from this call, the only direct information Mr Gracey had from the clients was from the meeting on 6 March 2018. Mr Gracey accepted during cross-examination that the feedback he was personally privy to was informal and in vague terms.
88. On 16 March 2018, Mr Gracey emailed Mr Ferguson and Miss Ward (copy to Mr Banks) suggesting they meet to discuss the claimant and her return. He added, 'We also need to reallocate CR and AY at pace given the workload being generated and the request from both customers for a change in RSM'.
89. During the claimant's later grievance, Mr Ferguson gave the following account of the meeting in mid-March with Mr Gracey, Miss Ward and Mr Paul (the respondent's in-house Counsel). We accept this account, as it was given relatively contemporaneously, and from a manager who was relatively neutral in the events.
90. At the mid-March meeting, Mr Paul advised there was no legal exposure in removing the AY and CR accounts from the claimant. Mr Ferguson and Mr Paul agreed that a new territory must provide the opportunity to perform against the quota defined. That meant they would need to be existing customers with a propensity to buy. It was jointly agreed that accounts would not move until the claimant returned and that, in order not to disturb her leave, she would not be told of the planned changes until she did return. No decision was made at the meeting as to which account manager AY and CR would be moved to. It was agreed that Mr Gracey would manage the accounts until the claimant's return.
91. Mr Banks asked Mr Ferguson to put the client's feedback from the meetings with CR and AY in writing.

92. On 21 March 2018, Mr Ferguson emailed Mr Gracey to set out the verbal feedback from AY and CR. He said they had a delicate situation emerging because both accounts had requested a change in account management. He said:

‘There’s obviously some trends in both accounts that I recommend should be discussed with Nadine as part of her personal development. A consistent trend is the lack of strategic alignment with key decision makers that has caused some friction in both the customers. I’m unsure whether the situation is reversible for both accounts, but at this stage both customers are asking for change.’

Mr Ferguson then expanded. In relation to CR, he said the main concern was that the claimant was selling tactically to many use cases and CR felt they were not getting the leadership to create an effective customer success plan that aligned requirements. This left the CR team in a difficult position with its internal customers. Stakeholders felt they were not listened to around what they needed prioritised and that the claimant drove an aggressive sales agenda. ‘There is a lack of confidence that Nadine will support them as needed in a complex deployment phase. CR’s ‘asks’ were an experienced Account Director who had led large scale enterprise software deployments of similar scale; who was ‘able to engage and align with Exec Directors, Managing Directors and CIO Paul –; will ‘chase customer success not the sale; and can ‘dig deep into Splunk and align the best people with CR to help steer them with what they need’.

Regarding AY, Mr Ferguson said their main concerns were that the claimant had been selling to many different projects which had negatively impacted their alignment; that she hadn’t been listening and aligning with the Managing Directors and global alignment of sales and services teams had not been achieved, creating mixed messages. He said AY wanted an experienced account leader who operated AY as a Global Account, ie a Global Account Lead based in the UK, and who could ensure a globally aligned service delivery so that the services teams in each project were aligned with each other’s deliverables. They wanted the Global Account Lead to be highly experienced in operating in this role.

93. Mr Gracey did not directly ask CR and AY for examples of how the claimant was ‘tactical’ rather than ‘strategic’. He told the tribunal that the feedback he received was mainly from Mr Ferguson, Mr Banks and Mr Bloch. He said the feedback from one of the sourcing managers was that the main stakeholders, having done their big deal, required a different type of account management. Although the claimant had done a good job to get it to that point, the overriding view was that now she had built and closed the deal, they needed a more senior level operative. Mr Gracey said they used the word ‘junior’ about the claimant.

94. Meanwhile, the claimant had exchanged some emails while on her leave. On 2 March 2018, K emailed her on her work email to tell her he had taken over responsibility for Splunk at CR and requested a call ‘to sync on the current state of play’. The claimant replied on 5 March, copying in Mr Ferguson. She said she was glad to hear they would be working closely

together and she suggested a call to discuss K's priorities and objectives. She said she was happy to join in the call if the timing worked out – she was 19 hours ahead. Mr Ferguson replied to the claimant saying he would pick up with K and 'Formal warning now. No emails or work activity whilst you are on LoA. This is serious.' K replied to the claimant on 6 March, 'Enjoy your vacation, and I'll catch up with you on your return. Meanwhile, Colin is working to get me connected.' The claimant replied 'Definitely, I'll catch up with you in May when I'm back.'

The usual practice on re-allocating accounts

95. The claimant had built long-standing relationships with CR and AY. She had had AY from FY14 and CR from FY15. Although in his witness statement Mr Gracey tried to suggest that a sales person is rarely given the same sales list from year to year, he accepted in cross-examination that key accounts where a representative had built a long-standing relationship would generally remain with the representative year after year.
96. Strategic accounts were generally not moved mid-year by the respondent. Accounts would be moved mid-year only if the sales representative had left or if they had been placed on a formal performance improvement plan. Mr Gracey said a further reason would be if the customer requested a change, but he was unable to provide any examples other than in the claimant's case.

Notifying the claimant of her reallocated accounts

97. On 13 April 2018, Mr Gracey emailed Mr Banks and Mr Ward, saying, 'I announced Raj [Dosanjh] on CR and AY yesterday and within 5 mins Nadine was tracking him on LinkedIn'. Miss Ward suggested that if the claimant was reading emails, Mr Gracey should invite her to a meeting on her first day back. Mr Gracey replied, 'The thing is that she was not on the email I sent so someone tipped her off immediately'.
98. Following Miss Ward's advice, on 20 April 2018, Mr Gracey contacted the claimant for the first time. He sent her the email Miss Ward had drafted. It said that he and Mr Banks would like to meet the claimant on her return to introduce himself as her new manager and discuss the FY19 account allocation. The claimant replied:
- 'Looking forward to meeting you and hitting the ground running. I appreciate you managing my accounts since Colin left and will be good to get an update. As Alan [Banks] is joining, I would like to discuss how the top EMEA Sales Manager award was decided for FY18 SKO. Thank you,'
99. Mr Banks immediately replied to Mr Gracey and Miss Ward, 'The game begins'. Mr Gracey emailed back, 'Yes'.
100. Miss Ward responded by deliberately starting a new email chain. The subject header was 'Re your other note'. She said:

'I agree. I think the game begins. Suggest you just have some bullet points and close it down as we are not going to change and provide her with the award. However just as a quick fyi I think she may start to fight re the account change and this award etc so we should not put anything down in email with her name in it as she can easily request the data subject access. Unless it is work related etc or specific confirmation or feedback which is going to her.'

101. We note at this point our concern regarding this email. Miss Ward was suggesting that when managers communicated about the claimant in future and knew they were communicating about her, they artificially leave her name off the email so that she would never be able to see it on a SAR request. Whether intended or not, this might well also have the effect of hiding certain documents from disclosure in any litigation. The only reason the email emerged was because Mr Banks responded to it, using the claimant's name. We do not know if there are other emails which still remain unfound.
102. The new email chain and suggestion of anonymisation shows that Miss Ward had in mind, while matters were handled in the workplace, how contemporaneous records might be read in the future. Miss Ward told the tribunal her concern was that 'emails can be taken out of context or forwarded on, so you have to be very careful'. We do not find this a convincing explanation, nor an acceptable one for what she had suggested. What Miss Ward did has made us lose some confidence in the reliability of her evidence and whether she is giving us the entire picture. It has caused us to look with some caution at those emails which she subsequently sent that did name the claimant. Having said that, we have still been careful to look at the entirety of available evidence on all points.

Other accounts

103. Mr Gracey set out his plan for FY19 in the Quarterly Business Review on about 30 April 2018. He noted the FY19 'big bets' as accounts BQ, CV, CQ, AY and BG. He also created a table of accounts by reference to 'target tier'. There were four tiers – 100k+, 500k+, \$1,+ and \$5m+. BG, BQ, CQ and CV were in the \$5m+ bracket. AV, AN, AT and CX were in the \$1m+ bracket. CA and BS were in the 100k+ bracket.
104. This reflected Mr Gracey's assessment on 30 April of what each account was worth. In the tribunal Mr Gracey was keen to play down the reliability of this table and to emphasise how sales could turn out quite differently in practice. He said the table was 'aspirational'. He said it was based on what Mr Ferguson had said as well as the pipeline value suggested by Salesforce.com. Salesforce.com is the respondents' programme which enters the history of deals and contracts agreed for future deals, forecasts and opportunities.
105. When deciding what opportunities to offer to whom, Mr Gracey would consider both Salesforce.com and Anaplan. Anaplan was an online system where Sales Operations and senior managers inputted data about a client including previous purchasing history. It enabled forecasts for the future scale

of likely sales. The system could assess a particular client's pipeline for the financial year and 'propensity to buy'. The only Anaplan figures for the various accounts which appeared in the trial bundle were for November 2017. These showed that in February – March 2018, Anaplan was showing the FY total pipeline (expected value of sales) for CR as just over 2m, AY as 210,000, CU as 500,000 and CX as nothing.

106. CX had been allocated by Mr Ferguson to the claimant. On 12 April 2018, Mr Gracey emailed Mr Bhamra (Head of Sales Ops, UK) to say 'As discussed, it is clear that we have to find additional accounts for Mark [Laws] and Nadine from elsewhere in the next few days. Please have the below actioned in SFDC on April 20.' Mr Laws was given a number of accounts including CX and AN. The claimant was given AH, CN, CU, CT and CA. Mr Gracey told the tribunal that he had given CX to Mr Laws on only a temporary basis pending the claimant's return because work had to be done. However, the email says nothing about it being temporary, nor do any other emails in the bundle. On 25 April 2018, the Enterprise Account Manager sent an email saying 'CX is under Nadine Lee mate'. Mr Gracey replied, copied to Mr Laws, 'Mark Laws has CX this FY'.
107. Mr Bainbridge had previously held accounts AN and CV. In his 12 April 2018 email, Mr Gracey allocated CV to Mr Dosanjh.
108. On 30 April 2018, Mr Gracey emailed Mr Banks, copy to Miss Ward, saying they needed to discuss the claimant's territory when they met the next day. He listed her current territory as AH, CT, CA, BE, CN, CU, and CO. He said 'We definitely need to find a few more accounts for her from somewhere. I could add BS And CX'.
109. The reason Mr Gracey had given AN to Mr Laws on 12 April 2018 was because Mr Ferguson had promised Mr Laws some large banking accounts which had not worked out; he wanted to broaden his opportunities and he was a flight risk. In his witness statement, Mr Gracey said AN had not been run particularly well and it was necessary to offer it someone who could engage on a strategic level with C-suite managers. Mr Gracey said variously that the claimant was away on leave, that her primary experience was in banking services and not oil and gas, and that there were concerns that she tended to be 'tactical' rather than strategic in her approach. We will comment on this explanation in our conclusions.
110. Mr Gracey had allocated CR, AY, CV, CJ and BK to Mr Dosanjh. In his witness statement, Mr Gracey said this was because Mr Dosanjh had an existing relationship with CV, having looked after them with his previous employer.

The claimant's return

111. The claimant met with Mr Gracey on 8 May 2018 on her return to work. Mr Gracey gave his version of the conversation in an email to Mr Banks and Miss

Ward the next day. He said the claimant had asked him to report back on why she had not been selected for EMEA Salesperson of the year for FY18.

112. The claimant asked what her accounts were for FY19. Mr Gracey told her they were AH, CT, CA, BE, BS and CX. The claimant said Mr Ferguson had told her she would be working on AY and CR as well as CU and CX. According to Mr Gracey, the claimant said CU and CX were a waste of her time and efforts. Mr Gracey said the 1st respondent had received requests to change the account manager on AY and CR. The claimant asked why she had not been informed of these changes while she was on leave.
113. In relation to the accounts she had now been allocated, the claimant said regarding CA and CT that she had no oil and gas experience; regarding CX that 'Elio sold them out last year'; and regarding AH and BE that they had little value.
114. We do not accept Mr Gracey's assertion that the claimant said in relation to CX that she had no gambling/betting experience or that she asked CX to be removed from her list. Mr Gracey does not say this in his 8 May email (where, by contrast, he does record in relation to the other accounts that she had said she had no oil and gas experience). Moreover, the claimant did in fact have some gambling/betting experience. Further, Mr Gracey did not tell the claimant that CX had already been assigned to Mr Laws and that he was therefore proposing moving it back. Finally, CX was part of the package she had been given before she went onto leave.
115. The claimant asked who AY and CR had been given to. Mr Gracey told them he had introduced them to Mr Dosanjh. Mr Gracey concluded:
- 'The meeting ended abruptly and she said she was shocked and 'had a lot to digest'. I confirmed that I would get back to her regarding quota and Sales award. It was blindingly obvious that she had been fully briefed by a lawyer ... A totally unpleasant experience. I have serious concerns around the negative impact she will have on the team that I am in the process of rebuilding...'
116. On 10 May 2018, Mr Gracey emailed the claimant regarding the questions she had asked at their meeting. He said the respondent would not normally contact people whilst on holiday/travel and it was better to discuss matters face to face. He said her current quota for FY19 was \$3.3m. The 1st respondent was willing to pro rate this if the claimant wished to take her period of leave into account. He also set out the formal criteria for the EMEA Salesperson of the year award.
117. The claimant emailed back on 14 May. She said she had expressed her serious concerns about being able to surpass her quota given the proposed accounts. In view of that, she asked for clarification of the accounts in her territory.
118. Mr Gracey replied on 18 May 2018 to say her revised territory was AH, CN, CU, BE, BT, AG, BR/BS, CT, and CA. He said he was also looking into

potentially moving CH over. On 22 May 2018, Mr Gracey confirmed he was also giving the claimant CH. The only account which Mr Gracey had removed from the previous proposed allocation was CX.

119. On 25 May 2018, the claimant asked whether, as CH had been allocated to her, it could include CC. CC was in fact part of CH. Mr Gracey agreed.
120. Mr Gracey's table of 30 April had put CX in the \$1m+ bracket, and CA (100k+) and BS (100k+). None of the claimant's other accounts allocated on 22 May 2018 appeared on the table at all.
121. No further changes had been offered or made by the date of the claimant's resignation. The net effect was that, from the original allocation of accounts to the claimant on her return, CX had been removed and CN, BT, AS, CH and CC had been added.

EMEA Salesperson of the Year

122. The EMEA Salesperson of the Year award is given annually to a member of the EMEA Sales team. It is presented to the winner at the Sales Kick Off event ('SKO') at the start of the next financial year. The award for FY18 was presented at SKO in Las Vegas on 27 February 2018.
123. The award does not carry any bonus but it is prestigious. All customer-facing sales staff attend SKO.
124. Mr Bloch made the decision as to who should receive the award for FY18.
125. In the previous 5 years, the highest attaining RSM had been given the award, ie highest revenue. The claimant was the highest revenue attainer on this occasion.
126. New selection guidelines were set out in an email dated 5 February 2018. The Salesperson of the Year 'Must be in top 5 in Theater when evaluated across attainment % and quota credit bookings (must align with 50/50 stack rankings for Club. 50/50 is blended score of attainment vs quota and \$s booked).'
127. Mr Bloch understood that the choice between the top five EMEA performers would then be down to his discretion. There was no guideline on how this discretion should be exercised.
128. In terms of quota attainment, in FY18, the claimant was 4th of the 5 and the eventual winner, Mr Wallbaum, was 5th (only 7% behind). The previous year, the award went to the person who was 3rd on quota attainment (the claimant was 4th). In FY16 and FY 15, it went to the top person on quota attainment (the claimant in FY15) and in FY14 it went to Mr Harper, who was second to the claimant.

129. Mr Bloch had a number of informal conversations with the relevant AVPs to discuss the candidates and the behaviours they wished to promote. He then had two meetings to discuss the potential winner, the first with Ms Petrova, Mr Wagenknecht and Miss Ward, and the second with Ms Petrova and Miss Ward.
130. Mr Bloch emailed Ms Petrova on 1 February 2018 to suggest they 'use the stage to recognise the good behaviours of the team'. He told the tribunal that he felt the award winner should be a good role model for the team. Mr Bloch told the tribunal he was looking for a team player and someone who had shown a degree of personal development. He said he had the 1st respondent's five key values in mind: to be innovative, passionate, disruptive (challenge the status quo), open (open-minded) and fun (recognises that celebrations and good times are a great antidote to hard work'. He said he also wanted someone who was humble, positive and coachable. He said that Mr Wallbaum had built trusted relationships with both new customers and with tactical customers, both of which were notoriously hard groups to satisfy.
131. The slide for the awards ceremony states that Mr Wallbaum had shown an ability to change personally and that he had navigated complex sales cycles with convoluted public tender and legal processes to close te biggest SW deal in EMEA in FY 18. Everyone around him had been impressed with how he had reinvented himself as an excellent team player. The slide was written by Mr Boeing, the Area Vice President for Central Europe, who worked with Mr Wallbaum and had given very positive feedback about him.
132. When asked for an explanation in the claimant's grievance, Mr Bloch said that he selected the winner (Mr Wallbaum) because he demonstrated real ownership and accountability; he led from the front and led the entire sales process; he was a great team player; he was very coachable and they had really seen him grow and develop; and excellent feedback. By contrast, he did not feel the claimant demonstrated ownership and accountability. She was very good at finding opportunities and working tactically, but Mr Ferguson and Mr Banks were heavily involved in CR and AY, who held the key executive relationships, and similar had happened with him on the AV account.
133. In May 2018, when Mr Gracey asked Ms Petrova for the criteria, she said they had discussed each of the top five individually taking account of whether the person was promoting Splunk values and whether they could be a role model for the other reps. She said the claimant 'was not considered as she was on LOA and would not have been able to be on stage. However, she is going to Club and got the watch as a gift for being in Club 5 times.'
134. On 15 June, Mr Ferguson was interviewed as part of the claimant's grievance. Mr Ferguson felt it was unsatisfactory that the award had not been given to the claimant. He said he felt that Mr Wallbaum was not a team player, which management had known at the time, and on a number of occasions, he had recommended that Mr Wallbaum stand down from an account.

135. Mr Bloch told the tribunal that he was the decision-maker and it was not part of his thinking that the claimant was on leave of absence at the time.

The claimant's grievance

136. The claimant submitted a grievance by email on 22 May 2018. She complained about various matters including the removal of the CR and AY accounts and the way it was done, the removal of CX, the failure to award her EMEA Salesperson of the year, the recruitment of Mr Dosanjh who knew Mr Gracey and Mr Banks and was allocated three large accounts, and she queried his pay. For the first time, she complained of race and sex discrimination. She said a high performing 'ethnic' female was being pushed aside for the old boys network. The respondents accept this email was a protected act under the Equality Act 2010.

137. The claimant complained that the 1st respondent had unilaterally and without proper cause removed her as Account Manager for CR and AY, which combined had brought in revenue of \$22.7m in FY18 as a direct result of her management of the accounts. Secondly, Mr Gracey had not told her at the meeting on 8 May 2018 that the 3rd highest grossing account in her assigned territory, CX, had been transitioned to Mr Laws who had joined the 1st respondent in March 2018. Three of her four accounts were removed while she was on leave. She pointed out that the accounts had been transitioned only three weeks before her return to work to newly hired account managers (the others going to Mr Dosanjh) and this could therefore have awaited her return. She said she should also have been notified of such significant changes, which would affect her salary, while she was away.

138. The claimant was also concerned about her loss of status as CR was her only global account. Her new accounts were not comparable to those she had lost and a significant number of them had no existing deployment in the UK. She asked for any analysis done on her new territory and evidence that the new accounts were fair compared to all team members. She said that some of her team members had been given reduced quotas compared with her full quota.

139. She said she believed the failure to award her EMEA Salesperson of the year was discrimination. She described herself as 'an ethnic person in Technology'. She pointed out that in FY18 she secured the largest deal in EMEA at the time and the first 8 figure deal EMEA had had. She was the first EMEA person to have secured Diamond Club membership through a Direct Sales role for 5 years consecutively.

140. The claimant noted that Mr Dosanjh had worked previously with Mr Gracey and Mr Banks. He had been given her two big accounts plus a third large account, CV. 'Again this appears to be an old boys network and a high performing female from an ethnic background with an outstanding performance is being pushed aside for the furtherance of that network.'

141. Finally in relation to gender pay, the claimant asked for details of Mr Dosanjh's pay.
142. Under preferred outcome, the claimant said she wanted the information requested in her grievance letter and 'full investigation and findings report to be provided'.
143. Scott Lewis was appointed to hear the grievance. Miss Ward and Mr Wagenknecht decided to appoint him because he was at executive level and understood the sales process, but he was not directly in the sales organisation and had not been involved in any of the matters concerning the claimant. Mr Lewis had been a manager for over 15 years and had experience of performance management and conducting disciplinaries.
144. Mr Lewis had not previously chaired a grievance and he had not been trained on how to do so apart from some guidelines sent to him by Miss Ward. These guidelines stated that the investigating manager should prepare a list of questions in advance of each interview, question any discrepancies in evidence and make sure the whole story is uncovered.
145. Mr Wagenknecht decided that different HR people should be involved at each level of the process. Since there were only the two of them and the junior Ms Heaney, they decided Mr Wagenknecht should deal with any appeal, so Miss Ward would assist at the first grievance stage. This was the first grievance they had dealt with in the respondent company.
146. Mr Lewis interviewed the claimant on 6 June 2018. He asked her whether she wanted to have CR and AY returned to her. She said that she wanted to receive the information requested, have the investigation conclude and then she would decide. She wanted to know whether the 1st respondent thought the process had been carried out fairly and whether it agreed with the points in her grievance letter.
147. Formally, Mr Lewis was the only person responsible for making the decision. However, Miss Ward acted as HR adviser through the grievance process and frequently gave input from her own knowledge about what had happened and the reasoning behind it. She was also effectively delegated parts of the investigation.
148. It was Miss Ward who investigated the recruitment process of Mr Dosanjh. This was a hire which she had approved at the time. Miss Ward did not carry out an in-depth review of the process. She spoke to Mr Browne who told her Mr Gracey, Mr Banks and Mr Bloch had interviewed Mr Dosanjh. She did not explore further. A closer examination of dates and emails would have shown what became revealed on examination through the tribunal hearing, ie that there were no formal interviews after the preliminary discussion with Mr Browne and that offers were made before Mr Bloch and Mr Banks spoke to Mr Dosanjh at the latter's request.

149. Miss Ward also investigated the gender pay complaint. Mr Lewis decided not to look at the salary data of other staff, as he felt it was sensitive information. He asked Miss Ward to look at it and to confirm whether anything looked out of balance. Miss Ward did the report and then discussed it with Mr Wagenknecht and Mr Paul.
150. Mr Lewis held face-to-face interviews with Mr Banks and Mr Grace. Miss Ward drew up the questions for him to ask. She also suggested questions to Mr Lewis to ask Mr Ferguson (before that interview was delegated elsewhere).
151. Miss Ward interviewed Mr Bloch (who was living in Israel) by telephone. Mr Lewis cannot remember the reason why Miss Ward conducted the interview. Initially, Miss Ward sent Mr Bloch an email asking for a few bullet points on why Mr Wallbaum was awarded Salesperson of the year, as they had a formal grievance raising the matter. Mr Bloch responded by asking Miss Ward to give him a call 'real quick'. Miss Ward was on a train and she called back later. It was a chat, not a formal interview. She set out Mr Bloch's explanation in an email dated 1 June 2018. Mr Lewis relied on this for the grievance outcome and did not investigate further. We have set out above the reasoning given by Mr Bloch as recorded by Miss Ward in her email. Mr Ferguson gave a completely different view during the grievance investigation (again set out above). The discrepancy was not put to Mr Bloch and there is no evidence of any further probing on the matter.
152. When it became clear that Mr Ferguson would also need to be interviewed, this was carried out by Mr Paul. Mr Lewis had felt he should not carry out the interview as he was friendly with Mr Ferguson at a personal level. Mr Paul carried out the interview by telephone as Mr Ferguson had left. The claimant provided them with a list of questions to ask Mr Ferguson.
153. Mr Lewis provided his grievance outcome in an email dated 6 July 2018. Mr Lewis went through each of the matters in the grievance, set out his conclusions and his recommendations. There were several aspects of the way the 1st respondent had managed events which he felt fell short, but he did not find any race or sex discrimination.
154. Mr Lewis said the accounts were moved because AY and CR senior staff had requested that account ownership be changed. The accounts had entered a new stage of maturity and needed a different set of skills. Mr Lewis said the decision was accelerated because of the gap between Mr Ferguson leaving and the claimant returning, which meant there would be too long without account ownership. The claimant had found out about the accounts being moved from a contact at CR.
155. Mr Lewis found that Mr Gracey, Mr Banks and Miss Ward believed a key reason driving the claimant's leave was that she was close to burn out. Mr Ferguson had noted this in his proposal email and in verbal conversations. This was never clarified with the claimant. The claimant denied this was her reason or that she had ever had such a conversation with Mr Ferguson.

156. Mr Lewis said it was clear that the 1st respondent 'did not follow its ideal best practice in terms of process and communications to NL [the claimant] in this instance. It is understandable that NL would feel treated harshly as a result of the reallocation of accounts, not being given the opportunity to feedback into the process of reallocation of accounts, or to respond to the feedback from both CR and AY, especially given the strong indication she was given of her territory prior to taking her LOA, and her tenure and history with these specific accounts.' Nevertheless, there were a number of important and mitigating reasons why it had happened, ie Mr Ferguson had left; feedback from the customer; perceived burn out; HR agreement on the legitimacy of reallocation before the claimant's return subject to a meeting on her first day of return. Mr Lewis recommended that the claimant be given a full review of the customer feedback.
157. Mr Lewis found there had been no loss of status, although the claimant no longer had management of an account within the Global Account Manager program. He recommended a documented plan to allocate the claimant an account that fell within the program.
158. Regarding the allocation of new accounts, Mr Lewis noted that Mr Gracey had set they were not set in stone. 'It is also clear that NL did not get an opportunity to participate in the account reallocation process, or feed her thoughts into this, as would usually be the case.' He recommended 'Go through this process collaboratively as a matter of urgency'
159. On EMEA Salesperson of the year, Mr Lewis noted there was a precedent for awarding it to the highest attaining RSM for the past 5 years and the claimant had clearly been the highest performing RSM in terms of revenue and attainment in FY 18. He added:
- 'In terms of any other discrimination alleged, I do not feel that I am personally in a position to respond to this in a fair and unconsciously biased way. Should NL want to take this point further, this can be raised through the appeal process.'
160. On Mr Dosanjh's recruitment, Mr Lewis stated simply that HR had confirmed Mr Dosanjh was interviewed by Mr Browne, Mr Gracey, Mr Banks and Mr Bloch, and relevant feedback put on the 20/20 tool. No further recommendations were made.
161. On gender pay, Mr Lewis said HR had investigated. Mr Ferguson had said he was unaware of any gender pay issues. Mr Dosanjh's pay was higher, but not for gender reasons. Different factors were taken into account on offers including current salary. The lack of an annual merit review meant that current employees could fall behind the external market. Mr Lewis recommended that the company generally review higher performers in sales teams to see whether any adjustments should be made given the number of new RSMs that had been taken on.

162. Mr Lewis concluded by telling the claimant she had a right of appeal within 5 working days.
163. In his covering note, Mr Lewis told the claimant the next steps were that he and Miss Ward would reach out to Mr Gracey, Mr Banks, Ms Petrova and Mr Timperlake to discuss the next steps. If the claimant had any questions or wished to appeal, she should do so by writing to Mr Wagenknecht.
164. On 6 July 2018, Miss Ward emailed Mr Banks and Mr Gracey to say that 'after a very thorough investigation, Scott has sent a detailed response to the grievance today. We will wait to see the response as there are 5 days if an appeal is raised. Scott and I will then book a meeting with you both to go through the outcomes and recommendations.'
165. Meanwhile, on 8 June 2018, a Ms Krempa had emailed Mr Banks about collecting data from top performing reps to determine 'what great looks like' at Splunk. She named 3 people including the claimant and asked if he agreed those were the top performing members of his team. Mr Banks emailed back, having replaced the claimant's name with a different (male) employee, saying 'Need to make a slight change due to personnel issues'. The claimant did not see this email at the time.
166. On 10 July 2018, the claimant appealed. Mr Timperlake was appointed to hear the appeal.
167. On 11 July 2018, Mr Gracey emailed Mr Banks with some suggested accounts reallocations. He said Mr Dosanjh was a major flight risk because CR and AY were sold out for the next 18 months at least and CV had nothing like the anticipated opportunity. He therefore suggested Mr Dosanjh be given BQ; that CP go to Mr Laws and a few other realignments. Then if the claimant departed, CH and AG should go to Fraser.
168. On 23 July 2018, Miss Ward emailed Mr Gracey saying she had been through Mr Lewis's grievance response and recommendations with Mr Banks. However, they needed to hold off on the recommendations until they had a final outcome on the grievance appeal mid week.
169. Mr Timperlake met the claimant on 20 July 2018 to discuss the appeal. He was accompanied by Mr Wagenknecht, the senior HR Director, EMEA, and Ms Heaney as notetaker.
170. Mr Timperlake did not interview anyone else as part of the grievance appeal process. He told the tribunal that he felt he could answer the claimant's complaints from his own knowledge of the business without speaking to anyone. It is clear from his answers in cross-examination, that Mr Timperlake did not carry out any investigation.
171. Mr Timperlake sent his appeal outcome letter to the claimant on 31 July 2018. Regarding the complaint that the claimant had not been sent documents and evidence she had requested, Mr Timperlake asked if there

was anything specific missing. Mr Timperlake disagreed with the suggestion that Mr Lewis had not made specific findings. He said the company needed to be forward looking. Clearly where recommendations were made for improvement, the claimant's grievance was being partially upheld.

172. He said that, for the avoidance of doubt, the removal of accounts was not breach of contract or discrimination. On gender pay, Mr Timperlake said Mr Dosanjh's pay was based on factors such as salary range of the role, current salary, overall compensation package and his overall seniority and experience. The salary level was unrelated to gender. He did however support Mr Lewis's recommendation that salaries be reviewed across the company.

173. On EMEA Salesperson of the year, again he upheld Mr Lewis's recommendations. For the avoidance of doubt, he said the decision was not discriminatory.

174. Mr Timperlake said that Miss Ward did not make the grievance outcome decisions. He concluded:

'I believe Scott has done a good job of summarising the situation and has also made some clear recommendations which I will review and determine if we should be implementing any of them. One big area of focus also needs to be communication which is also something I will look into. I am sorry you have had to raise a grievance, I have taken the points raised very seriously, but in summary I support Scott's findings.

'Finally, as set out above, events which have already happened cannot be changed. You are a high performing sales person and a valued member of the team. It is the company's – and my – desire to learn from this experience and move forward in a way which suits all parties, including being able to let you get on with your work in a way which is acceptable to you. We hope that you will be able to work with us to achieve this.

'... Your manager will be in touch directly and I will speak and work with Michael Wagenknecht to take forward the recommendations.'

Resignation

175. The next day, by email dated 1 August 2018, the claimant resigned. She said her resignation was the direct result of the issues she had raised in the grievance, the process the company had followed in determining the grievance and its failure to deal adequately with the serious issues.' She gave 5 weeks' notice, which she believed she was required to give.

176. The claimant had lost all trust in the 1st respondent. Her managers had removed her accounts and allocated poor accounts in their place, and had failed to rectify this through the grievance process. At the same time, they had given new recruits from their network preferential treatment to her detriment.

General recruitment pattern and pay

177. The 1st respondent accepted that IT firms are very male dominated across the Board. This also applied to the 1st respondent.
178. Under the gender pay reporting requirements, the 1st respondent's report as at the snapshot date of 5 April 2018 showed that the upper pay quartile comprised nearly 90% men. The 1st respondent did not at that time have many women in senior leadership roles.
179. Mr Banks appointed Mr Lynskey in June 2017. He subsequently appointed Mr Spence in August 2017 and Mr Wisbey in January 2018. Mr Banks and Mr Gracey jointly hired Mr Dosanjh in April 2018. All of them had worked with Mr Banks previously (all at Adobe except possibly Mr Lynskey). Mr Spence, Mr Wisbey and Mr Dosanjh were Regional Sales Managers like the claimant. They were all paid higher than the claimant's basic salary by the respondent. They were also all paid higher than the only other female RSM.
180. Ms Heaney provided a table of pay for Mr Gracey and Mr Lynskey's teams for the grievance investigation. In Mr Gracey's team, Mr Dosanjh (started 9 April 2018) was on £110K / £220K. The other four, including Mr Laws (started March 2018), the claimant (started February 2013) and the other female employee (started April 2017), were on £95K / £190K. Mr Laws had been hired by Mr Ferguson.
181. In Mr Lynskey's (all male) team, Mr Wisbey (started 31 January 2018) was on £110K / £220K; Mr Spence (August 2017) and another employee (October 2017) were on £105K / £210K; two earlier 2017 starters were on £95K / £190K and £85K / £170K respectively; and a 2016 starter was on £90K / £180K.
182. The respondent did not have any objective pay system. As noted on one of their pay data sheets 'We are paying people all over the place with no real consistency'. The 1st respondent says one key explanation is that they did not pay annual increments, so when recruiting new staff and having to tempt them away from their previous employer, they inevitably would be offering higher pay. They said seniority and experience would also be a factor which played into that.
183. Looking at the tables, one can see that bear out to a certain extent, but not completely. Mr Laws, who was hired by Mr Ferguson was paid less than Mr Dosanjh and Mr Wisbey who started in the same quarter. Mr Laws had 25 years' experience at C-suite level. Mr Ferguson was punctilious about going through his standard practices on recruitment.

The subject access request

184. On 20 June 2018, the claimant wrote to Miss Ward, making a subject access request ('SAR') under the Data Protection Act 2018. She requested any electronic data processed by or on behalf of the 1st respondent in relation to herself for the period 1 January 2017 to date. This should include various

items including communications relating to her performance, the removal of the CR and AY accounts, the allocation of new accounts and the assessment of her nomination for EMEA Salesperson of the year. She set out variants of her name for the search and listed 20 individuals who should be searched.

185. Mr Paul advised that such requests must be dealt with by the Data Protection Team in the US. On 6 July 2018, Miss Ward emailed Ms Heany asking her to chase up where they were on the SAR, which 'needs to be in progress. Can you ask Michael to escalate to Abby Buck if we are not getting anywhere. There should be a clear process in place for this.'
186. On 13 July 2018, the Data Protection Team replied to the claimant's request. No documents were enclosed. She was referred to various places where she could log in and search. For example, information about her travel could be found by logging in to Egencia and information about online courses she may have taken could be found by logging in to LinkedIn Learning.
187. The claimant forwarded this email to Miss Ward the same day, saying that the response was wholly inadequate. Miss Ward passed this on to the Data Protection Team. On 18 July 2018, Miss Ward sent Mr Wagenknecht and Mr Paul latest guidance from XpertHR on how to respond to a SAR request. She recommended they send it over to the US team and added, 'It clearly states that email search should be conducted if requested etc..... There are very clear guidelines on how they can get the extension and how they should respond to the employee'.
188. The Data Protection Team provided another inadequate response on 20 July 2018. After the claimant reported the matter to the ICO, the ICO decided that the respondent had failed to provide information as required by the Data Protection legislation. It instructed the 1st respondent to provide the outstanding information by 14 November 2018.
189. The information was eventually provided.
190. Miss Ward was not otherwise involved in the processing of the request.

Delayed payment of incentive compensation

191. Incentive Compensation was a commission payable on transactions which had closed in a particular year. It had been agreed before the claimant went onto her leave of absence that any commission she had earned for FY18 would be paid immediately on her return. The claimant was owed £65,000 when she returned on 8 May 2018, but this did not happen.
192. On 1 July 2018, the claimant asked the Sales Comp department why she had not been paid her commission. She chased again on 9 July 2018, and also asked Mr Gracey in an email if he had received a response from Sales Comp about the outstanding commission. On 11 July, a Sales Comp Analyst (Mr Shea) told the claimant, erroneously as it turns out, that there was an

outstanding document which needed signing off. The claimant emailed back on 13 July 2018, challenging this and copying Mr Gracey in.

193. It was a term of the Incentive Compensation Policy that commission would not be paid until the employee had signed their acceptance to the Compensation Plan. The claimant had not signed her FY19 Compensation Policy and Plan. It transpired that the software dealing with the process was unable to distinguish between different years and had therefore erroneously blocked the FY18 payment, automatically marking it as 'Do Not Pay'.
194. The claimant raised the issue again in her grievance appeal hearing on Friday 20 July 2018. On Monday 23 July 2018, Mr Wagenknecht, who was present at the appeal, emailed Mr Tatsumi saying the commission could not be held back because she had not signed her FY19 plan and could he please help solve this. As a result of Mr Wagenknecht's firm intervention, an advance payment was made to the claimant on 1 August with further payments on 31 August and October.
195. The claimant's argument is that this shows it could have been promptly resolved at an earlier stage by Mr Gracey when she raised it with him in early July. She alleges his failure to do so was because she had raised a grievance against him.
196. Mr Gracey says he spoke to Miss Ward the same day that the claimant spoke to him, and he believed she had in turn escalated it to Mr Wagenknecht, although the claimant subsequently raised it direct with Mr Wagenknecht. We were shown no emails from Mr Gracey to Miss Ward on the matter, but that does not mean he did not raise it verbally. We are not in a position to say whether he did or did not raise it verbally with Miss Ward.

Throdle

197. The claimant and a friend and colleague (Haider) who is still employed at the 1st respondent, had the idea of creating an App (called 'Throdle') for selling vintage cars in America. The company was incorporated in the USA in March 2018. The claimant and Haider split the shares 50-50.
198. The claimant and Haider first had the idea of setting up the App in January 2018. It was just a hobby at that stage. They had had a brainstorming exercise in January 2018. It was Haider who had interviewed HyperlinkInfoSystem and other providers.
199. On 1 February 2018, HyperlinkInfoSystem in India sent Throdle its first invoice in the sum of \$12,600. This was an upfront payment for development of the App. This was an invoice for securing the company's services. There was no business plan at that stage and no deliverable date.
200. A deposit of \$1,500 was paid to Aliquis to secure their services. On 19 March 2018, Hyperlinkinfosystem submitted their second invoice, which was

for \$9000. On 24 April 2018 there was an invoice from Aliquis to Throdle in the sum of \$2,504 from Aliquis for further design. On 2 July 2018, Aliquis Studios invoiced the claimant for \$1,500 for design of a logo for the App and brand.

201. The claimant bought out Mr Haider for £10 in 2019.

Law

Equality Act 2010

202. Under s13(1) of the Equality Act 2010 read with s11, direct discrimination takes place where a person treats the claimant less favourably because of sex or race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

203. Under s27, EqA 2010, it is victimisation if the respondents subjected the claimant to a detriment because he had done a protected act or because they believed that he had done or may do a protected act. A 'protected act' includes making an allegation (whether or not express) that someone has contravened the Equality Act. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

204. Under s136, if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A can show that A did not contravene the provision.

205. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

206. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

207. Equal pay claims are set out in chapter 3 of the Equality Act 2010. Like work claims are covered by s65.

208. An equal pay claim does not succeed under s69 if the employer shows that the pay difference is because of a material factor, reliance on which does not involve treating the claimant less favourably because of her sex than the employer treats the comparator. Further, if the claimant shows that, as a result of the factor, women doing work equal to hers are put at a substantial disadvantage when compared with men doing such work, the employer must show the factor is a proportionate means of achieving a legitimate aim.

Unfair constructive dismissal

209. An employee will be entitled to terminate her contract without notice to her employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221. The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

210. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462. the House of Lords held the implied term of trust and confidence to be as follows:

'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

211. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

212. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

213. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least

in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

214. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract. (United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

215. A claimant may resign because of a 'final straw'. The key case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 establishes these principles in regard to the final straw:

- (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.
- (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
- (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
- (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

216. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

217. The 'final straw' might refer to two different situations: either the employer's conduct has not previously amounted to a breach of trust and confidence or it may be that the employer's conduct has already crossed that threshold, but the employee has soldiered on until the last act which triggered her resignation. The significance of the 'last straw' is then that it revives the

employee's right to resign. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

218. An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, even if he or she has previously affirmed, provided the final act forms part of the series (in the way explained in Omilaju). The final action does not land in an empty scale. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

219. The employer cannot 'cure' the breach after the event, such that the claimant cannot resign in response. In Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121; [2010] IRLR 445, the Court of Appeal said this

A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

Conclusions

220. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

221. We inherited the agreed issues and they were confirmed again with the parties at the outset of the hearing. However, as we said to the parties at that stage, we do not find the separate formulation of issues 4 – 12 to be particularly helpful. We will address all the elements, but we propose to do this detriment by detriment

222. We will deal first with the direct discrimination claims.

EMEA Salesperson of the Year for FY18 – Issues 5, 4 and 11 (direct race and/or sex discrimination)

223. This complaint is brought against the 1st and/or 4th respondent.

224. We have first considered whether there are facts from which we could decide, in the absence of any other explanation, that the failure to award the claimant salesperson of the year for FY18 was direct race or sex discrimination. We find that there are in respect of sex discrimination but not in respect of race discrimination.

225. The job was essentially sales. The award was for 'Salesperson' of the Year. There was a precedent for making this award to the highest attaining RSM, ie highest revenue, for the past 5 years and in FY18, the claimant fell into that category. In FY18 she secured the largest deal in EMEA at the time and the first 8 figure deal EMEA had had. She received fulsome praise. She

was the first EMEA person to have secured Diamond Club membership through a Direct Sales role for 5 years consecutively. By contrast, the successful individual, a white man, had scored less than the claimant on revenue and on quota attainment.

226. In respect of the sex discrimination claim, there is also a general context whereby the vast majority of jobs held at the claimant's level and above her were held by men (accepting that the most senior person, based in the United States, was female), and that the claimant's big accounts were allocated in her absence to men. For all these reasons, we find the burden of proof shifts on the sex discrimination claim in respect of the 1st and 4th respondents.
227. We were not given the same level of detail regarding the ethnicity of others in the organisation. The race discrimination claim in regard to the EMEA Salesperson of the Year award therefore fails because the burden of proof does not shift.
228. As we have said, the burden of proof shifts to the 1st and 4th respondents to prove there was no sex discrimination whatsoever in the EMEA award decision.
229. Mr Bloch (the 4th respondent) made the decision. The selection guidelines in the email of 5 February 2018 said the successful candidate must be 'in the top 5' when evaluated across attainment percentage and quota credit bookings. Mr Bloch understood it was open to his discretion within that top 5. We accept he genuinely believed this, as it is the way we would also understand the guidelines.
230. Mr Bloch's immediate approach to the problem was to make a selection 'to reflect good behaviours of the team'. He told the tribunal he was looking for a good role-model, which was not purely a question of the highest sales, but also building client relationships. He wanted a good team player who was positive, approachable and coachable in the sense of knowing their own weaknesses.
231. The choice between the top five revenue / quota achievers was left to Mr Bloch's discretion with little guidance. That subjectivity potentially allows in discrimination, so we scrutinised Mr Bloch's reasoning carefully. The criteria which Mr Bloch said he applied are inherently credible for the role, even if other managers might have applied a strict financial approach. After all, the formal criteria did not specify – as they could have done - that the winner must be the top earner. We would say it is implicit in the idea that the winner should come from within the top 5 on attainment and quota, that other factors could also be taken into account.
232. We then considered whether Mr Bloch was merely asserting that Mr Wallbaum had the desired qualities as against the claimant, or whether he gave sufficient underlying reasoning to support his decision. Mr Bloch did give examples. He said that Mr Wallbaum had built trusted relationships with both new customers and with tactical customers, both of which were notoriously

hard groups to satisfy. Moreover, the Area Vice President for Central Europe, Mr Boening, who worked with Mr Wallbaum had given very positive feedback as evidenced by the slide for the presentation which he wrote.

233. We note that Mr Ferguson held a different opinion of Mr Wallbaum and felt the claimant should have received that award, but there was scope for different opinions without it meaning any discrimination had happened.

234. As for Ms Petrova's statement that the claimant was not considered because she was on leave of absence, it is not clear how she reached that view as Mr Bloch firmly denies it. Maybe it was an aspect which was discussed. But even if it was a factor, it would not help the claimant. There is no reason to think that a male candidate and/or a candidate of different ethnic origin to the claimant would not equally have been overlooked because he or she was on leave of absence.

235. For all these reasons, on the balance of probabilities we find that Mr Bloch and the respondents have satisfied us that there was no sex discrimination in the decision to award Salesperson of the Year to Mr Wallbaum rather than the claimant.

236. We would add that even had we found the burden of proof shifted in respect of race discrimination, for the same reasons, the respondents would have satisfied us that there was no race discrimination in the decision.

Removing the claimant's accounts CR, AY and CX (and without consultation, at least in respect of CR and AY) and/or allocating them to Mr Dosanjh – Issues 6, 4 and 12 (direct sex discrimination)

237. This complaint is brought against the 1st and/or 2nd respondent (Miss Ward) and/or 3rd respondent (Mr Gracey).

238. Removing and reallocating CR, AY and CX - without the claimant's consent was a detriment. These were high value accounts on which she had built relationships and in the case of CR and AY, had recently secured large high-profile deals. Moreover, the way it was carried out, without consultation and behind her back, was hurtful and humiliating.

239. We first considered whether there were facts from which we could decide, in the absence of any other explanation, that removing the CR and AY accounts from the claimant (and without consultation) and/or allocating CR and AY to Mr Dosanjh was direct sex discrimination. We find that there were.

240. The claimant was a top performer, if not the top performer, in the EMEA division for many years. She closed huge deals on her two key accounts CR and AY in around December 2017. She received many fulsome congratulations. She had built long-standing relationships with CR (since FY15) and AY (since FY14). Mr Gracey accepted that key accounts, where a representative has built a long-standing relationship, would generally remain

with that same representative year after year. It was also very unusual to move a strategic account mid-year unless the sales representative had left or been put on a formal improvement plan, neither of which applied in the claimant's case.

241. Moreover, the claimant had been specifically allocated CR, AY (and CX) for FY19 before she went on her 3 month leave of absence.
242. The CR and AY accounts were then given to a man (Mr Dosanjh) who had only just started with the company. CX, which also belonged to the claimant and which was the third highest grossing account in her assigned territory and in the \$1 million bracket in Mr Gracey's plan, was also reallocated to a man, Mr Laws. In the case of CX, there was no alleged client complaint or other pressing reason why this had to happen at all or prior to the claimant's return.
243. Mr Gracey drove and made the key decisions regarding account allocation. Miss Ward did not make the decisions. She simply gave HR support. The burden of proof therefore shifts to the 1st and 3rd respondents to provide an explanation and show there was no discrimination.
244. The 1st and 3rd respondents say they had to move CR and AY because it was at the clients' request. They say the reason for not consulting with the claimant was that she was absent on 3 months' leave.
245. This explanation existed at the time of the reallocation. On 16 March 2018, Mr Gracey emailed Mr Ferguson and Miss Ward to say they needed to reallocate CR and AY at pace given the workload being generated and the request of both customers for a change of regional sales manager.
246. The only written record of the clients' alleged requests is in Mr Ferguson's email of 21 March 2018. This was based on the 6 March 2018 meeting with AY attended also by Mr Gracey, and the phone call mid-March 2018 from Y at CR. Mr Ferguson's supporting evidence is problematic for the claimant because he had hitherto supported her on her career and she makes no allegations of discrimination against him. On the other hand, Mr Ferguson did not set out the content of the meeting until after a general discussion with Mr Gracey and Miss Ward at which the views of Mr Gracey were already made clear.
247. While we therefore find it true that those clients did ask for a change of account manager, it is not clear how assertively the request was made or whether, as Mr Ferguson put it, it was reversible. Certainly we note that K had made contact with the claimant on 2 March 2018 when she was on leave, saying he had taken over responsibility for Splunk at CR and requested a call 'to sync on the current state of play' The claimant responded on 5 March in a friendly manner and it was Mr Ferguson who stopped her communicating further while she was on leave. The next day, K emailed the claimant 'Enjoy your vacation, and I'll catch up with you on your return. Meanwhile, Colin is working to get me connected.' Then only one week later, when Mr Gracey phoned K to introduce himself as Mr Ferguson's successor, Mr Gracey says

K 'hinted' that change was needed. In cross-examination in the tribunal, Mr Gracey accepted that any client feedback he was personally privy to was 'verbal, informal and in vague terms'. Only four days after that, Mr Gracey was emailing his colleagues to say that CR needed to be reallocated 'at pace'. We find this time-scale concerning. If K had in mind that the claimant should have been replaced, we doubt he would have made the initial approach to her. His 6 March 2018 email indicates he expected to be back in touch with her on her return. It is a very short period of time from his friendly email to his alleged 'hint' in verbal, informal and vague terms that the claimant should be replaced.

248. This leads to the question whether, had the claimant been a man, the 1st and 3rd respondents would have acted on an apparent request by the clients in such vague terms. In particular, would the respondents have done the same where such a male RSM was on a 3 month leave of absence and his outgoing manager had indicated that the employee might not return after leave?
249. On the one hand, it is hard to believe the 1st respondents' clients had any great animus towards the claimant given they had just completed such large deals with her. Their reported reason for requesting a change was not that there had been some kind of breakdown in relations, but that they would like going forward to have someone more strategic and would like to 'align with key decision makers', which we were told meant that they would like to work with someone more senior. At CR, K was only 'hinting' vaguely. Mr Ferguson in his 21 March email indirectly raises whether the situation might be reversible: 'I'm unsure whether the situation is reversible for both accounts, but at this stage both customers re asking for change.'
250. Mr Bloch's evidence was revealing in this respect. He said the project manager of another client (AV), had in December 2016 asked him to remove the claimant from its account. Mr Bloch said he told the project manager ('E') that was not how the respondent managed deals, but he would step in and assist, and that he then helped the claimant close the deal. This suggests to us that such issues did arise from time to time with clients and sales representatives, and that Mr Bloch's usual reaction was to find out the problem and smooth things out.
251. This all suggests that the 1st and 3rd respondents too readily acceded to the initial informal requests of CR and AY, and happily latched onto the opportunity to remove the valuable accounts to give them to a new male employee (Mr Dosanjh) who, however allegedly good his track record, was no more senior than the claimant.
252. In deciding whether the 1st and 3rd respondents have satisfied us by its explanation that their decision was nothing to do with sex, we also take account of the fact that this was all done behind the claimant's back at high speed and with no attempt to discuss it with her first. The claimant had shown she was willing to be contacted while on leave by her response to K's email. Moreover, it had been decided at the mid March meeting that the change

would happen on the claimant's return and Mr Gracey would manage the accounts meanwhile. Then, despite the agreement in the meeting of mid-March, Mr Gracey went ahead and allocated CR and AY to Mr Dosanjh a few weeks later. He had not even met the claimant at that point. His internal comment that someone had 'tipped the claimant off' is suggestive of knowing he has done something unacceptable. Then when the claimant was eventually invited to a first meeting with her new manager on her return and wrote back a pleasant email saying she would like to discuss how the EMEA Sales Manager award was decided, Mr Banks, Mr Gracey and Miss Ward immediately viewed it as 'the game begins'. Miss Ward observed that the claimant 'may start to fight re the account change', so her name should not be put down in emails which she might later access under the Data Protection Act. We find it hard to imagine that a high earning male sales representative would have been treated in this way in regard to the removal of two long-standing accounts on which he had just sealed huge deals.

253. Further we note the terms of the email from Miss Ward on 21 August 2017, where she reported Mr Banks and Mr Ferguson's feelings that 'although [the claimant] is a good sales person, sometimes there is a style/manner issue and she sometimes needs hand-holding'. We were struck by both the content and the language used in that feedback to the US office. In terms of content, it is surprising that such criticisms are made of such a consistently high performer. We did not find any convincing evidence that she needed 'hand-holding' beyond the customary desire of clients with such large deals periodically to meet those higher up the hierarchy, especially to match ranks with the respondent's staff. We also find the further sentence in the email, 'Alan's [Mr Banks'] viewpoint is that she is a good sales person, but not 'great' surprisingly begrudging given her track record. In terms of language, we find the term 'hand-holding' belittling. Although it is conceivably possible that such a term would be used about a man, in our experience, it is one that is far more frequently used of a woman. We do not readily picture the sentence 'although [the claimant] is a good sales person, sometimes there is a style/manner issue and *he* sometimes needs hand-holding' being used of a male employee. Mr Gracey was to report to Mr Banks when he started, and discussed account allocations with him.

254. The claimant had an outstanding performance record. In December 2017, Mr Bloch had said her achievement was 'truly exceptional'. Mr Banks said 'doesn't get much better' and referred to her 'professionalism and persistence in getting these deals over the line'. In January 2017, Mr Bloch had referred to her teeing up the AV account for a big next year. At one point, addition, Mr Ferguson emailed the claimant to say that at the next training session, he would like her to talk through with the team 'how you've successfully navigated CR's Managing Director level org-engagement initiatives, messaging etc.' None of this is consistent with the respondents' heavy emphasis in these proceedings on how the claimant was 'tactical' rather than 'strategic'.

255. These are all reasons for finding the 1st and 3rd respondent's explanation unconvincing.

256. We did consider whether the reason why the transfer of her accounts was carried out behind the claimant's back was simply have been because the respondents genuinely did not want to disturb her on leave of absence. We did not think so. The claimant was due to come back shortly and it would have been possible to defer the decision. There was no evidence of any urgency. Alternatively, the claimant could have been contacted while on leave. She had indicated she did not mind being contacted on work matters in her approach when K contacted her.
257. We also considered whether the reason for reallocating the accounts was because the 1st and 3rd respondents anticipated that she would not return after her leave. Mr Ferguson was passing on his fears that she might not return. However, the 1st and 3rd respondents' usual reaction to a top person becoming a 'flight risk' was to offer them incentives to stay, not to make it more likely they would leave. Indeed, when considering the allocation of three big accounts to Mr Dosanjh and Mr Laws when they became available (AN, CV, BQ – see below), the fact that they were a flight risk because of disappointment on their other accounts was said to be a strong factor by Mr Gracey. This also contrasts with the Miss Ward's email back on 21 August 2017, responding to Ms Miller asking whether the company wanted to take steps to try to retain the claimant. Miss Ward quotes Mr Banks saying the claimant is good but not great, and showing no real effort to take steps to keep the claimant.
258. The position on CX is significant in its own terms as well as adding to the evidence regarding the reason for the decision and approach on CR and AY.
259. Mr Gracey's allocation of CX to Mr Laws has no explanation other than a desire to keep Mr Laws happy, as opposed to a desire to keep the claimant happy. There was no alleged client complaint regarding CX. It had already been allocated to the claimant for the financial year by Mr Ferguson before she went on leave. Even after he was picked up by the Enterprise Account Manager, Mr Gracey tried to persist with the reallocation. The explanation Mr Gracey gave to the tribunal that he had given CX to Mr Laws on only a temporary basis was patently incorrect as Mr Gracey's email of 25 April 2018 insisted, 'Mark Laws has CX this FY'. Mr Gracey subsequently revisited this decision, possibly because of the response from the Enterprise Account Manager, but the point we find significant is that he made the decision in the first place, without consulting the claimant when she was shortly due to return, under no external pressure, and that his first reaction was to try to stand by it. He then removed CX from the claimant again after his meeting with her. For reasons we set out in our fact-findings, we do not accept that she said she did not want it. It was part of the package the claimant had been given and not objected to before she went onto leave.
260. Looking at the totality, we find that the reason for the reallocation of CX was because of the claimant's sex and further, that the reallocation of CR and AY as well as the way it was handled while the claimant was away and

behind her back, was because of the claimant's sex. Mr Dosanjh and/or a man in the claimant's position would not have been treated this way.

261. These decisions were pushed for and primarily made by Mr Gracey, the 3rd respondent. We therefore find the 1st and 3rd respondents carried out these acts of sex discrimination.

Not amending the claimant's sales targets to reflect the change in assigned accounts – Issues 7, 4 and 12 (direct sex discrimination)

262. This complaint is brought against the 1st and/or 3rd respondent

263. This claim fails. Sales targets / quotas would be set once the accounts were finally agreed. Which accounts the claimant should have was still in a state of uncertainty at the date she resigned. It was premature to set new targets.

Not assigning the claimant accounts such as AN and CV – Issues 8, 4 and 12 (direct sex discrimination)

264. This complaint is brought against the 1st and/or 2nd respondent and/or 3rd respondent.

265. We first considered whether there were facts from which we could decide, in the absence of any other explanation, that the failure to assign the claimant accounts such as AN and CV was direct sex discrimination. We find that there are for the following reasons.

266. On her return to work, Mr Gracey initially allocated the claimant AH, CT, CA, BE, BS and - having tried to give it to Mr Laws on 12 April 2018 - CX. After some discussion, Mr Gracey removed CX again and added CN, CU, BT, AG, CH, CC and BR/BS. This was the position as at the date of the claimant's resignation. The 1st and 3rd respondents say the discussions were at that stage still ongoing. Whether or not that was true, the fact remains that this is what the claimant had been offered.

267. Mr Gracey's table of 30 April 2018 had put CX in the \$1million+ bracket, and CA (100k+) and BS (100k+). None of the other accounts appeared on the table at all. The table also showed AN in the \$1million + bracket and CV and BQ in the \$5 million+ bracket.

268. The significance of accounts AN and CV is that they were high value and that they became available at the relevant time. The same could be said of BQ.

269. Mr Gracey knew in April 2018 that the previous person holding those accounts, Mr Bainbridge, would be leaving on 22 April 2018. The claimant was due back on 8 May 2018, so her absence would not at that point have

credibly been a factor. In his email of 12 April 2018, Mr Gracey allocated AN (as well as the claimant's account, CX) to Mr Laws, and CV to Mr Dosanjh. The claimant was allocated AH, CN, CU, CT and CA. None of these were in the \$1 million + or \$5 million + tiers in Mr Gracey's table.

270. Mr Harper left on 31 July 2018, having given one month's notice. His accounts included BQ which was also in the \$5 million + tier. This account was given to Mr Dosanjh.
271. Looking at the overall picture, having removed two long-standing and valuable accounts from the claimant who had just secured two large deals and was generally a top performer, and having given those two accounts to a man; having also removed her next most valuable account (CX) and given it to another man; Mr Gracey then failed to allocate three large accounts which became available in the period when the claimant was expressing concern and upset, instead allocating them to men.
272. The decision was essentially made and pushed by Mr Gracey (although Mr Banks was informed and sometimes consulted). The burden therefore formally shifts in respect of the 1st and 3rd respondent.
273. Regarding the 2nd respondent, Miss Ward, again she was not a decision-maker. She provided HR support.
274. We add that a further basis for shifting the burden of proof is what happened in respect of the original reallocation of CR and AY and attempted reallocation of CX which we have found to be sex discrimination.
275. Alternatively, if we consider the 1st and 3rd respondents' explanation at stage 1, this would provide a further reason for the burden of proof to shift, ie the different reaction to the possibility of flight risk, as we set out below.
276. The burden of proof having shifted, the 1st and 3rd respondents did not satisfy us that the decision was in no way direct sex discrimination.
277. In April 2018, Mr Gracey gave Mr Laws AN because Mr Ferguson had promised Mr Laws some big banking opportunities which had not worked out and he was a flight risk. Mr Gracey told the tribunal that AN had not been run particularly well and it was necessary to offer it someone who could engage on a strategic level with C-suite managers. Mr Gracey said variously that the claimant was away on leave, that her primary experience was in banking services and not oil and gas, and that there were concerns that she tended to be 'tactical' rather than strategic in her approach. We believe that the reason Mr Gracey gave Mr Laws the account was that he was a flight risk. We do not accept the other explanations. The claimant was a top performer who had recently closed two very large deals on two very big accounts. We have discussed the comments in congratulatory emails above. In that context, the constant reference to her approach being 'tactical' as justification for removing the accounts and giving other large accounts to male colleagues we find unconvincing and exaggerated. The fact that she was away on leave is

also not a convincing reason given that she was at this point due to come back fairly shortly. The reasoning that her primary experience was not oil and gas is unconvincing in that Mr Laws also wanted to be given the financial sector. The hopping about amongst several explanations also makes us feel that none were particularly compelling.

278. What is more obvious and compelling is that Mr Gracey feared Mr Laws was a flight risk because large promised accounts had not come good. He also feared Mr Dosanjh was a flight risk for similar reasons. Mr Dosanjh had a previous relationship with CV, but then the claimant had had a previous relationship with AY and CR which had not prevented the respondents reallocating them.

279. The claimant was also a flight risk. But whereas Mr Gracey gave large accounts to two men to stop them leaving, he removed her three best accounts from the claimant and instead of offering her something large by way of compensation and good faith, he offered her a string of small and nondescript accounts.

280. For these reasons we find that the 1st and 3rd respondents have not satisfied us that the failure to offer the claimant large accounts such as CV and AN (and BQ) was not sex discrimination. The failure to do so is direct sex discrimination by the 1st and 3rd respondents.

Unfair conduct of the grievance and/or grievance appeal – Issues 9, 10, 4 and 12 (direct sex discrimination)

281. This complaint is brought against the 1st and/or 2nd respondent.

282. The unfair procedure referred to is failure to appoint an experienced and impartial person to chair the claimant's grievance; failure to adequately investigate the issues raised in the grievance; Miss Ward taking over the grievance investigations despite being personally conflicted; in the grievance and grievance appeal findings, deflecting from and/or refusing to make a decision on issues of discrimination; failing to carry out a proper appeal investigation.

Appointment of Mr Lewis

283. Mr Lewis was appointed to hear the grievance. He had no experience of hearing grievances, although he did have experience of performance management and conducting disciplinaries in over 15 years of management. He was impartial in that he had had no previous dealings with the claimant and he was in a different line of reporting.

284. We see no basis for inferring that Mr Lewis was chosen to chair the appeal because of the claimant's sex. Mr Lewis had the advantage of understanding sales whilst being in a different part of the company and uninvolved in the events in question.

Inadequate investigation and Miss Ward's involvement

285. Substantial parts of the grievance investigation were delegated to Miss Ward. This was made clear on the face of the grievance outcome report. This level of delegation went beyond providing procedural support to the grievance and was inappropriate because Miss Ward had been involved in many of the discussions at the time, including those making decisions about reallocating accounts AY and CR, not telling the claimant while she was on leave, and as to who should be awarded EMEA Salesperson of the Year. Miss Ward, although not a formal decision-maker, had taken an active part in those discussions and it would be difficult for her now to look at the underlying reasoning impartially or to probe she should. In particular, she had approved the hire of Mr Dosanjh.
286. Firstly, regarding the allegation of not granting the claimant the EMEA Salesperson of the Year, Miss Ward carried out the interview of Mr Bloch. This was by telephone as Mr Bloch was living in Israel at the time. We were not told why Miss Ward carried out this interview. Mr Lewis did not remember and Miss Ward thought it was simply because Mr Lewis was busy. We do not find that a good reason for delegating the interview. It is plain that the interview which was carried out was casual and did not ask probing questions. For example, Mr Ferguson's views were never put to Mr Bloch by Miss Ward.
287. Secondly, the investigation into the recruitment process for Mr Dosanjh was wholly delegated to Miss Ward who was not independent, having signed off the appointment herself. She simply spoke to Mr Browne and accepted his view that three 'interviews' had been carried out. It is not clear why this was delegated to Miss Ward unless it was because salary negotiations were involved and it was thought to be in the sensitive category.
288. Third, the gender pay claim was wholly delegated again to Miss Ward on the ground that Mr Lewis did not feel comfortable looking at confidential salary information. We are not convinced that Mr Lewis could not investigate the gender pay claim. Mr Lewis was more senior than those whose pay he was being asked to investigate. He was from a different area in the business. One would expect him to keep any information he found out confidential if appropriate and necessary. There was no reason why he could not have looked at the pay. It would also have been relevant to see the whole grievance holistically. Mr Lewis was inexperienced and it showed in his handling of the grievance. Miss Ward did however discuss her conclusions with Mr Wagenknecht and Mr Paul.
289. We can understand why Mr Lewis delegated the interview of Mr Ferguson, as he was a personal friend. This was delegated to Mr Paul together with Miss Ward and the claimant was present.
290. Looking at the grievance outcome as a whole, the report is thorough in its presentation, with points of analysis and recommendation, although the

claimant would have liked more specific findings of wrongdoing. In several respects, Mr Lewis was willing to say that the company had not followed best practice in terms of process and communications to the claimant. He felt it understandable that she would feel harshly treated both by the reallocation and how it was handled. Moreover, although the new account reallocation was not set in stone, the claimant had not been given the opportunity to participate in the reallocation process. Mr Lewis recommended going through this process collaboratively as a matter of urgency and adjusting her quota based on the agreed opportunity for the new territory.

291. Although we think it inappropriate, as we have said, that Miss Ward was delegated the three areas to investigate, and although she did not conduct the EMEA and Dosanjh investigations as thoroughly as she could have done, we do not find these factors enough on their own to shift the burden of proof on sex discrimination. We cannot see why such factors would be suggestive of sex discrimination. The fact that we do not agree that salary confidentiality or being busy were good reasons to delegate, we can see that Mr Lewis, being inexperienced, may have thought the process he was following was acceptable. Mr Lewis did put effort into constructing a detailed grievance response and he was prepared to make criticisms of the company and recommendations of greater transparency in the future. Mr Lewis's good faith is also indicated by his appropriate recognition that he should not interview Mr Ferguson as they were friends.

292. As for Miss Ward, she should have realised that she was conflicted on some of the matters and she could have done a better investigation, but neither of these were striking enough without something more to shift the burden of proof for sex discrimination. Grievance investigations do range in their extent and quality across employers. (See also our comments in relation to the same issue on victimisation, below.) The involvement of Miss Ward to any extent in the grievance (although we appreciate the delegation was a different matter) was because there were only two HR officials in the company and it had appropriately been agreed by Miss Ward with Mr Wagenknecht (who was senior to her) that one of them should do the grievance and a different one should do the appeal.

Failure to deal with the discrimination allegation on the EMEA award

293. The claimant complains of Mr Lewis's statement that he did not feel personally in a position to decide whether the failure to give her the EMEA award was discriminatory and that she could raise the point through the appeal process if she wanted to take it further.

294. The claimant says this comment and failure to find race or sex discrimination was itself direct sex discrimination or victimisation.

295. These were Mr Lewis's words:

'In terms of any other discrimination alleged, I do not feel that I am personally in a position to respond to this in a fair and unconsciously biased way. Should NL want to take this point further, this can be raised through the appeal process.'

Mr Lewis appears to be saying that he is not equipped to make a decision as to whether the failure to give the claimant the EMEA award was race or sex discrimination. Mr Lewis says he had found no race or sex discrimination, but was attempting to show sensitivity as a white man who was aware of racial bias. But he does not say, for example, 'I am unable to see any race or sex discrimination, but I do appreciate that I am a white man and may have unconscious biases'. Moreover, he talks about raising the matter through the appeal.

296. We asked ourselves whether Mr Lewis would have taken the same position had the same or equivalent allegation been made by a man. We do not think that he would. His reason for feeling that he could not judge the matter was that he is a man and the claimant was a woman making an allegation of discrimination.
297. Similarly, looking ahead to the victimisation allegation, it was because of the nature of the allegation, ie an allegation of discrimination, that Mr Lewis felt unable to deal with it.
298. In one way, we are reluctant to find, as we must, that Mr Lewis was guilty of direct sex discrimination and victimisation in his failure to make a decision on whether the failure to give the claimant the EMEA award was race or sex discrimination. A sense of responsibility over such serious issues and an appreciation of unconscious bias is unfortunately not a defence to direct discrimination. It is a fundamental flaw in a grievance not to make a decision on one of the allegations, let alone an allegation of race or sex discrimination. If Mr Lewis felt unable to judge the matter, he should have arranged for a different person to carry out the entire grievance. The matters raised were all linked by a common theme. There would then probably have been no detriment to the claimant. But in the way it occurred, there was a detriment. The appointed grievance officer had not made a decision on a key matter and had left the onus on the claimant to pursue it on appeal.
299. As it happens, matters were compounded because of the wholly inadequate and cursory appeal process carried out by Mr Timperlake. It was clear from his answers in cross-examination that Mr Timperlake did not carry out any fresh investigations of his own. Essentially, he spoke to the claimant, read the grievance outcome letter, and formed a general impression that it made sense to him from his knowledge of the business. It was a lazy and cursory approach. This included a bare statement that the failure to give the claimant the EMEA award was not discriminatory without any reasoning at all.
300. As for whether Mr Timperlake's approach was sex discrimination, we see no evidence that it was and no evidence to shift the burden of proof. It was a simply a rubber-stamping exercise.

301. In the light of our finding against Mr Lewis on his failure to make a decision on the EMEA discrimination allegation, we went back and considered whether we felt the delegation of certain aspects of the grievance to Miss Ward and the inadequate investigation by her of some of those matters, could be sex discrimination. We felt not. The matter on which we have found against Mr Lewis is rather unusual and specific. We accept that he delegated the Dosanjh and gender pay issues because he felt (albeit in our view mistakenly) that pay issues generally entail confidentiality and should be looked at by HR.

Victimisation

Issue 13

302. It is agreed that the claimant made the following protected acts. In her grievance dated 22 May 2018, she raised issues of race and sex discrimination, as well as remarks made during her grievance meeting on 6 June 2018 and in her grievance appeal dated 10 July 2018.

Issue 14a – 15 (1st respondent)

303. This concerns the failure to appoint an experienced and impartial person to chair the claimant's grievance. We do not consider this was because the claimant had alleged race and sex discrimination. We explain in relation to the direct discrimination allegation that Mr Lewis had the advantage of understanding sales whilst being in a different part of the company and uninvolved in the events in question.

Issue 14b – 15 (1st respondent)

304. This relates to deflecting from and/or refusing to make a decision on issues of discrimination in the grievance and grievance appeal findings. We have already explained above, alongside our finding of direct sex discrimination on this, that it was victimisation by Mr Lewis. Further, for the same reason we do not find direct sex discrimination in Mr Timperlake's failure, we also do not find victimisation. Mr Timperlake simply rubber-stamped the process.

Issue 14c - 15: 1st respondent failing to assign accounts with a comparable level of sales prospects

305. As already stated above, it is true that by the time she resigned, the claimant had not been allocated accounts with a comparable level of sales prospects to AY and CR. In particular, she was not offered any of AN, CV or BQ which became available.

306. BQ became available after the claimant had done her protected acts. We find that the burden of proof shifts for essentially the same reason that it does in respect of direct sex discrimination. In addition, it is particularly striking that when a high value account became available at the very moment the claimant was taking out a grievance about the issue of account allocation that she was not even considered for it. We were not satisfied with the explanation or reasons stated above in respect of direct sex discrimination. We therefore find that the failure to assign BQ to the claimant was also an act of victimisation by the 1st and 3rd respondents.

Issue 14d - 15: 1st respondent failing to comply with or adequately respond to the claimant's SAR

307. The claimant wrote to Miss Ward with a subject access request ('SAR') on 20 June 2018. Mr Paul advised that such requests must be dealt with by the Data Protection Team in the US. The request was duly passed on and on 6 July 2018, Miss Ward emailed Ms Heany chasing it up.

308. The claimant complains specifically of the responses sent on 13 and 20 July 2018. On 13 July, the Data Protection Team replied to the request without any documents, instead referring the claimant to various places where she could log in and search. On 20 July, the Team provided another inadequate response. The claimant reported the matter to the ICO which decided the company was in breach of the legislation and ordered it to provide the outstanding information, which it did.

309. The claimant's first protected act was on 22 May 2018. Nevertheless, we find that there are no facts from which we could decide, if unexplained, that there was victimisation. The request was dealt with by a Data Protection Team in the US which had no other dealings with the claimant as far as we know, and had not been accused by her of sex discrimination. We do not accept that Miss Ward was blocking progress. Her email of 6 July chases and requests escalation if there is no progress. Her email of 18 July downloads the latest XpertHR guidance, recommends it be sent to the US team and shows a level of frustration with how it is being handled. Nor were we given any evidence that SAR requests are usually dealt with better by the company or Miss Ward.

310. This claim for victimisation therefore fails.

Issue 14e - 15: R1 withholding or delaying commission payments

311. It had been agreed before she went on leave of absence that the claimant's commission for FY18 would be paid immediately on her return to work. She returned on 8 May 2018, but that did not happen. It later transpired the reason for the hold up was that the computer could not distinguish FY18 from FY19, the claimant having not signed the relevant documentation for FY19.

312. As we have said, the claimant first did a protected act on 22 May 2018 when she submitted her grievance.

313. The claimant started chasing payment on 1 July 2018 and she appears to have informed Mr Gracey of the problem around the same time. On 11 July 2018, Mr Shea said there was an outstanding document which needed signing. This was erroneous information, but it means that from Mr Gracey's viewpoint, the claimant was discussing it with the relevant department. It is a short time-scale from the claimant's response to Mr Shea (copied to Mr Gracey) on 13 July and the grievance appeal one week later when the claimant raised it again and Mr Wagenknecht followed up. We do not think any inferences can be drawn from Mr Gracey's actions or inactions in this short July period. Moreover, Mr Wagenknecht is a senior person in HR and this is the sort of query which HR deals with.

314. There is insufficient evidence to shift the burden of proof on this matter. This claim is not upheld.

Issue 16a: R1 not upholding any part of the claimant's grievances

315. We have discussed above our finding that the failure to make a decision on whether the EMEA award was race or sex discrimination was victimisation. Apart from that, we do not consider the failure to uphold any part of the grievance was itself victimisation. There is no suggestion that Mr Lewis was upset or offended by the fact that the claimant had alleged discrimination. He was prepared to criticise the respondents, to say they had not followed best practise and to recommend that they go through the accounts process collaboratively as a matter of urgency. He also suggested a pay review. We do not draw any more general adverse conclusions from his reluctance to make a finding regarding whether there was a discrimination in the EMEA award. That was a very specific reluctance, which he was willing to own up to. Although we have found that it meets the technical definition of victimisation, we do not feel it reflects more generally on his findings in the grievance.

Issue 16b: R1 not returning the claimant's previous accounts to the claimant

316. We have found the removal of CR and AY from the claimant was direct sex discrimination. We do not find that the failure to return them to her subsequent to her protected acts was victimisation because of those protected acts. The 1st and 3rd respondents had already shown their approach prior to any protected act.

Issue 17a - 18: R2 failing to adequately investigate the issues raised by the claimant in her grievance; Issue 17b - 18: R2 taking over grievance investigations despite being personally conflicted

317. The investigation of three matters was delegated to Miss Ward: the reasons behind the allocation of the EMEA award, the recruitment of Mr Dosanjh and gender pay. Miss Ward did not do a probing investigation of the first two of those matters in particular. However, we do not find that there are facts from which we could conclude that her investigating these matters, and in at least two cases, not as thoroughly as she could have, was victimisation. The 1st respondent did not have a large HR department. It is inevitable that HR managers are involved in issues as they arise in a workplace. The conflict may not have been readily apparent to her. As for the quality of the areas delegated to her to investigate, in our experience, the level of investigation in grievances is variable. Miss Ward did speak to Mr Bloch and she did speak to Mr Browne. Without any comparison as to what Miss Ward would usually do in practice, (and we do not find the provisions of a formal policy to answer that for us), we do not find there is sufficient to shift the burden of proof for victimisation.

Issue 17c - 18: 2nd respondent refusing to adequately respond to or address the claimant's SARs

318. This claim is not upheld for reasons set out in respect of issue 14d.

Issue 19a - 22: 3rd respondent failing to assign the claimant accounts with a comparable level of sales prospects to FY19

319. This is upheld in respect of BQ (see issue 14c). The 3rd respondent was the decision-maker.

Issue 19b- 22: 3rd respondent maintaining an unrealistic sales quota for the claimant for FY19

320. This claim is not upheld. As already stated, it had not yet got to the point where sales quotas were to be laid down. The allocation of accounts had to be finalised first.

Equal pay

321. The equal pay claim is made against the 1st respondent and based on like work with Mr Dosanjh. The 1st respondent concedes that Mr Dosanjh and the claimant were employed on like work.

322. The equal pay claim was not clearly formulated or argued in submissions.

323. The issues state that the claim relates separately to commission payments, bonus and RSUs. In terms of argument and evidence, it was clarified that the claim related to base pay, OTE and RSUs.

324. The claimant's pay at the material time was £95,000 basic and £190,000 OTE commission. She had 8597 vested RSUs and 4078 unvested RSUs. Mr Dosanjh was on £110,000 basic pay and £220,000 OTE. He was granted 1300 RSUs.
325. Looking at the others in Mr Gracey and Mr Lyskey's teams, at first sight, it appears that the more recent recruits are on the higher pay. One might think that is because the pay of existing staff was not annually reviewed, and pay does go up with time and market forces. However, closer examination indicates a different explanation. Aside from the claimant and one male RSM starting in 2016, the period of time between start dates is only one year. Moreover, Mr Laws, who had worked in the industry at a high level for 24 years, had been recruited by Mr Ferguson for £95,000 / £190,000 plus 900 RSUs in March 2018 following proper recruitment procedures. The more obvious pattern is therefore that RSMs who were headhunted and recruited by Mr Gracey or Mr Banks, having worked with them before, were paid more.
326. Mr Gracey head-hunted Mr Dosanjh. He was keen to get him to come to the 1st respondent. He asked about Mr Dosanjh's current package. He was told this was £115k base with 5% salary increase pending; 50-50 plan OTE £230k; 40k RSUs vesting up to March 2019; £750/month car allowance and various benefits. Mr Gracey discussed with Mr Banks what package to offer. He started with £100,000/£100,000 plus 1300 RSUs. Mr Dosanjh negotiated this up to the final offer.
327. We therefore find that the reason Mr Dosanjh was offered his final package was because that was the sum that was necessary to persuade him to leave his existing employer, who was already paying marginally more. We note that Mr Dosanjh was not required to provide any written verification of what he was earning. We find that surprising. Nevertheless, we accept this was the true reason for Mr Dosanjh's package. The need to pay Mr Dosanjh more to persuade him to join the 1st respondent was a genuine material factor defence which did not involve treating the claimant less favourably because of her sex.
328. However, the claimant has shown that as a result of this factor, women are put at a substantial disadvantage when compared with men doing work equal to hers. RSMs who were head-hunted by Mr Gracey and Mr Banks from colleagues they had worked with previously were paid more. The statistics show that, and it is not surprising. Someone who is head-hunted is in a strong position. The head-hunter, who knows them already, is well-disposed towards them. The candidate has a strong hand. One can see that in the way Mr Gracey negotiated on behalf of Mr Dosanjh with Mr Banks. There is a strong contrast with what happened when Mr Ferguson recruited Mr Laws, following proper recruitment procedures.
329. The practice of headhunting RSMs and then paying head-hunted RSMs more, was likely to and did favour men. The 1st respondent accepted that IT firms are very male dominated across the Board. The industry is heavily male-dominated at senior levels. Such individuals with long experience are

likely to be men. A form of word of mouth recruitment will therefore favour men. Moreover, under the gender pay reporting requirements, the 1st respondent's report as at the snapshot date of 5 April 2018 showed that the upper pay quartile comprised nearly 90% men.

330. The 1st respondent was unable to show that paying a head-hunted RSM a higher amount was a proportionate means of achieving a legitimate aim. Mr Ferguson was able to recruit a very experienced RSM in Mr Laws on the same pay as the claimant. The 1st respondent operated an informal procedure which was open to favouritism and subjective views of candidates' qualities. Mr Dosanjh was not even required to verify his alleged pay. We were given no clear evidence regarding why it was also necessary to pay Mr Spence and Mr Wisbey more than the claimant, how their qualities and experience were measured, and whether they would have come for less pay. The internal pay structure was also fairly random and there were no regular internal pay reviews. The 1st respondent has therefore not satisfied us that it was generally following a legitimate aim or that any such aim would be proportionate, having regard to its impact in particular on the claimant and female employees generally.

331. The equal pay claim therefore succeeds. The claimant was employed on like work with Mr Dosanjh for the period while they were both employed by the 1st respondent and the 1st respondent has not shown a non-discriminatory material factor defence that justifies paying Mr Dosanjh more on his base rate, OTE commission or RSUs.

Time-limits: Issues 2 – 3

332. It is agreed that any action taking place on or after 11 April 2018 is in time.

333. The removal of AY and CR from the claimant and allocation to Mr Dosanjh, though decided upon in March 2018, was 'announced' generally by Mr Gracey on 12 April 2018. Also in his email of that date, Mr Gracey allocated CV to Mr Dosanjh and CX and AN to Mr Laws. The allocation of BQ to Mr Laws and not the claimant occurred in July. Mr Lewis's failure to make a decision on whether the EMEA award was race or sex discrimination was on 6 July 2018.

334. These discriminatory actions were therefore in time. To the extent that a slightly earlier decision was made by Mr Gracey regarding AY and CR, this formed part of a continuing discriminatory state of affairs with the decisions and announcements in April and June set out in the previous paragraph.

Unfair constructive dismissal

335. The first question is why the claimant resigned. The 1st respondent argues that she resigned because she wanted to pursue her plans with Throdle. The claimant denies this.

336. At the time of her resignation, the discussion regarding the allocation of accounts to her had not finished. The grievance recommended going through the account allocation process 'collaboratively' as a matter of urgency. The appeal outcome said the company would look at adjusting the proposed territory. However, the decision to remove AY and CR (and CX) from her had concluded and the proposals made to her were all of substantially lower value accounts, even after some discussion. Three big accounts which had become available had been allocated to Mr Dosanjh or Mr Laws without giving her a thought.
337. The claimant resigned the day after receiving the grievance appeal outcome. She set out her reasons in an email. She said her resignation was the direct result of the issues she had raised in the grievance, the process the company had followed in determining the grievance and its failure to deal adequately with the serious issues. The key issues set out in her grievance were the removal of the CR and AY accounts and the way it was done, the removal of CX, the failure to award her EMEA Sales Person of the year, and the recruitment of Mr Dosanjh who knew Mr Gracey and Mr Banks and was allocated three large accounts. She also queried his pay. She said a high performing 'ethnic' female was being pushed aside for the old boys network.
338. We find that the claimant did indeed resign because of the matters set out in her grievance and her resignation letter as set out in the previous paragraph. Those contemporaneous documents record her concerns at the time and are consistent with her general reaction to the various matters at the time. The claimant's trust and confidence was destroyed before the grievance process and she resigned in large part because of what had happened prior to the grievance process.
339. The grievance process did not put right the loss of trust and confidence and indeed aggravated it by delegating certain matters to Miss Ward who had been involved in earlier discussions, and by the failure to make a reasoned finding about whether the failure to give her the EMEA award was race or sex discrimination.
340. Although the grievance outcome recommended discussing which accounts she should be given 'collaboratively', the damage was done. The claimant was a top performer over a number of years. She had recently closed two large deals for which she had received fulsome praise. Then her managers had removed her accounts without consultation and behind her back; had allocated poor accounts in their place; had treated her concerns dismissively, at the same time giving new male recruits from their network preferential treatment to her detriment.
341. These were matters which were likely to destroy trust and confidence and they did so. There was no reasonable and proper cause for these actions for the reasons we set out when discussing the direct sex discrimination allegations.

342. Recommending in the grievance that the allocation of accounts should now be undertaken collaboratively could not remedy the damage to trust and confidence which had already taken place. The claimant did not affirm by taking the grievance and appealing its outcome. She wanted to find out answers for what had happened and she wanted a specific acceptance of wrong-doing beyond the criticisms and recommendations which were made. When these were not provided, and indeed it was compounded by the aspects of the grievance we have mentioned, she resigned.
343. The claimant resigned because of the totality of the matters we have described. The failure to give her the EMEA award was part of her concern and that matter we do not find to be a breach of trust and confidence. For reasons we explain, it was simply a matter of opinion and a legitimate exercise of discretion by Mr Bloch. But the claimant also resigned substantially because of the removal of her accounts without consultation and behind her back and the fact that poor accounts had been allocated in their place, as well as the failure at both grievance and grievance appeal stages properly to make findings on her discrimination complaint about the EMEA award. Each of these matters separately and together amounted to a breach of the implied term of trust and confidence.
344. For completeness and with reference to the list of issues, we do not consider the following matters constituted a repudiatory breach: failing to adjust the claimant's sales quota (this was premature); withholding commission payments (this was a short delay due to a computer error); failing to comply with the SAR (we do not think this failing amounts to a repudiatory breach and we do not think this was why the claimant resigned); not appointing an experienced and impartial manager to chair the grievance (we have set out our views on this).
345. The 1st respondent suggested that the true reason the claimant resigned was to pursue a business with Throdle. We do not find that to be the case. At the time of these events, Throdle was a hobby which the claimant shared with another employee, who she bought out only after she had left. Despite Mr Ferguson's assumptions, the fact is that the claimant did return to work after her leave. When K emailed her on 2 March 2018, she was watching her work email and she responded suggesting a call to discuss K's objectives. That does not strike us as the behaviour of someone who is about to leave. The claimant may have hoped that in the longer term, Throdle could become a business which she could pursue, but it had not reached that stage, and it was not why she resigned when she did.
346. The claimant was therefore constructively dismissed. Her constructive dismissal was unfair. No reasonable employer would have behaved as the 1st respondent did in respect of the matters which we have found to be a repudiatory breach.
347. As a result of our finding of unfair constructive dismissal on the basis of breach of the implied term of trust and confidence (see paragraph 23 of the List of Issues), it is not necessary for us to consider whether the claimant's

contract contained the express or implied terms suggested at paragraphs 24 and 25 of the List of Issues and whether such terms were breached.

Employment Judge Lewis 14.7.20
Employment Judge Lewis

Dated:

Judgment and Reasons sent to the parties on:

21/7/2020...

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For the Tribunal Office