Case Numbers: 3200137/2017
3200953/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms F Habib**

Respondent: **Dave Whelan Sports Limited T/a DW Fitness First**

Heard at: **East London Hearing Centre**

On: **3 – 6, 10 – 13 and 17 & 18 March 2020**
and in Chambers on 14 July 2020

Before: **Employment Judge C Lewis**

Members: **Mr J Webb**
Mr L O'Callaghan

Representation

Claimant: Mr C Davey (Counsel)

Respondent: Mr G Self (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant's complaints in case number 3200137/2017 of**

   (i) direct discrimination because of age, sex, and religion or belief;

   (ii) harassment related to age and sex;

   (iii) victimisation; and

   (iv) less favourable treatment as a part-time worker fail and are dismissed.

2. **The Claimant's complaints brought in case number 3200953/2017 of victimisation also fail and are dismissed.**

REASONS FOR RESERVED DECISION

1 The Claimant brought two claims against the Respondent which have been heard together. Of the claims arising in the first claim the complaints of direct discrimination because of age, sex, and religion or belief, harassment related to age and sex , victimisation and less favourable treatment as a part-time worker fall to be determined by this Tribunal. The claims of race discrimination and for equal pay were withdrawn by the Claimant on 10 August 2017 and 31 October 2019 respectively. At a Preliminary Hearing held on 10 August 2017 Employment Judge Brown found that the Claimants' complaints relating to events before 18 November 2014 and her complaint of direct discrimination because of religion in relation to the acts of Claire Woolley in March 2015 were out of time and it was not just and equitable to extend time, the Tribunal therefore does not have jurisdiction to hear those complaints. In her second claim the Claimant brought complaints of victimisation, relying on the issuing of her first claim as a protected act under s 27(1) of the Equality act 2010.

List of Issues

2 At the start of the hearing the Respondent had provided copies of the list of issues that had been agreed following a Preliminary Hearing before Employment Judge Jones. However, the Claimant disputed this was the agreed version and wished to rely on another version of the list of issues: the version Ms Habib wished to rely on did not have any numbering and included some claims that had been withdrawn before Employment Judge Jones but in other respects the issues the issues were set out using identical wording. Mr Self for the Respondent explained that the list of issues that he had prepared had been based upon the issues as drafted by the Claimant, Ms Habib having indicated she was only prepared to agree to it if it was worded as she had expressed - the wording used in the List of Issues was therefore Claimant's. We compared the two Lists of Issues and were satisfied that where the issues were still live (i.e had not been withdrawn by the Claimant or dismissed) the wording used in the version prepared by the Respondent was identical to that in the List presented by the Claimant. The difference between the two versions being that some issues were referred to in the Claimant's which had clearly been withdrawn, including her equal pay claim.

3 The Tribunal referred to Mr Self's version of the List of Issues: this contained sequential paragraph numbers and did not include issues in respect of the claims that had been dismissed before this final hearing.

4 The List contained 49 issues relating to her first claim (numbered 1-49) and 9 issues related to her second claim (numbered 50 to 57). The allegation contained in issue 16 was withdrawn as it pre-dated the protected acts; the allegations set out in issues 18, 34, 39 and 48 were all withdrawn by Claimant's Counsel at the end of Mr Lusandisa's evidence. The allegation of direct discrimination because of religion or belief in respect of the appeal process contained in issue 35 was also withdrawn during the course of the hearing. The allegation at issue 56 that Mr Sumner victimised the Claimant in his handling of the matters alleged at paragraph 8 of the second ET1 was not put to Mr Sumner and was withdrawn at the end of his evidence on day 9 of the hearing.

5 Rather than list each of the 57 issues here and again when each issues is addressed in the body of the decision below, the description of the issue and the claims it gives rise to have been set out below as headings above the findings relevant to that issue.

Case management and timetabling

Bundles

6 The Respondent had prepared a bundle contained in two lever arch files, which were the documents to be referred to at the hearing. The Claimant was not happy with the contents of those bundles and her Counsel indicated that she had brought with her copies of further documents, which ran to five lever arch files, which she had photocopied to provide copies for the Tribunal and the Respondent. The Employment Judge indicated that the Tribunal would not be looking at two competing sets of bundles. The bundle prepared by the Respondent had been prepared from an agreed disclosure list.

7 Mr Davey told the Tribunal that he had been instructed the week prior to the commencement of the hearing and had not yet had time to go through all of the pages in the Claimant's bundles so was unable to say which were relevant but there appeared to be large amounts of duplication. The Tribunal indicated that we would be working from the Respondent's bundle but that if there were particular pages that were not in the bundle that the Claimant wished to refer to in her evidence then she could do so if the Tribunal were satisfied they were relevant. The Claimant stated that she needed to have each email in its full email trail in order to be able to orientate herself in the document. The Tribunal indicated that the Claimant could be taken to the email and given its context if necessary and if she was unable to understand the email then she would need to let the Tribunal know. The Claimant had also included in her bundles documents which she said were necessary to rebut the Respondent's assertion that she was not up to her job. The Employment Judge pointed out that this had not been suggested by the Respondent that she was not up to her job and Mr Self confirmed that it was not any part of the Respondent's case. When asked, the Claimant indicated the documents related to 2014.

8 The Claimant had provided a witness statement which did not contain any detail in respect of most of the allegations. She was allowed to put in a further statement which was drafted with the assistance of Counsel. Mr Davey requested, and was given, more time to take instructions and in the event the evidence did not get underway until the morning of day 3 when the Claimant was called to give evidence.

9 Before hearing the evidence the Tribunal went through the list of issues with the parties, discussed housekeeping matters and heard the Claimant's application to have Ms O'Reilly act as an intermediary.

The Claimant's supporter/ assistance provided

10 The Claimant attended with a supporter, Ms R O'Reilly, who had been providing some assistance to the Claimant in preparing herself for the hearing prior to the instruction of Mr Davey. Ms O'Reilly informed the Tribunal through Mr Davey that she was registered as an appropriate adult and attended court and other legal proceedings in that capacity

where an appropriate adult was deemed necessary. The Claimant told us that she has dyslexia and she also referred to having dysphasia, which she explained meant that she would struggle to find her place in the bundle and sometimes not be able to find the correct words she wanted to say; she told us that had found it very useful to have the assistance of Ms O'Reilly, particularly in her discussions with Mr Davey, to help her to express what she wanted to say. None of the four medical reports in the bundle refer to dyslexia or dysphasia [see ppA172, A210, A219, F15]

11 The Tribunal explained that the Claimant would need to give her own evidence: there was no medical evidence before the Tribunal or any other evidence from an expert or otherwise, that an Intermediary was required. However, Ms O'Reilly was able to sit next to the Claimant's Counsel during the Claimant's evidence and was asked by the Tribunal to indicate as and when she considered that a question was not understood by the Claimant and required rephrasing, or where the Claimant might be struggling to express herself and might need assistance.

12 During the course of the Claimant's evidence Ms O'Reilly moved to sit next to her to assist her with finding the relevant page numbers. The Claimant exhibited considerable difficulty in finding relevant pages and on focusing on the content. However, once she did focus on the content she was able to read it and answer questions on it, although not always without giving a running commentary as to what her views were on the content of the document.

13 At the conclusion of the Claimant's evidence Mr Davey requested further time to take her instructions on the Respondent's witness statements, indicating that this had been challenging and he had not managed to finish the task by the time the Claimant started giving her evidence. We therefore allowed further time once her evidence had been concluded for him to take further instructions before cross-examining the Respondent's witnesses.

14 The Tribunal took regular breaks during the Claimant's evidence.

The Claimant's application to introduce further evidence on day 7

15 At the end of day seven of the hearing, after Ms Akesson's evidence, and before we heard from Mr Kelly, Claimant's Counsel, applied to recall the Claimant to introduce her medical records. The Claimant wanted to be recalled to give evidence in relation to the stress she felt she was under following the arrival of Mr Lusandisa at the Thomas More Square gym in November 2014 and her visits to her GP in July 2015 after she believed she had been given alcohol. Mr Davey indicated that some of the pages the Claimant wished to rely on had been made available to the Respondent at the outset of the hearing. The Respondent's Counsel indicated that he would wish to see all the relevant medical records and not just the pages selected by the Claimant if they were to be introduced in evidence. Claimant's Counsel informed us that he had not read the medical evidence that the Claimant wished to put in evidence, because on being informed that all the relevant medical records would need to be disclosed the Claimant had decided she did not wish to disclose them; this was in the middle of last week but she had now changed her mind.

16 If the Claimant were to be given permission to introduce further medical evidence

it was apparent there would be an issue as to what extent all the records are to be disclosed, or which are the relevant medical records. Mr Davey informed us that it if the application was granted it was his intention to call the Claimant to adduce the medical records and also to ask her about the last part of Mrs Akesson's evidence in relation to the accessibility of performance reviews, which the Claimant says she can access on her phone. On being asked by Employment Judge how this was relevant to the issues or would take any of the matters that the Tribunal had to decide any further Mr Davey told us that there was a dispute in that it was the Claimant's account that she was distressed by Mr Lusandisa's conduct, whereas he gave evidence that in his view the relationship had started to break down after she was put at risk of redundancy; also that she wished to rely on the medical evidence in support of what the Claimant says about being given alcohol. It was pointed out that Mr Davey had just withdrawn that allegation at the close of Mr Lusandisa's evidence and we do not have to decide whether the Claimant was given alcohol. Mr Davey said he still wished to introduce medical evidence to show that the Claimant was raising issues of stress at work with her GP from March 2015, and to rebut Ms Akesson's evidence in respect of the accessibility of performance reviews.

17 Mr Self objected to the application. He pointed out that the Claimant had been given two days at the beginning of the hearing to go through the documents she wanted to have included in the bundle, she had made a selection and had included in a supplemental bundle at F2 to F4 a selection of her GP records, however she had not referred to those in her evidence and she had not incorporated them into her witness statement and he had therefore chosen not to cross examine on those documents. The Claimant had been re-examined by her Counsel for 2 1/2 hours during which time he had every opportunity to introduce the medical records and had not taken that opportunity, those documents had not been referred to, in addition they are self-reports to a General Practitioner. Mr Self submitted that the Claimant is simply seeking to delay matters further. He pointed out that according to the timetable at the outset of the hearing he had been planning to call Mr Kelly last Friday but was now looking at calling him a week later. If the Claimant is to be recalled to give new evidence this would further delay Mr Kelly's evidence and the remainder of the Respondent's witnesses evidence. He suggested this was another example of the Claimant not playing by the rules and that we should not permit the application. He submitted that the Claimant has been given every accommodation so far by the Tribunal in order to allow her to present her case. He opposed the application and also confirmed that he would possibly need to deal with any new matters introduced by the Claimant with his witnesses and potentially further witnesses could have to be introduced. He submitted that it is not appropriate to allow the Claimant to be recalled to deal with matters that have been overlooked by Counsel, he would then possibly need to recall his witnesses and asked where does that end, proceedings have been filibustered and now the line needed to be drawn. The evidence sought to be introduced was not evidence that went towards the key issues.

Tribunal's ruling

18 Having considered the submissions from both sides, we have also taken into account the Overriding Objective which is to deal with cases fairly and justly and includes, so far as practicable, ensuring the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of issues, avoiding unnecessary formality, and seeking flexibility proceedings, but also avoiding delay so far as is compatible with proper consideration of the issues and saving expense. In *Harris v*

Academies Enterprise Trust 2015 IRLR 208E 80 Langstaff J, (as he then was) observed that the concept of justice in the overriding objective can have a wider remit than simply reaching a decision that is fair between the parties, it also involves delivering justice within a reasonable time, having regard to cost implications and dealing with a case in a way that ensures that other cases are not deprived of their own fair share of the resources of the court.

19 We took into account the time allocated to the hearing and time taken up already, we consider that allowing the Claimant to be recalled would certainly eat into a fair allocation of that time, taking away more time from the Respondent's witnesses to give their evidence; we have already allocated two days at the start of the hearing to allow the Claimant to put in a witness with which both the Claimant and her Counsel were happy, and allowed time for the Claimant to go through and decide which documents from her bundles she wished to introduce into the bundles before the tribunal. We note that the Claimant elected not to disclose her medical evidence at that point, she made a decision before she gave her evidence. We have not been taken to documents F2 and F4 despite the Claimant having had an opportunity to give evidence about those. The Claimant has been represented throughout the hearing.

20 We also considered the relevance of the documents and the purpose for which the Claimant wishes to be recalled, which is effectively to corroborate her own account of when she began to feel stress at work. We have heard the Claimant's evidence in respect of this. We are now told that she wishes to rebut the suggestion by Mr Lusandisa that the relationship broke down once she had been placed at risk of redundancy. We will obviously take into account that Mr Lusandisa is only giving his evidence as to his understanding and that the Claimant's understanding of when she began to feel stress at work may well be different to his. In relation to the medical evidence in respect of consuming alcohol, that issue has been withdrawn and the medical evidence of what the Claimant reported to her GP cannot take that any further. In respect of rebutting Mrs Akesson's evidence, we are satisfied that it is an ancillary, or collateral, matter and is not directly relevant to any of the issues we have to decide. We are satisfied that if that further evidence was to be allowed the Respondent would also potentially wish to adduce further evidence to establish the position. While we have provided flexibility, as is appropriate in a tribunal, the leeway can only be stretched so far and not beyond the point where it would cause injustice to the other party. We are satisfied that that is not in accordance with the general rules of evidence and a fair hearing to allow new matters to be introduced in rebuttal of collateral issues; it only serves to prolong the hearing and is not relevant to any of the central issues upon which we have to deliberate and make findings. We find that it would not be in accordance with fair conduct of the evidence, the overriding objective, the fair allocation of the time available to the parties, nor the orderly presentation of evidence which itself is an essential aspect of a fair hearing. The application is refused

Findings of fact relevant to the issues before the Tribunal

21 We now turn to our finding on the issues identified in the list of issues. Some of the issues are dealt with together, out of numerical sequence, where they overlap with, or relate to, the same or similar incidents.

Issues 1 and 3

Issue 1 :18- 20/11/14 When he first met the Claimant Moses Lusandisa, he hugged the Claimant, the Claimant explained that this made feel uncomfortable preferring a handshake despite this he then held onto her hand whilst shaking it and in doing so rubbed his finger inside the Claimant's hand. SH

Issue 3: 10/16.12.14 Moses Lusandisa held the Claimant's hand and stroked the same and commented on their softness SH

22 The allegation against Mr Lusandisa described in the list of issues is that on the first meeting with the Claimant he hugged her inappropriately. The allegation in the claim form at A17 v was that Mr Lusandisa insisted on hugging her and was offended by her request not to hug, but that he did not attempt to hug her again. In the Claimant's evidence before the Tribunal her descritpion of this incident changed significantly from what was described in the claim form and in the Claimant's first witness statement: it expanded to include an allegation that while he was hugging her, Mr Lusandisa had then slid his hand down her back towards her hip.

23 Mr Lusandisa explained that he would normally wait for someone to instigate a greeting and then follow their lead, this was borne from experience because being of Francophile origin his cultural background was that people would greet each other with a kiss on the cheek in the French way and he was aware that was clearly not a British custom so he was conscious there were different expectations from different people as to how they should be greeted. In a professional context he generally went for a handshake but in the gym environment people were familiar and quite often greeted with hugs; if someone went in for a hug then he would reciprocate and do likewise. He recalled that the Claimant had a style which involved high-fiving and that she would greet people in what he described as 'a kind of American way'.

24 The Claimant attempted to demonstrate how she said Mr Lusandisa attempted to stroke the inside of her hand during the handshake. We do not accept that the hand stroking happened in the manner she described.

25 The Claimant does not mention any inappropriate touching or unwanted hugging in her grievance. She simply lists "Sex discrimination" at point 12 of her list of grievances. Mr Lusandisa's response to the allegation when he first learned about it was [B346 – 347]: "I am not aware of this and I would like Farida to elaborate more as it is a serious accusation". We accept that he had no idea what the Claimant was referring to and we find that his account at the time is consistent with his evidence to the Tribunal. We are satisfied that he may have hugged her on the first occasion they met; he could not recall whether he had and accepted that it was possible, but that once she made clear she did not want to be hugged he did not try to repeat it: this was not disputed by the Claimant.

26 In cross-examination the Claimant said she told Andrew Kelly and Kris Williams about Mr Lusandisa stroking her hand with his finger. Neither witness was asked about this in cross examination. We find that this allegation was not ever referred to in any recorded complaint by the Claimant in writing or in any of the notes of any conversations about her allegations. In the Claimant's grievance in January 2016 there was no mention of any inappropriate hugging, or stroking of her hand, let alone stroking her back. We find it highly unlikely she would have overlooked mentioning an incident like this if it had

happened. We do not find her evidence on this point to be credible. We find that the Claimant's account before us of her first meeting with Mr Lusandisa was embellished. We are satisfied that if Mr Lusandisa had slid his hand down the Claimant's back she would have raised it at the time, or in one of her grievances, or at the very least in her claim form. We do not find that that was something Mr Lusandisa did, nor something it is likely that he would do. We do not find the Claimant to have established facts from which we could conclude that the incident happened as she described.

Issue 3 comment that the Claimant's hands were so soft

27 In his evidence Mr Lusandisa explained that there was an occasion in which he high-fived the Claimant and she responded by saying 'oww' indicating that he had hurt her hand; he then took hold of her hand to see if it had been injured, when he did so he noticed they were soft and made a comment about the Claimant having soft hands, which he thought was a compliment. He explained to the Claimant that he had rough or hard hands and his wife had even bought him training pads and gloves to help with this, they both laughed and he thought it was an innocuous event. We find that the high-five incident was indeed innocuous.

28 Mr Lusandisa volunteered information about another occasion when he also held the Claimant's hand: which was when he had learned that she was upset having recently found out about the death of her mother; he had gone out of his way to travel in to work, together with his wife and daughter, to go and see the Claimant to check that she was okay and to try and comfort her, and on that occasion, he also took hold of her hand briefly. The Claimant denied that the incident in which he comforted her on the bereavement of her mother took place. We accept Mr Lusandisa's evidence, we find that he did travel to work together with his wife and daughter to check on the Claimant and tried to comfort her, and whilst doing so he briefly took hold of her hand. We find his account to be credible and that it is unlikely that he would have made this up.

Issue 2: Mr Lusandisa shouted at the Claimant and told her not to engage with more senior managers about her idea for the gym/business. He told the Claimant to pass all ideas through him rather than speaking to senior management (direct sex discrimination, age).

29 At paragraph 35 of her witness statement and in her oral evidence the Claimant described her idea as setting up members with each other as 'gym buddies'. Mr Lusandisa's told us that on the relevant occasion when the senior managers attended the gym, everyone stood around in a circle and they were asked for any suggestions, the Claimant came out with an idea about teaming single gym members up with each other like a dating arrangement and that this had not gone down very well, people had been looking around at him with raised eyebrows as if to say, 'What is she talking about? Mr Lusandisa accepts he called the Claimant over afterwards and suggested to her that she should run ideas by him before passing them on to senior managers, he described it a sense checking any ideas with him. He denies being aggressive or rude when he spoke to the Claimant.

30 We do not find it likely that Mr Lusandisa would have been aggressive or rude in the circumstances. There is no evidence from which we could conclude that Mr Lusandisa

would have behaved any differently with someone either younger or male in the same situation.

Issue 4: 11 November 14 – December 15 Moses Lusandisa never placed any event organised by the Claimant into the Company newsletter (age and sex discrimination direct).

31 Mr Lusandisa could not recall whether he had sent any specific events to the newsletter, he thought he may have done, but it was not up to him as to what was published in the newsletter. He explained that there was no reason for him not to send events to the newsletter and that the Claimant's success would reflect well on his club which would in turn reflect well on him. There was no evidence before us of any examples of any events organised by anybody else at the Thomas More Square gym (TMS) being placed in, or appearing in, the newsletter. Mr Lusandisa believes that he did send details of the Claimant's events to the newsletter once or twice and mentioned them to the Regional Business Manager. We find no evidence from which we can conclude there was any less favourable treatment of the Claimant and no comparator has been identified. There is no prima facie evidence from which we could conclude that there was any age or sex discrimination.

Issue 5: August 15 ***Mr Lusandisa intimated that he wanted to replace the Claimant (direct age discrimination)****. The victimisation allegation was withdrawn as it predates any protected act*

32 The Claimant relies on a story that she was told by Mr Lusandisa about a former General Manager of his, from which she inferred that Mr Lusandisa wanted her to leave TMS. Ms Habib claims that this story was told to her rudely and aggressively because Mr Lusandisa liked younger women and he wanted to replace her. Mr Lusandisa recalls that at a staff meeting he told his whole team about how his first General Manager had called his team together and told them he would be making changes, he had told them that they could get on board with his changes or they could leave. He told the story as a management tool to get the staff team on board with his expectations. This was something he said to the group early on and it was not directed at any one individual. Mr Lusandisa told us that he did not think about the Claimant specifically when he told it. We accept his evidence, we find it more likely that he recounted the story to the whole team as a means of indicating he wanted them to get on board with his way of doing things. We note that the Claimant's allegation is based on the inference that she drew from being told the story, which we do not find was a reasonable inference for her to draw in the circumstances. We do not find that Mr Lusandisa directed the story at the Claimant, that he told the story to indicate to the Claimant that he wanted to get rid of her, or that he had in mind that he could replace her with a younger woman.

Issue 6: 11 January 15 ***Mr Lusandisa refused the Claimant's Gold Certification training and told her she was a part-timer and the training was not for part-timers she would need to get a full-time job first. The Claimant made further request for the training but this was refused (direct age and sex discrimination, direct part-time worker discrimination).***

33 Mr Lusandisa explained to the Tribunal, as he had explained during the Claimant's

grievance, that he told the Claimant that she was not eligible to go on the Gold Certification training not because she was part-time but because as the Studio and Events Manager she was not a Head of Department and she did not manage Fitness First employees. There was a difference between Heads of Department, who managed employees, and the head of *a* department, which would include the Claimant who is Head of Studio and Events. He understood that the training was not relevant to staff who did not manage other employees.

34 We note that this complaint was raised in the Claimant's first grievance and Jemma Ellingham informed the Claimant [B258] that the reason that she was not put forward for the Gold Certification training was "not anything to do with full time or part time it [is] to do with your role", because, as the Studio Events Manager, she did not manage any employees. As a result of Claimant's grievance the Respondent's Learning and Development team agreed to look again at its policy which led to the relevant policy or 'journey' being amended. [B332] The outcome of the grievance was that on 25 May 2016 the Claimant was placed on the Gold Certificate training [B309]. Mr Lusandisa congratulated the Claimant and suggested that she spent some time with Mr Yoganathan to give her insight into the process [B308]. We were told by that no other SEM whether full-time or part-time had been eligible to go on the Gold training until the Learning and Development department changed the training journey as a result of the Claimant's grievance. This was not disputed by the Claimant.

35 The Claimant complained that her treatment was unfair because Tharan Yoganathan had been allowed to go forward to Gold Certificate training when he had not competed bronze. She referred to additional documents P150a and P151. Mr Lusandisa's evidence was that those documents were referring to the Membership Consultant bronze certificate which was an additional certificate in respect of sales and that Mr Yoganathan had achieved bronze in fitness before he came to TMS. We note that this is one of the topics on which the Claimant sought to introduce further evidence however having considered the evidence before us we are satisfied that the Claimant was mistaken in her understanding of Mr Yoganathan's training history and in any event we are satisfied that the reason for not placing her on this training before that date was not because of her age or her sex but because she was an SEM and as such she did not manage direct employees as part of her role.

36 The Claimant also complains that in February 2015 she had asked to be put forward for training in HR1 and HR 2 Essential training but was told by Mr Lusandisa that she was not a manager and was a part-timer.

37 No comparator has been identified for the purposes of the claim under the Part-time Workers Regulations and no submissions were made on this aspect of the claim. Nor has the Claimant brought a claim of indirect discrimination. Mr Lusandisa denied that he told the Claimant that she could not go on the training because she was part time. We accept that the explanation given was because she was not an HOD, and was therefore not responsible for managing Fitness First employees and we find that that is the reason why the Claimant was told she was not eligible to go on the Gold Certification training at that time.

Issue 7: 02.15 Moses Lusandisa excluded the Claimant from a Head of Department meeting at Thomas More Square (TMS) (direct age and sex

discrimination)

38 Mr Lusandisa accepted that the Claimant was excluded from a meeting at TMS in February 2015, he recalled that it was an occasion when the Heads of Department were discussing a confidential matter about an employee; he considered that it was confidential in respect of a member of staff and that only managers who had a role in managing that employee needed to be included in the meeting. The Claimant accepted in cross-examination that she was told at the time of the meeting in February 2015 that the reason she was not invited was because she was not a Head of Department. She did not accept the definition of who was a Head of Department. The Claimant complained about being asked not to attend the meeting and subsequently the Claimant was invited to attend meetings along with the Heads of Departments. The Claimant accepted that she was invited to Heads of Department meetings after her complaint but suggested they were sometimes deliberately held when she was not on the rota to be in. There was no evidence to support this contention.

39 The Claimant did not dispute that Claire Woolley was a Head of Department and attended the meeting. The Claimant had sought to describe Claire Woolley as somebody who was much younger than her but accepted on being told Ms Woolley's date of birth that she was only slightly younger and they were in fact only five years apart in age. Claire Woolley was 47 and the Claimant was 52 at the relevant time.

40 The Claimant was given an explanation at the time which was nothing to do with her age or sex but with which she was unhappy. The Claimant did not put forward any evidence from which we could find that the reason she was excluded from the meeting was anything to do with her age or sex rather than the reason given to her at the time.

41 The Claimant did not put forward any evidence from which we could conclude that she was excluded from the training because of her age. She was included in other training (gold certificate) after her grievance (protected act) and was included in other meetings with team leaders after her protected acts, whilst complaining that she was excluded from some meetings both before and after her protected acts.

Issue 8: 05.02.15 Moses Lusandisa refused the Claimant a pay rise request when he had given one to Claire Wooley and Tharan Yoganathan DS, DA, DP

And

Issue 25: 10.12.15 Moses Lusandisa refused the Claimant a pay rise (direct sex, age and part-time worker discrimination)

42 Mr Lusandisa's evidence [w/s paragraph 17] was that the Claimant did not ask him for a pay rise and this was not something raised with him at the time. Mr Lusandisa gave his account to Jemma Ellingham during the investigation into the Claimant's grievance at [B345]. It was accepted that Tharan Yoganathan and Claire Woolley were both given pay rises. Mr Lusandisa was not responsible for setting the level of pay. Jemma Ellingham looked into this and concluded that this was as a result of changes to their respective jobs/roles. [B333] Mr Yoganathan went from a Fitness Consultant to the Health and Fitness Manager and Ms Woolley from Receptionist to Membership Services

Manager. Mr Lusandisa explained to Ms Ellingham at the time of the grievance that the Claimant's performance was not such that it would merit a pay rise in the same way.

43 We find that the pay rise was not something the Claimant directly raised with Mr Lusandisa. We note from [B347] that in her first grievance the Claimant complains that she had not had a pay rise from the previous General Manager from 2009 – 2011 but in these proceedings this allegation was made against Mr Lusandisa.

44 We note that there is no difference in sex between the Claimant and Claire Woolley while the age difference between them is 5 years.

45 No evidence or argument was put forward in support of a claim under the Part-time Workers Regulations.

46 The Tribunal Members were surprised to find there was no system for any pay review within the organisation; from Ms Akesson's evidence it appeared that if you asked for a pay rise you would be considered for one but otherwise there was no annual review of pay. Pay increases were simply in line with the relevant National Minimum Wage increases.

47 As a result of the grievance raised by the Claimant she was given a pay rise as from 1 July 2016. We do not find any evidence from which we could conclude that the lack of pay rise prior to that date was related to her age or her sex.

Issues 9, 19, and 47

Issue 9: From 1 May 2015 Mr Lusandisa would pick on the Claimant in meetings by saying that she was behind on budget. (***direct age discrimination and harassment related to sex***)

Issue 19: In August 2015 Mr Lusandisa was palpably unhappy when the Claimant exceeded her target/budget and swore at the Claimant (harassment related to sex, and age, direct sex and age discrimination)

Issue 47: 9 January 2017 The Claimant was given an annual budget for rental income for the studio on 22 November 2016 but after filing her claim with ACAS the annual budget for a studio rent earning was increased by 1400 %. (victimisation)

48 These have been grouped together in the Respondent's closing submissions and we also deal with them together as they are allegations in respect of Mr Lusandisa's attitude to the Claimant in meetings regarding budgets and targets. We found that the Claimant's evidence in respect of these allegations was vague and contradictory.

Issue 9

49 Mr Lusandisa told the Tribunal that his ordinary, or usual, practice was to discuss the targets and budgets at team meetings; he would have the targets written up on a white board and go through them all. He told the Tribunal he did not single out the Claimant but

if she was behind on target he would say so, the same as with any other member of the team. The Claimant has produced no evidence to suggest that she was treated any differently to anybody else in this regard. We accept Mr Lusandisa's account and do not find that she was singled out for criticism.

50 The Claimant suggested that Mr Lusandisa was finding any excuse to pick on her and that was why the two apparently contradictory positions are set out in her allegations: firstly that he shouted at her when she failed to meet her targets and then he was angry and swore at her when she did meet her target.

Issue 19

51 We do not find that Mr Lusandisa was unhappy when the Claimant exceeded her target, or that he swore at her. We accept his evidence that he did not swear at the Claimant or get angry with her when she exceeded her target in 2015. We find that Mr Lusandisa had no reason to be unhappy with the Claimant when she met her target and that he considered that her success was his success. If she achieved her target she would get a bonus and he would have one of his KPIs ticked off.

Issue 47.

52 The Claimant had a target for achieving income from studio events or studio hire which she managed to achieve during the course of the year [2016] by hiring the studio on a regular monthly sum to someone called Eduardo. This income greatly exceeded the usual amount achieved in respect of studio hire. This was why following year's target was substantially higher. It was not Mr Lusandisa's responsibility to set the target, Mr Kelly explained that the management practice was to set the next year's budget target based on what was achieved the previous year plus an increase. The Claimant had achieved a very high rental income as a result of hiring the studio to Eduardo and this led to the budget for the next year being much higher than it had been the previous year. The Claimant was not able to meet this target as the company lost the custom of Eduardo who cancelled his contract for the studio booking following an altercation with the Claimant.

53 We accept having heard the evidence from the Respondents including Mr Lusandisa and Mr Kelly that the budgets were not set by Mr Lusandisa; he was not responsible for the increase in the Claimant's budget although it is his job to try to achieve them. There is no evidence to suggest that anybody of Mr Kelly's level or above increased the budget in order to subject the Claimant to a detriment as a result of the Claimant's protected acts. We find that the reason for the increase in the budget was that the Claimant had exceeded her budget by hiring the studio to Eduardo he paid the sum of £1,200 per calendar month and the original target for studio hire was £100. The next year's budget was set based on what had been achieved in the previous year which explains the substantial increase in the Claimant's target. Once the Claimant raised the issue that this was not achievable her target was reduced. No evidence was put forward of any link between the matter complained of and any protected act.

Issue 10: Jan-Mar 2015 Moses Lusandisa cancelled the Claimant's HR training as set out at para 21 (xii) of ET1 - Direct Age, Discrimination against Part Time worker, Direct sex discrimination

Issue 11: 06.02.15 Moses Lusandisa excluded Claimant from HR1 Training DS, DA, DP

Issue 12: 10.02.15 Moses Lusandisa excluded Claimant from HR2 Training DS, DA, DP

54 We find that Jemma Ellingham provided the Claimant with the Respondent's explanation for her not being able to go on the HR training on 20 June 2016 in response to the Claimant's grievance [B332]: the reason given was that it was specific to staff who managed Fitness First employees not those who managed self-employed staff and that no SEMs attend the HR training. In response to the Claimant's complaint in her grievance that he had blocked her self-development Mr Lusandisa explained [B347] that he had attempted to book the Claimant on HR training but she was not accepted for the training and the reason he was given was because she did not manage employees.

55 The Claimant told the Tribunal that she had to manage a number of PTs (Personal Trainers) and therefore should have been allowed to go on the HR training. We find that at the relevant time the Respondent drew a distinction between managing PT staff who were self-employed and managing Fitness First employees. We find that it was not Mr Lusandisa who excluded the Claimant from the HR training and that this was explained to her by Jemma Ellingham on 20 June 2016.

56 We do not find any evidence from which we could conclude that her age or sex or the fact that she was part-time was any part of the reason for the treatment. A very full explanation was set out in the letter by Jemma Ellingham in her dated 20 June 2016 at B332 and at the grievance meeting on 26 February 2016.

57 As a result of her grievance the Respondent's training department reviewed its policy and the Claimant was invited to go on the Gold Certification training. The Claimant informed the Tribunal that she had not completed the Gold Certificate training that she was invited to in 2016 for a number of reasons including the ongoing proceedings and their effect on her health.

Issue 13: 26 February 2015 Moses Lusandisa removed the Claimant from her lunch time free class (direct sex and age discrimination)

58 Mr Lusandisa accepted that the Claimant was removed from this class but put forward a business reason for doing so. We found his evidence to be straightforward and cogent. He explained that he reviewed the timetable and the feedback he received from members and Membership Consultants (who were responsible for trying to persuade new members to join) and decided to vary the timetable to make it more attractive. It was accepted by the Claimant that within the industry the timetable offered was varied regularly in order to prevent the members becoming stale or fed up with the offer and the classes would be redistributed from time to time. The Claimant accepted this affected others on other occasions and did not apply just to her. The Respondent maintained that she simply objects when it affected her.

59 We accept Mr Lusandisa's explanation for the changes to the timetable and removal of the Claimant's free lunchtime classes. We have found no cogent evidence upon which we could base a finding, or an inference, that this was connected to her age or her sex.

Allegations 14 and 44 asking the Claimant to wear makeup

Allegation 14 that in mid May 2015 Mr Lusandisa told the Claimant that she should wear makeup - direct sex discrimination

60 This allegation is first raised in the claim form at paragraph 21 (vi), there is no mention of any allegation that Mr Lusandisa told the Claimant she should wear makeup in May 2015 in the Claimant's grievance brought on 21 January 2016. In the grievance she complained about comments in respect of age and appearance that were made by Mr Tharan Yoganathan and not Mr Lusandisa. Mr Yoganathan has left the organisation and has not responded to the Respondent's attempts to contact him.

Issue 44: 09.16 to 11.16 Moses Lusandisa told the Claimant she should wear make-up -direct sex and age discrimination

61 The Claimant alleges [paragraph 46 of her witness statement] that in around November 2016 Mr Lusandisa made reference to how pretty three female members of staff looked saying they even wore make-up at 6 am, from which the Claimant inferred that he was implying she should wear makeup.

62 Mr Lusandisa was adamant that he had never told the Claimant she should wear makeup. He accepted that there had been an occasion where he had praised the Reception team for their effort in making themselves smart and presentable so early in the morning but he had not made any specific reference to make-up or intended to imply that the Claimant, should wear make-up. The Claimant was not a member of the Reception team.

63 We do not find that Mr Lusandisa told the Claimant directly or indirectly that she should wear makeup. We also find that any comments in respect of the Reception team were not directed at the Claimant. If Mr Lusandisa had told the Claimant she should wear makeup in May 2015 we find that it is extremely unlikely that she would not have raised it in any of her emails or in her grievance. The Claimant's grievance refers only to the comments made by Tharan Yoganathan. We do not find that Mr Lusandisa made any comment to her about makeup nor do we accept that the Claimant had a conversation in which she replied "you know I don't like makeup and that I don't wear makeup", we simply do not accept the Claimant was telling the truth about this allegation.

Issue 15 In May 2015 Mr Lusandisa shouted at the Claimant re News International moving out (direct sex discrimination, harassment related to age)

64 Prior to 2014 News International had offices in Thomas More Square and had provided corporate membership of the gym for its employees. In 2014 (before Mr Lusandisa joined the club) News International moved out of the Thomas More Square building, which had a significant impact on membership of the gym. Mr Lusandisa told us

that in May 2015 members of his team were still blaming the move of News International in 2014 for their failure to meet targets. It was not just the Claimant who was doing this, but numerous members of his team and he accepts that he did say to them that he did not want to hear any more about News International but that he did not shout at the Claimant or any other team member. We do not find that he singled out the Claimant in respect of any comments about News International, nor do we find that he shouted at her. No evidence was put forward of any link between this allegation and the Claimant's sex or her age.

Allegation 16: Mid 2015 The Claimant's keys were removed from her, e-mail access was taken away, praise letters removed from her personnel file and door codes not supplied to her, documents and e-mails deleted as per para. 21 (xiv) of ET1. (Victimisation)

65 This allegation was withdrawn, it had been alleged to have been an act of victimisation but it preceded any protected act.

Allegation 17: 2015 to 2016 Moses Lusandisa failed to give feedback on the Claimant's performance 2014 and did not conduct a review at all in 2015 *see paragraph 21(xv) of the ET1. Direct age and sex discrimination and victimisation.*

66 This was raised in the Claimant's grievance and cannot be an act of victimisation having predated the grievance which was the first protected act relied on.

67 In response to the Claimant's grievance Mr Lusandisa told Jemma Ellingham [B345] that he did not conduct reviews with the Claimant in and after 2015 because the Claimant was at risk of redundancy and because Tharan Yoganathan took over as her line manager. He accepted that he did not carry out the reviews and they would normally be required for the Claimant. He also explained that he found it very difficult to deal with reviews with the Claimant in the normal way and instead sought to break them down into small manageable chunks, setting manageable monthly goals. He accepted that he should have taken a more formal and fuller approach to a review but explained that he had tried to find the best way forward with working with the Claimant. The Claimant herself explained to the Tribunal that she experienced difficulty in managing information that was not broken down for her.

68 Mr Lusandisa explained to Ms Ellingham why he behaved as he did and this was communicated to the Claimant at the time and this part of her grievance was upheld. We accept Mr Lusandisa's explanation in his statement at paragraph 118, which was consistent with his oral evidence.

69 We accept that Mr Lusandisa handed over the reviews to Mr Yoganathan when he became her immediate line manager. Mr Lusandisa acknowledged that from around the time that the Claimant was placed at risk of redundancy he had found there were difficulties in managing her and that prior to that he had not carried out full reviews but had broken them down into manageable chunks. We find that this was in response to what he believed would work best for the Claimant. We do not find any evidence upon which we can find or infer that this was in any way connected with the Claimant's age or her sex. As already stated it was not an act of victimisation.

Issue 18: 04.07.15 Moses Lusandisa asked the Claimant to teach 30 minutes with no charge as a freelancer until 13.02.16, she was contractually entitled to payment under her freelance contract – Harassment -age and sex

70 This allegation was withdrawn.

Issue 19: Moses Lusandisa was palpably unhappy when the Claimant exceeded her target/budget and swore at the Claimant in a 1 to 1: SH, AH, DS, DA

[Dealt with above with issue 9]

Issue 20 8 July 2015 – Moses Lusandisa refused the Claimant's request to do extra days work as a Membership Consultant when Cara Grattage reduced her hours to part-time hours – direct age discrimination

71 The Claimant's evidence on this issue is contained in paragraph 46A of her second witness statement. The Claimant sets out why she considered herself to be well-qualified to take on the work. The Claimant put forward no evidence to suggest any link to her age. Mr Lusandisa addresses this allegation at paragraph 29 of his witness statement and he expanded on that evidence orally. He explained that Cara Grattage was on sick leave and the Claimant wanted to cover her work but he had Membership Consultants available to cover the shifts at no extra cost to his budget and he declined to spend his budget on asking the Claimant to do this work. It was purely an economic decision.

72 We accept Mr Lusandisa's explanation that his decision was due to the availability of other staff to cover the work within his budget; we do not find any connection to the Claimant's age or any suggestion that the reason for refusing the Claimant's request was in anyway connected with her age.

Issue 21: that Mr Lusandisa ceased to have one-to-one meetings with the Claimant from 7 September 2015: direct age and sex discrimination

73 Mr Lusandisa accepted [paragraph 25] of his statement that he reduced the number of one-to-ones he had with the Claimant but he did not accept that he ceased having them altogether. He explained the reduction in the number of meetings as being a result of both the volume of work that he had to do and the fact that the meetings were not very productive when he held them. He was also aware that sometimes after meetings the Claimant would misunderstand or misinterpret what had been said and this could lead to some difficulties. He formed this assessment before any allegation of discrimination had been raised against him by the Claimant. He sought to devolve responsibility for holding those meetings to Tharan Yoganathan, who held regular meetings with the Claimant on becoming her line manager. The Claimant also attended Mr Lusandisa's regular 11 am meetings.

74 The Claimant has not put forward any cogent evidence to suggest in any link to either her age or sex. We do not find there to be any evidence of less favourable treatment connected to or because of the Claimant's age or sex.

Issue 22: 14 September 2015 Mr Lusandisa told the Claimant not to email GMs and RMs about successful events

75 14 September 2015 is the date given by the Claimant for the Boogie Bounce event. There was no evidence before us that Mr Lusandisa had told the Claimant not to email General Mangers (GMs) and Regional Managers (RMs) about that event. The example relied on by the Claimant in her evidence [witness statement, paragraph 53] is in respect of an email sent on 3 January 2016 [B80] the response from Mr Kelly is at [B81].

76 We find that on 3 January 2016 the Claimant sent an email addressed "Dear Leaders" to the Managing Director and a number of the most senior managers in the organisation with four marketing ideas. In response Andrew Kelly emails Mr Lusandisa [B81], "Some great ideas but follow the chain, can't just send these emails". We are satisfied that Mr Lusandisa was following management instruction when he told the Claimant not to send her emails to the senior managers and Managing Director. There is no evidence before us from which we could concluded that this had anything to do with the Claimant's sex or age. Mr Kelly had simply instructed Mr Lusandisa that senior managers were not to be copied into such emails as a matter of course.

Issue 23: 11 to 13 November 2015 Tharan Yoganathan told the Claimant she looked 53 years old, needed to do her eyebrows and looked like a man (direct sex discrimination, harassment and age, harassment and direct discrimination).

77 We did not hear directly from Mr Yoganathan in respect of this allegation. He no longer works for the Respondent having left their employment on 31 July 2017 and we were told he had not responded to emails sent to him at his last known email address. The bundle contained a signed response that he had given to Ms Ellingham when she investigated the Claimant's grievance, at [B341]. In that document he denies making the statements alleged and gives an account of a conversation between himself and the Claimant which he had understood to have been light hearted on both sides, at a time when he believed he had a good relationship with the Claimant. He described the conversation as having been initiated by the Claimant who was making unwelcome remarks about his new haircut. He explicitly denied having made the comments attributed to him and states he cannot believe the Claimant had brought up the conversation, which dated back to the previous November, after so long, when he believed that they were joking between friends.

78 We have found that the Claimant's account of other incidents is unreliable. We weighed up carefully whether on this occasion we could place any weight on her assertion that these remarks had been made; we took into account the fact that she had raised this in her grievance. We note that the description of the exchange and how the comments came about have changed over time in the Claimant's retelling and that all context has been removed. We do not find that the description given to us in these proceedings is reliable. We find that the comments have been taken out of context and have been exaggerated in the Claimant's retelling: we cannot place any weight on her account to us of what was said.

79 We do not find that at the time the conversation with Mr Yoganathan took place the Claimant perceived that it amounted to a detriment or to harassment. We find that she has selected from the conversation those parts that suit her reframing of this conversation after the event as an act of discrimination.

Issue 24: On 26 November 2015 Mr Lusandisa asked the Claimant to give her circuit classes away and that she was told she was too old to do them (direct sex and age discrimination)

80 Mr Lusandisa explained that he had received feedback from Ms Grattage, who had been showing around prospective new members, that the standard of the Claimant's circuit class was not what would normally be expected. He then observed the class for himself and agreed that the Claimant was not as proficient at delivering a circuit class as she was with her other classes, particularly her yoga class for which he consistently praised her highly. He decided to ask a PT to take the circuit class, as they had the spare capacity, and he switched the Claimant to a Swiss Ball class instead. He denied saying that she was too old to run the class.

81 The Claimant alleges that this is an act of age and sex discrimination: She has not put forward any no basis for suggesting that is anything to do with her sex and gave no evidence on that point.

82 It was suggested on behalf of the Respondent that it is inconceivable that if the comment about the Claimant's age had been made that she would not have raised it at the time, either with Mr Lusandisa or with somebody more senior, and mentioned this as part of her grievance. It is noted that she does not mentioned it on 1 April 2016 when she discussed age discrimination at her grievance meeting, [B263].

83 We do not find that Mr Lusandisa made this comment. It may be that the Claimant convinced herself that the switching of her class was to do with her age, and she repeatedly came back to that point in her evidence, but we are satisfied that was not something that was said by Mr Lusandisa. We accept that Mr Lusandisa switched the Claimant to a Swiss Ball class because he considered that her circuit class was not of a high enough standard, We do not find this was because of the Claimant's age but was based on Ms Grattage's comments and his own observation.

Issue 32 is dealt with together with issue 24 as they touched on the similar subject

Issue 32 ***: 04 & 05.04.16: Mr Lusandisa cut the amount of time for the Claimant to provide a weekend freelance class - direct sex discrimination, direct age discrimination and victimisation***

84 Mr Lusandisa told us that the classes that had been in the timetable when he arrived at Thomas More Square had, in his view, been pretty much placed at the convenience, or whim, of the staff rather than to make it attractive to the members and that he had implemented some changes. The industry norm both across Fitness First and other gyms was that yoga was normally a 60 minute class, not 90 minutes, and LBT was 45 minutes and not 60. He decided to reduce the length of those classes to align them with the industry norm and to provide spare capacity for a wider range of classes. He

hoped that as a result the timetable would be more attractive which would assist in retaining members and encouraging new members to join.

85 We are satisfied that Mr Lusandisa was looking at the wider business perspective when he made the changes. We are satisfied that the changes in the classes and the timetables took place both before and after the Claimant's protected act and there is nothing to suggest any link to her having carried out a protected act and the subsequent changes to the class. We do not find that the amendments to the Claimant's classes were made in response to the allegation of discrimination in the Claimant's grievance. Nor do we find any evidence from which we could conclude that there was any link to the Claimant's sex or age.

Issue 25 – refusal of a pay rise -we have addressed above with issue 8.

Issues 26 and 27

Issue 26: 14.09.15 to 12. 2015: Recognition of the Claimant's achievement in relation to a charity event ("Boogie Bounce") on 14 September 2015 was diverted to a younger male Mr. Yoganathan. The Claimant was excluded from any recognition for the success of the event notwithstanding that no other member of the team had assisted or had any involvement in the event or its success. Direct age and sex discrimination.

Issue 27: December 2015 The Claimant discovered emails and documents that confirmed Moses Lusandisa's decision that she should not get credit for the charity event and that Tharan Yoganathan should be the recipient

Issue 28 04.01.16 Having made this discovery C made a complaint about it to Mr Lusandisa (a protected act).

86 It was not disputed that the Claimant worked hard on Boogie Bounce, that it was her project and that it was a success. In her evidence the Claimant tried to draw a picture of the event being hers alone and stated that nobody else had contributed in any way. Mr Lusandisa explained the direct and indirect contribution others made, from the other PTs, and the Reception team who booked in members, or drew their attention to the event, and indirectly contributed to its success. The certificate was awarded for the success of Team TMS.

87 We find that the certificate was handed to Mr Yoganathan because he attended a meeting of General Managers when Mr Lusandisa was away. Ms Ellingham was at the same meeting. Shortly after that meeting Mr Yoganathan was injured in a serious motorbike accident. We were taken to an email chain between Mr Yoganathan and Ms Ellingham [B 111 -110]. Mr Yoganathan emailed Ms Ellingham on 14 December asking how she was and thanking her for her concern over his health and recovery, he also suggested that it would be great to see her at the club sometime and do a training session. Ms Ellingham replied stating that she been told about his accident when she had called about a photo with the 'recognition frame' in the club. He replied sending her some pictures of the award but Ms Ellingham responded saying she wanted a picture with the team. Mr Yoganathan duly quickly arranged a photo with the team and sent it to Ms

Ellingham. Unfortunately the Claimant was not present when the photo was taken.

88 We find that it was Mr Yoganathan who arranged for the photograph to be taken. Mr Lusandisa had no role at all in arranging it or in deciding when it would be taken. We also find that the driving force for getting the photograph was Ms Ellingham. It was unfortunate that the Claimant was not present when the photograph was taken. The Claimant was extremely upset not to have been included in the photograph.

89 In her email on 4 January 2016 [B103 to 105] the Claimant attaches copies of the emails between Ms Ellingham and Tharan Yoganathan from 14 to 16 December 2015, and alleges that they,

> "Clearly prove that my GM Moses had deliberately planned to label my hard work on Tharan! So that Tharan can be nominated as a winner and his name recognized by the company."

The Claimant was asked about this but could provide no explanation as to why she says the emails show that Mr Lusandisa had deliberately planned to label her hard work as Tharan's. We are satisfied from the emails that the impetus for the photograph emanated from Ms Ellingham and Mr Yoganathan was not seeking to take credit for the event. It is also abundantly clear that Mr Lusandisa had nothing to do with the photograph being taken or the fact that the Claimant was not included. There is nothing in the emails to suggest any involvement by Mr Lusandisa. Despite this, the Claimant goes on to accuse Mr Yoganathan and Mr Lusandisa of "ROBBERY" and states, "robbery is a crime". Whilst this is indicative of the strength of the Claimant's feelings on this matter, and we accept she was genuinely disappointed and frustrated, we also find it indicates a willingness by the Claimant to make unfounded allegations.

90 The Claimant raises the photograph and recognition for her event in her grievance and Ms Ellingham apologised to her in her outcome letter [B312]. Mr Yoganathan also apologised [B 341]. We are satisfied that there is no evidence to suggest that the omission was intentional, nor is there any evidence from which we could conclude that the Claimant's age and/or her sex had played any part in what occurred.

Issues 28 simply describes the complaint to Mr Lusandisa on 4 January 2016 as a protected act

Issue 29: 07.01.16 The Claimant was advised that she was at risk of redundancy- Direct age discrimination, victimisation

91 The Claimant was placed at risk of redundancy on 7 January 2016. The Claimant alleges that the Respondent wished to employ younger employees in her role and that the proximity of the meeting for her 'at risk' of redundancy conversation to her complaint on 4 January 2016 means that it must be related to the fact that she put in a grievance.

92 It was not disputed that the Claimant did not move beyond being put at risk of redundancy and is still employed by the Respondent. We heard from Mr Kelly [paragraphs 4 to 6 of his statement] in relation to the decision to place the Claimant at risk of redundancy and were taken to copies of Jemma Ellingham's notes at [B262 -337] in

respect of the Claimant's grievance.

93 We expect accept the Respondent's evidence that the decision to place the Claimant at risk of redundancy took place before 4 January 2016. We were provided with a transcript of the meeting on 7 January 2016 between Mr Kelly, Mr Lusandisa and the Claimant at divider D in which Mr Kelly explained [D3] that Fitness First was thinking of restructuring staffing and management and was putting the SEM role at risk of redundancy. He explained the reason for the decision to do this [D4], which was because they had lost the business of News UK (News International) and were running 1000 members behind where they had been. He explained that although they lost the members the previous year, the club was running very Head of Department rich and had decided that the SEM role could be combined with the HFM role. He explained that there was also a Regional SEM in London (City and East) which is or would be responsible for nine clubs. The proposed structure at TMS going forward would be a General Manager, MSM, STL and HFM.

94 Mr Kelly told the Tribunal in his oral evidence that he had been thinking about how he could save money in the business since November 2015, his plan was to create a "Regional SEM" who would run events over lots of clubs. He confirmed that SEMs at other clubs were also at risk of redundancy and the proposed model had been used in other regions [AK w/s para 5]. He had responsibility for 18 clubs at that time and seven of those were without an SEM.

95 Mr Kelly informed the Claimant there would be a 30-day consultation period and invited proposals from the Claimant to avoid redundancy. He also provided the Claimant with his phone number so that she could contact him. He arranged another meeting which took place on 29 January. The Claimant asked a number of questions and Mr Kelly repeated the business case for the proposal, indicating that it would mean a saving of £6000 per annum, but told the Claimant that he wanted her to remain in the business. He also rejected the suggestion that the process was linked to her grievance telling her that the business decision had been made prior to that complaint being sent. Mr Kelly told the Claimant that he considered the proposal she put forward may well fit and also that he was prepared to recommend that she go for her Gold Certification program.

96 On 15 February Mr Kelly wrote to the Claimant informing her that he would like to discuss her proposal and suggested meeting after her grievances had been heard [B140]. On 16 February he emailed to arrange a meeting the following week and told the Claimant he had made a decision and it was "great news" [B154]. The Claimant was unable to attend the meeting because of a bereavement. Mr Kelly writes to inform her of what he has suggested on 25 February [B163] and more formally on 26 February 2016 [B170]. From the notes of the grievance [B166] it appears that the Claimant indicated in her grievance meeting on 26 February 2016 that the redundancy point had been resolved. There is a further meeting between the Claimant and Mr Kelly on 31 March and after that Mr Kelly sends an email setting out the proposal [B 252].

97 Mr Self suggested that at the end of the process the Claimant ended up in a very similar place to where she started and that her case makes no sense in the context of her being retained, if the Respondent wanted to get rid of the Claimant they could or would have pursued the redundancy.

98 We accept Mr Kelly's evidence as to the business rationale for the proposed redundancy and we find that the decision was taken before the Claimant had brought her grievance and before the Boogie Bounce recognition award photograph, the incident about which she complained, had taken place. We find that Mr Lusandisa played no role in the redundancy process apart from taking a note of initial meeting.

Issue 30: 21.01.16 The Claimant issued her first formal grievance see para 25 ET1. [described in the list of issues a victimisation but more properly described as a protected act]

Issue 31: 22.03.16 The Claimant raised her second formal grievance, this included complaints that the Respondent had failed to deal with the first grievance. The Respondent failed to investigate properly and an unfair outcome. Victimisation

[issue 32 is addressed above with Issue 24]

Issue 33: 20.06.16 The Respondent failed to investigate the Claimant's first grievance properly and arrived at an unfair outcome in its grievance outcome report see ET 1 para 27 -Victimisation

99 At issue 31 the Claimant describes her second formal grievance brought on 22nd of March 2016 which is relied on as a further protected act. Issue 33 repeats the same complaint in respect of the first grievance as made in respect of the second grievance, that is, that the Respondent failed to investigate properly and there was an unfair outcome and this was an act of victimisation.

The Claimant's first grievance

100 It was suggested by the Respondent that the first grievance brought by the Claimant was huge in scope, unparticularised and vague, with 25 headings and allegations in respect of a whole range of protected characteristics. That is apparent from the content of the grievance[B100-B102] and Jemma Ellingham's attempts to identify the complaints during her meetings with the Claimant and in correspondence.

101 The Claimant objected to Mr Gardner, the investigator initially proposed by the Respondent, on the basis that he was Mr Lusandisa's friend [B135]. The grievance was assigned to Ms Ellingham instead, as Head of HR Operations. After a series of delays, some of which we find were as a result of the Claimant disputing receipt of emails and insistence on only certain dates being suitable, a meeting was held on 26 February 2016. We were taken to the notes of that meeting [B166-168]. The Claimant did not dispute that she arrived late, she said she had difficulty finding the entrance to the building. It is also apparent from the note that the Claimant's colleague, who accompanied her, informed Ms Ellingham that they had to leave at 5 pm. Nine initial points were identified by Ms Ellingham at the meeting through discussion with the Claimant: these were primarily in relation to the blocking of the Claimant's career path and pay rises by her previous General Manager 'Mr Roney' [Ronnie Portsmouth], failure to give PVRs and the redundancy. Ms Ellingham made reference to an offer of mediation but that was rejected.

There was not enough time to cover all the points raised in the Claimant's grievance and it was agreed they would reconvene on another date.

102 There was some difficulty in arranging the next meeting which was eventually arranged for 1 April and lasted 3 and a half hours. In the meantime Ms Ellingham had looked into some of the matters raised by the Claimant and she fed back on a number of points. We find that it is clear from the minutes that she was attempting to put forward solutions to address the Claimant's concerns, this included putting the Claimant forward for her Gold Certification training. A number of matters were discussed and reference was made to a further meeting taking place to discuss any outstanding issues. The Claimant's representative suggested that to avoid another long meeting the Claimant should in the meantime provide examples of any outstanding issues that had not been addressed [B263].

103 There was some further difficulty in arranging the follow up meeting. The Claimant responded late to emails and had issues with her availability and that of her representative. On 4 May 2016 Ms Ellingham provided responses to a number of questions raised by the Claimant [B300] and confirmed she was available to meet on the date suggested by the Claimant, asking where she would lie to meet. Ms Ellingham emailed on 10 and 11 May with further attempts to arrange a meeting. On 16 May 2016 Ms Ellingham explained that she had not been able to arrange the meeting as the Claimant had not responded to her and that due to other work commitments she would have limited availability to meet; she gave the Claimant three options, namely no meeting at all, a meeting on 24 May, or for someone else to step in to do the grievance. We find that this was an attempt to bring the grievance to a resolution within a reasonable time. The Claimant ignored Ms Ellingham's three options and instead responded on 17 May with a series of questions she wanted answered before the next meeting was arranged [B307] and with further questions on 9 June 2016[B324]. On 20 June 2016 Ms Ellingham wrote to the Claimant setting out her conclusions in respect of the grievance[B329-B338], the outcomes included a small pay rise for the Claimant and access to the Gold Certification training. Ms Ellingham enclosed copies of statements from Tharan Yoganathan and Moses Lusandisa, and copies of the emails from the Claimant with additional questions together with Ms Ellingham's answers, with her outcome letter

104 We did not hear from Ms Ellingham however we read the notes of the meetings and the email correspondence and considered her outcome letter. We are satisfied that Ms Ellingham carried out a thorough and fair investigation into the complaints raised by the Claimant as best she could given the information she had been provided with by the Claimant. We also find that she gave the Claimant numerous opportunities to provide further information and details to support her the complaints but the Claimant, did not cooperate. We are satisfied that any failure to cover all the Claimant's issues comprehensively arose chiefly from a lack of input from the Claimant.

105 The Claimant was pressed to explain what she said was discriminatory about Ms Ellingham's handling of her grievance and could only point to what she described as 'the unfair outcome'.

106 We do not find any evidence of poor investigation or unfair outcome in the circumstances. We do not find that the fact that the Claimant was not satisfied with the outcome is sufficient to amount to a detriment in the circumstances. Nor do we find any evidence to suggest, or from which we could infer or conclude, that the grievance would have been treated any differently had it not included allegations of discrimination related to protected characteristics under the Equality Act 2010. We are satisfied that the fact that the grievance included allegations of discrimination had no bearing in how it was conducted or on the outcome.

The Claimant's second grievance

107 The Claimant brought a second grievance on 22 March 2016 complaining that she had been victimized (under the Equality Act 2010) by her Head of Departments as a result of her first grievance [B236-B237]. The second grievance was initially put on hold pending the outcome of the first grievance. Once she had concluded the outcome for the first grievance Jemma Ellingham decided that it was appropriate for a different manger to hear the second grievance and informed the Claimant that she had appointed Mr Schmidt to deal with the second grievance.

108 Mr Schmidt is a Learning and Development Partner with extensive experience of dealing with disciplinary and grievance issues and proved HR support for clubs outside of London. He came from a Club outside London and did not know the Claimant and had not had any involvement in any matters relating to the Claimant.

109 Mr Schmidt wrote to the Claimant on 21 July 2016 offering her three dates on which they could meet and asking her to respond within 7 days [B374]. The Claimant responded on 25 July asking Mr Schmidt to explain his position in Fitness First, she also said she would find out whether her union rep was available on12 August (the latest of the three dates offered) and refer back to him [B376]. Mr Schmidt responded on 26 July setting out his role and relevant background and asked the Claimant to confirm a time for their meeting on 12 August by 29 July [B378]. The Claimant did not respond by 29 July. She responded on 1 August stating that she was booked on training courses on 12 August (something she had not mentioned in her previous response) and asked if Mr Schmidt could do 19 August [382]. Mr Schmidt duly replied on 3 August 2016 [B389], he expressed his concern that he was trying to support the Claimant with her grievance in a timely manner and that the date she suggested was another week further on; he asked her to confirm whether she could attend on either 9th or 11th August, the two earlier dates he had suggested previously, and told her he could arrange to have her shifts covered if needed; he asked for a response by 12pm on 5 August [B389]. The Claimant did not respond and on 8 August 2016 Mr Schmidt sent her a formal invitation to a grievance hearing on 11 August 2016 [B393, B393a-B393c]. He informed the Claimant that if she did not respond he would conduct the grievance investigation with the information that he had in front of him.

110 Mr Schmidt attended the High Wycombe club on 11 August to hear the Claimant's grievance, he waited 45 minutes for her to arrive but she did not attend. He spoke to HR to explain that she had not attended and they contacted TMS to find out if she was working and were told that she was. Mr Schmidt told us that he was disappointed that she did not attend the hearing but decided to consider the grievance and conducted a full investigation which included speaking with the Head of Department team and General

Manger at TMS and trying to access CCTV footage referred to by the Claimant.

111 The Claimant contacted Mr Schmidt on 15 August to inform him that she would be available on 19 August [B399]. Mr Schmidt replied informing her that he had arranged the hearing for 11th August and understood she had been at work on that day, he asked her to submit any information that might assist him in investigating her grievance by email by 27 August [B412]. She did not provide any further information in support of her grievance.

112 On 28 November 2016 Mr Schmidt sent an email to the Claimant with the outcome of her second grievance. He upheld her grievance in respect of the incident with Eduardo but found no evidence of unfair treatment of any kind in respect of the remainder of her grievance [B554-B557].

113 The Claimant made no criticism of the conduct of the second grievance in her witness statement, she simply alleges (as she does in her ET1) that despite her second grievance being partially upheld she continued to be subjected to and unlawful treatment, victimisation and harassment. In cross examination the Claimant again pointed to the conduct of her managers after she had lodged her second grievance as being the victimisation she was complaining about; when pressed by Mr Self as to whether she alleged Mr Schmidt had victimised her the Claimant said that he ought to have provided her with other dates.

114 We do not find that Mr Schmidt's conduct in arranging the meeting and proceeding with the grievance as he did was influenced by the fact that the complaints included allegations of discrimination and victimisation under the Equality Act. We are satisfied that he acted as he did because the Claimant failed to respond to his requests to arrange a meeting.

Issue 34: 31.07.16 Mr Lusandisa "spiked" the Claimant's drinks with alcohol -Direct Religion or belief discrimination

115 This allegation was withdrawn at the end of Mr Lusandisa's evidence.

Issue 35: 01.08.16 Unfair treatment in the appeal process- Direct Religion or belief discrimination was withdrawn – the Claimant relied on victimisation only.

116 On 1 August 2016 the Claimant appealed the outcome of her first grievance. On 7 August 2016 Michelle Giles, an independent consultant, wrote to the Claimant to inform her that she had been asked to hear her appeal and asked the Claimant to provide some convenient dates and locations for the appeal. She informed the Claimant of her right to be accompanied. We were referred to some correspondence between the Claimant and Ms Giles. We were told we had not been provided with all of the correspondence however from the correspondence we were provided with we accept the thrust of the Respondent's submission that the Claimant was seeking to exercise control over the process and have things done on her own terms. For example the Claimant repeated that she would not agree to a meeting until she has been provided with a dated statement from Ronnie Portsmouth and a statement from Claire Wooley as well as detailed pay information she had requested [for example B454, B474, B480, B495-497, B525], despite having been provided with copies of the statements obtained by Jemma Ellingham and having been

told that the ay information would not be provided as the consent of the individuals concerned was required. Ms Giles made numerous attempts to arrange a meeting with the Claimant to progress matters [B417, B456, B462, B468, B471, B476, B477, B478, B482-483, B504]

117 On 10 November 2016 [B532-B535] Ms Giles wrote to the Claimant, noting that the issues that the Claimant had raised had been going on for far too long and setting out precisely what the Claimant was being asked to do (in terms of clarifying and supporting her appeal grounds) and the process and the timeline that Ms Giles was going to require the Claimant to follow. Ms Giles explicitly states that,

> "It is imperative that the matters are finalised and in those circumstances further delay will not be countenanced."

118 Ms Giles set out the scope of the grievance, including what would and would not be considered, against each respective heading, referencing the numbers used in the Claimant's appeal letter for ease of reference. She set out a list asking precisely what it was that that the Claimant was disagreeing with in the findings in Ms Ellingham's letter. She reminded the Claimant that she was considering an appeal and that any factual allegations that had not been previously made to Jemma Ellingham would not be considered.

119 Mr Self submitted that if the Claimant had followed the guidance in that letter she would have had a full enquiry into the matters that she had raised. We accept that submission. We find that the information requested was relevant to the Claimant's appeal. There is nothing to suggest anything other than had the Claimant provided the information requested to Ms Giles she would have considered it. Ms Giles expressly directed the Claimant that responding to those matters should take priority over the Claimant's work [B534], as well as counselling the Claimant to take a more proportionate approach to her complaints. The Claimant was provided with a choice of three dates for the appeal hearing [B 534] and told that if she did not choose a date by 5 pm on 17th November the default date would be 13 December, which was the last of the three dates offered.

120 On 14 November [B543] the Claimant informed Ms Giles that she would reply soon. On 18 November Ms Giles reminded the Claimant [B553] that she has not yet confirmed the date from the choice given and therefore the appeal hearing would be on 13th December; she also told the Claimant that she required the answers to the questions she had identified by 24 November. The Claimant responded on 29 November [B560] stating that her union representative was not available and that she [the Claimant] is on holidays; she did not take the opportunity to respond to any of the points raised by Ms Giles by 24th of November

121 In the appeal outcome letter sent on 5 December [B565-567] Ms Giles reiterates that the matter had gone on for too long and should be drawn to a close. Ms Giles records that as the Claimant has failed to provide any additional information against the specific allegations she is unable to consider those. Ms Giles did not uphold the Claimant's appeal.

122 The Claimant's only criticism of the appeal is of "unfair treatment". In her witness

statement dated 4 March 2020 [paragraph 116] the Claimant complains that no information requested by her in relation to the grievance procedure and or the subsequent appeal was provided to her.

123 We are satisfied that the correspondence in relation to the appeal speaks for itself and that Ms Giles had set out very clearly the process she would follow in order to look into and hear the Claimant's appeal. We are satisfied that Ms Giles was prepared to investigate and look into the allegations if the Claimant had provided the information requested but the Claimant simply failed to do so.

124 No criticism of or even reference to the appeal against the grievance was made in the Claimant's closing submissions. No basis was put forward at any time to suggest any religious element to the decision although this had been maintained as an act of direct religious discrimination as well as victimisation until late in the day. We find that this is indicative of the Claimant's scattergun approach to making allegations and withdrawing them at a very late stage or simply not pursuing them

Issue 36: 16th of September 2016 Having applied for a role on 12 August 16 as a HFM Andy Kelly refused to appoint the Claimant told her that she would be a "failure", "HFM will be brand new for you", "you do not have HFM experience". Direct sex and age discrimination and victimisation

Issue 37: 19.09.16 Andy Kelly appointed younger male Lloyd Nurse instead. Mr Nurse was first employed by Ronnie Portsmouth in April 2016 who then bullied the Claimant. The Claimant's was excluded from potential job opportunities HFM role. Direct sex and age discrimination, victimisation.

125 Mr Yoganathan was moving from TMS and his role as an HFM was potentially available. The Claimant applied for the role and an interview was arranged and carried out on 19 August. We have seen the transcript of that interview. The interviewer, Mr Cummings, who had never met the Claimant before, indicated that the TMS role was no longer available (Mr Yoganathan had changed his mind about leaving) but there were other roles available. Having read the transcript we are satisfied that Mr Cummings conducted the interview in a professional manner. We were told that Mr Cummings no longer works for the Respondent. Following the interview Mr Cummings tried to contact the Claimant by phone to give her feedback, after numerous attempts the Claimant made it clear that she would accept feedback in writing only. On 31 August the Claimant was told that she would be put forward for a face-to-face interview for an HFM role [B 426]. The Claimant responds making it clear that she is only interested in the role at TMS, which was available again [B428]. The Claimant is invited for an interview on 7 September with Mr Griesel whom she had also never met before. A transcript of the interview was included in the bundle [D 77 to 92].

126 On 8 September 2016 Mr Griesel provided feedback to Mr Cummings and Mr Kelly: in his opinion she had a good understanding of what was needed from an HFM but that the size of TMS would mean that the Claimant would be too risky an appointment as HFM; she lacked enthusiasm, which he thought would be a problem on the gym floor; he described her as methodical and cold; he did not think his own PTs would respond to her and for that reason he declined to put her forward for the position as HFM [B457].

127 Mr Kelly decided that it would be better to meet the Claimant in person to give her the feedback and arranged a meeting, however the Claimant requested the feedback in advance of her meeting with Mr Kelly [B466, B469]. The meeting took place on 19 September 2016 and a transcript of that meeting was in the bundle [D 55 to D 76]. We find that at that meeting Mr Kelly tried to let the Claimant down gently. He suggested the role was too big for her first HFM role but that she should be actively looking for other roles in less busy clubs. We do not find that Mr Kelly said to the Claimant in terms that she would be a failure but he did tell her that the TMS club was not the correct option at this time and that he didn't want to set her up to fail.

128 The Claimant alleges [w/s para 81] that the reason she was not appointed was because she was a part-timer, because she was a woman and because of her age and as victimisation for bringing her two grievances. She points to the fact that Mr Nurse is male and younger than her but put forward no other evidence to support her allegation, other than that she did not agree with the Respondent's assessment that she was not ready for the role.

129 We find that the rejection of the Claimant for this role was a business decision and it was reached following a fair and appropriate interview process. The recommendation was that of Mr Griesel but that Mr Kelly agreed with his assessment and found no reason to go behind it. He had intended that providing personal feedback would be a way to let the Claimant down gently and to encourage her not to see it as a setback; he considered that Mr Greisl was right that the Claimant did not have HFM experience and wanted to encourage her to consider other ways of achieving her goal.

130 It was accepted that Mr Nurse is male and younger but we find there was nothing more to suggest any link between that and his success and the Claimant's failure in being appointed to the position.

131 The Claimant's allegation refers back to a previous General Manager, Ronnie Portsmouth, about whom she had also made complaints similar to those she makes about Mr Lusandisa. The Claimant's allegations in relation to Mr Nurse are addressed below.

Issues 38 :2016 to 2017 Undefined ongoing bullying by Mr Lusandisa and Mr Nurse - harassment related to sex, harassment related to age and victimisation

132 These allegations were made in very general terms. Other than the incidents relied on as discrete allegations dealt with below, the Claimant evidence was that she was shouted at on various dates by Mr Nurse, Mr Lusandisa and Ms Wooley [w/s para 87and issue 49] and victimised by Mr Nurse from October 2016 to 3 February 2017 [w/s para 88] referring to an email on 18 February 2017 [at B626].

Issue 39: 20.09.16 Mr Lusandisa shouted at the Claimant as a result of her participation in the Fitness First Signature Class – Harassment related to sex, harassment related to age, victimisation

133 This allegation was withdrawn. It was not put to Mr Lusandisa. We are satisfied that it was withdrawn following the Claimant's evidence after which it was clear that if the incident took place it had nothing to do with the Claimant's sex, age or protected acts.

Issue 40: 27.09.16 Mr Nurse humiliated the Claimant by wrongly telling members, that her department was managed poorly. Victimisation

Issue 41: 25.10.16 Mr Nurse shouted at the Claimant, he then blocked her exit through a door and then followed her out when she did get out of the room - Harassment related to sex, victimisation

Issue 42: 25.10.16 The Claimant complained about the events that day and Mr Lusandisa verbally assaulted the Claimant and shouted [at] the Claimant that everybody had given him bad feedback about the Claimant. Her complaints about these matters were ignored - Harassment related to sex, victimisation

Issue 43: 11.16 Mr Nurse told members that she was not teaching her classes correctly- Victimisation

134 In September 2016 Mr Nurse was appointed as the Health and Fitness Manager (HFM) at TMS to replace Mr Yoganathan. Mr Lusandisa described the Claimant as being clearly put out by his appointment and that she was not friendly or approachable towards him and was difficult for him to manage. He found Mr Nurse to be very professional and considered it unlikely that he would discuss a member of staff in a critical way with members.

135 We find that the emails in the bundle are consistent with Mr Lusandisa's description of the Claimant being difficult to manage. The Claimant was unhappy at Mr Nurse's proposed changes to the November timetable (reducing her yoga class to 60mins and LBT to 45 minutes) and ignored Mr Nurse's instructions, she firstly told him to speak to Moses and then despite having his rationale explained simply refused to make the changes becoming very upset when he made the changes to the timetable himself. [B484-487, B493, B494, B499-500]. The Claimant also prepared "Members Feedback " forms, which she asked her clients to sign and which we find was an attempt to overturn Mr Nurse's decision. The Claimant described the email from Mr Lusandisa on 19 October 2016 [at B486] as being part of the bullying about which she complains, in that email Mr Lusandisa explains the rationale behind the changes and asks the Claimant to support her line manager's vision, he also tells her that copying in Andy [Kelly] and Jemma [Ellingham] is not a problem but she should ask herself what it is that she wants them to do in relation to this matter. We are satisfied that the content and tone of the email are appropriate and polite and cannot reasonably be described as bullying.

136 The Claimant pointed to her email of 30 October 2016 [B499-500] but no mention is made there of humiliating her by telling members her department was poorly managed, nor is there any reference to shouting (or as the Claimant described in evidence shouting and screaming) at her or blocking her exit. The Claimant does refer to 'bullying' but we find it is clear from the content of that email and those that went before and after it, that this refers to her belief that she was being targeted for a reduced in her hours; no mention is made of being shouted at, verbally assaulted, or being told that everyone had given bad feedback about her. Her complaint on 2 November 2016 [B511] was also in relation to the changes to her timetable which she again described as bullying. [see also B513-B514 – The Claimant alleges she is being targeted in her complaint in respect of the reduction in hours and B516-B518 again in respect of the changes to the timetable].

137 It was not until 23 February 2017 [B628-B629] that the Claimant complained to Moses Lusandisa that Mr Nurse had said on 27 September that she poorly managed the studio, at that time she described it as a 'misuse of power and victimisation', she made no reference to any of her grievances. The Claimant accepted that Mr Nurse was not at TMS during the period of time to which her grievances related and that those grievances did not involve him but she maintained that he was victimising her. She could not explain why he would do so other than to allege that he was in cahoots with Mr Lusandisa. We do not find that we can rely on the Claimant's description as being an accurate account of what was said nor do we find that it is likely that if Mr Nurse made the comment that he did so because the Claimant had carried out a protected act, it is much more likely that if he made any such comment it was because it reflected his assessment of how he found things when he stepped into his role and in an effort to make clear that a new manager was now in place.

138 In her evidence the Claimant described this period of time as being one of extreme bullying by Moses Lusandisa and that Mr Nurse started bullying her the week he arrived. We were simply unable to accept her account. We found that she was not a reliable historian in respect of her allegations of bullying. We find that the Claimant was quick to put any complaints she had about her treatment in emails to her managers but the matters relied on in evidence were not raised in her many emails at the time. On 15 November [B545] the Claimant told Mr Nurse that at times she found his tone to be aggressive, we are satisfied that this is a long way from the description provided to the tribunal of him shouting and screaming at her. We find that the Claimant has exaggerated the incidents in these complaints in order to bolster her claim. For the avoidance of doubt we do not find that the Claimant has established that Mr Nurse shouted at her, blocked her exit through a door, followed her out when she did get out of the room or told members that she was not teaching her class correctly. Nor do we find that Mr Lusandisa verbally assaulted her or shouted at her that everybody had given him bad feedback about her.

139 The Claimant appears to equate what she describes as bullying with harassment related to sex without providing any explanation of how the treatment she complains of is related to her sex other that the fact that she is a woman and Mr Nurse and Mr Lusandisa are men. The Claimant also alleges that Ms Wooley shouted at her during this period [issue 49].

[Issue 44: 09.16 to 11.16 Moses Lusandisa told the Claimant the Claimant should wear make-up DS, DA – dealt with above]

Issue 45: 05.01.17 Exclusion from staff meeting and failure to provide training information – age discrimination, victimisation

The licence to sell meeting

140 The Claimant held a 'licence to sell' and believed that she ought to have been allowed to attend a meeting with managers from the sales team on 5 January 2017. Mr Lusandisa gave evidence that the meeting in question was arranged for Sales Team Leaders and Membership Consultants. He acknowledged that the Claimant held a Licence to Sell (LTS) which allowed her to sell membership and earn commission but LTSs were not invited to the meeting. The meeting had been arranged by a Regional Business

Manager and there was similar training arranged for General Managers and their Heads of Department. The Claimant was not excluded from the second meeting as she was someone who was licenced to sell, however she was not someone who was managing those who were licenced to sell and therefore was not invited to the first meeting.

141 The Claimant provided no evidence in support of this allegation other than not being allowed to attend the first meeting. We find that the reason the Claimant was not invited to this meeting was because she was not a Sales Team Leader or a Membership Consultant and that the meeting was not aimed at those with Licence to Sell. The Claimant has alleged that she was excluded from meetings for similar reasons both before and after her alleged protected acts. There is no evidence from which we could conclude that this had any connection to her age or any protected act

Issue 46*: January 2017 Claimant required to give up paid classes to Lloyd Nurse* - victimisation

142 In January 2017 the Claimant was required to give up paid classes to Lloyd Nurse. Mr Lusandisa gave evidence about this and explained at paragraph 178 of his witness statement that the changes to the timetable reduction of the yoga and LBT made more money available in the budget in which he could provide a wider variety of classes; some of those were conducted by Lloyd Nurse but they did not all go to Mr Nurse, they were redistributed amongst other PTs. We accept Mr Lusandisa's explanation that he did this for business reasons to share out the classes and change the timetable to increase variety and it was not done as a result of the Claimant having raised grievance alleging discrimination.

Issue 47: 09.01.17 The Claimant was given annual budget for rental income for the studio on 22nd November 2016 but after filing her claim with ACAS the annual budget for studio rent earning was increased by 1400%. - Victimisation

143 This issue has been addressed above together with issues 9 and 19.

Issue 48: 01/02.17 Mr Lusandisa advising the Claimant that he hates Americans - Victimisation

144 This complaint was withdrawn

Issue 49 : 20th September 2016 to 3rd February 2017: The Claimant was shouted at by Mr Lusandisa, Clare Woolley and Lloyd Nurse and specifically on the Tuesday, 20 September 2016 Tuesday 25th of October 2016, Wednesday 2nd November 2016, Tuesday 3rd November 2016 and Thursday 10th of November 2016, Tuesday 10th of January 2017 and Tuesday 31st of January 2017, Friday 3rd February 2017. The Claimant raised complaints in relation to such incidents by way of emails to Andy Kelly, Gemma Ellingham, Claire Woolley, Mr Lusandisa and Lloyd Nurse but these were ignored/not acted on.

145 The Claimant simply repeats this allegation at paragraph 87 of witness statement stating that this is detailed in emails. No further evidence or detail in respect of the incidents was provided and we find that the Claimant has failed to establish this allegation

on the facts. We do not find that there is any cogent evidence before us from which we could conclude that the Claimant was shouted at by Mr Lusandisa, Ms Woolley and Mr Nurse on any of these dates.

Second claim 3200953/2017 – victimisation

146 The Claimant relies on the issuing of the claim form in case 3200137/2017 on 10 February 2017 and alleges she was subjected to the detriments at issues 50-57 of the List of Issues as a result. The allegation in respect of Mr Sumner at issue 56 of the List of Issues was withdrawn by the Claimant on day 9 of the hearing.

147 For clarity as to how the Claimant's case put the relevant paragraphs of the second claim form referred to are set out below each allegation.

Issue 50: Did Lloyd Nurse raise a grievance against the Claimant as alleged at para 7a of the ET1 claim form because C had brought ET proceedings?

> *ET1: 7a On the 10 March 2017 Mr Lloyd Nurse raised a grievance against the Claimant, alleging bullying, and that the Respondents were allowing "reverse empowerment" of the Claimant, and requesting the transfer of either himself or the Claimant, or the disciplining of himself or the Claimant."*

148 The fact that Mr Nurse raised a grievance and the content of the grievance are not in dispute. The Tribunal has to decide whether Mr Nurse brought his grievance because the Claimant had brought tribunal proceedings alleging discrimination (was the protected act a significant influence) and did this amount to a detriment.

149 The Claimant contacted ACAS on 10 December 2016 and the claim was issued on 10 February 2017. Lloyd Nurse brought his grievance on 10 March 2017 [B 642]. It was addressed to Jemma Ellingham and stated,

> "As you are aware I currently have an allegation outstanding from Farida regarding the way I [treat] her.
>
> I would now like to raise a grievance against Farida for slandering regarding this situation. Since joining TMS I've been unable to simply manage Farida without her making some sort of accusation against me. I feel I can't do what is being asked of me 'My job'. I continue to become frustrated and emotional unstable regarding this matter, as it's a common response from Farida to anyone managing her. I struggle to understand two things;
> 1 – Either I'm bullying her as every other person that's managed her
> 2 – She is fabricating situations of anyone that has managed her.
> Either way I find this alarming from a HR point. I no longer want to work in the same gym as the person, as is unfair to both of us. This situation has gone on long enough and I don't want to play a part of this reverse empowerment.
> I would also like to highlight that I raised a similar statement previously to you and had no response. The response is simple, anything around Farida gets pushed to one side, however I highlighted to you that I was unhappy and this plays a knock-on effect to my home life.

I can only see two ways in resolving this situation; either I transfer or she transfer, I'm disciplined or she's disciplined.

I apologise for how direct I've been, but please understand from where I'm coming from."

150 We are satisfied that the reference to an outstanding allegation is not a reference to the ET1, we find that this refers to the complaint the Claimant made about Lloyd Nurse to Moses Lusandisa on 24 February 2017, headed 'important matter' and setting out a number of complaints about Lloyd Nurse, including that he came to the sale room and yelled at her. The Claimant copied in numerous people including Kris Williams and also Martin Seibold, the Managing Director [B633-634]. Mr Nurse was interviewed in respect of his grievance on 20 March 2017, he explained that he "wanted to raise a grievance on slander based on the previous week …" and referred to the email sent by the Claimant on 24 February.

151 Mr Lusandisa emailed the Claimant on 5 and 7 March [B635, B636, B637] to arrange a meeting to discuss her complaint. On 7 March 2017 Kris Williams emailed the Claimant to confirm that he had spoken to Moses about the allegations the Claimant has made, suggesting they keep meeting meetings face-to-face as 'email is unproductive' [B640].

152 We are satisfied having read the Claimant's complaints dating back to November and beyond, that in relation to Mr Nurse they refer to victimisation in the non-technical sense, not in respect of the Equality Act 2010. In any event we find that Mr Nurse is referring to the unresolved complaints which predate the protected act relied on (the Claimant's second ET1) when he states that he has previously asked the Respondent to address the matter and it has not done so.

153 Mr Lusandisa was copied in to Mr Nurse's grievance as Thomas More Square Manager. We heard evidence from Mr Lusandisa about his conversation with Mr Nurse on receiving his email, he told us how emotional Mr Nurse was, that he told Mr Lusandisa that he felt he was caught in the middle and could not manage the Claimant, that he was at the end of his tether and was at a loss to know what to do. We accept Mr Lusandisa's account. We accept that Mr Nurse put in his grievance in response to the Claimant's unmanageability, as described in his grievance interview [BB654a-B654c], that he believed the Claimant's allegations that he had harassed and victimized her to be false, that he considered that she responded to attempts to manage her by accusing mangers of bullying her and was simply "crying wolf", and that what he was seeking was a resolution one way or the other.

154 We find that Mr Nurse was responding to the Claimant's unmanageable behaviour in the workplace and the fact that the Respondent had not addressed either his previous concerns or the allegations themselves so that things could move on. There was no evidence to suggest that Mr Nurse was aware of the fact that the Claimant had issued the second ET1 when he raised his grievance. We do not find that his grievance was brought in response to the protected act relied upon, namely the ET proceedings.

Issue 51: Did Moses Lusandisa raise a grievance against Claimant as alleged at para 7b of the ET1 claim form because the Claimant had brought ET

proceedings?

> *ET1: 7b On 14 March 2017 Mr Moses Lusandisa raised a grievance against the Claimant specifically referring to the First Claim and the claims therein as set out above, and further describing them as false accusations.*

155 We find that by the date on which he put in his grievance [B651-B652, B653] on 14 March 2017, the Claimant's ET1 has been received by the Respondent and Mr Lusandisa had been asked for his comments on its contents. His statement dated 14 March 2017 [B643 to B648] sets out a number of points which correspond to the numbering and paragraphs in the Claimant's ET1 and the allegations that she makes in that claim. The statement and the grievance are both dated 14 March 2017.

156 In his grievance Mr Lusandisa sets out how difficult and challenging he had found it to manage the Claimant. In his original draft [B651-B652] he also expressed concern about the Claimant's mental health, as a result of some disturbing allegations she had made about him and because he was aware there were other examples of the Claimant alleging that people were trying to hurt her [including one similar to the allegation made at paragraph 107 of her witness statement]. He realized straight away that he should not have raised his personal thoughts about the Claimant's mental health and so re-sent his grievance with this part removed [B653]. Mr Lusandisa pointed out that he had requested in the past that he be transferred to another club whilst her grievance was being investigated but this was denied. He goes on to state,

> "After reading the accusations made by Farida against me from her solicitor's reports, I physically and emotionally felt sick. I could not believe the level of fabrications she has made from a general conversation and a good moment we shared as a team but decided to twist the story and fabricated accusation, which are complete slander.
>
> I would like to make two formal request:
>
> 1. grievance against the Farida for false accusations on;
> – sexual harassment
> – racism
> – favouritism
> – limiting her progression
> – age discrimination
> – sexism
> – giving her alcohol without her consent
>
> 2. I would like to work away from Farida as I feel she is a risk to my health and well-being, this matter has been dragged for over a year and it is affecting my performance work and family as I found myself physically, mentally and emotionally drained.
> I trust this matter will be taken seriously and a healthy solution will be found for all parties."

157 In his witness statement Mr Lusandisa stated that he did not raise a grievance

simply because the Claimant had lodged a claim against the Respondent which involved allegations against him. In oral evidence when asked about his reason for bringing the grievance he told the Tribunal that on seeing the information in the solicitor's letter he was extremely upset and shocked at the allegations, specifically in relation to the allegation of religious discrimination, that he gave the Claimant alcohol, or spiked her drink, which he found deeply upsetting, the allegation of racism, that he had said he hated Americans, and the allegation of sexual harassment – unwanted touching. He had spoken to his wife about it and had decided that things could not carry on as they had been in terms of working with the Claimant. He confirmed that it was his own idea and no one else had suggested the grievance to him; he was feeling very emotional and he found it very distressing to be accused of giving somebody alcohol against their religion, his wife was a Muslim and he would never do anything against somebody's religion, whatever it was; he understands the importance of not consuming alcohol to a devout Muslim. He felt that the Claimant had overstepped, or gone beyond, the limit in making the untrue allegations of sexual harassment, racism and religious discrimination (spiking the drink) and he was horrified.

158 In respect of the timing of his grievance, Mr Lusandisa told us that he had a 'penny drop' moment when he saw Lloyd Nurse's grievance; he realised the impact on Lloyd and on himself of having to deal with the Claimant and what he described as her 'constant responses to managerial instructions being allegations of bullying and harassment or victimisation.' He also told us, and we accept that this was also a significant factor in his mind, that he was motivated by his frustration with the Respondent's failure to do anything to address the situation. He had raised his difficulties with the Claimant and the effect it was having on him with the company before and he had not been heard, he felt that he needed to have a voice; the resolution he was asking for was not to have to work with the Claimant any more. He told us he was seeking be allowed to work in a healthy environment. He also told us that he felt that the Claimant was making life hell with fabricated allegations, it had dragged on for over a year and nothing been done about it. He wanted to bring the company to action as he felt they could not brush aside the difficulties that were being experienced in the workplace by those having to manage the Claimant. We accept his evidence given orally to the Tribunal.

159 We are satisfied that Mr Lusandisa gave us an honest account of what was in his mind at that time and what motivated him to bring his grievance. We find he had in mind his concern that either the Claimant was making these allegations as a result of some mental ill-health (the context in which he referred to the three other allegations), or that she was malicious, knowing that the allegations were completely untrue, and he wanted it to stop, he did not want to be exposed to a working environment where he would continue to face such false allegations. Mr Lusandisa either wanted to move away or he wanted the Claimant's behaviour addressed.

160 We find that he did not bring the grievance out of vindictiveness or in retaliation for the Claimant's second ET1. We find that it was a cry for help, and for the Respondent to recognize the impact that having to manage the Claimant was having on him. We accept that he was horrified by seeing the allegations the Claimant had made in respect of spiking her drink and unwanted touching and he did not believe they could have been made honestly.

Issue 52: Did Mr Delaney's handling of his meeting with Claimant on 30/03/17 as

alleged at para7c of the ET1 claim form amount to a detriment, if so, was this because the Claimant had brought ET proceedings?

> *ET1: 7c On the 30 March 2017 during the Claimant's weekly meeting with Mr Moses Lusandisa, Mr Jared Delaney arrived and advised the Claimant that he wanted an informal meeting with her. The Claimant was surprised, having received no prior notification about the same and having never previously met Jared Delaney.*
> *When the Claimant asked Mr Delaney what the meeting was about he was reluctant to answer. It transpired that the meeting was about the grievances raised by Moses Lusandisa and Lloyd Nurse. It further transpired that Mr Delaney had sent an email to the Claimant the previous evening at 19:53 on 29 March 2017, and which the Claimant had not seen. The Claimant requested a private word with Mr Delaney who went on to describe in very loose terms the grievances had been raised against the Claimant and he mentioned the phrase a "breakdown in the relationship". Next day, Mr Jared Delaney sent an email to the Claimant on 31 March 2017 and the Claimant replied by email on 2 April 2017 disputing Mr Delaney's statements in his email dated 31 March 2017, and explained the facts of the actual interaction on the 30 March 2017.*
> *At this time Mr Delaney did not expand upon the content of Moses Lusandisa's and Mr Lloyd Nurse's grievances as directly relating to the Claimant's First Claim.*

161 The Claimant accuses Mr Delaney of turning up for a meeting without any notice. She accepts that he had sent her an email the night before but she had not seen it. The Claimant maintains that he should have asked Mr Nurse and Mr Lusandisa for their version of events first before going to her.

162 We accept Mr Delaney's evidence that it was the Claimant who first told him about her Tribunal claim when they met on 30 March 2017.There was nothing to suggest that Mr Delaney would have approached the meeting or the investigation of the grievance any differently had the Claimant not issued an ET1 (containing complaints under the Equality Act 2010).

Issue 53: Did Mr Delaney's handling of correspondence as alleged at para 7d amount to a detriment if so was this because the Claimant had brought ET proceeding?

> *ET1: 7d On the 4 April 2017, in reply to the Claimant's email to him setting out the course of events as above, Jared Delaney sent an email to the Claimant requiring her to answer questions which directly related to issues and findings of fact which were already before the Employment Tribunal by virtue of the First Claim, and which related directly to the evidence that would be presented. The framing of the questions further displayed bias against the Claimant. In particular Jared Delaney asked whether the Claimant had any "proof" or "witnesses" to the acts of sexual harassment, age/sex discrimination, verbal abuse and spiking of the Claimant's drink, as alleged in the Employment Tribunal First Claim.*

163 In his email to the Claimant on 31 March 2017 [B655] Mr Delaney thanked the Claimant for allowing him time [the previous day] to explain about the two grievances that had been raised, and told her he understood that she did not want to discuss the grievances until she had time to reflect on the news. He explained that the meeting would

form part of his investigation into the grievance, he also confirmed that he was aware that she had raised a grievance against Moses in the past and that had been resolved through the company's procedures, and that she had sought legal representation to resolve the issue privately.

> "As I explained yesterday my objective is not to investigate your claim but investigate the grievance that Moses has raised against yourself."

He offered her the opportunity to meet on 4 April at Lavender Hill (Clapham) and to bring a witness with her, he concludes by saying

> "If you would prefer to send your responses via email then I am happy to send you a list of questions that you could email by return, please let me know your preferred way to help my investigation."

164 The Claimant responded on 2 April 2017 [B657] disputing Mr Delaney's account of their meeting contained in his email and setting out her version of events.

165 The allegation of victimisation relates to Mr Delaney's response on 4 April 2017 [B659]. In his email on 4 April Mr Delaney states that he is aware that the Claimant is taking legal action against Fitness First but it was not his responsibility to investigate or answer those allegations; he stated that his role was to hear Lloyd and Moses' grievances and investigate the matters arising from that. He enclosed a copy of both grievances and explained he had a duty to investigate the grievance and had detailed the questions that he would like the Claimant to answer by 6 April. He set out five questions relating to the allegations against Mr Lusandisa contained in the Claimant's claim form asking the Claint if she had proof or a witness in respect of those allegations. Mr Delaney told the Tribunal that he would have asked Jemma Ellingham's advice to help him with the investigation, he believed the questions came from him but he would have taken her advice and he believed those five issues were the issues raised by Mr Lusandisa in his grievance.

166 We do not find that asking the Claimant if she had any proof or witnesses to the allegations she had made is in itself an indication of bias against the Claimant. Mr Delaney had been tasked with investigating Mr Lusandisa's grievance in which he complained that the Claimant had made false allegations against him. Nor do we find that in the circumstances it can reasonably be described as a detriment. We are satisfied that Mr Delaney acted in a genuine and reasonable attempt to discharge the Respondent's duty to its employees, it had a duty to Mr Lusandisa and Mr Nurse to investigate their grievances as it had to the Claimant when she had brought her own grievances. We do not find Mr Delaney acted as he did because the Claimant had lodged her ET1 but because he had a responsibility to investigate the grievances brought by two fellow employees.

167 The Claimant did not respond substantively by the deadline given, in the meantime she had requested a PDF of the documents, which was provided to her on 5 April. On 10 April Mr Delaney wrote to the Claimant informing her that he needed to conclude his investigation and politely requested that she answered the questions he had asked. He extended the deadline until 13 April to give the Claimant time to respond and informed her that if he didn't receive a response by that date he would have to make his

conclusions on the evidence he had been given.

168 The Claimant responded on 10 April [B664],

> "In respect of false accusations of grievances and actions that have been raised against me recently by Fitness First as a result of my Employment Tribunal claim, I am very concerned by your request for me to attend a meeting to discuss "the matters unreasonable and highly and intimidating". The nature of the information requested is clearly related to my current Employment claim and is therefore an act of victimisation following making protective act by filing a claim with the Employment Tribunal.
>
> Given the above circumstances such a meeting on your request for answer your question would be inappropriate"

169 The Claimant repeated in answer to questions in cross-examination that the act of asking her for any information or supporting evidence in relation to anything that she had relied on in her claim to the Tribunal was an act of victimisation. She maintained that she should not have to answer any questions or provide any evidence in respect of the allegations she had made because she had brought the complaint to the Employment Tribunal.

170 Mr Delaney did not press the Claimant for any further information and decided the grievance on the basis of the evidence he had obtained from other sources during his investigation. Mr Delaney wrote his outcome letter to Mr Lusandisa on 5 May 2017 [B670-B673] and to Mr Nurse [B673a-673d] also dated 5 May. In response to Mr Lusandisa's grievance Mr Delaney explained that he had conducted a full investigation with face-to-face meetings with Kris Williams a telephone call with Andy Kelly; face-to-face meeting with Mr Nurse and Mr Lusandisa; email communication with Claire Woolley, Lloyd and Tharan and had received a statement from Paul Woodcock. Having considered all the evidence he concluded that he could find no evidence to support the Claimant's allegations made against him, and that other heads of department were complimentary about his character and management style. He found that the relationship between Mr Lusandisa and the Claimant had broken down beyond prepare and that the relationship with Farida was causing an unsuitable work environment for him.

171 Mr Delaney upheld the complaints made by Mr Lusandisa and recommended that he be moved to another Fitness First club within London.

172 In respect of Mr Nurse's grievance he also conducted a full investigation and spoke to a number of people. He recommended that there be mediation attempted between Mr Nurse and the Claimant and recommended that they refrain from communicating by email and both receive some training on communication methods.

Issue 54: Did Mr Varellas' letter informing the Claimant that she would be investigated for matters alleged at para 7 f of the ET1 claim form amount to a detriment if so, was this because the Claimant had brought ET proceedings?

7f On the 30 May 2017 the Respondent by letter from Lee Varellas, General

Manager of Fitness First Cottons, advised the Claimant that she was to be subject to investigation into the "performance and conduct with regards the following:

Refusing to discuss allegations from Moses Lusandisa and Lloyd Nurse about the treatment they have received from you
Refusing to substantiate your allegations towards Moses Lusandisa
Refusing to discuss allegations of bullying by Lloyd Nurse
Refusing to discuss or answer questions of the above allegations with Jared Delaney, Regional Business Manager during the recent formal grievance against you.

173 On 30th of May 2017 Mr Varellas invited the Claimant to an investigatory meeting in respect of her performance and conduct [B675]. The Claimant was informed this was entirely a fact-finding exercise and did not form part of the disciplinary procedure; that once the investigation was concluded, if it was felt the disciplinary proceedings should be initiated the Claimant would be invited to attend a formal disciplinary hearing at a later date.

174 On 31 May the Claimant wrote to Kris Williams [B676 to B 677] stating that, "these actions [forcefully asking her to provide directly information which is part of her claim to the Tribunal] are illegal and an act of victimisation following making a protected act by filaing a claim with the Employment Tribunal. .. given the above circumstances such a meeting or or providing in answers to your questions would be inappropriate and highly intimidating and will directly affect Employment Tribunal proceedings and my ET claim." The Claimant told us that she took this position having received legal advice.

175 We are satisfied that requiring the Claimant to attend a fact-finding meeting could amount to a detriment. We also find the reason for her refusal to cooperate was her view that she should not have to do so while her ET claim was pending. Whilst the Claimant's reason for refusing to co-operate might have been because she had brought the claim, that does not mean that the Respondent acted for the same reasons. The Respondent was faced with grievances brought by two of its employees and it had an obligation to investigate those grievances. We accept Mr Self's submission that to leave them unresolved until after the conclusion of these proceedings would have placed those employees in an intolerable position. We find that the reason for the request to answer questions was because the Respondent was investigating the grievances. The Claimant refused to answer those questions. We were told the Respondent's employees are expected to co-operate with investigations into grievances in accordance with tis Grievance Policy. The fact-finding meeting was in respect of her refusal to cooperate with the investigation. We are satisfied that any employee who refused to cooperate with a investigation in circumstances where grievances had been brought by another employee against them would have been treated in the same way. Whilst the question for us is not whether the Claimant was subjected to *less favourable* treatment (than another employee would have been in similar circumstances), we have found the question of what would have been done in similar circumstances to be instructive in identifying the reason for the treatment complained of. We do not find Mr Varellas was influenced by the fact that the Claimant had brought tribunal proceedings. We find that he was simply following the company's procedure. It was suggested that had the Claimant attended the meeting Mr Varellas may well have accepted her explanation for not providing the answers sought, which was that she had been advised by her solicitor not to do so pending the outcome of the tribunal proceedings. In any event Mr Varellas

did not pursue the matter any further.

Issue 55: Did the Claimant suffer the detriments alleged at para 8 of the ET1 claim form?

(i) Moses Lusandisa's grievance of the 14 March 2017
(ii) Lloyd Nurse's grievance of the 10 March 2017
(iii) Being subjected to investigation on the 30 May 2017
(iv) Being placed at risk of disciplinary sanction/dismissal
(v) Damage to the Claimant's health and mental health
(vi) Effects making it difficult for the Claimant to perform her job duties

176 The detriments at *issue 55* are the same as covered above, namely Mr Lusandisa's grievance, Mr Nurse's grievance, the investigation and being placed at risk of disciplinary, together with their effect on the Claimant

[Issue 56: Did Mark Summers' alleged handling of matters alleged at para 8 of the ET 1 claim form amount to a detriment(s) if so, was this because C had brought ET proceedings? – withdrawn]

177 The allegation against Mark Sumner set out at issue 56 was withdrawn on 17 March 2020 after Mr Sumner had given his evidence.

Issue 57: Did Kris William's handling of matters alleged at para 11 of the ET1 claim form amount to a detriment, if so, was this because the Claimant had brought ET proceedings?

11. By emails dated 26 June, 03 July and 05 July 2017, Kris Williams Regional Business Manager wrote and pressurised the Claimant and invited the Claimant to have a meeting on 6 July 2017 again after the Claimant had commenced the Early Conciliation process with ACAS. The Claimant felt intimidated by the requests and the potential threat of the Respondent's repeated insistence of the existence of a broken down working relationship. The Claimant avers that the Respondent may use this fabrication as a reason for potentially ending her employment. Combined with the threat of disciplinary action, the Claimant avers that this belief and declination of the demand to effectively allow the Respondent to create evidence during that procedure then relevant to the First Claim, was justified and not misconduct or breach of any implied term. The Claimant repeatedly advised and responded on 30 June 2017, 04 July and 05 July 2017 that she could not discuss matters which were to be heard by the Tribunal, and that she felt pressurised by the Respondent to engage in an investigation onto those matters before the Tribunal.

178 Kris Williams wrote to the Claimant on 26 June inviting her to a meeting on 6 July [B688] the letter reads,

"Dear Farida,

I hope you're well.

I am aware that you have raised a number of issues in relation to your employment and I would like to invite you to meeting to discuss those issues. I would very much like to have the opportunity to meet with you so that we can discuss exactly what you think should happen for there to be a good and proper working relationship because at present, it is clearly not working. There has been a substantial period of time where there has been a poor working relationship between both Fitness First and the individuals employed within the Company and yourself and the situation is not good for either and we are anxious to resolve the situation.

I hope that during our meeting you can set out precisely your concerns and the barriers to there being a full, proper and good ongoing relationship.

I have therefore arranged for a meeting to take place on Thursday 6 July … and I would be grateful if you could please confirm your attendance at that meeting.…"

179 The Claimant's response to Mr Williams on 30 June [B689]

"…I am not sure which you are referencing so to clarify kindly the information as requested.

1. an itemised list of all the issues you are referring;

2. the dates they occurred on:

3. the employees involved,

Upon receiving the above information, I will reply accordingly"

180 In the meantime, Mr Sumner had emailed the Claimant on 5 June [B681] in an attempt to set up a mediation meeting between the Claimant and Lloyd Nurse, informing the Claimant that,

"The goal of the mediation will be to help both parties resolve or better manage disputes by reaching agreements about what both people will do differently in the future. We will be looking for mutually agreeable solutions and focusing on the future in order to improve their working relationship."

181 On 12 June [B686-B687] the Claimant responded taking issue with contents of Mr Sumner's letter and stating the actions were illegal and an act of victimisation. She did not engage with the offer of mediation.

182 We find this is a typical example of the Claimant's response to any such attempts to resolve matters and is an indication of a poor or broken working relationship. We do not find that the reference to broken relationships or reference to trying to improve those relationships can reasonably be described as intimidation, or amount to a detriment in the circumstances. It is clear from the correspondence that the emphasis was on trying to

understand the Claimant's concerns and finding ways to improve the working relationships in the future.

183 On 5 July Mr Williams tries again [B694] sending a letter the following terms,

> "There is absolutely no reason why we cannot discuss matters that are contained within your Employment Tribunal claim. That being said, I have not seen a copy of your Claim and so I can only reiterate that I'm keen to meet with you so that I can properly understand your concerns.
>
> I have seen your email to Ruth dated 4 July 2017 and it is clear to me that you continue to raise concerns about the working relationship.
>
> This is why I consider it is so important that you set out in clear terms to me precisely what issues remain and how you envisage this situation being resolved.
>
> We can discuss your email to Ruth on Thursday. Please therefore let me know if you are willing to attend."

184 The email to Ruth referred to was sent by the Claimant on 4 July [B 693] in relation to communication with Lloyd Nurse. The Claimant replied on 5 July 2017 [B695],

> "Dear Chris,
>
> Thank you for your email and your text message.
>
> Are you saying that you want to discuss matters that are contained within the Employment Tribunal claim?
>
> I do not have any issues other than those which are already dealt by ACAS or in the Employment Tribunals Courts. And as I was requesting information regarding the issues you wanted to discuss so I can give clarity on my ability to attend the meeting."

The Claimant goes on to suggest that if he would like to have a copy of her claim that he contact the Respondent's solicitors. In reference to the email on 4 July to Ruth and communication with Lloyd Nurse the Claimant states,

> "There is no problem of any sort of working relationships here and as I have always been professional, and expect the same from others."

The Claimant fails to attend the meeting.

185 We find the Claimant's statement that there is no problem of any sort in the working relationships is simply not sustainable, it bears no relationship to the reality of the

relationships on the ground, as evidenced from the Claimant's own emails let alone the grievances raised by her colleagues and the Claimant's claims to this tribunal. We do not find that the response from Mr Williams was threatening, nor was it reasonable of the Claimant to describe it as such in the circumstances. We doubt that she found it to be threatening, rather we find that the Claimant had taken a position (whether on legal advice or not) that she ought not to have to answer any questions that overlapped with the matters she had raised in her claim and she was not going to co-operate. We are satisifed that Mr Williams was trying to see a way through to resolve the situation and to repair damaged working relationships. We do not find this can reasonably be considered to be a detriment to the Claimant. We do not find that Mr Williams' actions were in response to the ET1 claim having been brought, or an attempt to gather information or "create evidence" in respect of that claim. Nor was it an attempt to find a reason to end the employment relationship. We are satisfied that it was simply a recognition that complaints and counter complaints had been made and further issues were still being raised by email, and Mr Williams was attempting to try to find a better way of dealing with the ongoing relationship.

The law

186 **Equality Act**

Section13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Section 26 Harassment

(1) A person (A) harasses another (B) if—
(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the purpose or effect of—
(*i*) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(*a*) A engages in unwanted conduct of a sexual nature, and
(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*).

…

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

(*a*) the perception of B;
(*b*) the other circumstances of the case;
(*c*) whether it is reasonable for the conduct to have that effect.

187 If the Claimant's subjective view (sub-s (4)(a)) is not established on the facts, the Tribunal need go no further: *Pemberton v Inwood [2018] EWCA Civ 564*, *[2018] IRLR 542*, *[2018] ICR 1291*. Conversely, if it appears to the Tribunal that it was not reasonable for the conduct to have the claimed effect (sub-s (4)(c)), that too will end the necessary inquiry: *Ahmed v The Cardinal Hume Academies UKEAT/0196/18 (29 March 2019, unreported)*.

188 The EAT observed in *Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT* while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

Section 27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

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

(2) Each of the following is a protected act—
(*a*) bringing proceedings under this Act;
(*b*) giving evidence or information in connection with proceedings under this Act;
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) 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.

…

189 It is for the Claimant to show is that he or she has been subjected to 'a detriment' and the necessary causal link to the actual or believed protected act. There is no requirement of comparison (affirmed by the EAT in *Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 733, EAT*.). The EHRC Employment Code at para 9.8 states, “generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage”. In *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL,* the House of Lords held that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage, although an unjustified sense of grievance could not amount to a detriment, whether or not a claimant has been disadvantaged is to be viewed subjectively.

190 The test to be applied by a tribunal is whether the treatment was by reason of the protected act(s), which requires a consideration of the employer's motivation (conscious or unconscious); it is not enough merely to consider whether the treatment would not have happened 'but for' the protected act(s): *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425*.

191 The Claimant must be able to prove a causal nexus between the fact of doing something *by reference to the Act* and the decision of the employers to impose the less favourable treatment. If for example it can be shown that the employers' actions were motivated by dislike of the applicant's *methods* (for instance, making secret tape recordings of conversations *Aziz v Trinity Street Taxis Ltd [1988] IRLR 204*, *[1988] ICR 534, CA*), rather than by the fact that he or she was making a complaint, under the Act, then this causal element may pose difficulties. In *Nagarajan v London Regional Transport [1999] IRLR 572*, *[1999] ICR 877, HL* the House of Lords held that conscious deliberate victimisation does not have to be shown; they held that it was open to a tribunal to infer a subconscious influence on an appointment panel, turning down an applicant who had a history of discrimination complaints. In *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, HL* a reference for Mr Khan was withheld, not 'by reason that' he had brought discrimination proceedings, but because those proceedings were imminent at the time of the reference request and the employer needed to preserve his position.

192 It is particularly important that the tribunal should apply the exact statutory wording of s 2(1): *Lindsay v Alliance and Leicester plc [2000] ICR 1234, EAT*. In applying the section, a tribunal should consider four questions – (i) whether the Claimant has done a protected act; (ii) whether she was treated less favourably than others who did not do the protected act; (iii) whether she was treated less favourably [because of doing] the protected act; (iv) whether she is nevertheless disqualified for claiming by [sub-s (3)], ie, because the allegations were false and made in bad faith: *HM Prison Service v Ibimidun [2008] IRLR 940, EAT*, 'bad faith' is to be construed as meaning lack of honesty; although in some cases an ulterior motive may be *evidence* of bad faith (see *HM Prison Service v Ibimidun [2008] IRLR 940, EAT*), it is not in law to be equated with it: *Saad v Southampton University Hospitals NHS Trust [2018] IRLR 1007, EAT*.

The reason for the treatment, was it because of the protected act?

193 There may be cases where there is a *connection* between the employer's acts and the protected act, but it is not the 'reason'. In *Martin v Devonshires Solicitors [2011] ICR 352, EAT*, an employee was dismissed for making delusional accusations against the firm due to a mental health condition (the employers taking the view that the situation might recur) that action was not victimisation because the protected act was only part of the background and the employer's action was separable from it: provided that that conduct was 'properly and genuinely separable' from the characteristic.

194 In the subsequent case of *Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773*, the EAT advised tribunals to 'start from the proposition that very few cases will be like *Martin*'. However, in the whistleblowing detriment case of *Panayiotou v Kernaghan [2014] IRLR 500*, *[2014] ICR D23, EAT* this aspect of *Woodhouse* was disapproved, the distinction was said to be logical (though subject to a tribunal being alert to possible spurious defences by employers on these grounds) and it was specifically held that there is no legal requirement that *Martin* can only apply in exceptional circumstances.

195 **Section 136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

196 Guidance on applying the statutory reversal of the burden of proof was given by the EAT in *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332, EAT*. This was considered and approved by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142*, *[2005] IRLR 258*.

197 In applying that first part of the two-stage approach, it is still necessary to determine whether the Claimant has established a prima facie case that any detriment was *because of* the protected characteristic (not just that there was detriment *and* the characteristic); in doing so, if the tribunal decides that there is no such evidence at all it may dismiss the case at that stage: *Maksymiuk v Bar Roma Partnership [2012] EqLR 917, EAT*. Equally, if the tribunal positively disbelieves the employer's explanation it can reverse the burden on that basis, even though the employer's case is primarily relevant at the second stage: *Birmingham City Council v Millwood [2012] EqLR 910, EAT*.

Were the allegations false and made in bad faith

198 Mr Self submitted that these were false allegations that were not made in good faith. The allegation of the spiking of the drink is an extremely serious allegation which has never been mentioned in any of the emails or grievances raised by the Claimant, even though she went into detail about many apparently less significant matters, while this very serious incident was not raised or mentioned. Similarly, the allegation of sexual harassment int the form of unwanted touching, sliding his hand down her back or stroking her hand with his fingers was not something that she had ever raised before in any of her complaints up to that date.

199 The allegations that Mr Lusandisa spiked the Claimant's drink with alcohol and that he had said he hated Americans were withdrawn after Mr Lusandisa's evidence, that is after he had been cross-examined. We heard the Claimant's account of the incidents. We are satisfied that the allegations were withdrawn because it was clear that there was no proper basis for making them. We have set out our findings of fact in respect of the allegation of unwanted touching, which we find is also a false allegation. We have found that these serious allegations are made without any proper basis, they were made for the first time the ET1 with no reference to them in any contemporaneous complaints.

200 We find that these allegations were made without any proper basis for the Claimant to believe them to be true, and were not made in good faith. We are satisfied that the Claimant had developed an unjustified sense of grievance towards Mr Lusandisa and was prepared to make extravagant allegations against him to try to paint him in as poor a light as possible and in order to bolster her claims to the Tribunal.

Observations of the Claimant's conduct during the hearing – relevant to her credibility

201 On one occasion after a short break when it was put to the Claimant by Mr Self that her behaviour was inconsistent the expressed behaviour on the first day that she gave evidence the Claimant became upset but having taken the pause to compose herself indicated that she was prepared to carry on. During her Counsel's cross-examination of the Respondent's witnesses she was constantly referring to the documents and highlighting passages and passing notes to her Counsel.

202 It was apparent to the Tribunal, and remarked upon by Mr Self who put it directly to the Claimant, that there was apparently a marked difference between the Claimant's ability to follow questions and documents when she was at the witness table to when she was sitting next to her Counsel while was cross-examining the Respondent's witnesses when she had no difficulty in reading documents and passing notes, whilst at the same time keeping up with the course of the evidence. The Claimant also displayed an inconsistent inability to understand particular words, for example the word 'escalate', in cross-examination she disputed understanding what it meant and was vague in her answers in respect of the use of that word in a particular email, but it was noted that she had used that same word (appropriately) in her own documents elsewhere. She also used the word 'vague' in her own evidence and had no difficulty using it in context however disputed understanding what it meant when it was used in cross-examination.

203 The Tribunal took into account that English was the Claimant's third language but she was also at pains to point out on numerous times that she had completed an MBA (in English) and told us she achieved the highest mark in her year.

204 The Tribunal also took into account that giving evidence is a stressful experience. There were no medical reports to explain the variance in the Claimant's behaviour. Whilst we note that sitting next to Counsel is not as stressful as giving evidence, it is still a relatively high-pressure environment. Having given careful consideration to how the Claimant behaved before us we accept Mr Self's submissions that the difference in the Claimant's behaviour was so marked it is hard to escape the conclusion that there was an element of performance and exaggeration in the Claimant's difficulties . Mr Self submitted that her conduct was consistent with how she behaved towards the Respondent and those who tried to manage her, which displayed elements of manipulation or attempting to manipulate dealings. We found during the hearing that the Claimant was reluctant to cooperate when things were not being done to her own agenda and attempted to slow things down to a point where she was given her own way, for example with the production of documents and her own set of bundles. The Claimant rarely answered a direct question unless pushed to by Counsel. There was an obvious distrust of anything that was coming from the Respondent, for instance the list of issues had been agreed by her then representative following various emails exchanges with Mr Self: the Claimant refused to accept the wording in that list of issues and insisted on referring to her own list on each occasion the list of issues was mentioned, despite it being confirmed a number of times by the Respondent's Counsel and also by the Tribunal that the words used were the same.

205 Mr Self pointed to the parallels between the Claimant's conduct in the Respondent's processes in pursuing her grievances and appeals and wanting to have control of those processes, only cooperating if they were done on her terms. Mr Lusandisa gave evidence to the Tribunal in which he explained that he found the Claimant difficult to

manage and observed that some of her behaviour exhibited through the Tribunal hearing was an illustration of the difficulties that he had faced.

206 Despite having instructed Counsel a week before the hearing, on the last day of the hearing (a Tuesday - the Tribunal sitting Tuesday to Friday of each week) the Claimant had sent further documents directly to the Tribunal and to Mr Self apparently for submission in the proceedings, which her Counsel had not had an opportunity to see; they had not been sent to anybody over the weekend or even on the Monday when the Tribunal was not sitting. Once Mr Davey had had an opportunity to read those documents he did not seek to rely on any of them. The Claimant also sought to rely on documents in the proceedings that she had accessed on the Respondent's system that related to somebody else's performance and training record and saw no difficulty or issue with having either accessed those documents or printing them for her own purposes.

207 Having heard the Claimant gave evidence we were drawn to the conclusion that she on some issues it was clear that she was not being entirely truthful in her account and on others that her recollection was unreliable. Having considered the evidence as a whole we have found that the Claimant's recollection of events was in many instances of a self-serving nature, in that she chose to recall what suited her and what put her in the best light and chose not to recall what other people had said or done at the time that might put them in a favourable light. For example, the Claimant flatly denied that Mr Lusandisa had sought to comfort her when he found out she had suffered a bereavement. We find her denial illustrates her inability or unwillingness to recall anything that puts their relationship in a better light than she is trying to paint, or is now prepared to acknowledge. Similarly in relation to Boogie Bounce, she flatly (and we consider unreasonably) refused to accept that anyone else had made any contribution to the success of the event.

Conclusions

208 We took into account the law and relevant authorities set out above in reaching our findings. We reminded ourselves that a witness can be unreliable or untruthful on one matter but still reliable or telling the truth on another.

209 For the reasons set out in our findings of fact above, in respect of the majority of the allegations contained in the list of issues before us we did not find that the factual basis of the allegation to have been made out and we do not need to address those matters again here.

Harassment allegation

Unwanted hug on first greeting

210 Unwanted conduct, whether perception of harassment is reasonable i.e one off hug which if it happened, on the Claimant 's own account was not repeated once she indicated that it was unwanted. We do not find that was conduct that could reasonably be perceived as harassment in the circumstances (where hugging was common among gym staff, it was a one-off incident and where when the Claimant stated that she did not want to be hugged it was not repeated). The allegation in the list of issues appears to acknowledge this at least to the extent that it goes on to make complaint about the

rubbing of a finger insider the Claimant's hand during a handshake instead, for the avoidance of doubt we rejected this allegation on the facts, we did not find that this took place.

211 Had we found this incident to have been harassment we would have to consider the issue of jurisdiction as the incident was alleged to have taken place on or around the 18- 20 November 2014, and the Claimant's first ET1 was issued on 10 February 2017. We have not found any ongoing harassment and the claim is out of time. We would not have considered it to be just and equitable to extend time in respect of this one-off incident had we found it had occurred as described by the Claimant.

Victimisation claim – second ET1

212 In respect of the victimisation claim in the second ET1 we are satisfied that being the subject of grievances by your colleagues and being invited to a fact-finding meeting, as a potential precursor to disciplinary proceedings, are actions which could subjectively amount to a detriment. We carefully considered the reason for the Respondent's actions in each instance to determine whether the necessary causal link with the protected act has been established and have set out our findings above. We are satisfied that (contrary to the Claimant's view) the test of causation is not a 'but for' test.

213 We are satisfied that the reason for the actions of Mr Lusandisa in bringing his grievance was not the complaint per se, but some other feature of it which could properly be treated as separable. We found that Mr Lusandisa brought his grievance in response to the Claimant's unmanageable and disruptive conduct and the Respondent's failure to take actions to manage the situation, which culminated in her making false allegations against him. (As did Mr Nurse although we have found he was not aware of the ET1 when he brought his grievance). The Respondent was left in the position of having to address his grievance, in the same way it had tried to address those previously brought by the Claimant, by investigating them. The Respondent's motivation in asking the Claimant to answer questions was to investigate Mr Nurse and Mr Lusandisa's grievances.

214 We found that in inviting the Claimant to a fact-finding meeting Mr Varellas was acting in response to the Claimant's refusal to co-operate with the grievance investigation as required of her by the Respondent's grievance policy. We are satisfied that this reason is properly separable from the fact of the Claimant having brought the ET proceedings.

215 For the reasons set out above we have not found any of the Claimant's complaints to have been made out and therefore have dismissed each of her claims.

216 Lastly, it is a matter of some regret that there has been considerable delay between the date of the hearing, the date of the in Chambers discussion at which the Tribunal were able to conclude their deliberations and the finalising of this judgment. This has been in large part a result of the number of issues and multiplicity of claims invited

together with the effects of the Covid-19 pandemic and its impact on judicial and administrative resources.

Employment Judge C Lewis
Date: 19 October 2020