EMPLOYMENT TRIBUNALS

Claimant: Ms Angela Dawson

First Respondent: Concept Information Technology Ltd

Second Respondent: Chris Short

Third Respondent: Matt Gillen

Fourth Respondent: Carl Short

Heard at: Birmingham Employment Tribunal (hybrid hearing)

On: 02, 03, 04, 05, 06, 09, 10, 11, 13 and 16 November 2020. With an additional deliberation day on 17 November 2020.

Before: Employment Judge Mark Butler
Mr R Virdee
Mr MZ Khan

Representation
Claimant: Mr S Brittenden (Counsel)
Respondent: Ms S Garner (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

- The claimant succeeds in her claim for victimisation with respect the following paragraph numbers on the agreed list of detriments: 21(2), 21(3), 21(7), 21(18), 21(20), 21(21), 22(2), 22(3), 22(4), 22(5), 22(6), 22(8), 22(9), 22(10). 22(11), 22(14) and 22(15)

- The claimant succeeds in her claim for unlawful deduction from wages

- The claimant succeeds in her claim for constructive unfair dismissal

- The claimant's claims for direct sex discrimination, harassment relating to sex, whistleblowing and remaining parts of the victimisation claim are ill-founded and are dismissed.

- This case will now be listed for a 1-day remedy hearing.

REASONS

Introduction

1. The various claims in this case arise following the claimant having resigned from her position, first with notice on 13 May 2019, and secondly without notice on 26 June 2019. The claims brought related to the alleged conduct the claimant was subjected to by the respondent up to the second resignation.

2. At a Preliminary Hearing, which took place on the 7 November 2019, before Employment Judge Camp, the issues of the claim were agreed between the parties. The details of this claim in its entirety were contained in a document that was appended to back of EJ Camp' record of Preliminary Hearing. This document stood as the agreed list of issues between the parties in this case.

3. The claimant brought claims for direct sex discrimination, sexual harassment, victimisation, whistleblowing detriment, (constructive) unfair dismissal, and unlawful deduction from wages.

4. In terms of witnesses, we had witness statements and heard from several witnesses.

    a. The claimant gave evidence herself. And we also heard evidence from Ms Brooke. Although we had a witness statement produced on behalf of Ms Davenport, who did not give live evidence. The tribunal considered the circumstances of her non-attendnace and put such weight that was considered necessary on this evidence.
    b. For the respondents we heard evidence from Mr Chris Short, Mr Gillen, Mr O'Sullivan, Mr Tristram, Ms Edwards, Ms Brown, Ms Jones, Ms Oakley, Ms Lewis Mr Peplow and Mr Carl Short.

5. On the whole, the tribunal has little comment to make on how evidence was given by the witnesses that we heard from. For the most, evidence was given in a direct and straightforward manner. However, one matter that did concern the tribunal was the constant use of the phrase 'I do not recall'. The tribunal accepts that some of these matters took place some time ago; however, this appeared to become almost a default position with respect several the witnesses for the respondents. This was most noticeable in the evidence of Mr Chris Short, Mr Gillen and Mr Peplow. This was most concerning with respect Mr Peplow, who in his evidence reverted to the answer 'I do not recall' without appearing to give any consideration to the question being asked. This has led the tribunal to place Mr Peplow's evidence low when considering reliability. We do also pass comment on the evidence of Mr O'Sullivan, who on a number of occasions introduced what appeared to be new matters not mentioned in his witness statement and who on a number of occasions was appearing to be avoiding the question. This also calls into his reliability as a witness.

6. This case was listed for 10 days. Given the current pandemic and the government guidance being that working from home should be the case wherever possible, enquiries were made with the parties on day 1 of the hearing as to whether this was a case that could be converted to a remote hearing. Having heard representations from counsel for both sides, having considered the number of issues to be determined in this case, being conscious of the number of witnesses in this case, that reliability of evidence given by witnesses was going to be of importance, a decision was made that for the most this case would continue as an in-person hearing, however with certain witnesses giving evidence remotely. This was with a view to reducing footfall in tribunal, and to reduce the handling of documents by multiple witnesses. In short, days 6 and 7 were done entirely by CVP.

7. The remainder of the first day was used for reading time. With evidence from the claimant given on day 2 of the hearing.

8. We were assisted in this case by opening submissions prepared on behalf of the respondent, a bundle of evidence that run to 945 pages, although the bundle was larger than this given that some page numbers had additional pages in the form of a, b, c… And, due to the additional documents disclosed during the course of this hearing. We were grateful to counsel for both for producing skeleton arguments/closing submissions, which were handed to tribunal on day 9 of the hearing, in advance of oral submissions.

Issues

9. The issues to be determined in this case are those that that are contained in the agreed list of issues that was before Employment Judge Camp at the Preliminary Hearing on the 7 November 2019. These are appended to the back of this judgment.

Submissions

10. We received written closing submissions on behalf of the claimant and on behalf of the respondents, and we also benefitted from hearing closing oral submissions. I do not repeat those here. However, these were reviewed and considered during deliberations.

Law

Equality Act 2010: burden of proof

11. The burden of proof in relation to Equality Act claims are dealt with at s.136 of the Equality Act 2010. At s.136(2) it is provided that

> 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.

12. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination**. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> 57. "Could… conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of**

the 1975 Act; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

13. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**
>
> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

14. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

15. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the

claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

Direct Sex Discrimination

16. Direct discrimination is provided for by section 13 of the Equality Act 2010. It is defined as occurring when:

> 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.

17. Mr Justice Elias, in **Islington Borough Council v Ladele [2009] ICR 387**, explained the essence of direct discrimination in the following way:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detrimentor treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

Detriment

18. The concept of detriment was given consideration before the then House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 227**:

> Lord Hope at paragraphs 34-36 explained that "This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment""
>
> Whereas Lord Scott at paragraph 105 explained that "…If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

Sexual Harassment

19. Harassment is defined under the Equality Act 2010 at section 26. Where it is defined as occurring where

(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).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

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

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

Victimisation

20. protection against victimisation is through section 27 of the Equality Act 2010, where it is stated that:

(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.

21. In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in Chief Constable of the **West Yorkshire Police v Khan [2001] IRLR 830**:-"The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so". The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

22. When considering whether a detriment has been suffered, the judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable

23. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

24. Some guidance on 'by reason that' is provided by Lord Nicholls of Birkenhead in **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** at paragraphs 30 and 31:

> "30. A situation, closely comparable to that in the present case, arose in *Cornelius v University College of Swansea* [1987] IRLR 141. This was a decision of the Court of Appeal, comprising Sir John Donaldson MR, and Fox and Bingham LJJ. Like the present case, *Cornelius* concerned steps taken by employers to preserve their position pending the outcome of proceedings. A college declined to act on an employee's transfer request

or to operate their grievance procedure while proceedings under the Sex Discrimination Act 1975, brought by the employee against the college, were still awaiting determination. Giving the only reasoned judgment, Bingham LJ said, at pp 145-146, para 33:

> 'There is no reason whatever to suppose that the decisions of the registrar and his senior assistant on the applicant's requests for a transfer and a hearing under the grievance procedure were influenced in any way by the facts that the appellant had brought proceedings or that those proceedings were under the Act. The existence of proceedings plainly did influence their decisions. No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over. But that had … nothing whatever to do with the appellant's conduct in bringing proceedings under the Act. There is no reason to think that their decisions would have been different whoever had brought the proceedings or whatever their nature, if the subject matter was allied. If the appellant was victimised, it is not shown to have been because of her reliance on the Act.'

Two strands are discernible in this passage. One strand is that the reason why the officers of the college did not act on the complainant's two requests was the *existence* of the pending proceedings, as distinct from the complainant's conduct in *bringing* the proceedings. They wished to defer action until the proceedings were over. The second strand is that the college decisions had nothing to do with the complainant's conduct in bringing proceedings against the college *under the 1975 Act*. The decisions would have been the same, whatever the nature of the proceedings, if the subject matter had been allied to the content of the employee's requests.

31. Mr Hand QC submitted that *Cornelius v University College of Swansea* [1987] IRLR 141 was wrongly decided. I do not agree. Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) ('by reason that the person victimised has - (a) brought proceedings against the discriminator … under this Act') cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be

regarded as discriminating by way of victimisation against the employee who brought the proceedings."

25. Following judicial discussion and scrutiny of an 'honest and reasonable defence' following **Khan**, Mr Justice Underhill (as he then was) concisely summarised the principles in **Pothecary and Witham Weld v Bullimore [2010] ICR 2008** at paragraph 19:

> "19. In these circumstances we need not attempt any elaborate analysis of how the law stands post-Derbyshire in the kinds of case with which it is concerned. Since, however, we heard some useful submissions on the question it may be helpful in other cases if we briefly summarise the position as we understand it, while repeating that in most cases this analysis is unnecessary:
>
> …
>
> (2) In the case of an act done by an employer to protect himself in litigation involving a discrimination claim, the act should be treated straightforwardly as done by reason of the protected act, i e, the bringing/continuance of the claim; and the subtle distinctions advanced in Khan as to the different capacities of employer and party to litigation should be eschewed.
>
> (3) In considering whether the act complained of constituted a detriment the starting-point is how it would have been perceived by a reasonable litigant; but such a litigant could not properly regard as a detriment conduct by the employer which constituted no more than reasonable conduct in defence of his position in the litigation.
>
> (4) there is no "honest and reasonable" defence as such; but the exercise required under (3) will in all or most cases lead to the same result as if there were."

Whistleblowing

26. The Public Interest Disclosure Act 1998 protects a broad range of workers.

27. A qualifying disclosure requires a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show ...that the respondent was failing or likely to fail with a legal obligation,....' (s43B(1)(d) ERA 1996).

28. In essence, what we as a tribunal must determine can be broken down into its constituent parts:
    a. Did the Claimant disclose any information?
    b. If so, did she believe, at the time she made the disclosure, that that the information disclosed was in the public interest and tended to show that the respondent was failing or likely to fail with a legal obligation

c. If so, was that belief reasonable?

29. The disclosure must, according to the EAT in **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**, convey information in the form of facts and not simply make an allegation or state a position. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the EAT warned Tribunals to take care when deciding whether the alleged disclosure provided information. Information can be disclosed within an allegation and tribunals are warned not to be seduced by a false dichotomy between an allegation and information. We should focus on the wording of the statute at section 43B, 'the disclosure of information which ...tends to show....' The assessment as to whether there has been a disclosure of information which tends to show a relevant failure is fact-sensitive.

30. Further guidance was given by Sales LJ in Kilrane, at paragraph 41:

> "It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in para. [24] in the *Cavendish Munro* case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with Health and Safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."

31. Furthermore, Slade LJ in **Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540**, at paragraph 22 stated:

> "The following principles relevant to this appeal are to be derived from the authorities on communications which are protected disclosures within the meaning of ERA section 43B(1)(d), the provision of section 43B(1) which was the basis of the decision of the EJ in this case. The disclosure must be of information not an allegation (**Cavendish Munro** paragraph 24), nor an expression of opinion or a state of mind (**Goode** paragraph 36). The information must be of facts which in the reasonable

belief of the worker making the disclosure tends to show that the health and safety of any individual has been, is being or is likely to be endangered. An earlier communication can be read together with a later one as "embedded" in it rendering the later communication a protected disclosure even if taken on their own they would not fall within section 43B(1)(d) (**Goode** paragraph 37). Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact. In **Everett**, the EAT held at paragraphs 46 and 47 that because the ET made no finding of fact on what was said at a meeting before a petition which was said to be a protected disclosure was signed, it was not possible for them to decide whether the petition read with what was said at that meeting was a protected disclosure."

32. Useful guidance on what is considered to be in the public interest can be read in **Chesterton Global Ltd & Anor v Nurmohamed & Anor (Rev 1) [2017] EWCA Civ 979**, Underhill LJ

> "36. It might be thought to follow from my rejection of Mr Linden's argument that I should accept Mr Reade's opposite submission that mere multiplicity of persons whose interests are served by the disclosure of a breach of the contract of employment can never, by itself, convert a personal interest into a public interest: if the essential question is the character of the interest served, why should that character be changed by the fact that the number of individuals whose interests is engaged is 200 or 2,000 any more than when it is two ? I see the logical attraction of that argument, and I was initially minded to accept it. However, on reflection, I do not think it would be right to take that position. The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

> 37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character[5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

33. There is no requirement that the protected disclosure be the sole or principal cause for the detriment in a section 47B claim. Rather, the test is whether the disclosure was a material influence, in the sense of being more than a trivial influence (**Fecitt & others v NHS Manchester [2012] ICR 372, CA**).

34. The Claimant must prove that there was a protected qualifying disclosure and that she suffered a detriment. If so, the Respondent must prove on the balance of probabilities that the detriment was not on the grounds that the claimant had made a qualifying disclosure i.e. that the disclosure did not materially influence, (was not more than a trivial influence on) the Respondent's treatment of the Claimant, see **Fecitt**, (above) in particular paragraph 41.

35. Section 48(3) of the ERA requires that any complaint of detriment for having made a protected disclosure must be brought within 3 months of the detriment complained of, or if there was a series of similar acts or failure to act, the last of them. If it was not reasonably practicable to bring the claim within that period, it may be allowed, if brought within such further period as the Tribunal considers reasonable.

Constructive dismissal

36. Relevant decisions on the matter of the claimant's constructive dismissal complaint include the following:

    a. **Blackburn v Aldi Stores Ltd [2013] IRLR 846**, in particular HHJ Richardson at paragraph 25:

> "In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the Tribunal to

assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the **Malik** test."

b. **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, as per Underhill LJ:

> "55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> > (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
> >
> > (2) Has he or she affirmed the contract since that act?
> >
> > (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
> >
> > (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
> >
> > (5) Did the employee resign in response (or partly in response) to that breach ?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

Unfair dismissal

37. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** it was held that in order to claim constructive dismissal an employee must establish:

a. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee(rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle[2005] ICR 1.
b. that the breach caused the employee to resign; and
c. that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal

38. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

39. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

Breach of contract

40. **Deadman v Bristol City Council [2007] EWCA Civ 822**, perMoore-Bick LJ:

> "The conditions, policies and procedures referred to in paragraph 13 of Mr. Deadman's Statement of Terms and Conditions of Employment vary in their nature and content. Some of them are clearly capable of constituting terms of his contract; others are not. In my view Mr. Hogarth was right in submitting that Integrated Equalities Policy is not a document which naturally lends itself to incorporation into the contracts of the Council's employees, but it does provide a useful insight into the standards which the Council itself considers that it is appropriate to observe in its dealings with them. **The recognition of the need to deal with harassment positively, quickly and sensitively provides one example, but rather than constituting a term in its own right it is in my view properly to be understood as illustrating the manner in which the Council expects to conduct its relationship with its employees, both in complying with its contractual obligation not to undermine the mutual relationship of trust and confidence and in**

observing its duty of care towards them under the contract and at common law. The Procedure for Stopping Harassment in the Workplace is rather different. Although some parts of it also contain little more than statements of policy, other parts, particularly section 7, are of a more detailed and formal nature and are capable of being incorporated into contracts of employment. In my view where an employer has published and implemented with the concurrence of employees' representatives formal procedures providing for the manner in which complaints are to be investigated, it will usually become a term of the contract of employment that those procedures will be followed unless and until withdrawn by agreement. **The fact that in this case the procedures were made in the implementation of a non-contractual policy is in my view of no significance.** What matters is whether they were in fact adopted as part of the contract of employment, as in my view they were in this case." (emphasis added)

41. **Braganza v BP Shipping Ltd [2015] UKSC 17**, per Lady Hale

"29. If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "*Wednesbury* reasonableness" (or "*GCHQ* rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker."

Jurisdiction: time

42. Time limits, as they apply to Equality Act 2010 claims are provided for at section 123:

(1) [F1Subject to [F2sections 140A and 140B]] proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

43. On the matter of whether there is a continuing act, Mummery LJ in **Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686** explained that:

> "52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Findings of Fact

We make the following findings of fact, on the balance of probability based on all the matters we have seen, heard and read. In doing so, we do not repeat all the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues. Where it is a disputed fact being determined and where necessary, there is some explanation as to why a finding was made.

General Matters

44. On 14 August 2014, Ms Dawson was offered the position of Principal Recruitment Consultant with Concept Ltd.

45. On 7 October 2014, the claimant commenced employment with Concept Ltd as an Executive Consultant

46. On 1 April 2016, the claimant was promoted to Managing Consultant of the government team.

47. On 11 July 2016, the claimant was given additional responsibility in that she was made responsible for managing the combined NHS and government team

48. On 16 February 2017, the claimant applied for the Managing Director role with Concept Ltd.

49. On 1 July 2017, Mr Matt Gillen is recruited as Managing Director of Concept Ltd.

50. On 25 January 2017, the claimant is appointed to the role of IT Contract Director. Mr Chris Peplow is appointed as the claimant's line manager.

51. Bonuses were achieved through a mix of financial and non-financial targets. They were set quarterly. Targets were based on need by the business. Where a matter was identified as needing focus, then it would form part of the targets set in order to receive a bonus.

52. Throughout the claimant's employment with the first respondent, her team performed to a high level in terms of team gross profit:

    a. Q3 2017, the claimant's team hit 72% of their Gross Profit target, and was the fourth best performing team. See p.854 of the bundle.
    b. Q4 2017, the claimant's team hit 130% of their Gross Profit target, and was the best performing team. See p.855 of the bundle.
    c. Q1 2018, the claimant's team hit 100% of their Gross Profit target, and was the best performing team. See p.856 of the bundle.
    d. Q2 2018, the claimant's team hit 83% of their Gross Profit target, and was the second best performing team. See p.857 of the bundle.
    e. Q3 2018, the claimant's team hit 88% of their Gross Profit target, and was the second best performing team. See p.858 of the bundle.

53. Mr Gillen introduced greater focus on the non-financial targets of T100s and traitor list.

54. The claimant did not achieve her Q3 2017 non-financial targets of having hit 43 runners by the last week of the quarter, having achieved 40, nor of implementing and managing T100 and traitor lists. Similarly, the claimant did not achieve either of these non-financial targets in Q4 2017. See p.853 of the bundle.

55. T100s and traitor lists were not an issue with the claimant after Q4 2017. This is a plausible conclusion to reach given that they no longer feature as a specific target for the claimant.

56. There was no criticism of the claimant's performance before April 2018.

57. On 08 May 2018, Mr Gillen emailed Ms Turner, who was head of HR, copying in Mr Peplow, asking for a note to be put on the claimant's HR file. The email itself states:

Laura,

Note for file.

Just had a managers meeting where Rob Taylor discussed 200 potential jobs with Andy Robinson at Dentsu, Angela said she was aware of these roles which was a surprise to all of us.
If she has withheld this critical commercial information I will be making things formal. I will report back.

Kind Regards

Matt Gillen
Concept Resourcing

Mr Gillen's explanation of this under cross examination was unsatisfactory. This is clearly an email to the HR manager, concerning what appears to be being described as a disciplinary issue, and it is therefore on balance a note for the claimant's HR file.

58. On 31 May 2018, the claimant emails Mr Gillen asking whether she can work on two roles for a client all day, before seeking clarity on whether there was management training on that day. See p.302 of the bundle.

59. Mr Gillen agreed to allow the claimant to do this. Under cross examination, Mr Gillen accepted that the claimant was asking an acceptable question, but further explained that he reluctantly agreed to the request.

60. Mr Gillen, having agreed to allow the claimant to miss management training and work on the two roles as requested, emails Mr Peplow, this time copying in Ms Turner, asking for Ms turner to record on the claimant's HR file that she has chosen not to do management training. He does not mention the conversation between himself and the claimant. This email is at p.302 of the bundle.

61. On 21 December 2018, Mr Carl Short sent Mr Gillen and Mr Chris short the following email:

From: Carl Short
Sent: 21 December 2018 13:57
To: Matt Gillen <matt.gillen@conceptresourcing.com>; Chris Short <Chris.Short@conceptresourcing.com>
Subject: Sex discrimination

In June 2017 we held a bake off competition

AD submitted a cake that depicted an image of Borat with his penis hanging out

)ee attached

I think AD was laughing about it when I viewed it. Lucy was with me too when I saw the cake, and I said "what's that? "

Lucy took a picture of the cake and sent it around the office, as she found my reaction funny

I thought the cake crude at the time but I didn't think it worth making an issue out of

In light of ADs comments about sex discrimination and being shocked etc, I think this is evidence that actually Angela wasn't easily offended by such things, and took part in and was comfortable with office banter of this type.

Other evidence that she wasn't offended by such things could be the Hen do photos, although that's conduct out of work, her work colleagues were there, and it's evidence she's not easily offended.

Kind Regards

)
Carl Short
Concept Resourcing

62. On 28 December 2018, Mr Chris Short sent an email to Mr carl Short, with Ms Turner and Mr Gillen copied in. This had attachments of photographs of the claimant in fancy dress taken from her Facebook page, and a sexually provocative comment by the claimant. The email sent stated:

From:	Chris Short
Sent:	28 December 2018 13:33
To:	Carl Short
Cc:	Laura Turner; Matt Gillen
Subject:	Useful - from Angela's facebook page
Follow Up Flag:	Follow up
Flag Status:	Flagged

The image / xmas card below below was sent to me and all the staff at concept in December. Interesting about 1 week after she was offended and disgusted by my alleged comments at the xmas party in 2016

Protected Acts/knowledge of the existence of a Protected Act/public interest matters

63. Finding: At some point between the middle of April 2018 and the 25 April 2018, the claimant raised concerns with Ms Turner concerning various treatments of

her within the workplace. Including, but not limited to bullying and/or discrimination.

Reason. This is clear evidence of the claimant, at paragraph 6 of her witness statement. There is no evidence to the contrary. A meeting was arranged by Ms Turner to take place on 25 April 2018, with the purpose of considering an informal grievance raised by the claimant. Therefore, grievances must have been raised at some point in advance of the meeting of 25 April 2018 being arranged by Ms Turner. This is consistent with the document entitled original complaint document 1, found at pp.272-279 of the bundle, and the minutes of the 25 April 2018 meeting in terms of content, found at pp.280-281 of the bundle.

64. Finding: On or around 22 April 2018, the claimant committed all her concerns to a document. This claimant intended to send this document to Mr Chris Short. The claimant intended on sending this document to Mr Chris Short in advance of meeting Ms Turner. However, this document was never sent.

    Reason: this is clear from the document found at pp.272-279 of the bundle, which includes a cover email that names Chris as the intended recipient.

65. Finding: the claimant met with Ms Turner on 25 April 2018, which was described as an informal grievance meeting. At this meeting, issues concerning bullying, discriminatory and aggressive treatment were raised by the claimant. The claimant also raised concerns about decisions being biased.

    Reason: there is clear reference to bullying, discriminatory, and aggressive treatment, as well as decisions being biased on the document at pp.280-281 of the bundle, which are the notes of the informal grievance meeting, taken by Ms Turner. This is not disputed by the respondents.

66. Finding: on 30 April 2018, the claimant met with Mr Chris Short to discuss the grievance. The claimant raised her concerns about discriminatory treatment in this meeting by handing Mr Chris Short a copy of the document that she had produced and sent to herself on 22 April 2018.

    Reason: there is a clear conflict in the case of the claimant and the respondents on this point (although I do note some confusion in the closing submissions made on behalf of the respondents in respect of whether this meeting was a protected act. Paragraph 16 of the respondents closing submissions suggests that they are accepting that the meeting between the claimant and Mr Chris Short was a protected act, whilst paragraph 17 suggests otherwise. Looking at the written submissions for the respondents as a whole, it appears that there is just some confusion around dates. It is therefore prudent to resolve this matter based on the evidence we have heard). The claimant says that she raised the subject of sex discrimination and handed Mr Chris Short a copy of her original complaint document. Whereas Mr Chris Short says that he does not recall

discrimination having been mentioned in this meeting and that he was never handed a document by the claimant. He says that the meeting focused on Mr Gillen as MD and the claimant's concerns about him. On balance, it is more likely that the claimant did raise sex discrimination as a subject in this meeting. This was raised only five days earlier with Ms Turner in an informal grievance meeting, formed part of the focus of the claimant's original complaint document, which was clearly intended to be sent to Mr Chris Short, and Mr Chris short under cross examination gave evidence that he was in communication with human resources, Ms Turner, throughout this period. It is implausible that Ms Turner would not have expressed that sex discrimination formed part of the claimant's grievance and that was not therefore discussed. Further, Mr Short under cross examination accepted that the claimant had notes with her in this meeting. This was the original complaint documents. We considered that the claimant was more likely than not to have handed this document to Mr Chris Short, given that he was the intended recipient from the outset.

67. Mr Chris Short arranged for a meeting between the claimant, Mr Peplow, Mr Gillen and Ms Turner to take place on 3 May 2018. This was with the intention of resolving matters raised by the claimant with both Ms Turner on 25 April 2018 and with himself on 30 April 2018.

68. Finding: The meeting between the claimant, Mr Peplow, Mr Gillen and Ms Turner took place on 03 May 2018. All participants in that meeting had knowledge that the grievance concerned allegations of discrimination.

    Reason: Given that we made a finding that Mr Chris Short discussed the claimant's concerns of discrimination with her on 30 April 2018, and it was he that arranged the meeting to resolve the claimant's grievances. And, Ms Turner was invited to this meeting, and she was acutely aware that the claimant was raising discriminatory matters from her meeting with the claimant on 25 April 2018. On balance, it is very likely that both Mr Chris Short and Ms Turner both explained the nature of the claimant's grievances to the other participants in advance of this meeting commencing.

69. In the complaint document No.2, sent by the claimant to Ms Turner on 30 November 2018, the claimant again raised matters concerning sex discrimination. This document is at pp.400-417 of the bundle. Within this document the claimant references discrimination generally making comments that '…am a threat to him as many women will not say anything through fear…', 'MG has often been referred to as treating woman and speaking to woman so very differently to men in our office…', 'I have watched strong, competent and confident (woman) leave in tears and with many issues and frustrations and say nothing as they are too scared to do so. I have seen and heard many woman being spoken to appallingly. I refuse to let you make me feel like this, treat me like this and say nothing.' This is not in dispute between the parties.

70. The claimant submits a further grievance, dated 17 December 2018. This provides further details of her grievance, which includes allegations of sex discrimination. This document can be found at pp.432-448 of the bundle. This is not in dispute between the parties.

71. The claimant raises allegations of sex discrimination through her representative's letter of 8 January 2019. This can be found at pp.459- 464 of the bundle. This is not in dispute between the parties.

72. The claimant also raises allegations of sex discrimination in her first resignation letter dated 13 May 2019. This can be found at pp.636-641 of the bundle. This is not in dispute between the parties.

Incidents at Christmas Party, December 2015

73. The First respondent held a Christmas party during December 2015. This is not disputed.

74. Some clients of the first respondent were invited to this Christmas party, including an individual called Simon, who worked in the injection moulding sector. This is not disputed (although the claimant thought that Simon was working in plastics).

75. Finding: At this party, Mr Chris Short touched the claimant's bottom, and had his hand placed there until the claimant turned around.

    Reason: This is a finding based on a very narrow margin. When Mr Chris Short was interviewed about this incident as part of the investigation into the claimant's grievance, he did not deny this allegation but simply responded by stating that he did not recall the details that Angela refers to a Christmas party of 3 ½ years ago. Mr Chris Short now denies this incident in his witness statement. We consider that his recollection at the time of the grievance interview would have been better than his recollection when producing his witness statement for these proceedings. And had this incident not occurred then Mr Chris Short would have denied this outright, given the nature of this allegation. This had to be balanced against the very clear and specific allegation being made by the claimant. Although we do note that the first time this matter is raised is in the grievance letter dated 17 of December 2018 at para 79, and that it did not appear in any of the claimant earlier grievances. We do accept that raising such matters are difficult in the workplace, especially a male dominated workplace, and this will have contributed to this delay in raising this incident.

76. Finding: At this same party, Chris Short introduced a male acquaintance to the claimant by stating '…have you met my friend, he has a massive penis'.

    Reason: we repeat the same reasons as above in relation to Mr Chris Short touching the claimant's bottom.

Chris Short's behaviour and reaction to claimant's grievance, 30 April 2018 meeting

77. The meeting on 30 April 2018 was to discuss the claimant's concerns that she had raised with Ms Turner on 25 April 2018. This is clear from the email chain on pp.282-283 of the bundle.

78. As per the previous finding of fact in relation to this meeting, the claimant raised the matter of discrimination in this meeting and handed Chris Short a copy of her original grievance document.

79. Finding: In this meeting, Mr Chris Short on numerous occasions use the phrases this was not bullying is it and that it is not discrimination.

    Reason: Mr Chris Short gave evidence about his reaction to the grievances raised by the claimant in November to December 2018 where he explained under cross examination that "I retaliated, I defended my position, I defended the company and told the truth". Given Mr Chris Short took a defensive stance when considering the grievance in November and December 2018, it is plausible that he took a similar dismissive and defensive stance when the matter discrimination was raised with him at the 30 April 2018 meeting. Our finding with respect Mr Chris Short's reaction on 30 April 2018 is consistent with how he described his reaction to the grievance in November/December 2018.

80. Finding: In this meeting, Chris Short criticised her leadership and performance, despite the meeting being arranged to discuss the claimant's grievances.

    Reasons: This is clear in the grievance interview of Chris Short at page 560 of the bundle.

81. Finding: It is more likely than not, that Mr Chris Short also used the phrases '…what do you expect me to do, he is my MD' and the phrase '…I thought you were not going to cry' in this meeting.

    Reason: in his grievance interview, Mr Chris Short states that cannot remember the full details of the meeting and did not deny making these comments. Given that we have found that the claimant's account in her witness statement of this meeting in respect of the other matters is accurate, it is plausible that her account in relation to these comments is also accurate, especially given the lack of denial by Mr Chris Short.

82. Each of the findings made at paragraphs 79-81 were in response to the claimant having raised concerns first with Ms Taylor, and secondly with Mr Chris Short, of discriminatory treatment and bullying, and accusations of decisions being biased. This again forms part of Mr Chris short defending both his and the companies position outlined above.

Whether first respondent and Chris Short failed to engage with, investigate, or take any adequate steps to address the grievances raised by the claimant in April 2018

83. To try to address the concerns raised by the claimant, Mr Chris Short arranged a meeting to take place between the claimant, Mr Gillen, Mr Peplow and Ms Turner. This meeting did take place on 3 May 2018.

84. Finding: Mr Gillen, Mr Peplow and Ms Turner all had knowledge of the issues raised by the claimant first with Ms Turner on 25 April 2018, and secondly, with Mr Chris Short on 30 April 2018.

    Reason: it is Mr Gillen who set up the appointment for the claimant, Mr Peplow, Ms Turner and himself to meet to discuss the matters raised with Mr Chris Short. This is clear from the appointment request email contained at p.285A of the bundle. Further, on the minutes of the meeting of 3 May 2018, starting atp.291A of the bundle, the purpose of the meeting is recorded as 'Angela Dawson raised a grievance with Chris Short and the contents of which to be discussed with Matt Gillen and Chris Peplow'. Further, in the minutes of that meeting, see p.291D of the bundle, Mr Gillen is recorded as saying 'I have never had anyone go over my head in my career. Chris has hired me to make tough decisions'. All of this suggests that Mr Gillen had discussed the claimant's concerns in advance of this meeting. Further, Ms Turner, who heard the claimant's concerns on 25 April 2018, was present at this meeting. And given that Mr Gillen and Mr Peplow's evidence was that they were seeking HR guidance throughout, it is highly unlikely that Ms Turner had not informed both Mr Gillen and Mr Peplow in advance of this meeting of the matters raised by the claimant.

85. The claimant's concerns of discrimination, bullying and biased decision-making are not addressed at this meeting. This is not disputed by the respondents, and this is clearly the case given that none of these concerns are referenced or addressed in the minutes of the meeting: see pp291A-D of the bundle. Given our finding that this meeting was to address the claimant's concerns, which included these matters, then we find as a matter of fact that the respondents, at least insofar as this meeting is concerned, failed to engage with, investigate or take any adequate steps to address the claimant's grievances with respect discrimination, bullying and biased decision-making.

Since April 2018 whether Chris Short marginalised/ignored the claimant, and did not discuss accounts with the claimant

86. There are no specific dates or incidents put forward by the claimant in relation to this allegation, other than a general issue raised in para 29(4)-(5) of the claimant's witness statement. And therefore, no findings on specific incidents can be made.

87. The claimant continued to play an active role with Dentsu, especially in September 2018, when the claimant secured the first respondent as a No 1

PSL. The claimant also attended a meeting with respect Next with Lauren Oakley. None of this is in dispute.

88. There was not a need for Mr Chris Short to speak to the claimant about her accounts, as those would be matters for discussion with her line manager, Mr Peplow, and the MD, Mr Gillen. This was accepted by the claimant under cross-examination.

Exclusion from social/team bonding- quarterly or half yearly golf days

89. There were several social bonding events that took place with the first respondent. These included golf days, rounders, and yoga, amongst others.

90. The claimant participated in rounders games as organised by the first respondent. This was her evidence under cross-examination.

91. Both males and females attended at yoga classes organised by the first respondent. The claimant accepted this under cross-examination.

92. The claimant participated in other social bonding events, including charity baking competitions. This is not in dispute.

93. Members of the team did take days away from the office to play golf. Clients were not invited to play golf. Those playing golf would take annual leave and pay to play.

94. The golf days were organised and arranged by Mr Ben Tristram. He was a direct report of the claimant. Golf days were arranged through general discussion around the office. At no point did the claimant ask Mr Tristram about whether she could attend one of these golf events. This was the evidence given by the claimant under cross examination.

95. Finding: Attendance at the golf days had no restrictions in terms of who could attend. However, discussions around attendance tended to be with those who had identified themselves as willing and interested in playing golf. There is no evidence that exclusion was due to sex.

    Reasons: The claimant accepted in evidence that she had never raised attending golf with Mr Tristram, which is consistent with the evidence given by Mr Tristram. The tribunal found Mr Tristram to be a reliable witness in terms of how golf days were arranged. The evidence of Ms Jones, Ms Oakley and Ms Garner also supported this finding. Further, the claimant's live evidence was that she 'would have' raised that she played golf. There was a lack of certainty in the answer given.

On 4 December, Chris Short did greet others but ignored the claimant

96. On 4 December 2018, the claimant was sat opposite Mr Gillen. Mr Taylor was also sat at the bank of desks at which the claimant was sat. When Mr Chris

Short arrived in the morning, he greeted both Mr Taylor and Mr Gillen, by saying 'Good Morning Rob' and 'Good Morning Matt'. Mr Chris Short did not greet the claimant that morning. Mr Chris Short under cross examination accepted that this did happen.

97. Finding: Mr Chris Short adopted this approach due to the claimant having raised a formal grievance on 30 November 2018.

    Reason: There is a dispute as to why Chris Short did not greet the claimant. The claimant's position was that Mr Chris Short deliberately ignored her and in effect this was the means of punishing her for having raised a grievance. Whereas Mr Chris Short's position was that when he entered the office that morning both Mr Taylor and Mr Gillen looked up, which invited the greeting. Mr Short's live evidence was that the reason why he did not greet the claimant was because she did not look up and, with him being conscious of her having raised a grievance, he did not want to force contact between the two of them. He took this as the claimant not wanting to engage with him. We preferred the evidence of the claimant on this matter. This incident took place four days after the claimant had raised a grievance. Mr Chris Short accepts that he was conscious at this time of her having raised a grievance. This is consistent with our earlier finding that Mr Chris Short and others were taking retaliatory steps to protect the business, and had effectively closed ranks. And, it is quite telling that the evidence we have heard was that Mr Chris Short, on that morning, greeted only the two people sat next to the claimant. Which must have been a deliberate choice.

<u>In November 2018, Mr Gillen refused to tell the claimant whether any male colleagues had received their quarterly bonuses</u>

98. This was withdrawn by Mr Brittenden on behalf of the claimant at this hearing.

<u>The persistent refusal to provide the claimant with a laptop since mid-2018</u>

99. Finding: there has not been a persistent refusal to provide the claimant with a laptop since mid-2018.

    Reason: There are no specific details as to when the claimant requested a laptop, and was subsequently refused. The claimant in live evidence stated she raised this for the first time in December, whereas in her witness statement at paragraph 30(2) she says that this was from around the middle of 2018. The claimant does not produce much in terms of supporting evidence of requests and refusal that is persistent. There is some consistency in the evidence that there was a company laptop that was available for use by employees of the first respondent, including the claimant. The claimant does not satisfy the evidential

burden in respect of satisfying the tribunal that this detriment/treatment happened.

Only permitting the claimant to take a 30-minute lunch break when certain male colleagues allowed longer periods for lunch

100. This allegation was withdrawn by the claimant at the commencement of this hearing.

The appointment of male staff on a higher salary and more favourable car allowance

101. This allegation was withdrawn by the claimant at the commencement of this hearing.

Bonus: withholding of bonus payments for Q2, Q3 and Q4

102. Finding: The claimant did not have her bonus payments for Q2, Q3 or Q4 withheld.

Reason: The position relating to bonuses is covered in detail at paragraph 29(7) of the claimant's witness statement. This does not provide evidence of withholding of bonus payments owed. There is no evidence to support a finding that bonus payment for Q2, Q3 or Q4 were withheld from the claimant.

Bonus: payment of higher bonus to male colleagues

103. Level of bonus was determined based on meeting of targets. Targets were determined quarterly based on past performance. This included both financial and non-financial targets. This is common ground between the parties.

104. No evidence is produced that would lead this tribunal to make a positive finding in respect of male colleagues being paid a higher bonus when compared to the claimant.

Bonus: removing staff from the claimant's team or reassigning placements to male colleagues to reduce the claimant's bonus and/or qualification for share options

105. As at 01 January 2018, all fixed-term contracts ('FTCs') sat with the contracts team.

106. A decision was made at the beginning on 11 April 2020 by Mr Gillen that the FTCs would no longer all sit with the contracts team. They would be split up

so that all FTCs that are pro rata'd would sit with the permanent team, and that all FTCs that are hourly/day rate would remain with the contract team. This decision was a business decision based on a policy change at the first respondent. See doc at p.269 of the bundle. Which is consistent with the evidence given by Mr Gillen under cross examination, and his answer in the grievance investigation (p.544 of the bundle). There is no evidence to support that this decision was made for any other reason.

Since 2017 and 2018, Mr Gillen has said to the claimant quote 'why don't you consider stopping managing?' And repeated comments to similar effect

107. Finding: It is unlikely that Mr Gillen made these comments.

Reasons: The lack of specifics in the pleading and the lack of detail in the claimant's witness statements (paragraph 30(8)), and lack of any supporting documents or responses to minutes indicating inaccuracy of such minutes. Given the way the claimant documented other issues, this led to our conclusion that on balance, these comments were unlikely have been made repeatedly since 2017-2018.

Mr Gillen regularly shouting at the claimant, and suggesting that the claimant was paranoid when she tried to raise this

108. This part of the complaint is not sufficiently particularised. We do not accept that shouting by Mr Gillen was regular, as otherwise the claimant would have been able to sufficiently particularise her complaints. Given that she has been able to do so with respect other aspects of her complaint.

In early 2018 Mr Gillen shouted and berated the claimant for 30 minutes for working at home on a Friday

109. Finding: Mr Gillen wanted a record of work completed by employees of the first respondent and wanted this done through a system called Bullhorn. Any work completed by employees of the first respondent when done with clients would need to go through that secure system. This was Mr Gillen's way of managing work.

Reason: The claimant in live evidence explained that Mr Gillen worked to targets. She also said that he was always wanting figures about what was being done, and 'that was his way'. In other words, he was evidence/data driven. And this is the consistent evidence from the witnesses that we heard during this hearing.

110. The claimant had an arrangement whereby she would work from home on a Friday. One of the reasons for this arrangement was so that the claimant

concentrate on her personal targets, that she couldn't get done when sat in a team. This was the evidence of the claimant under cross-examination and is consistent with the narrative of the email sent by the claimant to Mr Peplow on 02 January 2018, at pp246-247 of the bundle.

111. Mr Gillen at no point told the claimant that she would need to login to Bullhorn whilst working from home. This was explained to the tribunal by Mr Gillen.

112. In a meeting on 18 December 2017 between the claimant, Mr Peplow and Mr Gillen, it was raised with the claimant that working on home on a Friday would need to be reviewed should the team start to fall behind budget. The claimant when questioned about this explained that management were concerned that she would not be able to manage her team whilst working from home. And this is what was being explained to the claimant in that email at p 248 of the bundle.

113. At some point in mid-January 2018, due to weather conditions most of the workforce had to work from home. We accept Mr Gillen's evidence at paragraph 23 of his witness statement, that at this point he asked Ms Turner to monitor who logged in and out of the system at the end of each week. This was not limited to just the claimant. This included others who worked from home on a Friday, including an employee called Natalie and an employee called Robert. This is clearly shown on the document at p 264H, and the email sent by Ms Turner to Mr Gillen on 8 March 2018, at p 264G of the bundle.

114. In analysing the data, Mr Gillen identified that the claimant had not logged on to bullhorn on either 12 January 2018 or 2 February 2018. Alongside this, there were occasions where the claimant was logging onto the system relatively late on on a working day.

115. Mr Gillen met and discussed this matter with the claimant on 21 March 2018.

116. We do not find that Mr Gillen in early 2018 shouted at and berated the claimant for 30 minutes for working at home on a Friday. What is more likely, is that Mr Gillen raised concerns in a direct and forceful manner about the claimant's work output whilst working at home on a Friday having identified that the claimant was not logging in to the appropriate system.

Reason: this is not consistent with how the claimant described this meeting in her original complaint document, which starts at p 272 of the bundle. This matter is explained at paragraph 6 on p 274. The evidence of Mr Gillen's management style was consistent across many of the witnesses. That being that he did not shout. But that he was forceful. And this is consistent with the way he gave his evidence in this tribunal.

In relation to the Dentsu account, Mr Gillen:

a. failed to listen or acknowledge anything that the claimant said in relation to the progress she had made on the account-
b. did not believe that she had secure the client and checked with the head of global to see whether the claimant was telling the truth
c. refuse to permit the claimants to work on the account and the impact that this had on her potential to earn bonus.

117. In early 2018, the claimant was made responsible for contract work with Dentsu, alongside Sarah Marchand for permanent work with Dentsu (this was later Robert Taylor).

118. Finding: Mr Gillen was discussing progress of the Dentsu account with the claimant and was not failing to listed or acknowledge anything that the claimant said in relation to the progress that was being made on this account.

Reason: There is clearly correspondence and engagement between the claimant and Mr Gillen in relation to progress made on this account (at pp259-262, 264A-B, 267A-H of the bundle).

119. The original Preferred Supplier List ('PSL') contract with Dentsu had been for 15% for contract staff placements and 10% for permanent staff. did not believe that she had secure the client and checked with the head of global to see whether the claimant was telling the truth-accept happened- not sure if this is accurate. MG under cross-explained this was to do with the reduction in percentage. Check conversation with Taylor.

120. On 22 March 2018, Ms Eleanor Hodge of Dentsu emailed the claimant informing her that the PSL contract was up for renewal (p.267H of the bundle).

121. During negotiations, the claimant informed Mr Gillen that Dentsu had 8 roles available to the first respondent, but that this would be at a rate of 10%.

122. Finding: Mr Gillen was unhappy with the rate being offered by Dentsu. Consequently, he phoned the Global IT Director of Dentsu to try to understand why the rates had decreased and with a view to re- negotiate these terms.

Reason: The evidence clearly shows that the reduction in rate was a real concern for Mr Gillen, and as MD such an action is certainly plausible in the circumstances: see pp 262A, 264A, 267A-H, 291A-B. This is further supported by the live evidence of Mr gillen on this matter, which was clear, consistent and concise on this matter.

123. A business decision based on mark-up rates was reached not to pursue the 8 roles that the claimant says she was asked to place.

124. The claimant was encouraged to "chase Dentsu contract business" as part of her bonus targets, as from 01 May 2018. Dentsu remained a client that the claimant would continue to pursue placements with. See p.293 Bundle.

In November 2018, Mr Gillen ignored the claimant when she advised that she and a member of her team had secured a large tender for NEXT

125. The NEXT contract was secured by Lauren Oakley, with the claimant supporting her.

126. Finding: Mr Gillen did not ignore the claimant after advising him that her team had secured a large tender for NEXT.

Reason: Documents at p.373 ppp378A-C support the finding that Mr Gillen did not ignore the claimant but took an interest and acknowledge the information when he received it.

At a meeting on 15 November 2018, Mr Gillen was hostile towards the claimant, sneered at her, ignored her, and that and said that she would not manage past year end

127. Finding: this more likely happened than not in the meeting of 15 November 2018.

Reason: There is a clear negative tone in the email of 08 October 2018, at p.360 of the bundle. Particularly through stating 'We need to set her some strict objectives this afternoon that must be hit'. This is a change in tone from previous emails concerning targets. On 25 October 2018, by email with the subject heading 'Angela', Mr Chris Short asks Mr Gillen 'would it no tbe sensible to remove her from mgt and just focus on billing? Similar to what we did with Natalie (see p.382). Mr Gillen replies on that same date (p.381 of the bundle) 'It's all in hand Chris. I have a follow up meeting on the 13 November to discuss performance against targets this month'. It is plausible to conclude that this negative tone and that content was discussed in the meeting that took place on 15 November 2018. And further Peplow in cross-examination, described that this was an approach taken by the company with respect performance management. If objectives are not followed or completed, there would be a second chance, but on that second occasion the objectives must be completed otherwise action would be taken. And, Mr Peplow when interviewed for the grievance (see p.515 of the bundle), he recalls that in that meeting that '…there was a reference that if things didn't improve then Matt Gillen felt Angela Dawson shouldn't continue to manage past year end…'

Whether on 4 December 2018 Mr Taylor remarked 'we should take a cauldron in there', in relation to laughter heard from the female accounts team

128. Finding: Mr Taylor on 4 December 2018 did make a comment that 'we should take a cauldron in there', on hearing laughter from the female accounts team.

Reason: On balance this likely happened. None of the respondent's witnesses address this issue. Mr Taylor was asked about this incident during the grievance investigation and simply said he did not recall making the comment. Critically he did not deny making this comment.

Occupational sick pay: on 18 December 2018, Ms Turner informed the claimant that she would only receive four days occupational sick pay

129. On 5 December 2018, the claimant emailed Mr Peplow, with Mr Gillen, Ms Turner and Mr Chris Short copied in, to inform them that she has taken time off sick due to '…suffering from work-related stress due to the hostile and discriminatory environment at the office, and the hostile and discriminatory way in which I have been treated personally.' Within this email, the claimant also gives an indication that she will be submitting a full grievance in respect of the matters she was referring to. See p.423 of the bundle.

130. In relation to this matter, Mr Gillen emailed Ms Turner on 09 December 2018, stating that 'I'd like Angela on SSP once we have satisfied our legal obligation to pay her full pay which I understand to be 3 days. In light of discretionary concession we have given others throughout the year (10 days max?) can you confirm that we wouldn't be discriminant?' See p.428 of bundle.

131. In writing his email of 09 December 2018, Mr Gillen was seeking to only pay the claimant what he considered to be the minimum that the first respondent could pay without discriminating against the claimant. The issue of discrimination, and the grievances raised by the claimant in respect of the claimant, was in Mr Gillen's mind when he constructed this email.

132. Ms Turner responded to Mr Gillen on 10 December 2018, stating that 'The 10 days maximum sick pay rule is discretionary and is not contractual. Although I would like to have some examples of where we haven't offered this to others previously just to cover any possible discriminatory allegations. I will sit with [BLANK] and check this. See p.427 of the bundle.

133. On 13 December, Ms turner emailed Ms Edwards, with Mr Gillen copied in, confirming that the claimant's sick pay was 'as agreed with Matt', and would be 4 days on full pay, with the remainder paid on SSP. See p.429A of the bundle.

134. It is not in dispute that on 18 December 2018 Ms Turner informed the claimant that she would only receive four days occupational sick pay. - VICTIMISATION

135. This decision was made by Mr Gillen. Although he sought input from Ms Turner, it is he who made this decision.

136. Ms Turner, on an unconnected occasion, was paid full sick pay for the duration of a 12-day illness. This was the oral evidence of Mr Chris Short and Ms Edwards.

Occupational sick pay: the repeated failure to inform the claimant of (i) the reasons for not paying occupational sick pay and (ii) he was involved in making this decision as requested by the claimant in correspondence dated 19 December 2018, 24 December 2018, 8 January 2019 and 11 January 2019.

137. The claimant did request details of who was involved in making the decision on occupational sick pay/SSP on 19 December 2018, 24 December 2018, 8 January 2019 and 11 January 2019. VICTIMISATION

138. The respondents did fail to provide the information requested following those requests.

Grievance process: detriments at para 22(1) of agreed list of issues

139. It is not in dispute that the first respondent did not permit the claimant to be accompanied by a family member or friend at any grievance hearing. This decision was made by Ms Turner. This is consistent with the documents at p.502 and 503 of the bundle and Mr O'Sullivan's para 14 of his witness statement. Although we note that Mr O'Sullivan changed his evidence under cross examination. That decision was made on 13 March 2019.

Whether the investigation of her grievances was done in a fair sufficiently thorough or balanced manner

a. It is not disputed the claimant was not shown any witness or documentary. evidence of opportunity to provide comments prior to the grievance outcome.
b. There was no second meeting with the claimant to enable her to respond to the evidence. Mr O'Sullivan described showing the claimant evidence and having a second meeting would be best practice.
c. It is not disputed that the claimant's grievance dated 8 January 2019 was not discussed with her at the grievance hearing on 15 March 2019

d. It is not in dispute that none of the witnesses were interviewed in relation to the claimant's grievance of 8 January 2019.
e. Matters including the refusal to answer questions about occupational sick pay was not addressed in the grievance decision, and therefore the entirety of the claimant's grievance was not considered and resolved in this decision
f. the part of the grievance decision relating to the decision to pay the claimant's sick pay was incorrect as to when this decision was made. Particularly, whether this decision was made before or after the raising of the claimant's grievance
g. Laura Turner, who was implicated in the grievance, was involved in the investigation and interviewing of witnesses.
h. There are examples of where Mr O'Sullivan has made findings based on little investigation: no investigation into the cauldron comment, other than asking MR Taylor. Failing to put accounts to witnesses, such as when Mr Peplow referenced comments made by Mr Gillen in relation to managing past year end.
i. Mr O'Sullivan reached conclusions that the grievance was not made out on matters where the claimant was giving clear explanations of treatment, and the alleged perpetrator was merely stating that they were unable to recall. For example, in relation to Mr Chris Short touching the claimant's bottom at the Christmas party 2015.
j. Mr Chris Short accused the claimant of raising her grievance in bad faith and criticised her performance. Mr Chris Short under cross-examination explained that on reflection that this was not the right thing to raise. Explained that he was being attacked, his character was bein attacked, his business was being attacked and he was put in a position to defend himself. This accusation was retaliatory to the claimant raising a grievance.

<u>Grievance process: the persistent refusal to clarify whether the claimant had hit her profit target for 2018, in circumstances where Mr O'Sullivan assured the claimant that he would provide those details. Requests made on 15 March 2019, 23 April 2019, 3 May 2019, 8 May 2019 and 15 May 2019, were ignored</u>

140. Requests were made by the claimant for clarification on whether she had achieved her profit target for 2018 during the grievance meeting with Mr O'Sullivan, with further requests made on 15 March 2019, 23 April 2019, 3 May 2019, 8 May 2019 and 15 May 2019.

141. At the grievance hearing Mr O'Sullivan accepted that he stated that he would provide the claimant with information on whether the team reached their profit target for2018.

142. Mr O'Sullivan did not provide this information. Nor did he make any enquiry about this. This is not information that Mr O'Sullivan had access to.

143. Finding: Despite these requests, the respondents decided not to provide the claimant with this information. And the reason was due to legal advice expressing that this should be dealt with through the grievance process.

Reasons: there is consistency in the documents on this matter. See minutes of meeting of 20 March 2019 and claimant's notes of meeting at pp.508-509 of the bundle.

Whether on 16 May 2019 Chris Short subjected the claimant to hostile and intimidating treatment. It is alleged that he:

a. tried to force the claimant to have a without prejudice discussion without her agreement
b. repeatedly questioned the claimant as to why she wanted to come into the office after submitting her grievance
c. stated that the company did not care about the employment tribunal claim that she had already submitted because it had insurance
d. offer the claimant a derisory sum to leave the company premises immediately. When the claimant declined, he was visibly irritated and angry

144. A return to work meeting took place between the claimant, Mr Carl Short and Mr Gillen.

145. On the conclusion of this meeting, Mr Gillen left the meeting and Mr Chris Short came into the room where the claimant and Mr Carl Short were. And sought to speak with the claimant.

146. This meeting was not a without prejudice meeting. Although Mr Chris Short did try to introduce discussions as without prejudice. This is not pleaded as a without prejudice meeting in the grounds of resistance. And this action was clear in the evidence of Mr Chris short and Mr Carl Short.

147. The claimant produced notes of concerns with her return to work meeting on 17 May 2019, which included the situation when Mr Chris short entered the room and Mr Gillen left. This note was sent to Mr Chris Short, Mr Carl Short and Mr Peplow.

148. Finding: Mr Chris Short did question why the claimant wanted to come into the office on numerous occasions in this meeting after submitting her grievance. Mr Chris Short stated that the company had insurance, but did not insinuate or state that they were confident of winning. The claimant was offered a sum of money to leave the premises. Mr Chris Short was agitated during this meeting. This was a hostile and intimidating meeting.

Reason: there is consistency on a number of points when comparing the document that starts at p.508 of the bundle, the document that starts at p.663 (paragraph 5) and the evidence that we heard. There is also close correlation between the first part of the claimant's notes (although more detailed) and those notes produced by the respondents starting at page 656. This suggests that the document produced by the claimant at the time is an accurate record of what was stated in that meeting. Further, this is supported by matters that have already been relied upon in this judgment, that being that Mr Chris Short when faced with the claimant's grievance in November/December 2018 '…retaliated, I defended my position, I defended the company and told the truth'.

Persistent refusal to return the claimant's office keys; On 16 May 2019, Matt Gillen stated that the claimant was no longer allowed to work from home on Fridays; Demotion/removal of management responsibilities without consultation; Unilateral changes to duties/job content; Moving the claimant's workstation/segregating her team

149. None of these matters are disputed by the respondents. Therefore this tribunal finds as a matter of fact that there was a persistent refusal to return the claimant office keys, that on 16 May 2019, Matt Gillen stated that the claimant was no longer allowed to work from home on Fridays, there was a demotion/removal of management responsibilities without consultation, there were unilateral changes to the claimant's duties/job content, and the claimant did have her workstation moved, which was away from her team.

Chris Short belittled the claimant's contribution when he belatedly told her that she had achieved her profit target for 2018

150. On 20 May 2018, a meeting took place between the claimant, Mr Chris Short and Mr Carl Short. Mr Carl Short took some notes in this meeting (the notes taken by Mr Carl Short can be found at pp.508-513 bundle; the claimant also produced notes from this meeting which she emailed to Mr Chris Short. The claimant's notes were completed and sent to Mr Chris Short before the notes taken by Mr Carl Short had been sent to the claimant. See pp.687-694 of the bundle).

151. The claimant was informed at this meeting that her team target of £100,000 gross profit was achieved, however that the claimant had contributed little to achieving this target as all of the profit had come from the client ONS. This is common ground between the notes taken by Mr Carl Short and by the claimant.

152. The reason why Mr Chris Short had not provided this information previously, but was providing this detail on 20 May 2018, was because the claimant had decided not to pursue the grievance appeal. This does not appear

to be in dispute between the parties. With it being recorded on Carl Short's notes that this was due to advice from solicitors. And that it should be dealt with within the grievance process. It is consistent that once the grievance process had ended, Mr Chris Short was no longer in a position where should not provide this information.

The claimant was denied the ability to use the 'flexitime' policy

153. Finding: the claimant was not denied the ability to use the flexitime policy.

Reason: this part of the complaint is not particularised, as to on what occasions she was prevented from using the flexitime policy. There is little in way of evidence which supports that that she was denied the ability you to use the flexitime policy. Although we accept that this is linked to the provision of office keys, there is no evidence presented whereby the claimant turned up to the office and was not able to access the office in order to take advantage of the flexitime policy.

Chris Short berating the claimant on 20 May 2019 for over an hour

154. Finding: on 20 May 2019, Chris Short did berate claimant for over an hour, in a meeting that was hostile in nature.

Reason: The respondent witnesses, in particular Chris Short appears to accept that the much of the content of the meeting as recorded in the claimant's account of the meeting was correct and accurate. For example, such as suggesting occupational health in circumstances where the claimant was already leaving. This leads us to the conclusion that this document overall was an accurate record of what was said in that meeting.

Refusing to provide a copy of the staff handbook

155. The claimant was provided a copy of the staff handbook. She was provided the handbook on 04 December 2018, which was confirmed by the claimant under cross-examination. Ms Swain emails the claimant on 30 May 2019 purporting to resend the handbook; however, fails to attach the document.

156. Finding: The 2018 handbook was the up to date handbook being used by the first respondent.

Reason: no other handbook was disclosed until very late on in the hearing. And this included information that was no longer applied to the first respondent. Including location of the business and Mr Chris Short being MD, amongst other things. On balance, the 2018 handbook was the up to date handbook used.

Being contacted for work-related matters during her period of sick leave while suffering from work-related stress

157. The claimant went on sick leave from 05 December 2018, which was a Monday.

158. She informed Mr Peplow that she was taking time off sick by telephone on the morning of 05 December 2018, after having received an invite to a meeting from Mr Peplow to discuss targets. This is consistent in paragraph 52 of Mr Peplow's witness statement, paragraph 34 of the claimant's witness statement and pages 423 and 424 of the bundle.

159. Mr Peplow did not know that the claimant was absent from work until he received that phone call. No evidence is provided that suggests that Mr Peplow knew of the claimant's absence in advance of contacting her in relation to work matters.

On 21 May 2019, being falsely accused of committing acts of gross misconduct

160. The claimant throughout her employment often printed off documents. This is how she worked. She was not provided with a laptop to avoid having to print documents off. This was common knowledge of those that attended meetings with the claimant.

161. Nobody from the first respondent on or around 16 May 2019 informed the claimant that she was no longer to print off documents. In the notes produced by the respondents of the return to work meeting (pp.656-657), there is no mention of the claimant being told not to print off documents.

162. The claimant did print off documents around this time and took them off the premises in the way that she always worked.

163. Ms Lewis informed Mr Chris Short that the claimant had printed off 55 pages of documents.

164. Mr Chris Short took no further investigation to try to determine what documents had been printed off by the claimant. This was clear in his live evidence to the tribunal.

165. Mr Chris Short emailed the claimant on 21 May 2019 concerning printing of documents. He explained that there was a belief that they were highly confidential and commercially sensitive.

166. Mr Chris short followed this up with a letter to the claimant on 22 May 2019. This indicated that an investigation was to be started.

167. The claimant returned the documents she had printed off to the respondent by post on 22 May 2019.

Non-payment of occupational sick pay during her second period of absence

168. The claimant did not receive occupational sick pay during her second period of absence. This is not in dispute between the parties.

Resignation

169. On 23 April 2019. The claimant was sent a decision letter from Mr O'Sulivan, who rejected all of her grievances. See pp.588-610.

170. On 23 April 2019, the claimant initially indicated a desire to appeal the outcome of the grievance decision. The letter indicating this intention is at pp.613-614 of the bundle.

171. On 08 May 2019, the claimant was provided with all of the evidence in relation to the evidence in respect of the investigation into her grievance.

172. The claimant decided to reverse her decision and to not appeal the outcome of the grievance.

173. The claimant handed in her resignation on 13 May 2019. She resigned with notice. Her resignation letter is at pp.636-441 of the bundle.

174. The claimant contacted Ms Swain of the first respondent on 14 May 2019, to ascertain whether she was required to attend at the office following her resignation. Carl Short responded by letter on 14 May 2019 indicating that she was required to attend at the office. Live evidence from Mr Chris Short and Mr Carl Short confirmed that they wanted to utilise the claimant during her notice period and therefore required her to work.

175. The claimant was absent from work from 21 May 2019. See page 679 of the bundle.

176. The claimant did not return to work until 25 June 2019.

177. The claimant resigned without notice on 26 June 2019, because of what she describes as detriments that she had to endure on her return to work from her first absence. See pp.717-718 of the bundle.

Conclusions

Direct sex discrimination and sexual harassment

178. The allegations, save for those at para 21(1) and (2) of the schedule of detriments (which are considered separately and discussed further below), raised as part of the direct sex discrimination and harassment related to sex, have little particularisation linking them to the protected characteristic of sex. There is little evidence to support that any such treatment was because of the claimant's sex. There is insufficient evidence adduced by the claimant to advance a prima facie case of sex discrimination.

179. The initial burden rests with the claimant. She must do adduce facts from which the tribunal concludes that there is some link between less favourable/unwanted treatment and the protected characteristic of sex, beyond a bare difference in treatment and a bare difference in status. She failed to satisfy this burden.

180. However, those matters referred to at para 21(1) and (2) of the schedule of detriments, which concern events at a Christmas Party in December 2015, in our judgment, must be approached somewhat differently.

181. This tribunal has little difficulty in accepting that these two events satisfy the concept of less favourable treatment and the causal link to the protected characteristic of sex. Although, the claimant waited some time to raise her concerns on these matters, they are something that form the basis of her grievance. Although the respondents submit that the claimant was not easily offended and engaged in sexualised "banter" herself, this does not negate the fact that an individual can, and it is reasonable, to be offended by a physical and inappropriate contact and wording such as 'have you met my friend, he has a massive penis'. This is the case here, and these acts are inherently related to the sex of the claimant.

182. However, these incidents were in December 2015, ad so took place some over 3 years before the claimant commenced early conciliation with ACAS, which commenced on 18 February 2019.

183. These matters were one off incidents. They are unconnected and isolated from any of the other allegations. They do not form part of a continuing act. There is not a pattern of such treatment. They are of a very different nature to any of the other allegations.

184. Consequently, they are out of time, unless this tribunal considered it just and equitable to extend time. In this respect, the burden rests with the claimant. The claimant has not advanced any convincing argument that time should be extended in relation to these two incidents. The claimant has had legal representation for a significant part of her allegations against the respondents,

was aware of protections from discrimination from at the latest mid-April 2018, when she first raised such concerns with Ms Turner. And yet it was not until 18 February 2019 that the claimant commenced early conciliation with ACAS.

185. In these circumstances, it is not just and equitable to extend time in relation to those two acts. Therefore, the tribunal does not have jurisdiction to deal with allegation 21(1) or 21(2) and they are dismissed.

Victimisation

186. Our findings in relation to protected acts are clear above. The following were therefore protected acts for the purposes of the victimisation complaint:
   a. Meeting with Ms Turner on 25 April 2018;
   b. Meeting with Mr Chris short on 30 April 2018;
   c. The grievance of 30 November 2018;
   d. The grievance of 17 December 2018;
   e. Grievance letter of 08 January 2019, and;
   f. The first resignation letter of 13 May 2019.

187. Given our findings above, the following allegations are not acts of victimisation: paragraphs 21(4), 21(5), 21(6), 21(8), 21(9), 21(10), 21(11), 21(12), 21(13), 21(14), 21(15), 21(16), 21(17), 22(7), 22(12), and 22(13) of the schedule of detriments. The remainder are considered below.

188. On balance, there was a 'closing of ranks' in this case, that started after the claimant raised her initial allegations of discriminatory treatment on 25 April 2018, and which became more entrenched within senior management as further allegations were made and formal processes were engaged. This is clear from our findings and reasons for findings above, which we do not repeat here. However, we do reiterate the defensive attitude adopted by Mr Chris Short, which he explained to be the case under cross examination, the witness evidence of Mr Peplow (in particular), Mr Gillen and Mr Short that provides a misleading impression as to the claimant's performance, with none of them recording any positive contributions by the claimant post April 2018, despite documentary evidence to the contrary, the decision by Mr Gillen from May 2018 to start recording matters for the claimant's HR file despite never having done this before, and in circumstances where the full picture of what had happened was not being supplied, the decision by senior management to start collecting evidence in December 2018 with a view to undermining the claimant's grievances. The claimant raised discriminatory allegations in a series of protected acts, and the respondents decided from the outset that the allegations were false and entered, what can only be described as, defensive mode.

189. This closing of the ranks motivated many of the actions that are pleaded in the schedule of detriments. Albeit not the sole cause of some of the actions,

such as those where the respondents were acting on legal advice, the tribunal was satisfied that the raising of protected acts by the claimant caused a reaction in the respondents, which was of sufficient weight in the decision making process to be treated as a cause.

190. This tribunal concludes that the following paragraphs from the schedule of detriments were therefore acts of victimisation: 21(2), 21(3), 21(7), 21(18), 21(20), 21(21), 22(2), 22(3), 22(4), 22(5), 22(6), 22(8), 22(9), 22(10). 22(11), 22(14) and 22(15).

191. This leaves the following matters from the schedule of detriments outstanding: paragraphs 21(19), 21(22) and 22(1).

192. The claimant did not satisfy the initial burden that rested on her to establish that paragraphs 21(19), 21(22) and 22(1) were because of her having raised a protected act.

193. These matters are clearly part of a continuing act, with the actions found to be acts of victimisation intrinsically linked by the closing of the ranks by senior management following the claimant having raised allegations of discrimination. The final act of which was in time. Time limitation as to jurisdiction is not an issue in relation to these acts of victimisation.

Whistleblowing

194. The tribunal is not satisfied that the claimant has made a qualifying disclosure. At its height, the claimant's allegations of whistleblowing rest on assertions made in her grievance dated 30 November 2018. The tribunal is satisfied that the claimant is not conveying facts or information, but making allegations and expressions of opinion. And further, that this grievance is only engaging with a private workplace dispute, and does not reach the level of raising a matter in the public interest. References to general discriminatory treatment were simply made in passing, and were not allegations in themselves but were simply to provide some context to support her private workplace dispute.

195. On that basis, the claim for whistleblowing detriment is dismissed.

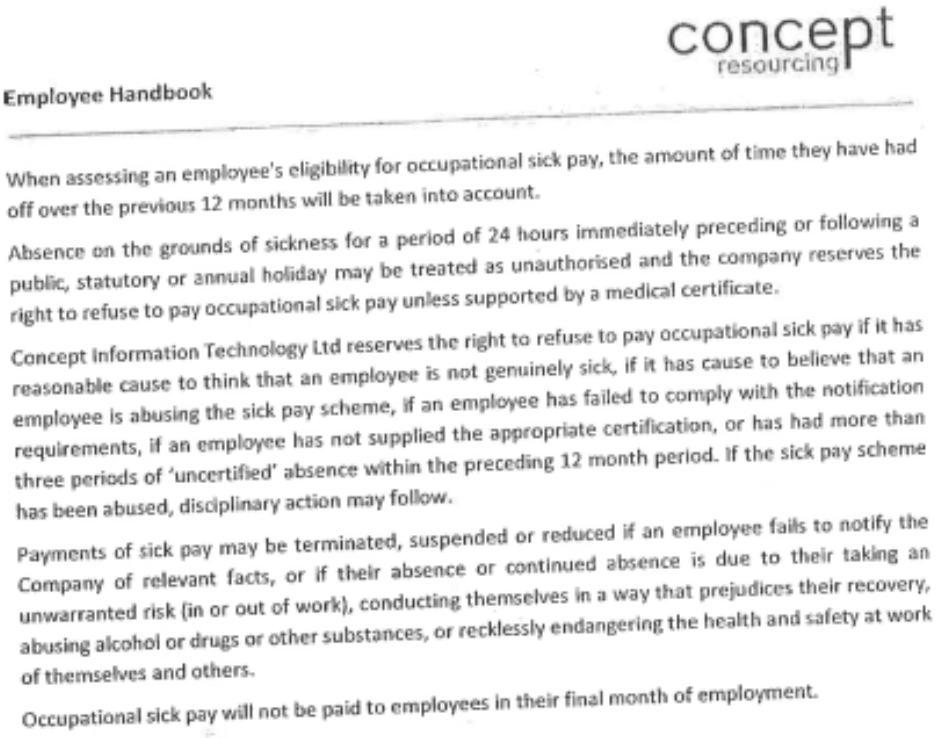
Unlawful deductions from wages/breach of contract/Occupational sick pay

196. The claimant was supplied with the up to date handbook. This was supplied to her with a view to explaining to her various non-contractual aspect of how her relationship was managed. Within this there is clear reference to a process which was to be applied to persons on sick pay. In particular, it indicates that although occupational sick pay is entirely at the discretion of the Company, it 'will not be unreasonably withheld as long as you complied with

the notification requirements and have produced any medical certificates' (p.186 of the bundle).

197. The employee handbook indicates that occupational sick pay has a direct relationship with length of service. Which, on reading, would give the claimant an entitlement to 3 months sick pay, which is the maximum provided for under that policy.

198. Furthermore, it is explained that the first respondent will take into account various matters when determining eligibility for occupational sick pay and how occupational sick pay may be reduced:



concept resourcing

Employee Handbook

When assessing an employee's eligibility for occupational sick pay, the amount of time they have had off over the previous 12 months will be taken into account.

Absence on the grounds of sickness for a period of 24 hours immediately preceding or following a public, statutory or annual holiday may be treated as unauthorised and the company reserves the right to refuse to pay occupational sick pay unless supported by a medical certificate.

Concept Information Technology Ltd reserves the right to refuse to pay occupational sick pay if it has reasonable cause to think that an employee is not genuinely sick, if it has cause to believe that an employee is abusing the sick pay scheme, if an employee has failed to comply with the notification requirements, if an employee has not supplied the appropriate certification, or has had more than three periods of 'uncertified' absence within the preceding 12 month period. If the sick pay scheme has been abused, disciplinary action may follow.

Payments of sick pay may be terminated, suspended or reduced if an employee fails to notify the Company of relevant facts, or if their absence or continued absence is due to their taking an unwarranted risk (in or out of work), conducting themselves in a way that prejudices their recovery, abusing alcohol or drugs or other substances, or recklessly endangering the health and safety at work of themselves and others.

Occupational sick pay will not be paid to employees in their final month of employment.

199. No consideration of this process took place by the respondents. The factors expressed as being relevant in determining whether occupational sick pay would be withheld or reduced was not considered. All that happened was a consideration by Mr Gillen, with some consultation of Ms Turner, as to whether paying four days occupational sick pay would be discriminatory action.

200. The tribunal concludes that this falls within the **Deadman** principle, and failing to comply with the published procedure of a document used to regulate the employment relationship, and one that had been actively provided to the claimant, breaches the implied term of trust and confidence.

201. The first period of sick leave saw deductions from the December pay, January pay, February pay, March pay, April pay and May pay. This is a series

of deductions pursuant to s.23(3) of the employment Rights Act 1996, and therefore was brought in time.

202. Consequently, the claim concerning underpaying of occupational sick pay as either unlawful deduction from wages or breach of contract must succeed.

Constructive unfair dismissal

203. The claimant resigned for the first time, with notice on 13 May 2019. The resignation letter clearly explains on what basis she resigned, which included, amongst others:
    a. The manner in which the company investigated and determined her grievance;
    b. The failure to consider all of her grievances;
    c. The attempt to focus matters on her performance;
    d. That Ms turner, who was subject to some of the allegation, played an active role in the grievance investigations;
    e. The failure to address all matters in the grievance decision.

204. Much of the matters above could not have been known by the claimant before 08 May 2019, as this is when she was supplied with the evidence considered in the grievance investigation and her SAR was completed.

205. The first resignation took place whilst the claimant was absent from work with work-related stress. She was absent from work from 05 December 2018 until her return to work on 16 May 2019.

206. The claimant was absent from work from 21 May 2019 and certified to return to work on 25 June 2019.

207. The claimant's second resignation, this time without notice was on the 26 June 2019, which was the day that she returned to work form her second period of illness. In her second resignation letter she references a number of matters which happened during the short period that she had returned to work in between illness, including the unilateral changes to her work duties, withholding information about her profit target, being subjected to intimidating meetings, being falsely accused of gross misconduct and not being paid company sick pay during the second period of illness. All of these are matters that this tribunal found as facts in this case.

208. It is the tribunal's view that the last straw in this case was the decision to not pay the claimant occupational sick pay. This did add to the breach of the implied term of trust and confidence, especially when one considers our findings in relation to occupational sick pay above. When considered objectively, the matters that occurred in between the claimant's first resignation

and second resignation did breach the claimant's contract fundamentally, in that it broke the implied term of trust and confidence. However, if we are wrong on this, then the retaliatory treatment of the claimant since her raising of allegations of discriminatory treatment, the failings in relation to the grievance process, coupled with the matters that took place following the claimant's return to work on 16 May 2019, was so serious to entitle the claimant to leave immediately.

209. There has been no delay in this case, given that the claimant resigned the day after her sick leave period had ended. Even if we are wrong on that, any delay from the accusation of gross misconduct on 21 May 2019 without any preliminary investigation, to the resignation without notice on 26 June 2019 is not implicit affirmation in circumstances where the claimant was absent from work with illness.

210. It is clear from the evidence that the Claimant resigned in response to these breaches. Thus, the Claimant was constructively dismissed. The Respondent has failed to show a potentially fair reason for the dismissal which, in the circumstances, was unfair.

Signed by: **Employment Judge Mark Butler**

Signed on: **04 December 2020**

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

IN THE EMPLOYMENT TRIBUNALS

BETWEEN:

MS ANGELA DAWSON

Claimant

and

(1) CONCEPT INFORMATION TECHNOLOGY LIMITED
(2) CHRIS SHORT
(3) MATT GILLEN
(4) CARL SHORT

Respondents

AGREED LIST OF ISSUES

DETRIMENTS

1. Whether the detriments listed in the attached Schedule of Detriments occurred, and if so:

Direct Sex Discrimination (s. 13 EqA 2010)

2. Whether C was subjected to less favourable treatment because of her sex?

Harassment (s. 26 EqA 2010)

3. Whether the detriments constitute unwanted conduct related to C's sex (Schedule of Detriments, para. 21))? If so:

   (i) did the unwanted conduct have the purpose or effect of violating C's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

and having regard to all the circumstances of the case, was it reasonable for the conduct to have that effect on C?

Victimisation (s. 27 EqA 2010)

4. Whether C did a protected act in respect of the grievances/concerns raised with R1 on the following dates: (i) 29 April 2018; (ii) 30 April 2018; (iii) 24 November 2018; (iv) 30 November 2018; (v) 17 December 2018; (vi) 8 January 2019; and (vii) 13 May 2019?

5. If so, was C subject to detriment on the ground of having done a protected act in respect of the detriments listed at (paras. 21(3) onwards)?

Whistleblowing Detriment (ss 43B, 47B ERA 1996)

6. Did any of the grievances/concerns in paragraph 4 constitute a disclosure of information that the Respondents were failing or likely to fail to comply with a legal obligation pursuant to s. 43B(1)(b)?

7. If so did C reasonably believe:

(i) the disclosure to be in the public interest?
(ii) the information disclosed to be true?

8. Was C subjected to any detriment in relation to any act, or any deliberate failure to act, by any of the Respondents on the ground that she had made a protected disclosure (Schedule of Detriments, paras. 21(3) onwards)?

DISMISSAL

Unfair Dismissal s. 98 ERA 1996

9. Whether R1 acted in fundamental breach of C's contract of employment thereby entitling her to resign [ET1 2nd para 4(7)]? C relies upon:

(i) the removal of her management responsibilities and unilateral alteration to her job content as breaches of express terms [ET1 2nd para 19(6)];

(ii) alternatively, whether R1 breached the implied term of mutual trust and confidence

10. Did C resign in response to that breach?

11. Did C resign without delay so as to constitute acceptance or affirmation of any such breach?

Automatic Unfair Dismissal s. 103A ERA 1996

12. Was C subjected to any detriment in respect by any act, or any deliberate failure to act, on the ground that she had made a protected disclosure?

13. If so, did any such detriment constitute a fundamental breach of contract? Did C resign in response to the same?

Dismissal: s. 39(2) EqA 2010

14. In respect of the Schedule of Detriments:

(i) whether C was subjected to less favourable treatment because of her sex (s. 13 EqA 2010)?

(ii) whether the detriments constitute unwanted conduct related to C's sex (s. 26 EqA 2010)?

(iii) whether C did a protected act in respect of the grievances/concerns at para. 4 above for the purposes of s. 27 EqA 2010? If so, was C subject to detriment on the ground of having done a protected act?

15. If so, did any such detriment constitute a fundamental breach of contract entitling C to resign pursuant to s. 39(2) EqA 2010? Did C resign in response to the same?

Unlawful deduction from wages (Part II ERA 1996)

16. What sums were properly payable to C in respect of occupational sick pay following her sickness absences commencing on (i) 5 December 2018 ("the first absence")[ET1 para 37]; and (ii) sickness absence ending 21 May 2019 ("the second absence")[ET1 2nd para 4(8)]?

17. Has there been an unlawful deduction from wages in respect of the decision to:

    (i) only pay C 4 days occupational sick pay in respect of the first absence;
    (ii) Pay nothing in respect of the second absence?

Jurisdiction

18. EqA 2010: Does the ET have jurisdiction to determine any of the complaints of detriment pursuant to s. 123 EqA 2010? Do they constitute a continuing act? If not, is it just and equitable to enlarge time?

19. Whistleblowing Detriment: Do the detriments amount to a series of similar acts or failures for the purposes of s. 48(3)(a)? If not, are the claims brought within the primary time limit? If not, should time be enlarged under s. 48(3)(b)?

20. Unlawful deduction from wages: does the ET have jurisdiction to determine the unlawful deduction of wages in respect of the first absence?

SCHEDULE OF DETRIMENTS

(Case No: 1301180/2019)

21. C relies upon the following detriments:

First and Second Respondents

(1) At a Christmas party in December 2015 whether [para 14(1)-(2)]:
   a. Chris Short touched C's bottom;
   b. Introduced a male acquaintance to C commenting *'have you met my friend, he has a massive penis'*.

(2) Chris Short's behaviour and reaction to C's grievance at a meeting in April 2018 in particular [para 6-8]:
   a. Whether he was dismissive, irritated, and interrupted C;
   b. Rather than listen to her concerns, criticised her leadership and performance.
   c. Interrupting C when she was discussing her grievance about Mr Gillen by saying "what do you expect me to do, he is my MD".
   d. Saying to C "I thought you were not going to cry".

(3) The alleged failure by the First Respondents and Chris Short to engage with, investigate, or take any adequate steps to address the grievances raised by C in April 2018 [para 9].

(4) Since April 2018 whether Chris Short marginalised/ignored C, and did not discuss accounts with C [para 14(5)].

(5) Bonus [para 14(6)]:
   a. The withholding of bonus payments for Q2, Q3, and Q4
   b. Payment of higher bonus to male colleagues
   c. Removing staff from her team or reassigning placements to male colleagues to reduce C's bonus and/or qualification for share options.

(6) Exclusion from social/term bonding events - quarterly or half yearly golf days [para 14(7)].

(7) On 4 December 2018 Chris Short greeted others but ignored C [para 14(8)].

First and Third Respondents

(8) In November 2018 Mr Gillen refused to tell C whether any male colleagues had received their quarterly bonuses [para 14(9)].

(9) The persistent refusal to provide C with a laptop since mid-2018 [para 14(10)].

(10) Only permitting C to take a 30 minute lunch break when certain male colleagues are allowed longer periods for lunch [para 14(11)] (Jon Horrocks and Robert Taylor are relied upon as actual comparators).

(11) The appointment of male staff on a higher salary and more favourable car allowance [para 14(12)].

(12) Bonus [para 14(13)]:

a. The withholding of bonus payments for Q2, Q3, and Q4

b. Payment of higher bonus to male colleagues

c. Removing staff from her team or reassigning placements to male colleagues to reduce C's bonus and/or qualification for share options.

(13) Since 2017 and 2018 Mr Gillen has said to C "why don't you consider stopping managing?" and repeated comments to similar effect [para 14(14)].

(14) Mr Gillen regularly shouting at C, and suggesting that C was "paranoid" when she tried to raise this.

(15) In early 2018 Mr Gillen shouted and berated C for 30 minutes for working at home on a Friday.

(16) In relation to the Dentsu account whether he:

a. failed to listen or acknowledge anything that C said in relation to progress she had made on that account.

b. did not believe that she had secured the client and checked with the Head of Global to see if C was telling the truth.

c. refused to permit C to work on the account, and the impact this had on her potential to earn bonus.

(17) In November 2018 he ignored C when she advised that she and a member of her team and secured a large tender for Next.

(18) At a meeting on 15 November 2018 Mr Gillen was hostile towards C, sneered at her, ignored her, and said that she should not manage past year end..

Other

(19) Whether on 4 December 2018 Mr Taylor remarked "we should take a cauldron in there" in relation to laughter heard from the female accounts team [para 14(15)].

Occupational Sick Pay

(20) On 18 December 2018 Ms Turner informed C that she would only receive 4 days occupational sick pay [para 20].

(21) The repeated failure to inform C of (i) the reasons for not paying occupational sick pay and (ii) who was involved in making this decision as requested by C in correspondence dated 19 December 2018 [para 22], 24 December 2018 [para 24], 8 January 2019 [para 28], 11 January 2019 [para 31].

Grievance Process

(22) R1's decision on 13 March 2019 not to permit C to be accompanied by a family member or friend at any grievance hearing [para 36].

(Case No: 1305852/2019)

22. Whether the following detriments occurred:

(1) Whether the investigation of her grievances was done in a fair, sufficiently thorough or balanced manner in that [ET1 2nd 11(1)-(18)]:

a. C was not shown any witness or documentary evidence or opportunity to provide comment prior to the grievance outcome.

b. C's grievance dated 8 January 2019 was not discussed with her at the grievance hearing on 15 March 2019.

c. Whether the process was used to criticise C and her performance [para 11(3)]?

d. Laura Turner's involvement in the investigation/interviewing witnesses in circumstances where she was the subject of an outstanding grievance.

e. Whether the evidence was subject to appropriate scrutiny; and/or denials of wrongdoing were accepted at face value in circumstances where witnesses were unable to recollect an incident; and/or grievances were rejected in circumstances where the evidence supported C's concerns [paras 11(6)-(9), (12)-(17)].

f. The grievance outcome incorrectly asserted that the decision to pay C SSP was taken before she raised her grievance in circumstances where Rs knew this to be untrue [para 11(9)];

g. None of the witnesses were interviewed in relation to C's grievance dated 8 January 2019 [para 11(10)].

h. A number of the matters in the 8 January 2019 grievance were not addressed in the grievance decision [para 11(11)].

i. Chris Short accusing C of raising her grievance in bad faith and criticising her performance [para 11(18)].

(2) The persistent refusal to clarify whether C had hit her profit target for 2018 in circumstances where Mr O'Sullivan assured the C that he would provide details. Requests made on 15 March, 23 April, 3, 8 and 15 May 2019 were ignored [paras 14-15].

(3) Whether on 16 May 2019 Chris Short subjected C to hostile and intimidating treatment [paras 16, 19(8)]. It is alleged that he:

a. tried to force C to have a without prejudice discussion without her agreement;

b. repeatedly questioned C as to why she wanted to come into the office after submitting her grievance;

c. stated that the Company did not care about the Employment Tribunal claim that she had already submitted because it had insurance;

d. offered C a derisory sum to leave the company premises immediately. When C declined, he was visibly irritated and angry.

(4) Persistent refusal to return C's office keys [para 19(1)].

(5) On 16 May 2019 Matt Gillen stated that C was no longer allowed to work from home on Fridays [para 19(2)]

(6) Christ Short belittled C's contribution when he belatedly told her that she had achieved her profit target for 2018 [para 19(3)].

(7) C was denied the ability to use the 'flexitime' policy [para 19(4)].

(8) Demotion/removal of management responsibilities without consultation [para 19(5)].

(9) Unilateral changes to duties/job content [para 19(6)].

(10) Moving C's workstation/segregating her team [para 19(7)].

(11) Chris Short berating C on 20 May 2019 for over an hour [para 19(9)].

(12) Refusing to provide a copy of the Staff Handbook [para 19(10)].

(13) Being contacted for work-related matters during her period of sick leave whilst suffering from work-related stress [para 19(11)].

(14) On 21 May 2019 being falsely accused of committing acts of gross misconduct [para 19(12).

(15) Non-payment of occupational sick pay during her second period of absence [para 19[13]).