Case Number: 1803040/20V

EMPLOYMENT TRIBUNALS

Claimant:	Miss S Talbot
Respondent:	Northgate Lighting Limited
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mrs Anderson-Coe and Mr Rhodes
On:	29 January, 1-4 February and 5 February (in chambers) 2021
Representation	
Claimant:	Mrs A Niaz-Dickinson (Counsel)
Respondent:	Ms A Rumble (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal succeeds and a remedy hearing will be arranged in due course.
2. The claimant's complaint of direct sex discrimination fails and is rejected.
3. The claimant's complaint of sexual harassment fails and is rejected.
4. The claimant has received her full notice pay and car allowance. Her complaints of wrongful dismissal and of unauthorised deductions from wages are therefore dismissed upon withdrawal by the claimant.

REASONS

INTRODUCTION

Tribunal proceedings

5. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was "V: video - fully (all remote)". A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

6. This claim was case managed during a preliminary hearing with Employment Judge Cox on 20 August 2020.

7. We considered the following evidence during the hearing:

   7.1 a joint file of documents and the additional documents referred to below;

   7.2 witness statements and oral evidence from:

      7.2.1 the claimant and her witnesses (both of whom were former colleagues of the claimant):

         a) Mr Alan McAssey; and

         b) Mr Michael Wallace;

      7.2.2 the respondent's witnesses:

         a) Mr Lee Doyle;

         b) Ms Fiona Thomson; and

         c) Mr Adrian Lee.

8. We also considered the helpful oral and written submissions made by both representatives.

9. The parties both provided additional disclosure documents during the hearing. Neither side objected to the inclusion of these documents in the hearing file.

10. The claimant applied to introduce supplemental evidence from Mr McAssey and Mr Wallace at the end of the fourth day of the hearing (after all of the respondent's witnesses and the claimant had been cross-examined). We rejected this application, having considered the factors set out in the overriding objective including potential prejudice to both parties and any delays and additional costs likely to be caused if we granted such application. We provided our full reasons for rejecting that application orally during the hearing.

Adjustments

11. We asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

CLAIMS AND ISSUES

12. The list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

13. The claimant brought the following complaints under the Employment Rights Act 1996 ("**ERA**") and the Equality Act 2010 ("**EQA**"):

    13.1 ordinary unfair dismissal;

    13.2 wrongful dismissal;

    13.3 direct sex discrimination, including that her dismissal was an act of sex discrimination (s13 EQA);

    13.4 sexual harassment (s26 EQA); and

    13.5 unauthorised deductions from wages, relating to her car allowance (s13 ERA).

LIST OF ISSUES

14. The claimant's Counsel confirmed during the hearing that the claimant had received her notice pay and her car allowance. The claimant's complaints of wrongful dismissal and of unauthorised deductions from wages were therefore dismissed upon withdrawal by the claimant.

15. The agreed list of issues is set out below.

UNFAIR DISMISSAL (S98 ERA)

16. What was the reason for the claimant's dismissal?

17. What was the reason or principal reason for dismissal? *The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*

18. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    18.1 there were reasonable grounds for that belief;

    18.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

    18.3 the respondent otherwise acted in a procedurally fair manner; and

    18.4 dismissal was within the range of reasonable responses.

EQUALITY ACT 2010 CLAIMS

Direct sex discrimination (s13 EQA)

19. Did the respondent do the things set out at Annex 1?

20. If the respondent did the things set out at Annex 1, was that less favourable treatment? *The claimant compares herself to the comparators set out at Annex 1 in respect of each allegation.*

Sexual Harassment (s26 EQA)

21. Did the respondent do the things set out in Annex 2?

22. If so, was that unwanted conduct?

23. Was the unwanted conduct either:

    23.1 related to sex; or

    23.2 of a sexual nature?

24. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

25. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Time limits

26. Were the direct discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    26.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    26.2 If not, was there conduct extending over a period?

    26.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    26.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    26.5 Why were the complaints not made to the Tribunal in time?

    26.6 In any event, is it just and equitable in all the circumstances to extend time?

RELEVANT LAW

27. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' helpful written submissions.

EMPLOYMENT RIGHTS ACT 1996 ("ERA") CLAIMS

28. The right not to be unfairly dismissed is set out in s94 and s98 of the ERA:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2)....

…

(2) A reason falls within this subsection if it -

…

(b) relates to the conduct of the employee…

…

(3) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

…

29. Where the employer's reason for dismissing the employee relates to the employee's conduct, the tribunal must first consider whether the respondent has established that its reason (or if more than one its principal reason) for dismissing the employee, was for a reason related to his or her conduct. The tribunal then goes on to consider the fairness of the dismissal for that reason, taking into account the guidance in *British Home Stores Limited v Burchell* [1980] ICR 303.

30. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair the tribunal has to decide whether the employer entertained a reasonable suspension amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must demonstrate three elements:

    30.1 the fact of that belief – i.e. that the employer did believe it;

    30.2 that the employer had in its mind reasonable grounds upon which to sustain that belief; and

    30.3 the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case, at the time at which it formed that belief.

31. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. It is not for the Tribunal to

decide whether the Tribunal would have dismissed the employee, as set out in the *Iceland* case at paragraph 24:

"(i) the starting point should always be the words of Section 98 for themselves;

(ii) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(iii) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer

(iv) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(v) the function of the tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair."

32. The ACAS code of practice on disciplinary and grievance procedures states as follows:

"(9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification."

EQUALITY ACT 2010 ("EQA") CLAIMS

33. Direct discrimination and harassment are defined by the EQA as follows:

13 Direct discrimination

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

…

26 Harassment

(1) A person (A) harasses another (B) if –

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

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

(i) violating B's dignity, or

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

…

(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.

(5) The relevant protected characteristics are – …sex;
…

34. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

…

Direct discrimination

35. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

35.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

35.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

36. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

37. In relation to less favourable treatment, the Tribunal notes that:

37.1 the test for direct discrimination requires a claimant to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

37.2 a claimant does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that a claimant can reasonably say that they would have preferred not to be treated differently from the way the respondent treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

37.3 unreasonable treatment in itself is not sufficient. For example, in *CC of Kent Constabulary v Bowler* EAT 0214/16, the EAT observed that: *"merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic"*;

37.4 the motive and/or beliefs of the parties are relevant to the following extent:

37.4.1 the fact that a claimant believes that she has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

37.4.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

37.4.3 for direct discrimination to be established, the claimant's protected characteristic must have had a *'significant influence'* on the conduct of which she complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

38. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA). Lord Justice Mummery in *Madarassy* stated that:

"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."

39. *Lord Justice Sedley* in *Deman v Commission for Equality and Human Rights & ors* 2010 EWCA Civ 1279 CA qualified this by stating that: *"…the "more" which is needed to create a claim requiring an answer need not be a great deal…it may be furnished by the context in which the act has allegedly occurred"*. For example in *Veolia Environmental Services UK v Gumbs* EAT 0487/12, the EAT held that a tribunal was entitled to take into account the fact that the employer had given inconsistent explanations for its conduct (whilst excluding consideration of the substance and quality of those explanations at the first stage of the test for direct discrimination).

Harassment

40. There are three elements to the definition of harassment:

40.1 unwanted conduct;

40.2 the specified purpose or effect (as set out in s26 EQA); and

40.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

41. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

42. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

43. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

44. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

45. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

46. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof – EQA complaints

47. The burden of proof for discrimination and victimisation complaints is dealt with by s 136 Equality Act 2010, as follows:

> **136 Burden of proof**
> …
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

48. The Court of Appeal in Igen Ltd v Wong [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable under the EQA (see Ayodele v Citylink Ltd [2017] EWCA Civ 1913). The guidance outlines a two-stage process:

    48.1 First, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see Madarassy v Nomura International plc [2007] ICR 867, CA.

    48.2 The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.

49. The Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

Time limits – EQA complaints

50. The time limit for bringing a complaint under the EQA is set out at s123 of the EQA as follows:

> **123 Time limits**
> (1) 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.

Continuing acts

51. The Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, [2003] ICR 530 held that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs during which the claimant was treated less favourably. The Court of Appeal held that the claimant was entitled to pursue her claim on the basis that the burden was on her to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs.

52. Where a series of acts are alleged to amount to discrimination, a finding that one or more was not discriminatory will mean that it cannot be considered to be part of a continuing act (South Western Ambulance NHS Foundation Trust v King [2020] IRLR 168 EAT).

Just and equitable discretion

53. The discretion to extend time limits under the 'just and equitable' test is much broader than that given to tribunals under the 'not reasonably practicable' formula (see, for example, British Coal Corporation v Keeble [1997] IRLR 336 EAT). However, the onus remains on the claimant to explain why it is just and equitable to extend the time limit and any exercise of the Tribunal's discretion is the exception, rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA). The Tribunal can take into account a wide range of factors when considering whether to exercise its discretion (Keeble, Southwark London Borough v Alfolabi [2003] IRLR 2020), including:

    53.1 the length of and reasons for the delay;

    53.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

53.3 the extent to which the party sued had co-operated with any requests for information;

53.4 the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

53.5 the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

FINDINGS OF FACT

Context

54. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

55. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the Gestmin case:

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

56. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

57. The respondent's business involves the supply of lighting products to the electrical wholesale market. The respondent employs around 55 staff at present, although it employed around a further 20 employees at the time relating to the events that are the subject of these claims.

58. The respondent's senior management team included:

58.1 Mr Adrian Lee – owner and Managing Director;

58.2 Mr Lee Doyle – Sales Manager (also owner and Managing Director of Solutions Lighting);

58.3 Ms Julie Blackburn – CIPD qualified HR Manager (who also provided HR support to Solutions Lighting). The respondent did not call Ms Blackburn to provide evidence at this hearing, although they confirmed that she remained employed by the respondent;

58.4 a Finance Director (who was also the Finance Director for Solutions Lighting).

59. The claimant was originally employed by the respondent in its internal sales team from 22 May 2017. She was promoted to the role of Regional Sales Manager ("**RSM**") with effect from September 2018 and initially covered the Yorkshire region. The claimant's region was later changed to cover a much larger area following the departure of another Regional Sales Manager in 2019.

60. The RSM role was an external sales role and involved travelling to visit existing and potential customers over the course of four days each week. Each RSM was expected to make at least five visits per day (i.e. twenty visits per week). The RSMs had one day set aside for administrative tasks, including logging the visits made, providing quotes to customers and recording mileage.

61. The claimant initially reported to another manager (whom we will refer to as "**JB**") when she became a RSM. JB subsequently handed over his role to Mr Doyle during October 2019. JB was then on leave from early November 2019 until he left the respondent's employment on 31 January 2020.

62. The claimant's fellow RSMs during her employment included:

Name	**Start date in RSM role/location**	**Notes**
Chris Sharkey	July 2019 Leeds	Transferred from another role with the respondent (he had started working for the respondent before the claimant joined). Still employed by the respondent at the date of the claimant's dismissal.
Alan McAssey	2018 Devon	Directly recruited into RSM role. Employment ended on or around 13 March 2020 due to the respondent's financial constraints.
Michael Wallace	September 2019 Newcastle	Directly recruited into RSM role. Employment ended on 30 March 2020 due to the respondent's financial constraints.
Jamie Arnold	January 2020 London	Directly recruited into RSM role. Still employed by the respondent at the date of the claimant's dismissal.

63. The claimant worked closely with the respondent's internal sales team, who were based at the respondent's office in Leeds. The internal sales team supported the

RSMs. For example, they fielded customer calls, provided information on pricing and stock levels and suggested potential targets for the RSMs to visit.

Claimant's allegations

64. The claimant's factual allegations relating to her direct discrimination and harassment complaints are set out at Annex 1 and Annex 2. References to allegation numbers are included below (where relevant). Some of these allegations are also relevant to the claimant's unfair dismissal claim.

Allegations 1.1 and 1.4 - claimant's working relationship with Mr Doyle

65. The claimant worked in the Leeds office for around two days per month per month, for example to attend pre-arranged meetings or team training days. The claimant travelled to visit customers on her remaining days, apart from her weekly admin days which she would normally work from home.

66. The claimant and Mr Doyle had previously come across each other in a professional context because Mr Doyle's business (Solutions Lighting) was based in the same building as the respondent. Mr Doyle and Mr Lee also worked together on other business matters. Mr Doyle invited the claimant, along with some of her colleagues, to attend a party at his house during Summer 2019. The claimant had initially accepted that invitation, was unable to attend but had given a present to Mr Doyle's family to thank them for the invitation.

67. The claimant stated that after Mr Doyle became her line manager, they sat close together in the office. She alleges that he made regular sexist comments to her when they were sat together in the office from October 2019 to 31 January 2020, including:

    67.1 that he was a 'tits and arse man'; and

    67.2 that 'men were better than women' at the claimant's job.

68. We find that Mr Doyle did not make regular sexist comments to the claimant whilst they were in the office together. The key reasons for our findings are that C failed to provide sufficient evidence of such alleged comments:

    68.1 the claimant's evidence is that she was only in the office twice per month over a four month period (often with the other RSMs), and that the comments made were made on occasions when her colleagues were not within earshot. However, the claimant was unable to recall any approximate dates or the context of any such comments;

    68.2 neither Mr Wallace nor Mr McAssey recalled over-hearing any such comments. Mr McAssey said that the claimant had not complained about any such comments to him, although she had confided in him regarding many of her other concerns; and

    68.3 the claimant said in her witness evidence regarding allegations of harassment at a dinner on 9th January 2020 and that *"I had not seen this*

kind of behaviour from Mr Doyle or Mr Lee before". This suggested that Mr Doyle had not made comments in a similar vein to those alleged by the claimant in relation to that dinner whilst they were in the office. Our findings regarding the dinner on 9th January 2020 are set out later in this Judgment.

69. The claimant also alleged at Allegation 1.4 that Mr Doyle 'found fault' with everything she did from November 2019 until her employment ended on 23 March 2020. However, she did not provide any specific examples of this allegation at paragraph 8 of her statement (despite referring to paragraph 8 when setting out Allegation 1.4 in the list of issues).

70. We find that Mr Doyle raised the concerns set out in the claimant's allegations in Annex 1, on which we make findings of fact in this judgment. We do not accept that Mr Doyle 'found fault' with everything the claimant did because she was unable to provide any other factual examples of this allegation.

Allegation 1.2 – claimant's call with internal sales team member (second week of November 2019)

71. The claimant alleged that Mr Doyle listened to her phone calls with a member of the respondent's internal sales team during the second week of November 2019 and 'ridiculed and berated her for her lack of knowledge'. She said that she called the office to check some details regarding one of the respondent's products. The claimant said that Mr Doyle listened to that call, called her back and ridiculed her product knowledge. She says that Mr Doyle told her it was not 'good enough' and that she was not giving the customer the best service.

72. We accept Mr Doyle's evidence that he listened to the claimant's call with the member of the internal sales team because that individual had raised concerns regarding it. The claimant accepted that it was reasonable for Mr Doyle to listen to customer calls of sales staff because he was her line manager. She said that she objected to the manner in which she said he spoke to her, stating that she 'got such a telling off and a roasting for it'.

73. We find that Mr Doyle did not 'ridicule' or 'berate' the claimant for her lack of knowledge. The key reasons for our findings are:

    73.1 we accept the evidence of the claimant and Mr McAssey that JB and Mr Doyle had a very different management style to each other;

    73.2 we accept that Mr Doyle's responsibility as sales manager was to try and improve sales by seeking to improve the performance of the sales team, including the RSMs; and

    73.3 we accept that the claimant was upset by the call and felt that Mr Doyle had 'told her off'. However, we do not accept that Mr Doyle did so in a manner which ridiculed or berated the claimant. The tone of the emails that Mr Doyle sent to the claimant (which we consider later in this Judgment) suggest that Mr Doyle's approach was not one of 'ridiculing' or

'berating' the claimant at this time. In addition, the wording of the emails sent to the claimant and to the other RSMs are similar in content and tone.

Allegation 1.3 - claimant's relationship with internal sales team

74. The claimant accepted in her oral evidence that Mr Doyle did not prevent her from calling the office for information. She stated that staff did not answer her calls and that she gradually gave up asking for help. However, we note that the claimant and Ms Bethany Wilby (a member of the internal sales team) had four conversations from 14 November to 9 December 2019 including two calls that were initiated by the claimant, two of which lasted over 20 minutes. A document setting out the times of these calls was shown to the claimant during the investigation meeting on 20 December 2019.

75. We find that that Mr Doyle did not prevent the claimant from calling the office.

Allegations 1.5 and 1.7 - Mr Doyle's instructions regarding MD Thompson (customer)

76. The respondent agreed annual rebates with its key customers, whereby customers would receive a cash rebate if they spent more than a set financial threshold with the respondent during the course of a year. The respondent was keen to encourage customers to increase their spending with the respondent to reach the rebate level. The respondent used the rebate systems to provide customers with a financial incentive to buy more products from the respondent. The respondent also believed that the rebate system helped to develop close customer relationships.

77. Mr Doyle was focussed on maximising the respondent's sales to all customers in late 2019. The claimant was unable to recall any examples of her complaint set out at Allegation 1.5, other than in relation to MD Thompson.

78. MD Thompson (an electrical wholesaler based in Norwich) was a major customer of the respondent, with a total spend of around £2 million per year. We find that Mr Doyle did not change his instructions regarding MD Thompson. He asked the claimant to visit their Norwich site and she did so in late November 2019. The claimant did not record any information on the CRM system in the days after this visit. The claimant emailed MD Thompson on 26 November 2019, setting out the figures that the customer would need to spend to reach the next rebate level (approximately £14,000). However, she did not provide any quotes to the customer for any specific products.

79. It is common ground that MD Thompson called the respondent's internal sales team during the first week in December 2019 and that Mr Doyle picked up that call. Mr Doyle looked on the CRM system to see if the claimant had quoted any prices for products. There was no information on CRM, so Mr Doyle called the claimant but she was not able to answer her phone at that time. Mr Doyle left a message for the claimant on her phone.

80. The claimant alleged at Allegation 1.5 that Mr Doyle 'misled' her and 'set her up to fail' by stating in his message that the customer wanted to know how much he had to spend to reach the next rebate level. She said that when she called the customer back, he only wanted quotes on particular products and was not interested in spending enough during December to reach the next rebate level.

81. We find that Mr Doyle did not deliberately mislead the claimant and that he was not 'setting her up to fail'. We find that Mr Doyle was focussed on encouraging customers to buy more products in order to increase sales and that he viewed discussions about rebate levels as a key tactic to sell more products to customers.

Allegation 1.6 - CRM requirements – early December 2019

82. The respondent asked all of the RSMs to spend some time in London during early December 2019, in order to focus on visiting customers and potential customers in that region. Around the same time, Mr Doyle also reminded the RSMs of the importance of keeping their CRM records up to date.

83. We find that the wording and tone of the emails that Mr Doyle sent to each of the RSMs during this period was broadly similar. For example, Mr Doyle emailed each of the claimant, Mr McAssey and Mr Wallace separately on 3 December 2019 regarding CRM. All three emails contained the same wording:

    "During our meeting last week we discussed the importance of CRM, your visits from last week leave more questions than answers, can you let me know why you are not up to date from last week?

    We talked about having CRM up to date on your admin day, unless I've missed something this was Monday this week."

84. The claimant stated in evidence that the content and tone of the phone calls and text messages that she received from Mr Doyle different from those received by the other RSMs. She said that she knew this to be the case because she had compared notes with them, although she accepted that she did not hear any of calls or see any text messages between the other RSMs and Mr Doyle. Mr Doyle denied this allegation and the claimant did not produce evidence of any such text messages or state the words used during such telephone calls. We find that Mr Doyle's communications with each of the RSMs was similar in content and tone.

85. Mr Doyle arranged for Mr Sharkey to carry out CRM refresher training for the other RSMs. Mr Doyle regarded Mr Sharkey as a 'super user' and saw him as the most consistent user of the CRM system. The parties disputed the length of this training, with the claimant stating it lasted 5 minutes and Mr Doyle stating it lasted around 45 minutes. We accept Mr McAssey's evidence that it lasted for around 30 minutes in total because we found Mr McAssey's evidence regarding this event credible. We note that the claimant was aware of what she needed to include in her CRM entries because she recorded the key steps in an email which she sent to Mr Doyle.

Allegations 1.8 and 1.9 - First investigation meeting – 20th December 2019

86. Mr Doyle held one to one meetings with the claimant and the other RSMs on 20 December 2019 at the respondent's Leeds office. They all received similarly worded invites to the meetings which were stated to be: *"an opportunity to have a private conversation and air any opinions you have"*.

87. After the claimant's meeting ended, the claimant was told to attend a meeting in the boardroom. She did not know what the meeting was about. Mr Doyle and Ms Blackburn were in the meeting. They informed the claimant that it was an investigation meeting to discuss four different matters which were described in the respondent's notes of the meeting as:

    87.1 'gossiping' about colleagues (including about JB) and failing to use time productively. This allegation related to four phone calls between the claimant and Ms Wilby, a member of the respondent's internal sales team;

    87.2 failing to use the CRM system correctly, including failing to record details of customer meetings and to make notes on follow up;

    87.3 failing to carry out key parts of the RSM role, including to quote for products and encourage customers to reach the rebate threshold; and

    87.4 failing to produce documents on time relating to mileage reports, falsifying documents and an unauthorised use of the claimant's company credit card (relating to spending of less than £100 on drinks for colleagues at a wedding, the receipt for which was authorised by JB).

88. Mr McAssey saw the claimant go up to the meeting and return to the office afterwards. We accept his evidence that the claimant was very upset by the contents of the meeting.

89. We find that:

    89.1 it was reasonable for the respondent to ask the claimant to attend the investigation meeting without warning her of its contents. The respondent's disciplinary procedure did not require advance notice to be provided of investigation meetings. In addition, the claimant spent most of her working time travelling to see customers and was only in the office a couple of times each month;

    89.2 the notes of the meeting were an accurate reflection of the language used in the meeting. The claimant did not view the notes at the time, but did not provide examples of any inaccuracies in the notes. The language in the meeting was firm, but it was not unreasonable or aggressive; and

    89.3 the claimant's apologies for her actions were genuine and were not 'forced'.

90. The decision at the end of the meeting was not to take any disciplinary action. The notes state: *"Sue to be given time to get her CRM up to date and she needs to make the arrangements to pay back the money owed"* in relation to her credit card

spending at a colleague's wedding. The claimant did not see a copy of the notes, but believed that the respondent would recover the monies from her salary under the deductions from wags clause in her contract of employment.

91. We also note that:

    91.1 Mr Doyle viewed Ms Wilby's part in the telephone as more serious than that of the claimant because she instigated the conversation about JB. Mr Doyle later issued Ms Wilby with a verbal warning regarding her conduct;

    91.2 Mr Doyle held an investigation meeting with Mr Wallace around the same time regarding Mr Wallace's unauthorised credit card spend of around £1600, which included a weekend away with his partner. Mr Wallace resigned on 23 December 2019 before the disciplinary meeting, but Mr Doyle persuaded Mr Wallace to retract his resignation and no disciplinary action was taken against Mr Wallace;

    91.3 Mr McAssey was not invited to an investigation meeting regarding his failures to complete the CRM entries to the respondent's satisfaction. Mr Doyle said that this was because the claimant was the longest serving RSM. However, Mr McAssey had carried out the RSM role since 2018.

92. The claimant wrote to Mr Doyle on 21 December 2019, seeking to clarify some of the points raised during the meeting. Mr Doyle replied reminding the claimant about HMRC rules around personal mileage. Mr Doyle also stated:

    "Thank you for the comments below, as far as we are concerned the issues has now been addressed and dealt with."

93. Ms Blackburn also drafted a performance improvement plan for the claimant, which set out areas for improvement and stated that there would be regular performance reviews. However, the respondent did not arrange any performance reviews with the claimant.

Claimant's working arrangements during January 2020

94. The claimant did not visit any customers on Thursday 2nd and the morning Friday 3rd January 2020. Instead, she worked from home and planned her visits for that month. The claimant worked from the office on the afternoon of 3rd January. The claimant also worked from home on Monday 6th January 2020. She said that this was her admin day and she used it to finish off the whole month's planning.

95. All of the RSMs attended the Leeds office on Tuesday 7th, Wednesday 8th and Thursday 9th January 2020 for training and an update on the respondent's 2020 business plans. During this week, the respondent installed a mileage tracker on the RSMs' mobile phones.

96. The claimant's region was changed on 9 January 2020 and she was informed of this during the 2020 business plans update. Part of her region was removed and reallocated to other RSMs. The claimant's remaining region consisted of the North

West of England, Shrewsbury and Wales. She no longer covered areas in the East of England including Nottingham and Derbyshire.

Allegations 2.1 and 2.2 – RSM team dinner on 9th January 2020

97. Mr Lee and Mr Doyle took the RSMs (i.e. the claimant, Mr Sharkey, Mr Wallace, Mr McAssey and Mr Arnold) out for dinner at the end of the training day on 9th January 2020. Mr Lee received a phone call from his wife during the dinner, regarding a car accident. She also sent him photos of the damage to the car. It was common ground that there was "banter" during the meal regarding the days' training session. Mr Lee showed everyone photos of the damage to his wife's car.

98. The claimant alleges that Mr Lee and Mr Doyle made the following comments regarding Mr Lee's wife:

    98.1 Mr Lee: *"She can't be trusted with a car of her own".*

    98.2 Mr Doyle:

        98.2.1 "*What they wouldn't do to her if it was their car?";*

        98.2.2 "*She would get a good seeing to";*

        98.2.3 "*He gets whatever he wanted after this";*

99. The claimant also stated in her witness statement that Mr Sharkey said: *"he would get a big blow job after that"*.

100. We find that:

    100.1 Mr Lee did not make the comment alleged by the claimant;

    100.2 Mr Doyle said words along the lines of: "*What they wouldn't do to her if it was their car?"* and *He gets whatever he wanted after this"*;

    100.3 however, Mr Doyle did not say *"She would get a good seeing to"*.

101. The key reasons for our findings are:

    101.1 the claimant's recollection of the comments made has varied during these proceedings. She did not set out any of the comments alleged in her grievances raised in March 2020 or in her claim form. She alleged three out of the four comments by Mr Lee and Mr Doyle in her email of 3 September 2020 to the Tribunal, following the preliminary hearing in August 2020 (the comment omitted was *"She would get a good seeing to"*). The claimant did not mention any alleged comment by Mr Sharkey until she produced her witness statement;

    101.2 Mr McAssey's evidence was that he did not overhear any such comments during the dinner. He said that he was sat at the other end of the table, however we note that there were only seven individuals at the dinner (including the claimant);

101.3 Mr Wallace did not overhear any of the comments alleged by the claimant. Instead, he states that: *"both Lee Doyle and Adrian Lee were really rude about Ade's wife because she had bumped her car and he was going home to "put something in her mouth"*; and

101.4 We accepted Mr Lee's evidence that he would not speak of his wife in that manner. We also accept his evidence that he left the dinner shortly afterwards to check that his wife was well following the accident;

101.5 We accept the claimant's evidence that the two comments made by Mr Doyle reflected stereotypical assumptions regarding 'women drivers', rather than regarding Mr Lee's wife's driving abilities as an individual.

102. We accept Mr McAssey, Mr Wallace and Mr Lee's evidence that Mr Lee and the claimant both left the dinner around the same time. We accept the claimant's evidence was that she left earlier than planned because she was offended by Mr Doyle's comments. Mr Doyle paid for the meal and then also left. The other RSMs went back to the hotel that they were staying at for drinks.

Further events during January 2020

103. Sadly, the claimant's brother passed away during January 2020. The claimant texted Mr Doyle on saying that she needed to take an urgent day's leave. Mr Doyle responded saying:

"Of course totally understand…sorry to hear your sad news, let me know if you need anything further from me or the business".

104. The claimant responded saying that she would be back in work during the next day and that she would dial in for the 9am catch up with the other RSMs.

MileIQ application

105. The respondent also introduced a new way of tracking the RSMs mileage in January 2020. The RSMs had to account for business and personal mileage. Up until January 2020, they did so by submitting a manual return. The respondent sourced a HMRC approved application called "MileIQ" which was added to the RSMs' mobile phones. At the conclusion of every journey, an RSM had to swipe to indicate whether the journey was for business or personal purposes. However, the RSMs were unhappy with MileIQ because they believed that it did not record their mileage accurately. They also believed that the payments that they received for business mileage from the respondent would be significantly reduced.

106. The claimant and the other RSMs exchanged emails and WhatsApp messages complaining about the MileIQ application. The claimant and the other RSMs also raised concerns with Mr Doyle and Ms Blackburn regarding MileIQ.

107. The respondent confirmed in early February 2020 that the RSMs were required to use MileIQ and that they regarded this as a change to the respondent's non-

contractual policies and procedures. The claimant responded to Ms Blackburn's email on 10 February 2020, stating:

"As per my other email, where I clearly said I do not consent to the changes in my contract which allows you to cut my salary…

You have not provided a consultancy period, or discussed options or "A BIG ONE"…consider the welfare of your employees!

You/Northgate have disregarded my non-consent and appear to just run rough shod over any concerns."

Allegation 1.10 - Second investigation meeting – 10th February 2020

108. The claimant was invited to a meeting at 4pm on 10th February 2020. Mr Doyle told the claimant that the purpose of the meeting was to review her performance improvement plan. However, the claimant's performance improvement plan was not reviewed during the meeting. Instead, Mr Doyle held another investigation meeting.

109. The notes of that meeting stated that the purpose of the meeting was to discuss the following allegations:

    109.1 refusal to carry out reasonable management requests relating to the respondent's new MileIQApp and providing information on customer visits and quotes in the CRM system;

    109.2 the tone of emails that the claimant sent to Ms Blackburn; and

    109.3 falsifying information on CRM regarding customer visits.

110. The notes of the meeting were not provided to the claimant at the time, but we find that they reflect the contents of the meeting. The claimant has not suggested that there were any material inaccuracies in the notes.

111. We find that Mr Doyle did question the claimant in an unreasonable and aggressive manner during the meeting. Mr Doyle did not approach the allegations with a view to conducting any fact-finding and it is clear from the notes that he had already reached conclusions regarding the allegations against the claimant. In particular, we note that:

    111.1 the matters regarding the MileIQApp and the CRM entries involved consideration of detailed information and the claimant was unable to access the information required. The respondent did not adjourn the investigation to permit the claimant to consider that information in more detail;

    111.2 the notes of the meeting suggest that the respondent had already taken a view of the claimant's conduct before any questions were asked. For example, the language used by Mr Doyle included:

111.2.1 *"So, let me get this right, a customer wants a visit and not only have you been to Birmingham and didn't visit, you haven't even got a booking in? Can you see how frustrating this is?"*;

111.2.2 *"What is evident is that this level of conduct and performance is not acceptable and we cannot continue with this*";

111.2.3 *"We cannot manipulate any of the electronic documentation, this is what is available";*

111.2.4 *"I am not in the habit of asking for stuff twice";*

111.2.5 *"This is amateur…How can we trust you when you say you are doing one thing and you're not!";*

111.2.6 *"the tone of your emails are disgusting"* (although Mr Doyle accepted during cross-examination that the claimant's emails to Ms Blackburn were 'not unreasonable'); and

111.2.7 the summary of the meeting concluded: *"There is clear lack of trust and importance to fulfil the responsibilities of the role. Disciplinary action is required"*

Invitation to disciplinary hearing and subsequent issues – 11 February 2020 onwards

112. Ms Blackburn emailed the claimant at around 2pm on 11 February 2020 with an invite to attend a disciplinary hearing on 13 February 2020, to be chaired by Mr Doyle with Ms Blackburn taking notes. The letter stated that the disciplinary hearing would consider the allegations raised at both investigation meetings (i.e. the meetings on 20 December 2019 and 10 February 2020).

113. Ms Blackburn described these allegations as a mixture of 'gross misconduct' and 'serious misconduct'. The allegations of gross misconduct and serious misconduct arising out of the first investigation were the allegations that Mr Doyle had previously stated in his email on 23 December 2019 had already been dealt with. The letter did not explain why these allegations were resurrected, nor why the respondent now regarded these allegations as 'gross' or 'serious' misconduct.

114. Ms Blackburn concluded the letter stating that:

114.1 one possible outcome of the hearing could be termination of the claimant's employment; and

114.2 that she would be entitled to be accompanied by a colleague to the hearing.

115. The claimant called Ms Blackburn when she received that letter but was unable to get through to her. The claimant then called Mr Doyle and they had a lengthy discussion, during which the claimant said that she was worried about losing her job.

116. The claimant emailed Ms Blackburn later that evening, saying that she would take a day's leave on 12 February 2020 in order to seek legal advice. The claimant said that she needed to postpone the hearing in order to prepare her defence and secure representation. In the meantime, the claimant forwarded some emails to her personal email account and to her colleagues. These included, for example, emails regarding the MileIQ application concerns.

117. Ms Blackburn responded to the claimant on the afternoon of 12 February 2020. Ms Blackburn incorrectly stated that the claimant was only allowed to be accompanied by a colleague because the respondent did not recognise any trade union representatives. The claimant and Ms Blackburn then exchanged several emails. The claimant repeated her postponement request and requested the evidence relied on by the respondent. The claimant also gave notice of her grievance.

118. The respondent placed restrictions on the claimant's emails on or around late on 12th February 2020 because they discovered that she had forwarded emails to her personal email account. However, this made it difficult for the claimant to continue working and to prepare for her disciplinary hearing.

119. The claimant emailed Ms Blackburn on 14th February 2020, stating that the respondent's refusal to permit her to have a trade union representative at the hearing was a breach of the ACAS Code. She also stated that she had secured representation for 25 February 2020. Ms Blackburn responded saying she had postponed the disciplinary hearing until 19 February 2020. She arranged for Ms Thomson to hear the claimant's disciplinary, in place of Mr Doyle. Ms Blackburn also arranged for Mr Matthew Beswick to hear the claimant's grievance on 17 February 2020.

120. The claimant said that she did not receive the invitations to those meetings. In any event, she was signed off on sick leave with work-related stress from 17 February to 2 March 2020.

121. Ms Blackburn then sent a revised invitation to a disciplinary hearing on 20 February 2020. The wording of that letter is somewhat confused and refers to Mr Beswick hearing an investigation on 17 February 2020. The letter also:

    121.1 provided a further set of disciplinary allegations entitled 'Investigation Three', despite the fact that no such investigation into any such allegations had taken place yet. Three of those allegations were referred to as 'gross misconduct' with a fourth allegation of 'serious misconduct';

    121.2 referred to a further set of fourteen documents labelled 'Bundle 3'; and

    121.3 did not refer to any re-arranged grievance meeting.

122. The claimant's solicitor responded to this letter, stating that the claimant appeared distressed and requesting that the disciplinary hearing be adjourned until 25 February 2020. Ms Blackburn initially refused, despite having received the

claimant's GP's note. Ms Blackburn stated in a letter to the claimant's solicitor dated 18 February 2020:

"I am not entirely sure what your client has told you but the content of your letter would suggest that she has not been entirely honest about the whole situation…

I have recently learned that Susan has obtained a sick note to presumable [sic] *excuse her from work; however, I am sure that you are aware that we are not expected to put off a disciplinary hearing indefinitely due to sickness. In the meantime, I request that your client provides a written submission if she is unable to attend the meeting. This submission will need to be sent to me directly by 10am on Thursday 20 February 2020."*

Arrangements during claimant's sickness absence

123. The claimant was absent on sick leave from 17 February to 2 March 2020. Her GP's note stated that her absence was due to 'stress at work'.

124. The respondent collected the claimant's mobile phone and laptop computer from her and retained these during her sickness absence on 18th February 2020. Ms Blackburn stated in her email to the claimant on 18 February 2020 that the purpose of this was to *"minimise any stress whilst you are unfit to work"*. As a result, the claimant was unable to access the respondent's IT systems during her absence.

Respondent's emails re JB leaving the respondent

125. On 19 February 2020, Ms Thirkill (the respondent's Regional Team Leader' sent an email to the RSMs, the internal sales team and others stating:

"Due to the social media posts…I have spoken with Lee Doyle and he has agreed that if any customers come on to us asking questions about [JB] *then we need to be honest with them. We must inform them* [JB] *had mental issues and after some time on sick leave he decided to leave Northgate…".*

126. Following a complaint by one of the email recipients, Ms Thirkill said that she:

"Just did what Lee told me to do ☹"

127. Ms Thirkill then sent an email stating:

"It has come to my attention that the email that I sent out this morning has a small error with a huge impact. Please can you delete this message immediately from your outlook files?

What I was supposed to say was…

[…]

We must NOT inform them that [JB] *had mental issues and that after some time on sick leave he decided to leave Northgate…".*

128. Mr Doyle denied instructing Ms Thirkill to send either email and said that he was on holiday at that time.

Allegation 1.11 - Third investigation meeting – 3rd March 2020

129. The claimant returned to work on 3 March 2020. Ms Blackburn asked her to attend the office at 8.30am for a return to work interview. Mr Doyle carried out that interview with the claimant. Immediately after this meeting, Mr Doyle told the claimant that he was holding a further investigation meeting with her.

130. The respondent had looked at the contents of the claimant's phone and laptop, which they had collected from her during her sickness absence. They found a private WhatsApp group conversation between the claimant and the other RSMs.

131. We find that it was unreasonable to arrange an investigation meeting with the claimant regarding the WhatsApp conversations on 3 March 2020. The key reasons for this finding are:

    131.1 the claimant had only just returned from two weeks' absence, relating to stress at work;

    131.2 this was a private WhatsApp group between the claimant and her RSM colleagues. The claimant and her colleagues envisaged that the contents of this conversation would remain private, albeit that they were communicating using the respondent's systems;

    131.3 none of the other RSMs were invited to an investigatory meeting regarding the WhatsApp group. We accept Mr Doyle's evidence that he did speak to some of the RSMs, however none of those discussions were formal. We note from the WhatsApp records that other RSMs had instigated discussions on various days and made derogatory comments, including:

        131.3.1 Mr Wallace stating: *"Julie bo-selector is just a fuckin idiot!"*;

        131.3.2 Mr Sharkey stating: *"Just spoke to Phil and told him to shove it up his arse!"*; and

        131.3.3 Mr Arnold stating: *"…the 96.6% accuracy is bullshit…Doesn't take a fucking genius to figure that out…"*.

        In addition, Mr Doyle himself noted during the investigation meeting that: *"Michael, you and Jamie are all heavily involved in this"*.

132. The notes of the disciplinary hearing stated that the outcome was that this matter would *"progress to disciplinary along with allegations of other investigation content".*

Respondent's restructure announcement – 13 March 2020

133. The respondent's sales dropped significantly during February 2020. The respondent announced on 12 March 2020 that they may need to make some redundancies as a result of a reduction in business related to an increase in their overheads, products being held at customer and the impact of the Covid-19 pandemic.

134. Both Mr McAssey and Mr Wallace were told that their employment would end as a result of this restructure. Both of them had less than two years' service at that time and the respondent regarded them as the two lowest performing RSMs. The respondent's spreadsheet of quotes and sales indicated that Mr Sharkey and Mr Arnold had provided the highest number of quotes during January and February 2020.By contrast, Mr Wallace had put very few CRM entries on the system during this period, although the CRM software had been installed on his laptop in early January 2020. Mr Doyle also emailed Mr McAssey on 12 March 2020, querying why he had only recorded one quote for February 2020 as at that date.

135. Mr Doyle phoned Mr McAssey on 13 March 2020 and told him that his employment would terminate. Mr Wallace's employment was terminated with one week's notice, ending on 30 March 2020. Mr Sharkey and Mr Arnold's employment with the respondent continued.

136. We accept Mr Doyle's evidence during cross-examination that:

    136.1 Mr Sharkey was regarded as a 'super user' of the CRM system and that his sales and quote figures were much higher than those of the other RSMs;

    136.2 Mr Arnold had only just started working for the respondent in January and the respondent did not expect him to perform at the same level as Mr Sharkey by that time;

    136.3 Mr Doyle did not speak to Mr Wallace or Mr McAssey about their lack of CRM entries because neither had two years' service, they were at the 'top of the list' for the March restructure and he knew that they would be leaving the respondent's business shortly; and

    136.4 Mr Doyle regarded the claimant as being 'in the pot' for the restructure, although he did not tell her this at that time. He said in response to cross-examination that as at early March: *"We were already well down the process of trying to improve the claimant"*. Mr Doyle also said *"When we had to restructure the business and release others, at that point the claimant was so far into there that we put the claimant in there to release for gross misconduct"*.

Covid-19 pandemic – respondent's working arrangements

137. Mr Lee emailed all of the RSMs on 13 March 2020 regarding arrangements during the coronavirus pandemic. He told all RSMs to cancel their customer visits and conduct sales by phone instead. His email stated that Mr Sharkey and the claimant should work from the office.

138. The claimant was unhappy with these arrangements and said that she did not wish to work in the office with other people. She said that she had a cough and a sore throat but that she did not need any time off work. Ms Blackburn exchanged emails

with the claimant, as a result of which she told the claimant to self-isolate for 7 days before returning to work in the office.

Allegation 1.12 - Claimant's grievances

139. The claimant's solicitors submitted two grievances with a covering letter on her behalf dated 18 March 2020, which the respondent received on 20 March 2020. These grievances were against Mr Doyle and Ms Blackburn respectively and included matters that were part of the subject and procedure of the three disciplinary investigation meetings.

140. We accept Mr Lee's oral evidence that he discussed the claimant's grievances with his solicitors and that they advised the respondent should continue with the claimant's disciplinary without hearing the grievance first. Mr Lee asked Ms Blackburn to respond to the claimant's solicitor on this basis, which she did on 25 March 2020 (after the claimant's dismissal) stating:

"We have had our legal team review the grievances that have been filed against Lee Doyle and I and we have informed that there is no substance in the content. More so, because the majority of the content has been addressed at a meeting that your client attended."

Allegation 1.12 - Arrangements for claimant's disciplinary hearing

141. Ms Blackburn wrote to the claimant on Friday 20 March 2020, inviting her to the re-arranged disciplinary hearing on Monday 23 March 2020 with Ms Thomson. The contents of this disciplinary invite were different to those of 20 February 2020 disciplinary letter. They referred to a different 'investigation 3' (i.e. the investigation meeting on 3 March 2020) and included two documents relating to that investigation.

142. The allegations and fourteen documents relating to the 'investigation 3' referred to in the 20 February 2020 disciplinary invitation were not included in the 20 March 2020 disciplinary invitation. However, Ms Thomson confirmed during her evidence that she had seen the 20 February 2020 disciplinary invitation and read the documents attached to that invitation.

143. The claimant emailed Ms Blackburn on Sunday 22 March 2020, asking for a postponement. She raised the issue of her grievances and stated that she had not been supported on her return to work on 3 March 2020, following her absence for work-related stress. The claimant also said that: *"I will be contacting my GP surgery tomorrow as I do not feel fit to work under this stress"*. The claimant then emailed Ms Blackburn and others at 9.45am on 23 March 2020, stating that she had obtained a GP's note for work-related stress and that she would send a copy shortly. A copy of the GP's note was included in the hearing file, stating that the claimant would not be fit for work for two weeks.

144. Ms Thomson was ready to start the claimant's disciplinary hearing at 10am on 23 March 2020. Ms Thomson gave evidence during the Tribunal panel's questions

that Ms Blackburn informed her that the claimant would not be attending the hearing. Ms Thomson stated that she considered the claimant's request for a postponement. She decided to refuse that request because the claimant had not forwarded her GP's note before the start of the hearing. Ms Thomson did not arrange Ms Blackburn to contact the claimant to request a copy of her GP's note. She said that she felt that the claimant was attempting to 'frustrate' the process and that it was appropriate to continue with the disciplinary hearing in the claimant's absence.

145. The disciplinary outcome letter dated 24 March 2020 (prepared by Ms Blackburn) stated: *"As you had not provided a valid reason not to attend the hearing, we had no option but to continue in your absence."*

Allegation 1.13 - Claimant's dismissal letter

146. Ms Thomson said that she had read through the documents attached to the disciplinary invitation letters, including Ms Blackburn's notes of the three investigation meetings. Ms Thomson stated that she did not discuss the disciplinary allegations, the documents or the meeting notes with anyone before the hearing.

147. Ms Thomson said that she waited for around half an hour for the claimant to attend the hearing. When Ms Blackburn confirmed that the claimant was not going to attend, Ms Thomson said that she considered each of the allegations in turn and provided a summary of her findings to Ms Blackburn. Ms Thomson confirmed that her summary findings were included at the end of the disciplinary outcome letter.

148. Ms Blackburn signed the outcome letter on behalf of the respondent and the letter concluded: *"your actions amount to gross misconduct and the decision has been made to dismiss you from the Company"*. However, the respondent stated that they would pay the claimant in lieu of her two week notice period.

149. We appreciate that the claimant did not attend the disciplinary hearing. However, we note that Ms Thomson failed to consider several issues which would have warranted further investigation from the documents that she had reviewed. These included:

149.1 **First Investigation meeting notes –** Ms Blackburn's notes of the first investigation meeting state that the next steps would be to arrange for repayment of the credit card monies from the claimant. They do not mention any disciplinary action to be taken against the claimant. However, Ms Thomson still considered the issues of the phone calls between the claimant and Ms Wilby and her credit card spending at a colleague's wedding as potential gross misconduct allegations. In addition, Ms Thomson failed to make any enquiry as to whether the respondent had made arrangements for the claimant to repay those monies.

149.2 **Performance improvement plan –** Ms Thomson did not consider the claimant's performance improvement plan and she did not check whether

the claimant had received any review meetings or warnings as part of that plan. Instead, she stated in her findings that the claimant *"continued to ignore any previous warnings given"*, when no such warnings had been issued to the claimant;

149.3 **Second investigation meeting notes –** the respondent's own notes of this meeting demonstrate that Mr Doyle had conducted the meeting in an inappropriate manner, as set out in our findings of fact in relation to that meeting. Ms Thomson did not consider whether Mr Doyle's conduct of the meeting impacted on the claimant's responses to the allegations.

149.4 20 February 2020 disciplinary invitation – the original disciplinary invitation referred to the findings of an investigation that had not in fact taken place, which the respondent stated gave rise to three allegations of gross misconduct and one allegation of serious misconduct. However, Ms Thomson failed to enquire as to why this issue had arisen and considered the documents relating to these allegations (including documents relating to the claimant's holiday bookings), even those documents did not form part of the invitation letter to the 23 March disciplinary hearing.

149.5 Third investigation meeting notes – all of the RSMs participated in the WhatsApp exchanges and some of the language used by the other RSMs were as bad, if not worse, than that used by the claimant (as noted by Mr Doyle during the investigation meeting). However, only the claimant was invited to a disciplinary investigation meeting.

149.6 Claimant's grievances – Ms Thomson was aware that the claimant had raised grievances against both Mr Doyle and Ms Blackburn, but she did not consider the issues raised by the claimant under either of those grievances when holding the disciplinary hearing.

150. In any event, we find that Ms Thomson's conclusion of gross misconduct was not substantiated on the basis of the evidence available to her regarding the disciplinary allegations against the claimant. We note that:

150.1 Ms Thomson failed to state in the outcome letter which allegations she believed amounted to gross misconduct by the claimant. Ms Thomson sought to elaborate on her findings in her witness statement, but did not disclose the notes that she states she took at the time of considering her decision to dismiss the claimant.

150.2 The five allegations of gross misconduct set out in the disciplinary invitation letter could not have amounted to gross misconduct:

150.2.1 Mr Doyle had concluded that no further action would be taken regarding the allegations regarding the phone calls with Ms Wilby (regarding JB's health) and the claimant's credit card spending at the end of the first investigation meeting. He reiterated that the respondent had 'drawn a line under' these allegations in his email

of 23 December 2019. We also note that Ms Thirkill sent an email to several employees of the respondent in February 2020 regarding JB's health (as referred to in our findings earlier in this Judgment);

150.2.2 Ms Thomson changed the nature of the allegations regarding CRM data from: (a) failing to complete CRM entries following customer visits; to (b) stating that the claimant was 'not to be trusted';

150.2.3 Ms Thomson failed to take any account of the participation of the claimant's colleagues in the WhatsApp Group discussions. Ms Thomson said that the claimant was 'continually forcing your opinion on to others' and that she had 'single headedly guided the rest of the team into negativity and anger'. This allegation was never put to the claimant who, at the highest, had been accused of participating in inappropriate discussions with colleagues.

150.3 In addition, the comments that Ms Thomson made in her summary findings also went beyond the allegations that the respondent had made against the claimant in the invitation to her disciplinary hearing. For example:

150.3.1 Ms Thomson found that the claimant refused to carry out tasks if there was 'no personal gain' or she viewed the task as 'pointless'. Ms Thomson did not link this comment to any specific allegation of misconduct;

150.3.2 Ms Thomson said that the claimant had not reached any 'targets set' or achieved 'KPIs', despite the fact that there had been no reviews of the claimant's performance. In any event, we find that these would be matters of capability, rather than conduct;

150.3.3 Ms Thomson concluded that there as 'no valid reason' for the claimant's absences on 12 and 14 February 2020, stating: "*You took it upon yourself to take time off of work because you wanted to".* Ms Thomson failed to take account of the fact that the claimant had informed Mr Doyle and Ms Blackburn that she needed time off on 12 February 2020 to prepare for her original disciplinary hearing, to which she was invited on two days' notice. She also failed to consider the emails between the claimant and Ms Blackburn regarding arrangements for the disciplinary hearing and the claimant's subsequent sickness absence due to work related stress for two weeks from 17 February 2020.

151. We note that Ms Thomson did not conclude in the outcome letter whether any allegations of serious misconduct were upheld. Ms Thomson sought to expand on the outcome letter findings in her witness statement. However, we note that in relation to the allegations of serious misconduct:

151.1 the first two allegations (re MD Thomson visit and the wedding mileage) had been dealt with by the first investigation on 20 December 2019, which concluded that no disciplinary action would be taken against the claimant;

151.2 the claimant had not been provided with any warnings regarding her use of the MileIQ application, which was only introduced in January 2020 by the respondent. She had also been provided with a performance improvement plan in December 2019 (which related to matters including the CRM system) but no reviews of that plan took place and no warnings were provided to the claimant;

151.3 Mr Doyle accepted during cross-examination that the claimant's emails to Ms Blackburn were 'not unreasonable' (referred to in investigation 3);

151.4 the claimant had not been accused of 'falsifying' documents during the investigations – she had instead been accused of failing to complete her CRM entries;

151.5 the claimant's absences on 12 and 14 February 2020 have to be viewed in the context that she had emailed Mr Doyle to say she would be absent to enable her to prepare for the disciplinary hearing (which was originally arranged for 13 February 2020) and against the backdrop of the claimant's subsequent absence from 17 February 2020 due to work-related stress.

152. We have concluded that Ms Thomson was influenced significantly by Mr Doyle in reaching her decision to dismiss the claimant for gross misconduct and also relied on advice from Ms Blackburn. The key reasons for our finding include:

152.1 Ms Thomson sought advice from Ms Blackburn on the decision not to postpone the disciplinary hearing. Ms Blackburn had already stated that the hearing would proceed if the claimant did not attend, as evidenced by her earlier correspondence with the claimant and the claimant's solicitor. Ms Thomson did not take any steps to ascertain her belief that the claimant was trying to 'frustrate' the process and disregarded the claimant's email stating that she had obtained a GP's note regarding her absence from the disciplinary hearing;

152.2 Ms Thomson and Ms Blackburn both reported into Mr Doyle, in his role as Managing Director of Solutions Lighting. Ms Blackburn made several handwritten comments on the investigation documents, such as '*sending P&C* [private and confidential] *documentation to Alan in work time when specifically told not to"*. Ms Thomson failed to question Mr Doyle's approach to the claimant's investigation meetings and ignored the points raised in the claimant's grievance regarding Mr Doyle. Ms Thomson also ignored the issues raised in the claimant's grievance regarding Ms Blackburn;

152.3 Ms Thomson did not carry out any additional investigations into the disciplinary allegations against the claimant, even where there were

obvious issues that should have been considered on the documents that were before her;

152.4 Ms Thomson provided generic findings of 'gross misconduct' and failed to consider each specific disciplinary allegation in detail. This suggests that she had reached a decision before considering the allegations that were in fact being raised against the claimant; and

152.5 Ms Thomson did not enquire as to any disciplinary action taken against the claimant's colleagues, including:

152.5.1 Ms Wilby (in relation to the first investigation);

152.5.2 the other RSMs (in relation to each of the three investigations. For example, Mr Wallace had spent around £1600 on an unauthorised credit card transaction (including for a weekend away with his partner) for which he had been invited to a disciplinary hearing which did not proceed.

Claimant's appeal

153. The claimant appealed against the decision to dismiss her in an email sent at 5.40pm on 30 March 2020 to Ms Blackburn. She stated that:

"You have failed to follow ACAS and your own procedures regarding disciplinary investigative meetings, any notes and evidence.

You have failed to hear my grievances against yourself and Lee Doyle.

You have failed to look after my wellbeing during this time, in your need to rush to this decision which you are aware has made me very ill."

154. Mr Lee responded less than an hour later by email, stating:

"I see no grounds or evidence for your appeal…indeed up to the point of your dismissal we were still waiting for your information and responses to the points already raised at previously held meetings dating back as far as December last year, these are summarised on your dismissal letter.

Unless you can get me these responses and the evidence that would support an appeal 5pm tomorrow, I cannot consider or take this email further."

155. The claimant then sent a longer email on 31 March 2020, stating:

"You have not listened to any evidence I put to you to defend myself.

Your investigations are floored [sic]*, again due process not being adhered to.*

You have accessed by private email and downloaded documents on a day I wasn't in possession of the laptop.

You didn't provide me with the below information."

156. Mr Lee did not respond until the claimant chased him on 7 April 2020. He then emailed the claimant, stating:

157. *"I was really hoping that you were going to respond specifically and with evidence to the points raised in your dismissal letter and indeed at the meetings that you have attended…*

Consequently, there are no grounds for an appeal.

We consider this matter closed."

158. We find that Mr Lee was not independent for the purposes of hearing an appeal. The key reasons for our finding include:

158.1 the respondent's disciplinary procedure specifically referred to a right of appeal. The claimant provided her appeal grounds to Mr Lee and he dismissed them without arranging a hearing;

158.2 Mr Lee had previously raised concerns regarding the claimant's performance, for example in an email of 8 January 2019 regarding a customer based in Morecambe. He was also adamant under cross-examination that he *"still didn't know what she did on 2nd and 3rd January to this day"*;

158.3 Mr Lee had previously decided not to hear the claimant's grievances relating to Mr Doyle and to Ms Blackburn;

158.4 we find that Mr Lee's belief that he could not hold an appeal hearing by alternative means during the Covid-19 pandemic, such as via Zoom (or similar videolink technology) or by telephone was not credible;

158.5 we note that Mr Lee had sought HR support from Ms Blackburn in relation to the claimant's appeal and remained unwilling to arrange an appeal hearing.

APPLICATION OF THE LAW TO THE FACTS

159. We have applied the law to our findings of facts as set out below.

ANNEX 1 – DIRECT SEX DISCRIMINATION ALLEGATIONS

Allegations 1.1 and 1.4

160. We have concluded that Mr Doyle did not make regular sexist comments and that he did not 'find fault' with everything that the claimant did during her employment.

Allegation 1.2

161. We have concluded that Mr Doyle did not 'ridicule' or 'berate' the claimant for her lack of knowledge regarding a call that she made to the internal sales team during the second week of November 2019.

Allegation 1.3

162. The claimant accepted during oral evidence that Mr Doyle did not prevent her from calling the sales team in the office for information.

Allegations 1.5 and 1.7

163. These allegations related to the respondent's customer, MD Thompson. The claimant was unable to recall any other examples to support this allegation. We concluded that Mr Doyle did not change his instructions and did not 'mislead' the claimant or 'set her up to fail'.

Allegation 1.6

164. We concluded that Mr Doyle had similar discussions regarding CRM entries with all of the RSMs, including by email, text and phone calls.

Allegations 1.8 and 1.9

165. We concluded that it was not unreasonable for Mr Doyle to call the claimant into a disciplinary investigation on 20 December 2019 without notice. We also concluded that Mr Doyle did not subject the claimant to "unreasonable and aggressive questioning" during that meeting.

166. We noted that Mr Doyle had considered the claimant's emails regarding the meeting, as evidenced by Mr Doyle's response on 23 December 2019.

Allegations 1.10 and 1.11

167. We concluded that the claimant was subject to unreasonable and aggressive questioning by Mr Doyle during the second investigation hearing on 10 February 2020. We also concluded that it was unreasonable for the respondent to invite the claimant to the third investigation hearing on 3 March 2020, immediately after her return to work interview (following two weeks' absence due to stress at work).

168. However, we have concluded that this was not due to the claimant's sex. We find that the reason for Mr Doyle's approach was that he felt frustrated at what he saw as the claimant's 'wilful disregard' of his instructions to complete CRM entries. We note that Mr Doyle had sent similar emails to Mr McAssey and Mr Wallace regarding their failures to complete CRM, but did not pursue matters with either of them under the disciplinary procedure because the respondent had already decided that their employment would be terminated as part of the respondent's March restructure.

Allegation 1.12

169. We found that Ms Thomson took the decision not to postpone the claimant's disciplinary hearing on 23 March 2020, having spoken with Ms Blackburn. We concluded that Mr Doyle was not involved in the decision to refuse the claimant's request to postpone her disciplinary hearing. Ms Blackburn advised Ms Thomson that the claimant had no valid reason for failing to attend the disciplinary hearing. She had previously informed the claimant that the disciplinary hearing would not

be postponed 'indefinitely', as set out in her earlier correspondence with the claimant and the claimant's solicitors.

Allegation 1.13

170. We found that Mr Doyle had a significant influence on Ms Thomson's decision to dismiss the claimant for the reasons set out in our findings of fact at paragraph 150 of our findings of fact.

171. We have concluded that Mr Doyle's view was that the claimant was failing to perform her duties properly, but that this view was not linked to the claimant's sex. The plans for the respondent's March restructure were in place by early March and were announced on 13 March 2020, around one week before the claimant received her final disciplinary hearing invitation.

172. Mr Doyle regarded two of the claimant's male colleagues, Mr Wallace and Mr McAssey, as two of the worst performers out of the RSMs and their employment was terminated as part of the respondent's March restructure. Both Mr Wallace and Mr McAssey had less than two years' service and Mr Doyle decided not to initiate disciplinary investigations into their conduct because they did not have sufficient service to claim unfair dismissal.

173. Mr Doyle's evidence was that as at early March: *"We were already well down the process of trying to improve the claimant".* Mr Doyle also said: *"When we had to restructure the business and release others, at that point the claimant was so far into there that we put the claimant in there to release for gross misconduct".* The reason why Mr Doyle wanted to dismiss the claimant was that he believed that she was deliberately failing to perform what he viewed as key tasks in the role, not because of her sex.

ANNEX 2 – HARASSMENT ALLEGATIONS

Unwanted conduct

174. We found that Mr Doyle made two comments, which contained words along the lines of:

    174.1 *"what they wouldn't do to her if it was their car"*; and

    174.2 *"he gets whatever he wanted after this"*.

175. However, we concluded that Mr Doyle did not say that: *"she would get a good seeing to"*. We also concluded that Mr Lee did not say: *"she can't be trusted with a car of her own"*.

176. We have concluded that the two comments made by Mr Doyle were unwanted conduct. We accept the claimant's evidence that she was offended by these comments, which is why she left the dinner early on that night.

If so, did it relate to the claimant's sex or was it of a sexual nature?

177. We find that Mr Doyle's two comments were potentially related to sex or of a sexual nature. We accept the claimant's evidence that the two comments made by Mr Doyle reflected stereotypical assumptions regarding 'women drivers', rather than regarding Mr Lee's wife's driving abilities as an individual.

178. ***Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?***

179. We found that Mr Doyle did not intend to violate the claimant's dignity or create the specified environment. Mr Doyle made these comments in the context of Mr Lee showing the group photos of the damage to his wife's car.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

180. We accept that the claimant was offended by the two comments that Mr Doyle made. We note that the claimant left the dinner before Mr Doyle and the other RSMs, at around the same time as Mr Lee.

181. We have considered the circumstances of the comments, including the following findings:

    181.1 there were seven people attending the dinner, including the claimant, Mr Doyle and Mr Lee. Mr Lee, Mr Wallace and Mr McAssey did not overhear the two comments made by Mr Doyle;

    181.2 the claimant left the dinner earlier than the other RSMs, but we accept Mr Wallace and Mr McAssey's evidence that she left at around the same time as Mr Lee. The other RSMs were staying at a local hotel and went there for drinks after the dinner. The claimant was not staying at the hotel and went home;

    181.3 the claimant did not complain that Mr Doyle had made any sexist comments until her grievance on 18 March 2020. The claimant did not refer to any specific comments by Mr Doyle in that grievance;

    181.4 the comment that the claimant states that Mr Sharkey made during that evening involved more ostensibly offensive language than Mr Doyle's two comments, however the claimant has not complained about Mr Sharkey's conduct that evening;

    181.5 we found that Mr Doyle did not make any other comments related to sex during the claimant's employment with the respondent.

182. We have concluded that Mr Doyle's two comments do not meet the threshold required for an act of harassment under the Equality Act 2010 because it was not reasonable for Mr Doyle's two comments to have the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or

offensive environment for the claimant. In reaching this decision, we took account of the factors set out above. We also took account of the caselaw set out in the section on 'Relevant Law' above, including:

182.1 Dhaliwal, in which the EAT stated that: *"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory…";* and

182.2 Weeks, in which the EAT stated that: *"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."*

UNFAIR DISMISSAL

183. We accept that the respondent dismissed the claimant due to alleged misconduct. However, we have found that the decision to dismiss the claimant was outside of the band of reasonable responses open to the respondent. In doing so, we have reminded ourselves that the Tribunal must not substitute its own decision for that of the employer and we have also considered the respondent's circumstances (including its size and administrative resources).

184. The key reasons why we have concluded that the respondent unfairly dismissed the claimant include:

184.1 did not have a reasonable belief that the claimant had committed gross misconduct because it failed to carry out as much investigation as was reasonable in the circumstances. In particular, the failings included failures to:

184.1.1 investigate the issues raised by the claimant during the investigation hearings, including in relation to the conduct of her colleagues who were involved in the matters alleged;

184.1.2 investigate the allegations raised in the claimant's grievances against Mr Doyle and Ms Blackburn, both of whom carried out the investigation into the claimant's disciplinary allegations and (in Ms Blackburn's case) were heavily involved in the decisions made regarding the arrangements for (and refusal to postpone) the claimant's disciplinary hearing; and

184.1.3 consider whether the allegations against the claimant were in fact of a level of severity that amounted to gross or serious misconduct;

184.2 failed to act in a procedurally fair manner, including:

184.2.1 resurrecting allegations relating to the first investigation which Mr Doyle had previously concluded were dealt with and that no further action was required (other than repayment of the credit card monies);

184.2.2 on 20 February 2020 inviting the claimant to a disciplinary hearing to consider three sets of allegations, the third set of which was reputed to have been subject to a disciplinary investigation which had not in fact taken place;

184.2.3 failing to consider the claimant's grievances before proceeding with the disciplinary hearing;

184.2.4 failing to appoint an independent disciplinary manager, for the reasons set out in paragraph 152 above;

184.2.5 failing to permit the claimant to bring a trade union representative to the disciplinary hearing;

184.2.6 failing to postpone the disciplinary hearing on 23 March 2020, after the claimant stated that she had obtained a GP's note for work-related stress;

184.2.7 failing to reach conclusions in relation to the specific disciplinary allegations put to the claimant;

184.2.8 failing to consider alternatives to dismissal, such as lesser disciplinary sanctions;

184.2.9 failing to consider whether the claimant's dismissal was consistent with the respondent's decision not to take any disciplinary action against other RSMs who were involved in similar conduct; and

184.2.10 failing to arrange for the claimant to have an appeal hearing with an independent appeal manager.

185. As a result, we have concluded that the claimant's dismissal was outside the range of reasonable responses and was unfair on both substantive and procedural grounds.

CONCLUSIONS

186. We have concluded that:

186.1 the claimant's complaint of unfair dismissal succeeds and is upheld;

186.2 the claimant's complaint of direct sex discrimination fails and is rejected;

186.3 the claimant's complaint of sexual harassment fails and is rejected; and

186.4 the claimant has received her full notice pay and car allowance. Her complaints of wrongful dismissal and of unauthorised deductions from wages are therefore dismissed upon withdrawal by the claimant.

187. The parties will receive notice of a remedies hearing in due course.

Employment Judge Deeley
Date: 19 February 2021

JUDGMENT SENT TO THE PARTIES ON

DATE: 23/02/2021

AND ENTERED IN THE REGISTER

DATE 24/02/2021

ANNEX 1 – DIRECT SEX DISCRIMINATION ALLEGATIONS

Date or time period	Individuals involved	Allegation	Comparator(s) – *NB the claimant also compares herself to a hypothetical comparator for each allegation*
1.1 October 2019-31 January 2020	Lee Doyle	Regular sexist comments by Lee Doyle such as that he was a 'tits and arse man' and that men were better than women at C's job (para 4, C statement) [14].	Chris Sharkey, Michael Wallace and Alan McAssey
1.2 2nd week of November 2019	Lee Doyle	Lee Doyle listened to C's phone calls and ridiculed and berated her for her lack of knowledge (para 5, C statement) [14].	Chris Sharkey, Michael Wallace and Alan McAssey
1.3 Mid November 2019 – 23 March 2020	Lee Doyle	Lee Doyle preventing C from calling the office for information (para 6-7, C statement) [14].	Chris Sharkey, Michael Wallace and Alan McAssey
1.4 November 2019-23 March 2020	Lee Doyle	Lee Doyle finding fault in everything that C did (para 8, C statement) [14].	-Chris Sharkey, Michael Wallace and Alan McAssey -Jamie from 2 January 2020
1.5 Late November 2019	Lee Doyle	Lee Doyle fixating on particular customers and contradicting his own instructions (para 9, C statement) [14].	Chris Sharkey, Michael Wallace and Alan McAssey
1.6 First week of December 2019	Lee Doyle	Scrutinised unreasonably in relation to CRM (para 12, C statement) [14].	Chris Sharkey, Michael Wallace and Alan McAssey
1.7 3-5 December 2019	Lee Doyle	Lee Doyle misleading C in relation to the requirements of a customer in order to set C up to fail (para 14, C statement) [15].	Chris Sharkey, Michael Wallace and Alan McAssey
1.8 20 December 2019	Lee Doyle	Being unreasonably called into to a disciplinary investigation meeting on 20 December 2019 and subjected to unreasonable and aggressive questioning (paras 16-18, C statement) [15].	Chris Sharkey, Michael Wallace and Alan McAssey

Date or time period	Individuals involved	Allegation	Comparator(s) – *NB the claimant also compares herself to a hypothetical comparator for each allegation*
1.9 23 December 2019	Lee Doyle	Lee Doyle refusing to look at relevant emails from C (para 22, C statement) [16].	Chris Sharkey, Michael Wallace and Alan McAssey
1.10 10 February 2020	Lee Doyle	Being told to attend the Respondent's offices and then called into a hearing on 10 February 2020 and subjected to unreasonable and aggressive questioning (paras 39-48, C statement) [17].	Chris Sharkey, Michael Wallace, Alan McAssey and Jamie
1.11 3 March 2020	Lee Doyle	Being unreasonably invited to an investigation hearing in relation to a private WhatsApp conversation between the Regional Sales Managers (para 64, C statement) [19].	Chris Sharkey, Michael Wallace, Alan McAssey and Jamie
1.12 22-23 March 2020	Lee Doyle	R not agreeing to postpone C's disciplinary hearing and consider her grievance (para 76, C statement) [19].	Chris Sharkey, Michael Wallace, Alan McAssey and Jamie
1.13 23 March 2020	Lee Doyle	Being dismissed/being dismissed for gross misconduct (para 77, C statement) [19].	Chris Sharkey, Michael Wallace, Alan McAssey and Jamie

ANNEX 2 – HARASSMENT ALLEGATIONS

Date	Individuals involved	Allegation
2.1 9 January 2020	Lee Doyle	"What they wouldn't do to her if it was their car?" "she would get a good seeing to". "He gets whatever he wanted after this". Was C subjected to sexist comments by Lee Doyle and Adrian Lee during a work dinner? (para 29, C statement) [16]?
2.2 9 January 2020	Adrian Lee	"She can't be trusted with a car of her own". Was C subjected to sexist comments by Lee Doyle and Adrian Lee during a work dinner? (para 29, C statement) [16]?