EMPLOYMENT TRIBUNALS

Claimant: Ms N Daoud (maiden name Boukhannouche)

Respondent: Bvlgari (UK) Ltd

Heard at: London Central Employment Tribunal

On: **26, 27, 28 , 29 November 2019 and 3 December 2019**
In chambers 4 December 2019 and 23 December 2020

Before: Employment Judge Quill; Ms H Edwards; Ms W Blake Ranken

Appearances
For the Claimant: In person
For the Respondent: Ms R Azib, counsel

RESERVED JUDGMENT

(1) The Claimant was unfairly dismissed by the Respondent.

(2) All of the complaints of harassment fail.

(3) All of the complaints of victimisation fail.

(4) The Respondent did not make unauthorised deductions from the Claimant's wages.

REASONS

Introduction

1. Firstly, Employment Judge Quill would like to apologise to both sides for the considerable delay in sending out this judgment, caused partially by the pandemic and partially by personal circumstances.

The Claims

2. Unfair dismissal; harassment related to race; victimisation; unauthorised deduction from wages.

The Issues

3. The issues, as identified at a preliminary hearing on 24 May 2019 were as listed below. However, the Respondent made clear that it was not seeking to argue that the dismissal fell within Section 98(2) of the Employment Rights Act 1996 and therefore we did not have to decide that. For ease of reference, the original numbering is retained.

<u>Unfair dismissal</u>

1. What was the reason for the Claimant's dismissal? In particular, was the Claimant dismissed because her behaviour at work had led to a serious and irreparable breakdown in the working relationship between her and the Respondent such that the Respondent lost trust and confidence in her?

2. Was the reason for the Claimant's dismissal a substantial reason of a kind such as justify the dismissal of an employee holding the position which the Claimant held?

~~3. If the answer to point 2 is no, did the reason for the dismissal fall within subsection 98(2) of the Employment Rights Act 1996?~~

4. If the answer to point~~s~~ 2 ~~or 3~~ is yes:

4.1. Was the dismissal fair or unfair in all the circumstances?

4.2. Was the decision within the band of reasonable responses which a reasonable employer could adopt?

<u>Harassment</u>

5. Did Nabeel Tariq engage in the following alleged unwanted conduct

5.1. Did Mr Tariq say to the Claimant that "*you don't have a management style and appearance to become a Deputy Store Manager*" on or around 6 July 2018?

5.2. Did Mr Tariq say to the Claimant that "*We do not talk English in that way*" on or around 3 July 2018?

5.3. Did Mr Tariq say to the Claimant:

5.3.1. On 4 July 2018, in response to the word "sacked", that "*This is an inappropriate word to use with your manager*"?

5.3.2. On 5 July 2018, in response the word "fun", that "*This is an inappropriate word to use with your manager*"?

5.4. Did Mr Tariq say, at last on three occasions, "*We don't cross arms when we talk to managers, this expresses that you are in an attacking position*" on 3, 4 and 6 July 2018?

5.5. On or around 3 & 4 July 2018:

5.5.1. Did the Claimant tell Mr Tariq that English was her third language, that she was still learning it and that she was not born in the UK?

5.5. 2. Did Mr Tariq say in response to the Claimant's comment at 5.5.1 that "*this is the problem*"?

5.6. On or around 5 July 2018 (and similarly on or around 26 July 2018), did Mr Tariq say if "*I receive an email from you going forward it will be a conversation sat down and documented*"?

5.7. On 8 July 2018:

5.7.1. Did Mr Tariq say to the Claimant "*go and look for it yourself*" in response to the Claimant asking him where the safe key was?

5.7.2. Did Mr Tariq, during a stock take give the Claimant a new list of accessories discrepancies to check and subsequently say to her "*I am not going to provide you with help and I am asking you to go and do it now, end of conversation*"?

6. If the Claimant establishes conduct referred in paragraph 5 above, was such conduct related to the protected characteristic of the Claimant's race? It is recorded that the Claimant identifies as North African.

7. If the conduct is found to be related to the protected characteristic of race, did it have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If it did not have that purpose, did it have that effect, taking into account:

7.1. the perception of the Claimant

7.2. The other circumstances of the case; and

7.3. Whether it is reasonable for the conduct have that effect?

<u>Victimisation</u>

8. Does the Tribunal have jurisdiction to hear the victimisation claims or are they out of time?

9. If necessary would it be just and equitable to apply a time limit in excess of 3 months?

10. Did the Claimant's email to Ms Santini of 4 August 2017 amount to a protected act pursuant section 27(2) of the Equality Act 2010?

11. If the of 4 August 2017 amounted to a protected act, did the Respondent subject the Claimant to any of the following detriments as a result of that act

11.1. Deciding not to promote the Claimant on 20 October 2017?

11.2. Deciding in December to allocate the Click &Collect orders task to the Claimant alone and to exclude the Claimant from earning commission for dealing with Click & Collect orders?

11.3. Deciding not to promote the Claimant in July 2018?

12. Did the Claimant raise a grievance on 7 August 2018 and was it a protected act?

13. The Respondent agrees that the raising of the grievance on 29 December 2017 was a protected act

14. Did the Claimant offer to be a witness on behalf of BYK in an investigation by the Respondent? If so, did that constitute a protected act?

15. If the acts referred to at paragraphs ~~13~~ 12 ~~and~~ to 14 above are found to be protected acts:

15.1. Did the Respondent fail to investigate the Claimant's grievance against Mr Tariq because she did a protected act?

15.2. Did the Respondent dismiss the Claimant because she did a protected act?

<u>Unlawful deduction of wages</u>

16. Was the Claimant entitled be paid in respect of overtime under her contract of employment?

17. If the answer to 16 is yes:

17.1. Did the Claimant work 13.5 hours of overtime prior to termination for which she did not receive the payment?

17.2. Further or alternatively was the Respondent permitted not to make such payments to the Claimant on the basis of a contractual provision? In particular, was the Respondent entitled to withhold such payments because (a) payments for overtime was at the Respondent's discretion and/or (b) any such payments for overtime would only be made at the end of the calendar year providing the employee was still employed by the Respondent at that time?

<u>Remedy</u>

18. Should any remedy awarded to the Claimant in respect of unfair dismissal be wholly or partially reduced because the dismissal would have occurred in any event regardless of any unfairness found (see *Polkey v AE Dayton Services Ltd [1988] AC344*)?

19. Should any remedy to the Claimant be reduced in total or in part because the Claimant wholly caused or contributed to her dismissal?

20. Has the Claimant acted reasonably to her losses?

The Hearing and the Evidence

4. There was a bundle of in excess of 800 pages.

5. There were 3 witnesses on behalf of the Claimant: herself, Mr Jose Felix Ubierna Garcia and Mr Michael Edward Hing (each of whom were former work colleagues of the Claimant.). We also took into account the signed statement from her husband, Mr Karim Daoud. Ms Stephanie Khalife did not attend, despite the Claimant being given permission to call her out of sequence.

6. There were 9 witnesses for the Respondent: Ms Federica Santini (Head of HR for the Respondent); Mr Nabeel Tariq (Store Manager); Mr Darren Lennon (Deputy Store Manager); Ms Paola Coltra (Finance and Administration Manager); Ms Ilaria D'Arco (Retail Executive Director); Marina Trezza (Director – Training, Development, Organisation); Mr Babis Velkopoulos (HR Specialist); Vincenzo Pujia (Europe Managing Director); Ivan Brisotto (Director of Compensation, Benefits and HR Budget). All of the Respondent's witnesses were cross-examined and answered questions from the tribunal. Ms Santini, Mr Tariq, Mr Lennon and Ms Coltra attended in person, and the other witnesses gave evidence by video link, with the permission of the tribunal and without objection from the Claimant.

The findings of fact

7. The Claimant commenced employment for the Respondent on 26 January 2015. Her job title was Sales Adviser and Sales Support.

8. The key terms of her employment agreement stated,

   8.1 In relation to overtime, "*you may be required to work overtime if the needs of the business demand it. Overtime is not paid, however, you will be entitled to time off in lieu for any time of half an hour or more that you work on any given day, which has been authorised by us in advance. For the avoidance of doubt, no overtime will be converted to time off in lieu unless we have previously authorised it.*"

   8.2 In relation to notice, the document stated that one month's notice of termination was required for an employee who had no more than 4 years continuous service.

9. During the Claimant's period of employment, she worked for the Respondent at a store which was based within a large department store, namely Selfridges. She reported (consecutively) to 4 store managers within that time (i.e., employees of the Respondent who were the manager of the Respondent's store inside Selfridges). These were: Mr Diego Grajera-Queseda (from start of employment until around August or September 2016); Ms Han Walsh (from around December 2016 to around December 2017); Mr Jayash Patel (from 8 January 2018 to 27 June 2018); Mr Nabeel Tariq (from 28 June 2018 until the end of employment).

10. The Claimant was on maternity leave from October 2016 to September 2017.

11. Ms Federica Santini commenced working for the Respondent in May 2016 as an HR (short for Human Resources) Specialist and later became Head of HR. From May 2018 onwards, she was formally appointed to a second, additional role, that of Retail Operations Manager. In November 2016, prior to formally taking on this additional role, she carried out some operational functions on behalf of the Respondent. She performed those functions with the Respondent's permission and consent.

12. Mr Vincenzo Pujia is a current employee of the Respondent and has worked the Respondent since 1998. Between December 2017 and March 2019. He was the Respondent's U.K. interim managing director. Ms Santini reported to Mr Pujia during this time. Mr Pujia holds Ms Santini in high regard and believes she is a valuable asset to the Respondent's UK operation.

13. The Respondent's appraisal period for employees runs from 1 January to 31 December. The Claimant's appraisal for the year 2015 was conducted in February 2016 by Mr Grajera-Queseda. The overall rating which was given to the Claimant was a C which meant "meets expectations". The appraisal record contains many comments which praised the Claimant's work over her first 11 months of employment (ie the period up to 31 December 2015). Some areas which required improvement were also noted (our emphasis added).

    13.1 For example, under the heading flexibility and innovation, the comment read "*Nesrine has been able to accommodate to the many changes the company has experienced in the last year. She is also in an excellent position to face the structural changes we are putting the unit through in 2016. Although she is reasonable and comfortable with diversity of opinion, **we would like to see more flexibility in her behaviour***."

    13.2 Under the heading judgement and commitment, for which the Claimant was given exceeds expectations, the comments were "*Nesrine is very driven and carries out her job and helps the team with theirs in a rational way. She is diligent and does not hesitate to go the extra mile in the completion of her tasks*."

    13.3 Under the heading teamwork the comments were, "*Although Nesrine is efficient and diligent, we have also noted that she **could act with excessive sharpness and be misunderstood, which in the past has led to conflict**. Nesrine is rational and works towards the achievement of goals at a unit level but will need to further develop the soft skills required to deal with difficult personalities that may have in the team. She has improved greatly in the past months and we will support her in achieving this goal as soon as possible*."

14. The appraisal document recorded that the employer and employee had agreed that the role might become more focused on admin in the future, but sales would still be part of the role.

15. The Claimant disagreed with some of the remarks. She thought her grade should be higher than C and stated that, in her opinion, she was assertive with other team members when necessary in order to meet deadlines set by the organisation.

16. The appraisal rating for any employee affects the bonus, which they might receive, because it produces a multiplier for the amount they might otherwise get. There are 5 potential appraisal grades A being the highest and E the lowest. For C, the multiplier is one. 80% of employees receive a C. For grades A and B multiplier exceeds one and for D and E. It is less than one (in fact, it is 0 for Grade E). In other words, employees have a significant interest in having an appraisal and in the graded outcome of the appraisal.

17. On 22 July 2016, before going on maternity leave, the Claimant sent an email to an HR officer, which was copied to Ms Santini and to the Respondent's then UK managing director, Vincent Reynes. This email contained the Claimant's job description and a list of tasks which the Claimant believed she was currently performing at that time.

    17.1 The Claimant specified that between 50% and 80% of her time was spent on admin tasks and the remaining 50% to 20% was spent on sales tasks on the shop floor, depending on how busy the shop floor was, and how much admin work there was to do.

    17.2 Her daily tasks included setting up the shop floor; assisting customers; checking and booking stock in the system; checking errors on the system made by staff and clearing them; dealing with finance team requests; issues with deadlines.

    17.3 Her weekly tasks included sending reports to head office finance department; weekly declaration to Selfridges; liaising with other branches and with Selfridges.

    17.4 Her monthly tasks included the monthly declaration; rebalancing stock between stores; dealing with buybacks.

    17.5 In addition, on a less regular basis. Her tasks included preparing and planning the stock-take; investigating the outcome of the stock-take and dealing with issues; and dealing with contractors access.

18. The purpose of the Claimant's email was to assist the Respondent to recruit maternity cover for the Claimant. While the Claimant was on maternity leave, her post was covered by 2 individuals, Matthew and Alessio (consecutively, not at the same time).

19. On 2 November 2016, the Claimant requested that her payslips be posted to her during maternity leave. Ms Santini replied, refusing, and stating that they would be available on the Claimant's return to work.

20. In January 2017, Ms Santini asked if the Claimant would like to come back from maternity leave sooner than expected on a part-time basis. The Claimant said "no" and she was not placed under any pressure to cut her maternity leave short.

21. The Claimant was not contacted for an appraisal, based on the months which she worked prior to going on maternity leave, for the year 2016. The Respondent did not arrange a meeting because the Claimant was not at work during the period in

which the appraisal process would usually take place (early 2017 in relation to the year ending 31 December 2016).

22. On 13 February 2017, the Claimant wrote to Ms Santini enquiring about her appraisal for the year 2016. She expressed the opinion that the other employees had all already had their 2016 appraisal conducted by Ms Santini. Ms Santini replied following day to suggest that the Claimant ought to liaise with the new store manager Han Walsh in relation to the 2016 review. Ms Santini went on to say that the Claimant would not have an appraisal for the year 2017, stating that this was because less than 6 months of the year would be left by the time the Claimant returned. (The Claimant had notified the Respondent that she would be back from maternity leave in September 2017, immediately taking 10 days leave, meaning that she would actually be back at work on 2 October 2017).

23. For the year 2017, the Claimant was at work for 3 months following her return from maternity leave (October, November, December). In relation to those 3 months, the Claimant eventually had a meeting with Ms Santini for appraisal purposes.

24. On 2 August 2017, Ms Santini wrote to the Claimant suggesting that the Selfridge's branch now required a single employee dedicated 100% to administration and therefore offering the Claimant a post of 100% client adviser (in other words, full-time on sales and with zero time spent on admin tasks).

25. The Claimant replied on 4 August 2017, to assert that she saw her role as mainly admin and as helping out on sales only when required. She said that more than 80% of her time, had been admin. She stated she did not accept the role of 100% client adviser. She said "*just for your information, based on UK employment law if my maternity cover is taken on in my role and I am offered an alternative. This is likely to be an unfair dismissal and or maternity discrimination*." The Claimant went on to state that if the store was expanding, then a Deputy Store Manager might be required, and she said she would like to take that post.

26. The same day, Ms Santini replied to state that the Claimant could have the store administrator position, if she wanted to have it. She explained that an employee named Silvia (Casalletti) would be covering the Supervisor role, and so the store administrator position would be 100% stock and admin and that "*Team management and things such rota etc*" would be dealt with by Han (Walsh) and Silvia (Casalletti). She stated that she thought a Deputy Store Manager post might become available in September, and she would let the Claimant know.

27. On 9 August 2017, Ms Santini informed the Claimant that a store administrator post was about to become available in Sloane Street. For that location, the Respondent required a store administrator who could reliably be left in charge of the store whenever the manager was off site. The Claimant declined this offer on 10 August 2017, asking to return to Selfridges and saying that she was interested in any Deputy Store Manager post.

28. A Deputy Store Manager position did in fact open up at the Respondent's Selfridges location. The Claimant was interviewed on 10 October 2017 by Ms Santini. Ms Santini did not recommend the Claimant to go through to the next stage. On 20 October 2017, Ms Santini informed the Claimant that she, Ms Santini,

believed that the Claimant was more suitable for a Supervisor role rather than a Deputy Store Manager role. A Supervisor role is one which is higher (in terms of salary and responsibilities) than that of Client Adviser, but is lower than that of Deputy Store Manager. However, as Ms Santini mentioned to the Claimant, the Respondent did not have any Supervisor posts in its structure in the UK.

29. Ms Santini selected 2 or 3 candidates to be interviewed by Mr Reynes for the Deputy Store Manager post at the Selfridges location and it was he, Mr Reynes, who made the final decision about who to appoint. An offer was made to one of these candidates. After some delay, that person declined the offer. The Respondent did not start the recruitment exercise again; instead, in January 2018, it made an offer to one of the other candidates previously interviewed by Mr Reynes. That candidate was Mr Darren Lennon. Mr Lennon commenced work for the Respondent on 27 April 2018. Mr Lennon had approximately 6 years of luxury retail management experience in London prior to this.

30. During the Claimant's absence on maternity leave, Ms Walsh had frequently sought the assistance of Ms Santini with operational matters including organising staff. That continued after the Claimant's return from maternity leave. For example, on 13 October 2017, Ms Santini took the decision that the Store Administrator should continue to be responsible for perfumes, spare parts and straps. This was a duty which had been performed by the employees who held the Store Administrator post as the Claimant's maternity cover. Other store employees had different specific responsibilities for different specific items.

31. On 7 November 2017, Ms Walsh sent an email reply to Mr Reynes, which was copied to Ms Santini. The subject line was "missing ring". The email described circumstances in which a ring had apparently gone missing. We were not told if the ring was ever found. The email mentioned the name of the employee who had been the last person known to have seen the ring and stated what he did with it on the Monday. The email mentioned that on the Tuesday the Claimant had not seen the ring. There is no hint in the email that Ms Walsh doubted the Claimant's version of events. The email described some background circumstances of the Monday and also mentioned the name of an employee who had recently left (though there did not appear to be a suggestion that that person had taken the ring).

32. The background to the email exchange between Ms Walsh and Mr Reynes was that another store had requested that the ring be transferred to them because they had a buyer for it. On 5 November 2017, Ms Walsh had written to the manager of that other store, in an email which appears to have been copied to all staff at both stores, and which stated:

"*Our deepest apology regarding the delay in transferring this ring. The problem is Nesrine, and the whole team have looked everywhere, and today continuing to look for the ring - unfortunately we can not find! We had respond back from bond after asking them to check the stock level for the ring. No success there neither. At this stage, I can only give you this feedback. We will off course, continue to search and investigate this matter. Hopefully We will have more positive feedback for you soon.*" (sic)

33. The Respondent had plans to open a pop-up store within Selfridges with effect from Saturday 2 December 2017. A pop-up is a temporary store space within Selfridge's, away from Bulgari's normal boutique, intended to push brand awareness and to highlight selected items. Ms Walsh received the stock for the pop up around 21 November 2017, and acknowledged the instruction that the products must not be put on display prior to 1 December.

34. The Claimant was invited to be in charge of the pop up, working alongside the store manager, for this pop-up by email from Ms Santini on the afternoon of Monday 27 November. The email suggested that the Claimant liaise with the store manager and the marketing team so that she would have all the information needed to make the pop-up a success.

35. On 5 December 2017, Han Walsh was due to make a presentation regarding the pop-up to personal shoppers and other Selfridges' staff. However, Ms Walsh called in sick. The Claimant had not been briefed in relation to the presentation and only found out about it, approximately 15 minutes before it was due to start. Therefore, the presentation was made by two other individuals (not employees of the Selfridges Bvlgari branch).

36. On 6 December 2017, the Claimant sent an email to Tim Johnson which suggested that she thought there were security risks due to the location of the pop-up and also that staff were having to work more than 6 hours without a break. The email was forwarded to Ms Santini.

37. On 6 December 2017, at 10pm, the Claimant sent feedback on the first 4 days of the pop-up to Ms Trotta, Head of Marketing and Communication. The email was copied to Ms Walsh and Ms Santini and others. The email was positive about the pop-up and said that it was doing well. As instructed, she also commented on clientele and stock. Furthermore, the Claimant made a suggestion that sales could be increased by rearranging staff. Ms Trotta replied to Ms Santini (only) by stating "*Ha ragione*." The translation is "she's right".

38. The email to Ms Trotta indicated that the Claimant regarded her role as more of an administrative one than as a seller. This view was consistent with the instructions which Ms Trotta had given to the Claimant by email on 1 December 2017.

39. Ms Trotta replied to the Claimant copying in Ms Walsh, Ms Santini and Mr Reynes (amongst others) stating, "*Dear Nesrine many thanks for useful feedback. We will definitely take your point into consideration. Thanks.*"

40. Ms Santini interpreted the Claimant's email to Ms Trotta as stating that the Claimant did not know how she was supposed to manage the pop-up and perform her administrative tasks. On 13 December 2017, Ms Santini sent an email to Claimant stating that an employee from a different branch was being brought in as permanent Supervisor of the pop-up boutique. The Claimant was told to focus on admin and shop floor. Ms Walsh had now departed and a store manager from a nearby store was providing temporary cover pending a permanent replacement.

41. Later, on 13 December 2017, Ms Santini emailed the Claimant to inform her that she would not be able to attend the Christmas party the following Monday. The

background was that one of Ms Santini's colleagues Babis Velkopoulos had sent out invitations and the Claimant had not said "yes" or "no" but had said "tentative". Although, Mr Velkopoulos had attempted to get clarification from the Claimant, she had not replied to him.

42. Ms Santini did not write to any other employee to state that they would not be coming to the Christmas party. No other employee had replied "tentative". There were some employees who had not been included by Mr Velkopoulos when he had sent the email invitation (because they became employees after the invitation had already been sent out) and some of those people did go to the event. There was no-one who had been sent the original invitation by Mr Velkopoulos, and who failed to reply "yes", but who then attended the event.

43. At the Selfridges location, the Respondent participates in Click & Collect. The method is that the customer places an order via the Selfridges' website and then attends the Respondent's Selfridges store in order to collect the item. At the Respondent's Bond Street store, the Click & Collect had been in place for some time, but operated slightly differently in that the order was placed via the Respondent's own website. Both of these arrangements had been in place for some time prior to December 2017. In each case the employee who processed the Click & Collect order received individual sales commission. The Respondent's Harrods store had not been operating Click & Collect previously but was now about to commence doing so. The arrangement was going to be more similar to the method used in Selfridges than at the Bond Street store. The planned commencement of the Harrods operation led to a review which involved head office in Rome.

    43.1 On 13 December 2017, it became apparent that head office in Rome had not been aware that staff were getting individual sales commission on Click & Collect. The view from head office was that - while such sales would count towards team-based commission – individual commission should not be awarded to the individual who processed the order.

    43.2 The decision, which was made by Ms Trotta, on 13 December 2017, was that from 2018 onwards individual sales commission would not be awarded in relation to Click & Collect sales for either Selfridges or Harrods, but Bond Street would be treated differently.

    43.3 This was not Ms Santini's decision and, indeed on 13 December, she argued against it (or at least sought to postpone it for Selfridges). On 20 December 2017, Ms Santini notified all staff at Harrods that the scheme was now live and that there would be no individual commission for it.

    43.4 On 22 December 2017, at 17:11, she notified all staff at the Respondent's Selfridges store that they would cease to get individual commission on Click & Collect from 2018. The email to Selfridge's specified that Click & Collect must be handled by the Store Administrator (and mentioned the Claimant by name) and by sales advisers only in the Claimant's absence. Ms Santini's email implied that the fact that the work should be done by the Store Administrator was as per previous guidelines; however, her witness statement

clarified that she was referring to general commission guidelines rather than a formal written policy.

43.5 At Harrods, when the Click & Collect was initially put in place, there was no formal arrangement that the Store Administrator was responsible for all Click & Collect work.

44. On 22 December 2017, at 16:40, the Claimant emailed Ms Santini to say that she believed she was entitled to a bonus for that year. She mentioned the fact that Ms Santini's previous email (14 Feb 2017) had said that she was not entitled to an appraisal for 2017. Ms Santini replied at 17:01 to say that the Claimant was entitled to a bonus and that it would be pro rata given that the Claimant had worked for 3 months of the year.

45. Ms Santini sent her emails of 22 December 2017 while she was on annual leave. It was not unusual for Ms Santini to respond to work emails during time off. It follows from the timings just mentioned that the email to staff at the Selfridges store about Click & Collect was sent about 30 minutes after the Claimant requested a 2017 bonus, and about 10 minutes after Ms Santini's reply to the Claimant. However, the reason for Ms Santini's 17:11 email was to supply the information to the staff that she had already intended to supply to them. The contents of her 17:11 email were not influenced by the Claimant's 16:40 email.

46. On 29 December 17, the Claimant submitted a formal grievance by email sent to Isabelle Castellini and Marina Trezza in Rome. The email alleged discrimination and unfair treatment from Ms Santini. It asserted this had commenced in October 2016, when the Claimant went on maternity leave, and it claimed that it continued to the date of the email. The Claimant alleged that there had been discrimination during her maternity leave in that she had been refused commission and had been refused a request to have her payslips posted to her. In the email, she also alleged that there had been comparisons drawn in relation to the Claimant's ability to lift boxes compared to the male employees who had acted as maternity cover. The email asserted (based on a WhatsApp exchange which the Claimant had had with Han Walsh) that Ms Santini had asked for qualitative feedback in relation to other employees, but not the Claimant. The email suggested that the removal of commission for Click & Collect had come 10 minutes after the Claimant had queried her entitlement to an appraisal.

47. The email was forwarded to Ms Santini who supplied her comments to Ivan Brisotto on 2 January 2018. Mr Brisotto was one of Ms Santini's line managers and is the Respondent's Director of Compensation, Benefits and HR budgets, based in Rome. In her 2 January 2018 email:

47.1 Ms Santini apologised for the fact that the matter had been brought to Mr Brisotto's attention.

47.2 Ms Santini stated that she had made a mistake (in her 14 February 2017 email to the Claimant) by stating - incorrectly - that the Claimant was not entitled to bonus. She said she would rectify that.

47.3 Ms Santini denied the allegations of discrimination, providing detailed accounts of her version of events in relation to each matter. Within her numbered point 7, she wrote (italics as per original).

> "I'm also puzzled to hear that Han Walsh would have had such informal discussion with Nesrine. I have an email from Han Walsh that clearly states that, in an episode of a missing ring, *Nesrine is the problem* (quote). On that occasion, I prompted Han Walsh to have a more thorough investigation. As such allegations needed to be supported with clear evidences."

48. This last comment was a reference to the email of 5 November 2017 to a fellow store manager (and copied to all staff at Selfridge's and the other store) which is quoted in full above. Ms Santini stated to the tribunal that she stands by the comment just quoted in her email to Mr Brisotto.

49. Marina Trezza (Director of Training, Development, Organisation and based in Rome) was appointed to deal with the grievance on behalf of the Respondent. She emailed the Claimant on 8 January 2018 to say so, and to provide a copy of the grievance procedure and some details of the way in which the grievance would be conducted, including informing the Claimant of her right to be accompanied to the meeting. Since Ms Trezza was based in Rome the meeting took place via a video telephone call on 29 January 2018. Mr Velkopoulos also attended the meeting. There was also a note taker who produced detailed typed notes of the meeting and those typed notes were provided to us in the hearing bundle. The Claimant received a copy of the notes and accepted the accuracy.

50. Ms Trezza had a telephone discussion with Ms Santini on 9 February 2018. The notes were in the bundle and Ms Santini commented on them by email on 14 February 2018, agreeing them save for a slight clarification in relation to commission.

50.1 The only questions asked to Ms Santini were in relation to Click & Collect commission (which Ms Santini confirmed had ceased at Selfridges with effect from 1 January 2018 as a result of the discussions with head office, which had taken place around 13 December 2017), and in relation to payslips (which Ms Santini confirmed could potentially be sent by post in accordance with UK law; but stated that she had made a decision not to do so due to problems with the post) and whether the Claimant had been given feedback in relation to her unsuccessful Deputy Store Manager application other than the 20 October 2017 email (in relation to which Ms Santini confirmed there had been no other feedback, but stated that the email itself had contained all the necessary information).

51. By an exchange of emails dated 8 March 2018, and 9 March 2018, Ms Trezza requested and received some further information from Ms Santini.

51.1 Ms Trezza pointed out that the Claimant had alleged that Ms Santini and asked Han Walsh for feedback about other employees for the year 2017, but had not asked about the Claimant's performance in the 3 months which she had worked at the end of 2017. Ms Trezza pointed out that the Claimant was

alleging this was evidence that Ms Santini was not intending to pay the Claimant any bonus. Ms Santini's reply was that 3 months was not sufficient time to assess any employee's individual performance, but that it had always been Ms Santini's intention to rate the Claimant as a C and she stated that was in line with what had been done for other people.

51.2 Ms Trezza asked whether there had been scope for Selfridges to have had higher performance and Ms Santini said that she believed that there had been, but the Selfridges outlet had not been as successful as the Respondent's other UK stores.

51.3 Ms Trezza asked if the Claimant had received commission for November 2016 and December 2016. While not answering directly Ms Santini stated that the Respondent's policy had been followed and that the policy was that an absence for maternity leave, marriage leave, illness, injuries, et cetera shall be calculated as if the salesperson were present in the store if the period of absence does not exceed 15 working days.

51.4 Ms Trezza asked if Ms Santini had made the alleged comments to Ms Han Walsh, stating that "*I don't like this girl because she knows too much*" and "*Nesrine is on maternity and we hope she won't come back*", and had informed Ms Walsh that the Claimant would not get the role of Deputy Store Manager.

51.5 Ms Santini's reply was "*I would really like to ask for a recording of these conversations. As for the third sentence, I really struggle to see the rationality of it. As I reached out to Nesrine whilst she was still on maternity to ask her if she would consider coming back earlier from maternity…*"

51.6 In a later email the same day, Ms Santini expressly denied making any of the comments "*to Han or anyone in Nesrine's team*".

52. By letter dated 15 March 2018, Ms Trezza gave the Claimant a detailed outcome of the grievance. She stated, "*having considered all of the evidence available to me, I found no element of discrimination or unfair treatment by Federica in any of the raised points.*"

52.1 In relation to the lack of feedback about the Claimant from Ms Walsh, Ms Trezza decided that there had been no deliberate intention by Ms Santini to fail to obtain such feedback. Ms Trezza decided that any feedback would have made no difference to the rating of C, which had been given. Ms Trezza acknowledged that Ms Santini had initially made a mistake when she said that there would be no appraisal for the Claimant for 2017, but she was satisfied that it had been a genuine mistake which Ms Santini had corrected. Ms Trezza stated that she believed that the Claimant should not have raised the matter as a grievance.

52.2 In relation to commission for Click & Collect orders, Ms Trezza stated that the decision had not been made by Ms Santini and that the timing of the announcement by Ms Santini was not connected in any way to the Claimant's previous email to Ms Santini.

52.3 In relation to the Deputy Store Manager application, Ms Trezza was satisfied that this had been handled correctly and without any discrimination or unfair treatment.

52.4 The allegation that Ms Santini had been attempting to force the Claimant out of Selfridge's was rejected.

52.5 Ms Trezza decided in relation to the pop-up that the allocation of this responsibility to the Claimant in the first place had been a development opportunity which could have assisted the Claimant's career development (as opposed to an extra burden). She also decided that the fact that it had subsequently been removed from the Claimant was a fair and reasonable decision, and was primarily based on the fact that Ms Walsh had left the business which meant that the Claimant had additional work and responsibilities because of that, which meant that it was more appropriate to allocate the pop-up responsibility to somebody else.

52.6 In relation to 2016 commission, Ms Trezza said that if the Claimant had not been paid the correct commission on individual sales for 2016, then, that was not discrimination, but was an error. She made no finding, as to whether there had been an error or not. In other words, she made no finding, as to whether any commission was due to the Claimant.

52.7 In relation to pool commissions, Ms Trezza decided that the Claimant had received the correct amount and because her maternity leave exceeded 15 days, she was not entitled to pool commissions for the period of absence.

52.8 The argument that the failure to send payslips by post to the Claimant was discriminatory was rejected.

52.9 In relation to job roles and the suggestions of which posts the Claimant might have following her return from maternity leave the allegations of less favourable treatment were rejected. It was accepted that the Claimant had undertaken some management tasks for the previous store manager (Diego Grajera-Quesada), but that it was not considered practicable for the Claimant to continue to do those tasks in the future as there was to be a dedicated store administrator role with Han Walsh as store manager and Silvia as Supervisor.

52.10 In relation to Ms Santini, communicating directly with the Claimant (as opposed to via the store manager) that complaint was rejected.

52.11 In relation to extra tasks allocated to the Claimant, Ms Trezza decided that this was appropriate and was in line with what store administrators at other stores had been asked to do, in order to free up client advisers to be able to concentrate on sales tasks.

52.12 In relation to the specific comments that Ms Santini was alleged to have made to Han Walsh, Ms Trezza decided that there was insufficient evidence that these statements had ever been made and noted that Ms Walsh did not leave the business on good terms and that therefore her recollection of events may be coloured by dissatisfaction with the business and Ms Santini.

52.13 Ms Trezza said that she believed that the Claimant was having privileges that other sales administrators did not have such as fixed hours with no late shifts and with weekends off.

52.14 The Claimant was notified of her right to appeal.

53. On 21 March 2018, the Claimant sent her appeal letter to Mr Pujia. The Claimant alleged that other people had had maternity leave prior to her during Ms Santini's tenure and she therefore alleged that Ms Santini did in fact know the process. She also asserted that Ms Santini had only agreed to do the appraisal after the Claimant had challenged Ms Santini about it. She also asserted that it was unfair to her that Ms Santini had neither taken any feedback from Ms Walsh nor brought any paperwork to the grievance meeting in order to assess the Claimant individually, as opposed to just based on team performance. Amongst other things, she disputed the reasons for not offering her the Deputy Store Manager job and noted that - as of March 2018 - there was still no Deputy Store Manager in place.

54. Mr Pujia investigated the Claimant's grievance appeal, and this included meeting the Claimant on 18 April 2018, and Ms Santini on 14 May 2018 and Ms Trezza on 18 May 2018. He gave the outcome by letter dated 6 June 2018. He did not uphold the appeal. His reasons included that:

54.1 Ms Santini had not been the HR manager when the other employees mentioned had returned from maternity leave, and Ms Santini had not been aware of the practice regarding appraisals for maternity leave returnees.

54.2 He believed that the C rating for the Claimant's appraisal for 2017 was appropriate and that the decision for Ms Santini to conduct the appraisal meeting was appropriate given that Ms Walsh had left the business.

54.3 He was satisfied that the decision in relation to click & collect commission had been made by Rome and not by Ms Santini.

54.4 He rejected the Claimant's complaints in relation to the job offers that have been made to her during maternity leave and the decision not to appoint her as Deputy Store Manager and the decisions made in relation to the pop up.

54.5 In relation to communications, Mr Pujia rejected the argument that Ms Santini's means of communicating had unfairly targeted the Claimant and said, "*I am aware that Federica has a direct style of communicating with employees (not just with you) and I do not see any evidence that this was unfairly targeted at you)*".

55. His letter stated his genuine opinions. He did regard Ms Santini as having a direct style, and he did not believe that she had treated the Claimant differently.

56. On 16 March 2018, the Claimant wrote to human resources to say that she had not had her appraisal outcome email, and she stated that she thought this was "discriminative". Ms Santini replied to say that the Claimant needed to meet the current store manager, Mr Patel, to define her objectives and once that had been done, the email would be generated. Ms Santini also said that other employees in

the company also had yet to complete the process and that the deadline was 31 March 2018.

57. Mr Patel agreed the Claimant's objectives and forwarded them to human resources, on 19 March 2018. These included having responsibility for back office, inventory, managing deliveries incoming and outgoing in a timely and accurate manner, managing stocking consignments and being in charge of supplies for the boutique, including water, office consumables, point of sale rolls.

58. In 2018, Ms Ilaria D'arco joined the UK operation on a part-time basis, reporting to Mr Pujia.

59. On 14 May 2018, the Claimant sent an email to all the staff at the Respondent's Selfridges' outlet, highlighting what she said was unpleasant behaviour, namely empty handbag boxes having been left in the Claimant's work location for her to dispose of.

60. In June 2018, Mr Patel was deemed to have failed his probation and was not confirmed in post as store manager at the Respondent's Selfridges store. He was offered a Deputy Store Manager post elsewhere which he declined. On 28 June 2018, Mr Tariq commenced employment as store manager at Selfridge's.

61. On 28 June 2018, Mr Tariq was briefly introduced to his new colleagues, including the Claimant. There was no detailed discussion with the Claimant on that date. The first time that Mr Tariq and the Claimant both worked together was 2 July 2018.

62. On 28 June, the Claimant emailed Mr Lennon (who had started work as Deputy in April) with a copy to Mr Tariq to ask for advice on how to deal with the delivery of nine big boxes. Mr Lennon replied to say that he would discuss with Mr Tariq. Having done so, on 2 July 2018, Mr Lennon advised the Claimant to start moving the smaller boxes and Mr Tariq would provide support in due course.

63. On 3 July 2018, the Claimant and Mr Tariq had some conversations. The Claimant reported to her husband that evening that Mr Tariq had criticised her speech and body language that day. The Claimant alleges that the specific words used by Mr Tariq were "*we don't talk English that way*". Mr Tariq denied using those words. [He was not specifically challenged by the Claimant on his denial, although that is not the basis for the finding we make]. Our finding is that the Claimant's recollection of the exact words used is incorrect, and that Mr Tariq made a comment that the Claimant should improve her communication skills, but he made no specific reference to talking "English".

64. On 27 June, just before leaving, Mr Patel had emailed the staff at Selfridges about their areas of responsibilities. In the email, he stated that Mr Lennon (and another employee, Jessica) would be responsible for Click & Collect, sales discrepancies and customer service issues. The Claimant forwarded this email to Mr Tariq on 4 July 2018. Notwithstanding the email of 27 June sent by Mr Patel, Mr Tariq believed that Click & Collect should be the Claimant's responsibility. This was because his experience elsewhere (at retailers other than the Respondent) was that it would be a duty for the (equivalent of) store administrator rather than for

sales staff. Mr Tariq believed that the Click & Collect duties had been done by Claimant in the past and that she should perform the task in the future.

65. On 4 July 2018, the Claimant emailed Mr Tariq to ask for support with a delivery which had been received the previous day. In particular, the Claimant asked for help climbing the ladder because the floor was not even and she expressed the view that she could not do it by herself without support.

65.1 Later that day, the Claimant and Mr Tariq had a discussion. The Claimant and Mr Tariq had a meeting in the stockroom and Mr Lennon was also present. Amongst other things, stated at the meeting, the Claimant was asked to contact either Mr Tariq or Mr Lennon when starting her shift in order to discuss what needed to be done that day. Mr Tariq said that he wanted to move to discussing work-related tasks in person rather than by email. He also said that he wanted the Claimant to be mindful of body language and tone when interacting with team members and management. At the meeting, Mr Tariq formed the view that the Claimant had a negative view of the company. When recollecting the 4 July meeting some weeks later (in discussion with Ms Coltra on 28 September 2019) his recollection was that she used the word “hate”.

65.2 During the meeting, the Claimant stated that previous managers had been sacked in the recent past. Mr Tariq said that this was an inappropriate remark. Mr Tariq’s recollection is that the Claimant had gone on to add words to the effect of “how long do you think you will last”. Neither the Claimant nor Mr Lennon recall that being said and it is possible that Mr Tariq is recalling what he thought was the implication, rather than something expressly stated; however, we do not find that this is a crucial matter to resolve. His reason for stating that the word “sacked” was inappropriate was that he thought it a rude word to use to describe the circumstances of his predecessors’ leaving.

65.3 During the meeting, the Claimant stated that English was not her first language. Mr Tariq did not reply (as alleged by Claimant) “*this is the problem*”. This is not a remark mentioned either in Claimant’s husband’s statement, or the Claimant’s grievance letter or in the grievance interview with Ms Coltra.

65.4 That evening he emailed Ms Santini, with a copy to Mr Lennon, with the subject line, “FYI-Click & Collect process”. In his email, he asserted that an area which needed to be addressed immediately was the administration and operations of the boutique. He stated that he did not believe that it was operating as efficiently and was not as well-organised as it could be. He stated that he had "*approved with Nesrine to suspend her responsibility of C&C and for the team and Darren to take care of the process for one month only until 4 August*". He said that during this time, it will give him and the Claimant the opportunity to spend time "*reorganising all of our operational/admin functions, stockroom standards. Once this is done we will reinstate the responsibility to Nesrine*.”

65.5 He also sent an email to the Claimant recording the contents of their discussions earlier that day. The Claimant replied to his email, approximately 14 minutes after it was sent. She said "*thank you so much for having this meeting with you today and am really looking forward to working with you and having your support.*"

66. On several occasions in July, Mr Tariq made the Claimant aware that he did not think that she should use email to contact him if they were both in the building. (At this point the Claimant's office was one floor below the shop floor). These occasions included 4 July and 5 July 2018. He did not say on either of those dates that there might be a disciplinary warning issued.

67. Our finding is that on 5 July 2018, the word "fun" did not crop up in conversation between Mr Tariq and the Claimant, and it follows that he did not tell her that she was wrong to use that word on that date. Our finding is that what the Claimant probably has in mind is that on 26 July, she said that she was not sending emails to him for "fun" and he replied by saying that she was being rude and failing to understand the point of his objections to the use of emails.

68. Mr Tariq did have discussions with the Claimant about body language in general, and about crossing arms in particular. His opinion (based on his training about retail techniques) was that body language can make a difference between appearing welcoming and appearing hostile. He does not recall using the exact words "*in an attacking position*" to the Claimant. Our finding, on the balance of probabilities, is that he did not use the exact expression "*in an attacking position*" and we find that it is more likely that he said something to the effect that crossed arms created a poor impression. In any event, Mr Tariq did tell the Claimant that he wanted her to be mindful of body language when interacting with management, and he suggested to her that she should not cross arms when doing so.

69. On 5 July 2018, Mr Tariq did not say to the Claimant: "*if I receive an email from you going forward it will be a conversation sat down and documented*".

70. On Sunday 8 July 2018, there was a stock take. This involved checking which items the Respondent actually had in stock (by physically counting them) and comparing to what was supposed to be in stock (by comparing to records) and noting any discrepancies/issues and seeking to resolve such issues.

    70.1 The Claimant attended work before 8am. She attempted to charge a taxi to the Respondent because she believed that this was in line with the Respondent's policy for paying fares for working unsociable hours (ie starting early on a Sunday). The payment was declined by Mr Lennon.

    70.2 This day the Claimant worked for 13.5 hours. This was overtime as Sunday was not her regular day. It was also compulsory over time because she had been asked by the Respondent to come in to do the stock-take that day.

    70.3 On that day, the Claimant asked Mr Tariq if he knew whether a safe key was, and he suggested that she should find it herself. Mr Tariq had not hidden the key, or deliberately taken any steps to make it difficult for the Claimant to find. At the time that the Claimant asked him the question, he did not immediately know where the key was, and he did not think that he should stop what he was doing and start looking for the key. He thought that if the Claimant looked around, and spoke to colleagues, she would be able to find the key without his involvement.

70.4 During the day, after the employees had completed the counting part of the task, the Claimant was given a list of issues relating to jewellery stock to check. As she was part way through checking those issues in relation to jewellery, Mr Tariq allocated her a different list of issues to check; the second list was in relation to accessories. The Claimant objected on the basis that she had been working on jewellery and someone else might be better placed to do the accessories. Mr Tariq informed her that he had made a decision and that she should do as he asked. It is more likely than not that he uttered the exact phrase alleged by the Claimant "*end of conversation*"; however, in any event, both the Claimant and Mr Tariq agree that she objected to the new task and he insisted that she do it.

71. On 2 July 2018, Mr Velkopoulos notified staff that there was an opportunity for Deputy Store Manager at Sloane Street. On 5 July 2018, the Claimant emailed him to say that she was interested and supplied her CV. Mr Velkopoulos acknowledged receipt the same day and told her that in first instance there would be an interview with him. Mr Velkopoulos told the Claimant to inform Mr Tariq and she did so.

72. In early July (the Claimant says 6 July and Mr Tariq says 8 July; however, the exact does not matter), Mr Tariq spoke to Claimant about her application for Deputy Store Manager and said that he did not think she had the right skill set at that time. He suggested that she needed to develop a more open communication style and to improve her body language if she was to be appointed as DSM. He did not refer to her physical appearance.

73. Mr Tariq's had formed an opinion of the Claimant quickly and he did think that she was not suitable for the Deputy Store Manager post. This was his own opinion, and that he had not been influenced by Ms Santini.

74. The interview for Deputy Store Manager at Sloane Street was scheduled for Tuesday, 10 July 2018. The Claimant was due to commence annual leave the following day. An interview went ahead and was conducted by Mr Velkopoulos acting alone. The person in charge of deciding who would be appointed to the post was Sandra Kleefus. Following discussions between Ms Kleefus and Mr Velkopoulos it was decided that Ms Kleefus would not interview the Claimant. The Claimant was notified by email dated 31 August 2018 that somebody else had been selected. The successful candidate had previous experience within luxury retail and had been accepted onto the Harrods Management Programme. She held a Masters degree and had been Assistant Sales Manager within the Harrods concession. The announcement was made to staff on 3 September 2018.

75. The Respondent had an employee "BYK".

75.1 On 10 July 2018, BYK was given an invitation to attend a meeting with Mr Tariq and Ms Santini. BYK was told by Ms Santini that it was a formal meeting. BYK replied to say that she believed she was within her rights to bring somebody else to the meeting. She said that she would like to bring the Claimant to the meeting as a "witness". Although BYK used the word "witness" in her email to Ms Santini, we are satisfied - from the entirety of what is written in the email, and from what the Claimant told us - that BYK was seeking to

have the Claimant accompany her to the meeting rather than to give evidence. BYK referred to her right to bring either a member of staff or a member of union to a formal meeting as per the Respondent's handbook. Ms Santini replied to state that BYK would not be allowed to bring any companion and Ms Santini asserted that this was because it was an investigation meeting, rather than a disciplinary meeting.

75.2 We were provided with a copy of notes that were taken in relation to the meeting with BYK. The notes were provided to us via the Claimant but the Respondent accepted that they were an actual copy of notes which the Respondent had made during the meeting. According to the notes, there was a suggestion that BYK might have committed misconduct and that was the reason for holding the meeting. During the meeting BYK made some complaints about how Mr Tariq had (according to BYK) treated her. BYK also stated that she might raise a formal grievance against Mr Tariq. The notes do not record any allegation (express or implied) that Mr Tariq or the Respondent or anybody else was potentially in breach of the Equality Act 2010.

75.3 The Claimant told us that if she had been permitted to participate then she believes she would have been able to give evidence about what she says was Mr Tariq's poor behaviour. However, the Claimant did not suggest to the tribunal panel that she herself had intended to raise an allegation that Mr Tariq had breached the Equality Act had she attended the BYK meeting on 10 July.

75.4 There was no evidence that the Claimant had told Mr Tariq or Ms Santini what she would have said had she been in attendance at the meeting.

75.5 A further meeting appears to have taken place on 13 July 2018 between Ms Santini and BYK. We were not provided with any minutes of that meeting, or of any invitation letter sent to BYK about it.

75.6 A dismissal letter dated 13 July 2018 was issued to BYK. The dismissal letter stated that BYK's performance and conduct fell below the required standard. There were several bullet points including a “number of episodes/issues with other members of the team”; “high level of absence” and “failing to meet sales targets”. It was also stated that she had failed to carry out “the lawful and reasonable instructions” of the store manager; based on the interview notes, this seems to relate to some failure to, or reluctance to, go to a pop up store.

75.7 It was alleged that she had said on 11 July 2018 that she was not happy at work.

76. On 18 July 2018, all of the UK staff were notified that there was a new position for a store administrator in the Respondent’s Selfridges store. For some time, Ms Santini had believed that a second store administrator for that branch was necessary due to the increase in volume of work. Ms Santini had been attempting to get approval for a second store administrator for several months. The advertisement was for a second store administrator and not for someone to replace the Claimant; the Respondent intended to increase the number of workers doing the store administrator role.

77. The Claimant was absent on annual leave and rest days, from 11 July 2018 to 23 July 2018. She returned to work on 24 July 2018. On her return, Mr Tariq informed her that he had moved her office from being one floor down to being on the same floor as the shop floor. He gave the Claimant a list of pending tasks for her to do. Various tasks were allocated to the Claimant which had not been done by anybody else during her holiday absence.

78. In the course of going through her list of tasks, the Claimant discovered that a defective bracelet which should not have been on sale had - in fact - been sold during her absence. She brought the matter to Mr Tariq's attention, and suggested that the store should take steps to retrieve the defective item. Mr Tariq informed the Claimant that it was his decision not hers. We do not accept that the encounter left her feeling scared and stressed, but the Claimant did hold a strong and genuine opinion that Mr Tariq’s stance was wrong.

79. Following the Claimant's shift, on 24 July, Mr Tariq sent emails to her with additional tasks for her to complete. On 25 July 2018, in response to a request from head office, Mr Tariq asked the Claimant to deal with a report of discrepancies. The email trail in relation to the request dated back to April 2018. The email trail contained further requests approximately every 2 weeks. The 11 July 2018 request was addressed to Darren and Jessica, and the 25 July emails were to Nabeel and Darren.

80. The Claimant replied to Mr Tariq the following morning (26 July at 8:37). She said she was happy to perform the task but stated that she had a large number of other tasks to perform and finalise before the end of the month which she itemised. She said that in the past all discrepancies at the Selfridges outlet had been dealt with by previous management without her involvement. She finished her email by stating "*therefore I am in desperate need of your help and support to minimise those discrepancies and meet the deadlines*".

81. On receipt of this email, Mr Tariq went to see the Claimant in order to speak to her in person about it. The Claimant started recording the conversation without telling Mr Tariq that she was doing so, and without asking his permission, and without his noticing that she had done so. The Claimant's evidence to us, which we accept, was that this was the only recording she made of any of her conversations with any of the Respondent's employees.

82. The audio recording was played to the tribunal and we also had a transcript of it. We were mindful of course that the Claimant knew that she was being recorded and Mr Tariq did not, and that the Claimant knew that Mr Tariq was unaware that he was being recorded. Each party invited us to find that the conversation demonstrated some level of unreasonableness by the other. In fact, we found that there was nothing particularly remarkable about the conversation.

    82.1 Neither party seemed out of control or overly emotional and there were no indications that either party felt intimidated by the other.

    82.2 Mr Tariq was pushing the Claimant to be specific about exactly what tasks she believed that she had to do and how long each was likely to take. These were not unreasonable questions, given the email which the Claimant had just sent.

The Claimant was not refusing to perform tasks which Mr Tariq had allocated to her, but she was asserting that she believed that the tasks had been organised differently in the past to the way that Mr Tariq was suggesting. In particular, she indicated that different people rather than the Claimant had done those tasks in the past, and she claimed she did not know exactly how long each task would take her to do by herself.

82.3 The Claimant did not argue against the deadlines which Mr Tariq was suggesting.

82.4 At one point Mr Tariq appeared to form the view that the Claimant was suggesting that she would just do one task at a time, but that is not what she said on this recording (which she knew was being made and he did not).

82.5 Mr Tariq suggested that the Claimant was asking for a lot of help. During this conversation, Mr Tariq and the Claimant did not specifically discuss the fact that the Respondent was seeking to recruit a second administrator or that that might reduce the Claimant's workload in the future.

82.6 Mr Tariq said that he had helped a lot already. He said that if there were further "*emails from you like this …*" (referring to the one of 26 July at 8:37am) *"… going forward, it will be a conversation sat down and documented because I have asked you three times not to send me these emails. Are we clear?*"

82.7 The reason he said "sat down and documented" is that Mr Tariq had in mind that his experience in the retail industry was that a manager will instruct an employee to do something three times. If the employee fails to comply with the instruction after the third time, then there is a documented meeting which would be put in the employee's human resources file.

82.8 He informed the Claimant that she should speak to him rather than hit send on an email and this email should not have been sent. She replied that she was not sending emails for fun. He said that she was being rude, and her comment about not doing it for fun was uncalled for, and added "*End of story, let's move forward*".

83. Having worked on Sunday 8 July 2018, the Claimant asked, by email dated 26 July 2018, to have Friday 3 August as a day off as time in lieu. Having checked with human resources, Mr Tariq replied the same day, and he stated that the Claimant would not be allowed to have time off in lieu for the whole day. He gave various options, one of which was to take 1/2 day as time off in lieu and work 1/2 day.

84. On 27 July 2018, the Claimant became ill at work. She went to hospital with one of her colleagues. The colleague reported to Mr Velkopoulos that the situation was not urgent.

84.1 The Claimant provided a sick note dated 31 July 2018 to her employer to cover the period 30 July to 31 August 2018. It stated that she was not fit for work and the note did not suggest that there were adjustments which would enable her to return to work more quickly. The reason given was "stress and anxiety at work".

84.2 A further sicknote dated 29 August 2018 to cover the period up to 30 September 2018, was also provided the Respondent. This document contained the same information.

85. On 31 July 2018, Mr Tariq sent an email. He addressed it to Mr Velkopoulos and commenced it "*According to the sick note that we have received from our administrator – It states that her sickness is related to 'stress and anxiety at work*'". In the email, amongst other things, Mr Tariq stated:

> *I can also confirm that she only returned to work on Tuesday the 24th of July, and only worked 3 shifts with us before the incident on Friday. Within such a short period of time we were actually busy with setting up the accessories hall so allowed our admin to carry out her own workload and work according to her own preference without any interference.*
>
> *I am not a doctor but her symptoms on Friday are not in line with the reasons stated for her sickness on the sick note from the doctor.*

86. Mr Tariq informed the tribunal that he was not casting doubt on the genuineness of the Claimant's illness. Rather he stated that he is familiar with the symptoms of a panic attack, having experienced them himself and he believed that the Claimant was actually more ill than her GP's note indicated. We found this explanation to be implausible. His email was seeking to cast doubt on either the Claimant's illness and/or on the fact that it was work-related.

87. It was not clear from the documents which we received who else Mr Tariq had copied in. He did copy it to Ms D'Arco because he wanted to discuss arrangements for covering the Claimant's absence. Ms D'Arco's reply the same day (31 July), agreed to discuss the matter with him the next day, and copied in Mr Velkopoulos, Mr Lennon, Ms Santini and Mr Pujia.

88. Mr Velkopoulos replied on 1 August 2018, copying in the same individuals and stating "*Thank you very much for your thorough update with regard to Nesrine's incident and her condition. It is very good that you have clarified what were the working conditions during Nesrine's return after holidays*."

89. By email dated 7 August 2018, the Claimant contacted Ms Santini and Mr Velkopoulos attaching a document entitled "formal letter of grievance - bullying and harassment".

89.1 The letter stated that the Claimant's opinion was that Mr Tariq's conduct was unwanted, uninvited and unwelcome. She alleged that his behaviour to her was, in her words, "discriminative". She said that she had experienced less favourable treatment from him.

89.2 She reported that on her second day of meeting him (2 July 2018), he had been critical of her leaving her feeling targeted and discouraged.

89.3 She said that on 3 July, he had accused her of not being a team player and that he had criticised her on her English when she was trying to explain herself.

89.4 She said that on 4 July and 5 July, he had had further discussions with her, and she regarded those as threatening. She claimed that (on 5 July), he had said that he would put a “red flag” on her if she sent another email like the one she had sent that day.

89.5 She alleged that on 6 July, he had asked to speak to her about the Deputy Store Manager application, and then had stated that she lacked the skills and needed to be much more positive.

89.6 The Claimant, complained about the events of the stock-take day on 8 July 2018, (in relation to the safe key, and giving her a new list of discrepancies when she was halfway through the previous one).

89.7 She asserted that on her return from leave - on 24 July - Mr Tariq had overloaded her with tasks and kept checking on her and pressurising her and asking her why she was taking so long to do things. She said that on 25 July, he had given her a list of things to do by the end of the month (so 4 days). She also referred to the conversation of 26 July 2018, without making any mention of the tape-recording.

89.8 She alleged that on 27 July, she had been feeling very stressed when Mr Tariq had asked her to cover the shop floor for (she alleged) one hour.

89.9 The letter alleged that the that Mr Tariq had caused the Claimant's health to deteriorate and that she had lost her appetite and was having sleepless nights. She said she did not have “trust or confidence” in Mr Tariq and did not want to work there anymore because of his “bullying and harassing behaviour”.

89.10 She said that she had requested a meeting with Mr Tariq to discuss the matter, but he had ignored the request.

89.11 She stated that she was considering legal action if the problem could not be resolved internally. She said that she wanted the letter to be treated as a formal grievance.

90. The email was acknowledged on 8 August 2018 by Mr Velkopoulos and he informed her that he would deal with it on his return from annual leave which was due to be 28 August 2018. The person appointed to deal with the grievance was Paola Coltra, Finance and Administration Manager. She contacted the Claimant on 7 September 2018 to arrange a meeting to take place on 18 September 2018.

91. On 10 September 2018, an announcement was made that Rita Colaprico was starting work as Bond Street’s store administrator and that she was “future Selfridges Store Administrator”. This was not intended as a replacement for the Claimant, but as an additional employee in the role (part-time) as administrator for the Selfridges branch.

92. The meeting with Ms Coltra went ahead on 18 September 2018 and the Claimant was accompanied. Mr Velkopoulos attended and took notes which, when typed were approximately 9 pages. During the meeting, Ms Coltra asked the Claimant various questions about the incidents stated in her 7 August grievance. At the end of the meeting, Ms Coltra asked the Claimant what she was seeking and if there

was anything else which the Claimant wanted to say, or any documents she wanted to submit.

93. After the meeting Mr Velkopoulos, sent the notes to the Claimant on 21 September, giving her the opportunity to comment and/or to submit further documents. They exchanged emails between then and 1 October 2018, at which point the notes were considered finalised. Based on the meeting notes, the Claimant was asked directly why she thought Mr Tariq was being hostile and why she thought he was discriminating against her. In neither answer did she refer to race or any other protected characteristic. Furthermore, she did not do so when asked if she had anything to add, or in response to any of the questions asked. Her representative made a small number of interventions, none of which were to mention race or any other protected characteristic. In fact, the thrust of the Claimant's complaint did not seem to be that Mr Tariq was himself motivated to treat her badly, but that, in fact, he had been influenced by Ms Santini's opinion of the Claimant.

94. On 28 September, Ms Coltra interviewed each of Mr Tariq and Mr Lennon. She was satisfied with the answers which Mr Tariq gave to her.

95. On 2 October 2018, Ms Coltra sent the grievance outcome letter to the Claimant's work email address. Ms Coltra did not uphold the grievance.

    95.1 She found that there was no evidence that Mr Tariq had treated the Claimant inappropriately, or that Ms Santini had asked him to make the Claimant's life difficult.

    95.2 She found that the Claimant had used a direct style of communication and had expressed negative views about her employer and that these things had led Mr Tariq to regard the Claimant as uncooperative.

    95.3 She said that she would recommend that Mr Tariq review the Claimant's workload, given the Claimant's comments that it was too high. She rejected the complaint that it had been unreasonable, on 27 July, to ask the Claimant to cover the shopfloor, in the absence of Mr Tariq and Mr Lennon.

    95.4 The outcome letter stated that Ms Coltra regarded the Claimant as having been intimidating and as having refused to follow Mr Tariq's "*lawful and reasonable instructions as your manager*".

    95.5 It said that the Claimant had not been communicating with colleagues respectfully and that she had not been exhibiting the levels of professionalism required, including in her attitude towards Bvlgari.

    95.6 The letter said: "*You should reconsider your way of communicating with your colleagues and that you adopt a more professional and polite attitude at work in the future.*" (sic)

96. On 28 September, the Claimant's doctor confirmed that the Claimant was fit to return to work. She did so on Monday 1 October 2018. The doctor's letter did not say that the Claimant needed any adjustments. Before she returned, she sent an email which requested a half day as time off in lieu on 5 October 2018, mentioning that this was her son's birthday. She had some entitlement, taking what she was

owed having worked 8 July. Mr Lennon declined this on the basis that he was going to be on annual leave and because the October rota was already finalised

97. In the week of the Claimant's return to work, starting Monday 1 October, the new additional administrator, Ms Colaprico worked one day in the Selfridges store, on 1 October itself. Mr Lennon did not work that week due to his annual leave. It follows that Mr Lennon's assertions, as per his written statement to the tribunal, about the Claimant's behaviour following her return to work, are not based on anything that he saw or heard himself. The same applies to anything which he said to Ms D'Arco or anybody else about that week.

98. After the Claimant had returned to work, Mr Tariq sent 3 emails to Mr Velkopoulos:

    98.1 On 1 October 2018 at 7:06pm. He itemised things that he said had happened that day and summarised: "*With all the communications – her tone of voice, body language, and attitude, is very aggressive. I do not feel I can communicate with her ...*" adding "*I think it might be worthwhile you having a chat to set the expectations on ensuring she remains professional*"

    98.2 On 2 October 2018, at 8.41pm, he sent an email which started "*Just to note the continued issues with conduct*", and also referred to some things that he said he had asked the Claimant to do that day which she had refused, or been reluctant, to do.

    98.3 On 4 October 2018, at 10.02pm, he sent an email with the subject heading "*regarding nesrin's attitude and behaviour at work*" (sic). It is an email which, when printed, is two pages of A4. It stated, amongst other things

        98.3.1 Near the beginning: "*Having not seen any improvement but a further deterioration in behaviours and attitude I am sending below a recap of issues for your consideration to review.*"

        98.3.2 Near the end: "*Therefore the trust and relationship is beyond repairable*"

99. Our finding is that the last of these emails was sent after the decision to dismiss the Claimant had already been made. The decision to dismiss the Claimant was made on 4 October, but significantly earlier than 10.02pm UK time (which was just after 11pm in Italy).

    99.1 The three decision makers were Mr Pujia, Mr Brisotto and Ms Santini. Discussions about dismissing the Claimant took place over several weeks. In other words, the discussions started before the Claimant returned from sick leave. No minutes or emails were provided to us.

    99.2 Mr Pujia wanted Mr Tariq to attempt to manage the Claimant after she returned to work, and only to dismiss her if that failed. When he was told that there had been no improvement, he authorised dismissal, without asking what, specifically, had been done to seek to improve the situation.

    99.3 Mr Pujia and Mr Brisotto each relied on Ms Santini to guide them in relation to UK employment law. Neither of them knew what specific procedures would be or should be followed.

99.4 Mr Pujia relied on Ms Santini for all his information about the situation. Mr Brisotto also discussed matters directly with Mr Tariq on at least one occasion.

99.5 Mr Pujia stated that he also relied on information from Ms D'Arco in order to make the decision to dismiss. Ms D'Arco states that she was not involved in the decision. On balance, we prefer Ms D'Arco's account and we believe that Mr Pujia is probably thinking about the interview which Ms D'Arco conducted with him after the dismissal, as part of the appeal process.

99.6 On 4 October 2018, because of their respective opinions about the Claimant's behaviour, and their belief that it had not improved following her return after sickness absence, Mr Pujia agreed to Mr Brisotto's and Ms Santini's recommendation to terminate the Claimant's employment.

99.7 Ms Santini made the decision that the Respondent would dismiss based solely on the decision that she, Mr Brisotto and Mr Pujia had reached and that there would be no prior hearing or procedure. Ms Santini spoke to Mr Velkopoulos and instructed him to meet the Claimant the following day to inform her.

100. On 5 October 2018, the Claimant was called to a meeting which started at 9.40am that day. She was not told in advance what the meeting was to be about. Mr Velkopoulos and Mr Tariq conducted the meeting. Mr Velkopoulos asked the Claimant to listen to what they had to say and said that she could speak only after they had said everything that they had to say. He informed her that her employment was terminated with immediate effect, with a payment in lieu of notice. He gave the following reasons:

100.1 Breakdown in the working relationship, beyond repair

100.2 Claimant unhappy working there and hates the company

100.3 Disobeyed clear and direct orders from manager

100.4 Disruptive and not cooperative in the workplace

100.5 Respondent does not trust her to work professionally and to follow instructions

100.6 Respondent not able to tolerate her behaviour any further

101. Mr Velkopoulos then asked Mr Tariq to list "*examples of incidents that show the relationship has broken down*". He did so, and these were:

101.1 Refusing to follow management instructions, refusing to accept a delivery, refusing to collect paper from stockroom

101.2 Refusing to make notes during Click & Collect training

101.3 Before sick leave, being resistant to working on shop floor

101.4 Refusing to do Click & Collect

101.5 Referred to deputy manager as inexperienced, thereby undermining him and stating that she hated the company and the HR team

102. The Claimant asked which person had made the decision and Mr Velkopoulos refused to answer that point. The Claimant asserted that she ought to have been given notification of the meeting, and Mr Velkopoulos told her that was incorrect, as it was not, he said, a grievance or disciplinary meeting.

103. A dismissal letter signed by Ms Santini was sent the same day. It said the termination of employment was because the Claimant's "*behaviour at work has led to a serious and irreparable breakdown in the working relationship between yourself and the Company such that the Company has lost trust and confidence in you*". It cited similar incidents to those mentioned by Mr Tariq and added: *"Your behaviour at work has led to the Company no longer trusting you to work professionally and to follow lawful and reasonable instructions from your manager"*.

104. The letter told the Claimant that she could appeal. The Claimant did, in fact, appeal against both the dismissal (by letter dated 11 October) and against the October grievance outcome decision (by letter dated 8 October 2018). Ms D'Arco was to hear both appeals and, on 11 October 2018, invited the Claimant to a meeting on 18 October, informing her that she could be accompanied. At the Claimant's request the meeting was postponed to 29 October 2018 and took place on that day. The Claimant was accompanied by a union representative. Ms D'Arco was accompanied by Mr Velkopoulos.

105. During the meeting, the Claimant's rep asked for details of the reasons that the Claimant had been dismissed and about who had made allegations against her ad what investigation had been done. The Claimant was told that it was Mr Tariq who had raised matters, but Mr Velkopoulos declined to answer the questions about investigation process. Ms D'Arco said she would look into that. The rep also wanted to know who had taken the decision to dismiss, and Mr Velkopoulos asserted that it was the company, not an individual, and declined to name the people involved in the decision.

106. As part of her decision-making, Ms D'Arco interviewed:

106.1 Mr Pujia, Mr Brisotto and Ms Santini about the dismissal

106.2 Ms Coltra and Tim Johnson (the only person suggested by the Claimant), about the grievance outcome and

106.3 Mr Lennon, Mr Tariq and Mr Velkopoulos about both the dismissal and the grievance.

107. As per the interviews with Ms D'Arco:

107.1 Mr Pujia, believed that the background to the dismissal was that there had been several occasions when the Claimant's behaviour was not within guidelines. He recalled that he had been told several times over a period of 4 months that he needed to take a decision in relation to the Claimant's behaviour. Ms D'Arco read examples from the termination letter, and Mr Pujia said that he agreed that the examples showed that the Claimant was

uncooperative. He said that he did not think it relevant whether the Claimant had said (or whether she denied saying) that she hated Bvlgari. He also said that he thought that a meeting with the Claimant to allow her to comment on the issues before making a decision would have made no difference to the decision.

107.2 Mr Brisotto stated that the dismissal was because the Claimant's behaviour was not compatible with the environment that she worked in. He also believed that a pre-dismissal hearing would have made no difference to the outcome. Ms D'Arco read examples from the termination letter, and Mr Brisotto had no comments.

107.3 Ms Santini stated that she was always involved in dismissals, but was not the driver. She believed that the decision was because of a breakdown in the employment relationship. She thought a pre-dismissal meeting with the Claimant would have made no difference to the outcome.

108. By two letters dated 30 November 2018, both appeals were rejected. In relation to dismissal, the letter noted that although no disciplinary procedure had taken place, that would have made no difference to the outcome. It stated that the Respondent had been entitled to conclude that the relationship had broken down. Ms D'Arco said that she thought that the decision was correct, and gave reasons including:

108.1 That Mr Lennon and Mr Tariq had said that the Claimant did refuse, in a meeting with them both, to carry out instructions in relation to doing Click & Collect, albeit she ultimately did it in October 2018.

108.2 That she refused to collect some paper when instructed to do so by Mr Tariq.

108.3 That she resisted an order to report to shop floor at start of each shift.

108.4 That she initially refused to check additional discrepancies on 8 July.

108.5 That she said she hated the company on 4 July.

108.6 That she was unsupportive to colleagues

108.7 That she was rude.

109. The Claimant commenced ACAS early conciliation on 27 September 2018 (Day A) and the certificate was issued on 10 November 2018 (Day B). She presented her claim to the tribunal on 4 December 2018.

110. On 13 December 2018, one of the Claimant's former colleagues, and one of her witnesses, Mr Hing, received a "first written warning" for behaviour towards colleagues, including swearing on the shop floor. The warning was stated to last for 12 months. It followed a hearing under the disciplinary procedure, and stated that if there was further misconduct then there might be a further hearing which could lead either to a final warning or to dismissal. The letter stated that there had been previous similar incidents and that Mr Hing had not apologised.

The Law

111. Section 98 of ERA 1996 says (in part)

> (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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> …
>
> (b) relates to the conduct of the employee,
>
> …
>
> (4) 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.

112. The Respondent bears the burden of proving, on a balance of probabilities, what the reason was for the dismissal. Or, if there is more than one reason, what the principal reason was.

113. A reason for dismissal is a set of facts known to the employer or beliefs held by them which cause them to dismiss the employee. *Abernethy v Mott, Hay & Anderson [1974] ICR 323, [1974] IRLR 213*.

114. If the Respondent proves that circumstances existed such that the Claimant could have been dismissed for a fair reason, then that does not – in itself – discharge its burden of proving what the actual reason for dismissal was. This is because the fact that such circumstances existed would not, in itself, prove that it was those circumstances which caused the decision-maker to decide to terminate the Claimant's employment.

115. Generally speaking, within Part X of the Employment Rights Act, the employer's reason for dismissal will be that of the decision-maker, ie the person or persons who actually took the termination decision. However, as per the Supreme Court's decision on *Royal Mail Group v Jhuti*, if a person (who is more senior than the employee) determines that she (or he) should be dismissed for a particular reason, but hides the true reason behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

116. Once the tribunal has made its findings of fact as to the dismissal reason, it must then go on to decide, as a question of law, whether the factual reason falls within Section 98(1)(b).

117. In this case, the Respondent expressly does not rely on any reason in section 98(2). Therefore, the tribunal must ask whether the reason amounts to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (hereafter "SOSR").

118. The word "other" is significant. The importance of the need for the tribunal to clearly and precisely identify the factual reason for the dismissal before seeking to categorise it within Section 98 is exemplified by the discussion at paragraphs 47-56 of *Ezsias v North Glamorgan NHS Trust [2011] I.R.L.R. 550* in the EAT, albeit the main significance of the issue in that case was which contractual procedure ought to have been followed (emphasis added):

> 48. ... The Tribunal gave as its reason for that the fact that the reason for Mr Ezsias' dismissal had been "some other substantial reason of such a kind as to justify his dismissal". Of course, the question whether, for the purposes of the law of unfair dismissal, Mr Ezsias was regarded as having been dismissed for his conduct or for some other substantial reason was a different question from whether the action which had been taken against him should have been regarded as having been taken because of his conduct for the purpose of determining whether any disciplinary procedure applied to the case. **Since the answer to both questions is inevitably going to be the same**, the link which the Tribunal made between the two is understandable. The critical question, therefore, is whether the Tribunal's conclusion that the action which had been taken against Mr Ezsias had properly been regarded as having been taken because of his conduct was legally flawed. That **depended on what the actual reason for taking action against Mr Ezsias was, i.e. what were the set of facts which caused the Trust to take action against him**.
>
> 50. … **The Tribunal could have been saying that Mr Ezsias' behaviour, i.e. the behaviour which had caused the breakdown of working relationships with his colleagues in the Department, had been the reason for his dismissal**. If that is what the Tribunal had been saying, it is possible that the action which the Trust took against Mr Ezsias should have been classified as action taken against him because of his conduct. **But it does not necessarily follow that it should have been classified in that way. After all, in Perkin the Court of Appeal classified the reason for Mr Perkin's dismissal as coming within the category of "some other substantial reason",** even though it was his manner and management style which had led to the breakdown of relationships. **On the other hand, the Tribunal could have been saying that Mr Ezsias had not been dismissed for the things he had done which caused his relationship with his colleagues to break down, but rather for the fact that working relationships had broken down. In other words, the fact that Mr Ezsias had been in the main to blame for that might have been part of the history, but it was immaterial to why the Trust chose to take action against him**. If that is what the Tribunal had been saying, then the Tribunal's finding that Mr Ezsias had been dismissed, not for a reason relating to his conduct, but for some other substantial reason of such a kind as to justify his dismissal, becomes understandable.
>
> 51. ... The distinction between dismissing him for his conduct in causing the breakdown of the relationships and for the fact that those relationships had broken down (Mr Ezsias' responsibility for that being incidental) was apparent for all to see.

> 53. **It is apparent … that the Tribunal was alive to the refined but important distinction between dismissing Mr Ezsias for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down.** In these circumstances, the only fair reading of the Tribunal's finding at para. 542 about the reason for Mr Ezsias' dismissal is that although as a matter of history it was Mr Ezsias' conduct which had in the main been responsible for the breakdown of the relationships, it was the fact of the breakdown which was the reason for his dismissal (his responsibility for that being incidental).
>
> 54. With that in mind, we return to the question whether the action taken against Mr Ezsias for that reason should properly have been classified as action taken against him because of his conduct. **As we said at [48] above, the law about whether someone's dismissal is for their conduct or for some other substantial reason of such a kind as to justify their dismissal is not directly relevant, but the reasoning which underlies that jurisprudence would inevitably apply here.** Once you have excluded Mr Ezsias' responsibility for the breakdown of the relationships as the cause of, or a factor contributing to, that breakdown, and you concentrate only on the fact of the breakdown of the relationships, the answer, in our view is inevitable. **However you characterise the reason for the action taken against him, it was not his conduct.**

119. The tribunal must also bear in mind the comments in paragraph 58:

> 58. ... We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of “some other substantial reason” as a pretext to conceal the real reason for the employee's dismissal.

120. The Respondent here argues that the reason for the dismissal was “*serious and irreparable breakdown in the working relationship*”. If the Respondent fails to persuade the tribunal that it had a genuine belief that that was the state of affairs, and that it genuinely dismissed her for that reason, then the dismissal will be unfair.

121. Provided the Respondent does persuade us that the Claimant was dismissed for that reason, and if we are satisfied that it is SOSR, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we take into account the Respondent’s size and administrative resources and we decide whether the Respondent acted reasonably or unreasonably in treating the situation as a sufficient reason for dismissal.

122. In considering the question of reasonableness, we must analyse whether the Respondent had a reasonable basis to believe that the state of affairs was indeed that there had been a “*serious breakdown in the working relationship*” and also whether it had a reasonable basis to believe that it was “*irreparable*”. We must analyse whether dismissal was outside the band of reasonable responses which a reasonable employer could adopt.

123. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer’s decision to

dismiss, even if the second stage is carried out to a high standard of fairness. See *Taylor v OCS Group [2006] IRLR 614*

124. It is not the role of this tribunal to assess the evidence and to decide whether or not

    124.1 we think that there had been a serious and irreparable breakdown in the working relationship and/or whether

    124.2 we think that the Claimant should have been dismissed.

    In other words, it is not our role to substitute our own decisions for the decisions made by the Respondent.

125. That being said, the mere fact alone that the employer decided that dismissal was the appropriate outcome does not automatically mean that we are obliged to decide that their decision was one which a reasonable employer might reach. We may take into account all the circumstances, including what caused the state of affairs that led to the dismissal. In *Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11*

    [36] In our view, context is highly important; as has been said, it is everything. Cases and the situations which they present must be viewed within their own context. So far as *Ezsias* is concerned, it is, we consider, important to recognise that what this tribunal was concerned with in the relevant passages was a very narrow appeal. It was on what was identified as ground 4 at para 39 of the Judgment. In a nutshell the claim was that Mr Ezsias had been dismissed otherwise than in accordance with disciplinary procedures to which he was entitled not as a matter of essential fairness but under his contract of employment. The critical question was whether in the light of the reason for the dismissal those procedures applied to his case. The focus of the case thus was entirely upon whether or not as a matter of contract the disciplinary procedures applied or whether they did not. So viewed, the relevant question posed at the start of para 47, to which we have already referred, is asked in the context of deciding whether or not as a matter of contract the disciplinary procedures should have applied, allowing, as it happens in that case, Mr Ezsias to argue further that a particular set of procedures should have been applied to him because his dismissal should be regarded as professional rather than personal misconduct.

    [37] It was that which made it necessary, as we see it, to identify what was the reason for the dismissal. We do not see the tribunal in *Ezsias* as having been concerned with the question that arises in the present case, which is whether it is relevant to the fairness of a dismissal to pay regard to the development of the breakdown in trust and confidence. So far as *McAdie* is concerned, it too was a quite remarkable case. That was a case in which the dismissal was for capability. Capability of its nature does not lend itself as easily as does a conduct case to issuing a warning. Ill health is not as easily regulated by the warning of the consequence of continued ill health as misconduct is to be regulated by the warning of continued conduct said to be wrongful; that is obvious. So far as dismissal there was concerned, too, we note that if there were responsibility in law for the state of health of the claimant, she would not be without a remedy. That cannot so easily be said in the context of a claim in respect of some other substantial reason. Where the substantial reason relied upon is a consequence of conduct (and in this case it can be no other), there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the

like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as s 98 would require.

[38] We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, 61 LGR 369 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness.

[40] Context being everything, subject to the wording of the statute, in our view there is no force here in the argument addressed to us by Mr O'Dair that would refuse any entitlement of the tribunal to consider the background as part of the circumstances. Indeed, it might be thought that the citations from the *McAdie* case would permit it in most cases, though not plainly in that case itself. We are not saying that in every case in which there is a dismissal for some other substantial reason, where that reason is a breakdown of trust and confidence, that a tribunal *must* have regard to how that situation came about; to do so would be to repeat the error identified in *McAdie*. But what we are asked to do is to say that the tribunal is not entitled in an appropriate case to take such matters into account, and that we simply decline to do.

<u>Respondent's unfair dismissal submissions</u>

126. The Respondent asked us to take into account the following cases, and we have done so.

127. Adesokan v Sainsburys Supermarkets Ltd 2017 IRLR 346 concerns a claim for wrongful dismissal. The employee did not succeed either before the High Court or the Court of Appeal. At paragraph 30, Elias LJ stated: "*It follows that, in my view, Sainsbury's was entitled to dismiss summarily for gross misconduct*." He also said at paragraph 26, discussing the high court's reasoning: "*Given the significance placed by the company on the TP, the judge was entitled to find that this was a serious dereliction of his duty. He found that this failing constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. The appellant seems to have been indifferent to what in the company's eyes was a very serious breach of an important procedure*."

128. Foley v Post Office 2000 ICR 1283. As noted by the Court of Appeal: "*The tribunal found that the reason for Mr. Foley's dismissal was "unauthorised absence for part or whole of a duty on 16 May 1997," that that was a reason relating to conduct within section 98(2)(b) of the Act of 1996, and that the decision to dismiss him for the conduct alleged, though "harsh," was reasonable pursuant to section 98(4) of the Act. It was fair. The tribunal was "mindful that we must not impose our decision*

upon that of a reasoned on the spot management decision." The dismissal was *"within the range of reasonable responses."* The Court of Appeal reinstated the original tribunal's decision. It held that the employment tribunal, having considered that the employer had established reasonable grounds for its belief that the employee was guilty of misconduct and that it had carried out as much investigation as was reasonable, had concluded that the employer acted reasonably in treating that as a sufficient reason for dismissing him; and that there was no error of law in its approach or its conclusion and, accordingly, no ground on which an appellate tribunal could interfere with its decision, It noted that although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not.

129. In the same judgment, addressing *Madden's* case, which was also a dismissal because of conduct, the court noted:

> This case illustrates the dangers of encouraging an approach to unfair dismissal cases which leads an employment tribunal to substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response.

130. In *Reilly v Sandwell MBC [2018] UKSC 16* at paragraph 16, Lord Wilson observed "*In this case the employer showed the reason for the dismissal, namely the non-disclosure, and that it related to Ms Reilly's conduct*." And at paragraph 24, noted: "*It seems that an employee's "conduct" within the meaning of section 98(2)(b) of the Act can precipitate a fair dismissal even if it does not constitute a breach of her contract of employment: see the observation of Phillips J on behalf of the EAT in Redbridge London Borough Council v Fishman [1978] ICR 569, 574, adopted by the EAT in Weston Recovery Services v Fisher UKEAT/0062/10/ZT at para 13*." At paragraph 31, Lady Hale noted that the employee had been in breach of her employment contract, before noting (paragraphs 32 to 35) several issues which therefore did not fall to be decided. The Supreme Court stated (paragraph 23) that the tribunal and the appellate court had taken the correct approach to determining that the dismissal decision lay within the band of reasonable responses.

131. Tayeh v Barchester Healthcare Ltd [2013] EWCA Civ 29: ("*Subsection (2) identifies five categories of reason, of which the second, in section 98(2)(b), is one that 'relates to the conduct of the employee …'; and that, of course, was the reason invoked by BHL, its case being that it dismissed Ms Tayeh because of her misconduct in three separate respects, each meriting dismissal. If the employer negotiates itself through section 98(1), as BHL did, it does not, however, follow automatically that the dismissal was fair: it remains for the ET decide whether it was fair or unfair, and that requires it to have regard to section 98(4)* ,")

> 68. Given these findings by the ET, Ms Garner was, I consider, entitled to take the view that BHL's investigation disclosed that no genuine mitigation in relation to the 'failure to make observations' charge had been shown by Ms Tayeh. In my judgment, the EAT was justified in concluding that the majority of the ET had misdirected itself

in concluding otherwise. The majority's error was that it was substituting its own view as to the fairness of Ms Tayeh's dismissal on ground 5 for a view which in my judgment BHL was entitled to hold.

69. I conclude, therefore, that the EAT was right to conclude that the decision of the ET as to the unfairness of the dismissal could not stand. The ET's error was to substitute its own views as to the seriousness of the charges for those of BHL, which BHL was entitled to hold.

132. In *Leyland (UK) Ltd v Swift 1981 IRLR 91*, the Court of Appeal noted that the dismissal followed a criminal conviction (for dishonesty) and that the tribunal had failed to take into account the employee's behaviour when the employer asked him about the conduct which had led to the conviction. The tribunal judgment implied that it found that the employee had lied to his employer about (and failed to apologise for) his actions and the Court of Appeal thought that this should not have been ignored by the tribunal when deciding if the dismissal had been reasonable.

133. In *Acco (UK) Ltd v Monge [2002] 8 WLUK 220*, the EAT decided that the dismissal had not been unfair. The tribunal had made unjustified criticisms of the investigation which the employer had undertaken and had also wrongly substituted its opinion for that of the employer. The tribunal had failed to take proper account of the fact that – after a fair investigation – the employer had decided that the employee's conduct (having flying lessons during working time, without expressly notifying his employer or requesting time off) amounted to a breach of trust.

134. The Respondent asked us to note particularly paragraph 44 of *East of England Ambulance Service NHS Trust v Sanders*, in which the EAT pointed out that there are some types of conduct for which immediate dismissal is appropriate, even if the employee has a good prior record and/or even if dismissal might have severe consequences for the employee and/or even if the claimant might have put mitigating factors before the employer. The case was remitted because, although the tribunal had made a finding that the employee had been dismissed because of conduct, it had failed to reach determinations on all of the points required by the tripartite Burchell test.

135. In *Shrestha v Genesis [2015] IRLR 399*, the Court of Appeal, making reference to both *Foley* and *Hitt* noted that the question of whether an investigation (in that case into allegations of dishonesty related to mileage claims) was not necessarily an unreasonable one just because there were some avenues which could theoretically have been further explored: "*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the* Burchell *test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the* Burchell *test will depend on the circumstances as a whole.*"

<u>Remedy</u>

136. This hearing was for liability only.

137. If assessing compensation for unfair dismissal, it is necessary to consider what would have happened (or might have happened) if the unfair dismissal had not occurred: *Polkey v AE Dayton Services Ltd [1988] AC344* ("Polkey"). It should not be assumed that, but for the unfair dismissal, the Claimant would have remained employed by the Respondent indefinitely. The tribunal may have to take into account facts which the employer might have found out if it had acted fairly, or future events which may have occurred if the employer had acted fairly. Polkey requires an assessment of the chances of different scenarios unfolding, rather than an "all or nothing" decision made on balance of probabilities.

138. There may also have to be adjustments to either the basic award and/or the compensatory award to take account of ERA section 122(2) and/or ERA section 123(6) respectively.

139. In an appropriate case, the compensatory award might be adjusted to take account of the Claimant's or the Respondent's failure to follow an ACAS code, if applicable.

140. None of these remedy issues fell to be decided as part of this liability decision.

Time Limits for Equality Act complaints

141. Section 123 of EA 2010 states (in part)

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

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

142. The Claim was issued on 4 December 2018. Early conciliation started on 27 September 2018 and finished on 10 November 2018. Because the claim was issued less than one month after the end of early conciliation, claims relating to any acts or omissions alleged to have occurred on or after 28 June 2018 are in time. Subject to Section 123(3)(a) of EA 2010, allegations relating to incidents on or before 27 June 2018 are out of time, subject to the tribunal's ability to extend time in accordance with Section 123(1)(b).

143. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was

an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

144. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to:

144.1 the length of, and the reasons for, the delay on the part of the claimant;

144.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

144.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

<u>Burden of Proof for Equality Act complaints</u>

145. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action, namely all the claims of harassment or victimisation which rely on the definitions in section 26 and 27.

146. Section 136 of EA 2010 states (in part)

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

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

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

147. Section 136 requires a two stage approach:

147.1 At the first stage the tribunal considers whether the Claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

147.2 If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

148. Where the Claimant fails to prove, on the balance of probabilities, that a particular alleged incident did happen, then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

Harassment

149. Section 26 of EA 2010 states (in part)

(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.

150. For the purposes of subsection (1), race is a relevant characteristic. Furthermore, for the purposes of subsection (1), the Claimant will need to establish on the balance of probabilities that she has been subjected to "unwanted conduct" which has the "purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment" for her.

151. In relation to subsection (1), it is not sufficient for a Claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) EA 2010. The conduct also has to be related to the particular protected characteristic, ie race. Because of section 136, the Claimant does not need to prove - on the balance of probabilities - that the conduct was related to race. However, in order to shift the burden of proof, she would need to prove facts from which we might infer that the conduct could be so related.

152. In *HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390*, the court of appeal stated that – when considering the effect, and taking into account section 26(4) – it was important not to "cheapen" the words used in section 26(1).

even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute

harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

153. When assessing the effects of any one incident which is one of several incidents, it is not sufficient to consider each incident by itself in isolation. The impact of separate incidents can accumulate and the effect on the work environment may exceed the sum of the individual episodes. See the EAT's decision in *Driskel v Pensinsula Business Services*, and its earlier decision in *Reed and Bull Information Systems Ltd v Stedman (1999) 1RCR 299* at 302:

    "It is particularly important in cases of alleged sexual harassment that the fact finding tribunal should not carve up the case into a series of specific incidents and try (to) measure the harm or detriment in relation to each."

154. The guidance in that passage is not confined solely to sexual harassment cases, and the EAT also commented on *Qureshi v Victoria University of Manchester, EAT/484/95*'s which warned against taking too piecemeal an approach to the analysis of a set of incidents which were each said to amount to race discrimination. Taking the allegations as a whole (as well as considering each individually) is necessary not just when assessing the effect of the Respondent's conduct on the claimant, but also when deciding whether to draw inferences that the unwanted conduct (or any of it) was related to race.

<u>Victimisation</u>

155. Section 27 Equality Act 2010 reads:

27 Victimisation

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

(a) B does a protected act, or

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

156. There is an infringement if (a) a claimant has been subjected to a detriment and (b) she was subjected to that detriment because of a protected act. The alleged victimiser's improper motivations might be unconscious or conscious.

157. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that their treatment was less favourable than another's.

158. In terms of what constitutes a protected act, *National Probation Service For England And Wales (Cumbria Area) v Kirby* was decided under the pre-Equality Act legislation. It suggests that a broad definition be given to "*any other thing for the purposes of or in connection with this Act*" as per 27(2)(c). It also makes clear that it is not a requirement that the protected act involves an assertion that there has been a breach of the Equality Act. It can include - for example - being interviewed as part of an investigation into an allegation of discrimination or harassment, even if the interviewee states that they do not believe that there was discrimination or harassment

159. As per section 27(2)(d), an act may be a protected act where the allegation is either express or implied. There is no requirement for the claimant to have specifically mentioned the phrase "Equality Act" or to have used specific words such as "discrimination" or "race". However, to be a protected act in accordance with 27(2)(d) the allegation relied on must assert facts which, if true, could amount to a breach of Equality Act 2010. Where an employee makes an allegation of wrongdoing by the employer, but without asserting (either expressly or by implication) that the wrongdoing was a breach of the Act (eg that it was less favourable treatment because of a protected characteristic, or harassment related to a protected characteristic) then the allegation does not fall within section 27(2)(d).

160. To succeed in a claim of victimisation the claimant must show that she was subjected to the detriment *because* she did a protected act (or *because* the employer believed she had done or might do a protected act). Where there has been a detriment and a protected act then that is not sufficient, in itself, for the complaints of victimisation to succeed. The tribunal must consider the reason for the claimant's treatment and decide what (consciously and/or subconsciously) motivated the employer to subject the claimant to the detriment. This will require identification of the decision-maker(s) and consideration of the mental processes of the decision-makers. If the necessary link between the detriment suffered and the protected act is established, the complaint of victimisation succeeds. The Claimant does not succeed simply by establishing that "but for" the protected act, she would not have been dismissed (or subjected to another detriment).

161. The Claimant does not have to persuade us that the protected act was the only reason for the dismissal or other detriment. If the employer has more than one reason for the dismissal (or other detriment), the Claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected acts have a "significant influence" on the decision making. For an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence which is more than trivial". See *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA* and *Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469, EAT*

162. A victimisation claim might fail where the reason for the dismissal (or other detriment) was not the protected act itself but some feature of it which could properly be treated as separable, such as the manner in which the protected act was carried out. See *Martin v Devonshires Solicitors 2011 ICR 352*,

163. Section 136 applies to victimisation complaints. Therefore, the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened section 27. If the Claimant does that, the burden then passes to the respondent to prove that victimisation did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the claim.

Unauthorised Deduction From Wages

164. Part II of the Employment Rights Act 1996 (sections 13 to 27) deals with "Protection of Wages".

165. Section 13 (alongside the exceptions set out in Section 14) deals with the right not to have unauthorised deductions made from wages. Other than deductions authorised by statute (which is not an issue in this case) for a deduction to be authorised it must either:

165.1 Be one which is authorised by the contract of employment (with either the term itself being part of a written agreement, or else the term itself being something which the Respondent has explained to the Claimant in writing, before the date of the deduction) or

165.2 Be one which the employee has agreed to in writing (such agreement occurring after the date of the specific event which is said to be the reason for the deduction, but before the deduction itself.

166. As per section 13(3), a shortfall (other than one due to computation error) in the sums properly payable to the worker is to be regarded as a deduction even if the employer does not refer to it as a deduction.

Analysis and conclusions

167. We will use the numbering in the list of issues for ease of reference.

Unfair dismissal

1. What was the reason for the Claimant's dismissal? In particular, was the Claimant dismissed because her behaviour at work had led to a serious and irreparable breakdown in the working relationship between her and the Respondent such that the Respondent lost trust and confidence in her?

168. The decision-makers were Pujia, Brisotto and Santini, with Pujia having the final say. He was more senior than the other two and we note that in his interview with Ms D'Arco (after the dismissal had taken place, on 20 November 2018) he made clear that other people in the organisation had "*told me on many occasions that I had to take a decision in respect of Nesrine's behaviour*". Both propositions in this quote are accurate, namely: (i) he was regarded as the person who needed to make the decision and (ii) the decision that he was being asked to make was about the Claimant's (alleged) behaviour.

169. As is clear from the dismissal letter, the appeal outcome letter, and the interviews that the decision makers gave to D'Arco, the conduct (as the decision-makers perceived it) of the Claimant was the reason that the decision-makers decided that dismissal was appropriate.

170. The reason that the Respondent took the decision to dismiss was that the decision-makers (Pujia, Brisotto and Santini, with Pujia having the final say) formed the belief that the Claimant was failing to carry out the instructions of her manager and the belief that the Claimant's actions were inappropriate and not in accordance with the Respondent's behavioural guidelines and the standards of behaviour which it required from employees holding the post of store administrator.

2. Was the reason for the Claimant's dismissal a substantial reason of a kind such as justify the dismissal of an employee holding the position which the Claimant held?

171. The reason for the dismissal was the opinion which the Respondent had formed about the Claimant's conduct. Conduct is a potentially fair reason (section 98(2)(b) of the Employment Rights Act 1996), but the Respondent's counsel, acting on instructions, expressly stated that the Respondent was not relying on any reason within section 98(2) and was relying solely on – as per section 98(1)(b) – "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

172. In our judgment, this was not some **other** substantial reason as per the definition in section 98(1)(b). Unlike the situation in *Ezsias*, the Respondent in this case did not make a decision that the (alleged) state of affairs - of the Claimant not working harmoniously with her line manager - was its reason for dismissing the Claimant (regardless of the cause of that state of affairs). The dismissal reason was the decision-makers' opinion that the Claimant's conduct was such that she should be dismissed.

173. We do, of course, take into account that the mere fact alone that an employer's actions are the thing that has caused the breakdown of the relationship does not – in itself mean that the dismissal reason had to fall into the category "conduct" (s98(2)(b)) rather than SOSR (s98(1)). See *Ezsias* at paragraph 50 discussing *Perkin v St Georges NHS Trust*, which was a case in which the Claimant's conduct was not only found to have brought about a particular state of affairs (which state of affairs was found to be the reason for the dismissal), but also was considered "blameworthy" when assessing compensation. However, our finding is that it was the Claimant's conduct (as the decision-makers understood it to be) that was the reason for dismissing the Claimant. More precisely, it was the fact that Mr Pujia (based on what he was told) formed the view that the Claimant had failed to comply with guidelines for behaviour which persuaded him that some action should be taken against the Claimant and it was the fact that Mr Pujia (based on what he was told) formed the view that appropriate efforts had been made to improve the Claimant's behaviour, and those efforts had failed, that led him to decide on 4 October 2018 that dismissal was appropriate. His thought process did lead him to form the belief (based on what he was told) that the Claimant's conduct had brought about a state of affairs where she could not be trusted to carry out her duties in the future; that was the reason that he decided that dismissal, rather than – for example – a disciplinary warning, was appropriate. However, he arrived at

the end result that the Claimant should be dismissed (rather than given a warning) by first concluding that the Claimant's conduct was at fault and required a sanction of some description.

4. If the answer to point~~s~~ 2 ~~or 3~~ is yes:

4.1. Was the dismissal fair or unfair in all the circumstances?

174. There was no hearing prior to dismissal. The Claimant was not told that particular allegations had been made, or told what the evidence was for those allegations, or given any opportunity to challenge any such evidence, or to present her own evidence. She was not told that she could be accompanied to the meeting on 5 October (and, in fact, when she raised the point in the meeting, the Respondent told her that she could not be accompanied). On 5 October, there was no discussion with the Claimant before she was told that she was being dismissed.

175. During the appeal stage, the Claimant was not given clear information, despite requests from her representative, about which individual(s) within the organisation had taken the decision to dismiss her or what investigation there had been.

176. On the Respondent's case, an investigation and/or a hearing was not necessary because the dismissal was for some other substantial reason. However, we have found that the reason was conduct.

177. In any event, in the week commencing 1 October, Mr Tariq was making reports about the Claimant's (alleged) conduct to Mr Velkopoulos, without the Claimant having a chance to comment on what was said in those emails prior to her dismissal. Furthermore, during what Mr Pujia and Mr Brisotto say was a lengthy decision-making process (starting well before 1 October), Mr Brisotto and Ms Santini (directly) and Mr Pujia (indirectly) heard Mr Tariq's version of events but not the Claimant's.

178. Alternatives to dismissal such as moving the Claimant to another store do not seem to have been fully considered; at the least, there are no contemporaneous documents to show they were considered, and the Claimant was not offered the opportunity of a move as an alternative to dismissal. No express warning that the Claimant might be dismissed if she did not change her behaviour was issued. To the extent that the 2 October letter from Coltra commented adversely on the Claimant's behaviour – and invited her to reflect upon it - that letter was only received by the Claimant two days before the dismissal decision was made.

179. The appeal is to be treated as part of the process. We do not find that the appeal stage was carried out to such a high standard of fairness that it cured any previous defects.

179.1 Ms D'Arco was more junior than Mr Pujia, and she did not press him on his answers when she interviewed him.

179.2 The process was somewhat circular. Mr Pujia did not have clear and specific details about exactly the Claimant had done which breached the Respondent's standards of conduct, or about what, exactly, Mr Tariq had done to give the Claimant a chance to improve. However, when Ms D'Arco read from the letter

confirming dismissal, Mr Pujia told her that he agreed with the contents of the letter. When it was pointed out to him that the Claimant had said that she disputed some of the factual contents of the letter, Mr Pujia indicated that he did not think that was important.

179.3 During Ms D'Arco's meeting with the Claimant, there was a refusal to answer the Claimant's representative's questions about the process which had led to the decision to dismiss the Claimant.

179.4 It does not seem that Ms D'Arco investigated the Claimant's assertion that Mr Lennon could not provide corroboration for Mr Tariq's account of the events of October, given that – according to the Claimant – he was not there. At point 2(a) of her letter, Ms D'Arco implies that she had formed the view that it was in October that the Claimant had had a meeting with Mr Lennon and Mr Tariq and refused to do Click & Collect (and/or had showed an unacceptable level of reluctance). We do not think that it is falling into the trap identified in *Shrestha* to say that Ms D'Arco could and should have investigated whether Mr Lennon was present in the workplace in the week commencing 1 October. It would have been a fairly simple check to make and fairly easy to discover that Mr Lennon could not have been truthfully saying that the Claimant refused to do Click & Collect in October, as there was no meeting between him, the Claimant and Mr Tariq that month (as he was on leave).

180. For these reasons, our judgment is that the procedure adopted by the Respondent was such that no reasonable employer would have adopted prior to making a decision to dismiss the Claimant.

4.2. Was the decision within the band of reasonable responses which a reasonable employer could adopt?

181. Even in cases of dismissal for conduct which is not so called "gross misconduct", the existence of a prior warning is not necessarily required in order for a dismissal to be within the band of reasonable responses which a reasonable employer could adopt. However, our judgment is that the Respondent's decision in this particular case was outside that band.

182. Although the Respondent has referred to its opinion that the relationship between employer and employee had broken down, we have found that the actual reason for dismissal was the Respondent's belief that the Claimant was being insubordinate and rude: by outright refusal to follow her line manager's instructions, and/or by showing too much reluctance to do so. Even on the Respondent's case, for several of the examples of the Claimant's insubordination or rudeness (her responses to the instructions to do Click & Collect and to report to Shop Floor at start of shift, for example) she had done as instructed, albeit after expressing disagreement. Our judgment is that - taking into account the Claimant's length of service and previous good record - no reasonable employer would have dismissed without first having given a warning to the employee and a reasonable chance to show that she could comply with instructions and comply with the Respondent's guidelines for the conduct of its employees.

183. This situation is distinguishable from each of the cases which the Respondent's representative cited to us as examples.

183.1 *Adesokan* is not a decision about the band of reasonable responses in an unfair dismissal case. It dealt with the test for determining whether or not an employer was in breach of contract by failing to give notice. In this case, the Respondent made a payment in lieu of notice and, in any event, the tests for unfair dismissal and for wrongful dismissal differ in several respects.

183.2 *Swift* was presented as authority for the proposition that a failure to apologise is "very relevant" when deciding whether to dismiss an employee. In fact, we do accept the proposition that – in some circumstances, at least – the fact that an employee makes clear that they are not willing to try to improve might mean that it is within the band of reasonable responses to move straight to dismissal without first issuing a warning followed by an opportunity to improve. However, Lord Denning MR was making a slightly different point in *Swift*; he was pointing out that, rather than 'come clean' and make full disclosure, accompanied by an apology and a promise not to do it again, the employee – in Lord Denning MR's words – "put forward a 'cock and bull' story". This case is different in that – although the Claimant did take the stance that the instructions given to her were not reasonable (ie it was her line manager, rather than her, who was in the wrong) – she did not evince an intention to never comply. On the contrary, she did, in fact, comply. More generally, *Swift* was a comparatively early case which set out the – by now uncontroversial – important principle that the test for whether a sanction was disproportionate is whether any reasonable employer might reasonably have dismissed the employee, not whether a reasonable employer would have considered a lesser penalty to be appropriate.

183.3 *Reilly* and *Monge* were employees who were found, after being given the opportunity to comment on the allegations, to have breached their contracts of employment by their conduct. It was not outside the band of reasonable responses to treat those particular breaches as a sufficient reason to dismiss. Mr Pujia's decision that the Claimant was not acting in accordance with the guidelines for appropriate behaviour was not made after hearing any explanation from the Claimant or even after hearing precise details of the alleged breaches of contract. However, and in any event, *Reilly* and *Monge* were senior employees who had failed to disclose relevant information to their employers, and their employers did not believe that this past breach could be rectified by (for example) a simple promise to act differently should the exact same circumstances arise in the future. Their actions caused their trustworthiness to be doubted more generally as to how they might act in future different circumstances. The Claimant was a junior employee who had been open about her actions and her purported reason for those actions. Rather than outright refusal to carry out particular instructions she had made the claim (unreasonably in Mr Tariq's opinion) that, some of the time, he gave her too much to do, and too little time to do it and she asked him (without proper justification in Mr Tariq's opinion) to tell her which tasks to prioritise. The employer had, in fact, decided that an additional person was needed to assist with store administrator duties in the Selfridges location, and October 2018 was the start of the period in which the Claimant (full-time) and that part-time

additional employee would both be working in the role. A reasonable employer would not have decided that the Claimant's actions in claiming to be overworked in July, when acting as the sole administrator, meant that she could not be trusted, in the future, to carry out instructions even after the employer had provided some additional administrator resources.

183.4 As per *Foley*, *Madden*, *Tayeh* and numerous other cases, it would be an error of law for us to substitute our opinion as to the appropriate sanction for that of the employer. However, that does not mean that a tribunal can never decide that a decision to dismiss was unreasonable. It means that we should only decide that the decision to dismiss was unreasonable if we are satisfied that no reasonable employer would have dismissed this employee for this reason. That is the conclusion we have reached here. Mr Pujia did not think it relevant whether or not the Claimant had said that she hated the company. Thus the conduct in question were her interactions with Mr Tariq in July (when Mr Tariq started, and the Claimant had 2 weeks leave that month) and again in the first 4 days of October (when the Claimant returned to work after a sickness absence). The circumstances were that (apart from comments in the 2 October grievance outcome letter) the Claimant had not been warned that she might face disciplinary action, let alone dismissal, if she did not show greater willingness to follow Mr Tariq's instructions promptly and without complaint.

184. Furthermore, while we have found that the actual reason for dismissal was conduct, we were asked to find that the reason was NOT conduct but was SOSR. As per *Sylvester*, even had we been persuaded that the reason was SOSR, then that would not mean that we were unable – if we thought it appropriate – to take into account the background circumstances, and the existence, or otherwise, of a warning to the employee that she must modify her behaviour or else be dismissed. In this case, Mr Tariq told the tribunal that in his opinion and experience, in the retail industry, where a manager told an employee to do something three times, and they failed to do so on the third occasion, a formal documented meeting would follow. In our view, even if relying on an alleged breakdown in the relationship between employer and employee (or line manager and employee) no reasonable employer would have formed the view that the particular circumstances of this case were such that there was no need to do something similar prior to dismissal. No reasonable employer would have formed the view that Ms Coltra's investigation of the Claimant's grievance meant that a dismissal decision on 4 October 2018 was reasonable.

<u>Harassment</u>

5. Did Nabeel Tariq engage in the following alleged unwanted conduct

5.1. Did Mr Tariq say to the Claimant that "*you don't have a management style and appearance to become a Deputy Store Manager*" on or around 6 July 2018?

185. The Claimant satisfied us that Mr Tariq made comments to that effect in early July, and that they were unwanted.

186. The purpose of Mr Tariq's remarks was not to violate the Claimant's dignity or to create the environment described in section 26(1)(b)(ii) Equality Act 2010. His

purpose was to inform the Claimant that his genuine opinion was that she was not yet ready for that particular promotion.

187. We accept that the Claimant's perception of the comment was that she was genuinely offended by it and she believed that Mr Tariq's opinion was unjustified. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by the remark. It is reasonable for employees to expect to hear the views of more senior employees as to whether they are, or are not, considered ready for promotion; sometimes the employee will strongly disagree with their manager's opinion, but it does not follow that a hostile (etc) environment has been created, or their dignity violated.

188. The burden of proof has not shifted as to whether the comment was related to race. Neither this comment in isolation, nor the totality of Mr Tariq's interactions with the Claimant, persuade us that there are facts from which we might infer (in the absence of an adequate explanation from the Respondent) that the comment was related to race. We are satisfied that Mr Tariq was expressing the opinion which he genuinely held, and that he had not formed the opinion for a reason related to the Claimant's race. We are also satisfied that his decision to share his opinion with the Claimant was not related to her race.

5.2. Did Mr Tariq say to the Claimant that "*We do not talk English in that way*" on or around 3 July 2018?

189. We were not satisfied that Mr Tariq used those exact words. In particular, the Claimant did not persuade us that Mr Tariq had made specific reference to speaking "English". The Claimant would not have wanted him to criticise her use of the English language, but we found that he did not do so.

190. Mr Tariq did criticise the Claimant from time to time because of comments that she had made. He made those statements because his perception was that the Claimant was speaking rudely to her manager and/or was being disrespectful of decisions made by her employer (such as the fact that previous store managers had departed).

191. More generally, Mr Tariq held the view that the Claimant needed to improve in her manner of communication with him as her manager. However, his concerns did not relate to her (English) vocabulary or her accent or her ability to speak the English language; his concerns related to what he saw as her tone of voice and the thoughts and attitudes which she conveyed (which he perceived as a reluctance to follow instructions).

192. The purpose of Mr Tariq's remarks was not to violate the Claimant's dignity or to create the environment described in section 26(1)(b)(ii) Equality Act 2010. His purpose was to inform the Claimant that his genuine opinion was that she should improve her manner of communication.

193. Given that we have found that Mr Tariq did not refer to speaking "English", it was not reasonable, in all the circumstances, for the Claimant to perceive such a comment as having the effect of violating her dignity, etc.

194. The burden of proof has not shifted. We found that Mr Tariq did not make specific reference to "English" and the Claimant has not persuaded us that there are facts from which we might infer (in the absence of an adequate explanation from the Respondent) that comments which Mr Tariq made were related to race. We are satisfied that Mr Tariq was expressing opinions which he genuinely held, when he told the Claimant that (for example) words she had used were inappropriate. He had not formed the opinion for a reason related to the Claimant's race.

5.3. Did Mr Tariq say to the Claimant:

5.3.1. On 4 July 2018, in response to the word "sacked", that "*This is an inappropriate word to use with your manager*"?

195. We are satisfied that he did say words to that effect and that the Claimant did not want him to make this remark.

196. The purpose of Mr Tariq's remarks was not to violate the Claimant's dignity or to create the environment described in section 26(1)(b)(ii) Equality Act 2010. His purpose was to rebuke the Claimant for a comment which, in his genuine opinion, should not have been made.

197. We accept that the Claimant's perception of the comment was that she was genuinely offended by it and that she believed that Mr Tariq should not have criticised her use of that word, which, in her opinion was factually accurate. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by Mr Tariq informing her that she should not have used the word "sacked" about the third parties in question. To find that the remark had reasonably had that effect on her would be to cheapen the significance of the words of section 26(1).

198. The burden of proof has not shifted. There is no basis for us to find that the comment might have been related to the Claimant's race, and we find that it was not related to her race.

5.3.2. On 5 July 2018, in response the word "fun", that "*This is an inappropriate word to use with your manager*"?

199. He did not make any such comment on 5 July 2018. The Claimant had in mind the exchange that took place in the recorded conversation of 26 July 2018, in which the Claimant said that she was not sending emails "for fun" and Mr Tariq reacted by saying that she was being rude, and her comment was uncalled for, and added "*End of story, let's move forward*".

200. His response was "unwanted" in the sense that she wanted a different response: one which neither criticised her sending of the email in the first place, nor her comment about not doing it "for fun".

201. The purpose of Mr Tariq's remarks was not to violate the Claimant's dignity or to create the environment described in section 26(1)(b)(ii) Equality Act 2010. His purpose was to rebuke the Claimant for a comment which, in his genuine opinion, was inappropriate to the circumstances, and failed to engage with the reasons that he had given to her for why she should not have hit "send" on the email in question, but should have spoken to him instead.

202. We accept that the Claimant's perception of Mr Tariq's response was that she was genuinely offended by it and that she believed that Mr Tariq should not have criticised her for sending the emails, or for trying to persuade him that she thought the circumstances justified her replying to his email by email. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by Mr Tariq informing her that she should have made the comment about "not sending emails for fun" in the context of the discussion which they were having at the time.

203. The burden of proof has not shifted. There is no basis for us to find that the comment might have been related to the Claimant's race, and we find that it was not related to her race.

5.4. Did Mr Tariq say, at last on three occasions, "*We don't cross arms when we talk to managers, this expresses that you are in an attacking position*" on 3, 4 and 6 July 2018?

204. Mr Tariq did not use the exact words referring to an attacking position. He did make comments to the effect that the Claimant needed to improve her body language and the comments which he made were unwanted by the Claimant.

205. Mr Tariq made those comments because his perception was that the Claimant needed to improve in her manner of communication with him as her manager. His concerns related to what he perceived as a reluctance to follow instructions.

206. The purpose of Mr Tariq's remarks was not to violate the Claimant's dignity or to create the environment described in section 26(1)(b)(ii) Equality Act 2010. His purpose was to inform the Claimant that his genuine opinion was that she should improve her manner of communication via body language.

207. The burden of proof has not shifted. We found that Mr Tariq did not make specific reference to "attacking position", but, in any event, the Claimant has not persuaded us that there are facts from which we might infer (in the absence of an adequate explanation from the Respondent) that comments which Mr Tariq made were related to race. We are satisfied that Mr Tariq was expressing opinions which he genuinely held, and that that he had not formed his opinion about the Claimant's body language for a reason related to the Claimant's race.

5.5. On or around 3 & 4 July 2018:

5.5.1. Did the Claimant tell Mr Tariq that English was her third language, that she was still learning it and that she was not born in the UK?

5.5.2. Did Mr Tariq say in response to the Claimant's comment at 5.5.1 that "*this is the problem*"?

208. We did find that the Claimant said that English was her third language and that she was still learning and that she was not born in the UK. We rejected the assertion that Mr Tariq responded by saying "this is the problem".

209. This allegation therefore fails on the facts.

5.6. On or around 5 July 2018 (and similarly on or around 26 July 2018), did Mr Tariq say if "*I receive an email from you going forward it will be a conversation sat down and documented*"?

210. He said this on 26 July only, and did not say it on 5 July as well. It was an unwanted remark and carried with it the implication that the Claimant might face disciplinary action.

211. The purpose of the remark was to convey to the Claimant that she might face disciplinary action of sorts (a formal record being placed on her file) if she persisted in emailing Mr Tariq. The Claimant understood it to mean that, and she was upset and offended.

212. Mr Tariq did not intend to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment. He intended to persuade the Claimant not to email him in future, and to convey to her that he would take a formal approach if she did so.

213. We accept that the Claimant's perception of Mr Tariq's response was that she was genuinely offended by it and that she believed that Mr Tariq should not have criticised her for sending the email, and he should not have implied formal action might follow. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by Mr Tariq informing her that she should not have sent the email. There was a legitimate difference of opinion between them, but Mr Tariq explained his stance (ie his reasons that she should have spoken to him rather than emailed him) to the Claimant clearly, and it is reasonable for an employee to expect that her line manager might give her instructions from time to time, and she will not necessarily agree with every instruction that she is given. In our view, it would be cheapening the words of the section to regard this exchange has having the effect described in section 26(1)(b).

214. The burden of proof has not shifted. The Claimant has not persuaded us that the comment might have been related to the Claimant's race, and we find that it was not related to her race.

5.7. On 8 July 2018:

5.7.1. Did Mr Tariq say to the Claimant "*go and look for it yourself*" in response to the Claimant asking him where the safe key was?

215. Mr Tariq did say words to that effect. His remark was unwanted.

216. Mr Tariq made the comment because he did not immediately know the exact location of the safe key was and he thought that the Claimant should find it. He

did not make the remark for the purpose of violating the Claimant's dignity or creating a hostile, etc, environment for her.

217. We accept that the Claimant's perception of Mr Tariq's response was that she was genuinely offended by what he said and that she believed that Mr Tariq should have tried to be more helpful. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by Mr Tariq informing her that he expected her to look for the key.

218. The burden of proof has not shifted. There is no basis for us to find that the comment might have been related to the Claimant's race, and we find that it was not related to her race.

5.7.2. Did Mr Tariq, during a stock take give the Claimant a new list of accessories discrepancies to check and subsequently say to her "*I am not going to provide you with help and I am asking you to go and do it now, end of conversation*"?

219. He did give the Claimant a new list of discrepancies to check when she was part way through checking the list he had given to her earlier. The tone of the conversation was that Mr Tariq expected the Claimant to do the new list by herself, and to start immediately, and without a further/lengthier discussion.

220. His actions were unwanted. The Claimant did not think it was reasonable to select her to be the person to start the new list, or to expect her to do it by herself.

221. Mr Tariq's purpose was not to violate the Claimant's dignity, or to create a hostile, etc, environment. His intention that day was to get the stock take fully completed, and he thought that the most efficient use of resources was for the Claimant to start the new list (alone) while her colleagues completed other tasks. He did not wish to have a detailed discussion because he regarded it as a decision that he was entitled to make as a manager, and not one which – in his opinion - required a debate.

222. We accept that the Claimant's perception of Mr Tariq's instructions was that she was genuinely upset and offended and that she believed that Mr Tariq was not taking account of how much work she had done already when asking her to start a new task, and that he had not fully considered whether someone other than the Claimant could have been asked to do the new task. In our opinion, in all the circumstances of the case, it was not reasonable for the Claimant to believe that her dignity had been violated or that an intimidating, hostile, degrading, humiliating or offensive environment had been created by Mr Tariq's instruction, or the manner in which he delivered it. It was legitimate for the Claimant to hold the personal opinion that someone else could have been given the task. However, it is reasonable for an employee to expect that her line manager might give her instructions from time to time, and she will not necessarily agree with every instruction that she is given, and will not necessarily be given a detailed rationale each time, or a breakdown of what each of her colleagues have been asked to do. In our view, it would be cheapening the words of the section to regard this exchange has having the effect described in section 26(1)(b).

223. The burden of proof has not shifted. The Claimant has not persuaded us that the incident might have been related to the Claimant's race, and we find that it was not related to her race.

6. If the Claimant establishes conduct referred in paragraph 5 above, was such conduct related to the protected characteristic of the Claimant's race? It is recorded that the Claimant identifies as North African.

224. We have set out above which conduct we found did and did not occur and we have also explained in each case whether the conduct related to the protected characteristic of the Claimant's race. In reaching our conclusion that none of the conduct related to the Claimant's race, we considered Mr Tariq's conduct as a whole, as well as looking at each individual incident separately.

7. If the conduct is found to be related to the protected characteristic of race, did it have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If it did not have that purpose, did it have that effect, taking into account:

7.1. the perception of the Claimant

7.2. The other circumstances of the case; and

7.3. Whether it is reasonable for the conduct have that effect?

225. As we went through the conduct alleged in each of the subparagraphs of paragraph 5, we addressed in each case whether the conduct had the purpose of effect set out in section 26(1)(b) of the Equality Act 2010. In reaching our conclusion that none of the conduct had that purpose or effect we considered the effects of Mr Tariq's conduct as a whole, as well as looking at each individual incident separately.

Victimisation

10. Did the Claimant's email to Ms Santini of 4 August 2017 amount to a protected act pursuant section 27(2) of the Equality Act 2010?

226. Our decision is that it did.

227. The Respondent's email of 2 August suggested that the Claimant would potentially return to a different role after maternity leave, and gave reasons. The Claimant's response was that – in her opinion – there would be maternity discrimination if she was not allowed to return to exactly the same role, and gave reasons. Amongst other things, she suggested that she was not redundant, and that – in the circumstances – the legislation did not allow the Respondent to require her to accept alternative duties.

228. Regardless of whether the Claimant was right or wrong about the legal situation, we are satisfied that the Claimant made the assertions in good faith

229. We do not accept the Respondent's counsel's argument that, because the 2 August 2017 email referred to an offer of duties which would only commence in

the future (at the end of the Claimant's maternity leave) the Claimant's email of 4 August 2017 could not fall within section 26(2)(d). [The argument being that if the contravention had not already occurred, then the Claimant could not have been making an allegation within that subsection.]

229.1 The email of 2 August refers to a situation which it says has already occurred, and that it is already known that the circumstances are such that the Claimant cannot return as Store Administrator and will be Client Adviser instead.

229.2 We do not read section 18(4) of the Equality Act as meaning that an employer's email expressing an intention to change the employee's duties cannot amount to unfavourable treatment, even though the new duties will only start at the end of maternity leave.

230. However, in any event, if the email of 4 August 2017 is not within section 26(2)(d), in our judgment it would therefore fall within section 26(2)(c). In those circumstances, it would be doing an "other thing" for the purposes of the Act, namely expressing an intention to challenge the employer's decision as discriminatory if implemented.

11. If the of 4 August 2017 amounted to a protected act, did the Respondent subject the Claimant to any of the following detriments as a result of that act

11.1. Deciding not to promote the Claimant on 20 October 2017?

231. The burden of proof has not shifted. The Claimant has not proved facts from which we might infer that her protected act was a significant influence on either (a) Ms Santini's decision not to place the Claimant on the shortlist of candidates to be interviewed by Mr Reynes or (b) the Respondent's decision to offer the post to (consecutively) two other candidates rather than to the Claimant.

232. Shortly after the Claimant's email of 4 August 2017, Ms Santini sent her email of 9 August 2017 to the Claimant. The offer was of a "sideways" move in the sense that it was an opportunity to move from being Store Administrator at one location to having the same job title at another store (Sloane Street). However, as Ms Santini's email made clear, it would provide the opportunity to be in charge in the manager's absence, thereby gaining experience. We do not believe that Ms Santini would have sent this email to the Claimant if it was Ms Santini's intention (as a result of the 4 August 2017 protected act) to act as a blocker to the Claimant's potential future advancement.

233. The two people offered the deputy store manager post (the person who turned it down, and then Mr Lennon) each had experience which the Claimant lacked.

234. We are satisfied that the reason that the Respondent offered the post of Deputy Store Manager of the Bvlgari outlet within Selfridges to candidates other than the Claimant is that the Respondent believed that each of those other candidates was better suited, and had more relevant experience, than the Claimant.

11.2. Deciding in December allocate the Click &Collect orders task to the Claimant alone and to exclude the Claimant from earning commission for dealing with Click & Collect orders?

235. This is two separate allegations, and we need to address each separately: (i) decision about individual commission; (ii) allocation of duties to Claimant, and statement that sales staff only need to the work when the Claimant was absent.

236. The reason why individual commission was no longer paid to the staff at Selfridges was the decision taken in Rome, which was communicated to Ms Santini by Ms Trotta on 13 December 2017, that individual commission on Click & Collect should not be paid (for either Selfridges or Harrods staff) in the future (albeit team commission would still be paid).

237. Although Ms Santini did not immediately communicate the decision to the staff in the Selfridges' outlet (and did not do so until 22 December, not long after the Claimant had sent an email that day enquiring about bonus entitlement), Ms Santini had no choice other than to implement the decision which she had been told she must implement. The timing of her communication to staff about the commission decision was not connected to the Claimant's 4 August 2017 email.

238. The burden of proof does not shift. We are satisfied that the protected act did not influence the Respondent (acting through Ms Trotta) in its decision about commission. The reason for the commission decision is that the Respondent did not think that any staff (not just the Claimant) at Selfridges or Harrods should get individual commission based on the Click & Collect arrangements at those stores.

239. In relation to the fact that Ms Santini's 22 December email specifically mentioned that the store administrator should do the Click & Collect work, Ms Santini thought that she was doing no more than reiterating and formalising the existing practice. It was work which had been done by the employees temporarily filling the store administrator role while the Claimant had been on maternity leave and Ms Santini saw no reason to change that when the situation with individual commission changed. Although the Claimant focuses on the fact that the email stated that, by default, the Claimant should do all the Click & Collect work, the email also addressed the need for the work to be done in the Claimant's absence. It is not surprising or suspicious that Ms Santini thought that the removal of individual commission might mean that employees would become less eager to do the work and that – therefore – her email notifying the removal of the commission should also address the fact that the work must still be done and specify who must it.

240. The burden of proof has not shifted. As mentioned above, after the protected act of 4 August, Ms Santini's email of 9 August showed willingness to assist the Claimant by giving her the opportunity to gain experience acting up as manager. The Claimant has not proved facts which show a link between her protected act of 4 August 2017 and the email of 22 December 2017 from Ms Santini.

241. We are satisfied that the Claimant's 4 August 2017 email did not influence Ms Santini's decision to inform staff, by way of her 22 December email, that Click & Collect work was the responsibility of the Store Administrator, and that it was the responsibility of sales staff whenever the Store Administrator was absent.

11.3. Deciding not to promote the Claimant in July 2018?

242. By the time of this decision, there had been at least two protected acts: 4 August 2017 (as per our decision above) and the 29 December 2017 grievance (as conceded by the Respondent).

243. There was not good documentary evidence presented to us to establish the exact date on which it was decided that the Claimant would not be appointed as Deputy Store Manager in Sloane Street. That means that there is no contemporaneous evidence presented to us as to whether the decision was made before or after the 7 August 2018 letter (which, as mentioned below, we have found to be a protected act).

244. The Claimant was told on 31 August 2018 and so obviously the decision had been made by then. The fact that the successful candidate was publicly announced on 3 September 2018 tends to show that the Respondent might well have decided some significant amount of time before 31 August 2018 that the Claimant would not be part of the final round of interviews.

245. However, the Claimant has not proved facts from which it could be inferred (in the absence of an explanation from the Respondent) that the decision not to shortlist her (and not to appoint her) could have been influenced by the protected acts of 4 August 2017 or 29 December 2017 or 7 August 2018. The successful candidate had superior qualifications for the job.

246. We are satisfied that the reason why the Claimant was not appointed to the Deputy Store Manager role between 10 July 2018 and 31 August/3 September 2018 is that the Respondent wanted to appoint the strongest candidate to the role and that at least one of the applicants was stronger than the Claimant.

12. Did the Claimant raise a grievance on 7 August 2018 and was it a protected act?

247. On balance, we are satisfied that this was a protected act.

248. The Respondent points out – correctly – that when Ms Coltra interviewed the Claimant and asked questions which would have given the Claimant the opportunity to say (for example) that she was alleging that Mr Tariq was discriminating against her because of her race (or harassing her for reasons related to race), the Claimant did not do so.

249. We also weighed up carefully that the Claimant's 4 page letter does not expressly allege that Mr Tariq (or anyone else) has breached the Equality Act. This is in contrast to the 4 August 2018 and 29 December 2017 emails which did expressly allege maternity discrimination. (Neither of them referred to Equality Act 2010, but each referred to breaches of the law, and clearly described the treatment alleged to be unlawful and clearly specified the alleged link between the unlawful treatment and the protected characteristic.)

250. The 7 August letter says that the Claimant found Mr Tariq's "behaviour to me to be very discriminative; I have experienced less favourable treatment from him". In itself, alleging discriminatory behaviour without making clear (whether expressly or by implication) that the allegation was that the less favourable was because of a protected characteristic would not necessarily be enough. Similarly, the use of

the word "harassment" without alleging (whether expressly or by implication) that the harassment was related to a protected characteristic would not be sufficient.

251. The 7 August letter also refers to a desire to "*address the problem internally without the need for legal action*". However, in context, that follows immediately after the Claimant's alleging that the Respondent (specifically Mr Tariq) was causing her stress and ill health. In context, the threat of legal action seems to be a reference to a potential personal injury claim based on breach of duty of care, rather than alleged breaches of Equality Act.

252. However, in our judgment, the sixth paragraph of the letter – where the Claimant refers to "picking on my English" – can be taken to contain an implied allegation that the treatment described in the remainder of that paragraph was less favourable treatment because of her race and/or harassment related to her race.

14. Did the Claimant offer to be a witness on behalf of BYK in an investigation by the Respondent? If so, did that constitute a protected act?

253. The Claimant did not do any protected act in connection with BYK. That is nothing which the Claimant did fell within section 27(2) Equality Act 2010. Neither BYK herself, nor the Claimant, made any allegation that fell within section 27(2)(d). If BYK had been alleging breach of Equality Act 2010 then the Claimant's offering to be a companion to BYK during any meeting at which that allegation was to be discussed might have been enough to satisfy the requirements of section 27(2)(c); however, on the facts, that was not the situation.

15. If the acts referred to at paragraphs ~~13~~ 12 ~~and~~ to 14 above are found to be protected acts:

15.1. Did the Respondent fail to investigate the Claimant's grievance against Mr Tariq because she did a protected act?

254. We have found that there was a protected act on 7 August 2018, and that there was no protected act in connection with BYK. The Respondent admitted that the 29 December 2017 grievance was a protected act.

255. However, allegation 15.1 fails on the facts because the Respondent did investigate the grievance. Ms Coltra interviewed the Claimant and Mr Tariq and Mr Lennon and produced a detailed outcome letter. It was not the outcome which the Claimant wanted, but it was a formal written outcome.

256. For the sake of completeness, we are satisfied that the fact that the Claimant did a protected act on 29 December 2017 was not a significant influence on Ms Coltra's decision to reject the 7 August 2017 grievance. Furthermore, the paragraph in the 7 August letter which mentioned "picking on my English" was not a significant influence on Ms Coltra's decision to reject the 7 August 2017 grievance.

15.2. Did the Respondent dismiss the Claimant because she did a protected act?

257. In analysing this issue, we are satisfied that the conditions of the first part of section 136(2) are met and that there are facts from which we could decide, in the absence

of any other explanation, that the Respondent contravened section 39(4)(c) of the Equality Act 2010 (ie victimised the employee by dismissing her). This means that we must find in the Claimant's favour unless (as per section 136(3) the Respondent shows that it did not contravene the provision.

258. In deciding that we were satisfied that the burden of proof had shifted, we did not not ignore that it is not sufficient for the Claimant to simply show that there was a protected act and that there was a dismissal. However, we have taken account of:

258.1 The Claimant's treatment seems different to that of Mr Hing. He received a written warning for swearing and raising his voice on the shop floor. The letter stated that this was not the first such incident and that there had been no apology from him. The warning followed a meeting which had been conducted under the disciplinary procedure.

258.2 The Claimant's treatment seems to be different to that of BYK. There was a documented investigation meeting with BYK on 11 July, to which she was invited in writing, and at which minutes were taken. There was a further meeting on 13 July 2018, after which BYK was dismissed for – amongst other things – refusing to carry out lawful and reasonable instructions of Mr Tariq. The difference is not explicable by the fact that BYK had less than 2 years' service and the Claimant had more than 2 years' service.

258.3 The Claimant's treatment was not in accordance with the "Disciplinary and Performance Improvement Procedure" in the staff handbook.

258.4 The Claimant's treatment was not in accordance with what Mr Tariq thought usually happened in the retail industry where there was a failure to follow a manager's instructions.

258.5 The Claimant's treatment was out of the ordinary for a company seeking to comply with UK law, in that she was an employee with in excess of 3 years' service who was called to a meeting and told that she was being dismissed, without (i) a written invitation letter or (ii) a right to be accompanied or (iii) notification that the meeting would consider dismissal or (iv) a chance to comment on whether or not she should be dismissed.

258.6 The Claimant was dismissed despite the fact that she had received no prior warnings.

258.7 The Claimant's potential dismissal had been discussed at a senior level (with Mr Pujia in particular and also with Mr Brisotto). It had been discussed for some time prior to the decision being made on 4 October, but without the Claimant having been notified.

258.8 The Respondent's response to the 7 August grievance included, in the 2 October letter, comments that the Claimant had a negative attitude towards Bvlgari.

258.9 The decision to dismiss was taken on her 4th working day back at work after doing the protected act of 7 August 2018 whilst off sick.

259. However, even though the burden has shifted, the Respondent has persuaded us that the decision to dismiss the Claimant was not influenced by the fact that (according to our judgment) the Claimant did a protected act on 7 August 2018 or 4 August 2017 or by the fact that (as per the Respondent's admission) she did a protected act on 29 December 2017.

260. Mr Pujia (the main decision-maker) and also Ms Santini and Mr Brisotto (the other decision-makers) were each satisfied that the Claimant's conduct was such that her employment should be terminated. They each formed the view that a warning to the Claimant would not produce an improvement. In the case of Mr Pujia, he assumed that specific efforts had been made to bring about an improvement; in fact, the Claimant had not been formally told that her conduct was regarded as falling short of the Respondent's guidelines or formally told that she was at risk of dismissal, but Mr Pujia did not ask specific questions about what had been done. He would not have asked more, or different, questions in the absence of the 7 August 2018 (or 4 August 2017 or 29 December 2017) protected acts.

261. Mr Tariq was not a decision-maker, but he had input to the decision by speaking to Mr Brisotto and Ms Santini directly (who fed his views, in general terms, to Mr Pujia) and also by speaking to Mr Velkopoulos who fed his views to Ms Santini. Mr Tariq only conveyed what were his genuine opinions, namely that the Claimant was disruptive and uncooperative and showed a reluctance to follow his instructions without a debate. Mr Tariq was not influenced in his views by the fact that, in her 7 August 2018 protected act, the Claimant had alleged that he had picked on her English. Mr Tariq's criticisms of the Claimant's attitude (as he perceived it to be) pre-dated the 7 August letter and – on the Claimant's own account – he had been critical of her to her face on several occasions in July.

262. Mr Brisotto and Mr Pujia each relied on Ms Santini for advice/decisions about compliance with UK employment law. Neither Mr Brisotto nor Mr Pujia made the decision that the Respondent would not follow the disciplinary procedure but would instead seek to rely on SOSR (irreparable breakdown of the working relationship). That decision was made by Ms Santini.

263. We are satisfied that the reason that Ms Santini decided that there would be no disciplinary procedure (and no investigation, and no hearing to allow the Claimant to comment on potential dismissal) is that Ms Santini came to the view (which we have found to be incorrect) that this was a shortcut that could legitimately be taken. She came to the view that if the Claimant was told on 5 October 2018 that the dismissal was because of "serious and irreparable breakdown in the working relationship" then there would be no need to have any (other) procedure prior to implementing the dismissal, and no need to run the risk that the hearing officer might reach a decision which was different to the one which she and Mr Brisotto had persuaded Mr Pujia to approve.

264. Ms Santini was not influenced by the Claimant's 4 August 2017 email from more than a year previously (and, as mentioned above, her 9 August 2017 email satisfies us that Ms Santini was not annoyed by the Claimant's 4 August email). She was not influenced by the contents of the 29 December 2017 grievance which had been rejected. She was not influenced by the fact that, in her 7 August 2018 letter, the Claimant alleged that Mr Tariq had picked on her English. She was

influenced only by the facts that the Respondent had decided to dismiss the Claimant based on her conduct (unfairly in our judgment) and she wanted the decision to be implemented as quickly as possible.

265. In relation to Ms D'Arco's decision to reject the appeal, the Claimant's protected acts did not influence her. Her investigation was not the type of thorough reconsideration which might have led us to decide that the dismissal had been a fair one, but we are satisfied that that is because she was deferential to Mr Pujia's decision, and that she would not have done a more thorough investigation into the dismissal in the absence of the 7 August 2018 protected act (or the acts of 4 August 2017 or 29 December 2017).

8. Does the Tribunal have jurisdiction to hear the victimisation claims or are they out of time?

9. If necessary would it be just and equitable to apply a time limit in excess of 3 months?

266. Acts or omissions alleged to have occurred on or after 28 June 2018 are in time. Therefore, the complaints about: not being promoted to Sloane Street DSM; the 7 August grievance not being investigated; dismissal, are all in time.

267. The decision in December 2017 that there would be no individual commission was not an act which continued until 28 June 2018 or later. The effects of the decision (the lack of commission) did continue, but there was a one off decision, make by the Respondent's employees in Rome, around 13 December 2017. The individuals who made that decision were not the decision-makers for any of the later acts alleged to breach the Equality Act. This decision was communicated to the Claimant on 22 December 2017. The Claimant was not in ignorance of her rights to bring a claim, and there were no health reasons preventing her contacting ACAS by March 2018 or issuing the claim within the resultant time limit. By the time the Claimant did issue the claim, she was more than 8 months out of time. It was also about 6 months after the grievance appeal outcome. In terms of liability, the Respondent was not disadvantaged by the time delay in terms of the witnesses or documents which it could produce. However, in terms of remedy, the need to reconstruct what commission the Claimant might have earned in 2018 if individual commission had remained in place would have meant that the Respondent was significantly disadvantaged by the delay. Taking all of this into account, there is no just and equitable reason to extend time in relation to this complaint.

268. The Claimant was told in December 2017 that she would be responsible for doing Click & Collect work, except when she was absent. Seemingly, there was some fluidity after that in that Mr Patel later sent an email allocating other staff to do Click & Collect, and Mr Tariq – in July – did not immediately re-establish the system by which the Claimant was solely responsible. He later insisted on her doing it over her objections, relying in part on his own experience for other retailers, and not solely on Ms Santini's 22 December 2017 instruction to staff. Had the Claimant established that requiring her to do all of the Click & Collect (except when absent) was victimisation, we would have been likely to decide that it was in time as an act which continued until after 28 June 2018.

269. The decision in October 2017, that the Claimant would not be offered the Deputy Store Manager at Selfridges was out of time. So was the fact that in January 2018, after the first candidate refused, the Respondent offered the job to Mr Lennon rather than to the Claimant. It was Ms Santini's decision in October 2017 that the Claimant would not be shortlisted and interviewed by Mr Reynes. Ms Santini is also a person against whom the later allegations were made. However, our decision is that there was no continuing act between the decision not to shortlist the Claimant in October 2017 and the decision not to follow any disciplinary procedure in October 2018. Although the same person (Ms Santini) was involved each time, they were quite separate actions taken for unconnected reasons. The Claimant was not unaware of her rights, and not prevented from bringing a claim in time by ill-health. Mr Reynes was not a witness in these proceedings, which put the Respondent at some potential disadvantage in relation to the Respondent's specific reasons for first making the offer to the original successful candidate and later to Mr Lennon. More than a year passed between the Claimant being told she was unsuccessful, and her issuing her claim. This delay would cause memories to fade. In all the circumstances, we do not extend time for this complaint.

<u>Unlawful deduction of wages</u>

16. Was the Claimant entitled be paid in respect of overtime under her contract of employment?

17.2. Further or alternatively was the Respondent permitted not to make such payments to the Claimant on the basis of a contractual provision? In particular, was the Respondent entitled to withhold such payments because (a) payments for overtime was at the Respondent's discretion and/or (b) any such payments for overtime would only be made at the endo of the calendar year providing the employee was still employed by the Respondent at that time?

270. The unlawful deduction claim (in relation to the Claimant's final salary payment) fails. The written contract is clear that when overtime is required to be worked the employee will have only a right to take time off in lieu, and will not have a right to paid for that overtime. The Respondent has sole discretion as to whether to pay for the time rather than grant time off in lieu.

271. The Respondent does not seem to have been particularly co-operative with the Claimant in relation to allowing her to take the time off in lieu. However, even if we were to consider this as a potential breach of contract complaint (contrary to the agreed list of issues), and even if we decided that the Respondent was actually in breach of contract (and the terms of the written contract did not require the Respondent to make a payment and they also did not specify terms for the timing of using the time off lieu) then the Claimant does not appear to have suffered a loss. Had the Respondent required the Claimant to work out her notice, then, during the notice period, she would have had further opportunities to request the Time Off In Lieu. In fact, the Respondent gave her the whole month "off" and paid her in lieu of the full month.

Outcome and next steps

272. There will be a remedy hearing on 15 February 2021 for a whole day. The hearing will be fully remote and by video.

Employment Judge Quill

Date: 29 December 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30/12/20..

....
FOR EMPLOYMENT TRIBUNALS