Case Numbers: **3303448/2019 (V)**
3303666/2019
3303665/2019

EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
(1) Paula Whitbourn	**v**	(1) Key People Limited
(2) Jason Atherton		(2) Just Recruit Group Limited (In Administration)
(3) Scott Neto		

Heard at: Bury St Edmunds (by CVP)

On: 15 and 16 March 2020
08, 09, 10, 11 and 12 February 2021
15 and 16 February 2021 (In Chambers)

Before: Employment Judge M Warren

Members: Mr C Davie and Mr B Smith

Appearances
For the Claimants: Mr P O'Callaghan (Counsel).
For the Respondents: Mr N Freed (Director).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. Mrs Paula Whitbourn's claims of unfair dismissal and sex discrimination succeed. The First Respondent shall pay her compensation in the sum of **£58,657**.

2. Mr Jason Atherton's claims of unfair dismissal and for holiday pay succeed. The First Respondent shall pay him compensation in the sum of **£57,940**.

3. Mr Jason Atherton's claim in breach of contract for notice pay fails.

4. Mr Scott Neto's claims for unfair dismissal, in breach of contract and for holiday pay succeed. The Second Respondent shall pay him compensation in the sum of **£100,442**.

5. The recoupment provisions do not apply.

REASONS

Background

1. We were originally due to hear this case during the week commencing 15 March 2020, the week before the Coronavirus lockdown came into effect. During that week, the Coronavirus was already causing considerable alarm. We spent day 1 reading the witness statements and reading or considering the documents referred to in the witness statements. By day 2, some of the witnesses and counsel were very reluctant to attend the Tribunal hearing in person. Whilst we tried very hard to find a way of conducting the hearing at that time in a way that would have enabled everybody to feel comfortable and safe, it proved impossible to find a satisfactory solution. We were therefore constrained to adjourn. In consultation with the parties and the listing department, the earliest we were able to re-list the case was 8-16 February 2021. We reserved the case to ourselves.

2. Just Recruit Group Limited went into administration on 29 January 2021. On Friday 5 February 2021, the claimants made an application to join in as a respondent, a company to which the business of Just Recruit had been transferred by the Administrators, Achieva Group Limited.

3. Achieva Group Limited instructed Mr Linsted of Counsel to oppose the application and to apply for the claimants' application to be considered in 4 weeks' time, in order to allow Achieva Group Limited time to prepare.

4. After discussion and allowing Mr O'Callaghan time to take instructions, the claimants decided not to proceed with their application.

5. As at the start of the hearing, the Administrators had not been asked to give their consent to the case involving Just Recruit proceeding. During a break, Mr O'Callaghan made contact with the Administrators to ask for their leave and they indicated that they were taking legal advice.

6. Upon the claimants withdrawing their application, we adjourned at 2.15 on day 1 in order to give the Administrators time to give their consent to the claim against Just Recruit proceeding.

Preliminary Decision

7. At the start of day 2, the Administrators consent had not been forthcoming. An issue arose as to whether or not it would be appropriate to proceed with the cases of Mrs Whitbourn and Mr J Atherton, whose employer was the first respondent Key People, (not in administration). Mr Freed objected. After hearing submissions, our decision to the parties was as follows:

7.1 The preliminary issue that arises in this case this morning is that the claimants Mrs Whitbourn and Mr Atherton are ex-employees of Key People Limited. Mr Neto is a former employee of Just Recruit Group Limited. Just Recruit Group Limited is in administration, Key People Limited are not. The Administrators for Just Recruit Group Limited have not yet given consent to the case of Mr Neto being dealt with by the Tribunal. We are told that the Administrator has sent a copy of the bundle to Solicitors and is seeking advice.

7.2 The history of the case is that it was scheduled to have been heard in March 2020 and had to be abandoned because of the Covid crisis. At that time the soonest we could list this case was now, (February 2021). One factor to bear in mind is that this time last year, the soonest we could get the case re-listed was almost one year later. As a result of the Covid crisis, the state of the tribunal list is now significantly worse than it was one year ago because of: a) the number of postponed cases that have packed out the list and b) the avalanche of new cases that are coming in because of Covid related issues. Any postponement is likely to kick this case into the back end of 2022.

7.3 The proposal from Mr O'Callaghan for the claimants this morning is that we push on and hear the cases of Mrs Whitbourn and Mr Atherton whilst we await a decision from the Administrator. If during the course of the hearing the Administrator gives consent, then we can also hear Mr Neto's case.

7.4 Mr Freed objects to that proposal, rightly pointing out that these cases were consolidated, that there are overlapping facts and that a decision in the Whitbourn and Atherton cases might prejudice the Neto case in due course.

7.5 We have before us an agreed list of issues. This is a list of issues that was agreed when the respondents were represented by counsel in March 2020. The respondents are no longer represented by lawyers. Mr Freed, an officer of the first respondent Key People Limited, is here representing that company. Just Recruit Group Limited are unrepresented.

7.6 We examined the list of issues. What that tells us is that in respect of all three claimants, it is accepted they were unfairly dismissed; it is

accepted that their dismissals were not procedurally fair. The amount of the basic award is agreed. The question before us is the loss which each claimant has suffered. We would have to assess that and to what extent each claimant has or has not mitigated their loss. The crucial point is paragraph 5 of the list of issues, which poses the so-called Polkey question; would the claimants have been dismissed anyway if a fair procedure had been followed? What chance is there that they would have been dismissed anyway? That will involve the Tribunal in hearing evidence and making an assessment of the veracity of the decision to dismiss and the reasons given for it.

7.7 We then analysed the witness statement of Mr Freed who is the only person who is going to give evidence for the respondents. The reasons for dismissal given in respect of Mr Atherton refer to a meeting that he and his co-director Mr Donovan had with Mr Atherton and Mr Neto on 8 October. This arose out of the desire of Mr Atherton, who was a shareholder in Just Recruit, and Mr Neto to sell that business. It is said, though disputed, that Mr Atherton and Mr Neto indicated that they could not carry on with things as they were. The evidence of Mr Freed would be that he and Mr Donovan took the view that the business could not carry on with Mr Atherton and Mr Neto because of their attitude.

7.8 Mr Freed's witness statement goes on to set out that they, Messrs Donovan and Freed) settled upon a redundancy rationale to dismiss Mr Atherton. He explains the diminished contribution of Mr Atherton to the business, the consequential reduced income of Key People, the substantial employment costs of Mr Atherton and how they assessed that Key People could do without a Sales Director, which is the role Mr Atherton had in that business. He goes on to say that if they had engaged in consultation, it would have been futile. He offers in the alternative, if the Tribunal were to find that redundancy was not the reason for dismissal, that there was an irretrievable breakdown in the employment relationship because of Mr Atherton and Mr Neto indicating on 8 October that they did not wish to carry on as they were, working for Key People and Just Recruit respectively.

7.9 So that is something which appears to be in dispute relevant to both Mr Atherton and Mr Neto, for if we read on in Mr Freed's witness statement, he speaks of their reasons for dismissing Mr Neto as that they felt there was an impasse with Mr Neto as well as Mr Atherton, because of the depths of their disillusionment. He does go on to say that they believed there had been a significant drop in sales performance and that this was because Mr Neto was starting his own business venture, but clearly it all stems from that meeting on 8 October.

7.10 There does appear to be some overlap of dispute between Mr Atherton and Mr Neto.

7.11 We move on then to analyse Mr Freed's evidence relating to the dismissal of Mrs Whitbourn. In essence, he sets out how firstly, there was perceived poor performance by Mrs Whitbourn but secondly, that they discovered she had set up a company which they believed had been set up with a view to being run in competition with the respondent and that she intended to entice away their candidates. The latter is put forward as the reason for her dismissal. There does not appear to be that same potential overlap of disputed facts on Mrs Whitbourn's case. Furthermore, Mrs Whitbourn's case is not just about unfair dismissal, she also brings a claim of sex discrimination. She complains of direct discrimination in a verbal warning she was given on 13 September 2018 in respect of her performance and secondly, in respect of her dismissal. In respect of her sex discrimination claim, she refers to a comparator, somebody called Simon Barratt, who she said had also set up a company and yet was not dismissed. There is no overlap at all with the cases of Mr Atherton and Mr Neto.

7.12 Applying the overriding objective and seeking to do justice, bearing in mind this case arises out of dismissals in October 2018, that is some 2½ years ago and if we do not get the cases started we are likely to be looking at 3½-4 years from dismissal before they are heard, we conclude that, order for consolidation or not, we should proceed with Mrs Whitbourn's case but that the case of Mr Atherton will have to wait until the situation with regard to the Administrators is known.

The Issues

8. The parties agreed upon a list of issues at a time when everyone was represented by solicitors and counsel, shortly before the hearing in March 2020. Mrs Whitbourn's claim of discrimination by reason of her marital status was withdrawn at the hearing in March 2020. I set out below by way of cut and pasting, the agreed list of issues.

Unfair Dismissal — all Claimants

1. In respect of each claimant, what was the reason for the Claimant's dismissal and was that a potentially fair reason under the ERA s.98? The relevant Respondent's position in respect of each is that they were dismissed for the following potentially fair reasons:

1.1. Paula Whitbourn — gross misconduct, alternatively SoSR;

1.2. Jason Atherton — redundancy, alternatively SoSR;

1.3. Scott Neto — capability, alternatively SoSR.

2. In respect of each Claimant, the Respondent accepts that the dismissal was not procedurally fair.

3. It is agreed that the basic awards due on a finding of unfair dismissal (subject to any reduction, as to which see below) are:

3.1. Paula Whitbourn - £11,430;

3.2. Jason Atherton - £9,398 (which equates to the sum Mr Atherton was paid as a

redundancy payment); and

3.3 Scott Neto - £4,064.

4. In respect of the quantum of any compensatory award:

4.1. What loss has each of the Claimant's suffered?

4.2. To what extent have the Claimants sought to mitigate their loss?

4.3 Have the Claimants failed to act reasonably in mitigation of their loss?

5. Should there be a Polkey reduction to take account of the possibility each Claimant would have been fairly dismissed had a fair procedure been carried out, or that each Claimant's contract of employment would otherwise have been fairly terminated?

6. Should each Claimant's compensatory award be reduced under ERA s.123(6) to take account of action by that Claimant which to any extent caused or contributed to that Claimant's dismissal?

7. Should each Claimant's basic award be reduced under ERA s.122(2) to take account of that Claimant's conduct prior to dismissal?

8. Should each Claimant's compensation be reduced on account of the principal in W Devis & Sons Ltd v Atkins [1977] AC 931 on account of conduct which did not come to light until after their dismissal?

Wrongful Dismissal

9. In respect of Paula Whitbourn:

9.1. It is not in dispute that Ms Whitbourn set up Specialist Sourcing Group Ltd in May 2018 without informing her employer.

9.2. By doing so, did Ms Whitbourn commit a fundamental breach of her contract of employment entitling her employer to dismiss her without giving her notice?

9.3 If yes, did her employer dismiss her for committing that fundamental breach?

9.4 If Ms Whitbourn did not commit a fundamental breach of contract entitling her employer to dismiss her without giving her notice, to what amount in damages is she entitled, it being agreed that her notice period was 12 weeks?

10. In respect of Mr Atherton:

10.1. It is agreed that on 26 October 2018, Mr Atherton was dismissed summarily.

10.2 It is agreed that Mr Atherton's entitlement was to 12 weeks' notice of

termination.

10.3 It is his employer's case that he was paid a gross sum of £23076 as a payment in lieu of notice. Was that amount paid?

10.4 Was the amount paid to Mr Atherton lower than was contractually due to him in respect of his notice period?

10.5 If yes, to what extent does consideration of that issue fall within or outside the Tribunal's jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?

10.6 To the extent that it falls within the Tribunal's jurisdiction, by how much (if anything) was Mr Atherton underpaid in respect of his notice period?

10.7 Prior to dismissal, did Mr Atherton commit a repudiatory breach of contract which was unknown to the employer at the time but on which grounds the employer would have been entitled to dismiss Mr Atherton without notice?

11.1 In respect of Mr Neto:

11.1. It is agreed that on 26 October 2018, Mr Neto was dismissed summarily.

11.2. It is agreed that Mr Neto's entitlement was to 8 weeks' notice of termination.

11.3. It is his employer's case that he was paid a gross sum of £15,384.61 as a

payment in lieu of notice. Was that amount paid?

11.4. Was the amount paid to Mr Neto lower than was contractually due to him in respect of his notice period?

11.5. If yes, to what extent does consideration of that issue fall within or outside

the Tribunal's jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994?

11.6. To the extent that it falls within the Tribunal's jurisdiction, by how much (if anything) was Mr Neto underpaid in respect of his notice period?

Holiday Pay

12 Did Mr Atherton and/or Mr Neto have any accrued but untaken holiday owing to them as at the termination date?

12.1. It is Mr Atherton's case that he had accrued but untaken holiday at termination, whereas it is his employer's case that it was 1 day;

12.2. It is Mr Neto's case that he had 1 day's accrued but untaken holiday at termination, whereas it is his employer's case that he had exceeded his annual leave allowance.

Direct sex Discrimination — Paula Whitbourn

Verbal warning

13. It is agreed that on 13 September 2018, Ms Whitbourn was given a verbal warning in respect of performance for failure to achieve business targets.

14. Does Ms Whitbourn prove facts from which the Tribunal could properly conclude that in giving her a verbal warning she was treated less favourably because of her sex than her employer treated or would treat others? Ms Whitbourn relies upon Tim Barratt, Simon Barratt and Mark Cussens as comparators.

15. If yes, does her employer prove that the issuing to Ms Whitbourn of the verbal written warning was not because of her sex?

Dismissal

16. It is agreed that Ms Whitbourn was dismissed on 29 October 2018 and that the reason given by her employer was gross misconduct relating to the incorporation of a temporary employment agency in May 2018 without informing her employer.

17. Does Ms Whitbourn prove facts from which the Tribunal could properly conclude that in dismissing her she was treated less favourably because of her sex than her employer treated or would treat others? Ms Whitbourn relies upon Simon Barratt as a comparator who had also incorporated a temporary employment agency whilst employed by the First Respondent and without informing his employer.

18. If yes, does her employer prove that Ms Whitbourn's dismissal for setting up a temporary employment agency without informing them was not because of her sex?

Discrimination — Remedy

19. If Ms Whitbourn succeeds in either or both of her claims for direct sex discrimination, by what amount should she be compensated for injury to feelings?

20. If Ms Whitbourn succeeds in her claim that her dismissal was direct sex discrimination, what is her loss consequential on that discriminatory act?

21. To what extent should any such loss be reduced as a result of the possibility that Ms Whitbourn's employment could have been terminated in a manner not in breach of the Equality Act 2010?

ACAS Uplift

22. Did the ACM Code of Practice on Discipline and Grievance Procedures apply to the acts of:

22.1. Issuing Ms Whitbourn a verbal warning; and

22.2. Dismissal of each of the Claimants?

23. If yes, did the employer fail to comply with that Code in respect of that matter?

24. If yes, was that failure unreasonable?

25. If yes, is it just and equitable in all the circumstances for the Tribunal to increase the award? If so, by how much up to a maximum of 25%?

Statutory Cap

26. The statutory cap set out at ERA s.124(1ZA) applies to the claims for unfair dismissal.

27. It is agreed that in respect of Mr Atherton and Mr Neto that cap is £80,682.

28. To the extent that Ms Whitbourn fails in her direct sex discrimination claim relating to her dismissal, and accordingly to the extent that the statutory cap is applicable to her unfair dismissal claim, at what amount is her compensatory award for unfair dismissal capped?

Evidence

9. For the hearing in March 2020, we had before us witness statements as follows:

   9.1 One statement from Mrs Whitbourn.

   9.2 Two statements from Mr Jason Atherton; a statement dealing with the substantive issues and a further short statement dealing with events

on 16 March 2020. The respondent had applied for a postponement of the hearing on the grounds that Mr Norman Freed had been told to self-isolate due to the Coronavirus. Mr Atherton gave evidence to the effect that he had seen Mr Freed in the offices of Key People meeting with Mr Mark Atherton, Mr Paul Donovan and their solicitor.

9.3 Two witness statements from Mr Neto. The statements were virtually identical, the difference between them being that the second statement contained a detailed rebuttal of points made in the respondents' amended grounds of resistance, which in themselves were largely repetitive. As I observed during the hearing, this was unhelpful.

9.4 A witness statement from Mr Paul Donovan, Director of Key People at the time.

9.5 A statement for Mr Norman Freed, Company Secretary and Director for Key People.

10. We had before us a paginated and indexed bundle of documents running to page 223. Unhelpfully, this was not assembled in date order but had one section for claimants' documents and one section for the respondents' documents, contrary to the order of EJ Lewis given at the preliminary hearing before him on 2 August 2019.

11. In addition to the agreed list of issues, we also had a cast list and a chronology.

12. At the start of the current hearing, we were provided with a pdf file of documents relating to remedy and very short witness statements as to remedy from Mr Neto and Mr Jason Atherton.

13. We heard oral evidence from each of the witnesses except Mr Donovan. We were informed that since March 2020, Mr Donovan had been dismissed for gross misconduct in acrimonious circumstances, which is why he was not called to give evidence. We read his statement, but treated its content with circumspection as he was not here to have his evidence tested under oath.

14. At the March 2020 hearing, the respondents were represented by counsel. At this hearing, the first respondent, Key People, was ably represented by Mr Freed, the second respondent in administration was un-represented.

15. Although we decided to proceed with the case of Mrs Whitbourn only, on Wednesday 10 February 2021 the Administrators' gave their consent to Mr Neto's case continuing. Having heard evidence from both sides on Mrs Whitbourn's case, we went on to hear evidence from Mr Atherton and Mr Neto followed by evidence from Mr Freed in respect of their two cases, on Thursday and Friday 11 and 12 February 2021.

The Law

Unfair Dismissal

16. Although both respondents have accepted the dismissal of each of the claimants was procedurally unfair, it is still necessary for us to consider the law in relation to what amounts to a fair or an unfair dismissal, because the respondents' pleaded cases are that the compensation awards should be reduced to reflect that had a fair procedure been followed, the claimants would have been fairly dismissed anyway. We therefore need to set out what is required for a dismissal to be fair.

17. Section 94 of the Employment Rights Act 1996, (ERA) contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal. Two are relied on in the alternative by the respondents in this case: redundancy (s98(2)(c)) or, *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"*, (s98(1)(b)).

18. If such a reason is established, the Tribunal must go on to apply the test in Section 98(4):

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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."*

19. This will entail the Tribunal asking itself whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

20. Redundancy is defined in section 139(1) of the ERA as follows:

> *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

21. No business or place of work was closing in this case, so the provisions of subsection (1) (b) are what concern us here.

22. Judge Peter Clark in Safeway Stores Plc v Burrell [1997] ICR 523 identified a simple three stage test for redundancy, (at paragraph 24) as follows:

(1) Was the employee dismissed? If so,

(2) Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

(3) Was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?

23. The seminal case to assist us in deciding whether a decision to dismiss by reason of redundancy satisfies the test of fairness set out at section 98(4) is Williams & others v Compare Maxim ltd 1982 ICR 156 EAT, which clarified that the Tribunal should ask itself whether, *" the dismissal lay within the range of conduct which a reasonable employer could have adopted".* In that case, factors were identified which might help us in answering that question:

- Whether the selection criteria were objectively chosen and fairly applied
- Whether employees were warned and consulted about the redundancy
- Whether, if there was a union, the unions view was sought
- Whether any alternative work was sought

24. Commenting on redundancy and procedure in the House of Lords in the case of Polkey v A E Dayton Services 1988 ICR 142 Lord Bridge said:

"the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation"

25. The Tribunal should not concern itself with the commercial merits of the employers decision to make redundancies; it is not for us to tell employers how to run their enterprise, (see James W Cook & Co (Wivenhoe) Ltd (in Liquidation) v Tipper [1990] ICR 716 and Campbell v Dunoon and Cowal Housing Association [1993] IRLR 496)

26. If the reason for dismissal is redundancy, we must look at the circumstances of the case in the round. Failure to act in accordance with one or more of the principles in Compair Maxam does not necessarily involve the conclusion that the dismissal was unfair. Whether in the circumstances of any particular case an employer has acted reasonably in taking or not taking any step or failing to follow any procedure renders a dismissal unfair is a matter for the Tribunal to decide in the light of all the circumstances of the case in reaching the conclusion as to whether or not the dismissal was reasonable within the meaning of s 98(4). (See Grundy (Teddington) Ltd v Summer & Salt (1983) IRLR 98 EAT)

27. The potentially fair, "some other substantial reason" is a, "catch all provision", recognising that the list at s98(2) cannot capture every situation in which a decision to dismiss is potentially fair. From the very wording of s98(1)(b) it is self-evident that the reason must be:

    27.1 Not the same reason as one of the other potentially fair reasons, although it may contain elements of the other reasons;

    27.2 "Substantial", which means that it must not be frivolous or trivial, and

    27.3 A reason that potentially justified dismissing an employee holding the position the claimant held.

28. Sometimes, a dismissal resulting from a business reorganisation may not give rise to a redundancy situation. It may however, amount to some other substantial reason. To be a reason of a kind that might justify dismissal, there must be sound, good business reasons for the reorganisation, see Hollister v National Farmers Union [1979] IRLR 238.

29. The test of fairness in s98(4) still has to be passed and whilst every case must turn on its facts, one would usually expect to see a process of warning and consultation similar to that one would expect to see in a redundancy dismissal.

30. Sometimes a Respondent may say that the reason for dismissal was a break down in confidence between employer and employee, which is a substantial reason justifying dismissal. Such cases must be approached by Tribunals with care, so as not to allow employers to use such a justification for dismissal as a convenient label to stick on any situation where an alternative potentially fair reason is not available, (per Mummery LJ in Leach v Office of Communications [2012] ICR 1269 CA). It is not an, "automatic

solvent of obligations" (Per Underhill P in Mc Farlane v Relate Avon Ltd [2010] ICR 507 EAT).

31. Nor, in such cases, should the Tribunal simply conclude that if the employer/employee relationship has broken down and there is a loss of trust and confidence, that is the end of the matter. In considering the fairness of the dismissal the Tribunal may consider the surrounding circumstances behind that loss, (see Perkins v St George's Healthcare NHS Trust [2005] IRLR 934).

Wrongful Dismissal

32. Wrongful dismissal is something quite different from unfair dismissal; it is a dismissal that is in breach of contract. The question of unfairness in a dismissal arises out of the Employment Rights Act 1996, the remedies for which are stipulated in that Act. Whether a dismissal was in breach of contract, (and therefore wrongful) is a question of common law. The classic example of wrongful dismissal is a dismissal without providing the period of notice required by the contract.

33. The remedy for wrongful dismissal is to place the employee in the position they would have been in had the contract been performed, which usually means paying them in damages what they would have received had they been given the required period of notice.

34. Where an employee has been dismissed without the notice that is required by the contract, the question will be whether the employee has committed a fundamental breach of contract, such as may entitle the employer to dismiss without notice.

35. One important difference between unfair dismissal and wrongful dismissal is that an employer can defend a claim of wrongful dismissal on the basis of facts found out after dismissal, see Boston Deep Sea Fishing & Ice v Ansell (1888) 39 CHD 339.

36. It is frequently the case that a contract of employment will say that the employer is entitled to dismiss the employee without notice if they are guilty of gross misconduct. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

37. Another key difference between a case of wrongful dismissal and a case of unfair dismissal is that in an unfair dismissal case involving conduct, the key question is the reasonableness of the employers belief that the employee was guilty of the alleged misconduct. In a wrongful dismissal case, the tribunal is concerned with whether the employee is actually guilty of the misconduct; a finding of fact to the effect is required.

Sex Discrimination

38. The relevant law is set out in the Equality Act 2010.

39. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

40. Sex, (gender) is one of a number of protected characteristics identified at s.4.

Direct Discrimination

41. Mrs Whitbourn says that she was directly discriminated against because of her sex. Direct discrimination is defined at s.13(1):

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

42. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

43. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? There is no difference in meaning between the term, "because of" in section 13 and "on the grounds of", under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

44. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many*

subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

45. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

46. Section 136 deals with the burden of proof:

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

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

47. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of

steps that we have carefully observed in the consideration of this case. In this particular case it is worthwhile setting them out:

47.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.

47.2 If the Claimant does not prove such facts, she will fail.

47.3 It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.

47.4 The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.

47.5 At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.

47.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

47.7 These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

47.8 Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.

47.9 Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.

47.10 It is then for the Respondent to prove that it has not committed the act.

47.11 To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the

treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Onu v Akwiwu referred to above).

47.12 The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.

47.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

48. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

49. Madarassy v Nomura International plc [2007] IRLR 246 CA also confirms that a mere difference in treatment is not enough, Mummery LJ stating:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

50. In Denman v Commission for Equaltiy and Humand Rights and Others [2010] EWCA Civ 1279 Sedley LJ made the point though, that the something more which is needed need not be a great deal, it might for example be provided by a failure to respond to, or an evasive or untruthful answer to, a questionnaire or by the context in which the act has occurred. In other cases, that something more has been statistical evidence suggesting unconscious bias, inconsistent explanations or refusal to provide information.

51. In Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 Kerr J said, (quoting Lord Nicholls in Shamoon) that sometimes the reason for the treatment is intertwined with whether the Claimant was treated less favourably than a comparator such that, *"the decision on the reason why issue will also provide the answer to the less favourable treatment issue".*

Remedy – unfair dismissal

52. The claimants seek compensation, not re-employment.

53. When a claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the ERA which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case).

54. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to any action taken by the employer.*"

55. Section 123 (4) provides that a claimant has the same duty to mitigate his or her loss as would a claimant under the common law. The burden of proof lies with the employer to show that the claimant has failed to mitigate loss.

56. The burden of proof though lies with the respondent if it wishes to assert that the claimant has failed in that duty. The question is not whether the claimant has behaved reasonably, but whether he or she has taken reasonable steps to mitigate. She or he is expected to behave as they would have behaved had they no prospect of receiving compensation, (Archbold Freightage Ltd v Wilson [1974] IRLR 10 NIRC).

57. Langstaff J reviewed the law on mitigation in Cooper Contracting Limited v Lindsey UKEAT/0184/15 which might be summarised as follows:

    57.1 The burden of proof is on the wrongdoer.

    57.2 The burden of proof is not neutral – if no evidence is offered, the employment tribunal does not have to find a failure to mitigate.

    57.3 What has to be proved is that the claimant acted unreasonably.

    57.4 There is a difference between acting reasonably and not acting unreasonably

    57.5 What is reasonable and unreasonable is a question of fact

57.6 The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.

57.7 The tribunal should not apply too exacting a standard on the claimant, he or she is the victim.

57.8 In summary, it is for the respondent to show that the claimant acted unreasonably.

57.9 It may have been perfectly reasonable for the claimant to have taken a better paid job, that is important evidence, but not itself sufficient.

58. In the case of Polkey v A E Dayton Services Limited [1988] ICR 142, Lord Bridge quoted Browne-Wilkinson LJ from the case of Sillifant v Powell Duffryn Timber Limited [1983] IRLR 91:

> "*If the Tribunal thinks that there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment*."

59. Whilst that case involved redundancy and an unfair procedure, the principles set out in this quotation apply equally to any case of unfair dismissal, for applying section 123(1) requires the Tribunal to award such sum as it considers just and equitable and what is just and equitable must depend, to some degree, on what prospects there were that the Claimant might have been or might in due course have been, fairly dismissed any way, see Gove and Others v Property Care Limited [2006] ICR 1073. That inevitably entails a degree of speculation, but Tribunals are reminded that speculation is what they have to do, if they are to make an award that is just and equitable in accordance with section 123(1), see Software 2000 Ltd v Andrews [2007] ICR 825. The principle is not limited to cases of procedural unfairness; there may be other factors unconnected with procedure that may mean that the claimant might have been dismissed anyway.The assessment we must make is what this employer would have done, (in other words, not apply a test of what some other, reasonable employer, would have done – see Hill v Governing Body of Tey Primary School [2013] ICR 691). A reduction in accordance with these principles might be a percentage reduction or it might involve limiting the compensation to a particular period.

60. Section 123(6) of the ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the Claimant, it must reduce the award of compensation by such proportion as it considers just and equitable.

61. In Nelson v BBC (No2) 1979 IRLR 346 the Court of Appeal laid down that there are 3 findings that an Employment Tribunal must make before reducing an award for contributory fault. They are:-

    61.1 There must have been culpable and blameworthy conduct by the employee, (that can include not just misconduct or breach of contract but also conduct which could be described as perverse, foolish, bloody-minded or merely unreasonable in all the circumstances – but not all unreasonableness – it depends on the circumstances);

    61.2 The conduct must have caused or contributed to the dismissal.

    61.3 It must be just and equitable to reduce the award by the proportion specified.

62. The amount of any reduction is a matter of fact and degree for the tribunals discretion but the Court of Appeal gave some general guidance in Holliers v Plysu Ltd 1983 IRLR 260:-

    - employee wholly to blame : 100%
    - employee largely to blame : 75%
    - employee and employer equally to blame : 50%
    - employee slightly to blame : 25%

63. A Claimant's conduct might also result in the Basic Award being reduced: section 122(2) provides that the Basic Award may be reduced where the Tribunal considers the conduct of the Claimant before dismissal such that it is just and equitable to do so.

64. In considering what is, "just and equitable" to award, (under s123(1)) a Tribunal may have regard to misconduct on the part of the Claimant before dismissal but discovered by the Respondent after the Claimant had been dismissed. The unfairness of the dismissal is unaltered, but such misconduct may make it just and equitable to reduce the compensation payable, see W Devis and Sons Ltd v Atkins 1977 ICR 662.

65. Note that section 123(1) refers to what is just and equitable, "having regard to the loss sustained by the complainant" and so one should still have regard to that loss before deciding what is just and equitable.

66. Misconduct, or any other reason for dismissal, known before the dismissal, but not relied upon by the Employer, cannot give rise to a reduction in compensation: see Devonshire v Trico-Folberth Ltd 1989 ICR 747.

67. Misconduct after dismissal is not relevant either, see Soros & Another v [1994] ICR 590 and Mullinger v Department for Work and Pensions UKEAT/0515/05.

68. By an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A, where in a case of unfair dismissal or discrimination, it appears that a relevant code of practice applies, the employer has failed to comply with that code and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award by up to 25%. The only ACAS code of practice to which that provision relates is the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2009) which sets out recommendations as to how an employer should handle cases of disciplinary issues and how to handle a grievance which has been raised by an employee.

69. The ACAS code applies to cases of misconduct and poor performance, it does not apply to cases of redundancy or the expiry of a fixed term contract. It does not apply to cases ill-health, (Holmes v Qinetiq Ltd UKEAT/0206/15). Whilst it may apply in some cases where the potentially fair reason relied upon is, "some other substantial reason" if there are elements of misconduct or poor performance, it does not apply to cases where the substantial reason is relationship breakdown, (Phoenix House Ltd v Stockman UKEAT/0264/15). Where disciplinary procedures are or ought to be applied, even if ultimately the dismissal is for a non-disciplinary reason, the code applies. If the employer ought to have treated the case as a disciplinary matter, the code applies, (Lund v St Edmunds School Canterbury [2013] ICR D26).

70. Section 124 (1ZA) limits the amount of compensation that may be awarded for unfair dismissal to the lower of 52 week's pay or a specified figure which is changed annually, (currently £88,519).

71. A week's pay for the purposes of the Statutory Cap is to be calculated in accordance with sections 220 to 229 of the ERA. It is based on gross pay. It includes employer pension contributions, see University of Sunderland v Drossou [2017] ICR D23. It includes contractual bonus payments, (not bonus' which are purely discretionary) see Canadian Imperial Bank of Commerce v Beck UKEAT/0141/10). If a bonus is described as discretionary, but is in fact paid regularly, it might be deemed to be contractual, see Hoyland v Asda Stores Ltd [2006] IRLR 468. Where an employee has normal working hours, whose pay does not vary with the amount of work done and whose pay does not vary from week to week according to the days or times the employee is required to work, a week's pay is the amount payable under the contract, s221(2). The Court of Appeal held in Evans v Malley Organisation Ltd T/A First Business Support [2003] ICR 432 that if commission varied with the amount of work done, one should apply s221(3) and calculate the employees average pay over the preceding 12 weeks, but if the amount of commission depended upon success, (e.g. achieving a certain level of sales) a week's pay should be calculated by reference to the basic contractual remuneration in accordance with s221(2). In other words, if the commission is based on success, it does not count toward the calculation of a week's pay.

Remedy - Discrimination

72. Compensation for discrimination should place the victim in the position that would have been in had the discrimination not occurred. That will include reimbursing any financial consequences of the discrimination. It will also include compensation for injury to feelings.

73. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

    73.1 Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

    73.2 Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

    73.3 Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

    73.4 In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

    73.5 Tribunals should bear in mind the need for public respect for the level of awards made.

74. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

    74.1 The top band should normally be from £15,000 to £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

    74.2 The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

74.3 Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

75. Those bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19 and in the case of De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 uplifted by 10% in line with a Court of Appeal decision in a personal injury case known as Simons v Castle [2012] All E R 90. Each year the Presidents of the Employment Tribunals issue guidance on how these bands should be regarded as amended to take account of inflation. The relevant Presidential guidance for the purposes of this case, (March 2018 for cases presented after 6 April 2018) sets the Vento bands at:

Top: £25,700 to £42,900

Mid: £8,600 to £25,700

Bottom: £900 to £8,600

The Facts

76. Both respondents, Key People and Just Recruit, were recruitment businesses in the Pharmaceutical, Health & Safety and Occupational Health sectors. As noted above, Just Recruit is now in administration and is no longer trading.

77. At the relevant time Key People, (incorporated in 1991) was owned as to 40% by Mr Paul Donovan, (Manging Director from 2001 to January 2018); as to 20% by Mark Atherton, Director, (described by Mr Donovan as "effectively the Chairman" and uncle to the second claimant Mr Jason Atherton); as to 20% by somebody called Mr Lee Atherton, (presumably a relative, but we were not told that and did not need to know) and 20% by an investment Company. Mr Norman Freed, an accountant by profession, was Company Secretary and Director.

78. Just Recruit was incorporated in April 2010. 60% of its shares were owned by Key People and at the time relevant events began, 20% were held by Mr Jason Atherton, 10% by Mr Neto and 10% by Mr Neto's wife.

79. Key People at the time had between 20 and 30 employees. We were not provided with individual annual accounts for the two companies, but the group accounts in the bundle at page 110Z for the year ending December 2018 show pre-tax profits (that is after £100,000 plus salaries to directors) of £300,769.

80. In January 2001 Mrs Whitbourn joined Key People as a Pharmaceutical Recruitment Consultant. She signed a contract of employment 8 years later on 18 May 2009. The contract begins with a preamble that states that it is

to be read on conjunction with section 2 of the staff handbook, which together forms her contractual terms and conditions of employment. We were referred by Mr Freed to clause 3.3 of the contract, which reads as follows:

> "The Employee must devote the whole of his/her time, attention and abilities during his/her hours of work to his/her duties for the Company. Accordingly, the Employee may not, whether directly or indirectly, undertake any other work (including voluntary work) or carry on in business of whatever kind during his/her hours of work for the Company or outside Company hours if, in the reasonable opinion of the Company, this is likely to affect his/her work performance."

81. Mrs Whitbourn's hours of work were 9am to 3pm on Mondays and Wednesdays, 9am to 5.30pm on Tuesdays and Thursdays. In other words, she worked a 4 day week. Her salary was expressed to be £40,000 per annum together with bonus and commission, details of which are not stipulated in the contract.

82. We were not taken to during the hearing, but should mention that we have come across during our deliberations, provisions relating to conflicts of interest at page 160O. In short, the provisions enjoin the employee to avoid conflicts of interest. It is unclear as to the provenance of this document, but it would appear to be part of an extract of the company handbook and from page 160E, looks as if it is probably in a "section 4" of that handbook and therefore not incorporated into the contract of employment by the preamble noted above.

83. There is an Equal Opportunities Policy at page 160G and a Discrimination and Harassment Policy at page 160H-J.

84. Mrs Whitbourn's contract at clause 15 refers to disciplinary and grievance procedures contained within the staff handbook, expressly stated not to form part of her terms and conditions of employment. Those procedures too appear to be in section 4 of the staff handbook.

85. In April 2001, Mr Mark Atherton's nephew, (Jason) joined Key People as a Recruitment Consultant. He too signed a contract of employment 8 years later on 21 April 2009. Relevant to the issues in this case are the provisions for termination of employment at clause 14. 14.3 gives the employer the discretion to make a payment in lieu of salary. In that respect clause 14.4 reads:

> "The Company may, at its absolute discretion, require the Employee not to attend their place of work for the duration of their notice period and may, at its absolute discretion, relieve the Employee of some or all of their contractual duties during the period. The Employee will however be paid his salary and receive his/her benefits provided for under this agreement during the garden leave period during which period he/she will also remain contractually obligated to the Company."

And 14.6 reads:

> "Where the Employee would normally receive commission or bonus payments in respect of placing work candidates into either permanent positions or contract assignments with client companies, payment of commission and/or bonus will be made for the period up to and including the termination date. For the purpose of clarity, this will include the Employee's applicable notice period. No commission or bonus payments will be made for the period after the termination date."

86. Just Recruit was formed in April 2010 and Mr Jason Atherton appointed a Director. In August 2010 Mr Neto was recruited and employed by Just Recruit as Group Recruitment Director. He was not a statutory director to start with, appointed to the formal role of director on 19 November 2012. He was responsible for the day to day running of Just Recruit.

87. Mr Jason Atherton was appointed a director of Key People on 12 May 2011.

88. Mr Jason Atherton was issued with 20% of the shares in Just Recruit on 12 September 2013.

89. Mrs Whitbourn was provided with a guaranteed salary of £80,000 in the year 2015, that was increased to £85,000 in 2016 and £90,000 in 2017. This reflected good performance year on year.

90. Mrs Whitbourn and Mr Jason Atherton married in 2016. Mr Mark Atherton's behaviour towards Mrs Whitbourn changed as a consequence of that marriage. He would avoid communicating with her and made it clear that he did not approve of relationships, "in the office".

91. On 20 November 2017, Mrs Whitbourn was informed that her guaranteed salary would be removed for the next year and that she was to revert to her original contract terms. She was so informed by a letter of that date from Mr Mark Atherton, the letter reads:

> "This letter is to inform you that Key People has underperformed this year. This follows a period of decline over a number of years.
>
> As a result, we will not be in a position to offer you a guarantee of salary for the next fiscal year. That is 2018. This means you will return to the standard terms of your employment."

92. This does not appear to be logical or make sense given that in the previous 3 years Mrs Whitbourn had been provided with a guaranteed salary which was increased by £5,000 each year. Furthermore, whilst we have not been provided with profit and loss figures for the two individual companies, (oddly, given the issues in this case) we do have the group profit and loss accounts at page 110AE – 110Z which show profits before tax in 2013 of £534,904; 2014 £190,744; 2015 £729,037; 2016 £865,500 and 2017 £867,545.

93. Just Recruit lost two major clients at the end of 2017 or early 2018. Mark Atherton, Jason Atherton, Mr Donovan and Mr Neto met to discuss

this in February 2018 and everybody understood and accepted the impact this would have on turnover and profit for Just Recruit in the short term.

94. Mark Atherton met with Mrs Whitbourn on 22 February 2018 and informed her that her sales target would be set for £18,000 of new business per month. Mrs Whitbourn says it should have been set at £16,000 per month, pro rata reduced to reflect the reduced hours that she worked compared to her colleagues, just as her salary was pro rata reduced by 20%. She wrote an email of protest which is in the bundle at page 81Y. Her key points were:

94.1 Her performance had been consistent and improved year on year in new business and actual revenue. Her first fall in actual revenue was in 2017 which resulted from reductions in long term contract margins enforced by clients.

94.2 Over the previous 4 years she had achieved significantly more sales revenue than any other senior consultant and yet was paid less than them.

94.3 She had brought in more new clients than any other consultant and had retained more clients and contractors.

94.4 She had been told that her salary had been reduced because she spends less time in the office than other consultants, even though she worked from home on Fridays and had her phone diverted so that she never misses a call.

94.5 She refers to seeing her colleagues being called, (by Mr Mark Atherton although she does not say so in her email), “lazy, complacent and greedy”.

95. She did not receive a reply and so chased for a reply on 1 March, (page 81AA).

96. Mr Donovan replied to Mrs Whitbourn on 1 March. He said there would be no change to her employment contract, that guarantees are at the discretion of the company, that no consultants had a basic pay increase and she would not have one either. He said that in the last year her, “benefit to the Company” had fallen by £70,000 and that is why the guarantee had been removed and that this should, “not come as a surprise”. He said that all sales consultants work from the office and the other work is at the discretion of the consultant and, “not required”. He said that Mr Jason Atherton had been warned over a year ago that Mrs Whitbourn’s performance would be impacted unless she expanded her portfolio. He said that her most pressing requirement was to dedicate herself to business development.

97. So on the one hand we have Mrs Whitbourn telling us that her performance has been good and on the other hand we have the respondent telling us that her performance has been declining. We do not know which is right

because we have not been provided with the evidence, which would have been in the gift of the respondent.

98. At paragraph 9 of her witness statement, Mrs Whitbourn complained of not being allowed to work on low margin clients but that her full time colleagues were. Once again, there was an absence of evidence from the respondents about this, however we did hear oral evidence from Mr Freed. Mrs Whitbourn was comparing herself to a colleague called Mr Cussens who worked with Roche in Switzerland. Mrs Whitbourn worked with Roche in the United Kingdom and had been working at a margin of 12.5%. When that margin was reduced, she says she was prevented from continuing work with Roche by Mr Mark Atherton and Mr Donovan and yet her colleague Mr Cussens was permitted to work with Roche in Switzerland at rates often less than 9%. Mr Freed's explanation, which seemed logical and credible and with which Mrs Whitbourn did not really disagree, was that the risks working in Switzerland with Roche were lower because in Switzerland the respondent worked through an intermediary who was responsible for paying the contractor, whereas in the United Kingdom the respondent paid the contractor and billed Roche.

99. In April 2018 the directors at Just Recruit met at the initiative of Mr Neto and Mr Jason Atherton. They agreed to place Just Recruit on the market and seek a buyer. It was accordingly placed with an agency for sale in May 2018. A potential buyer was found. Messrs Freed, Mark Atherton and Donovan did not approve of the buyer because they regarded the individual behind the company that was the proposed purchaser as an asset stripper. As a consequence, Mr Freed refused to provide financial information requested and the buyer withdrew. Mr Neto and Mr Jason Atherton were not happy about this turn of events.

100. On the 16 May 2018 Mrs Whitbourn formed a new company called Specialist Sourcing Group Limited, of which she was a director. She was the sole officer of the company registered at Companies House. She used her married name, Atherton. The stated nature of the business was, "Temporary Employment Agency Activities". Six days later and before the first statement was due to Companies House, on 22 May 2018, she resigned as a director.

101. On 8 August 2018, the respondents carried out a search at Companies House against the name of Mrs Whitbourn, and they must also have searched against her married name. They discovered the existence of Specialist Sourcing Group Limited and printed out the source report. In due course, that report was handed to Mrs Whitbourn and a copy of it is attached to her witness statement.

102. At the end of August 2018, Mrs Whitbourn's son, (Mr Jason Atherton's stepson) Mr George Barnes was recruited to and began working for Just Recruit.

103. On 13 September 2018, Mrs Whitbourn was called into a meeting with Mr Freed and Mr Donovan, the minutes are at page 83. She was issued with a warning for failing to achieve new business targets. The minutes refer to her being issued with a formal written warning. In the meeting she was told she was being given a verbal warning. The document she was handed was expressed to be a first verbal warning, (page 85). Mrs Whitbourn protested that she was being discriminated against as others were also failing to achieve new business targets and were not being given warnings. When challenged about this at the time, she refused to say how she knew, but said that she was aware. She also protested that she was a major earner for the company and that her billings exceeded that of many others. Mr Donovan is recorded as explaining that current billings relate to past new business brought in by Mrs Whitbourn, for which she was already in credit. The minutes record Mrs Whitbourn refusing to sign and date the copy written warning handed to her and that she had left the meeting before it was concluded. The minutes read that Mr Freed and Mr Donovan continued, agreeing that her performance against target would be monitored for September and the position reviewed in October. It was stated that she would be issued with a second written warning if she did not meet her target.

104. There is a paucity of evidence again on targets and the achievement against targets of comparators. This is surprising as in evidence, the respondent and the claimants agreed that every month Mr Jason Atherton would produce and publish to all, a document setting out the new business figures for all sales consultants as compared to their targets. It is surprising these documents have not been produced by the respondent and we have no explanation.

105. One document we do have is in landscape and starts at page 110V. It tells us the new business achieved by the sales consultants from January to August 2018. It does not tell us the targets of each sales consultant, which varied. For Mrs Whitbourn, we can see that she achieved zero new business in March and April 2018. We know that her target was £18,000 per month, which if achieved, would be £144,000 in total for those 8 months. If her target had been £16,000 per month, the total achieved should have been £128,000. The total achieved was £95,000. Mr Cussens achieved circa £194,000, Mr Tim Barratt £107,000 and Mr Simon Barratt £135,000. In comparing these totals achieved figures, one needs to keep in mind that Mrs Whitbourn's hours of work were four fifths of those of her full time colleagues.

106. Mrs Whitbourn wrote an email to protest against the warning on 27 September 2018, addressed to Mr Mark Atherton, copied to Mr Donovan and Mr Freed. She protested firstly that the minutes record her being handed a formal written warning whereas what she was told in the meeting and what she was in fact handed, was a first verbal warning. She protested that the minutes do not show that she had stated she was being discriminated against because she is a part time female worker. She also

said the minutes did not show that she had stated that her continuing relationship with clients and candidates ensured extensions to business, which is not represented in any figures. She also wrote that the minutes were incorrect in describing her as leaving the meeting before it was concluded, saying that she left when it was finished. She protested about the procedure followed, in particular that she should have been informed in advance of the meeting, she should have had an opportunity to bring a colleague with her, there should have been a discussion about the cause of the performance shortfall, what training and support might help and a reasonable a period agreed for improvement. She wrote that she had questioned in August why her target was set at £18,000 per month, Mr Donovan had said that he would get back to her but he had not done so. She explained that as her salary was pro rata to reflect that she worked a four day week, her target should be pro-rata also, at £16,000 per month. She repeated her assertion in the meeting that there were other colleagues not meeting their target who were not being issued with a verbal warning. Finally, she complains that with regard to the client Roche, she was prevented from working with Roche when in the UK its margin was reduced to 10% whereas her full time male colleague in Switzerland had been allowed to work with similar margins during the same period.

107. Mr Freed replied to Mrs Whitbourn on 1 October 2018, page 86. He confirmed that she had been issued with a verbal warning and apologised for the error. With regard to her allegation that she had been discriminated against, he simply wrote that the allegation was, “untrue and has no foundation whatsoever”. He said that the meeting and the warning were about her failure to achieve new business, not about her ongoing relationship with clients and candidates. He asserted that she had left the meeting before it was concluded. He asserted that the respondent had complied with ACAS, “Regulations”. With regard to Mrs Whitbourn’s challenge about her target he simply wrote, “Your new business targets are set by the Company. Unless they are changed by the Company they remain in force.”. He said that others in the past had been given warnings for failing to meet new business targets.

108. The respondent has not produced any evidence about others at any time receiving warnings for not achieving new business targets.

109. On 28 September 2018, Mr Jason Atherton returned his company car. He says that he did this because it was approaching 3 years old, the tax on the car had increased in any event and he cycled to work.

110. Also on 28 September 2018, Mr Jason Atherton and Mr Mark Atherton met and discussed the performance of Just Recruit.

111. Next we deal with an allegation that Mr Neto was holding back deal sheets in order to suppress the apparent performance figures of Just Recruit and thereby reduce its value. We accept the evidence of Mr Neto that this was on the instruction of Mr Mark Atherton, Miss Holly Thompson, (Senior

Account Manager and step daughter of Mr Mark Atherton) and Mr P Donovan.

112. Mrs Whitbourn complains that in October 2018 after a sales consultant had left, the management of the contracts of a number of contractors was transferred to Mr Tim Barratt rather than to her, the implication being that this was indicative of more favourable treatment because he was male, (although this is not an allegation of sex discrimination, but offered as background information). We accept Mr Freed's explanation that Mr Barratt had sourced and introduced these contractors in the first place and so it was logical that he should have the benefit of them.

113. On 8 October 2018, the directors of the two companies again met at the instigation of Mr Jason Atherton and Mr Neto. Precisely what was said, or the way it was said, is in dispute. There is a contemporaneous note in the form of an email from Mr Neto to the other attendees on 8 October timed at 14:35 at page 92. We find that this is an accurate note. Mr Mark Atherton was not present, he was in hospital for a knee replacement operation. The relevant passages from the note read as follows:

> "SN outlined his feelings about the sale process for Just Recruit Group and frustrations that this was not quite how it was initially agreed, he also expressed his disappointment at the way he was communicated with from MA and felt it was more like an employer/employee relationship as opposed to directors and shareholders.
>
> JA stated that from a professional point of view, he had conflicting views with MA as to how the company and sales team should be run and he felt he could no longer deliver the message desired.
>
> SN suggested there was two possible solutions.
> 1 Key People purchased the shares of JA and SN.
> 2 JA and SN purchased the shares that Key People hold in JRG.
>
> A brief discussion was had as to the value of shares and SN suggested a figure of approx. £1,000,000 for the shares of JRG.
>
> JA and SN then left the meeting for NF and PD to have a discussion.
>
> On returning NF said that the message was clearly understood and that the decision would be finalised ideally by the end of October. SN pushed for a swifter outcome and NF suggested that by 20 October a decision as to which direction the sale would take would be decided and concluded as swiftly as possible. SN highlighted that should JA and SN purchase KP shares in JRG then there is more to do from that perspective so an answer in terms of direction of sale by the end of this week is better suited to the situation."

114. In evidence, Mr Freed said that Mr Jason Atherton had said that he and Mark Atherton were too old. This is denied. It is not an allegation Mr Freed expressly makes in his witness statement. On balance we find that Mr Jason Atherton did not in blunt personal terms describe

Mr Mark Atherton and Mr Freed as, "too old" but his theme was that their approach to running a business was old fashioned and they wanted to run a modern business with new technology.

115. Mr Freed's evidence is that Jason Atherton and Mr Neto were presenting the respondents with an ultimatum: that there were only two ways forward, either Key People buy their shares, or they buy Key People's shares in Just Recruit. The wording of Mr Neto's contemporaneous note does not refer to there being, "only" two solutions. Clearly on the wording of his note, the situation was as they saw it, that things could not continue as they were. These were the only two solutions under discussion.

116. After this meeting, Mr Freed consulted with Mr Mark Atherton in hospital and on his instruction, he and Mr Donovan spoke to solicitors to seek advice. The outcome of discussion with solicitors was that Mr Jason Atherton should be made redundant on the basis that they did not need a sales director at Key People.

117. On 16 or 17 October 2018, Mr Jason Atherton listened to the recording of a telephone conversation between Mr Freed and a security company, from which he learned that he was to be dismissed. The purpose of the conversation was to discuss having security on site when that message was given to him. He also heard his wife Mrs Whitbourn referred to as, "collateral damage". The recording was available for Mr Atherton to listen into because all telephone conversations of the respondents staff were recorded for staff training purposes.

118. In anticipation of dismissal, Mr Jason Atherton carried out a factory reset on his phone, which had the effect of deleting everything on it. All data relevant to the respondent's business was automatically backed up on the respondent's IT system. The deletion removed personal matter, such as photographs.

119. Mr Atherton and Mr Neto were dismissed on 26 October 2018. The dismissal meetings were recorded. Neither were given advanced notice of the meetings.

120. A transcript of Mr Jason Atherton's dismissal meeting is at page 102. The relevant passage reads as follows:

> "With regards to your position at Key People, we've been through the position, it's been expansible on many occasions. Sales have been dropping and it's Mark's opinion and ours that you are not performing well as a Sales Director, so we have decided to dispense the Sales Director position, as a consequence you will be made redundant, and, that's it."

Attending the meeting on behalf of the respondent was Mr Donovan and Mr Freed.

121. Mr Donovan and Mr Freed also spoke with Mr Scott Neto. The relevant passages from the transcript are as follows:

> "At the meeting you told us that you weren't happy with the way Just Recruit was run, and Jason and you said that you weren't prepared to carry on the way it was.
>
> I don't believe that's what I said but yeah …
>
> You told Paul and I that you thought there were two solutions.
>
> Yep …
>
> Those are the only options that you gave us.
>
> No that was two of my suggestions …
>
> If in searching around for other ways forward, and we came up with a couple of ideas … The first one was that we just let it continue as it was but you indicated you weren't happy with that and that's not a workable solution and the position we have now come to is what we consider the only way to continue.
>
> …
>
> Over the last 12 months we've had a drop in sales of a third. Profits are down 67% and our view is that you've taken your own on. You were, for whatever reason you've got this thing that you want to do as something on your own or something different I don't know.
>
> …
>
> While under your management the company is dropping …
>
> We have decided to terminate your employment …
>
> Based on your performance …
>
> Though, the timing of this is purely co-incidental after trying to buy your shares?
>
> One thing does not include the other."

122. Mrs Whitbourn was dismissed on 29 October 2018. She was not given advanced warning. The transcript of the dismissal meeting is at page 101. Mrs Whitbourn was presented with the printout of the company search and asked to explain it. The relevant passages from the transcript then read as follows:

> "As you can probably see, it was something I did in April for five days because a very good friend of mine runs a company where she looks after homeless care staff, you probably know her, my friend Fiona. She was having trouble with recruitment and I said Oh I will help you out. I never did it, and closed it. Five days is was open and I never did anything so absolutely; and also I took advice before I did it and there was absolutely no problem, no conflict of interest.

> Well we have taken advice and there is a conflict of interest and because of that you'll be fired for gross misconduct.
>
> Ok. I took advice before I did that and there was absolutely no conflict of interest, it never did anything, it never made any money, it never did one single thing. It was five days in May.
>
> …
>
> No, absolutely no grounds for gross misconduct because I checked before I did it and it was a company of mine if you would like to look at her home instead who looks after care staff and since my salary was dropped significantly this year I looked at other opportunities to earn some money, but as it happens she didn't need my services."

123. Mrs Whitbourn also cleared her phone by doing a factory reset. Neither she nor Mr Freed could remember whether she had done it before, during or after the meeting.

124. We were referred to a letter dated 26 October 2018 confirming Mr Jason Atherton's dismissal at page 110AQ. We were not referred to and could not find in the bundle any letters confirming dismissal or reasons for dismissal in respect of Mrs Whitbourn or Mr Neto. Mr Jason Atherton's dismissal letter included the following:

> "We have concluded that we actually have no requirement for a Sales Director and can actually operate without that role. Clearly that will also enable the business to make a substantial overhead reduction when you consider your total remuneration package. We will not be back filling your role so this represents an immediate saving to the business.
>
> …
>
> You are entitled to 12 weeks' notice but you will not be required to work your notice period. Your last day of employment will therefore be 26 October 2018 and we will pay you in lieu of your notice period, in accordance with your contract of employment."

125. In her sex discrimination claim, Mrs Whitbourn relies upon three actual comparators. We comment on them as follows:

    125.1 Mr Mark Cussens is relied upon because he was allowed to work for Roche at reduced margins. There is an explanation for that which we accept, set out above.

    125.2 Mr Simon Barratt – the respondent says that he worked in a different sector and so his targets were different and he is not therefore an appropriate actual comparator because he is not in the same circumstances. Mrs Whitbourn's case is that he did not achieve target either but had no warning. We have absolutely no evidence

from the respondent about that. We have the document at page 110V which tells us on 110W that Simon Barratt achieved during the 8 months recorded for 2018 about £135,000 worth of new business which is clearly more than Mrs Whitbourn, but we do not know what his target was. Four fifths of £135,000 is £108,000 still more than Mrs Whitbourn. Simon Barratt was also offered up as a comparator in respect of the dismissal. Mrs Whitbourn's point was that he too had formed a company and yet he was not dismissed. She had to accept in evidence however that the respondents' discovery that Mr Barratt had formed a company was after he had left their employment. As Mr O'Callaghan said in closing submissions, this was not his strongest point.

125.3 Mr Tim Barratt – Mr Freed says that Mr Tim Barratt had previously received three warnings for not achieving new business target, but no evidence was produced about that. Mrs Whitbourn says that he was behind target at the same time that she was and again, the respondent has not produced evidence about that. At page 110V we see that his new business achieved during the 8 month period was £107,000. If one multiplies that by four fifths, the figure becomes £85,600 suggesting that he was under achieving as compared to Mrs Whitbourn.

126. There is no evidence that the management of Key People had ever undergone diversity training. Mr Freed acknowledged that he had never received any such training.

Conclusions

Reason for Dismissal

127. We approach the conclusions using the structure of the list of issues. The numbers in square brackets below represent the relevant paragraph number in the list of issues.

128. [1] The first question posed is, whether the reason for the dismissal of each claimant was a potentially fair reason?

129. [1.1] The reason Mrs Whitbourn was dismissed was because she was "collateral damage" in the dismissal of her husband, Mr Jason Atherton. The fact that she had formed a limited company was a convenient excuse. Given that the respondent had known of the existence of the company for 2 months, had seen that she had resigned as a director within 5 days of formation and showed no interest whatsoever in the explanation which she gave, we are satisfied that the principal reason for her dismissal was that she was married to Mr Atherton, who had been dismissed 2 days earlier.

130. [1.2] & [1.3] The respondent took exception to the approach Mr Jason Atherton and Mr Neto took to the sale/purchase of Just Recruit. Underlying

this was a deterioration in the relationship with Mr Jason Atherton because Mr Mark Atherton, for some unexplained reason, took a dim view of his nephew being married to Mrs Whitbourn. There was clearly a difference in approach as to the management of individuals and the management of business as between Mr Mark Atherton, Mr Donovan and Mr Freed on the one hand and Mr Jason Atherton and Mr Neto on the other hand. Evidenced for example by the way that Mr Mark Atherton spoke to people, their terse abrupt approach in correspondence, (for example the dismissive treatment of Mrs Whitbourn) and with the greatest of respect and in the nicest possible way, the, "Old School" approach of Mr Freed. Mr Jason Atherton and Mr Neto were dismissed because Messrs Mark Atherton, Mr Freed and Mr Donovan did not like the fact that they wanted to exit the ongoing relationship one way or the other, by selling their shares or buying the respondents shares and did not like the fact that Mr Jason Atherton and Mr Neto wanted to adopt a different attitude to management.

131. Mr Jason Atherton was not dismissed because he was redundant. The respondent was entitled to decide upon a re-organisation of its management structure so as to do away with a Sales Director, but that was not the genuine reason for Mr Jason Atherton's dismissal.

132. Mr Neto was not dismissed because of poor performance. We were not taken to any evidence of Mr Neto's poor performance. That this was not the genuine reason for dismissal is apparent on the face of Mr Freed's witness statement at paragraphs 27 and 28. Performance was an excuse.

133. It follows that none of the three claimants were dismissed for a potentially fair reason and their dismissals were unfair, quite apart from the admitted unfairness in the procedure followed for each of them.

Mitigation

134. [4.2] and [4.3] After her dismissal, Mrs Whitbourn started looking for new employment straightaway. The effect of restrictive covenants in her contract of employment prevented her from working anywhere that might bring her into contact with former clients of the respondent. She was successful at the second interview she got to, with a business called Alexander Mann Solutions in the pharmaceutical industry working as an in-house recruiter for her employer. She is on a flat salary of £45,000 per annum with no bonus or commission. She has the potential of a 2% company wide bonus, but none had been given in the last two years. She secured the job offer in March 2019 and after a months' delay while DBS checks were carried out, her employment started on 1 April 2019. She explained that being aged 52 and having had 17 years' service with one employer only, on paper her CV was not the most attractive. She said she had to search far and wide, made many applications, including countless online applications. She said that once she got herself in front of somebody i.e. for an interview, she was

successful. We are satisfied that Mrs Whitbourn took reasonable steps to mitigate her loss.

135. Mr Jason Atherton set himself up in competition with the respondent, in breach of his contract of employment. He approached former clients of the respondent. This led to the respondent taking High Court proceedings against him and his having to give an undertaking to the court to desist and agree to be subject to an order for costs. His actions were in breach of clauses 18.2 and 18.3 of his contract. That was not a reasonable step to take to mitigate loss. We must make an assessment of how long we think his losses would have continued post dismissal, had he taken reasonable steps to mitigate. In our judgment, if he had looked for another position not competing with the respondent, he would most likely have found somewhere after a period of approximately 6 months, as had Mrs Whitbourn. The primary period of loss is therefore to 1 May 2019. He was very well paid with the respondent as was Mrs Whitbourn, he would be unlikely to obtain a position equally as well paid. In our judgment, he would likely have obtained employment earning approximately 50% of what he was earning with the respondent. He is clearly a good sales executive and in our view, would after about a year have achieved promotion or found other work, through which he would have received remuneration at a similar level to that he received with the respondent. His period of loss therefore would have come to a complete end on 1 May 2020.

136. Mr Neto had been successful at running a business, (Just Recruit). He set himself up in a similar business, not competing with the respondent. That was in our judgment a reasonable step for him to take. He did not fail to mitigate his loss.

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137. [5] None of the three claimants were dismissed for potentially fair reasons and therefore, no matter what process was followed, their dismissals would not have been fair in accordance with s.98 of the Employment Rights Act 1996.

138. In Mrs Whitbourn's case, even if the reason the respondent dismissed her was her conduct in setting up the company or indeed, capability, we cannot see how either could have been a fair reason to dismiss on the facts. She gave a reasonable and plausible explanation: the company that she had set up was to assist a friend in a business that did not compete with the respondents, (the provision of care in the home) which had never got off the ground, her involvement in which ceased after 5 days in respect of which no action had been taken beyond its formation.

139. With regard to Mr Jason Atherton and Mr Neto, we considered what would have happened had the respondents adopted a fair approach. The respondents would have explored with Mr Jason Atherton and Mr Neto whether a deal could be done:

139.1 Key People might have bought out Mr Jason Atherton and Mr Neto, on agreed terms which would have been negotiated and which would have been acceptable to both sides;

139.2 Key People might have sold its shares to Mr Jason Atherton and Mr Neto, in which case they would have stayed in employment;

139.3 A buyer might have been found, which would probably have entailed Mr Jason Atherton and Mr Neto agreeing to remain in Just Recruit at least for a period of time. If that was not the case, their employment would have ended on favourable and agreed terms acceptable to all parties, or

139.4 If none of the above were achieved, there may have been an untenable situation in which Mr Mark Atherton, Mr Paul Donovan and Mr Norman Freed of Key People would not have been able to work with Mr Jason Atherton and Mr Neto, in which case through a fair process they would have negotiated terms of departure on mutually acceptable terms, compensating them for their loss.

140. Actually, we do not believe this particular employer would ever have fairly dismissed these three claimants. For example, Mr Freed says that they took legal advice as to what to do about Mr Jason Atherton and the advice was to make him redundant. It is very unlikely indeed that those advisors suggested that the way to go about this would be to call Mr Jason Atherton into a meeting without any advanced warning, consultation or discussion about alternatives and simply inform him that he was redundant. It is extremely unlikely that they were advised that in the event of finding themselves defending a claim of unfair dismissal, they would be able to successfully do so without producing substantive evidence to show there was a genuine redundancy situation.

Contributory Conduct

141. [6] None of the three claimants in our view were guilty of culpable and blameworthy conduct which could be said to have contributed to their dismissal. Mrs Whitbourn's formation of a limited company of which she remained a director for 5 days only, for the purpose explained, (which we accept) which did absolutely nothing at all was not on its own culpable or blameworthy and had no causal link to the dismissal.

142. With regards to Mr Jason Atherton and Mr Neto, it is not culpable or blameworthy conduct to have a difference of opinion with others as to the way a company is run nor to want to either buy out other shareholders or be bought out.

143. The claimants' compensatory awards should not be reduced pursuant to s123(6).

144. [7] For the same reasons, it is not just and equitable to reduce their basic awards under s.122(2) either.

Devis v Atkins Reduction

145. [8] Should the claimants' compensation be reduced because of conduct which did not come to light until after their dismissal? The principle of Devis v Atkins referred to in the list of issues is in respect of conduct which took place before dismissal but which was not discovered until afterwards. It does not apply to conduct which occurred after dismissal.

146. We considered whether Mrs Whitbourn and Mr Jason Atherton resetting, (and therefore wiping) their company phones before handing them over could be considered such conduct. We concluded not. All company data on the phones was backed up on the company's IT system. There was no loss or destruction of data. It is understandable that they would have wanted to remove personal messages, photographs and the like.

147. However, we take a different view of Mr Jason Atherton listening into Mr Freed's telephone conversations. Mr Freed is not a sales person, he is a fellow director and company secretary. Mr Jason Atherton had no legitimate reason to listen into Mr Freed's conversations and his doing so was in our view, appalling conduct. In evidence he was quite brazen about it and unapologetic. Had such conduct been discovered it would likely have led to dismissal, given that it would have led to a break down in trust and confidence between fellow company officers. In our judgment, it would be just and equitable to reduce any compensation that Mr Jason Atherton might receive by 25% in respect of this conduct.

Wrongful Dismissal

148. [9] Mrs Whitbourn was not in breach of her contract of employment in setting up her company, Specialist Sourcing Group Limited. Mr Freed relied upon clause 3.3 of her contract, set out above. On the credible information provided to the respondent and which we accepted in evidence, the setting up of this company was not something which could be said to be in the reasonable opinion of her employer, likely to affect her work performance. Even if this idea had got up and running, which it did not, her intention was to work out of hours, at weekends. Mrs Whitbourn is therefore entitled to her notice pay.

149. [10.1] The list of issues at paragraph 10.1 is rather odd because it says that its agreed that Mr Jason Atherton was dismissed summarily, but he was not. The dismissal letter at page 110AQ expressly states that Mr Jason Atherton will be paid in lieu of his notice period, in accordance with his contract of employment.

150. [10.3 & 10.4] Mr Atherton's evidence is that he was paid 12 weeks' notice; his case is that he was not paid enough as he should have received his bonus and commission for that 12 week period, as appears in his Schedule of Loss. In accordance with clauses 14.4 and 14.6 of his contract of employment, (set out above) Mr Atherton should have received benefits during his notice period and payment of commission or bonus. The "Termination Date" is defined at 14.8 as the date at the end of the applicable notice period. He did not receive and should have received bonus and commission for that 12 week period.

151. [10.5] That he did not receive such payment is a breach of contract arising on termination of employment and therefore the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 applies.

152. [10.7] However, in contrast to a case of unfair dismissal, where wrongful dismissal is concerned, misconduct prior to dismissal but not discovered until afterwards, is a defence to a complaint of wrongful dismissal. Mr Atherton listening into recordings of telephone conversations of a fellow director is contrary to the implied obligation on the part of both employer and employee to behave in such a way as to maintain mutual trust and confidence. An employer cannot have trust and confidence in an employee who spies on his colleagues in such a way. Mr Atherton so doing was in breach of that fundamental term of his contract of employment such that had the respondent known about it at the time, it would have been entitled to and would have, dismissed him summarily without notice. In those circumstances, Mr Atherton's claim founded on wrongful dismissal fails.

153. Ironically, that makes no difference to the compensation that Mr Atherton should receive, because his average earnings for the unfair dismissal calculation includes the bonus which was paid monthly and the lost pension contributions appear as a head of loss in the context of the unfair dismissal compensatory award.

154. With regard to Mr Neto, although the list of issues states at 11.1 that he was summarily dismissed on 26 October 2018, that is not apparent from the transcript of his dismissal meeting. We were not taken to a letter of dismissal and cannot find one in the bundle. The Schedule of Loss sets out that he received notice pay based upon his basic salary of £100,000 per annum, ignoring the £20,000 guaranteed bonus, commission he would have earned and the 5% pension contributions that would have been made during the notice period.

155. Mr Neto was not provided with a contract of employment but the respondents case is that he was employed on a contract in identical terms to the contract of someone called Kyle Birkin copied in the bundle at page 81A. As with Mr Atherton, clause 14.3 provides that he may be paid salary and pension in lieu of notice and at 14.6 this would include commission and bonus. 14.8 defines the Termination Date for the purposes of that clause as being the date at the end of the notice period. Mr Neto's

claim in in breach of contract in respect of notice pay succeeds and he should therefore receive damages in an amount equivalent to the bonus, commission and pension contributions he would have received during the notice period. Such shortfall is as a consequence of a breach of contract arising on termination of employment bringing the claim within the jurisdiction of the Employment Tribunal [11.5].

Holiday Pay

156. [12] Mr Atherton and Mr Neto each claim one days' holiday pay on the basis that the holiday pay they had received was one day short. That evidence was not contested in the hearing and accordingly, they will both be awarded one days accrued holiday pay.

Direct Sex Discrimination – Mrs Whitbourn

157. There are two specific allegations of direct sex discrimination by Mrs Whitbourn, that in relation to her verbal warning on 13 September 2018 and the other in respect of her dismissal.

158. We will deal with the dismissal first [16]. Mrs Whitbourn offers as a comparator Mr Simon Barratt, who she says had also formed a company of his own and was not dismissed. She accepted in evidence the respondent had not discovered Mr Barratt's private company until after he had resigned his employment. Her case in that respect therefore falls down and Mr O'Callaghan was candid enough to accept in his closing submissions that this was not his, "strongest point". The claim in this respect is therefore not really pursued but for the avoidance of doubt, Mrs Whitbourn's dismissal was because of her association with Mr Atherton, her gender played no part in the decision to dismiss her. For example, had she been a male partner or a husband of Mr Atherton, she would have been dismissed. Had Mr Atherton been a woman and the person in Mrs Whitbourn's position, the husband, he would have been dismissed. The complaint of direct sex discrimination in this respect fails.

159. We turn next to the complaint of direct sex discrimination in respect of the verbal warning on 13 September 2018 [13]. From the figures we were able to see in respect of Mr Tim Barratt, it rather looks as if he was performing poorly, yet received no warning. On its own, that would not be enough to shift the burden of proof to the respondent, but we also considered:

159.1 No one in the respondents' management chain had received diversity training;

159.2 Although there was an Equal Opportunities Policy, there appears to be no awareness of its existence or any training on how it should be implemented, (Mr Freed did not know it existed);

159.3 Although Mr Freed told us orally in his evidence that there were differences in the type of work done by the various sales consultants, including differences between Mr Tim Barratt and Mrs Whitbourn, no evidence was produced by the respondent of a documentary nature to support that or set out in the witness statements;

159.4 No evidence was produced by the respondents in respect of the targets of other sales executives;

159.5 No evidence was produced by the respondents about what warnings, if any, were given to other sales executives regarding their performance, either historically or at the time when Mrs Whitbourn was warned, and

159.6 When Mrs Whitbourn complained about sex discrimination, her complaint was dismissed peremptorily and was not investigated.

160. These are facts from which we could raise an inference that the difference in treatment between Mr Tim Barratt and Mrs Whitbourn, or the difference in treatment between Mrs Whitbourn and her hypothetical comparator, (a man in precisely the same circumstances as she was in) was because of her gender. That is enough to shift the burden of proof to the respondent, for without an explanation from the respondent, we could properly conclude that gender was the reason for the difference in treatment.

161. By failing to produce any evidence at all to assist in why Mrs Whitbourn was given a warning whereas others were not, the respondent has failed to discharge that burden of proof. We conclude that a man in precisely the same circumstances as Mrs Whitbourn would not have been given a verbal warning as she was and that the reason for that difference in treatment is that she is a woman. The claim of sex discrimination in respect of the verbal warning therefore succeeds.

ACAS Uplift

162. The list of issues poses the questions whether the ACAS Code of Practice on Discipline and Grievance Procedures applies either to Mrs Whitbourn's verbal warning [22.1] or the dismissal of each of the claimants [22.2]?

163. The purported reason for Mrs Whitbourn's dismissal was however, her alleged misconduct. The Code applies in that case and has not been followed: she received no advance notice of the disciplinary hearing at which she was dismissed, no advanced warning of the allegations that she faced, nor an opportunity to prepare her defence, she was not allowed the opportunity of bringing a companion with her, her dismissal was not confirmed in writing and she was not provided with a right of appeal. We considered what the percentage uplift should be after we had carried out our calculations as set out below so that we knew what sum it was that we

would be uplifting and came to the conclusion that the appropriate uplift, that which would be just and equitable, would be 10%.

164. Mrs Whitbourn's verbal warning was for performance, that is covered by the ACAS code. She was not given advanced notice of the issue, was not given the opportunity to take a companion to the meeting, she was notified of her right to appeal, (not strictly a requirement) although she did in fact appeal, (her email of 27 September 2018) to Mr Mark Atherton, the reply came from Mr Freed who was one of the decision makers and therefore not independent. The breach of the code is less egregious than in respect of the dismissal, but the compensation subject to uplift is much lower. We concluded that the appropriate uplift under this head of claim should also be 10%.

165. The reasons offered for the dismissal of Mr Jason Atherton and Mr Neto were redundancy and capability respectively. The ACAS Code does not apply to dismissals for redundancy. The actual reason for the dismissal of both of them was that the respondents took exception to their wanting to part company either by selling their shares or buying out the others', which does not really involve an element of misconduct either. The ACAS Codes of Practice do not apply to Mr Jason Atherton.

166. The code does apply to Mr Neto's dismissal purportedly for capability. The code also applies to claims in breach of contract and so any uplift should also be applied to any damages in breach of contract awarded to Mr Neto. The respondents breach of the ACAS code for Mr Neto are the same as for Mrs Whitbourn. Having regard to the amounts of compensation to be uplifted, we find that it is just and equitable to uplift each award for Mr Neto by 10%.

167. We note that the respondent did not comply with the ACAS Code in that it did not investigate Mrs Whitbourn's grievance that she had been discriminated against. However, this was not raised as an issue by Mrs Whitbourn and we are not therefore obliged to consider whether an uplift should be applied, see Pipecoil Technology Ltd v Heathcote UKEAT/0432/11.

Findings of Fact necessary for compensation calculations

Mrs Whitbourn

168. Because all of the figures set out in Mrs Whitbourn's Schedule of Loss were unfortunately, gross, we have had to work out for ourselves what her net pay would have been. We have payslips in the bundle at page 110N and 110O. October's payslip is unusual, because that was her final payslip. We take the net pay for the months of September (£3698), August (£4434) and July (£4006) which total £12138. Multiplied by 4 and divided by 52 equals £934 per week.

169. Mrs Whitbourn's Schedule of Loss takes her to the end of October 2020 and we accept her stated actual income to that date at £18750. Her payslips for October and November 2020 in the remedy bundle at page 23 and 24 show her net pay for those two months at £2713. We assume that her net pay for December and January were the same and her net pay for the first two weeks of February 2021 were one half of that i.e. £1356. Her net pay for November, December and January was therefore, (3 x £2713) £8139. We add that and £1356 for February to the total in the Schedule of Loss of £18750 to arrive at income to date of £28245.

170. As for Mrs Whitbourn's future loss, we assessed that it will be another year from now before she could reasonably be expected to be in a position where she could be earning the same level income than she was earning with the respondents. We therefore calculate her future loss to 16 February 2022.

171. Mrs Whitbourn has not mentioned whether or not she is in a pension scheme with her new employer but we assume that she is and that the terms are the same. Her loss is 5% on the £40000 shortfall of her current income which is £2000 per annum or £38 per week.

172. In calculating Mrs Whitbourn's compensation, we have to apply the salary cap. The commission that she received was to reward success; i.e. sales achieved. It was not based upon the amount of work done and is not therefore included in the calculation of a week's pay for the purposes of the statutory cap based upon 52 weeks' pay. The statutory cap to apply must therefore be Mrs Whitbourn's £40,000 per annum basic salary.

173. The act of discrimination was a one off act. Having regard to the guidance in Armitage and the Vento bands as updated, we asses the award for injury to feelings at £5,500.

Mr Jason Atherton

174. Mr Atherton's figures in his Schedule of Loss are gross and we have had to calculate what his net income was. As with Mrs Whitbourn, we ignore his October payslip which is his final payslip and therefore unusual. The figures for September (£6712), August (£6943) and July (£7250) total £20905, multiplied by 4 and divided by 52 gives an average net weekly income of £1608. Those figures are of course, inclusive of bonus and commission.

Mr Scott Neto

175. Again we have to calculate Mr Neto's net income. His payslips are at page 110R. Ignoring October, his pay for September was £5751, for August £5766 and for July £5814. That is a total of £17331 which multiplied by 4 and divided by 52 gives an average weekly net pay income of £1333. This figure includes the £20,000 bonus.

176. In order to calculate Mr Neto's net loss resulting from his unfair dismissal, we need to discount his net notice pay. To calculate this using his October 2019 payslip, applying the percentage of notice pay to gross pay overall, to the gross notice pay figure. Thus his net pay in October 2019 was £14579 and his gross pay £27799. His net pay was therefore 52.44% of his gross pay. Of that, the notice pay element was £15384 multiplied by 52.44% suggests that his net notice pay would have been £8067.

177. Mr Neto's notice period was 8 weeks. His notice pay was based upon his basic salary of £100,000 (notice pay was £15,384 gross ÷ 8 x 52 = 100,000). He is entitled in damages in breach of contract to the shortfall in respect of his bonus, commission and employer pension contributions. His average payments for bonus and commission for August, September and October were, (3 x £1666 + £1170 + £1144 + £2581 x 4 ÷ 52 x 8) £6083. The shortfall in pension contributions is (8 x £96) £768. His damages in breach of contract should be £6851. The figures are gross, the damages are taxable in the hands of Mr Neto.

Loss of car allowance

178. Although each of the claimants have included in their Schedules of Loss, "loss of car allowance" they accepted that this was not a proper head of loss as it was an allowance paid to them for using their own vehicles on company business, compensating them for the wear and tear on their vehicle. After dismissal, they were not using their vehicle on company business and therefore not incurring the wear and tear. There is no loss.

Grossing up

179. None of the claimants have suggested that their awards should be grossed up.

<u>Compensation Calculations</u>

180. Calculations for each of the three claimants as follows:

Mrs Whitbourn

Basic Award Agreed		£11,430
Compensatory Award Prescribed Element: 29/10/18 to 16/02/21 is 121 weeks 121 x £934	£113,014	
Add Penson loss November 2018 to March 2019 21 weeks at £38	£798	

Less actual income	£28,245		
	£85,567		
Add ACAS Uplift at 10%	£8,557		
	£94,124	£94,124	
Non-Prescribed Element:			
17/02/21 to 16/02/22 is 52 weeks			
52 x £934	£48,568		
Add Loss of Statutory Rights	£500		
	£49,068		
Add ACAS Uplift at 10%	£4,907		
	£53,975	£53,975	
		£148,099	
Apply statutory cap 52 week's pay		£40,000	£40,000
			£51,430
Discrimination injury to feelings	£5500		
ACAS uplift 10%	£550		
Interest at 8% from date of discrimination			
£484 per annum or £1.32 per day			
13/09/18 to 16/02/21 is 2 years and	£968		
158 days x £1.32	£209		
Compensation for discrimination	£7,227		£7,227
			£58,657

Mr Jason Atherton

No Basic Award as received redundancy payment			
Compensatory Award			
Prescribed Element:			
24/10/18 to 30/04/19 is 26 weeks			
26 x £1,608	£41,808		
Less pay in lieu of notice	£12,470		
	£29,338	£29,338	

01/05/19 to 30/04/20 is 52 weeks 52 x £1,608	£83,616	
Less what should have earned had C mitigated loss – less 50%	£41,808	
	£41,808	£41,808
Penson loss:		
26 weeks at £96	£2,496	
52 weeks at £96 x 50%	£2,496	
	£4,992	£4,992
		£76,138
Non-Prescribed Element: No Future Loss		
Add Loss of Statutory Rights		£500
		£76,638
Less 25% for misconduct discovered post dismissal		£19,160
		£57,478
1 days' holiday pay as claimed		£462
		£57,940

Mr Scott Neto

Basic Award Agreed		£4,061
Compensatory Award Prescribed Element: 29/10/18 to 16/02/21 is 121 weeks 121 x £1333	£161,293	
Less pay in lieu of notice	£8,067	
	£153,226	
Add Penson loss (excluding notice period) 113 weeks at £96	£11,616	
	£164,842	
Add 10% for failure to follow ACAS Code	£16,484	
	£181,326	

There is no point in calculating total loss as statutory cap has been exceeded		
		£88,519
Statutory Cap		
Total compensation for unfair dismissal		£92,580
1 days' holiday pay as claimed		£326
Notice pay shortfall	£6,851	
Add ACAS uplift at 10%	£685	£7,536
Total damages for breach of contract	£7,536	
		£100,442

Costs Application

181. Achieva Group Limited have made a costs application in respect of the claimants' application to join that company into these proceedings as a third respondent. The application is put forward in a letter from solicitors for Achieva Group Limited, Constantine Law dated 9 February 2021.

182. The background is that by an email timed at 15:40 on Friday 5 February 2021, Mr O'Callaghan made an application to add Achieva Group Limited to these proceedings on the basis that, "there is a clear "commonality of ownership" in that Achieva Group Limited purchased Just Recruit Group as part of a "pre-packed administration" within the last 7 days in a blatant attempt to avoid liability in these proceedings". Mr O'Callaghan refers to information that the directors of the first respondent Key People Limited were also in discussion with the same administrators and it was feared that Key People Limited would also go into liquidation and that business also sold under a pre-pack administration to Achieva Group Limited.

183. In his application, Mr O'Callaghan referred to an Employment Tribunal case, that of Mr PM Rogers and Mrs K Rogers v Project Viva Limited (In Administration) & Others 1300027/2016. He said in that case an Employment Judge had allowed the purchaser of the respondent company via a pre-pack sale in administration to be joined in as a respondent. He said that the application was allowed on the basis that there was, "a commonality of ownership and directorship between the companies".

184. Mr O'Callaghan argued in his application that Mr Freed was a shareholder in other holding companies which held shares in Key People, Just Recruit and Achieva Group. He was also said to be a director of all of those companies.

185. We have explained above how events unfolded at the outset of the hearing which led to the claimants withdrawing their application. The application set out in Constantine Law's letter of 9 February 2021 is put forward on the following basis:

185.1 The application was made at 15:40 Friday 5 February 2021, that the application was speculation and that there were a number of inaccuracies in the statement in support of the application;

185.2 Constantine Law were contacted at 16:30 on 5 February and a substantial amount of work had to be done in a relatively short period of time over the weekend, including finding and instructing Counsel; and

185.3 The claimants withdrew their application at 2pm on Monday 8 February 2021.

186. The application is not made by reference to the legal merits of the claimants' application.

187. The costs sought are £8,728.

188. In oral submissions, Mr Freed referred me to the case of Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, from paragraph 39 onwards and in particular paragraph 41. Paragraph 41 sets out Underhill LJ's exhortation to look at the whole picture of what has happened in a case and to ask whether there has been unreasonable conduct.

189. Mr Freed made the point that the application was made very late on a Friday afternoon with no advanced warning, which left him the weekend scrabbling to find a solicitor to act on behalf of the company and then over the weekend to find Counsel free to appear on Monday morning. He said that an application without merit had been made which had resulted in Achieva Group Limited incurring substantial costs and the purpose was, he said, to press Achieva Group to settle the claim.

190. In response, Mr O'Callaghan said that he had first received written confirmation that Just Recruit was in administration at 16:21 on Wednesday 3 February. He said he was in court at the time. He had received instructions from the claimants that they were concerned that Key People was also going to go into administration and it had appeared that at the last minute, the respondents were setting about avoiding this hearing in an unethical way by going into administration. He explained he was unable to deal with the matter on Thursday 4 February as he was engaged on another case. He met the claimants in conference on Friday morning and with very little time in hand, they decided to make the application on the basis of the tribunal case cited and the fact that there appeared to be commonality of ownership. He said that the claimants took a sensible line on Monday

8 February when they realised that the implications of pursuing the application were that their hearing would be adjourned for a significant period of time. The claimants ought not to be punished for taking a sensible decision on Monday 8 February.

The Law

191. Rule 76 of the Employment Tribunal's 2013 Rules of Procedure provide that a costs or time preparation order may be made and a tribunal shall consider whether to do so, where it considers that:

> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success.*

192. As for the amount of costs that we may order should be paid, rule 78 provides that we may:

> *" (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
> *…"*

193. In Gee –v- Shell UK Limited [2003] IRLR82 Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".*

194. In Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise, which I would paraphrase as follows:

> 1. Has the putative paying party behaved in the manner proscribed by the rules?
>
> 2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).
>
> 3. If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

195. In McPherson v BNP Paribas (London Branch) 2004 ICR 1398 CA it was suggested that in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct. On the other hand, in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 (paragraphs 39 – 41) it was emphasised that the tribunal has a broad discretion and it should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as "nature", "gravity" and "effect". The words of the rule should be followed and the tribunal should:

> *"look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*".

196. The Court of Appeal in Yerrakalva made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances.

197. Returning to the case of McPherson and on the subject of cost in cases where proceedings have been withdrawn by the Claimant, I refer to paragraphs 28, 29 and 30 of the judgment:

197.1 At paragraph 28 it is explained that it would be unfortunate if we had a regime as to costs whereby Claimants who withdrew would automatically face an order for costs thus discouraging anybody from ever withdrawing.

197.2 At paragraph 29, is set out the other side of the argument, equally valid, which is that we ought not to adopt a practice which encourages speculative claims, only for them to be withdrawn at the last minute, when no offer of settlement has been made.

197.3 And at paragraph 30:

> *"The solution lies in the proper construction and sensible application of Rule 14 as it then was. The crucial question is whether in all the circumstances of the case the Claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim in itself is unreasonable".*

Conclusions

198. It is not the claimants' fault that after all this time, the second respondent goes into administration one week before the final main hearing. One can understand their anxiety that the same may happen with the first respondent. We are not in a position to comment on whether the claimants' allegations of commonality of ownership are well founded or not because we did not hear evidence on the issue.

199. The claimants did not learn that the second respondent had gone into administration and that its business had been sold to Achieva Group Limited until late in the afternoon on Wednesday 3 February 2021. The claimants do not have solicitors working for them, they rely upon Mr O'Callaghan by way of the Bar's direct access scheme. He was not available to meet with the claimants until the morning of Friday 5 February. One can understand that anxiety levels would have been high and there would have been a great deal of pressure to decide what to do about it. We have not heard full submissions from either Mr O'Callaghan or from Achieva on the legal merits of the application. Constantine Law's letter of application merely describes the claimants' application as "speculative".

200. Talking through the practical implications of the application and the delays that it would cause to hearing the merits of the case led the claimants to make a sensible decision to withdraw their application. We considered the balancing exercise spelt out by the Court of Appeal in the case of McPherson referred to above. On the one hand tribunals do not want to adopt a policy of discouraging sensible decisions to withdraw, on the other hand we do not want to encourage speculative applications in the hope they might achieve settlement. We stand back and look at the circumstances in the round and consider whether we think the claimants acted unreasonably in making this application on Friday afternoon and withdrawing it on Monday afternoon. In our view they did not. Under extreme time pressure and in a situation not of their making, they took a decision on reflection, listening to what the Employment Judge had to say, to sensibly withdraw. That is not unreasonable conduct and not conduct the Employment Tribunal ought to sanction with an order for costs. In those circumstances, we decline to exercise our discretion and will not make an order for costs.

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Employment Judge M Warren

Date: 16 March 2021

Case Numbers: **3303448/2019 (V)**
3303666/2019
3303665/2019

25 March 2021
Sent to the parties on: .....

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For the Tribunal Office