EMPLOYMENT TRIBUNALS

Claimants: Mr N Burton (1)
Ms L de Souza (2)

Respondents: Decision Logic Ltd (1)
IT Tech Services Ltd (2)
Mr B Miles (3)
Mr A Gulamali (4)

Heard at: Bristol (by video) **On:** 8 to 12 and 26 March 2021

Before: Employment Judge C H O'Rourke
Mr R Spry-Shute
Mr N Cross

Appearances
For the Claimants: Mr M Fodder - counsel
For the Respondents: Mr J England - counsel

RESERVED JUDGMENT

The Claimants' claims of constructive unfair dismissal, automatic unfair dismissal, sex and age discrimination, victimisation, breach of contract and failure to provide s.1 ERA-compliant terms and conditions of employment, fail and are dismissed.

REASONS

Background and Issues

1. The Claimants were employed by the first or second Respondents (R1 and R2) as business development managers (BDM), for either two, or two and a half years, from either mid-2017, or January 2018, to their resignation, with immediate effect, on 6 January 2020. R1 manufactures and sells computers; R2 is either the company that employed the Claimants, or simply acted as the payroll company; the Third Respondent (R3) was the Claimants' line manager and the Fourth Respondent (R4) is the First Respondent's founder and majority shareholder. The business, generally, trades under the name 'Chillblast'.

2. The Claimants allege the following:

2.1 Constructive unfair dismissal;

2.2 Automatic unfair dismissal, on the grounds of having made a protected disclosure;

2.3 Sex and Age discrimination, to include associative discrimination;

2.4 Victimisation;

2.5 Breach of contract in respect of notice and failure to provide equal opportunities; and

2.6 Failure to provide terms and conditions of employment compliant with s.1 Employment Rights Act 1996 (ERA).

3. Issues. The issues were set down at a case management hearing on 30 June 2020 and are set out below:

3.1 Identity of the Respondent(s). Which of R1 or R2 were the Claimants' employer?

3.2 Time limits

3.2.1 Given the dates the claim forms were presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

3.2.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

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

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

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

3.3 Were the unfair dismissal, breach of contract and protected disclosure complaints made within the time limit in section 111 / 48 / 23 of the Employment Rights Act 1996? The Tribunal will decide:

3.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

3.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

3.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3.4 Constructive unfair dismissal

3.4.1 Did the Claimants' employer (identity of which is in dispute) commit a repudiatory breach of the Claimants' contract? The Claimants are relying on the following:

3.4.1.1 Breach of trust and confidence relating to:

1. The claim of direct discrimination above;
2. The claims of victimisation above;
3. On 3 January 2020, coming across evidence which the Claimants say reasonably demonstrated that it was not possible for the Statements to have been provided on 19 January 2018 as found by the business in the grievance outcome letters. The Claimants concluded this was a fundamental breach and the last straw in their employment relationship on the following grounds:
    1. They had effectively been called liars but could now demonstrate they were telling the truth;
    2. No fair and reasonable investigation had been carried out in relation to the S1 ERA grievance and the Claimants were able to provide significant and readily available contemporaneous email evidence which contradicted the outcome findings;
    3. They had been misled as to employment law and their employment rights;
    4. The orchestrated collusion and fabrication went to the very top of the organisation.

3.4.1.2 Unfair on the grounds of procedural unfairness in relation to the failure to carry out a timely, fair and reasonable investigation into their S1 ERA grievance, which is never a fair or legitimate business reason (within the range of reasonable employer responses) to act in bad faith and wilfully misrepresent the law and the truth.

3.4.2 Did the Claimants resign in response to the breach?

3.4.3 Did the Claimants waive the breach, by affirmation of contract, delay or other action?

3.5 Wrongful dismissal; notice pay

3.5.1 What were the Claimants' notice periods? The Claimants say three months and the Respondents statutory notice.

3.5.2 The Claimants were not paid for any notice periods.

3.5.3 Were the Claimants entitled to resign without notice, in the face of a fundamental breach of contract?

3.6 Automatic Constructive Unfair Dismissal due to Protected disclosure ('whistle blowing')

3.6.1 Did the Claimants make one or more qualifying disclosures, as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.6.1.1 What did the Claimant say or write? When? To whom? The Claimants state that they made disclosures to a previous employer, which, in a subsequent Employment Tribunal claim against that employer, were found by that Tribunal to have been qualifying disclosures. Those disclosures were then, in turn, disclosed (by a third party) to R1/R2, which resulted in R1/R2, on 2 September 2019, raising a concern as to an 'uncapped claim' by the Claimants.

3.6.1.2 Were the disclosures of 'information'? (This query and subsequent ones dependent on contents of prior Tribunal judgment – to be disclosed by the Claimants).

3.6.1.3 Did they believe the disclosure of information was made in the public interest?

3.6.1.4 Was that belief reasonable?

3.6.2 Did they believe it tended to show that:

3.6.2.1 a criminal offence had been, was being or was likely to be committed;

3.6.2.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.6.2.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

3.6.2.4 the health or safety of any individual had been, was being or was likely to be endangered;

3.6.2.5 the environment had been, was being or was likely to be damaged;

3.6.2.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.6.3 Was that belief reasonable?

3.6.4 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the Claimant's employer?

3.6.5 Was such disclosure the reason (of if more than one, the principal reason) for the Claimant's dismissal?

3.7 Automatic Unfair Constructive Dismissal for Asserting a Statutory Right (s.104 Employment Rights Act)

3.7.1 Was the reason (or if more than one, the principal reason) for dismissing the Claimants their assertion that R1/R2 had infringed a relevant statutory right?

3.7.2 The Claimants allege that the motive/reason for their dismissal related to their assertion of a statutory right for the provision to them of a correct and complete written statement of employment particulars, under s1. ERA and their assertion that this right had been breached.

3.8 Direct age and sex discrimination (Equality Act 2010 section 13)

3.8.1 The less favourable treatment relied upon by the Claimants is not being given the opportunity to apply for the role of Head of Sales. It is acknowledged by the Respondents that the Claimants were not given the opportunity to apply for the role of Head of Sales.

3.8.2 The Claimants rely upon the customer service team as a comparator (which the Respondents do not accept is a valid comparator), or the hypothetical comparator of a man, aged under 50, carrying out the same role as the Claimants. Have the Respondents treated the Claimants as alleged less favourably than they treated or would have treated a comparator?

3.8.3 If so, have the Claimants proved facts, whether by adducing facts themselves or from any other source, from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic(s)? The protected characteristics relied upon are:

1. Mr Burton (C1's) age (56);

2. Ms De Souza (C2's) sex;

3. C1's association C2's sex;

4. C2's association C1's age.

3.8.4 If so, what is the Respondents' explanation? Have they proved no discrimination whatsoever?

3.9 Victimisation (Equality Act 2010 s. 27)

3.9.1 The protected acts relied upon (which the Respondents agree are protected acts), comprised of various grievances raising allegations of discrimination and are:

1. C2 – 2 July 2019;
2. C1 – 16 July 2019;
3. C1 – 16 July 2019;
4. C1 – 17 July 2019;
5. C2 – 19 July 2019; and
6. C1 & C2 – 13 August 2019.

3.9.2 Did the following alleged detriments occur:

1. Threatening the Claimants with dismissal on 16 July & 12 August 2019;
2. Allegedly attempting to put the Claimants off their direct discrimination claims by moving Sheena Mitchell to PAYE from contractor status on 31 July 2019 & changing Jamie Fish's position from Head of Sales to Business Development Manager on 30 August 2019;
3. Accusing the Claimants of poor performance on 12 August 2019 with no supporting evidence and that there was an unreasonable change to the performance timescale;
4. Accusing the Claimants of poor conduct on 12 August 2019 with no supporting evidence;
5. Reviewing the same performance month twice with the threat of an elevated penalty the second time around on 15 August 2019;
6. Appointing a biased/apparent biased chairperson to hear the Claimants' grievance;
7. Trying to separate the Claimants as a joint business team on 19 August 2019;
8. Putting undue pressure on the Claimants to change their choice of companion on 20 August 2019;
9. Refusing to hear the Claimants' grievances in the correct order and refusing to accept any further grievances;
10. Undermining the Claimants' ability to achieve the new revenue target set and earn commission by giving new business to Jamie Fish;
11. Failing to comply with their subject access request;
12. Failing to withdraw the disciplinary performance proceedings and hearing the disciplinary performance proceedings without the Claimants present on 18 September 2019 & 24 September 2019;
13. Unreasonable delay/timing out;
14. Unreasonable failure to comply with the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures on the following grounds:
    1. Failure to deal with issues fairly;

2. Failure to carry out necessary investigations and share the results of the investigations (12 August 2019 & 24 September 2019);
3. Failure to be notified in writing with sufficient information (12 August & 24 September 2019);
4. Failure to allow a choice of companion (12 August 2019);
5. Pressure to change choice of companion;
6. Failure to allow a choice of companion despite the request to exercise this statutory right (12 August 2019);
7. Failure to adjourn disciplinary hearings on the grounds of good cause (24 September 2019);
8. Failure to adjourn grievance hearings on the grounds of good cause (26 September 2019);
9. Failure to hear grievance appeal hearings without unreasonable delay (17 September 2019);
10. Failure to temporarily suspend the disciplinary hearings to hear the separate but related grievance hearings (24 September 2019).

3.9.4 Did the Respondents subject the Claimants to a detriment because they had done a protected act?

3.10 Breach of contract as to Equal Opportunities

3.10.1 Was it a term of the Claimants' contracts that R1/R2 'will provide equal opportunity to all who apply for vacancies through open competition'?

3.10.2 Did R1/R2 breach that term and if so what is the measure of damages?

3.11 Schedule 5 Employment Act 2002 cases

3.11.1 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimants a written statement of employment particulars or of a change to those particulars?

3.11.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

3.11.3 Would it be just and equitable to award four weeks' pay?

The Law

4. We reminded ourselves of the case of **Western Excavating (ECC) Ltd v Sharp**

[1978] ICR 221 EWCA, which sets out the test for constructive unfair dismissal and which has been itemised already by us, when we set out the issues above. Also, we considered the case of **Mahmud v BCCI International [1997] UKHL ICR** 606, which stated (as subsequently clarified) that:

> *"The employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*

5. In respect of the discrimination claims, we note that the initial burden of proof is on the Claimant to establish a prima facie case that the Respondent has committed a contravention of the Equality Act, specifically, primary facts from which the Tribunal could reasonably and properly conclude, in the absence of any explanation to the contrary that there had been unlawful discrimination (**Ayodele v Citylink Ltd [2018] IRLR EWCA)**.

The Facts

6. We heard evidence from both Claimants and on behalf of the Respondents from Mr Ben Miles, R3 and the managing director of R1/Chillblast, from Mr Martin Sawyer, the operations director and Mr Amil Gulamali, R4 and the majority shareholder of R1. We refer throughout to 'the Claimants', without distinguishing between them, or their evidence. This is because they have throughout operated as a team, both in their engagement with and work for R1/R2, their bringing of grievances, in which, predominantly, C2 wrote on both their behalves, their attendance as each other's companion at grievance meetings and finally, in their bringing of this claim. Indeed, one of their complaints against the Respondents is that they attempted to '*separate* (them) *as a joint business team'*.

7. The Respondent (R1 or R2) is a small to medium enterprise, with approximately forty or so employees.

8. Chronology. We set out the following uncontentious chronology:

   8.1 3 January 2017 – Claimants commenced working for R1/R2 (they state, as a team – having worked that way in previous employments), as self-employed contractors, with the title business development managers (BDM). They initially submitted invoices for payments to R1, but were told to redirect them to R2, which company, in turn, paid them, thereafter.

   8.2 3 July 2017 – it is common ground that the Claimants were initially engaged, as contractors, for a six-month period, with the intention of becoming employees thereafter. At the expiry of that period, the Claimants consider they become employees (albeit that they continued to invoice for their services, in the same way as before and there is no discussion or correspondence between the parties as to any change in status), whereas the Respondents consider that in the absence of any other arrangement being made, the Claimants went onto to a 'rolling' self-employed contract.

8.3 11 August 2017 – date of judgment in an employment tribunal case brought by the Claimants against a previous employer, which found that the Claimants had made protected disclosures to that employer. The Respondents accepts that in turn, those disclosures became known to them, at a later point [431].

8.4 1 January 2018 – the Respondents state that the Claimants became employees, being 'onboarded' at that point by a Mr Hudson, the then production manager, whose responsibilities also included HR. The Claimants agree that a meeting of some form took place and that they were issued with documentation, to include the Chillblast handbook [182], but not a statement of terms and conditions of employment [206]. On 5 January 2018, the Claimant's had requested to '*move our status with Chillblast (IT Tech Services Ltd) unto a PAYE footing, as this is the tax status the HMRC will require for us to have our tax affairs in order'*, to which Mr Miles replied, agreeing, stating that some '*admin*' would be required for the '*onboarding* (of) *an "employee" rather than a self-employed contractor …'*. [256]. That arrangement was backdated to the start of the month.

8.5 6 February 2018 – the Claimants were given a pay rise, from £2500, to £3100, per month, as well as entering into a commission arrangement [260].

8.6 18 December 2018 – the Claimants requested a further pay rise [266-268].

8.7 January 2019 (the vast majority of dates hereafter, unless otherwise stated, are 2019) – Mr Miles became managing director, having been sales director prior to that. He had not had direct responsibility for the Claimants' work to that point. Thereafter, there was discussion with Mr Miles as to a new sales 'manager' role, with the Claimants saying that they were told that a sales account manager was being sought, which would be a junior role to theirs, not, as subsequently transpired, a 'head of sales' role, which would have management responsibility for their positions.

8.8 30 January– an appraisal meeting was held between the Claimants and Mr Miles [271]. Mr Miles stated that he considered that the Claimants were overestimating their contribution to the business and that he explained this to the Claimants, refusing a pay rise. The Claimants said that Mr Miles blamed this refusal on the overall poor performance of the business, but made no mention of any concerns with their performance. Mr Miles said that he had raised both issues as factors for his decision.

8.9 1 April 2019 – a Mr Jamie Fish joined, as 'head of sales' (albeit that the Respondents said that he was also known as 'head of B2B sales' (business to business)). The Claimants state that the (acknowledged) omission of the Respondents, to give them the opportunity to apply for this role, was an act of discrimination, either direct or associative, based

on C1's age, or C2's sex. They also claim that R1/R2 was in breach of their contract of employment (as set out in R1's handbook) as to providing '*equal opportunity to all who apply for vacancies through open competition'*. [182]. Mr Miles said he decided that this new role was necessary, to help formulate sales strategy and to manage the Claimants. He said that he decided to recruit externally, as he did not consider that either Claimant was suitable for the role, '*given that a large element of the role would be to manage their poor performance'* (WS18).

8.10 June – a Mr Rob King had recently joined Chillblast, as head of finance and Mr Miles asked him to review each department's figures.

8.11 13 June – Mr Fish forwarded on an email from Mr King to the Claimants, as to their performance, in which he stated '*there is clearly a need to increase* (sales) *substantially, as we are not breaking even ..'* [278]. The Claimants disputed the calculations [277].

8.12 17 June – Mr Miles put the sales department "*at risk"* [361], stating in an email that '*we obviously want to treat them* (the Claimants) *with the utmost courtesy and respect but there remains a huge culture of dependency from them as team members, and an unwillingness to step outside of their comfort zone of handling existing accounts.'* [279].

8.13 26 June – Mr Miles gave a presentation to the department, at which the Claimants were told that they would need to increase their revenue to '*break-even point … circa £750,000 revenue per year'*, which would mean that their monthly sales target became £62,500 each [295]. The Claimants state that they were told that this target was to be met by the end of a three-month period, commencing in September, after what they described as the 'quiet summer holiday period', whereas Mr Miles stated that the three-month period commenced immediately, expiring at the end of September (as subsequently confirmed by him in an email of 22 July [346]).

8.14 27 June – the Claimants were provided with Chillblast's organisation chart, showing Mr Fish as 'Head of B2B Sales' [222]. The Claimants state that this is the first occasion of which they were aware that Mr Fish had been recruited to this role (or as 'Head of Sales') and that therefore, by implication, they had not been invited to apply for it.

8.15 2 July – C2 raised an equal pay grievance, in relation to Mr Fish's earnings [322]. This, in turn, was to become the first of several 'protected acts', relied upon for subsequent claims of victimisation.

8.16 16 July – C1 raised a grievance of discrimination by association with C2 [328] (also a protected act).

8.17 16 July – the Claimants alleged that by way of detriment, in respect of those protected acts, they were threatened with dismissal by Mr Miles. They rely on an email from him, which includes the text '*As the*

performance stands, the situation is very serious and requires urgent action in order to avoid us considering a potential restructure or formal performance management processes'. [346]

8.18 17 July – C1 raised a further grievance alleging direct discrimination on grounds of age, in relation to Mr Fish's appointment [327].

8.19 19 July – C2 raised a further grievance, alleging sex discrimination, in respect of the same matter.

8.20 31 July – the Claimants alleged detriment, based on the Respondents moving a Ms Mitchell, hitherto a contractor, onto PAYE status, in an attempt to counter, or weaken their sex discrimination claims.

8.21 31 July – Mr Miles met with the Claimants to discuss their discrimination grievances. He was accompanied by a Mr Doherty, a representative of a company providing Chillblast with HR advice, which trades under the name 'The HR Department' [377-381]. Following the provision of the notes of the meeting, the Claimants responded with a 'corrections sheet', with a disclaimer at its head (and as used on all subsequent such corrections sheets) '*CAVEAT whilst it is acknowledged the meeting notes are not a verbatim record it is noted that all salient points have <u>not</u> been captured and the comments in blue below only reflect corrections as to what has been recorded. Please refer to the grounds for appeal for a more comprehensive account of the grievance meeting'*. [375]. Subsequently, they refused to give consent to the recording of these meetings [467].

8.22 12 August – a series of meetings were held with each Claimant [386-390], to review their performance. As a consequence, the Claimants have alleged detriments, relating to alleged threats of dismissal, accusations of poor performance/conduct, with no supporting evidence and unreasonable failure, in several respects, to comply with the ACAS Code, to include failing to carry out proper investigations and to provide information as to the results of such investigations, or to permit a choice of companion [391].

8.23 13 August – the Claimants brought a grievance of victimisation [391].

8.24 14 August – the Claimants' previous grievances were rejected [397-404].

8.25 15 August – Mr Miles invited the Claimants to a grievance meeting, in relation to their grievance of 13 August, to be chaired by Ms Mitchell [410]. The Claimants subsequently alleged a detriment in the appointment of Ms Mitchell, on grounds of bias.

8.26 15 August – Mr Miles invited the Claimants to a formal performance review meeting on 21 August [411-413]. The Claimants subsequently alleged a detriment in respect of this review.

8.27 16 August – the Claimants made a Subject Access Request (SAR) for copies of their '*personnel files and copies of all personal data held …'* [472].

8.28 16 August – the Claimants appealed the grievance outcomes of 14 August.

8.29 19 August – the Claimants subsequently alleged an act of detriment, in respect of Chillblast requesting that from that point on, their revenue reporting is to be on an individual basis, rather than as a team, thus separating them [482].

8.30 19 August – the Claimants wrote to Mr Gulamali, asserting that they are making a protected disclosure to him, in relation to Mr Miles' alleged breaches of the Equality Act [420].

8.31 20 August – Mr Sawyer (standing in for Mr Miles, while on leave) wrote in response to the Claimants, in respect of arrangements for forthcoming grievance and performance review meetings. As the Claimants worked remotely and therefore would have to travel some distance to the office for these meetings, Mr Sawyer proposed that they each have two separate meetings, one for hearing grievances, the other for performance review, on the same day. The Claimants insisted, however that as they would wish to be each other's companion and witness at these meetings, they would both be attending effectively four meetings in one day, which they considered too much. When Mr Sawyer suggested [468] that they were free to choose any work colleague to accompany them, thus reducing the overall number of meetings they had to attend (particularly in view of their request also that the timetable for the meetings '*takes into account reasonable time to prepare and reasonable time to confer before and after each meeting'*), they considered this an act of detriment, as well as being a breach of the ACAS Code.

8.32 21 August – the Claimants raised a grievance in relation to the meetings of 12 August and the invitation to the performance review meeting, alleging breach of the staff handbook [561]. Mr Miles confirmed suspension of the performance review, pending resolution of this grievance [421].

8.33 22 August – the Claimants were invited to a hearing of this grievance, to be chaired by Ms Mitchell [422].

8.34 29 August – the Claimants raised a grievance against Ms Mitchell being appointed to hear their previous grievance and also disputed that their grievances were not being heard in the right order.

8.35 30 August – Mr Miles wrote to the Claimants, refusing to replace Ms Mitchell and stating that '*until such time that the current outstanding issues and concerns have been dealt with, the Company will not accept*

any further grievances from you' [460]. This decision (and the Claimant's contention as to the order of hearing of grievances) subsequently formed further alleged acts of detriment.

8.36 30 August – Mr Miles informed the Claimants that Mr Fish would no longer be Head of Sales, but become a BDM [429]. Mr Fish had written to Ms Mitchell on 16 August [414] stating that he had found managing the Claimants very difficult. He referred to them not '*wanting to be managed or take guidance … at times argumentative, with constant over-talking …in my working experience, I have never come across such uncooperative members of staff … I have questioned several times why there is a need to have two people working on an account … all of the above has contributed to a decline in my mental health and wellbeing since joining Chillblast.'* The Claimants alleged, as a detriment that Chillblast was attempting to put them off their discrimination claims by changing Mr Fish's role from Head of Sales to BDM.

8.37 2 September – Mr Gulamali sent Mr Miles a copy of an article from Bloomberg, from 2017, about the Claimants' tribunal claim against their previous employer [431]. Mr Miles forwarded it on to 'The HR Department', stating that '*we are concerned that whistleblowing carries an uncapped claim'* (referring to possible compensatory payments) [435].

8.38 4 September – the Claimants brought a grievance about how B2B accounts are being allocated between them and Mr Fish [454].

8.39 6 September – Mr Miles invited the Claimants to a performance review meeting on 24 September.

8.40 17 September – the Claimants disputed that the documents disclosed in response to their SAR were sufficient and clarified their request to include details of all personal data held on three Chillblast data bases, as well as LinkedIn, phone records and payroll/pension/expenses records. They also requested details of any documents (emails, letters, minutes, recordings etc.) containing their personal data and processed by eight named individuals, over the last year. One of the documents previously disclosed by Chillblast, were statements of terms and conditions of employment for the Claimants, but which the Claimants stated they had not previously seen, until their disclosure the previous day [484].

8.41 20 September – the Claimants brought grievances as to alleged breach of s.1 ERA, in respect of not being provided with terms and conditions of employment and also at to failure to comply with their SAR.

8.42 23 September – the Claimants argued that performance/disciplinary matters should be adjourned until their grievances in relation to the handbook have been resolved and in any event that they should be withdrawn, as the target has been met [529].

8.43 24 September – a formal performance review meeting was held, in the Claimants' absence [502]. It concluded that the Claimants had not met the target and that the deadline would be further extended by a month, for further review. Formal oral warnings were subsequently issued on 27 September [522]. The Claimants subsequently alleged five detriments in relation to this meeting.

8.44 26 September – the Claimants' victimisation grievances were heard, in their absence (and subsequently rejected) and on the same date, their appeals on the equal pay and discrimination grievance outcomes were rejected [508-524].

8.45 2 October – the Claimants presented their first claim to the Tribunal, alleging age and sex discrimination.

8.46 3 October – the 'handbook' grievance was heard (and subsequently rejected) [572].

8.47 4 October – the Claimants appealed against the formal oral warning.

8.48 10 October – the Claimants appealed against the rejection of the victimisation grievances.

8.49 11 October – C1 brought a grievance seeking withdrawal of the performance procedure [593].

8.50 16 October – the Claimants appealed against the outcome of the 'handbook' grievance [581].

8.51 30 October – the victimisation appeals were heard (and subsequently rejected) [626].

8.52 5 November – performance warning appeal hearings were held (and subsequently rejected) [637].

8.53 7 November – 'handbook' appeals heard (and subsequently rejected) [643].

8.54 28 November – s.1 ERA grievances heard.

8.55 3 December – performance review held with the Claimants (and Mr Fish), subsequently resulting in formal written warnings [678].

8.56 4 December – outcome to s.1 ERA grievances issued, partially upholding them [671]. Mr Sawyer wrote, in respect of whether or not the Claimants had been provided with such terms and conditions in January 2018, (which they denied) that '*I can see no evidence that you were not provided with* (them) *… as part of your onboarding process in accordance with Company expectation and therefore it is my reasonable belief that* (they) *were provided to you at the appropriate time.'*

8.57 8 December – the Claimants raised a grievance in respect of whistleblowing detriment [689].

8.58 10 December – the Claimants appealed against the outcome of the s.1 ERA appeal [683].

8.59 12 December – the Claimants appealed against the formal written warnings [696].

8.60 6 January 2020 – the Claimants resigned with immediate effect [716]. (While Chillblast did offer to hear outstanding appeals, the Claimants did not wish to do so).

8.61 3 February 2020 – the Claimants presented their second tribunal claim, alleging constructive unfair dismissal, breach of contract and failure to provide s.1 terms and conditions.

9. The Claims. We turn now to each of the individual claims. As will be apparent from the list of issues and the chronology, these are complex and often overlapping. Both counsel, to their credit, made every effort to attempt to rationalise them and we are grateful for those efforts. They both provided detailed written submissions, to which they also added oral submissions. In doing so, both counsel based those latter submissions on the 'framework' provided by Mr England's written submissions and on that basis, therefore, in particular in relation to the setting out of 'Issues', we do the same (albeit that we do not take them in the same order, for chronological reasons).

10. Issue 1 – Identity of the Respondent(s). We find that R2 was the Claimants' employer and we do so for the following reasons:

10.1 From the outset of their engagement with Chillblast, the Claimants were paid by R2.

10.2 The entire grievance procedure was dealt with under R2's letterhead, without any objection by the Claimants (noteworthy, in the context of their extensive objections to very many other aspects of the process).

10.3 They themselves referred to R2 as their employer, in the on-boarding process [256].

10.4 Neither Mr Miles nor Mr Sawyer were employed by R1, but by R2. R1 had previously been the predominant employer of staff for Chillblast, but that was changed in 2017 [Companies House returns 242 and 255].

10.5 Albeit that the Claimants dispute sight of the s.1 T&Cs, these documents show R2 as the employer. While it is correct that the Handbook references R1 (under the overall trading name of Chillblast), this document is dated from 2014, long pre-dating the change of arrangements in 2017.

10.6 While the Claimants considered this arrangement to be '*just a matter of administrative convenience'* and that R1 was their true employer, there is no evidence of any documentary relationship to that Company, per se, as opposed to Chillblast, as a trading entity (they themselves frequently refer to obtaining orders for 'Chillblast' [example 302]).

11. Issue '1a' – Start date of Employment. We find that the Claimants' start date of employment was 1 January 2018 and we do so for the following reasons:

11.1 While it was undisputed evidence that there was a general understanding that after six months of being contractors and all being well, the Claimants would move to employment status, this was merely an aspiration and far from being a contractual requirement.

11.2 When the notional 'six-month' period was reached, in mid-2017, neither the Claimants nor R2 took any action, with the contractor relationship continuing as before.

11.3 In contrast, in January 2018, on the Claimants' own request, seemingly almost entirely for tax reasons, they were formally 'onboarded' as employees, clearly a process they could have instigated in mid-2017, had they wished, but for their own reasons, did not. This is not, as C2 asserted, a question of '*the legals catching up'*, but a positive decision, on their part, at a particular point in time, to change their status. As should be evident from the chronology above and the Claimants' bringing of previous tribunal proceedings, they are clearly very well-informed as to their employment rights and not hesitant in asserting them, so we are confident that had the Claimants considered that they should have become employees in mid-2017 that would have occurred.

12. Issue 2 – Time Limits. This issue applies only to the direct discrimination claims, with the Respondents asserting that the Claimants were 'on notice' of Mr Fish's true status at the point of appointment, in April 2019, based on him being shown as, interchangeably, 'Head of Sales' or 'Head of B2B Sales', in LinkedIn adverts [730] and that therefore the claim they brought in October of that year, is out of time. The Claimants, in turn, assert that they only became aware of the true nature of his position, on being provided with the organisation chart, showing Mr Fish as their manager, in late June and that therefore, allowing for Early Conciliation, their claim is within time (if correct, the relevant time limits are not disputed). In short, we concur with Mr Fodder's submissions that an expectation by R2 that the Claimants should intuit the nature of Mr Fish's role from their reading of LinkedIn adverts (and there is no evidence they did read them), is a '*thin point to hang an argument on'*. It seems bizarre to us that there is not a single email from the time of Mr Fish's appointment, to the Claimants, setting out in clear terms what his role in relation to them was. Also, in the context of their subsequent vehement refusal to accept his direction, when they were in no doubt as to his role, it should not be assumed that they would somehow, by inference, in April, see him as their manager. Accordingly, these claims are within time and the Tribunal has jurisdiction to hear them.

13. Issue 7 – Direct Discrimination. As stated above, the Claimants allege direct and associative discrimination, on ground of age and sex, in respect of the undisputed fact of them not being given the opportunity to apply for the Head of Sales role. They rely on the hypothetical comparator of a man, aged under fifty, carrying out the same BDM role as them. We conclude that they were not treated less favourably, on either grounds of age or sex, for the following reasons:

    13.1 In respect of age, Mr Fish was, at appointment, aged 47 (48 in June) and the comparator' man's age was just short of his 50th birthday. We struggle to see that such a small difference in age (two years or so) would have made any difference to R2's decision to appoint Mr Fish, rather than a person just older than the comparator.

    13.2 While it was asserted that the age of fifty is somewhat of a 'watershed' in employment terms, such a factor did not prevent R2 from recruiting C1 when he was aged 54, or Ms Mitchell, at the same age.

    13.3 We agree with Mr England's submission that this claim is based on nothing more than conjecture on the Claimants' part. While it was accepted by R2 that Chillblast's employee age-profile is preponderantly young, we do not consider that therefore indicates a desire to discriminate on grounds of age, when one considers the nature of Chillblast's product - computers and accessories aimed at 'gamers'. While, no doubt, over time, gaming will become more common with older players (if only because the current generation will age), it is self-evident and not, as asserted, '*stereotypical*' that such players will be among the younger generation. Certainly, the initial burden of proof being on the Claimants in this respect, they presented no objective or background evidence to counter such a view. Accordingly, therefore, we accepted Mr Miles' evidence that as a consequence, the persons who were interested in employment with Chillblast came from the gamer community and accordingly were predominantly from that younger age group. No evidence was provided by the Claimants to indicate that R2 excluded older employment candidates, by, for example, their method of advertising vacancies, or in scrutinising applications. Much more likely, therefore, is the fact that as Mr Miles stated, job applicants were predominantly younger persons.

    13.4 Turning to the claim of sex discrimination, this has even less merit. C2 simply conjectures, without any substance that she was not invited to apply because of her sex (albeit, rather contradictorily, C1 was not either, despite being a man). There is, in contrast, clear evidence of Ms Mitchell being appointed to a considerably more senior role, with oversight and responsibility for aspects of the entire business, regardless of her sex. The same arguments are made as to overall gender imbalance in the workforce, being predominantly male, but for the same reasons as set out above, we consider that this is simply a reflection of the nature of this industry.

13.5 In any event, even were the Claimants to have established a *prima facie* case, sufficient to shift the burden of proof to the Respondents (which, for the avoidance of doubt, we don't consider that they have), the Respondents have provided ample evidence that they had a non-discriminatory reason for any such less favourable treatment. We accept the Respondent's evidence, in particular that of Mr Miles that he, as the new MD, needed to 'get a grip' of the sales department, by appointing Mr Fish to manage the Claimants' performance and that therefore, as, in his view, they were clearly underperforming, they would be entirely unsuited to, in effect, 'manage' themselves. While the Claimants assert that, until June 2019, they were unaware of any underperformance on their part, we don't accept such assertion, We consider it more than likely that they were informed of such underperformance (at least in broad terms), by Mr Miles, at the pay review meeting on 30 January. He had a clear recollection of having done so, in the context of refusing their pay rise request and it is entirely logical that this subject would arise in such a discussion. He said that he had discussed with them the need to gain new clients, rather than focusing on existing ones and introduced a higher percentage commission for new business (accepted by C2), as an incentive. He also explained, he said that the Claimants' 'running costs' consumed any profit. While C2 (in particular) denied that that there had been any focus on their performance (as opposed to the business as a whole), we prefer Mr Miles' evidence, both on this point and generally, for the following reasons:

13.5.1 Mr Miles' evidence was entirely straightforward and direct throughout his lengthy cross-examination and he had no hesitation in admitting to errors or misjudgements on his part.

13.5.2 In contrast, the Claimants' evidence (focussing on C2, who was their self-described 'lead' witness) was often evasive and sometimes had the appearance of rehearsal. C2 had, several times, to be reminded to answer the question she was asked, rather than simply launching into a lengthy contradiction of the point being made, such as, for example, when being asked about whether or not she and C1 had met laid-down targets in September, when the documents clearly indicated that they had not. Their insistence, also, during the months of grievances, appeals and performance reviews that they be each other's companion (to the exclusion of any other neutral employee) and their refusal to permit digital recording of the meetings, despite routinely disputing the contents of subsequent minutes and their highly-selective and caveated 'correction' of such minutes, all indicate to us a desire to control evidence, to their own advantage.

13.6 The Claimants clearly were underperforming, as subsequently shown by Mr King's investigations and had been for some time. They were perhaps fortunate that Chillblast, at least until Mr Miles' promotion, had been somewhat laissez-faire about generating a profit from the sales department and they had therefore been pretty much left to their own

devices, without much oversight. However, that changed with Mr Miles' appointment as MD and once armed with the facts and figures provided by Mr King, he was in a position to put them under pressure to generate profits. Part of that change was to appoint Mr Fish, in an effort to manage the Claimants and their performance and therefore, in that context, there can have been no question of them, either singly, or as suggested in cross-examination by C2, as a job-share, 'managing' themselves.

13.7 Finally, the Claimants agreed that they (or at least C1) had, in the past, been offered customer services manager roles, which, while the Claimants were not interested, indicated that the Respondents were willing to consider the Claimants for other roles, regardless of age or sex.

14. Issue 8 – Victimisation. As stated above, there is no dispute that the Claimants engaged in six protected acts between 2 July and 13 August 2019, by the bringing of the various grievances already referred to. The question is, therefore, whether they suffered the detriments claimed and whether any such detriments were 'because of' such protected acts? We consider each detriment, in turn:

14.1 Threatening the Claimants with dismissal, on 16 July and 12 August. The Claimants were not threatened with dismissal, on either date. The email of 16 July relied upon [346], simply follows up on Mr Miles' performance concerns, stating that '*As the performance stands, the situation is very serious and requires urgent action in order to avoid us considering a potential restructure or formal management processes'*. This falls far short of being 'threatened with dismissal'. While a restructure might, logically, in the future, result in redundancies, there would be considerable 'water to go under the bridge', before any such stage would be reached. Similarly, if any 'management process' was commenced, it would, as was proved to be the case, take many months to reach such a point (and never did in the Claimants' case). The 12th August reference is to performance meetings held on that date. C2 does not say in her statement that she was threatened with dismissal. Nor does C1 directly allege this, instead referring to being '*lead down a path of dismissal'*, with reference to an email [567], which he wrote some seven or so weeks later, in which he refers only to '*an implicit threat of dismissal/contemplation of dismissal'* and which phrase is also used in their email of the next day, in direct reference to the meeting [391]. The Respondents cannot be held accountable for the interpretative gloss the Claimants choose to put on such communications.

14.2 Attempting to put the Claimants off their direct discrimination claims, by moving Ms Mitchell from contractor to PAYE status on 31 July and changing Mr Fish's role from Head of Sales to BDM, on 30 August. The allegation here is that in order to weaken those claims, Ms Mitchell, as a woman, in her mid-fifties, could be shown to be appointed to a senior position, regardless of her age and/or sex and Mr Fish by being, in effect, demoted, serves to diminish any more favourable treatment he may have received. The former allegation was not actively pursued in cross-

examination, or in submissions, but, in any event, Ms Mitchell's change in status was in progress before any protected act (20 and 23 June [280-1]. In respect of the latter allegation, there is abundant evidence that Mr Fish himself chose to step down, for the reasons he gave, as set out above. All the evidence indicates, in particular the Claimants' disruptive, uncooperative and nit-picking handling of their grievances and response to management instructions that they would have been extremely challenging staff to manage. These alleged detriments are therefore dismissed.

14.3 Accusing the Claimants of poor performance/conduct at the meetings of 12 August, with no supporting evidence and with an unreasonable change to the performance timescale. It is agreed evidence that the Claimants' underperformance was discussed at these meetings. Conduct was not. If, indeed, the Claimants really believe the assertion that such discussion as to their performance was without supporting evidence, then that can only serve as an indication of their perhaps wilful disregard for the evidence provided by Mr King [276-278 & 307-318]. By this point, the Claimants had been given a formal presentation by Mr Miles, on 26 June, including being copied his PowerPoint slides, setting out in clear detail the evidence for his conclusions as to their performance. It was simply the case that the Claimants chose to disagree with that evidence ('*there are three kinds of lies; lies, damned lies and statistics'* [308]), as they did to the imposition of the three-month target. However, both such matters are reasonable management decisions, particularly in the context of the financial situation Chillblast found itself in and therefore cannot be detriments. However, even were they to be such, all the indications are that the issues that originated them arose before any protected acts, the earliest of which was 2 July and therefore cannot have been because of those acts.

14.4 Reviewing the same performance month twice, with the threat of an elevated penalty the second time round, on 15 August (in reference to the meetings of 12 August). The letter relied on, of that date [411] invited them to a formal performance review meeting on 21 August, referring to their failure to meet the target in July (by approximately £2,250 short of £62,500). However, on the Claimants' own evidence, the meeting of the 12th had not been formal and was without, they complain, supporting evidence, but, being formalised by the letter of the 15th, that merits complaint. This is not a 'double' review, but simply the formalisation of earlier discussions. Again, in the circumstances, this is a reasonable management action and cannot therefore be a detriment and further, as already stated, Chillblast's concerns as the Claimants' performance predate their grievances.

14.5 Appointing a biased/apparently biased chairperson to hear their grievance. The Claimants considered that Ms Mitchell met this description, because she had been moved to PAYE to weaken their discrimination claims and that her son also worked for Chillblast and may be part of the 'factual matrix'. They considered, instead that Mr Gulamali,

as Mr Miles' superior, should have heard their grievances, but he did not wish to do so. Putting aside whether or not Ms Mitchell might have been perceived as biased (and without the Claimants having first put her judgment to the test, it is difficult to see how they could allege this), there is no evidence, whatsoever that Ms Mitchell was appointed for anything to do with any protected acts of the Claimants. Instead, the evidence pointed to, firstly, Mr Gulamali being a 'hands-off' 'president', content to leave the running of the business to Mr Miles and with a perhaps understandable reluctance to immerse himself in this matter. Secondly, this is not a large business, with many layers of management and therefore, inevitably, other senior managers were going to have to become involved, of which Ms Mitchell was one. Thirdly, the sheer number and detail of allegations made meant that the load of dealing with them inevitably had to be shared. It was also the case that throughout, the Respondents acted on the HR Dept's advice, which, while it would not excuse the Respondents from any missteps, does indicate that they had no ulterior motives, but merely wished to ensure that, to the limit of their resources, they followed HR 'best practice'.

14.6 Trying, on 19 August, to separate the Claimants as a joint business team. It is the case that the Claimants were recruited and worked as a team, reporting their sales income as such. However, following Chillblast's concerns as to their performance, it was decided that individual targets should be allocated and that therefore dictated submission of individual performance data. Both Messrs Miles and Sawyer were concerned that C2 seemed to do the bulk of the work on major clients and that therefore, by submitting joint figures, she was masking possible underperformance by C1 [389]. There was also concern that the Claimants duplicated their efforts, by working on the same client contracts, when splitting their work would have been more cost and time effective. From our perspective, it beggars belief that it would be perceived as unreasonable for an employer to issue such an instruction and equally remarkable that an employee would choose to ignore it (which they did). We are entirely confident that if, say, R2 had seen their performance management process through to its conclusion, where, following the requisite warnings, the Claimants were dismissed on capability grounds, based on being a team, then they would have inevitably sought to argue that such dismissals were unfair, as not based on any assessment of their individual performance. This decision cannot, therefore, be a detriment.

14.7 Putting the Claimants under undue pressure, on 20 August, to change their choice of companion. There was no 'pressure', 'undue' or otherwise, in this respect. R2 simply suggested that to reduce the number of meetings, in one day that both Claimants had to attend, as they worked remotely, at some distance and as they insisted on being each other's companion, other employees could be called upon. Once that suggestion was rejected, R2 said nothing further on the matter. Again, there was no detriment to the Claimants in this respect and we reiterate our comments above as to their motivation for such insistence.

14.8 Refusing to hear the Claimants' grievance in the correct order and refusing to accept any further grievances. The former of these complaints is effectively replicated below and will be dealt with within that section of these Reasons. The latter complaint relates to Mr Miles' letter to the Claimants, of 30 August, stating that '*until such time that the current outstanding issues and concerns have been dealt with, the Company will not accept any further grievances from you'* [460]. By this point, R2 had received eight grievances and one appeal, in the space of two months (a helpful table is at page 229). It will, in the circumstances, have been a very reasonable assumption by R2/Mr Miles that more were to come. We have already referred to the limited management resources of Chillblast and it was clear to us that the Claimants seemed determined, by the bringing of 'scattergun', sometimes repetitious and often extremely petty grievances, to deliberately, as a tactic, put those resources under extreme pressure. The Claimants were not, to our mind, engaging in any genuine grievance process (i.e. with the aim of successfully resolving a dispute with their employer, in order that both parties could resume a normal working relationship), but instead waging a campaign against their employer, to either engineer some settlement, or in the hope of 'tripping them up', with the sheer weight of grievances and appeals, thus ensuring that at least some might eventually succeed. Shortly after this date, as C2 confirmed in cross-examination, they took legal advice, which she said was in relation to '*just a schedule of loss'*, indicating their true intentions in this matter. It is correct that R2/Mr Miles was reacting to the grievances already brought, which, it is agreed, were protected acts, but he was not, we find, doing so because of the nature of those grievances, i.e. *because* they were protected acts, but because of the sheer number and frequency of them. We are confident that had the Claimants brought a similar number of grievances in relation to non-Equality Act-related matters, the reaction would have been the same. It may be that a more appropriate response from Mr Miles might have been to say that until existing grievances had been dealt with, no further grievances would be *processed*, but simply acknowledged as received, but, however, in view of our findings as to the Claimants' motivation in this respect, we see no detriment whatsoever to them in this case and, in any event, four more grievances and five appeals were subsequently received by R2 and processed.

14.9 Undermining the Claimants' ability to achieve the new revenue target and earn commission, by giving new business to Mr Fish. There was some evidence that Mr Fish had been passed enquiries received on Chillblast's website, from prospective clients [162], by a Technical Support Advisor. Mr Miles' unchallenged evidence on this point was that neither he nor any other member of management was involved in allocating enquiries or accounts [617]. There is no evidence that the Support Advisor had any knowledge of the Claimants' protected acts, or would have been motivated in any way by them, or was directed thus by anybody more senior. Mr Sawyer investigated this grievance, during which discussion it was clear that the Claimants had never previously considered website enquiries as a resource [604], indicating that they had no interest in such

queries and were not, therefore, genuinely aggrieved by Mr Fish being allocated these, by their nature, small accounts.

14.10 Failing to comply with the Claimants' Subject Access Request (SAR). We had no hesitation in accepting Messrs Miles and Sawyer's evidence that they had no prior experience of handlings SARs and that they misinterpreted the Claimants' original request, as referring to documentation held on the Claimants' personnel files, as opposed to (as subsequently clarified) every single piece of electronic personal data held, relating to the Claimants. Once clarified, this onerous request was nonetheless complied with and no complaint was made about the data then provided. This was simply a yet further egregious example of the Claimants' oppressive approach to this process and their employer. There was no detriment whatsoever to the Claimants.

14.11 Failing to withdraw the performance proceedings and hearing such proceedings, in their absence, on 18 and 24 September. The dates refer to effectively one incident – they were advised on the former that the review would proceed in their absence and, on the latter date, the review was held. The Claimants considered that, firstly, there were no grounds for R2 to have concerns about their performance, which for all the reasons set out already, was clearly at least a misconception, if not a wilful avoidance tactic, on their part. This was a reasonable management decision for R2 to take and of course, had the Claimants attended at the review, they would have had the opportunity to advance their arguments in this respect. Secondly, they considered (as already referred to in paragraph 14.8 above) that the grievances were being held in the wrong order, of that at least their grievance in respect of the Handbook [568], originally scheduled for 19 September, but cancelled at the Claimant's request, needed to be heard before the review. There was no real rationale, however, for this assertion, or valid explanation as to why a dispute about the contractual implications of an equal opportunities clause in the Handbook could have implications for their performance review. It was also the case that the Claimants had been specifically requested to keep the 19th free, but, instead, accepted an invitation to a business meeting with a client on that day, on less than a week's notice [538], insisting that accordingly the timetable for the hearing of their various grievances and appeals be re-arranged. It is our view that these assertions and efforts to adjourn meetings were simply designed to delay the review process (bearing in mind that at this point, the Claimants were approximately three months' short of two years' service). It was entirely the Claimants' choice to make themselves allegedly unavailable for this meeting, which had been scheduled for some time and included the necessity of Mr Sawyer flying from the Czech Republic to attend it. It was therefore an entirely reasonable decision of R2 to proceed with it, with or without their attendance and therefore cannot be a detriment and which, even if it was, was clearly completely for reasons other than their protected acts.

14.12 Unreasonable Delay, attempting to 'time out' the Claimants' ET1s. As indicated above, R2 was dealing with the Claimants' many grievances and appeals as promptly as they could, given their management resources. The Claimants themselves imposed delay in failing to either focus on grievances that could potentially have some merit, thus reducing the matters needing to be dealt with, or to consolidate such grievances, in order that they could be considered as a whole, instead bringing them in a 'drip-feed' fashion, thus ensuring that R2 was always trying to 'play catch up'. Also, as indicated above, they cancelled a crucial meeting, resulting in a backing up of matters to be considered. In any event, it is pure conjecture on the Claimants' part that any of the Respondents were aware of tribunal time limits, or had it mind to impose the requisite delay and both claims were, regardless, brought in time.

14.13 Unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures. The Claimants have alleged ten such failures on R2's part. Many of these complaints duplicate matters already considered and therefore we intend dealing with them as briefly as is appropriate. We find that there were no such failure to comply with the Code, as set out below:

14.13.1 A failure to deal with issues fairly – this is so inadequately pleaded that it is given no further consideration, beyond general considerations as to overall fairness, covered under other headings.

14.13.2 A failure to carry out necessary investigations and share the results of investigations (12 August and 24 September). These matters have already been dealt with in paragraphs 14.3 and 14.11, above.

14.13.3 A failure to be notified in writing with sufficient information (in relation to the same dates). As already stated, the meeting of 12 August was not a formal one and therefore there was no requirement to provide written information in advance of it, but again, in any event, the Claimants had ample information as to R2's concerns about their performance, in respect of both meetings (to include 24 September), but chose to dispute it. They didn't seek more information, but only information they happened to agree with.

14.13.4 The next three complaints are effectively the same, all related to either a failure to allow a choice of companion, or pressure to change an existing choice. These matters have already been dealt with in paragraph 14.7 above and are not considered further.

14.13.5 Failure to adjourn disciplinary hearings on the grounds of good cause, in relation to 24 September and which has already been considered in paragraph 14.11 above.

14.13.6 Failure to adjourn grievance hearings on the grounds of good cause (26 September). We have already covered one ground, which is the alleged bias of Ms Mitchell (paragraph 14.5 above). The other is that the hearing proceeded in their absence,

but, as with the circumstances of the 24th September meeting, the Claimants had, only the day before, announced that they would not be attending [528] and had already been informed that the meeting would go ahead in their absence. This was again, their choice.

14.13.7 Failure to hear grievance appeal hearings without unreasonable delay (17 September). The Claimants lodged their appeal on Friday 16 August [229]. It was acknowledged on the following Monday and they were invited to a hearing on 4 September, with an explanation that due to Mr Sawyer and the HR Dept's rep having holidays in that month, it could not be arranged any earlier [415]. C2's response, the same day [416], raised no objection to that proposal. C2 accepted in cross-examination that in fact they were unable to attend on either 4 September, or the next day, proposed as an alternative, due to their attendance at a trade event. The appeal was eventually heard on 17 September and no complaints were recorded in the minutes, as to any delay [493]. This current complaint, therefore, clearly has no substance.

14.13.8 Failure to temporarily suspend the disciplinary hearings of 24 September, to hear the separate but related grievance hearings. This matter has already been considered at paragraph 14.11 above.

15. Issue 5 – Automatically unfair dismissal for making a protected disclosure. There is no dispute that the Claimants made a protected disclosure to their previous employers (as that is what was decided by a previous Tribunal), but of an unknown nature and date. Mr Gulamali was entirely frank in his evidence that he was aware, at the point that the Claimants were first engaged by Chillblast that they had taken tribunal proceedings against their previous employer and that they had even taken time off work with Chillblast, to attend the hearing. He said (and we believed him) that he was entirely unconcerned about this fact, as he knew of the previous employer, considering that their compliance procedures were lax and agreed with this Tribunal's wording that they therefore 'had it coming to them'. At or around that time (July 2017), he did see the Bloomberg article [431], but put the whole matter out of his mind thereafter. It clearly didn't have any adverse impact on him, as the Claimants thereafter transited into employment, with no concerns from R2. The article again then surfaced, on 30 August 2019, when his brother sent it to him [430]. He copied it to Mr Miles, who, on 2 September, raised a concern with the HR Dept. as to whether whistleblowing claims were '*uncapped'* (in terms of compensation) [435]. The Claimants allege that this disclosure to Mr Miles was the reason or principal reason for their constructive unfair dismissal. This is frankly nonsense, for several reasons and further indicating their willingness to 'throw against the wall' any allegation against their former employer they could conceive of, in the hope that something would 'stick'. Those reasons are that:

15.1 They allege in their constructive unfair dismissal claim that they resigned due to a fundamental breach of trust and confidence by R2, in relation to matters that do not include the protected disclosure, but related to their

claims of discrimination and victimisation and that as a 'last straw', they had been effectively been labelled as liars by Mr Sawyer. Logically, therefore, the protected disclosure cannot be the reason, or even the principal reason for their dismissal. The discrimination and victimisation claims can have nothing to do with the protected disclosure, as they predate it and the idea that Mr Sawyer, four months later, would be motivated by the disclosure, to allegedly call them liars, is deeply implausible.

15.2 The Respondents' witness' evidence strongly indicates that this concern about an 'uncapped' whistleblowing complaint was short-lived (there is no further reference to it) and was rapidly subsumed by the many other complaints they had to deal with (many of which, of course, if successful, also had 'uncapped' compensation).

15.3 By the point that the Claimants did in fact bring a whistleblowing detriment grievance, on 11 December [689] and that had been acknowledged on 16 December, R2/Mr Sawyer was dealing with the then most advanced complaint of the Claimants, their detailed appeal against the grievance outcome of their s.1 ERA complaint, which had been submitted on 10 December and consisting of five closely-typed pages [683-688]. They were invited to a meeting on 6 January 2020, but on which day the Claimants resigned [716], making no reference to their protected disclosure. The 'last straw' of which they complain, Mr Sawyer's letter of 4 December [671], predates their whistleblowing grievance and therefore the latter can have had no bearing on Mr Sawyer's choice of words in his letter.

16. Issue 6 – Automatically unfair dismissal for asserting a statutory right. This claim relates to the Claimants' request for a correct and complete s.1 ERA written statement of terms and conditions. As with the automatic unfair dismissal claim for making a protected disclosure, to succeed, this must have been the reason, or principal reason for the dismissal. We note that the Claimants' witness statements make no mention of this specific particular claim and nor were the Respondents' witnesses questioned in respect of it, with Mr Fodder describing it, in submissions, as '*no longer at the forefront of our case'*, indicating to us, again, the willingness of the Claimants to advance claims which they had little intention or evidence to pursue. Briefly, the Claimants allege fundamental breach of contract as the reason for their resignation, two elements of which (discrimination and victimisation) predate their s.1 ERA grievance (20 September) and also, more importantly, the outcome to that grievance, of which they complain (4 December). It is obvious, even on their own case, that the third element of the alleged fundamental breach is that they were dissatisfied with the investigation of that grievance and particularly to being allegedly '*effectively called liars'*, not whether or not they had asserted the right to be provided with terms and conditions. Any such request, therefore, for such terms and conditions cannot, of itself, have been the reason, or principal reason for their dismissal.

17. Issue 9 – Breach of Contract in respect of Equal Opportunity. The Claimants assert that the section of the Handbook, dealing with equal opportunities, in particular the phrase that the employer '*will provide equal opportunity to all who apply for vacancies through open competition'* was a term of their contract of employment, which R2 breached by not inviting them to apply for the Head of Sales role [188]. We find that it is not a contractual term and that therefore there can have been no breach of contract, for the following reasons:

    17.1 While the preamble to the Handbook does refer to giving '*an overview of the terms and conditions of your employment'* … and that '*This handbook also summarises the main terms of employment'*, it does go on immediately to say that a separate '*Statement of Employment Terms and Conditions … setting out specific terms and conditions of service'* has, or will be issued to employees, then listing the type of such standard terms that would be found in such a document [182]. Where it does, later in the document, refer to matters that could be contractually-related, such as hours of work, holidays, or notice, it does so with the caveat that reference should be made '*to your Employment Statement'*. We note, by way of comparison that the '*Valuing Diversity*' section of the Handbook makes no such reference. We consider, therefore that while the wording of the Handbook could be clearer, for example by specifically stating that it is not part of the contract of employment, it should be clear to any objective viewer that it is not a contractual document, because otherwise why expressly refer to a separate document that is?

    17.2 Even were sections of the Handbook contractual (which we don't consider to be the case), the '*Valuing Diversity*' section is not apt for incorporation into the contract, as it is clearly expressed in aspirational terms, as to '*valuing diversity'* and believing '*that people from different backgrounds can bring fresh ideas'*. These are expressed as '*principles'* which are adopted by following '*key actions',* then setting out broad, universal actions that any employer seeking to promote equal opportunities would seek to follow. While some of these actions may be clearer or less ambiguous than others, compared say to the action of '*will ensure that all managers understand and maintain their responsibilities … under this policy'*, it would be illogical to single out one or more actions, as severable contractual terms, given the overall context of this section of the Handbook.

    17.3 In any event, it is clear that the phrase relied upon by the Claimants does not mean that Chillblast will only recruit through open competition, but instead that, if it chooses to recruit in such a way, it will afford equal opportunity to all those who apply. It is entirely at an employer's discretion as to whether or not they choose to advertise a post, either externally, or internally.

18. Issue 3 – Constructive Unfair Dismissal. We consider the following:

    18.1 The acts or omissions of R2, upon which the Claimants seek to rely are as follows:

18.1.1 The claims of direct discrimination and victimisation: it is the 'claims' that are specifically relied upon, not any 'acts' and as we have dismissed these claims, we do not consider them further. In any event, as should be clear from our findings of facts, we do not consider any acts of the Respondents, relevant to those claims, to fall anywhere near the test in **Mahmud v BCCI**.

18.1.2 On 3 January 2020, coming across evidence which the Claimants say reasonably demonstrated that it was not possible for the s.1 statements to have been provided to them in January 2018, as found by R2 in its grievance outcome. The Claimants considered this a fundamental breach and last straw, because they had, in his outcome letter, effectively been called liars by Mr Sawyer; no fair and reasonable investigation had been carried out in reaching that decision; they had been misled as to employment law and their rights and there had been orchestrated collusion and fabrication going to the very top of the business.

18.2 The evidence in respect of the 'liar' accusation is as follows:

18.2.1 In cross-examination, Mr Sawyer readily accepted that in retrospect, his choice of wording of his letter [671] that '*I can see no evidence that you were not provided with your statement of employment terms and conditions as part of your onboarding process … and therefore it is my reasonable belief that* (they) *were provided to you at the appropriate time'* was poor, in that clearly, there was evidence before him to counter that proposition, namely the Claimants' own account of not being provided them, until seen as part of their SAR. In cross-examination, he said that he '*had found it a difficult decision to come to, which I did on the balance of probabilities, but it was a marginal decision'* and that he '*should have said that I have taken your evidence into account'* in reaching his conclusions.

18.2.2 He said that he'd been unable to speak to Mr Hudson (who had conducted the 'onboarding'), due to him being involved in some unspecified ongoing investigation, in respect of which point he was not challenged.

18.2.3 He accepted that there was nothing on file to show that the statements had been sent to the Claimants, but said that he knew the provision of such documents at the onboarding meeting was normal practice. He also pointed out that the Handbook (which the Claimants accepted they had received at the meeting) specified that the statements would either have already been provided to them, or if not received, would be provided within eight weeks of commencement of employment. He pointed out that despite the Claimants agreeing that they were aware of this fact [grievance hearing 28 November – 653], they nonetheless

did not raise the issue until the SAR disclosure, almost two years after their employment commenced and which he said influenced his decision, as he found it '*surprising*'.

18.2.4 The statements that had been disclosed [206-7 and 217-218], as held on the Claimants' personnel files and although containing handwritten dates of 1 January 2018 and their correct job titles, were unsigned by the Claimants. It was suggested to Mr Sawyer that as these documents were on the file, they could not therefore have been given to the Claimants and he said that '*I can't comment on that, but found it strange. I took a lot of time to come to a reasonable conclusion'.* In re-examination, he said that his understanding was that once signed by employees, a copy would be retained on their file. He agreed that he had '*missed'* the fact that there was no third page to the statements (which would have included R2's signature [example 226]).

18.2.5 He admitted, however that he aware that Mr Hudson was not doing a '*complete job and that there had been holes'*. He said that he would have come to a different conclusion today, mainly because, as has subsequently been pointed out, the salary level shown on the statements, of £37,200, cannot have been correct, if they do date from January 2018, as that salary level was not agreed until February. He said he had not noticed this discrepancy at the time and that if he had, it would have changed his mind, but pointed out also that neither did the Claimants bring it to his attention. He agreed, however that the Claimants could not have been aware of his thought processes and had to rely therefore on the wording of his letter, which he said was '*poor'*. He said that when the Claimants raised this issue, he could not, as suggested, '*go back and consider'*, as they had already resigned.

18.2.6 He disagreed that by this point, he would have seen them as 'troublemakers' and no longer wanted them to stay and that therefore that influenced his decision, saying that he had made a mistake and had no expectation that they would resign, as a consequence.

18.2.7 C2, in cross-examination, said the following:

18.2.7.1 While she and C1 had been given a copy of the Handbook, in an on-boarding meeting with Mr Hudson, in January 2018 and she accepted that it specifically referred to the provision of a s.1 statement, it '*was the Respondent's responsibility to raise it'*.

18.2.7.2 When it was put to her that Mr Sawyer's letter did not suggest she and C1 were 'lying', she said that he had

given no weight to their evidence and that he was therefore implying that they were liars.

18.2.7.3 She agreed that neither their resignation letter, nor their five-page letter of appeal [684] refers to them being accused of 'lying'.

18.2.7.4 She had not noticed the salary discrepancy point at the time of the grievance.

18.2.7.5 While she and C1 had appealed against the grievance outcome, they felt that, as they'd lost trust and confidence in R2, they should not proceed with it.

18.3 Was the wording used by Mr Sawyer a breach of the implied term of trust and confidence? We find that it was not, for the following reasons:

18.3.1 He did not use the word 'lying', or anything like it and while his wording was clumsy, he clearly, on balance, on the evidence before him at the time, did not accept the Claimants' account. This is not, however, the same as accusing them of lying. There can be, for example, other reasons for a difference in accounts, such as mistake, misunderstanding or forgetfulness. While he did not offer such alternative explanations, which may have 'softened' this finding, he is not a lawyer and was clearly not writing the letter with an eye to future litigation on this precise point.

18.3.2 He found the decision a difficult one and it was clear to us, from his frank and honest evidence in cross-examination that had he been alerted to the pay discrepancy point, he would have come to a different decision, indicating that he did have an open mind on the issue.

18.3.3 The Claimants did not immediately, on receipt of the letter, raise the 'lying' allegation, despite, on their evidence, categorically knowing that they had not been provided the statements in January 2018. Nor, in fact, did they make the allegation, until that is, in their ET1, nearly two months later, despite bringing an appeal and sending a letter of resignation, in the interim. This is not, we find, the action of employees that are being impliedly accused of being liars, particularly these employees, who have not hesitated, for the previous six months, to raise numerous allegations, many just as serious. Instead, we find, they brooded on the letter's contents, considering how they may be able to advance their case, belatedly realising the pay discrepancy point and using it to their perceived advantage.

18.3.4 Trust and confidence is a mutual implied term and it is obvious to us that the Claimants exhibited little trust and confidence in their dealings with the Respondents over the previous several months.

> They were, to our mind, playing an elaborate game of 'employment chess', prolonging it long enough to secure two years' employment and then claiming 'checkmate' with their resignation. There was no genuine breach of trust and confidence, or genuine insult or outrage felt by the Claimants, as they were simply going through the 'moves' necessary to reach a desired outcome.

18.4 As we have found that there was no breach of the implied term, we do not, strictly speaking, need to go further, but we are clear that in any event, the Claimants did not resign because of any breach, but had long planned to do so, when they had the requisite service to bring this claim.

18.5 We briefly consider the other alleged breaches: firstly, the failure to carry out a fair and reasonable investigation of their grievance. Mr Sawyer accepted that there were flaws in his investigation and he clearly found it a difficult process. However, neither he nor the Claimants had picked up on the pay discrepancy point and he was confronted with two experienced, very well-informed employees, evidently well able to assert their rights, who accepted that they had had an onboarding meeting, at which they were given the handbook and were aware therefore that they should also have been given s.1 statements, but, unaccountably, had failed to mention this omission, until nearly two years later. He was perfectly entitled, therefore, to be suspicious of that account. As previously stated, we are confident, from his evidence that had he been aware of the pay discrepancy point, he would have come to a different conclusion, indicating an essential fairness in his approach. Further, in the context of all the ongoing grievances at the time, R2 carried out as much investigation as was reasonable, in respect of an issue that, at the time at least, must have seemed somewhat procedural or administrative and of less importance than claims of victimisation and whistleblowing.

18.6 Secondly, the suggestion that there had been '*orchestrated collusion and fabrication'* going '*to the very top of the organisation'*, in relation to the s.1 statements found on the file, with the suggestion that they had been doctored, is a somewhat wild assertion on the Claimants' part. They have provided no evidence of any such 'collusion' or 'fabrication', or who may have been involved in such and did not pursue this matter in cross-examination. Our view of the Respondents, from their witness evidence, is that they seem a very unlikely set of managers to engage in such a process. They genuinely seemed anxious to ensure that they complied with their legal obligations, regardless of the pressure which such obligations no doubt imposed on their other management responsibilities and, apart from following through on the performance management procedure, that they had identified as potentially necessary in June, made no 'attack', in response to the Claimants' blizzard of complaints. Other, less scrupulous managers, might have, for example, taken more direct action against the Claimants in respect of their obvious disregarding of reasonable management instructions, by initiating

disciplinary misconduct proceedings, with the aim of their dismissal, before they achieved two years' service.

18.7 Thirdly, the allegation that the Claimants had been misled as to employment law and their rights is so vague as to be meaningless, particularly in the context of the Claimants frequently pointing out to the Respondents, in great detail, their extensive knowledge of such matters. We don't therefore consider this allegation further.

19. Constructive Wrongful Dismissal. As the Claimants were not constructively unfairly dismissed, there being no fundamental breach of contract, they were not entitled to resign without notice and therefore this claim fails and is dismissed.

20. Failure to provide s.1 Statement, Employment Act 2002. The Claimants were, at the latest, provided with such statements when their SAR was met and therefore well before these proceedings were begun. In any event, as their other claims have not succeeded, this matter cannot be considered further.

Conclusion

21. For these reasons, therefore, the Claimants' claims (as set out above) fail and are dismissed.

Employment Judge O'Rourke
Date: 26 March 2021

Reserved Judgment and Reasons
sent to the parties: 01 April 2021

For the Tribunal Office