EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms E Avdonina	**v**	**(1) Delin Capital Asset Management UK Limited** **(2) Mr I Linshits** **(3) Delin Capital (UK) Limited**

Heard at: London Central
(Via Cloud Video Platform)

On: 1, 2, 3, 4, 5, 8, 9, 10 March 2021 and 15 March 2021 (in chambers)

Before: Employment Judge Joffe
Ms D Olulode
Ms J Grant

Representation

For the claimant: Mr S Brittenden, counsel

For the respondents: Ms E Misra, counsel

RESERVED JUDGMENT

1. The claimant was dismissed by the first respondent on 18 September 2018.

2. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is upheld.
3. The discussions between the claimant and Mr McFaull on 18 September 2018 were not inadmissible pursuant to s 111A Employment Rights Act 1996.
4. Had the claimant not been unfairly dismissed, her employment would have continued for a further six months and there is a 25% chance it would have continued thereafter.
5. The claimant's claims of direct maternity / pregnancy discrimination under s 18 Equality Act 2010 are not upheld and are dismissed.
6. The claimant's claims of direct sex discrimination under s 13 Equality Act 2010 are not upheld and are dismissed.
7. The claimant's claims of victimisation under s 27 Equality Act 2020 are not upheld and are dismissed.

Claims and issues

1. The issues in the case had been agreed between the parties and are as set out below. There were some infelicities in how they had been expressed but the issues to be decided were clear to us.

Ordinary Unfair Dismissal

i) Whether the claimant was dismissed by the first respondent:

a. On 18 September 2018 (expressly as alleged in paragraph 35 of the Details of Claim):
b. On 19 September 2018 (constructively by reference to the matters set out it paragraph 36 of the Details of Claim);
c. On 25 September 2018 (expressly as set out in paragraphs 31 and 49 of the Details of Claim).

ii) If the claimant was expressly dismissed. then whether the first respondent had a potentially fair reason for doing so (namely conduct or capability).
iii) Whether, if the claimant was dismissed expressly, the dismissal was fair having regard to sub-section 98(4) Employment Rights Act 1996 ('ERA').
iv) If the claimant was constructively or expressly dismissed then whether the claimant would have been dismissed in any event and, if so, when ('Polkey')

Protected Conversation

v) Whether or not the discussion between the Claimant and Mr McFaull on 18 September 2018 constitutes a protected conversation within the meaning and ambit of section 111A ERA having regard to the ACAS Code of Practice on Settlement Agreements ('the Code').

Maternity / Pregnancy Discrimination

vi) Whether the claimant was dismissed by the first respondent tor the purposes of section 39(2)(c) Equality Act 2010 ('EqA') on 18, 19 or 25 September 2018.
vii) If so, whether the respondents or any of them knew that the claimant was pregnant at the time of her putative dismissal.
viii) If so, whether the first respondent treated the claimant unfavourably during the protected period, contrary to section 18 EqA, by dismissing her.
ix) Alternatively, whether in putatively dismissing the claimant the first respondent treated her less favourably that it treated or would have treated a hypothetical male comparator contrary to section 13 EqA because of her sex.
x) Whether the claimant can, as a matter of law, rely on section 13 EqA, having regard to the effect of sub-section 18(7) EqA it being admitted that the claimant was pregnant at the time of her putative dismissal ie within a protected period.

NB: The parties did not address us on the issue at x) and we therefore took it that the point was not pursued

Victimisation

xi) Whether the claimant did a protected act for the purposes of sub-section 27(2)(d) EqA having regard to her correspondence of 18, 20, 21, 25 and 28 September 2018.
xii) Whether if the first respondent dismissed the claimant on 26 September 2018 this was on the ground that she had done a protected act.
xiii) Whether, post-termination of employment, the respondents refused to confer any entitlement under an LTIP on the ground that she had done a protected act

Sex Discrimination

xiv) Whether, contrary to section 13 EqA, because of her sex, the respondents or any of them treated the claimant less favourably in respect of the terms of a proposed severance agreement for her dated 18 September 2018 than the actual comparators set out in a confidential schedule

2. At the outset of the hearing, as a result of agreement between the parties that the first respondent had been the claimant's employer, we released the third respondent from the proceedings, however, with the agreement of the parties we reinstated the third respondent at the end of the hearing when it became apparent there might be an issue as to any liability in respect of the issue at xiv). For the reasons which appear in our conclusions it was not necessary for us to decide whether the third respondent was in fact liable in respect of that issue.

Findings of fact

The hearing

3. We heard evidence from the claimant and, on her behalf: Mr Amos Chia, formerly an associate at the first respondent, Mr Anthony Butler, formerly chief investment officer of the first respondent and Ms Massy Larizadeh, who had done work for the first respondent as a consultant. For the respondents we heard from: the second respondent, Mr Graeme McFaull, non-executive chairman of the first respondent, Mr Mark Kirkland, currently managing director of the first respondent, Ms Irina Heeneman, personal assistant to the second respondent, and Ms Shen Yildirimlar, office and operations manager for the first respondent.

4. We had a bundle of 1138 pages and received some limited further documentation in the course of the hearing.

5. The hearing was held remotely by Cloud Video Platform because it was not possible to hold an in person hearing. The parties agreed to a remote hearing and there were no technical issues of note.

The parties

6. The first respondent is a pan-European investor, developer and manager of logistics real estate, which very broadly speaking means warehouses and distribution centres. The second respondent is the sole shareholder of the first and third respondents. His family trusts provide the investment capital for the first and third respondent's activities, save where third party investment has been obtained. The second respondent takes an active role in the businesses and is a member of the first respondent's Investment Committee.

7. The second respondent is of Russian national origin and had previous businesses in Russia. He was the subject of some criminal charges in Russia which were dropped in 2010 and were thought by media commentators to have been politically motivated, due to the second respondent's support for opposition leaders. A previous Russian company run by the second respondent had been declared bankrupt.

8. The second respondent was not named in any sanctions lists or watchlists for companies or individuals involved in improper business practice but the information about his issues in Russia would appear when investors conducted due diligence checks or 'Know Your Customer' ('KYC') checks.

9. Mr McFaull told the Tribunal that ultra high net worth individuals with ties to Russia would tend to produce KYC challenges. This was a difficult challenge but not insurmountable.

10. The third respondent is a further group company which previously employed the claimant before her employment transferred to the first respondent.

11. The entire Delin business (including the first and third respondents) has some 35 staff in offices in London, Rotterdam and Madrid.

Relevant people

12. Mr McFaull was non executive director and chairman of the first respondent and worked two days per week for the first respondent during the relevant period.

    Mr Christian Jamison was the managing director of the first respondent who preceded the claimant.

    Mr Mark Kirkland was chief operations officer of the third respondent from 12 March 2018 and then succeeded the claimant as managing director of the first respondent.

    Mr Andrew Pym was chief finance officer of the first respondent from early 2018.

    Mr Anthony Butler was chief investment officer of the first respondent from early 2018.

    Mr Andrew Colman was a finance director of the first respondent whose employment terminated before the claimant's.

    Mr Amos Chia was an associate for the first respondent from April 2016.

    Mr Tudor Baidoc was also an associate of the first respondent.

    Mr Paul Marcuse was a consultant advisor to the first respondent and a member of its Advisory and Investment Committees.

    Ms Irina Heenemann was the second respondent's personal assistant.

    Ms Massy Larizadeh was a consultant for the first respondent.

    Ms Shen Yildirimlar was and is the office and operations manager of the first respondent.

Introduction

13. The parties relied on and highlighted to the Tribunal what were to some extent parallel chronologies drawn from the same underlying sequence of events in support of their different narratives or theories of case. In order to understand the full context and draw appropriate inferences we had to put together a jigsaw made from the different narratives and tether that narrative to the underlying documents with which we were provided.

Credibility

14. Counsel for the respondents submitted that this was not a case where we were required to decide that particular individuals were being untruthful; rather it was a

case of clashing perceptions of the same events. That seemed to us to be a fair characterisation. We did not conclude that particular witnesses were being deliberately dishonest and when we had to resolve issues of fact, we on the whole accepted that witnesses believed their differing accounts of relevant events,

Chronology of relevant events

15. On 13 December 2010, the claimant started work as an associate in the real estate team of the third respondent. She had previous experience at ING, a global real estate business, including experience analysing and presenting deals. The claimant was a Russian national and moved from the Netherlands to take up the role with the third respondent.

16. In October 2013, the first respondent was launched and the claimant was appointed head of investments and vice president. She reported to Mr Jamison, then head of real estate. The first respondent is a relatively small business in terms of personnel, with no individual performing an HR function.

17. The evidence we heard was that Mr Jamison was MD of the first respondent in 2016 but we were not told when he assumed that role.

18. Up until about 2016, work for the first respondent involved 'vanilla' transactions buying and selling existing properties (i.e. not complex development opportunities) for what were called Capital Preservation Portfolio 1 assets ('CPP1').

19. In 2016, Mr Jamison left the first respondent's employment on agreed terms in the form of a settlement agreement. We were not given full details of the reasons for Mr Jamison's departure reasons but it was clear that the second respondent was unhappy with him as we discuss further below. Mr Jamison's settlement agreement is dated 26 January 2016. On 29 January 2016, the claimant was appointed interim managing director. She did not have previous management experience but was a unanimous appointment by the Board, including the second respondent.

20. This was a major promotion for the claimant who was ambitious, talented and hard working, as the respondents agreed..

21. Mr McFaull emailed the claimant on 29 January 2016 confirming her new terms and conditions:

    As discussed, I am writing to confirm your new T&Cs.

    You are promoted to interim Managing Partner with immediate effect.

    The interim designation of the appointment is a technicality whilst we benchmark the market. We hope and believe that you will quickly grow into the new position and will support you in this.

    Your salary is raised from Jan 1st 2016 to £150,000 pa and you will in addition he paid £50,000 pa pro rata for every month you are the Managing Partner.

Your bonus will be set at 100% of salary earned with at least 50% guaranteed for this year.

You will participate in the LTIP scheme which we work to put in place within the next 90 days.

Structure at the time

22. The first respondent's team was small. The claimant acted as chief investment officer and performed some CFO and company secretary duties also, although Mr Colman was in the finance role at this point. The claimant worked long hours.

23. Mr McFaull as non executive chairman was also chair of the Advisory Committee of which the claimant was a member and the Investment Committee of which the claimant was not a member.

24. The Investment Committee met roughly monthly depending on investment activity. The claimant with support from her team was required to present reports on investment opportunities for approval by the Investment Committee.

25. The Tribunal was told that the claimant had to get approval for each proposed investment but could sign off expenses up to 50,000 euros per annum.

Events after the claimant was appointed managing director

26. Mr Colman sent an email to a third party on 1 February 2016 in which he said: 'Ekaterina is handling her new role exceptionally well, so we are all still on course here'.

27. Mr McFaull agreed with that description in evidence, but said that the claimant was only a month in role at that point.

28. During this period, the first respondent was moving from 'vanilla' deals towards development deals – these were new to the claimant and to the respondents.

29. On 16 February 2016, the claimant presented documents to the Investment Committee for two developments in Netherlands. There was feedback about the documents presented being too detailed and insufficiently focussed. There was guidance which was clearly intended to focus more attention on risk.

30. A passage from the meeting minutes reads:

For this initial entry into the development market, the IC stated that DCAM should focus on one deal at a time. DCAM should present a comparison between the two projects and a recommendation as to which of the two should be pursued

The IC set an absolute requirement that no binding commitment should be made to a second development project until the first project is at least 50% pre-let. Proposed arrangements with partners, eg third party developers, construction partners or existing land owners, must be clearly set out and analysed…the track record of partners must be considered and the proposed mechanisms for profit sharing explained and quantified

31. Mr McFaull's evidence about the claimant's performance during the very early part of her tenure was that she was doing what asked of her as MD but was not yet 'the finished article'.

32. On 3 March 2016 there was an Advisory Committee meeting at which the first respondent's three year strategy was discussed. The minutes record:

The AC was supportive of the proposal to seed third party managed accounts with existing core assets from the CPP1 portfolio.

33. It was agreed that the first respondent needed to strike a balance between achieving 15% investment return and risk. In respect of the organisation structure, it was agreed that there should be a move towards 'a more traditional and institutional approach'

34. The claimant's evidence was that there were three prongs to the three year strategy:

- To set up a development business
- A third party fund to be seeded with some former assets from the second respondent's family trusts
- Tor grow existing assets in management.
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35. The ambitions for the company included:

- Development projects
- Growing geographical reach
- Transitioning from investment management for small private companies to investment management for institutions such private equity finds and pension funds.

36. The staff team was growing although small. Mr Bart De Sittar was appointed in early 2016 to direct development in the Netherlands. Mr Baidoc and Mr Chia were analysts who started working for the first respondent in early 2016.

LTIPS scheme

37. The LTIPS scheme was also set up during 2016 to provide long term incentives to employees of the first respondent. The LTIPS scheme had the same term as the three year strategy and mirrored that plan. The claimant helped draw up the scheme along with Mr Colman and in house legal team and Macfarlanes. The claimant was granted 18% of the LTIPS shares.

38. The Scheme provided, inter alia:

Unless deemed to be a 'Good Leaver' an individual will lose 100% of their entitlement if they leave the employment of DCAM prior to a settlement date. A Good Leaver is defined as someone who leaves because of death or permanent disability, serious illness preventing them to work, or is made redundant. A Good Leaver will receive no

entitlement if they leave before 31 December 2016, one third of their entitlement if they leave before 31 December 2017, and two thirds of their entitlement if they leave before 31 December 2018. The DCAM Remuneration Committee retains the option to increase the amounts retained by any leaver above these entitlements.

39. Mr Kirkland's evidence to us was that this was that this provision reflected standard market practice.

Mr McFaull's feedback to the claimant during this period:

40. Mr McFaull was the claimant's de facto line manager. The claimant said that he was a mentor and friend to her and that he was honest, transparent and supportive to her in her very difficult role. They had weekly one to ones and other catch ups.

41. Mr McFaull described it as a respectful relationship; the claimant would listen to feedback and might push back; they had a good healthy dialogue. He was generally happy with the claimant's performance in 2016; there were teething issues but he knew the claimant was a hard worker and wanted her to succeed.

42. At an Investment Committee meeting in August 2016, there was a discussion about possibly entry into the German market. The claimant and her team were tasked with producing a German Country Paper. A move into Germany was supported in principle but the strategy needed to be developed.

43. Mr McFaull suggested in evidence that by the end of 2016 the Investment Committee (himself, the second respondent and Mr Marcuse) perceived the claimant as struggling in her role. That perception related to issues about the preparation of papers for the Investment Committee which can be summarised as a lack of analysis, particularly of risk, and what the second respondent in particular saw as a lack of transparency. Mr McFaull said he regularly provided feedback to the claimant on these issues.

44. There was a dispute between the parties both as to the seriousness of any concerns or criticisms raised and the extent to which the claimant received such feedback from Mr McFaull.

45. Mr McFaull pointed in evidence to examples of what he said were these issues and feedback about the issues:

- We saw Mr McFaull's handwritten notes of a meeting on 1 October 2016 with the claimant where the second respondent was said to be concerned about lack of transparency and 'feeling negative'. The claimant said in evidence that this meeting was about an asset the second respondent was selling to his wife and she was not told there was a concern about transparency. The claimant disagreed that she had had strong feedback about her performance at this difficult meeting. She accepted there was a recurring theme raised with her about late circulation of papers. The team was very stretched and late circulation of papers was a byproduct.
- On 8 November 2016, Mr McFaull said in an email to the claimant:

A small point but we will need an agenda for tomorrow. Also we never seem to see the minutes of these meetings.

- From 21 November 2016, we saw Mr McFaull's handwritten notes of meeting of a quarterly and Investment Committee meeting: This note suggested that the claimant and Mr Colman were told that they must circulate all papers in advance, that they should have been prepared with a strong plan A case and should set out project risks and mitigants if any.
- On 8 December 2016, Mr McFaull sent an email to Mr Marcuse relating to what appeared to be concerns about one or more development projects:
Given Ekaterina's lack of experience and [redacted]'s lack of detail focus, I have muscled my way into this to ensure we have some discipline and rigour. I hope that this will be sufficient!

46. The claimant sent an email to Mr McFaull on 8 December 2016 about a difficult meeting with the second respondent.

Graeme, apologies that I sent it to everyone but Simon Is already aware of these requests and thought it makes sense to keep Paul in the loop.

Really frustrated after these 4.5 hours in the room debating whether we should just sell it all and become a developer and on our terms. Appreciate it's naive to expect not to constantly review the strategy with ever changing factors but it Is getting beyond normal to question path we agreed in May and two weeks ago (like treasury paper)!

There seems to be not a single fixed point in our strategy except that we need to make money (with the absence of any equity).

Need to go to Italy tomorrow so really don't hold my breath that this meeting will conclude anything tomorrow and so we are back to square one (ie why do we need to sell or to have a FM business). He disagrees that he ever approved it or ever we concluded what values we should get from the portfolio to get them over the line

Where we are now I just wish we never went to that meeting with - What a waste of time and of hundreds of hours of analysis — as you now it was a huge effort

The only slightly positive is that seemingly Urban strategy now finally looking good. But question whether we need any third party equity there at all (despite an earlier request to consider using third party equity on riskier concepts). Sense a full turnaround of using third party capital ever which is fine but appreciate to be better communicated and not in such a format and not after we agreed the LTIP.

Utterly confused and glad to be away for a weekend. Appreciate a call at some point.

47. Mr McFaull forwarded this email to Mr Hodson:

What's going on? He's going to lose Ekaterina...

Will call you in the morning.

48. The claimant said in evidence that this correspondence reflected the second respondent trying to change strategy outside of meetings. She told us that a lot of

toing and froing around papers arose from the second respondent's volatile behaviour. She said that, despite agreement to the three year plan, the second respondent was not keen to develop the fund management business and wanted to concentrate on development.

49. Mr McFaull's evidence was that it was the second respondent's style to challenge decisions and issues privately, but ultimately the issues would come back to a board setting. He said that the second respondent sought input but responded to input and was persuaded by unanimity. He said that ultimately things were done with proper governance; the second respondent would have lots of discussions outside the meetings which did not alter Board strategy.

50. In oral evidence, Mr McFaull said about his own email that the claimant was a new MD finding her feet : 'she was still taking things too much to heart, would get a tougher skin.' He did have a fear at that time that she might become overwhelmed and potentially leave and they were keen not to lose her at that point.

51. It was clear that despite these discussions, there was no change of strategy ultimately, ie there was no change to the three year plan which included the fund management business.

52. On 17 January 2017, Mr McFaull wrote to the second respondent about the award of bonuses:

    In terms of Ekaterina herself. I think she has had a very strong year and delivered on almost every KPI (with the timing of the deal and the lease being slightly behind). I would like to award her a full 100% bonus as recognition of this performance which I think will send the correct signal to her.

53. The claimant received a bonus of £171,000 and a salary increase to £202,600.

54. The second respondent agreed in evidence that he was generally happy with the claimant's performance in her first year as MD. Mr McFaull agreed that she had had a good year and met his expectations in circumstances where he did not expect her to be 'the finished article' There were clearly no performance issues of any significance in 2016.

55. On 3 February 2017, the respondents congratulated the claimant on a milestone on a large development project for Lidl ('Rosendaal'), which was the first respondent's first development project in the Netherlands.

56. At the time the respondents were happy about this project although Mr Kirkland suggested in evidence that the claimant had suppressed information about issues which were discovered later, mostly, as we understood it, after the termination of the claimant's employment.

57. On 22 February 2017, the claimant gave an example of the second respondent wanting to discuss the budget outside the usual processes. The documentary evidence was that Mr McFaull emailed her to say:

    He has tried to call me a couple of times today but I've been in meetings. I think he's bored...

I suggest that you resist discussing the budget with him (don't take his call) and that this is best discussed our meeting on Wednesday.

For a man who demands structure he is the first to breach it!

I will talk to him at some point tomorrow and repeat this to him.

58. Mr McFaull's evidence about that exchange was that the second respondent was not bypassing proper procedure but supplementing it with a lot of informal conversations around the board process: 'He goes off piste as is his privilege.'

59. The second respondent in evidence said that he did ask for information outside the Investment Committee process but was not seeking to bypass the Investment Committee.

The second respondent's concerns about the claimant

60. The second respondent told us in evidence that he had concerns about the claimant although it was not entirely clear when these became significant. Mr McFaull's evidence suggested that it was during the course of 2017.

61. The second respondent said that the risks involved in investment concerned his family money and he expected the claimant to learn and understand his risk profile. He told the Tribunal: 'It was more important not to lose money than to make money…I had a conservative approach. I was consistent with that.'

62. The second respondent's evidence to the Tribunal was that he felt the claimant did not sufficiently analyse risks and was looking to pursue deals which would further her own profile without prioritising his interests. He felt she was not transparent about disclosing information and would not disclose information which might prevent the IC approving investment proposals.

63. In April 2017, the first respondent entered into a partnership with a private equity firm, Blackstone (referred to by the respondents as 'BX'), to acquire logistics assets in Germany, Benelux and the UK. The transaction involved the first respondent selling what the second respondent described as its 'best assets'. The sums produced were to be invested in UK development strategy. This led in time to pipeline concerns we describe below.

64. The claimant accepted in evidence that the second respondent went along with the Blackstone strategy reluctantly. It was approved by the Board.

65. The second respondent said that for him it was a turning point in his view of the claimant; he thought she was more focused on advancing her own reputation rather than the interests of the respondents and in marketing herself rather than the business.

66. Mr McFaull gave examples of more issues about paperwork in this period.

67. For an 8 May 2017 Investment Committee meeting, the minutes record that:

GM requested that for this and every development project a matrix of all open projects be presented to the IC, to allow a review of the aggregate risk in terms of operational execution and financial exposure.

68. The claimant told us that this was a normal discussion about reporting and the first respondent looking at how to improve reporting.

69. On 19 May 2017, Mr McFaull emailed the claimant:
We really, really need to stop sending these papers out late!

70. On 23 May and 1 June 2017 there was an Investment Committee meeting. The minutes record, with respect to the case for launching a pan-European urban logistics listed REIT that the Committee was positive:
The Board raised several issues that will need to be addressed. PM pointed out that earlier consultation would have been appropriate and raised specific concerns on the initiative.

71. A number of concerns were then set out.
Given such a range of issues and risks, the Board expressed strong reservations as to the feasibility of such a project.

72. The claimant's evidence was that she was asked to investigate the launch of an REIT by the second respondent. It was a monumental task. There was a two way dialogue about how to add analysis to papers presented to the Investment Committee and developing reporting metrics. Her perception was that she and the Investment Committee were trying to improve reporting together.

73. On 1 June 2017, Mr McFaull's handwritten notes of a meeting described as 'DCAM quarterly' record: 'too many things not finished', 'Too busy. Too superficial:'

74. It was suggested to the claimant in cross examination that she had this feedback and she accepted that she had had feedback about needing to get Blackstone to the next stage.

75. On 20 June 2017, in an email to the claimant, Mr McFaull said:

I have many questions about this paper – too many for an email.
Can we all discuss please. I will make time tomorrow.

76. The claimant said that there were discussions with Mr McFaull; this was advice and encouragement about how to tackle a big workload. The point was 'even better' and the feedback was presented as support not criticism. Performance issues were not raised with her.

77. On 1July 2017, Mr McFaull's handwritten notes record concerns about the claimant:

Doing too much too soon (superficial)
Weak team – lack of leadership
…

Symptoms – slow papers
Error ridden
Superficial / optimistic views – making IC inefficient
Lack of progress on issues incl
- *Recruitment*
- *Funding*

78. It was not suggested to the Tribunal that Mr McFaull shared these concerns with the claimant at the time he wrote these notes.

79. On 4 July 2017, Investment Committee minutes record that the Committee was concerned with a number of elements of a proposed deal. The claimant told us that, because this was a very challenging and complex deal, they had to have several 'bites of the cherry'.

80. It is fair to say that the events which unfolded were presented to us in very different ways by the respondents and by the claimant.

81. The claimant told us that these were the growing pains of an expanding business and stretched team and that it was naturally a back and forth process with the Investment Committee. Throughout the period, they were changing and working on templates for reports and further requests after IC meetings were part of the discussion. The to and fro was part of the process of probing reports.

82. She said that the issues raised in these meeting and emails were not criticisms of her performance; they were on track with KPIs. By summer 2017 they had a lot of reports to do. They were constantly working on the reports and late packs were not a big deal.

83. The respondents said that the minutes and emails showed problems that kept arising and were not being addressed. Their position was that reports should be more polished and complete and that the toing and froing was a reflection of the inadequacy of the papers.

84. On 5 July 2017, Mr Marcuse sent an email to Mr McFaull. He said that there was a 'need for a strong experienced CIO alongside Ekaterina'.

There have been enough 'learning' from ICs for Ekaterina to be able to refine the IC template…this would hopefully serve to cut down the backwards and forwards. A new CIO should want to review the entire investment process of course but given there may be a recruitment delay, Ekaterina should do it now.

85. The claimant said the Board knew she was very stretched and needed a CIO to support her to get to next stage. The respondents' position was that they hoped to resolve what they perceived to be issues with the claimant's performance by providing her with support and more structure.

86. On 1 September 2017 Mr McFaull's handwritten notes recorded concerns about the claimant. These were not notes of a meeting and it was not suggested he shared these concerns with the claimant on that date:

prep not good enough, late papers again.

Projects not completed before new projects

87. The minutes of the 12 September 2017 Management Board meeting record the Board raising a number of questions and concerns about a proposed expansion of the UK Urban Logistics Strategy:
Overall the strategy needs to be refined, sharpened and simplified to present a more compelling case. DCAM to update proposal and resubmit on 26 Sept.

88. The respondents said that this was another example of the same concerns being raised about papers presented to the Investment Committee.

89. The minutes of the 17 October 2017 Investment Committee record:

The IC requested that DCAM review the format and length of the IC papers to make them sharper – they should focus on what, why, the risks and downside scenario.

90. An action recorded was that comments should be collected from Investment Committee members and a new template format prepared for board papers. It is listed as being an action for Mr McFaull. The claimant's evidence was that Mr McFaull was tasked with redesigning the packs. It was an ongoing frustration for the claimant that she was so stretched that she did not have time to redesign the packs.

91. In late October 2017, Mr McFaull had discussions with Mr Riskin, the independent adviser to the Investment Committee. His handwritten notes suggest that the claimant was seen as lacking experience and 'unwilling to take / seek advice' but also as lacking support.

92. He also recorded similar discussion with Mr Marcuse. The handwritten notes suggested that Mr Marcuse raised issues about the quality of the papers for the Investment Committee, that they were not circulated early enough, that there was lack of preparation and an issue around 'transparency [keeping issues hidden]'.

93. Mr McFaull's evidence to the Tribunal was that those discussions and the second respondent's frustration with the claimant led to a discussion with a recruitment adviser, Stuart Hall.

94. In his witness statement, Mr McFaull suggested that the first respondent was looking potentially at replacing the claimant at this time.

95. Mr McFaull's handwritten notes of the discussion with Mr Hall on 30 October and the document from the recruiter of 5 November 2017 paint a different picture:

The current CEO… has been performing well but has become stretched as the business emphasis has changed particularly with the recent JV…The impending appointments of a new CFO and CIO will help the organisation develop more strength in the management team which in turn should take some of the day to day pressure away from Ekaterina but one aspect which these appointments will not cover is the lack of internal successor and the inherent risk that this brings should Ekaterina decide to leave.

To fulfil this succession planning need, it has therefore become apparent that it would be helpful to gain an understanding of the Logistics sector, and potentially others, of the Real Estate market and therefore ascertain whether or not there exists talented individual who could fit into an as yet unnecessary role at DCAM.

96. The documents do not support the proposition that the first respondent was looking to replace the claimant in 2017; rather they suggest that the first respondent was looking at a potential problem with succession planning. Mr McFaull agreed in evidence that there was no plan to replace the claimant at the time but he said that it was always an option and one that the second respondent raised on many occasions and that they did discuss it and dismissed it at the time. Although none of the documents referred to it, he said it was something that was discussed on many occasions hypothetically.

97. Mr McFaull spoke to another recruiter, Emily Bohill, on 9 November 2017. Again Mr McFaull's handwritten notes do not suggest they were talking about replacing the claimant. Mr McFaull's evidence was that he wanted Ms Bohill's assessment of the cliamant as MD.

98. We concluded that Mr McFaull's witness statement overstated the extent to which the first respondent was seriously considering replacing the claimant at the time as did the postit notes Mr McFaull retrospectively put on the notes (and which were reproduced in the bundle) in which he described the notes as referring to 'testing market on alternatives to EA'.

99. However we also concluded that the second respondent in the background was encouraging a change of managing director. Mr McFaull did not raise that possibility explicitly with the recruitment people but he may have thought that in testing the market and in looking at succession planning he was potentially opening up the possibility of considering a change of MD in the future, particularly if the second respondent continued to be dissatisfied with the claimant.

100. On 23 October 2017, Mr McFaull's notes of a discussion with Mr Marcus, under the heading 'Fixing DCAM', cover a variety of topics, including:

- Papers being inconsistent, not circulated early enough and lack of transparency 'keeping issues hidden'
- 'Things coming too early' and being rushed and ill-prepared.

101. On 3 November 2017, the claimant had a meeting with the second respondent about strategy. Mr Hodson wrote to Mr Colman, about this meeting:

She looked a bit like I do on a daily basis. Some raised voices and lots of pointing...

102. The second respondent in evidence accepted that meetings sometimes involved raised voices and he sometimes became emotional but not that he engaged in pointing or became aggressive.

103. On 6 November 2017, Mr McFaull commented in an email:

No, let's discuss them at the end of Friday - if we get that far...

I think E is at the end of her tether and I'm already there. I think we may see things disintegrate but then that's what he's good at.

104. Asked about this email in evidence. Mr McFaull disagreed that it was the second respondent's style to reverse decisions made by the Investment Committee. He said that the claimant was frustrated but he was not fearful she would leave. We had no clear evidence as to what had caused Mr McFaull to be at the end of his tether.

105. The recruiters Armstrong Shepherd were appointed in autumn 2017 to help recruit a CIO and replacement CFO for the first respondent. Mr McFaull's evidence was that this was to provide more support to the claimant to produce better more transparent investment proposals for the Investment Committee.

106. On 17 November 2017, Mr Pym was offered the CFO role. On 20 December 2017, Mr Butler was offered the CIO role.

Events of 2018

107. The claimant pointed out in evidence that she received several awards and industry recognition in early 2018.

108. On 1 January 2018, the claimant's salary was increased to £260,000. Mr McFaull said this was because the first respondent needed to pay her more than the sum Mr Pym was appointed on.

109. In January 2018, Mr Pym and MrButler started work for the first respondent.

The claimant's relationships with Mr Pym and Mr Butler

110. These relationships were clearly difficult at first. The claimant accepted that she found the relationships challenging because she was not used to delegating. She said that she had trust issues as she had not had support before. She described them as having a challenging first few months but said that she then developed very good relationships with both.

111. Mr McFaull's evidence was that eventually the claimant and Mr Butler found a way to work together but there remained constant friction with Mr Pym. The latter account was corroborated by the feedback Mr Pym gave to the claimant's coach, Maggie Rose, later in 2018.

112. Mr Mc Faull said that even with the support provided by the new recruits, because of the difficulties in the relationships / in working as a team, the improvement hoped for did not materialise because the claimant and her reports were not aligned at meetings. The issues he identified with the claimant's performance continued in Investment Committee meetings as a result.

113. On 1 February 2018: Mr McFaull sent an email congratulating the claimant on an accolade she received in the press:

In the "top influential women in UK real estate".. oohhh! Well done you!

114. On 13 February 2018, Mr McFaull had a meeting with the second respondent and Mr Marcuse to discuss bonuses. Mr McFaull's evidence was that the second respondent had had enough of the claimant but that he and Mr Marcuse persuaded him to continue to support the claimant's development at least until the end of the calendar year. They discussed potentially sending the claimant on external management courses. The second respondent suggested a coach for the claimant.

115. Mr McFaull said that he persuaded the second respondent that the claimant should get a full bonus to show that they supported her and wanted her to succeed in the role.

116. The second respondent said in evidence that Mr Marcuse and Mr McFaull convinced him to give the claimant one last chance as there was no succession plan. He considered that he was not seeing improvements and wanted to start exploring options to replace the claimant.

117. Mr McFaull's handwritten notes show that there was indeed a discussion about the claimant's perceived shortcomings:

fed up fighting

didn't learn from BX deal – perceived losses

Not enough focus on our profit – e.g. UK fund / APG

118. Next to the entry in respect of the claimant's bonus, the note records 'supportive of her personal development'.

119. It was put to Mr McFaull that awarding the claimant 100% bonus was inconsistent with the respondents' case as to her performance deficiencies: Mr McFaull said the claimant was not performing poorly but was not performing at 100% of expectation. Plan A was to develop the claimant, keep her confidence high and show obvious support to her; they hoped that having a new team on board would make the difference. Mr McFaull and Mr Marcuse persuaded the second respondent to pay the bonus at that level. There was a disagreement between them about how well the claimant was performing but ultimately the second respondent acquiesced. Furthermore the first respondent had had a good year and this was reflected in the bonus.

120. We accepted Mr McFaull's evidence, which was backed up by his contemporaneous notes. It was clear that by this point Mr McFaull and the second respondent were at odds about the claimant's performance and her future. It appeared that overall Mr Marcuse and Mr McFaull did not feel that the claimant was significantly off target in terms of developing into the MD role but the second respondent disagreed. They sold the second respondent the 100% bonus by saying it would incentivise the claimant.

121. The fact that coaching was being raised at the same time demonstrated to us that there were genuine doubts about the claimant's performance. We concluded that the

awarding of 100% bonus was not inconsistent with there being varying degrees of doubt and concern about the claimant on the part of the Board and the second respondent.

122. On 7 March 2018, there was a meeting between Mr McFaull and the second respondent to discuss a coach for the claimant. The notes of the meeting recorded that she would 'be set objectives / given support and that aspiration was for her to "Become[a] manager".

123. On 8 March 2018: Mr McFaull sent an email to the claimant about 'IC Materials – Spanish Opportunities' in which he said:

Anthony's paper leaves much to be desired… it's pretty vague on that and in particular what risks are we expecting to take.
The one lesson we should have learnt in recent weeks is not to take the IC or indeed Igor [the second respondent] for granted on accepting these deals. This needs much more work up front.

124. On 12 March 2018, Mr Kirkland commenced as chief operating officer of the third respondent.

125. In early 2018, the first respondent was looking at entering into the Spanish market. Mr McFaull said that the claimant did not appear to appreciate the risks involved and that the deal she proposed made no sense as it involved investing in two properties as part of a single transaction.

126. On 12 March 2018, Mr McFaull emailed the claimant about problems with Spain:

The papers and IC around the entry into the Spanish market illustrate well one of the problems that we have been suffering with DCAM.

I have put my thoughts down in this email for you to consider and to aid a conversation we should have before today's meeting.

From my perspective this is what has happened:

1. A heads up at a previous IC in terms of how we may enter the market with three models to be considered and debated today

2. Papers are circulated late on two prospective land acquisitions, with a mention of these going into a forward sale agreement with [redacted] or an other, with no mention of risk or the approval process

3. You and I exchange emails and you send a subsequent note

4. Anthony then sends a draft HOTs which show us as a JV partner putting up 5% and having the obligation to bring more deals. Still no mention of risk

Issues:

1. No discussion in principle on the entry strategy despite trailing such a debate

2. Seemingly unrealistic matching of land acquisition and ultimate forward sale arrangements (Q - how long to negotiate a deal with a Starwood?)

3. No pro-agreement with DC on the principle or appetite on a JV

4. No mention of risk

5. Papers late and not particularly clear

The result is confusion, frustration and further ebbing of confidence... a cycle we need to break!

What should have happened (for debate):

1. Have the agreement with DC in terms of a JV and minority investment

2. Debate the entry strategy options with the IC .

3. Seek approval for the outline deal of land acquisition and forward sale but be very clear of sequence, timings and risks.

4. Get the papers structured on a clear and comprehensive form and be very clear about approval being sought

5.send the papers out on time

Observation: things seem disjointed and rushed — why? If we want to move at speed then we need to get the basics right otherwise we will make a mistake which could be expensive and potentially fatal.

127. The claimant's subsequent email to Mr Butler acknowledged the concerns:
FYI: got similar comments from other IC members
There is lack of confidence from the IC to support entry to Spain due to papers being unclear and late.
Let's sit down and agree how we create better templates and satisfy the Board.

128. On14 March 2018, Mr McFaull contacted Maggie Rose about coaching for the claimant. He said: 'She is a very talented individual but lacks leadership experience and with the company enjoying rapid growth, she is becoming a bit exposed.'

129. On 23 March 2018, Mr McFaull emailed the claimant about issues with the papers and presentation of those papers at an IC meeting by the claimant's team. The claimant responded to say that she agreed on all points and that they were working to improve.

130. On 29 March 2018, a fundraising campaign with pension provider APG was unsuccessful because of KYC issues to do with the second respondent.

131. Mr McFaull emailed the claimant:

After such a long process and considerable hard work, this is extremely disappointing.

I appreciate that these matters are beyond our control but it does bring some doubt as to what partners will be easier/feasible to land.

Let's lick our wounds over the weekend and pick up when we're together on Tuesday.

Coaching and development plan

132. On 3 April 2018, the claimant met with the proposed coach Maggie Rose and Mr McFaull met with Ms Rose separately.

133. On 10 April 2018, Mr McFaull met with the second respondent and Mr Marcuse to discuss 'Ekaterina's Development Programme', a document prepared by Mr McFaull, but not shown to the claimant. This said, inter alia:

Agreed that we would commit to the development of EA over the next year

> Business Coach

> External management course

> Personal objectives to be set and monitored

NB - Progress expected to be evidenced by calendar year end

134. The second respondent said that it was his idea at this time that they could possibly keep the claimant as CIO, to retain her talent in a different role. Mr McFaull did not think that the claimant would be interested in that role and they would have had to terminate the employment of the existing CIO to pursue this idea.

135. We saw Mr McFaull's handwritten notes from some time in April 2018 which included the comment 'Behaviour towards EA … again! Why??'. Mr McFaull's evidence about this note was that he was not sure if it was based on his own observation or feedback he received. He said that he could not recall what the behaviour was but that something had not gone as per 'the agreement' he had with the second respondent. He said that he had several times spoken to the second respondent about his behaviour towards the claimant. He told him not to have bilateral conversations with the claimant. He said that he was 'bound to have said' the second respondent's manner could improve.

136. By early 2018, the claimant told us that the second respondent was hostile to her, seeking to humiliate the claimant and portray her as incompetent, despite her ongoing good performance and the growth of the first respondent's business, including the doubling of the value of the assets under management.

137. The second respondent said that his behaviour at the time was evidence of his frustration with the claimant. He said he was emotional not hostile and that his impatience was showing.

138. On 10 May 2018, the second respondent and Mr McFaull met with Ms Rose and received some feedback about her discussions with the claimant. Mr McFaull said that 'Igor wanted tangible results by the end of the calendar year'. Mr McFaull accepted that neither Ms Rose nor the claimant were given the opportunity to see if coaching improved the claimant's performance: 'Events overtook it.' Ms Rose had only produced some summary reports by September / October 2018, including seeking 360 degree feedback from the claimant's team.

139. In June 2018, the claimant became pregnant. It was a planned pregnancy by IVF.

140. On 1 June 2018, there was a work trip to the Netherlands. The claimant, Mr Kirkland and others attended. Mr Kirkland emailed the second respondent:

Ekaterina unfortunately missed a great opportunity to impress us, demonstrate strong leadership and really present the future strategy. ideal opportunity to impress.

- Bart is disorganised and not a leader but is impressive in terms of his knowledge and delivering the buildings and securing sites

- obviously a need for more resources in the team, but again not properly articulated.

- Graeme frustrated with Ekaterina's performance today and generally with the logistical aspects of the trip (late timings, insufficient time allocated to strategy and pipeline).

German strategy

141. Mr McFaull told us that Germany had been discussed during Mr Jamison's tenure, probably back in 2015. Blackstone had an asset in Germany, so they tasked the team with creating a German strategy in 2016. It was a huge economic market and there was always a plan to proceed in Germany at some point.

142. The plan was for the team to present a more detailed strategy paper to the Investment Committee in July 2018.

143. On 26 June 2018 Mr McFaull emailed his comments on the draft German strategy paper prepared by the claimant and her team:

'*Comments as follows, in no particular order of importance:*

o Needs to start with "Why Germany?" - Increases pipeline potential; JV partner appetite; balance to a slow UK; etc. etc.

- We need to stress that we want to enter Germany in the medium term and this is not a burning issue (ref this morning's conversation)

- Some more detail on lease types e.g. triple net, etc.

- which region would you choose to start with and why?

- Who would partner with us and in what conditions?'

144. He sent a further email:

By medium term I was really meaning to stress that we will progress all of the 'day job" projects to a level of completion before getting too excited about anything else. Unless that is made clear we will simply descend into yesterday's conversation [which I want to avoid].

Clearly the BX assets need to be managed as per our obligations. As for the new deal, we need to demonstrate that we have finished things that we have started i.e. UK and Spain before starting another project. Otherwise will be seen as a distraction.

145. On 28 June 2018, the claimant circulated a strategy pack for Germany. The covering email said:
The recommendation to continue with exploring the market but given the current pipeline of projects in Spain and Netherlands and challenges in the UK, the execution is planned for the medium term (Q1 '19) with a follow up meeting to discuss the pipeline and funding opportunities in the Autumn.

146. We saw several emails from Mr Pym in which he complained about the papers not having been discussed with him before he went on leave and also commented on the quality of the paper:

It is not just about the distribution, it is the lack of discussion, not to mention that the paper itself is half baked.

We will definitely need to discuss on my return.

147. On 2 July 2018, the claimant presented the German Strategy paper to the Investment Committee.

148. The minutes of the meeting record that the German Strategy paper was presented by the claimant and her team. There was a discussion and the Committee was supportive but said that Spain had to be the priority in the short term. It was agreed that a further paper would be presented in September to include a full pipeline of opportunities and to address the points raised by the Committee.

149. Mr McFaull's handwritten notes of the meeting record 'focus on UK/Spain' under 'Next Steps' .

150. There was a dispute between the parties about whether the claimant should have been paying a head-hunter to look to recruit a country head for Germany prior to the July 2018 meeting.

151. Mr McFaull remembered that in the July meeting the team gave feedback about meetings with people in Germany and said that meeting with a head-hunter would have been part of that. He said he did not know they had been recruiting or interviewing potential candidates. The claimant said that she had been transparent about the use of the head-hunter.

152. Ultimately it did not seem to us to be necessary for us to reach any conclusions on the head-hunter issue since the respondents' case was that they were not aware of the head-hunter being engaged to recruit a country head until after the termination of the claimant's employment.

153. Mr Kirkland was highly critical of the claimant's proposals. He said that she was proposing that the respondent could enter the German market by purchasing an established German developer. He said that she did not have cogent data to support that proposal nor an explanation of the value of moving into the German market. He described it as a 'ludicrous and naïve proposal which further damaged [the claimant's] reputation with the Investment Committee.'

154. Mr McFaull said that he spoke to the claimant several times in early July to advise her to stop focussing on Germany, given everything else that was going on but that despite these discussions, she progressed the project with no authority to do so. He said that it was her inability to listen and stop pursuing the proposal which was really the last straw in terms of the claimant's performance.

155. Mr Brittenden put to Mr McFaull that there were no documents evidencing the claimant pursuing Germany after she had been told not to. Mr McFaull said: 'My recollection is she did. She stopped listening to me.'

156. The claimant's evidence was that in summer 2018 the team was told to delay new entry into Germany and no new capital investments were to be approved. She said that all the hard work she and her team had done was wasted because of a unilateral change in strategy after the IC meeting on 2 July. She said that the second respondent was particularly rude and aggressive to her that week.

Criticisms of the claimant

157. We summarise the various criticisms put forward by the respondents about the claimant's performance and the evidence which we heard. There is inevitably some repetition of items we have set out in the chronology above.

Quality and timing of papers presented to Investment Committee

158. Mr McFaull's evidence was that:
Attention to detail was sometimes insufficient
There was late and inadequate paperwork
The second respondent felt the claimant was not transparent
The respondents felt the claimant expected the Investment Committee to just rubber stamp proposals
Papers needed to be refined, sharpened and simplified.

159. The claimant made the point that the team was incredibly stretched and that deals changed a great deal in real time. She said that there was a change of approach; the Investment Committee did not want long detailed memos - they wanted a shorter version first then a fuller memo. Papers were required three working days before a meeting. Three working days in advance could be five calendar days before a meeting; that could be a lifetime in the life of a transaction – it was inevitable that more information would be necessary, hence the emails asking for further information.

160. It was put to Mr McFaull that toing and froing was the sign of a healthy and functioning IC process. He said 'but if you see things are missing or misconceived and repeated it becomes a cycle and erodes confidence. Repetition is not necessarily healthy'. He was challenged on the issue that the claimant was criticised

earlier in the period for papers being to detailed and later for papers not being detailed enough. He said that 'too much detail and verbiage can obscure risk. In the early days there was just too much paper and not getting to the heart of the matter.'

Finding investors / third parties for fund management

161. We heard that a large pension fund, APG, pulled out due to KYC checks on the second respondent. The claimant said that her ability to get results was hindered by the second respondent having red flags on due diligence

UK Urban project / UK pipeline

162. The claimant said the problem with the UK Urban project was investors pulling out due to KYC issues connected with the second respondent.

163. The respondents said that there was an issue with a lack of pipeline even if investors had been found. Mr McFaull told us that APG pulling out was almost a relief since there was no pipeline to invest in.

164. The claimant gave evidence that a number of opportunities were presented to the Board and it was suggested on the claimant's behalf that the claimant was simply outbid on a number of projects and that was not her fault.

165. The respondents said there were four or five projects where they were outbid and that this showed lack of market knowledge; you needed to understand the market and put together a package which was likely to succeed. The second respondent said that 'you have to have a solution which makes it profitable to pay more. You have to know the market or you cannot win.'

166. The claimant told the Tribunal that there was a project in Dagenham which was progressing at the time of her dismissal. Mr Kirkland's evidence was that ultimately that opportunity disappeared.

<u>Spain</u>

167. In essence, the respondents said that the claimant had packaged two pieces of land with two different vendors as a single transaction. This was a risky venture in a new jurisdiction. The Investment Committee felt that the claimant was trying to push the transaction with inadequate scrutiny and that she could not provide the required information. There were lots of meetings to try and extract the information.

168. Asked if the deals were successful, Mr McFaull said that of the two pieces of land, one was half developed in 2020, the other not developed three years later: 'I would not call that a success'.

169. The claimant said that the deals were intrinsically challenging and that problems were created by the second respondent changing his position and by KYC issues with lenders.

170. Mr McFaull said that the issues with the Spanish deal put him beyond doubt that the respondents needed a change.

Feedback about criticisms

171. The claimant accepted that issues were raised about the timing and quality of board papers and she accepted that criticisms could be made. They were a very stretched team. She accepted issues were raised about particular projects but not that performance concerns more generally were raised.

172. Mr McFaull accepted in evidence that he never told the claimant that her employment was in jeopardy. He said that there was continuous feedback and criticism and that most people would have detected that there was dissatisfaction.

Hostility of the second respondent to the claimant

173. We heard evidence about the second respondent's alleged hostility to the claimant.

174. The claimant told us that that this hostility was evident at a one-off meeting in late 2017 (the 4.5 hour meeting referred to above) and then in 2018 it became a regular pattern.

175. The second respondent said he was increasingly frustrated in 2018 and that there were some robust exchanges. He said that the claimant was also robust. Culturally neither he nor the claimant was naturally polite. He said that he was not hostile. He considered that he and the claimant had a generally good working relationship including weekly informal catch-ups. They attended two social occasions together in May 2018.

176. The second respondent accepted that there had been one or two conversations with Mr McFaull about his behaviour to the claimant where Mr McFaull told him he should be calmer. He said he was emotional but not aggressive: 'I am still learning to be polite like an Englishman'. He accepted that he would raise his voice on occasions but it was not shouting.

177. Mr McFaull said there were many heated discussions and that the claimant was also robust and forthright. He said that the second respondent was expressing frustration. He had seen him in a variety of contexts, with men and women; his style was the same with both if information was not forthcoming.

178. Mr Butler told us that in meetings in 2018, he witnessed aggressive behaviour by the second respondent towards the claimant in meetings but not towards others. He also overheard shouting and aggressive talking by the second respondent in meetings between the second respondent and the claimant at which Mr Butler was not present because the meeting rooms had poor soundproofing. The claimant would leave the meetings looking very disturbed and visibly upset.

179. Mr Kirkland's evidence was that the second respondent was frustrated with the claimant. He witnessed some heated discussions. He said that the claimant also forthright.

180. The claimant told the Tribunal that the hostility was particularly apparent at two meetings in July 2018.

First meeting:

181. The claimant's evidence was that the second respondent raised his voice and said the claimant lacked accurate knowledge of the market and was unaware of the contents of the contract being discussed. The second respondent demanded she read part of the contract (the break clause). She started to do so then Mr Butler took over. She was proved right about the contract. She said in evidence that she would not expect the Board and NEDs to review the details of contracts, it was very unusual. She was treated like a child and found it humiliating. She was hormonal and emotional at the time and her voice was breaking.

182. Mr McFaull's evidence was that he did not remember the second respondent saying the claimant lacked accurate knowledge, but he did recall her being asked to read the contract. He could not see a problem with the claimant being asked to read the contract to clarify. He did not see why it would be humiliating.

183. Mr Butler said that the meeting was a meeting about a joint venture with an existing investor on a Spanish opportunity. There were numerous and unfair comments by the second respondent about the claimant's lack of knowledge of the market and the existing contract with the investor; he asked her to read out a paragraph of the contract. Mr Butler was shocked and took over because the claimant was embarrassed. She was correct about what was in the contract. He had not encountered a similar situation in thirty years in the business and thought it was incredibly demeaning.

184. Mr Chia was also in the meeting. He said that the second respondent made berating and unfair comments about the claimant's knowledge of the market and the contract with the proposed joint venture partner. The second respondent accused the claimant and the team of being unaware of the details of the proposed contract and demanded that someone read out loud a certain paragraph from the contract. The wording showed the claimant was right.

Second meeting

185. There was discussion in this meeting about an option agreement and Dutch law.

186. The claimant said that the second respondent, with a smirk on his face, asked if she even understood what the proposed agreement was about. Mr Butler and Mr Chia gave similar evidence as to what was said by the second respondent but did not describe him as 'smirking'.

187. Mr McFaull remembered the occasion but did not recall any smirking or the second respondent asking did the claimant even understand what the agreement was about. He said he had seen the second respondent in five different boardrooms and with the claimant's predecessor. He had the same style in all of these contexts; he did not see him set out to embarrass or humiliate anyone.

188. The second respondent said that it was possible he would have asked if the claimant even understood what the agreement was about. He and the claimant would both raise their voices. If you asked anyone who worked for him they would say he was quite demanding and not as polite as he probably should be.

189. We concluded that the claimant and second respondent were both robust in their interactions generally but the second respondent's approach in these meetings went beyond what was usual in their professional relationship and the claimant was justifiably upset.

Description by the second respondent of the claimant as disrespectful

190. In evidence the second respondent was challenged on using the word 'disrespectful' a number of times in his witness statement to describe the claimant. He said this related to the raising of her voice and her stepping into arguments with him without listening. He said he was quite a good listener and expected the claimant to listen.

191. The second respondent said that the claimant did not respect that the money for the first respondent came from his family trusts, did not respect his experience in the business and acted like it was her business and not his. He saw that as disrespect. He asked her to put him on the first respondent's website as founder and she did not. He said that that that felt like huge disrespect.

192. In response to Tribunal questions, the second respondent said that Mr Jamison, the claimant's predecessor, was also disrespectful. He also hid things from the second respondent. He was 'even worse' than the claimant, would not mention the second respondent's existence and would just refer to 'investors'; he treated the second respondent like he was 'nobody' even though it was his money. They had heated discussions. He said that Mr Jamison left the business because he was disrespectful and did not treat him like the owner of the business. In Mr Jamison's time, the second respondent did not even have a place in the office.

Events from July 2018 onwards

193. On 3 July 2018 Ms Rose emailed Mr McFaull to say she was meeting with the claimant and on 5 July 2018 that meeting took place.

194. The claimant told us that morale in the team was very low at this point because of a failure to set up an LTIPS plan to incentivise the newer joiners, a 'very erratic

shareholder' (the second respondent), the fact that the management team were 'deprived of decision-making authority' and the lack of a plan / budget for the future.

195. On 9 July 2018, the second respondent said that he attended a breakfast meeting at which the claimant said 'it's not only your money', the reference apparently being to other investors. He found this disrespectful. He said in evidence about his feelings at that time that he was in business to have a positive impact on the world, have fun and interact with people he liked and who liked him. He realised the claimant saw the world differently from him. He felt at this point that it was better to part with the claimant in an amicable way because 'life is too short'.

196. Also on 9 July 2018, Mr McFaull had a meeting with Mr Kirkland about what was ultimately called 'Project Guard' but was then called 'Panther'.

197. He did not recall whether the second respondent had asked him to have this meeting but said that, after many meetings with the second respondent over the previous six months at which he expressed his unhappiness about the claimant's progress, he knew he needed to present the second respondent with some options. He said that replacing the claimant was a constant topic with the second respondent so he decided he should arm himself with a proposal of options as to how to further that: 'I had been her staunchest defender but my patience was waning.'

198. Mr McFaull's manuscript notes of the meeting show that they were looking at options and 'repercussions', speaking with head-hunters, and considering 'what could a comp[romise] agreement look like'.

199. Also on 9 July Mr McFaull had a meeting with the claimant; his manuscript notes show that there was a discussion about changing approaches to Germany – with the comments 'June – no Germany' and 'inconsistent / wasted resource'.

200. He had a further meeting on 9 July with the claimant's team about the proposed Spanish deal. He told the Tribunal that he wanted to show the claimant's team that the Investment Committee supported them and explain the Committee's concerns. He told them that the information received by the Committee was shaky and that the Committee was frustrated. Risks were not being properly considered and there was too much focus on the interests of the potential joint venture partner rather than the interests of the respondents. He said that it was clear at the meeting that the claimant had not been giving the team the full picture as to why the Committee was unhappy.

201. As we have recorded above, Mr McFaull's evidence about the Spanish project was that the Investment Committee were not happy with the investment proposal presented in March which involved buying two parcels of land in one transaction. He said that the committee felt the claimant was continuing to push the transaction without proper scrutiny and was not providing the committee with the information it needed to assess the risks. This exacerbated the second respondent's concerns about the claimant's transparency.

202. On 19 July 2018, there was correspondence between the claimant, Mr McFaull and others about an option agreement in relation to the Spanish project which appeared to be causing consternation. Mr McFaull urged the claimant to control the situation. Mr Kirkland was highly critical of a paper produced by the claimant's team and by the

team's approach to the project. There was a suggestion that the team were trying to 'bounce' the Investment Committee into deals. He said: 'There is a clear lack of leadership and no management of the DCAM board.'

203. Mr McFaull's reply said:

An honest if rather brutal summary. Whilst I share your concerns, as per our call, I think Ekaterina's email repairs some of the damage.

Ultimately without confidence on finance we will not proceed. That said, I still believe that within reason the Option premium is a reasonable risk given the reward.

It's such a pity that the team's "way of doing business" is putting this opportunity at risk...

204. On 23 July 2018 Mr McFaull sent the second respondent and Mr Kirkland an email:

Gentlemen in advance of today's lunch, I list below some questions for us to debate:

1. Do we wish to retain EA in the team, and if so in which role?

2. Which search consultants should we approach for this assignment?

3. When and if do we talk with EA...

We did not hear evidence about this lunch, if it took place.

205. On 26 July 2018 Mr McFaull had a further meeting about the Spanish project with the claimant, Mr Pym and Mr Butler. The agenda for the meeting in Mr McFaull's manuscript notes shows that the areas covered were:
The perspective of the IC
Management perspective
Agreed areas of improvement

206. Mr McFaull said at this meeting that the Investment Committee was feeling rushed into making decisions and had many unanswered questions and that 'Spain has been unusual'.

207. Mr McFaull's evidence to the Tribunal was that the treference in his manuscript notes to 'aggressive – questioning competence not supportive – challenging' represented feedback from the management team about the Investment Committee:' 'IC feels like US and THEM'.

208. The claimant told us that she had been expressing her concerns about the second respondent's behaviour to Mr McFaull and on this occasion Mr Pym and Mr Butler also expressed their concerns.

209. On 26 July 2018, Mr McFaull had a discussion with Macfarlanes about the Project Guard proposals and then on 30 July 2018 he sent the second respondent, Mr Kirkland and Mr Marcuse his 'work in progress' note on recent conversations about Project Guard.

210. That note included the following passage:

To be discussed and challenged:

Retain and develop – rejected
Joint MDs – who, practicalities
Appoint CEO but retain as MD – constructive dismissal?
Appoint Executive Chair but retain as MD – constructive dismissal?
Replace immediately – MK to act as interim – risks?
Communicate, offer retention and search – how likely to succeed?
Delayed communication until search advanced – risk of leakage into the market.

211. Mr McFaull's evidence to the Tribunal was that there was a decision to find a different leader for the business at about this point.

212. In August 2018, the claimant told us the Q2 report was presented to the Board and no concerns were raised about her performance. She said that the report highlighted good performance in all areas and that the business was growing.

213. On 20 August 2018, Mr McFaull met again with Mr Kirkland and the second respondent. Mr Kirkland had been on holiday for two weeks. Mr McFaull's handwritten notes of the meeting show the second respondent expressing views that suggested there were issues with 'trust – judgment – loyalty' and that there were failures including 'UK strategy' and 'fund raising'.

214. Mr McFaull said that they decided in the course of this meeting to make a without prejudice offer to the claimant to leave the business on agreed terms. There was then some delay in implementing the decision as both the second respondent and the claimant had time away from the business.

215. In September 2018, the commercial director and investment principal resigned. The claimant said they cited the inflexible decision making process at Board level and the lack of commitment from shareholders as reasons for leaving,

<u>What was known or suspected about the claimant's pregnancy</u>

216. We heard a great deal of evidence from witnesses as to what they knew or inferred or did not know and did not infer about the claimant's pregnancy in summer 2018 and into September. We bore in mind that it is common experience that some people take a great interest in the personal lives of their colleagues, some take none and all shades in between. Similarly some people, depending on their level of interest and experience, will notice the physical changes of early pregnancy and some will not and we bore in mind that those changes vary enormously as between individuals.

217. The claimant told us that she had a background of infertility issues. She underwent IVF. She said her team knew about her fertility issues but the Board and the second respondent did not.

218. As a result of IVF in the summer of 2018, she said that she gained five to six kilos in three to four weeks. She was wearing looser clothing from early July onwards – shirt dresses two sizes up and much looser, with no belts or buttons around the waist. She

had morning sickness and thought people would have heard her in the toilet. She did not announce she was pregnant, but believed people knew and that they were gossiping about it.

219. Mr Chia, who worked closely with the claimant, said that he could see a baby bump. He said that the claimant was more frequently off sick and had hospital appointments. He said that he heard Massy and Shen discussing the possibility that the claimant was pregnant, something along the lines of having a bet about whether the claimant was pregnant and observing that the claimant had a baby bump. He said that senior associate Tudor Baidoc also said something.

220. Mr Butler said that he saw a baby bump. He did not hear any gossip and had no actual knowledge that anyone else knew of the pregnancy. He said that people would not gossip with him anyway because of his seniority.

221. Massy Larizadeh told us that that by late August / early September the claimant looked clearly pregnant and had gone up several dress sizes; she had a larger chest and had a tummy which she had never had before. She said that she said jokingly to Shen Yildirimlar, 'I bet she is pregnant' and they laughed and said 'obviously no one is going to ask her'. She said that Shen said: 'she is even having lunch these days.'

222. Shen Yildirimlar denied having this discussion with Ms Larizadeh. She said that she herself had fertility issues but was very private and she and the claimant had not discussed their respective fertility issues. She and the claimant had discussed some of Ms Yildirimlar's private medical issues and the fact that the claimant was seeing an acupuncturist.

223. She agreed she did have a discussion with Massy Larizadeh where Massy, whom she described as nosy, looked at a calendar entry and said 'that's a ladies hospital'. It did not strike Ms Yildirimlar that that was connected with pregnancy. She said that it could have been another sort of 'ladies problem', diagnostic checks; it could have been anything. It was none of her business and she did not think about it again. She said that was her only relevant conversation with Massy. She might have had a conversation with Massy about buying lunch for the claimant but that conversation was not connected with pregnancy. She did not get involved with gossip and did not hear any. She was away on holiday during early September. She sat one row away from the claimant. She did not notice a change to the claimant's appearance; the claimant always looked great. They were both busy and not sitting together.

224. Ms Yildirimlar sent an email to the claimant after the claimant left employment saying that the claimant was 'better off away from this hole' and she should 'smack them all down'. She said in evidence that she herself was not that happy in her work at the time and meant that if something had happened, the claimant should fight for her rights. She was showing loyalty to the claimant. We had considerable sympathy for Ms Yildirimlar who was or had been close to the claimant and also continued to work for the first respondent so gave her evidence in difficult circumstances. Although she was uncomfortable, we considered she was doing her best to be truthful.

225. Ms Heenemann told us she was not friends with the claimant. She said that they had a good working relationship and a common cultural background but were too different

to be friends. They had discussions about hair, nails, skin and fashion, topics they were both interested in.

226. Ms Heenemann said that she and the claimant had a conversation in August 2018 whilst drinking with colleagues at a bar near the office about Ms Heenemann's observation that the claimant's skin looked particularly bad that day. She asked the claimant if everything was OK and the claimant said she was fine but going through some hormonal changes.

227. Ms Heenemann told us that she herself had PCOS so it did not occur to her that the claimant's reference to hormonal changes must relate to pregnancy / IVF. She said that work was very busy at the time, particularly when Ms Yildirimlar was on holiday. She did not notice any change in the claimant' s clothing or a baby bump. She did not hear rumours about the claimant being pregnant,

228. Mr McFaull said that he was not aware of rumours about the claimant being pregnant. In his position he was excluded from gossip. He did not notice anything about the claimant's changing shape. He told us that he had not noticed when his own wife was pregnant. He denied that pregnancy had any effect on his decision making and said he was not aware of the claimant's pregnancy until she told him on 18 September. He was aware that she had had an accident on 6 September (discussed below) reaching for luggage and thought she had tweaked or torn something.

229. The second respondent had meetings with the claimant during the summer period which would be in the diary for an hour at a time. He did not notice any change to her shape. He was aware of the 6 September incident discussed below and that it involved stomach pains. He had his own office and was not involved in gossip. He said that it would be 'unethical and stupid' to be influenced by the claimant's pregnancy, which he was not in any event aware of.

230. One other piece of this jigsaw was an email which Mr Pym sent to Ms Rose on 12 September 2018 as part of the 360 degree feedback which other employees were asked to provide about the claimant. In that email, he said one concern that he had had when he took on his role was about the claimant being at a different life stage from other members of the team and not understanding or adapting to the responsibilities others had outside of work. He said that he felt that to some extent that concern had proved to be correct. We thought this was an email Mr Pym was unlikely to have sent in these terms if he had become aware that the claimant was herself entering a new life stage with parental responsibilities at the time of the email.

231. On 6 September 2018, the claimant had an accident on a work trip to Paris and the Netherlands. She was returning from the Netherlands by train and was taking luggage down from an overhead rack when she experienced pain in her stomach and bleeding. She attended a women's hospital in Brussels.

232. Late that evening, she contacted Shen Yildirimlar to get medical insurance details. Ms Yildirimlar was about to go on holiday and contacted Ms Heenemann to get the information.

233. Ms Yildirimlar's evidence was that she was told the claimant had gone to hospital and that she had had a huge stomach pain. She asked her if she was looking after herself and the claimant told her she would catch her up when she returned. In answer to questions, she said that pregnancy probably crossed her mind at this point although the tenor of the evidence in her witness statement was that she had no knowledge or suspicion of the claimant's pregnancy.

234. These were conversations after 11 pm at night. Ms Heenemann had been to the gym after work and had a phone call from Ms Yildirimlar when she got out of the shower. Ms Yildirimlar asked her to find the insurance details. She told Ms Heenemann that the claimant had got off the train because of stomach pain. Ms Heenemann said that she did not think further about it; it was late and she wanted to go to bed. She did not connect the incident with the hormonal changes conversation: 'I am not interested in the claimant's life. We have never been close friends so I would not want to put the puzzle together because I just did not care.'

235. When the claimant returned to work she told Mr Pym and Mr Butler that she had had a bleed.

236. Ms Heenemann said that everybody in the office knew about the accident and they were talking about it. She herself told the second respondent that the claimant was in pain and the train had to stop to take her to hospital. She mentioned stomach pain to the second respondent.

237. We were shown a few photographs in the bundle which showed the claimant's physical appearance during summer / September in swimwear and underwear. It did not seem to us that these cast any light on what colleagues would have made of her appearance in business clothing at the time and the claimant was not urging us to draw any conclusions from these photographs.

238. On 10 September, Mr McFaull had a meeting with the second respondent and Mr Kirkland at which it was agreed that Mr McFaull should meet with the claimant to discuss the proposed settlement agreement. Mr McFaull was chosen because of his close working relationship with the claimant. This was further discussed at a breakfast meeting with Mr Marcuse on 11 September 2018.

239. Accordingly on 11 September 2018, a catch up between the claimant and Mr McFaull was scheduled for 18 September 2018.

240. Ms Heenemann's email setting out availability recorded:

Ekaterina – in the office all day but at doctor's 3 – 4:30 pm

241. The reference in the outlook calendar Ms Heenemann looked at reads 'Fr Chilcott'. Ms Heenemann's evidence was that she knew nothing about the appointment but surmised it was a doctor's appointment because 'Fr' was obviously a typo for 'Dr' given that 'f' and 'd' are adjacent on the keyboard.

242. On 11 September 2018, Mr Pym sent feedback to Ms Rose for her 360 degree review which included the following passage:

Feedback previously received from the Chairman was that the management team rushed everything, and therefore proposal often lacked rigour. This is feedback that Ekaterina does not appear willing to heed, which I believe is a reflection of her drive to hit targets for personal financial reward, without fully understanding the damage that this can do to the team's standing with the 'Shadow' Board.

244. On 13 September 2018, Ms Rose sent to the claimant a 'Themes and Commentary' document prepared from 360 degree feedback from the claimant's team: This document included the following section:

10. What most troubles you about the business?

…We have 'reluctant' capital. We sometimes need to drag to a deal. It undermines my confidence.

I think there's a struggle with risk.

We can get overridden by Igor. He doesn't think like we think or isn't aligned.

Igor — he doesn't understand people how to lead, manage or motivate and that his command and control regime doesn't work.

The team are the ones that created the business. Being Russian is not doing our business reputation good in the market place.

He interferes by controlling the money.

…The role of Igor is something that will need some resolution.

I don't have a great deal of visibility on the investment side of things. I've not witnessed discussions but I have witnessed the effect on the team. A huge amount of energy that could be outward facing is spent inward facing. The degree of analysis required is a big challenge for Ekaterina. It's not something she creates.

The Shareholder being Russian. The current political climate and increasing focus on due diligence (KYC — Know Your Client) by business partners is already causing issues for the business, with a small number of banks declining to work with us, and no real confidence that existing banking relationships will be scalable to a sufficient extent to support the business.

Unrealistic expectations of the sole shareholder and a governance structure that focuses on criticism and is too institutional.

245. On 17 September 2018, Mr McFaull had a meeting with the second respondent and Mr Marcuse. Mr McFaull said that the Board continued to weigh up the merits of making a without prejudice offer to the claimant even after he booked the meeting with the claimant and he continued to have reservations about the proposal because of the gap which would be created in the leadership team and because they had not decided on a succession strategy. The second respondent's view remained that they should proceed with the proposal.

246. The second respondent described his thinking in evidence: 'It ceased to be fun, it ceased to be trust and respect and it was necessary to find an elegant exit.' He said

that if the claimant had come back in response to the elegant exit proposal with a suggestion that she should be CIO, he said that he would '95%' have agreed to that.

18 September 2018

247. On 18 September 2018, the claimant and McFaull met for the planned without prejudice meeting. There were subtle but significant differences in their accounts of what happened at the meeting, some of which were necessary for us to resolve.

248. In the claimant's account:

Mr McFaull opened by saying: 'there is no easy way to say this'. Mr McFaull then said that the second respondent no longer required her services and that a decision had been taken to terminate her employment. She was shocked and started to cry.

The claimant said that nothing was said about the Board losing confidence. Mr McFaull suggested continuing the conversation outside of the office. He told her she should take her bag with her as she would not be coming back. She asked if she could return to the office to collect her shoes and other personal belongings. Mr McFaull refused that request, saying arrangements would be made for these to be returned to her later.

She took her bag and they went to the Churchill café where she was presented with a severance agreement. Mr McFaull told her that the agreement had been under consideration for the last six weeks. She said she would like to consider talking to Mr Marcuse. Mr McFaull told her that Mr Kirkland would be her successor.

In oral evidence, the claimant told us that that Mr McFaull said he was resigning and that the termination of the claimant's employment was the second respondent's decision and he had nothing to do with it. In her witness statement however she had said that Mr McFaull told her he did not support the decision and she had surmised his subsequent resignation was connected.

She also said in oral evidence, although not in her witness statement: 'We agreed to meet the following day once I had digested the proposal. He made clear the offer is the offer, nothing to negotiate or discuss, decision made. He made it very clear decision was made. I had two choices: go to court or accept the offer.'

The claimant accepted that she asked whether she could get advice from Cameron McKenna.

249. In Mr McFaull's account:

He agreed that he commenced with the statement that there was no easy way to start this conversation. The claimant then said she had seen the folder he had with him and knew what the meeting was about. She became upset and said the reason she was upset was pregnancy. He congratulated her and she asked him to keep the news confidential.

He suggested moving to the Churchill café. The claimant asked whether she could collect her belongings. He suggested that she need not come back that day. He told us that he meant that, because she had an external appointment, she should just take what she needed to avoid another trip to the office that day.

They had a friendly discussion about the claimant's pregnancy on the way to the Churchill café. At the café he told us that he said that the claimant was not considered to be a well rounded MD or leader. The Investment Committee had hoped she would grow into her role but the rate of her development and the lack of business progress in investing and fundraising had eroded the Board's confidence in her. He gave her the without prejudice letter containing the offer. She raised a concern about LTIPS and he suggested that she find a form of words for the agreement which would give her more comfort. The conversation ended with the suggestion that they should meet the following day to continue the discussion. He said they agreed that he would call the claimant the following morning to arrange where to meet; he put this in his diary.

250. We saw the pre-prepared letter which was handed to the claimant which included some passages we considered particularly relevant:

This letter confirms our conversation today. I outlined to you when we met the concerns the Board has with your progress in the role of Managing Director of Delin Capital Asset Management. Whilst you have in many respects risen to the challenge we set you two and a half years ago when you took on the role, the absence of progress in UK development over the past year and our lack of success in fund raising have materially eroded confidence in you at Board level and in particular with our shareholder.

Given these circumstances, and before proceeding to take any formal decisions or action, we wanted first to offer you the opportunity of an elegant exit for your employment…on agreed terms. This reflects the valuable contribution you have made to the business over the last eight years and our wish, that being the case, to explore an amicable basis for releasing you from your contract.

251. Mr McFaull said in evidence in respect of the reference in the first paragraph to 'funding' that the failure to get investment from APG was not the claimant's fault but there were other avenues which had not yielded results.

252. He said that the 'easier one is pipeline'; 'we were all disappointed at the lack of progress', particularly the second respondent.

253. Mr McFaull accepted that the letter did not refer to other alleged issues such as the 'chronic issue' about the inadequacy of the papers. He said that he rightly or wrongly chose a couple of good topics.

254. A further relevant passage from the letter read:

Paid leave*: We agreed today that you would have a period of paid leave while you consider this offer and take advice. While you are out of the office, you should not*

have any dealings with your colleagues, or our partners, prospective partners or advisors. We will also temporarily suspend your access to the company and its systems during this time.

As a formal matter, the offer set out in this letter remains open for acceptance by you until 5 pm Friday 28 September 2018. We have agreed in any event to speak again over the next two days so that I can take your feedback on this offer and other questions or comments you may have. There is no obligation for you to accept this offer or to sign up to a settlement agreement. Should you choose not to accept this offer, then that will have no bearing on any decision we may then take as to your future as Managing Director.

255. We also saw some typed notes of the meeting made by Mr McFaull which gave the account set out in his witness statement. There was no date on these notes but Mr McFaull's evidence was that his notes were made shortly afterwards, probably that afternoon whilst his memory was fresh.

256. The notes included this passage:

Before leaving the office she asked whether she should collect all her belonging and I said no as she already had an external appointment at 3 pm and I suggested that she would be better off not coming back to the office that day. I clearly meant not to come back that evening rather than a never come back at all.

257. Mr McFaull said in evidence that he read the letter as a script. The claimant's account was not his style of language. He told us that the respondents wanted an 'elegant exit' and a change of leadership. The decision to change the leadership had been taken. He said that he had never seen anyone reject a compromise agreement. He had never seen anyone come back from 'that conversation'.

258. Mr McFaull said that if the agreement had been rejected, they would have had to look at plan B or C. There was no defined plan B or C because he had 'perhaps naively thought the compromise agreement would run its course'. He had not contemplated it not being accepted. He said that they would have had to revert to the options discussed earlier in the year.

259. He denied that he said 'the offer is the offer': He had dealt with two compromise agreements on the claimant's behalf before; she knew the agreement first presented was not the final outcome. Mr Colman's had taken several months. If her particular concern was the LTIPS, he had said that they would find a form of words she was comfortable with. She would have known it was not a fait accompli.

260. The offer made to the claimant included a payment of £100,000 ex gratia. She would leave on 30 September 2018. So far as the LTIPS were concerned, she would be treated as being vested with two years and nine months' worth of shares. Her legal fees would be paid in the sum of £1000.

261. Mr McFaull emailed Mr Marcuse that afternoon to say that the claimant was disappointed and insulted by the offer but that discussions would continue over the next few days.

262. Later that afternoon Mr McFaull wrote to the second respondent to say that 'following their recent conversation', he was tendering his resignation from his role with an intention of terminating his employment in December. He would work to ensure that Mr Kirkland's role was a success and to start the recruitment process for a permanent replacement for the claimant.

263. In evidence Mr McFaull told us that he had had many conversations with the second respondent over the last year about the fact that he was tired of travelling to London, was semi-retired and wanted to do less. He deliberately timed his resignation so he could retire just before Christmas and put the claimant's compromise agreement to bed. He no longer wanted to be in London two days per week.

264. On 19 September 2018, Mr McFaull tried to telephone the claimant but the claimant did not take his calls.

265. She sent him an email that day saying:

You summarily terminated my employment with Delin Capital Asset Management yesterday. Please note that I hereby reserve my rights in respect of the above.

Should you wish to contact me, you may do so only through my solicitor, Mr Ramyar Moghadassi of Moghadassi & Associates…

Kindly arrange for my personal belongings to be picked up.

266. Mr McFaull wrote back to the claimant saying:

I do not agree that your employment was summarily terminated during our meeting yesterday. I put a without prejudice offer to you verbally and this was confirmed in writing in the letter I provided you with at the end of our meeting (privilege is not waived in respect of that discussion/correspondence).

Given your request that I arrange for your personal belongings to be collected. I assume that you are terminating your employment with immediate effect and that you are rejecting the without prejudice offer that was put to you yesterday. If my assumptions are incorrect however then please do let me know.

267. On 20 September 2018, the claimant's solicitors wrote to Mr McFaull:

To set the record straight, you had a meeting with our client at approximately 1.30 pm on 18 September… Our client believed this to be a routine "catch up"…However our client was not allowed to come back to her lunch, or her job, because you summarily terminated her employment at the Meeting.

You opened the Meeting by saying "there is no easy way to say this" and then informed our client that the shareholder, Mr Igor Linshits, no longer requires her services. You then went on to explain that the shareholder's dissatisfaction with our client stated six weeks ago, which is when he decided to terminate our client's employment, and that the law firm or Mcfarlanes had been instructed for advice.

268. Between 19 and 25 September 2018, Mr McFaull told employees that the claimant was off sick; he said that this was to give her time to consider the settlement offer.

269. The claimant was unhappy that colleagues and clients were told she was sick and was concerned that people would think she was behaving unprofessionally by not being in contact so after about a week she told some clients that she had left the business.

270. Over this period, correspondence passed between the claimant's solicitors and Macfarlanes for the first respondent. It was put to Mr McFaull that the respondents did not challenge the claimant's account of the meeting in this correspondence as to what was said about the second respondent not requiring her services. Mr McFaull's evidence on this point was that once lawyers were involved he was led by legal advice. He said that he did not draft the letters but accepted that he would have been providing instructions to the solicitors.

271. We concluded in respect of what seemed to us to be the claimant's key contention that Mr McFaull told the claimant that her services were no longer required by the second respondent, that we accepted that those words or something very like them were used. There were a number of reasons why we accepted her account. It did seem to us unlikely that Mr McFaull would not have told Macfarlanes that this account was incorrect if that had been the case and that the claimant's account would have been challenged in correspondence.

272. We considered that the passage from Mr McFaull's allegedly contemporaneous notes we quoted above showed that Mr McFaull had not made his own notes of the conversation as early as that day or even very soon after, but drafted them after correspondence had been received and assertions had been made about what was said about the claimant leaving the office and her possessions. There is no other good explanation for the way in which Mr McFaull has framed this passage of the notes.

273. Although we accepted that Mr McFaull probably intended to follow the prepared letter as a kind of script, there were competing tensions for him. He had a good relationship with the claimant and had long resisted the second respondent's desire to dispense with her services. On a personal level he probably did want to distance himself from the decision to some extent and we think he conveyed his own longstanding ambivalence to the claimant in some form. We considered that the conversation occurred in a context where they both understood that no one had come back from such a conversation in the business, where a firm decision had been made that there should be a change of leadership and that he unambiguously conveyed to the claimant that her role as managing director was terminating. The irretrievability of the situation was consistent with the provision in the letter that the claimant go on paid leave, have no contact with colleagues and have her access to IT systems suspended. That provision was inconsistent with Mr McFaull's assertion that she was simply being told not to come back to the office that day.

274. We did not however accept that the claimant was told or that it was implied that the offer was non-negotiable. That would have represented a significant departure from the respondent's previous practice (as we discuss below); the claimant did not suggest in correspondence or in her witness statement that any such statement was

made. We think that if something of that sort had been said it would have been reported by the claimant at some point before she gave her oral evidence. It was apparent from Mr McFaull's evidence and the documents in the bundle that she was aware of the negotiation process in relation to individuals Y and Z. We concluded that if she had thought that she was being treated differently from Y and Z in respect of whether there was a negotiation to be had about the figures, she would have mentioned that in correspondence.

275. On 25 September 2018, Mr McFaull invited the claimant to a meeting by email. He said:

The reason that I am contacting you directly is because I understand that. despite my request for you to maintain confidentiality with respect to our discussion last week, you have not contacted [redacted - a client] to inform them that you have left Delin. You will appreciate that your actions in contacting third parties put us in a very difficult position such that I now need immediately to confirm the position to the business and externally.

Your email to me last week said that you are treating yourself as having been dismissed summarily by me when we met on 18 September. Your lawyers have twice confirmed to Macfarlanes that this is your position. I think you know that that is not what happened in our meeting, but it you insist on maintaining that position and have announced this to third parties as well then we have no option but to treat your employment as having ended (by your resignation without notice).

I would like to see you today please at 4pm at the office so that we can discuss the situation and your actions. I would also like to know who else you have contacted or alarmed that you have left Delin. I cannot delay making a statement past today and so I intend to put out an appropriate statement after we meet.

The without prejudice offer put to you last Tuesday was conditional on you maintaining confidentiality which you have not done and so that offer lapses and is withdrawn. I attach a copy of Macfarlanes' latter to your lawyers today which also confirms this.

Please confirm that you will attend the office at 4pm

276. The claimant did not attend the proposed meeting and that same day Mr McFaull sent a letter purporting to dismiss her. He said that she had contacted a number of third parties to say that she had left Delin when he had asked her to keep the without prejudice discussion confidential:

'I am obliged to treat your conduct and absence as bringing your employment with Delin to an end with immediate effect by reason of your repudiatory breach of contract.'

277. The reference to absence, Mr McFaull said in evidence, was the claimant not attending the meeting which he invited her to. The 'conduct' was not turning up to the meeting. He said that the letter was drafted by solicitors. Mr McFaull's evidence was that the respondents were trying to get past an impasse created by the claimant's solicitors' assertion that she had been dismissed and the approach taken was the result of legal advice.

278. The claimant's solicitors sent a long letter to the respondents on 25 September 2018 in which they alleged that the claimant had been discriminated against because of sex and pregnancy. These allegations were repeated in a letter dated 28 September 2018.

279. On 26 September 2018, Mr Kirkland announced that the claimant had left her employent and that he was interim managing director.

280. Mr Butler said that during the period after the claimant's departure, Mr Kirkland referred to the claimant on at least two occasions as 'that silly girl' and Mr McFaull referred to her as a 'stupid girl' This was in the context of legal correspondence being received.

281. Mr McFaull's evidence was that he might have said this. 'It's my language'. He said it was his old fashioned language and that he would have called Mr Butler, for example, a 'stupid boy'. He accepted there was no evidence of him having called anyone a stupid boy. We accepted that this was Mr McFaull's manner and his 'language'. Given what we knew about Mr McFaull's relationship with the claimant, we were not able to conclude that it was evidence of a dismissive attitude towards women or the claimant in particular.

282. Mr Kirkland accepted that he said 'silly girl' in the context of conversations with Mr Butler where they were discussing legacy issues discovered after the claimant left. He denied it was in the context of discussions about letter from her lawyers. He said he would call a man a silly boy but could recall no example of doing so. In Mr Kirkand's case these remarks seemed to us to be consistent with what appeared to be his generally negative view of the claimant and his dismissiveness of her.

<u>LTIPS decision</u>

283. There was correspondence between the parties about the claimant's entitlement to LTIPS. We do not set all of that correspondence out but summarise the salient points.

284. On 30 October 2018, her solicitors wrote to the respondents' solicitors:

…if your client chooses not to classify our client as a 'Good Leaver', then this amounts to less favourable treatment on grounds of our client's gender and/or victimisation arising in consequence of our client having done a protected act.

285. In a 20 November 2018 letter, the respondents' solicitors said that the claimant had failed to make representations as to why the discretion should be exercised to classify her as a good leaver

286. On 21 November 2018, the claimant's solicitors wrote again

We refer you back to our correspondence dated 13 November 2018 where we clearly stated 'As your client has permitted male colleagues to retain entitlement under the LTIP in circumstances where they have left, if your client chooses not to classify our client as a 'Good Leaver', then this this amounts to less favourably treatment on grounds of our client's gender and/or victimisation arising in consequence of our client having done a protected act'

In our view this amply sets out the basis as to why our client should be classified as a Good Leaver.

287. On 27 March 2019, there was a meeting of the board of directors of the third respondent, Mr Kirkwood and Mr Richards, to decide whether to exercise a discretion to treat the claimant as a good leaver.

288. The minutes are extensive and carefully drafted. There is a reference to the proceedings the claimant has brought:

6.5 On 25 February 2019, DCAM received confirmation from the Employment Tribunal that EA had lodged a claim against it and Igor Linshits personally…The fact of her claim is set out for information, but should not form the basis for determining her Leaver status.

288. The minutes also note:

6.7 The Board considered the Leaver status under the Articles of other leavers in light of EA's assertions. It was noted that:

6.7.1 No Leavers had automatically qualified as Good Leavers under the Articles:

6.7.2: Discretion had been exercised to treat two Leavers as Good Leavers as part of confidential settlement agreements offered to the Leavers in question and accepted by them;

6.7.3 As for the two previous male leavers, EA had been made a without prejudice proposal of exit terms which included beneficial treatment of her shares. Unlike the previous male Leavers, EA did not engage in settlement discussions and the offer, having lapsed, was unilaterally withdrawn by the Company, therefore no confidential settlement agreement was entered into with EA.

…

6.10 After considering the above factors, the Board resolved:

6.10.1 Not to exercise its discretion to treat EA as a Good Leaver:

6.10.1.1 The Board placed emphasis on the fact that EA was not automatically a Good Leaver, and the circumstances under which her employment ended were not akin to the Good Leaver definition in the Articles, nor are they akin more generally to how a 'good leaver' is viewed in the market. Further, EA was offered beneficial treatment of her shares via proposed exit terms, but she chose not to engage in those discussions and as such no confidential settlement agreement was entered into.This was very different to the other Leavers who were deemed Good Leavers as a result of confdential, negotiated settlement terms. EA's representations were that if she was not teated as a Good Leave, this would be an act of sex discriminationor

victimisation because of her gender and/or her pregnancy. No other representations were made by EA. Therefore, given the Board is not exercising its discretion to make EA a Good Leaver, EA is a Bad Leaver for the purposes of the Articles.

289. Mr Kirkland said under cross examination that he had seen the claim form and that it would have been odd if it had not been referred to. He said it had not influenced the decision on the LTIPS.

290. Under questioning, he said that the factors the Board looked at in exercising its discretion were the circumstances of leaving and performance. The overriding factor was that the claimant's leaving was not akin to being a good leaver.

291. There are references to criticism of the claimant's performance in the minutes but no balanced assessment of her performance over the three years the LTIPS scheme covered. Mr Kirkland's evidence to the Tribunal was that since he had been involved with the respondents (a limited period) her performance had been poor.

292. As to the details of how the claimant had left, the minutes essentially restate the version which the respondents presented to us at the hearing, ie that the claimant was dismissed due to her own repudiatory breaches of contract in telling third parties she had left the business and being absent without leave.

293. Mr Kirkland said that they did not investigate those issues but had discussions with Mr McFaull and the respondents' lawyers. He said that the two men treated as good leavers were in different circumstances as they had signed settlement agreements.

Other settlement agreements

294. Mr McFaull's witness statement included a table which summarised the component parts of the settlement agreements reached with comparators X, Y and Z, which table reflected the settlement agreement documents which were provided in the bundle. We reproduce the table here:

Schedule 1

COMPARISON OF LEAVER TERMS

	Ekaterina	Comparator X	Comparator Y	Comparator Z
Notice	Three months paid in lieu	Three months paid in lieu	Incorporated into the ex-gratia payment	Three months in total (part worked, part paid in lieu)
Discretionary bonus	None	None	None	£33,800
Ex gratia payment	£100,000	£145,000	£58,062.53	£113,500
LTIP	To be treated as having vested 2 years, 9 months (of 3 years)	None	Treated as a Good Leaver in respect of 25% of his DPL shares	Treated as a Good Leaver in respect of 75% of his DPL
Medical insurance	Maintained until the end of the policy year and then paid in lieu for the balance of her notice period	Maintained until the end of the policy year	None	Maintained until the end of the policy year
Accrued holiday	To be paid on termination	None	Deemed taken	Paid on termination
Legal fees	£1,000 plus VAT	£1,500 plus VAT	£1,500 plus VAT	£6,500 plus VAT (£3,000 company contribution and balance offset against ex-gratia amount)

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295. Relevant evidence which we heard about the comparators X, Y and Z was as follows:

- X left before the LTIPS scheme started. Mr McFaull accepted that the claimant had four years longer service than X.
- X had also been managing director. Y and Z were employed in more junior positions.
- Y had been out of the office due to ill health. He had been employed for 18 months, but only spent six months in the office. Mr McFaull said he was treated as a good leaver due to his ill health.
- Z had been employed 2015 – 2018 and left in early 2018. As to Z's bonus, Mr McFaull's evidence was that 2017 was a good year; he worked the full year and his settlement agreement was negotiated at the start of 2018.
- McFaull thought all of the legal fees had been negotiated up for X, Y and Z and that Z had wanted more of the settlement amount apportioned as legal fees for tax reasons.
- Mr McFaull's evidence was that X, Y and Z's compromise agreements were all subject to extensive negotiation. He was not able to remember what sums had been offered initially but the final sums would have been higher than the initial offesr. The claimant had been involved in Y's and Z's negotiations. The claimant was privy to the Y and Z negotiations and knew that they were negotiated settlements. She was able to say she was insulted by the initial offer because she was aware of the sums ultimately received by Y and Z.

296. In relation to any disparities in respect of what the claimant was offered, Mr McFaull said: 'Negotiation is the simple answer… I fully expected she would negotiate. In relation to the claimant's settlement agreement, he said that there was no budget cap and his hands were not tied on the amount.

Law

Pregnancy discrimination

297. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends, if the employee has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; if she does not have that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

298. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

299. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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."

300. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

> *(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination 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 which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(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.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved 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 sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a 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.

301. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

302. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

303. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

304. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

305. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT. If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place, it must apply the shifting burden of proof: Country Style Foods Ltd v Bouzir 2011 EWCA Civ 1519, CA. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These might be explanations arising from the tribunal's own findings: Chief Constable of Kent Constabulary v Bowler EAT 0214/16.

306. The shifting burden of proof does not apply to underlying facts as opposed to the element of discrimination.

Sex discrimination

307. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:
- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

308. The discussion of the law at paragraphs 299 – 306 above is applicable to direct sex discrimination.

Comparators

309. On a comparison for the purpose of establishing direct discrimination there must be 'no material difference between the circumstances relating to each case': s.23(1) EqA.

Post termination discrimination

310. Post termination discrimination and harassment are unlawful if the discrimination or harassment 'arises out of and is closely connected to a relationship which used to exist between' a person and her former employer: s 108 EqA. Although not set out in the Equality Act, post termination victimisation is also prohibited: Onu v Akwiwu and anor; Taiwo v Olaigbe and anor 2014 ICR 571, CA.

Victimisation

311. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

312. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

313. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

314. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

Unfair Dismissal

315. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Dismissal

316. Where there is ambiguity as to whether a dismissal occurred, we must apply an objective test and consider the context in which the words were used and how a reasonable employee would have understood the words: Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT.

Constructive dismissal

317. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

318. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

319. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another was, whether the breach played a

part in the dismissal (Nottingham County Council v Miekle and Abbey Cars Ltd v Ford EAT 0472/07). In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

320. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

321. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (Woods v Car Services (Peterborough) Limited) [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462). It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher education Corporation 2010 IRLR 445.

Reason for Dismissal

322. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

Capability

323. In respect of a dismissal for capability in the form of performance, the tribunal must consider:
- Did the employer honestly believe the employee was incapable?
- Did the employer have reasonable grounds for that belief?

Alidair Ltd v Taylor 1978 ICR 445, CA.

Reasonableness

324. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

325. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted.

The test applies to the procedure followed by the employer and to the decision to dismiss.

326. In order for a capability dismissal to be fair, an employer must have followed a fair procedure. This will generally involve:
- telling the employee in what respects his performance is inadequate;
- adequate warning of the risk of dismissal;
- an opportunity to improve performance.

James v Waltham Holy Cross UDC 1973 ICR 398, NIRC, Polkey v AE Dayton Services Ltd 1988 ICR 142, HL.

327. Whether an express warning that the employee's job is in jeopardy is required will depend on all the facts of the case. The mere fact that an employee is a senior manager does not of itself obviate the need for a warning: Burns v Turboflex Ltd EAT 377/96.

328. The Acas Code of Practice on Disciplinary and Grievance Procedures applies to poor performance and requires that the employer should:

establish the facts of each case
inform the employee of the problem
hold a meeting with the employee to discuss the problem
allow the employee to be accompanied at the meeting
decide on appropriate action, and
provide the employee with an opportunity to appeal.

329. The Code will be taken into account by a tribunal when determining the reasonableness of a dismissal in accordance with S.98(4) ERA: s.207 Trade Union and Labour Relations (Consolidation) Act.

Polkey reduction

330. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

331. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

> in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;
>
> if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);
>
> there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;
>
> however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;
>
> a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

332. As Elias J said in Software 2000:

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Protected conversations

333. Evidence of pre-termination negotiations is inadmissible in ordinary unfair dismissal claims: s 111A ERA 1996.

334. Subsection 2 provides: In subsection (1) “pre-termination negotiations” means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

335. Subsection 4 provides:
In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

336. Para 17 of the Acas Code of Practice on Settlement Agreements states that improper behaviour includes behaviour that would be regarded as ‘unambiguous impropriety’ under the ‘without prejudice’ rule and gives a further non-exhaustive list:
- harassment, bullying and intimidation, including the use of offensive words or aggressive behaviour
- criminal behaviour, such as the threat of physical assault
- victimisation
- discrimination because of age, sex, race, disability, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity and marriage or civil partnership
- putting undue pressure on a party

Putting undue pressure on a party may include not giving an employee a reasonable period of time to consider any proposed settlement offer or an employer saying before any form of disciplinary process has been commenced that the employee will be dismissed if she rejects a settlement proposal.

Rule 50

337. There are specific statutory powers under the Employment Tribunals Act 1996 and the 2013 Rules of Procedure dealing with restrictions on publication and on public access to hearings.

338. Section 10A of the ETA provides that ET procedure regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of:
(a) information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment;
(b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person; or
(c) information the disclosure of which would … cause substantial injury to any undertaking of his or in which he works.

339. Rule 50, which is headed 'Privacy and restrictions on disclosure', provides as follows:

> *'50.– (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include –
(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above –
(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;
(b) it shall specify the duration of the order;

The case law and the European Convention

340. The starting point when a court or tribunal is considering whether to make a privacy order is the common law principle of open justice. In R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420, [2012] 3 All ER 551 CA, the Court of Appeal described the principle of open justice as follows:

> ‘Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.

341. Similarly, the Supreme Court in R (on the application of C) v Secretary of State for Justice [2016] UKSC 2 said this:

> 'The rationale for a general rule that hearings should be held in public was trenchantly stated by Lord Shaw of Dunfermline in the leading case of *Scott v Scott* [1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30. He quoted first from Jeremy Bentham:
> “'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards

against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.'"

342. In Scott v Scott [1913] AC 417 HL, Lord Atkinson acknowledged the importance of the principle in the following terms:

> '… The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect …'

343. See also R (Guardian News & Media v Westminster Magistrates Court, in which the Court of Appeal said:

> 'The purpose of the open justice principle .. is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators'

344. The role of open justice in the right to a fair trial, is enshrined in article 6 of the European Convention on Human Rights. Art 6(1) says:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

345. Article 10 rights also have to be considered. Art 10(1) says:

> 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …'

346. Article 10 rights are qualified. Art 10(2) says:

> 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society …. for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

347. Other Convention rights (including the right to respect for a private life under art 8) may outweigh the requirement for public access to judicial proceedings or pronouncements. Art 8 says:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

348. On the subject of anonymisation, the Supreme Court has said that 'in many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved… There is a balance to be struck. The public has a right to know, not only what is going on in our courts, but also who the principal actors are.' (R (on the application of C) v Secretary of State for Justice) [2016] UKSC 2, per Baroness Hale.)

349. Where Convention rights give rise to competing interests, the House of Lords in Re S (a child) (identification: restrictions on publication), [2004] UKHL 47, [2004] 4 All ER 683 said:

'… neither article has as such precedence over the other … where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each …', per Lord Steyn.

350. Lord Steyn also quoted the observations of Lord Woolf MR on criminal trials in R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966:
"The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

351. The Supreme Court in Re Guardian News and Media Ltd [2010] UKSC 1, [2010] 2 AC 697, [2010] 2 All ER 799 added that 'the weight to be attached to the rival interests under articles 8 and 10 – and so the interest which is to prevail in any competition – will depend on the facts of the particular case'

352. In Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38, the Supreme Court said:

'There should be no doubt about the principles. The question in any particular case should be about how they are to be applied.

The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide

cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly.

But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.'

353. Where a privacy order is sought: (i) the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation; (ii) it must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice; (iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the employment tribunal should credit the public with the ability to understand that unproven allegations are no more than that; and (iv) where such a case proceeds to judgment, the tribunal can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations: Fallows v News Group Newspapers Ltd [2016] ICR 801, EAT.

Article 8

354. Article 8 must actually be engaged: "is the information private in the sense that it is in principle protected by article 8 ? If no, that is the end of the case": McKennitt v Ash [2008] QB 73.

355. The ambit of 'private life' may extend to a person's working life. The concept of private life also extends to a person's reputation and honour: Vicent del Campo v Spain (Application No. 25527/13) 2018 ECHR 909, ECtHR.

356. 'Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.': *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457.
In cases where information is not obviously private, as Lord Hope said '…the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.

Submissions

357. We received written and oral submissions from both parties and considered these with care. We refer to the submissions only insofar as is necessary to explain our conclusions.

Conclusions

Ordinary Unfair Dismissal

Issue: Whether the claimant was dismissed by the first respondent:

a. On 18 September 2018 (expressly as alleged in paragraph 35 of the Details of

Claim):

358. Given the findings of fact we have made, it follows that there was an express dismissal on 18 September 2018. There was no ambiguity – the claimant was told that her role as managing director was being terminated. Even had we found that the discussion was closer to Mr McFaull's account, that might still have been constituted an express or constructive dismissal but we did not have to reach any further conclusions, given our findings.

359. We were therefore not required to consider the alternatives of a dismissal on 19 September 2018 or 25 September 2018

Issue: If the claimant was expressly dismissed. then whether the first respondent had a potentially fair reason for doing so (namely conduct or capability).

360. We concluded that the respondent's genuine principal reason for dismissing the claimant related to capability.

361. There was ample contemporaneous documentary evidence which we have set out in some detail in our findings of fact and which showed that there were concerns, whether these were fair or unfair:
- About the quality of reports;
- About assessment and attitude to risk;
- About UK pipeline;
- On the second respondent's part about transparency;
- About the Spanish deal;
- About issues connected with Germany.

362. In relation to the German issue, we were troubled by the way in which Mr McFaull characterised the 'last straw' when there did not seem to be hard evidence of the claimant continuing to forge ahead with German projects after the change of tack in early July 2018. However when we looked at the evidence on Germany in the round, there was ample evidence of dissatisfaction with the papers and proposal to acquire a German developer and that there was a sense that the claimant was pushing ahead regardless of the views of the Investment Committee. The claimant's own evidence supported the view that she was unhappy with the Investment Committee's decision not to pursue entry into Germany in the summer of 2018.

363. The issue about raising funds which was mentioned in the letter of 18 September 2018 seems to have been a genuine gripe of the second respondent's even if Mr McFaull acknowledged that the KYC issues in relation to the second respondent had been a significant factor, possibly the most significant factor, in the inability to attract investors.

364. Underlying and binding together many of these issues appeared to be a lack of alignment between the claimant's and the second respondent's appetite for risk and what he saw as her lack of respect for his views as to how his family money should be

dealt with. The 360 degree feedback from the claimant's team illustrated how the team shared the claimant's view of the second respondent as an impediment to the team running the business in the way that they wished to.

365. We considered carefully whether the fact that the respondents terminated the claimant's employment without giving her development plan a chance to play out demonstrated that there was some other primary reason for the dismissal. The real picture it seemed to us was that Mr McFaull persuaded the second respondent to pursue the development plan as a response to the claimant's perceived deficiencies but, as he told us, the Spanish and German projects in particular brought him to a point where he could no longer defend the claimant to the second respondent.

Issue: Whether, if the claimant was dismissed expressly, the dismissal was fair having regard to sub-section 98(4) Employment Rights Act 1996 ('ERA').

366. We concluded that the process followed by the first respondent was outside the band of procedures which a reasonable employer could have followed. We accepted that there may be circumstances where feedback to a managing director will be sufficiently clear that the managing director will have a good knowledge of what is expected of her and that her employment is at risk, such that the procedures contemplated in the case law and in the Acas Code may be abridged.

367. That was not this case. The claimant had received significant bonuses and salary increases. The business had grown and had certainly had a good year in 2017. It was clear that she was not as a matter of fact aware that her employment was at risk and we concluded that the fact that there were significant performance concerns would not have been reasonably clear to any new managing director in her position in a new and growing business which was feeling its way into new markets. The claimant saw her interactions with Mr McFaull, reasonably, as his constructive criticism and support to enable her to succeed in her role. Things were clearly worsening by summer 2018 to the point that the claimant should probably have realised that the second respondent in particular was unhappy with her approach but against the background of other indicators of positive performance, we do not consider that a reasonable employee in her position would have realised she was at risk.

368. It was certainly not apparent to us that it would have been impracticable or inappropriate for there to have been a formal process with the claimant which included at least a warning that her employment was at risk, an explanation of what improvements was required, and a period of time in which to make those improvements. The fact that the development plan was created and a time period set showed that Mr McFaull in particular recognised that it was reasonable to set a review period and put in place support for the claimant to meet the respondents' requirements. However in the events which happened, the plan was not discussed with the claimant and she was not given any form of warning.

369. Furthermore, a reasonable employer, it seemed to us, would have invited the claimant to a meeting, with someone to accompany her, to discuss the performance issues prior to making a decision to terminate her employment. That could have been done even if

a further meeting was scheduled to have a protected conversation about the possibility of a settlement agreement.

370. It follows that the claimant's dismissal was procedurally unfair and substantively unfair in that, although the respondent genuinely believed there were failures in the claimant's performance, it did not have reasonable grounds for concluding that those issues merited dismissal. It did not conduct a process which was within the band of reasonable responses.

Issue: If the claimant was constructively or expressly dismissed then whether the claimant would have been [fairly] dismissed in any event and, if so, when ('Polkey')

371. There were two aspects for us to consider:

- How long it would have taken for a fair capability procedure to have been pursued;
- What might have happened had such a procedure been pursued.

372. We noted that the respondents had contemplated the claimant having until the end of the year to improve, from the time they initially thought about having a development plan for the claimant in April 2018. That seemed to us to be some evidence of the amount of time a managing director in this business would require, having been set objectives, to demonstrate that she could meet those objectives. We think Mr McFaull, with his good knowledge of both the business and the claimant, at that point was setting out a reasonable roadmap. Bearing in mind that some elements of the plan had been started in terms of the coaching by Ms Rose having begun and the 360 degree review having been largely completed, and doing our best with the information we had about the business, it seemed to us that a reasonable employer would have allowed no less than six months from the setting of the objectives to reach a conclusion about the claimant's performance and make a decision on her future. In that time, there would have been time for the coaching to have some impact, time for some more deals to have been developed for UK pipeline, and there would have been some six Investment Committee meetings at which to assess the claimant's performance.

373. We then had to undertake the more difficult assessment of whether the claimant's performance would have changed in the ways the respondents desired had a fair process been instigated. This was a difficult and speculative exercise.

374. We bore in mind that a major issue was attitudinal – the claimant's attitude to risk was different from that of the second respondent. It was clear from the 360 degree document that she and in turn her team felt frustrated by the second respondent's attitude to risk and hampered in the way they wanted to run the business. They saw him as holding them back and characterised him as 'reluctant capital' There was an 'us and them' attitude in relation to the Investment Committee. Underlying that seemed to us to be a potentially more significant issue in relation to attitude. It was clear to us that the claimant was highly critical of the second respondent's approach and felt that

either he needed to change or to have less of a role in the business and that the Investment Committee itself needed to change.

375. We also noted that the issues with documents recurred over years without the reports reaching a satisfactory state. We accepted that there were issues with under resourcing and that these were being addressed by enlarging the team but the underlying issue about the Investment Committee feeling they were not being given enough information about risk seemed to arise from the attitude of the claimant and her management team as to the role the Investment Committee should play.

376. The claimant frankly accepted in evidence that there were some issues for example in respect of her abilities as a manager of a team and in relation to the mechanics of the production of documents and no doubt with the correct support and time she would have worked hard to address these concerns; we were confident she would have succeeded. We were considerably less sure that she would have been able to address the concerns which she did not accept were legitimate, in particular the fact that if there was a disconnect between her attitude to risk and that of the Investment Committee and the second respondent, that it was for her to change. In relation to all of the issues which seemed to grow out of that disconnect, in particular issues around the Spanish and German projects, she blamed the Board and did not seem to accept any fault on the part of herself or her team. We bore in mind on the other side of the scales that the claimant identified strongly with the business and its success and that she had been employed for a long period; we thought that she would have some strong motives to try and retain her position but that she would have been frustrated at running the business in the way the Investment Committee and the second respondent wanted it to be run.

377. Doing our best with the evidence we had and our overall impression from that evidence that the claimant was a talented, hardworking and ambitious person who was also to some extent determined to pursue the path that she thought best, we did not think that the prospects that she would have become the 'finished product' the Investment Committee and the second respondent wanted at the end of a six month period were greater than 25%.

Issue: Protected Conversation

Whether or not the discussion between the claimant and Mr McFaull on 18 September 2018 constitutes a protected conversation within the meaning and ambit of section 111 ERA having regard to the ACAS Code of Practice on Settlement Agreements ('the Code').

378. This issue is logically out of order but we record our conclusions in the order the issues were presented in the list of issues. On the facts we have found, the dismissal preceded any settlement offer or opening shot in negotiations and so the discussions on that day were not pre-termination negotiations. It follows that the discussions are

not rendered inadmissible in the unfair dismissal proceedings and we have considered them in reaching our conclusions above.

Maternity / Pregnancy Discrimination

Issue: Whether the claimant was dismissed by the first respondent for the purposes of section 39(2)(c) Equality Act 2010 ('EqA') on 18, 19 or 25 September 2018.

379. We found that the claimant was dismissed on 18 September 2018 for the reasons previously set out.

Issue: If so, whether the respondents or any of them knew that the claimant was pregnant at the time of her putative dismissal.

380. We heard a great deal of evidence about what various individuals in the office knew or suspected but what was important for us ultimately was whether any of the decision makers knew or suspected the claimant was pregnant at the time they made their decisions. There was nothing that persuaded us on the balance of probabilities that they did.

381. It seemed clear to us that the claimant's pregnancy was by no means so obvious by late summer that anyone encountering her would inevitably have guessed. The witnesses who said it would have been 'reasonably obvious' by early September were the individuals who worked closely with her, in particular Mr Butler and Mr Chia. We bore in mind that confirmation bias may well have played a role in their belief that what they suspected to be the case and subsequently had confirmed must have been obvious to everyone.

382. In respect of Ms Yildirimlar, we did conclude she had some suspicion but accepted that it was no more than that.

383. We accepted Mr McFaull's evidence that he had not guessed and the claimant appeared to accept that he did not know hence why she told him on 18 September.

384. The second respondent had meetings with the claimant but says he did not know or guess that she was pregnant. It was clear that any gossip in the office would not have been generally shared with Board members and other senior individuals; Mr Butler made that clear. We were not able to conclude that Ms Heenemann had guessed on the evidence which we had nor did it seem more likely than not that she would have shared her suspicions with the second respondent if she had guessed. We accepted that he did not know of or suspect the pregnancy.

385. We were invited by claimant's counsel to draw an inference from the timing of the 18 September meeting and the abridgement of the development plan that Mr McFaull and the second respondent must have known or suspected and been motivated by the

knowledge of the claimant's pregnancy to call the meeting. However, it seemed to us that there was ample evidence in the contemporaneous documentation of the growing unhappiness of the second respondent and others which led to the decision to dismiss the claimant. The evidence the claimant herself gave about what she perceived to be the second respondent's increasing hostility towards her in 2018 also supported the narrative that he was increasingly frustrated with the claimant's performance and attitude, well before her pregnancy would have been apparent, and that Project Guard was the result.

Issue: If so, whether the first respondent treated the claimant unfavourably during the protected period, contrary to section 18 EqA, by dismissing her.

386. It follows that if the respondents did not know or suspect the claimant was pregnant, her pregnancy could not have been a reason for her dismissal. This claim is accordingly not upheld.

Issue: Alternatively, whether in putatively dismissing the claimant the first respondent treated her less favourably that it treated or would have treated a hypothetical male comparator contrary to section 13 EqA because of her sex?

387. We had to consider whether there was evidence on the basis of which we could reasonably conclude that the claimant's sex played a material role in her dismissal. We consider in turn the matters the claimant pointed to.

<u>Hostile treatment by the second respondent</u>

388. It seemed to us significant that the treatment the claimant complained of was a feature only from late 2017 into 2018; it was not intrinsic to the relationship with the second respondent but became a feature as he became more frustrated with the claimant. We accepted that although both could be robust and forthright, the second respondent's behaviour had worsened during 2018 and went beyond acceptable robust airing of views; but the primary reason for that, on the basis of the evidence we heard, was the second respondent's frustration with the claimant's attitude and performance.

389. Nonetheless it could have been the case that the second respondent would not have spoken in the way that he did to a man with whom he was similarly frustrated and we carefully considered whether there was evidence to that effect.

390. We had the evidence of Mr Butler that he did not see the second respondent behave towards a man in the same way. However we bore in mind that Mr Butler had been in the business for a limited period of time and would not have seen the second respondent in other contexts with a man in the role of managing director. Mr McFaull, who had seen the second respondent in a variety of other boardroom contexts including with Mr Jamison, the claimant's predecessor, detected no difference in

approach and we accepted that evidence, which seemed to us to be consistent with what the second respondent said about his own attitude to Mr Jamison and the second respondent's account of his style.

Description of the claimant as disrespectful

391. We were urged to find that the second respondent described the claimant as disrespectful because he did not like being disagreed with by a woman or a woman being argumentative. In fact the evidence given by the second respondent was that he found the claimant's male predecessor even more disrespectful and it was clear to us that the basis for this feeling of disrespect was the second respondent's sense that neither Mr Jamison nor subsequently the claimant had respect for his role in the business and for the fact that he provided the capital which was the basis of the business. His evidence on that point seemed to us to be particularly transparent and heartfelt and in a sense he was correct. The claimant did think that the second respondent should be reined in and that he was interfering in the business and in investment decisions.

392. The references to the claimant as a 'silly girl' or stupid girl' were dismissive and inappropriate but the remarks were made in circumstances where Mr McFaull and Mr Kirkland were unhappy with the claimant's behaviour. Whilst descriptions of a woman as a 'girl' can often indicate a sexist attitude, there was insufficient in the context for us to draw any sensible inference that Mr McFaull or Mr Kirkland were operating on the basis of any such attitude.

393. Looking at all of the facts in the round, including the fact that the second respondent had approved the claimant's appointment to managing director in the first place and had at least initially been supportive of her, and the fact that Mr McFaull had clearly been extremely supportive of the claimant throughout much of her employment, we were unable to conclude that there were facts from which we could reasonably conclude that the claimant's sex had played a material role in the decision to dismiss her. The burden of proof did not pass to the respondents and this claim is not upheld.

Victimisatlon

Issue: Whether the claimant did a protected act for the purposes of sub-section 27(2)(d)

EqA having regard to her correspondence of 18, 20, 21, 25 and 28 September 2018.

394. The suggestion that there was a protected act on 18 September 2018 was, correctly in our view, not pursued.

395. The letter of 20 September 2018 from the claimant's solicitors mentions pregnancy in the following context:

As you know our client is pregnant. We would therefore warn you against placing our client under additional stress by contacting her directly when she has specifically asked you not to do so in the email she sent you yesterday at 2:40 pm.

396. The letter goes on to reserve the claimant's rights. There is no connection drawn between the claimant's pregnancy and her dismissal and nothing that could reasonably be construed as an allegation of discrimination even on the most liberal reading of the letter.

397. It was not suggested in evidence that there was a protected act on 21 September 2018.

398. We considered that the letter of 25 September 2018 was clearly a protected act as it made clear allegations of discrimination.

399. The letter of 28 September 2018 also made clear allegations of discrimination and was a protected act.

400. The claimant also submitted that commencing proceedings was a protected act although there had been no application to amend prior to the full merits hearing. The matter was fully aired at the hearing and Mr Kirkland was cross examined as to whether he had been influenced in his decision not to exercise discretion to declare the claimant a good leaver by the fact that she had brought discrimination proceedings. We concluded that there was no prejudice or hardship to the respondent in allowing an amendment to add this protected act and that the amendment should be allowed. The proceedings alleging sex and pregnancy discrimination were a protected act.

*Issue**:** Whether if the first respondent dismissed the claimant on 25 September 2018 this was on the ground that she had done a protected act.*

401. Because we concluded that the claimant was dismissed on 18 September 2018, this issue fell away and we dismissed this complaint.

Issue: Whether, post-termination of employment, the first or second respondent refused to confer any entitlement under an LTIPS on the ground that she had done a protected act?

402. We concluded that Mr Kirkland's suggestion that the claimant's performance had played a role in the exercise of the discretion was at best an exaggeration. There was no balanced consideration of the claimant's performance over the period covered by the LTIPS revealed by the minutes and we concluded that his suggestion that performance played a role was an attempt to justify the inclusion of reference to the claimant's performance in the minutes.

403. Could the fact that Mr Kirkland and the minutes to some extent misrepresented the role of performance in the decision, taken together with other facts we have found, lead us reasonably to conclude that the protected acts played a role in the decision not to treat the claimant as a good leaver?

404. We concluded that they did not. It seemed to us that the respondents had not treated anyone as a good leaver who was not so defined by the terms of the scheme unless that person had entered into a settlement agreement and that from an economic and pragmatic perspective that was both understandable and a complete explanation for the decision not to treat the claimant as a good leaver. It was the practice in the market and the respondent's practice. Insofar as the minutes were written to suggest that there was some more wide-ranging consideration of factors which might lead to an exercise of the discretion in the claimant's favour, they were to a limited degree disingenuous and performative. However, that did not seem to us to lead naturally to an inference the protected acts played any role in the decision. A more natural inference is that, on advice, and in the context of litigation, the respondents were keen to demonstrate that a careful process was followed in circumstances where, for reasons unconnected with the protected acts, the outcome was inevitable.

405. We concluded that the minutes had been put together with the benefit of legal advice, hence the reference to the claimant having brought proceedings, but these not playing a role in the decision. No doubt it was considered sensible to be transparent about the fact that there were such proceedings. The reference was not a fact that pointed towards the protected acts playing a role in the decision.

406. The burden of proof did not pass to the respondents. We accordingly dismissed the victimisation complaint in relation to the LTIPS.

Sex Discrimination

Issue: Whether, contrary to section 13 EqA. because of her sex, the respondents or any of them treated the claimant less favourably in respect of the terms of a proposed severance agreement for her dated 18 September 2018 than the actual comparators set out in confidential schedule

407. We concluded that X, Y, and Z were not appropriate comparators because the circumstances in which they were ultimately offered the sums set out were not materially the same as the circumstances of the claimant's offer. Mr McFaull told us and we accepted that these were the sums ultimately negotiated by X, Y and Z. The opening offers were lower although he did not have (and the respondents had not been asked to provide) the details of the initial offers. The fact of negotiation was a material difference between the claimant's case and those of her comparators.

408. X, Y and Z might still have been appropriate comparators if we had accepted the claimant's oral evidence that she was told that the deal was the deal and there was no prospect of negotiating a different package; in those circumstances we would be comparing her final offer with her comparators' final offers. However, we preferred Mr McFaull's evidence that he was expecting to engage in negotiation with the claimant. There were a number of reasons why we preferred his evidence:

- The claimant's account in oral evidence did not appear in her witness statement or the detailed correspondence sent by her solicitors at the time of dismissal which otherwise detailed what the claimant said had occurred in the meeting;
- The respondent had engaged in negotiations with other employees;
- Mr McFaull's note of the meeting recorded a discussion about a concern the claimant expressed about the LTIPS which we accepted was an aspect of the discussion which occurred and which demonstrated that the agreement was not set in stone but was open to discussion, and that the claimant knew that was the case

409. We carefully considered whether the fact that there was no evidence as to the precise sums initially offered to the comparators was an omission by the respondent which should lead us to an inference that the evidence of Mr McFaull that the offers had been negotiated up should be rejected because the respondents had in some way been evasive. We did not ultimately conclude this was appropriate for the reasons which follow.

410. The claim form said that the claimant had been treated less favourably than her comparators in that the terms of the agreement which she was offered were less favourable that the severance arrangements offered to the comparators.

411. At the very least there was some ambiguity as to whether the comparison was made with the opening or ultimate offers.

412. In their response, the respondents simply denied that the comparators were appropriate and that the claimant's offer was influenced by her sex. There was reference to the claimant declining to enter into negotiations.

413. By the time witness statements were served, it would have been clear to the claimant that Mr McFaull was saying that the comparators' settlements had been subject to negotiation. If at this stage (ie exchange of witness statements) the claimant had wished to compare her offer with the comparators' original offers or challenge the suggestion that the comparators' offers had been negotiated upwards this was the point at which she could have asked for further information and documents. The Tribunal would have been entitled to draw such inferences as were appropriate from evasive replies. Both parties have been thoroughly represented throughout these proceedings and if the claimant was seeking to make the comparison on a different basis from that which was assumed by Mr McFaull's witness statement and the documents disclosed (which were the final agreements for the comparators only and not the original proposals), her representatives should have made that clear.

414. Even if we had found that a comparison between the claimant's opening offer and the final agreements of X, Y and Z was appropriate, we were not persuaded that we would have found that there was less favourable treatment. The package offered to the claimant included 2 years and 9 months of her LTIPS entitlement. In the claimant's schedule of loss, she estimated the value of the LTIPS benefits on that basis at £500,000. Comparator X's package was worth significantly less than the package offered to the claimant as X had no LTIPS entitlement. The claimant's overall package was significantly greater than comparator Y's. We did not have a valuation of the

LTIPS entitlement of comparator Z but the evidence was that the claimant was entitled to a significantly greater proportion of the LTIPS, as managing director, than any other employee. It therefore was not apparent to us that Z's package was more favourable than that originally offered to the claimant, unless examined on an item by item basis, in which case some items were individually more favourable. We did not have to reach any ultimate conclusions on whether it was appropriate to consider the packages in that way, because of our conclusion that none of the comparators were appropriate.

415. For those reasons we dismissed this complaint.

Rule 50

416. The parties had agreed to replace the names of the comparators with the initials X, Y and Z but had not made an application to anonymise the names. When the Tribunal pointed out the requirement that there be a determination under rule 50 before names could be anonymised, counsel for the respondent submitted that, because there were confidential settlement agreements, the contents of those agreements touched on the private lives of the individuals concerned.

417. We were not persuaded that we had been presented with cogent evidence that the article 8 rights of X, Y and X were in play, however the information as to the comparators' settlement agreements had been created and communicated in a context of confidentiality between the parties to those agreements. In circumstances where the anonymisation of the comparators would in no way impede the public's understanding of the issues and where there was no suggestion before us that the public would have any legitimate interest in the names of these private individuals, it seemed to us that the interests of justice weighed in favour of anonymisation. We note that the expectations of parties entering into confidential agreements is that their involvement in those agreements will not be made public without a compelling reason. It is in the wider public interest that parties are able to dispose of potential proceedings and confidentiality is often a significant factor in whether an agreement can be reached.

Remedy hearing

418. There will be a telephone case management hearing to give directions for a remedy hearing should the parties be unable to resolve their remaining issues. The parties will receive a notice of hearing.

Employment Judge Joffe
London Central Region
27/04/2021

Sent to the parties on:
28/04/2021

For the Tribunals Office