



EMPLOYMENT TRIBUNALS

Claimant: Mr P Tilson

Respondent: The British United Provident Association Limited

Heard at: London Central
(Via Cloud Video Platform)

On: 27, 28, 29, and 30 April and 7 May
2021 (in chambers)

Before: Employment Judge Joffe
Ms S Pendle
Ms E Flanagan

Appearances

For the claimant: Mr M Greaves, counsel
For the respondent: Ms K Nowell, counsel

RESERVED JUDGMENT

1. The claim of wrongful dismissal is upheld.
2. The claims of direct sex discrimination are not upheld and are dismissed.

REASONS

Claims and issues

1. The issues in the case were agreed between the parties and were as follows. They were adjusted to reflect the claimant's reliance on a hypothetical comparator and in the alternative Ms Twaites as an actual comparator in relation to one issue. They were not in some respects clearly articulated as we discuss further in our conclusions.

DIRECT SEX DISCRIMINATION

In relation to paragraph 35 Grounds of Claim:

- i) Is Coralie Smith an appropriate comparator in that there was no material difference between the circumstances of Ms Smith and the Claimant aside from sex?
- ii) If so, did the Respondent treat the Claimant less favourably than Ms Smith:
 - in that his alleged complaints regarding bullying by Ms Smith were not investigated but complaints made of bullying against the Claimant were investigated by the Respondent?
 - in that the Claimant was dismissed following such allegations being made and no action was taken against Ms Smith?
- iii) Alternatively was the claimant treated less favourably in these regards than a hypothetical comparator?
- iv) If the Respondent did treat the Claimant less favourably than Ms Smith or a hypothetical comparator, was this because of his sex?

In relation to paragraph 36 Grounds of Claim:

- v) Is Kirsty Decker an appropriate comparator in that there was no material difference between the circumstances of Ms Decker and the Claimant aside from sex?
- vi) If so, did the Respondent treat the Claimant less favourably than Ms Decker or a hypothetical comparator in:
 - a) allowing Ms Decker to be accompanied to the investigation meeting regarding her grievance but not inviting the Claimant to be accompanied to his investigation meeting?
 - b) allegedly interviewing those witnesses suggested by Ms Decker but not interviewing the witnesses requested by the Claimant (para 36.2 Grounds of Claim)?

In relation to paragraph 37 Grounds of Claim:

- vii) Was the Claimant treated less favourably than a hypothetical female comparator against whom allegations of bullying behaviour that appear to have merit were made and against whom concerns over their attitude to males were raised, in that:
 - a) A comparator would have been informed of the allegations which raised concerns over their attitude to men whereas the Claimant was allegedly not told how the allegations regarding his attitude to women were arrived at (para 37.1 Grounds of Claim)?
 - b) A comparator would have been told the name of the grievant when the Claimant was not told the identity of the grievant (para 37.2 Grounds of Claim)?
 - c) A comparator would have been permitted to put forward her side of the events when the Claimant was allegedly not given any explanation of the complaints so was allegedly unable to defend himself (para 37.3 Grounds of Claim)?
 - d) A comparator would have been subject to a reasonable investigation before being dismissed whilst the Claimant was allegedly not subject to a reasonable investigation before being dismissed (para 37.4 Grounds of Claim)?

- e) If a comparator was dismissed at the end of the investigation, she would have been paid notice, whilst the Claimant was not paid for his notice period (para 37.5 Grounds of Claim)?
- vii) Was the Claimant's dismissal less favourable treatment because of his sex, contrary to section 13(1) EqA

Findings of fact

The hearing

- 2. The claimant gave evidence on his own behalf. For the respondent we heard from Ms Charlene Mansell, previously an HR business partner for the respondent, Mr Philip Hunt, formerly head of IT security strategy for the respondent, Mr Matt Spiers, at the relevant time global security transformation and assurance director, and Deepa Shah, HR business partner at the relevant time. We had an agreed bundle running to 329 pages.
- 3. The respondent conceded wrongful dismissal at the outset of the hearing.

Chronology

- 4. On 8 May 2017 the claimant started employment with the respondent as a change agent in the information security and governance team. The respondent is a well known private healthcare provider with a large number of staff and significant resources.

Relevant policies and procedures

- 5. The respondent has a detailed grievance procedure which makes provision for grievances to be raised formally or informally. Where a formal grievance is raised there are procedural stipulations including

5.4 Right to be accompanied

You may bring a companion to any formal meetings held under the grievance procedure. This companion may be a fellow Bupa employee or a trade union representative. You must tell the person holding the meeting who your chosen companion is in good time before the meeting.

...

An appropriate impartial manager will be assigned to hear the grievance and to decide the outcome. A note taker will normally attend the meeting to ensure there is a record of the meeting.

6. The respondent also has a performance management procedure. This provides for an informal stage at which targets are set and performance subsequently monitored and a formal stage at which there is provision for a series of formal capability meetings.
7. The claimant's line manager at the outset of his employment was Coralie Smith. Ms Smith has retired and we did not hear evidence from her. The team in which the claimant worked was small, ultimately including Kirsty Decker and the services of Mr Baig, who worked in a different team.
8. The claimant gave evidence about Ms Smith's relationships with some other colleagues, which ultimately did not appear to us to be relevant to the issues. He alleged that she was critical of various colleagues, both male and female.
9. The claimant also told us that although his relationship with Ms Smith was initially a good one, by the summer of 2017 she was on occasions angry and confrontational with him.
10. The claimant gave evidence about a number of incidents of what he said was poor treatment by Ms Smith. We did not hear from Ms Smith and as there was no claim against Ms Smith, it was not necessary for us to make findings of fact about these incidents.
11. In November 2017, the claimant passed his probation. In November or December 2017, Ms Decker joined the team as a junior change agent. Ms Smith asked the claimant to mentor Ms Decker but in February or March 2018 Ms Smith told the claimant that Ms Decker did not want him to mentor her.
12. On 13 March 2018, the claimant met with James Dowling, head of strategic resourcing, and complained about Ms Smith's treatment of him. Mr Dowling left the respondent's employment shortly after this and we did not hear evidence from him. The claimant told us that he described his experiences with Ms Smith and said that her behaviour was unacceptable. He said that he asked whom he could contact in the HR team to get support and that Mr Dowling suggested the possibility of raising a grievance.
13. The claimant contacted Ms Mansell, then HR Business partner for the IS business area in which the claimant was located. She had responsibility for some 800 employees. An employee might contact her directly to discuss an issue every three to four weeks, she estimated; that might for example be an issue about payroll; grievances were rare. The Employee Relations team was responsible for grievances and disciplinaries.
14. Ms Mansell is a career HR professional. She had been involved with a number of formal and informal grievances. She could recall two occasions when the grievances

involved a man accusing a woman of bullying. In one of these she had heard the grievance alongside the line manager and the grievance had been upheld with the female line manager ultimately being dismissed. On other occasions, investigation into grievances brought by women against male colleagues had revealed that the bullying was by the woman against the man. Overall, her experience was that the alleged perpetrators and victims of bullying were evenly spread between male and female.

15. Ms Mansell has since left the respondent's employment following maternity leave. At the time she prepared her witness statement she was on maternity leave. She told us that she prepared her statement with no access to documents and a number of dates in her statement had to be corrected in evidence. For example, she believed that the first meeting with the claimant was in January or February 2018 whereas the emails provided showed that it took place in April 2018. Because the claimant and Ms Mansell had very different recollections of the meeting, we had to pay close attention to such contemporaneous documents as were available.
16. Ms Mansell did not keep file notes or minutes of her meetings. She told us that she had a notebook in which she recorded action points. We did not see the notebook. It appeared that Ms Mansell took it home with her when she started maternity leave and she was not asked for it by the respondent during the course of the proceedings. Ultimately we did not draw any inferences from the respondent's failure to obtain the notebook. It appeared to be an aide memoire Ms Mansell used at work but which did not form part of the respondent's own files. It seemed to us that it was more likely to have slipped through the net on disclosure than been deliberately repressed.
17. The claimant's first contact with Ms Mansell arose from him forwarding a chain of emails he had had with Mr Dowling with the subject line 'Catch up'. The claimant and Mr Dowling had met and on 13 March 2018, the claimant sent Mr Dowling an email in which he asked about whether the respondent had any work experience opportunities for a teenage nephew and also whom he should contact in HR if he did 'have a grievance of any form'.
18. Mr Dowling replied with Ms Mansell's details and said that she could also discuss the work experience issue with the claimant.
19. On 20 March 2019, the claimant wrote to Ms Mansell forwarding the chain of emails with Mr Dowling. In his email he referred first to work experience. He then said, 'On another subject I may also want to discuss some progression issues here at Bupa because I have been told there are none'.
20. On 21 March 2019, Ms Mansell emailed the claimant back and gave him some information about work experience. She told him that she was free to meet the following day. Ms Mansell said that she did not recall scrolling down to see the earlier emails to Mr Dowling. She said that if she had noticed the reference to a possible grievance she would have raised it with the claimant and arranged for the conversation to be held in a formal meeting room.
21. The claimant wrote back on 3 April 2019, as he had been on leave and Ms Mansell then replied on 9 April 2019 because she had also been on leave. The claimant and Ms Mansell met on 12 April 2019.

22. The claimant told us that he discussed with Ms Mansell the fact that he felt his work was very fragmented and did not reflect what was in his job description. He said that he also raised issues about how his role was developing, Ms Smith's attitude towards him and occasions when Ms Smith has subjected him to her ill temper and aggression. He said that Ms Mansell did not seem concerned about these matters, did not offer him support and that Ms Mansell's reaction was to say 'you don't seem very happy here'. He felt she was encouraging him to resign.
23. Ms Mansell told us that the meeting was essentially focussed on development opportunities for the claimant at the respondent. The claimant said he thought he was in the wrong role and that Ms Smith had not recruited for the role properly or understood the nature of the role during the recruitment process. Ms Mansell said that she was surprised by this suggestion as the claimant was a like-for-like replacement of the previous postholder.
24. She said that the claimant went on to ask if the role could be altered or he could be moved into a different role. Ms Mansell said that she told him that they could not create a vacancy for the claimant but that he could be considered for suitable vacancies which arose. She encouraged the claimant to get in touch with the UK Change team within the UK Market Unit, where there was potential for suitable opportunities to arise.
25. Ms Mansell's evidence was that the claimant did not raise issues about Ms Smith, apart from the suggestion that she did not understand the claimant's role. She said that she did not encourage the claimant to leave the respondent; she talked through his options. She suggested that he continue in his role whilst looking out for other opportunities. If he was unhappy and not willing to wait for other internal opportunities, his only option would be to look externally. In cross examination she said that the conversation ended on a positive note with a discussion of families and cycling. If the claimant had raised issues about Ms Smith's behaviour, she would have taken that seriously.
26. After the meeting on 13 April 2019, the claimant sent Ms Mansell an email . He said: 'thanks for the recent chat Charlene, the insights on development going forward, and the suggestions for my nephew's work experience.' The rest of the email referred to the work experience issue and a request by the claimant for an organisation chart. Ms Mansell replied with a link to the organisation chart.
27. We were urged on behalf of the claimant to reject Ms Mansell's account because her memory of the dates had been inaccurate; it was said that the meeting would not have been memorable for her but would have been memorable for the claimant so his account was more likely to be accurate. A later email referred to 'continuing issues with my manager'; it was suggested that this was evidence that bullying issues had indeed been raised in the April meeting.
28. We considered very carefully the documents we had. The email chain seemed to us to support Ms Mansell's account of events, i.e. that the discussion had been about the claimant's role and the nephew's work experience. We considered there was a very significant difference between not remembering dates of meetings and not remembering what would have been striking details of those meetings. Ms Mansell did

not meet individual employees frequently; we think that if the claimant had made a striking allegation about Ms Smith she would have remembered it. She remembered details about the claimant's issues with his role and the personal conversation which they had. We could see no reason why she would have lied to us about the meeting; she is no longer employed by the respondent. We concluded that it was more likely that the claimant now remembers the meeting as including matters which may have been in his mind and which he may well wish he had raised but which he did not in fact articulate to Ms Mansell.

29. In the spring of 2018, the claimant became involved in helping Bupa Global embed something called the IROM model. The claimant's perception was that Ms Smith was aggressive and ill-tempered with him and unfairly critical of his work on the project. Notes of Ms Smith's one-to-ones with the claimant show that it was her perception that the claimant was not progressing quickly enough with the project, and was blaming others for the delay. There was a meeting on 2 May 2018, in which she described the claimant as having a fundamental misunderstanding of his role. The claimant said in evidence that Ms Smith lost her temper and aggressively criticised him and that he asked for a 'reset' of their relationship. He said that he raised with her at the meeting that she was losing her temper unfairly with him.
30. On 22 May 2018, Ms Smith emailed the claimant about finding his computer unlocked. She said it had happened twice in a week and next time it happened she would 'report it as an incident'.
31. On 31 May 2018 there was a meeting to review a document called the Information Handling Rules, which was part of the IROM framework. The claimant said that whilst he was seeking to deal with a meeting confirmation email on his laptop, Ms Smith angrily ordered him to close his laptop in front of colleagues, Ms Decker and Mr Baig. Ms Smith's notes record that the claimant had been using a laptop then failed to engage in the meeting after he was asked to put the laptop away. Her notes record that his behaviour was 'not acceptable'. Evidence Mr Baig later gave to the grievance investigation was that the claimant had slammed the laptop shut and shoved it away from him. The claimant's evidence to the tribunal was that he expressed his frustration about how Ms Smith was speaking to him by rolling his eyes, closing the laptop and pushing it away from him.
32. Ms Smith's notes say she spoke to HR about the issue.
33. The claimant emailed Ms Mansell on 31 May 2018, saying, 'I have some continuing issues with my role and with my manager that I wish to discuss'.
34. On 4 June 2018, the claimant and Ms Smith had a one-to-one meeting. Ms Smith's notes record that they discussed the 31 May meeting and that the claimant was 'very angry' and said Ms Smith should not have spoken to him in that way in front of colleagues. The claimant said Ms Smith was rude to him. Ms Smith's notes say that the claimant did not apologise for his lack of engagement or contribution to the team exercise. The claimant in evidence said that he raised with Ms Smith the subject of her losing her temper. He said that she did not apologise and that they eventually agreed to disagree and he asked again to reset the relationship.
35. On 11 June 2018 there was a meeting between the claimant and Ms Mansell.

36. The claimant's account of the meeting was that he described the recent events and complained about Ms Smith's aggressive behaviour, which he said was contrary to the respondent's values. He said that Ms Mansell said that they had discussed the same issues before and that if he was unhappy he might not want to continue at the respondent. She reluctantly suggested that he could raise a grievance against Ms Smith but was totally unsupportive and did not offer any suggestions for mediation or resolution.
37. Ms Mansell's evidence was that the claimant complained about the 31 May meeting, but not about Ms Smith's behaviour generally. She said that he said that both sides had become cross and he felt he had been treated unfairly. She said that Ms Smith had also already spoken to her about the incident and said that the claimant's behaviour had been unacceptable.
38. Ms Mansell said that she explained the grievance possibilities, that it could be raised formally or informally. If the claimant wanted to keep it informal, either she or the claimant could speak to Ms Smith about how the matter could be resolved. If he wanted to raise it formally, she referred him to the grievance policy on the intranet. The claimant did not ask for further action to be taken. He did not say he was being bullied by Ms Smith. If he had done, her first suggestion would have been that he raise a formal grievance.
39. Again, it did not seem to us that Ms Mansell's inability to recall the date of the meeting reflected on her memory of the contents of the meeting. We accepted that her HR training and experience would have led her to a firm suggestion of a formal grievance had the claimant suggested an ongoing pattern of behaviour by Ms Smith which could amount to bullying. We could see no reason why Ms Mansell would consciously mislead the Tribunal and again we thought the claimant's recollection was more likely to be affected by what he wished he had said at the meeting and by the fact that he has no doubt spent much time reflecting on these issues.
40. We also considered the fact that, at a later investigation meeting, the claimant was recorded as having said 'he had spoken to the People Team about his relationship with CS and they had offered to help him raise a grievance but he chose not to.' Whilst we bore in mind that the claimant had not had the chance to review and agree the notes of that meeting, it seemed improbable to us that the notes would not have recorded that the claimant felt he had been discouraged from bringing a grievance if that is what he had related.
41. We therefore concluded on the balance of probabilities that Ms Mansell's account of the matters the subject of material disputes in respect of this meeting was accurate.
42. On 16 August 2018, Ms Smith held a performance review with the claimant. Ms Smith's notes suggest that she raised an issue about the claimant's knowledge in respect of the IROM materials as well as an issue about the claimant leaving his PC unlocked. The claimant in evidence said that although Ms Smith did not lose her temper at the meeting, he felt that her tone and attitude were testing and forensic as if she were trying to catch him out or gather evidence to support an agenda. The formal review document we saw made reference to the IROM project having started slowly but said 'work so far

is good'. There was reference to the claimant needing to work harder at developing his knowledge of the subject matter. There was no performance rating recorded.

43. During the week commencing 20th August 2019, the claimant, Ms Smith and Ms Decker met to discuss a change management presentation which was being prepared in advance of Ms Smith's pending retirement to explain the work of the team to the new manager. The claimant alleged that he was criticised for not working with Ms Decker (in front of Ms Decker), although he had been led to understand that he was to prepare the presentation. He said that he was not aware of any similar criticism being made of Ms Decker although Ms Decker had also independently prepared a presentation.
44. On 23 August 2018, there was a meeting to discuss progress on development of a SharePoint internal website which would host information on the IROM project as well as other information. The meeting was attended by the claimant, Ms Smith, Mr Baig, Ms Decker and Julia Twaites who worked in communications. One of the documents which was going to be placed on the website was the Information Handling Rules, which the claimant had been working on. He had not submitted his work to Ms Smith, he told us, because he was nervous of asking Ms Smith for some guidance he required because of her behaviour. Ms Smith was attending the meeting remotely by telephone; the other participants were together in a room.
45. The claimant's account of what happened in the meeting was that Ms Smith pressed him on the status of the Handling Rules. He told her that he needed to clarify something before submitting the document. She continued to press him and he asked to discuss with her in a separate meeting. He felt she was criticising and belittling him in front of his colleagues and eventually became frustrated and lost his composure. On his account he raised his voice and said 'I need clarification, I want clarification, I need clarification.' Ms Smith then closed the meeting. The claimant said he asked Ms Decker to leave the room so he could call Ms Smith back. When he did so, he says Ms Smith criticised him and said that he should have apologised for his outburst in front of junior colleagues. She finished the call by saying that they would discuss the matter further in his next one-to-one.
46. Ms Smith's notes of the meeting record that the claimant 'got angry and raised his voice', that she spoke to him after the meeting and 'he was clearly frustrated and shouted at me'. She then spoke with HR.
47. On 29th August 2018, there was a meeting between the claimant and Ms Smith in which the claimant's conduct in the meeting of the 23rd August was discussed. Ms Smith's notes record the claimant as being angry and say that he did not apologise. There was a transcript of the meeting produced from a covert recording made by the claimant. This shows that the claimant and Ms Smith also discussed an email sent by the claimant which apologised for but also explained / justified his behaviour. We saw a series of emails between the claimant and Ms Smith dated 23 August – 30 August 2019. Ms Smith raised her concerns about being shouted at; the claimant apologised but said that Ms Smith had not apologised when he had complained of similar behaviour of hers.
48. Ms Mansell gave evidence that Ms Smith raised concerns about the claimant's performance with her in about May 2018 on a no names basis. They had a discussion about how Ms Smith should raise and document her performance concerns. In about

July 2018, Ms Smith revealed to her that it was the claimant about whom she had performance concerns. She said that his performance had not improved although she had been raising her concerns in his one-to-ones over previous months. In late August or early September 2018, Ms Smith said to Ms Mansell that she intended to put the claimant on a Performance Improvement Plan ('PIP').

49. Ms Mansell told Ms Smith that a PIP was appropriate if there were ongoing performance issues which had not improved despite informal discussions. She told us that Ms Smith was reluctant to use the PIP as she thought it would further damage her relationship with the claimant but agreed that it was the appropriate course of action. Ms Smith provided Ms Mansell with a draft copy of the PIP before it was given to the claimant and Ms Mansell checked it to see whether the objectives seemed fair and whether it contained clear expectations and targets. She said to the Tribunal that she believed it was quite lenient given the issues Ms Smith had described.
50. On 4 September 2018, Ms Smith met with the claimant and informed him about the PIP. The claimant said he told Ms Smith that the PIP was not in accordance with his recent performance appraisal; she said that she had changed her mind but 'would give no substantive reason why'. The PIP was emailed to the claimant that day. One of the targets was that the claimant should 'deliver all activities in the BG IROM project plan prior to handover to the MU at end of October 2018'.
51. After the meeting, the claimant said that he immediately went to see Ms Mansell. Ms Mansell said that the claimant approached her within 15 minutes of her arrival at the office and asked for an urgent meeting. He said 'she can't put me on a performance improvement plan'
52. Ms Mansell said that she explained that Ms Smith was the claimant's manager and if she believed he was underperforming she was within her rights to put him on a PIP. She said she told the claimant that Ms Smith said the concerns had been raised several times with him and that he did not disagree with that.
53. The claimant's evidence was that he also complained to Ms Mansell about treatment by Ms Smith and said that the PIP was vindictive and in contrast with a good performance review he had had recently. He said that Ms Mansell did not offer any support or empathise with him. Ms Mansell denied that the claimant had said the PIP was vindictive or words to that effect. She said that he accepted that points in the PIP had been raised previously and gave explanations why they had not been achieved but did not disagree that they had not been achieved. She said that if someone had suggested that a PIP was vindictive, she would have told that person that he had the right to appeal it by bringing a formal grievance.
54. Ms Mansell said in evidence that the claimant was visibly angry with her and that he appeared to believe she should be on his side. She said she asked him whether the IROM project was on track and he said no and listed what she characterised as excuses for the delays and blamed others for lack of progress.
55. Both the claimant and Ms Mansell told us that there was a discussion about body language. Ms Mansell said this occurred because the claimant huffed / sighed heavily and sat back in his chair dismissively. She found his body language rude and raised with him whether body language could be causing issues with Ms Smith. She said the

claimant became cross and loud when she suggested this. She said to the Tribunal that his behaviour felt very aggressive.

56. The claimant's evidence was that he said that anyone would be frustrated at the way he was being treated and asked if he was expected not to show any emotion. He said he was being unfairly treated.
57. On what seemed to be the material point of difference between the parties, i.e. whether the claimant said in the meeting that the PIP was vindictive, we again accepted Ms Mansell's account on balance. We overall found her to be a more reliable historian than the claimant and we accepted that her HR training and experience would have led her to suggest formal action if an employee had raised that a PIP was being imposed by his manager vindictively,
58. On 5 September 2018, there was a meeting between the claimant, Ms Smith and Mr Spiers, who was going to be taking over management of the claimant's team on Ms Smith's retirement. The meeting was to discuss the handover of line management, The claimant recorded part of the meeting on his mobile phone and we saw a transcript of the recording.
59. In the first part of the hearing which was recorded, both the claimant and Mr Spiers explained their backgrounds and roles. There was then a discussion of the PIP, which was not recorded, and what was expected of the claimant. Mr Spiers told us that the objectives in the PIP seemed fair and in line with what he would expect from someone in the claimant's role.
60. The claimant's evidence was that he said that the reasons for the PIP were 'spurious, contentious and suspicious'. Mr Spiers' evidence was that the claimant expressed unhappiness with the PIP but did not use those words to describe it.
61. At some point around this time, Ms Mansell's evidence was that she had a conversation with Ms Decker. Ms Mansell thought it was after her discussion with the claimant on 4 September 2018 and before Ms Decker submitted a grievance. It appeared from other evidence that in fact the conversation must have taken place earlier than Ms Mansell recalled as there was an email from Ms Smith to a more senior manager, Mr Jenkins, referring to a complaint which Ms Decker had written and which had gone to HR. That email was dated 28 August 2018.
62. Ms Mansell said about this meeting:

I was contacted by Kirsty Decker. Kirsty asked if she could have two minutes to speak with me. She went on to say she had concerns about the way in which Peter was treating her and others, and she wanted to know what her options were. Kirsty explained that, not for the first time, there had been an issue during a team meeting in which Peter had lost his temper. She said the issues with Peter's behaviour had started in relation to a project where Kirsty and Peter were asked to work together, and Peter had refused and done the work he felt should be done himself. The problems had then continued in relation to both Kirsty and other members of the team. Kirsty explained during an exchange between Peter and Coralie, Peter had become very angry and had shouted at Coralie, and continued to do so even when someone had suggested taking the conversation offline. She explained that there had been a member of the BUPA

Global IS team on Skype and a secondee in the meeting, which had made his conduct even more inappropriate. She also mentioned several situations where Peter had made her feel uncomfortable and upset due to his rude behaviour towards her.

I explained that she could raise the matter informally, which may involve me speaking to Peter to see what his position was, or alternatively we could all sit in a room together to try to resolve the problems. However, Kirsty believed the problems had already gone too far and she had been treated inappropriately too many times for this. She said she had been sitting on things for a while, hoping they would get better, but it had become clear that this was not going to happen. She felt the relationship could no longer be resolved informally. I therefore explained the option of Kirsty raising a formal grievance and told her that the policy was on the intranet I suggested that she should think about it first.

63. We saw a copy of Ms Decker's undated grievance document but not the email to which it must have been attached. Ms Decker said in her grievance:

Peter has become increasingly difficult to work with over the past few months and I now feel that I'm at a point where I am so uncomfortable with him that it has become almost impossible to interact with him. Last week in particular there were a number of incidents where Peter was extremely rude and aggressive in meetings.

In addition to this I feel that Peter's attitude makes him highly unapproachable. He doesn't make any effort to even say hello and when in meetings he talks over people frequently. I don't like to make assumptions but based on recent behaviours I cannot help but feel that he does this because both Coralie and myself are women as he does not project the same persona on men in the team. I personally have tried hard to collaborate and work well with him but this is never reciprocated.

...

Unfortunately, these are just snapshots of incidents that have occurred and I feel that I am now at a point where I do not feel comfortable enough to sit in a team meeting with him.

64. Ms Mansell said that she discussed the grievance, which she believed was submitted to Ms Smith in the first instance, with Ms Smith. She said that normally, the grievance would be heard by Ms Decker's line manager, however Ms Smith was referred to in the grievance and was likely to be required as a witness. Ms Mansell considered that someone outside of the team should be appointed and, having reviewed the available managers, chose Mr Hunt, who did not know either Ms Decker or the claimant well and did not work with either of them on a daily basis.. She referred Mr Hunt to Fiona Gardner, employee relations adviser, for support in conducting the grievance.
65. Mr Hunt told us that he knew Ms Smith reasonably well as they both reported to Paul Jones, director of information architecture. He did not know either the claimant or Ms Decker personally and had had limited professional interactions with them.

66. Mr Hunt had no training in conducting grievances and had never conducted a workplace grievance before. He had dealt with complaints about safeguarding in his volunteer work for the Scout Association but his role had been to hear complaints and not to investigate them. He had not heard employee grievances.
67. In terms of his own experience and beliefs, he said that he did not have a perception that men were more likely to be bullies and women victims of bullying. He had been involved in one bullying incident himself where he had felt bullied by a female manager. He did not himself raise a grievance against the manager but had been a witness in a grievance brought by another, female, employee against the manager. The manager had had performance issues raised with her and had left the respondent's employment.
68. He said that Ms Smith had spoken to him about hearing the grievance and had outlined the complaints to him. He did not perceive it as a grievance which materially involved Ms Smith so as to cast doubt on whether he was an appropriately impartial person to hear it. It struck him initially as a 'small petty internal matter'.
69. Mr Hunt said that he would have interviewed Ms Decker as the complainant first but he was conscious that Ms Smith was retiring soon and so he interviewed her first.
70. On 11 September 2018, Mr Hunt met with Ms Smith. Steve Jackman attended to take notes; Mr Jackman was not in HR. The notes of this meeting, like the other grievance interviews, were not verbatim minutes and were clearly significantly condensed, as Mr Hunt accepted.
71. Mr Hunt had not clarified the specifics of the grievance with Ms Decker at this point and did not ask Ms Smith about specifics. He said in evidence that the incidents complained of were only crystallised when he had seen Ms Decker. The notes record that the meeting commenced:

Phil: Explained that a grievance had been raised by Kirstie Decker from Coralie's team concerning Peter Tilson. Could Coralie give any instances that might support this grievance.
72. Ms Smith then gave a number of examples of her own criticisms of the claimant including the fact that she felt that he was not a team player and spoke about his behaviour at the 23 August meeting, including the fact that the claimant had started shouting. She said that 'I assess he is aggressive to me and Kirstie, but not to men.'
73. On 13 September 2018 Mr Hunt invited Ms Decker to a formal grievance meeting on 26 September 2018. He sent her a formal invitation and told her: 'you have the right to be accompanied at this meeting and may choose a fellow Bupa employee or trade union representative.'
74. Mr Baig was also invited to a meeting and notified that he could be accompanied. He was interviewed on 26 September 2018 before Ms Decker was interviewed. Mr Cook attended to take notes. Again there was no support from an HR employee at this or indeed any of the grievance meetings.

75. Mr Hunt opened the discussion by asking Mr Baig what he knew about the investigation. Mr Baig 'Correctly identified the issue and the main actors in the investigation'. Mr Baig went on to say that there were no issues with the claimant's interactions with Mr Baig. He had seen the claimant shout at others, notably Ms Smith and Ms Decker. He gave the example of the 23 August 2018 meeting. He said that when Ms Smith had left the meeting the claimant had criticised her to Ms Decker and Mr Baig. He said that the claimant had refused to apologise to Ms Smith for shouting.
76. Mr Baig was asked whether he had noticed these behaviours with anyone else. He said 'Yes, but only really ladies. The words he uses are fine but there is a negative tone.'
77. He was asked whether there was a noticeable difference between how the claimant treated men and women and answered, 'Yes, he seems very impatient with women. Generally he seems to have a short fuse and becomes rapidly agitated but this is more so around women. He's fine when everything is going to plan but not if he is asked a question he doesn't like, is challenged, or things start to go out of his control, even if it is due to his own doing.'
78. After Mr Baig's interview, Mr Hunt interviewed Ms Decker, A colleague, Simon Hutchings, attended with her to provide support. Mr Cook again took notes.
79. The notes show that Ms Decker discussed a number of issues:
- The issue about the presentation. She said that the claimant had lied to her, saying that Ms Smith had asked him to do the work. When Ms Smith tried to resolve the issue at a subsequent meeting her had waved his arms around and raised his voice;
 - Another task where he would not engage with her
 - That the tone of his emails was abrupt and rude
 - He was dismissive of her in person
 - The events of 23 August
 - The claimant's failure to support her as a mentor
 - That the claimant lied and became verbally aggressive and waved his arms around when challenged.
80. The notes went on:
- KD stated that now she is always uncomfortable around him, especially in meetings and not just when challenging him, but even when just asking a question. KD went on later to say that she had 2 concerns having raised the grievance:*
- *That when PT finds out he will make her life difficult*
 - *Now CS has left, PT will manipulate things to get on at KD's expense*
- KD said she dreads meetings, when she sees an email from him her stomach churns, and that PT dismisses any comments about his behaviour and always blames everyone else.*
81. When she was asked by Mr Hunt what a good outcome for her would look like, Ms Decker said that she wanted total separation from the claimant. 'Both personally due

to his behaviour but also professionally as his non-delivery is impacting negatively on her. She stated she likes her actual role and would be happy in it if it were not for PT.'

82. Mr Hunt asked Ms Decker if she 'wanted anyone else to input'. Ms Decker 'suggested Julia Twaites as she had worked before with PT before KD was around and was not part of the immediate team so could hopefully provide an impartial external view.' The notes record that Mr Hunt agreed to interview Ms Twaites.
83. Mr Hunt accepted in evidence that he had not requested to see any of the emails Ms Decker referred to as being rude. He had not asked for specific examples of much of the behaviour Ms Decker described. Mr Hunt said that he came away from the meeting with the impression that Ms Decker was fearful of displays of aggression by the claimant and of meetings with the claimant.
84. Mr Hunt's evidence was that he had intended to interview Ms Twaites anyway as she was present at the 23 August 2018 meeting.
85. Mr Hunt invited Ms Twaites to an investigation meeting shortly after he had interviewed Ms Decker. That meeting took place on 2 October 2018. Ms Twaites had been told she could bring a colleague and brought with her Sangeeta Suthar. Mr Cook took notes.
86. Ms Twaites was asked about the meeting on 23 August 2018 and said that there was tension in the room and she felt something was going on at the meeting but that she was not aware of what was going on.
87. She was asked further questions about the claimant more generally. She said that she had not otherwise noticed any inappropriate behaviour. Asked about the claimant 'stretching the truth', she said that she sensed from conversations that he tended to. She said that she had not noticed any differences between the claimant's behaviour towards men and women.
88. During the process, there was email correspondence between Mr Hunt and Ms Gardner. On 26 September 2018, Ms Gardner asked about scheduling a catch up discussion. On 2 October 2018, Mr Hunt said that he thought he needed the chat now. He had reached a stage where he needed further guidance. He said that he had conducted the grievance hearing with Ms Decker and would be completing a third witness interview that morning. 'Which means that I am close to delivering a decision'.
89. Ms Gardner replied that day asking Mr Hunt to send her the notes from the investigation meeting he had held. She suggested they could then have a discussion the following day. Mr Hunt then sent through his notes and a draft outcome document and they arranged to speak the following day. Ms Gardner then replied, again on 2 October 2018, asking if Mr Hunt had had a meeting with the claimant. She said '...obviously this is a crucial part of the grievance as it has been raised about him that we would need to do and take account of responses from him before formulating any response.' Mr Hunt then wrote back to say he had not spoken with the claimant:

'that's what I want to talk to you about, He is not aware of this so far and Kirsty is extremely concerned that he will take it out on her as soon as he does find out.

Their line manager is aware of the situation but is waiting for instructions from me who in turn needs advice from you.'

90. Ms Gardner replied:

If Kirsty wishes her grievance to be answered appropriately then she needs to feel comfortable with Peter being spoken to. As she has raised these concerns now I would say we have a duty to thoroughly investigate and that would include speaking with Peter around all the concerns she has raised in order to gain his side, and then formulate a view against each of the points she has raised around whether you wish to uphold or not uphold each point. Without putting these concerns to Peter we would not be able to carry out a true grievance investigation.

If there are any issues that arise in terms of Peter's behaviours once he is spoken to then obviously this is something that his line manager would need to deal with in the appropriate manner. Equally if you found in Samantha's [sic] favour overall and some recommendations are in line with her desired outcome then that would need to be positioned with Peter, and if he is unaware that the grievance has been raised then that would not be appropriate.

Let's have a more rounded conversation about all this tomorrow so I can ensure you have all the support you require before taking this forward.

91. The draft outcome document which Mr Hunt had prepared that day summarised Ms Decker's grievance:

You find Peter Tilson's behaviour threatening, disturbing and upsetting because:

- When under pressure of work or when he is challenged, he is often verbally aggressive, raising his voice and even waves his arms about.*
- You feel that, at times, he is abrupt, rude and dismissive. This is both in person and in emails.*
- You have evidence of him being untruthful regarding uncompleted tasks that he was responsible for.*
- His behaviour is not just directed at you but to other colleagues.*
- You perceive a difference in his behaviour towards male and female colleagues.*

92. Mr Hunt's decision was outlined as follows:

My decision

During our discussions I have not found you to be particularly timid or nervous, in character and therefore not particularly susceptible to assertive behaviour. '

Yet, it is clear that you are genuinely distressed by Peter Tilson's general conduct towards you and others and that you are frightened of his verbal aggression. It is also evident that you have made reasonable efforts through your line managers to reach an amicable solution, but this has not worked. Independent witnesses to a specific

outburst you describe during a meeting on 23rd August together with accounts of Peter Tilson's general attitude at other times corroborate your summary of his verbally aggressive and disruptive behaviour.

I therefore conclude that your grievance against Peter Tilson is justified and is upheld. I am not able to reach a conclusion regarding the allegation of a difference in his behaviour towards men and women.

93. In terms of outcome, Mr Hunt recommended separating Ms Decker and the claimant, so far as was possible, and that Matt Spiers should consider direct action to address the claimant's conduct and failure to meet the values.
94. On 3 October 2018, Mr Hunt and Ms Gardner spoke in person and Ms Gardner reiterated the advice which she had already provided to Mr Hunt.
95. Mr Hunt accordingly decided to interview the claimant. He sent him an email saying that he was investigating a confidential matter and that the claimant was required to help him with his enquiries. In his witness statement he had said that he did not tell the claimant what the meeting was about or invite him to bring a companion for two reasons:
 - Because it was not a formal meeting, but a fact finding interview
 - Because it would have caused him to question what the meeting was about and, given Ms Decker's concerns about how he would react, he did not want to let him know what the meeting was about until they met in person.
96. At the beginning of his evidence in chief, Mr Hunt said the first reason was not correct; it was a formal meeting. In hindsight, he said that he should have offered the claimant the right to bring a companion. He stood by the second reason. He said he did not intend to ambush the claimant. He accepted in cross examination that letting the claimant have a companion would not have been likely to reveal to the claimant that the grievant was Ms Decker and said that was his error. He accepted that he had gone further than was necessary to protect Ms Decker, but denied that was connected with the sex of Ms Decker or the claimant.
97. Mr Hunt accepted that Ms Decker had not expressly asked for anonymity. He did not tell the claimant who had brought the grievance. He said that he had observed Ms Decker in the office displaying fright, avoiding interaction or any contact with the claimant. He shared a large open plan office with the claimant and Ms Decker and would observe that Ms Decker would move away from the claimant or move desk to avoid contact with him. He said that at the time he was genuinely concerned for her welfare. He said that he would have behaved the same way had the sexes of the claimant and Ms Decker been reversed.
98. On 9 October 2018, the claimant attended the meeting with Mr Hunt. Mr Cook took notes.
99. In the meeting itself the claimant was not told who had raised a grievance or any of the detail of particular allegations. He was left to respond on the basis that he guessed it related to the 23 August meeting and he seemed to believe the aggrieved person was Ms Smith. He is noted as accepting that he had shouted at Ms Smith at the 23 August meeting but said that he had apologised. He explained that he had felt undermined by Ms Smith and said there were occasions when Ms Smith 'lost her cool'

with him and refused to apologise for doing so. He had asked Ms Smith if they could reset their relationship. He said their relationship had deteriorated over a long period. He did not accept that his behaviour had been inappropriate save for the shouting incident. He spoke about the PIP and said he had spoken to Ms Mansell about it. She had counselled him on his body language and he had taken that on board and gone forward with the PIP.

100. He was asked some general questions about whether he was abrupt, dismissive, aggressive and rude, whether he was impatient or had a short fuse, and whether he threw his arms up or slammed his laptop lid. He was asked if he knew why others reported that he had been untruthful about completing tasks or task ownership. He was asked if he treated junior staff differently. He was not asked if he treated men differently from women.
101. In evidence Mr Hunt accepted 'with hindsight' that the claimant had not been given a right to reply on some issues.
102. The claimant was not asked to agree the minutes or sent a copy of them.
103. After the meeting, Mr Hunt amended his draft outcome letter. Nothing about his findings or decision changed but he added a passage:
I have also interviewed Peter Tilson.
Peter's account of the events during the meeting of 23rd August corroborates with yours and those of other witnesses in that he did become verbally aggressive and that his body language displayed anger. He has explained that this uncharacteristic behaviour is a result of a long-standing problematic relationship with his line manager, Coralie Smith and was in no way directed to anyone else in the room. Peter said that he was shocked to learn that the grievance had originated from someone other than Coralie.
104. Mr Hunt accepted that he should not have reached conclusions about the tone of emails without looking at any emails. He said that the claimant had shown him a couple of emails where there was no issue with tone.
105. That same day the claimant emailed Mr Hunt suggesting a number of other people who could be interviewed about his behaviour.
106. On 10 October the claimant wrote again to Mr Hunt by email raising concerns about the motives for the grievance, asking Mr Hunt to investigate email and Skype trails and stating that he would 'venture my accuser must have resilience issues if this was found at all frightening'. The claimant said he felt victimised, raised the issue of Ms Smith's behaviour towards him and stated that not knowing the facts or identity of the grievant left him unable to defend his actions properly.
107. Mr Hunt said in evidence that he found the remark about the accuser having resilience issues inappropriate and considered that it suggested the claimant had little insight into the impact of his actions.

108. At some point around this time, Mr Hunt observed Ms Decker and the claimant together in a meeting. It was a meeting for a project they were all involved in. It was a meeting of four or five people in a small room. He did not observe any tension and it seemed clear to him that the claimant was not aware that it was Ms Decker who had brought the grievance. 'Up until that point I was very concerned that KD was distressed in his presence however at this meeting they were in the same room and I did not witness that level of distress, whether it was very well disguised or not. I had to have a think and seek further guidance.' He thought the grievance required further probing.

109. On 11 October 2018, he wrote to Ms Gardner:

Here are the notes taken from the interview with PT and two subsequent emails he has sent me.

I have had further thoughts on the matter and, coincidentally attended a business meeting with PT and KD and observed at first hand their interaction.

Consequently, my deliberations are not as clear cut as I first thought.

I would appreciate a discussion and some guidance.

110. Ms Gardner emailed him back on 16 October 2018:

I just wanted to drop you an email as I'm on a call until around 4.30pm today so may not get chance to catch you by the phone.

In your email to me dated 11th October you have stated that you attended a business meeting with both Kirsty and Peter and observed their interactions. In grievances we need to ensure and be able to demonstrate that the manager appointed to conduct the investigations and make decisions is totally independent, and has no awareness of the employees concerned. Therefore I've had to give thought to the fact you have raised the point that you have been involved in the same business meetings as both Kirsty and Peter, and therefore your impartiality may be challenged.

Having given this thought and following a discussion with Charlene, we feel that the best way forward with this grievance would be to appoint a new grievance manager who is completely independent and outside of the business area.

111. Ms Mansell told us that she was concerned that Mr Hunt would not be seen as unbiased if he had an increased level of business involvement with the claimant and Ms Decker. She said that she also had a discussion with Ms Decker, who had said to her that she felt Mr Hunt could not be impartial as he was involved in a project with her and the claimant. Ms Decker was also upset at how long the process was taking as she had to work with the claimant in the meantime.

112. Mr Hunt said that had he not been removed from the investigation at this point, he would have considered interviewing the 'character witnesses' the claimant had put forward in the same way as he had interviewed Ms Twaites on more general character issues. He said that the issue had become more complicated. Seeing the claimant and Ms Decker together had raised some doubts for him.

113. On about 19 October 2018 Ms Mansell went on maternity leave unexpectedly as her baby arrived two months early. She prepared a hasty handover note about issues concerning the claimant. She noted that the claimant was on a PIP and set out the background to the PIP. She referred to Ms Decker's grievance and said that Mr Hunt was investigating it and it looked like it could result in disciplinary action. She did not note the fact that Ms Gardner and she had identified concerns about the grievance investigation.
114. Ms Deepa Shah replaced Ms Mansell. She is a senior HR professional with over a decade's worth of experience in HR roles. She is CIPD qualified. She has been involved in a large number of disciplinaries and grievances.
115. Ms Shah had an introductory meeting with Paul Jones, director of architecture, programmes and operations. Mr Jones said that the claimant was trying to find out who had brought the grievance and that Ms Decker was distressed by his enquiries. Ms Shah agreed to speak with Ms Decker and rang her that day. Ms Decker told Ms Shah that she was worried about coming into the office because of how the claimant was behaving and was tearful. Ms Shah told Ms Decker that she would be looking into the case.
116. Ms Shah then had discussions with Ms Gardner and looked at the investigation notes which she told the Tribunal she felt showed consistent evidence of the inappropriate behaviour by the claimant. Ms Gardner expressed concern that Ms Decker's concerns had not been fully addressed and that her identity had not been disclosed to the claimant.
117. On 24 October 2018, Ms Gardner wrote to Ms Shah asking if there was an update as to who the new grievance manager would be. Ms Shah wrote back to ask if they could speak as she was not sure why they would be starting again with the investigation as it appeared Mr Hunt had interviewed everyone he could and needed to make a decision.
118. On 25 October 2018, Ms Gardner sent an email to Ms Shah:

I raised concerns with Charlene around Phil's impartiality as it came to light that he attends business meetings with Kirsty and Peter, and clearly we need to demonstrate that we have appointed an independent manager to hear grievances. This would usually be someone from outside of the business area and a manager with no knowledge of the employees concerned. In addition to this Kirsty has expressed dissatisfaction with Phil as the hearing manager and has been very upset with Charlene around this I understand last week.

You'll note that despite interviewing Peter, Phil has not mentioned who has raised the grievance, and also has not asked specific questions in order to address Kirsty's concerns, therefore has not given Peter the true right of reply.

As a result he is now stating he feels victimised.

In order to progress with this matter and deliver an outcome we need to be in the position of being clear with Peter who has raised the grievance and specifically what concerns they have raised around his behaviour. To date this has not been

done, and therefore we are treating Peter unfavourably. If Kirsty wishes to remain anonymous then we are unable to progress the grievance for her.

I don't feel that Phil has adequately addressed any of the points Kirsty has raised in her grievance with any of the witnesses as there is lack of clarity around the questioning / closed questions and therefore difficulties will arise in him being able to provide responses to the points she has raised.

In my view we need to get a new manager in place for this as swiftly as possible in order to address Kirsty's concerns in the right way and draw this matter to a conclusion as it has now been going on for some time.

119. Ms Shah said in evidence that she did not feel there was a need for a new manager as Mr Hunt had not had day to day involvement prior to drafting his outcome letter. She did not feel he had been biased or conflicted. She did not believe the decision not to disclose Ms Decker's identity was unreasonable given the concerns which Ms Decker had expressed. Her discussions with Mr Jones and Ms Decker made her conscious of the effect the ongoing process was having on those involved. She did not feel the grievance had been substantively unfair. She did not in essence feel that starting the grievance process again was justified. Ms Shah's evidence in her witness statement did not grapple with the issues which Ms Gardner had, correctly in our view, raised about the failure to put the concerns clearly and in detail to the claimant.
120. As we have said, Ms Shah is an HR professional and when cross examined about the detail of inadequacies in the grievance investigation appeared to be very uncomfortable and tended to give generic or evasive answers.
121. Ms Shah then met with Mr Spiers. They discussed the grievance and the claimant's PIP. They discussed the fact that Ms Decker was increasingly upset and needed an outcome to her grievance. Mr Spiers told her that he was trying to keep the claimant and Ms Decker apart as much as possible as the claimant was still trying to work out who had brought the grievance but this was increasingly difficult. She said that they both took the view that there was clear evidence of serious misconduct by the claimant.
122. Ms Shah said that she and Mr Spiers decided together that it was not sustainable to continue the claimant's employment, primarily because of the conduct issues but also because of the performance issues. They agreed that the evidence against the claimant supported a finding of gross misconduct. Ms Shah said that there was a performance gap in a very important area of work and also evidence of aggressive behaviour not consistent with the respondent's values. The two together meant the claimant was not the right person for the role. Ideally the grievance would have been restarted but the situation had become untenable as both parties were distressed and it was not possible to separate their workloads much longer. The grievance had become public because the claimant was asking questions. She said a female employee with the same allegations and the same performance issues would have been treated in the same way as the claimant.

123. Ms Shah said that, had the claimant had two years or more service, it was likely that he would have been invited to a disciplinary hearing before a final decision was made. She said that the respondent rarely followed the disciplinary procedure in relation to employees with less than two years' service. She told the Tribunal that she could think of two women and one man with under two years' service whose employment had been terminated without a formal process over the last year. These appeared to be cases of poor performance.
124. When asked by the Tribunal whether the fact that an individual had a protected characteristic which was perceived as more likely to put the individual at risk of discrimination such as having a disability or being from a minority ethnic background played a role in a risk assessment of whether it was 'safe' to dismiss without due process, Ms Shah said it did not. It might however play a role in the level of settlement offer made.
125. Ms Shah told the Tribunal that her experience was not that men tended to be more aggressive than women; she had seen all gender combinations in terms of complaints. Grievances about aggression often involved a difference in seniority with a more junior staff member feeling that a senior colleague or manager was being aggressive.
126. Mr Spiers had not dismissed an employee before although he had been otherwise involved in disciplinary processes. Mr Spiers told us that he felt the situation had become untenable in the very small team. Both the claimant and Ms Decker had spoken to him and both were distressed and frustrated by the situation. He said that the conduct situation on its own would probably have led him to the view that the claimant should be dismissed. He considered that three people had supported an allegation of aggressive and bullying behaviour by the claimant. If there had just been the performance issues, they would probably have led to a formal performance procedure. He told the Tribunal that he did not believe he had seen the email which set out Ms Gardner's concerns about the grievance process.
127. On 30 October 2018, the claimant had a meeting with Mr Hunt. He told the Tribunal that Mr Hunt said to him that he thought the grievance allegation was going away and that Mr Hunt had been removed from the grievance because he had attended meeting with the claimant and the grievant. Mr Hunt did not recall this conversation and said he could see no reason why he would have said that the allegations were going away.
128. On 31 October 2018, Ms Shah emailed Mr Spiers:
Thanks for your time today.
As discussed, due to problems with the initial investigation into the grievance and concerns over Peter's behaviour and performance in general, I recommend that we terminate his contract of employment. Although ideally, Bupa would follow due process, given his length of service is under 2 years, the risk to the business is low.
I would recommend that we follow a "Without prejudice" conversation with Peter. Peter is on 1 months' notice and I would suggest that we offer 3 months as

severance pay. This would amount to £15,435. Under HMRC rules, this payment can be made free of tax and NI.

If you are happy to proceed, I'll get all the paperwork drawn up.

129. Mr Spiers then wrote to a more senior manager, Mr Flanagan, to seek approval of the proposal on 1 November 2018 and Mr Flanagan confirmed that he was happy with the proposal if Mr Spiers and Ms Shah were.

130. So far as the claimant's progress with the PIP was concerned, Mr Spiers' evidence was that the claimant's progress was 'ok' but some of the dates for objectives in the PIP were not met. In particular the claimant was supposed to have completed all of the activities in the IROM plan by the end of October 2018 so it could be handed over. There were a number of matters outstanding. Mr Spiers said that there were therefore outstanding performance concerns. He did not accept in cross examination that the delays were not the claimant's responsibility.

131. The claimant's evidence was that he had been working closely with the stakeholders and Mr West in particular was keen that the claimant provide ongoing assistance to Bupa Global.

132. On 2 November 2018 the claimant had a PIP review meeting with Mr Spiers. The claimant raised a concern about the uncertainty which he was working under.

133. Ms Shah prepared a script for Mr Spiers to use at a dismissal meeting:

Thanks for meeting with us today. I've asked Deepa Shah, our new People Partner, to be present at this meeting to help us work through the situation we face.

- *As you know, there have been a number of concerns over your behaviour as well as your performance. Recently Bupa has started a formal investigation over allegations of bullying and harassment.*
- *The allegations are serious enough for us to considering whether they would result in dismissal for gross misconduct*
- *This is coupled with our on-going concerns over your performance, as you know, you are currently on a coaching plan*
- *We have numerous sources alleging that the behaviours you display, in particular to females, is unacceptable and against our Bupa Code.*
- *Deepa and I have discussed this at length, and whilst we could continue down the formal processes of completing the grievance investigation, followed by a disciplinary and then a termination, in conjunction with your performance issues, the impact and disruption to the team and the wider team make the situation untenable for us now.*
- *Therefore, we have asked you here today to notify you that we will be terminating your contract of employment with Bupa effective immediately.-*

134. A letter of dismissal was also prepared containing the following passage:

Following the investigation meetings regarding allegations of bullying behaviour, I am writing to confirm my decision to terminate your employment without notice on grounds of gross misconduct and unsatisfactory performance.

I have considered the evidence put forward as part of the investigation. The reason I have decided to terminate your employment is that: There are allegations of bullying behavior that appear to have merit as well as concerns over your attitude towards females. In addition to this, I have concerns over your underlying performance.

Whilst I have considered all of the sanctions available to me, including issuing you with a final written warning and further training, I have concluded that these were sufficiently serious breaches of your obligations to warrant dismissal.

135. Both Ms Shah and Mr Spiers struggled to explain the references in these documents to concerns about the claimant's behaviour towards women, a charge which Mr Hunt had not found to be substantiated. Challenged about what was said to be the inadequacy of evidence of aggression by the claimant, Mr Spiers said he also took into account Ms Mansell's account of his behaviour towards her.
136. On 6 November 2018, Ms Shah and Mr Spiers met with the claimant. They told him he was being summarily dismissed and gave him a copy of the dismissal letter.

Law

Sex discrimination

137. 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.
138. 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.
139. 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. “

140. 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.

141. 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.)
142. 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.
143. 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.
144. 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.
145. Mr Greaves also referred us to Eagle Place Services Ltd and ors v Rudd [2010] IRLR 486, EAT in which the EAT upheld a tribunal decision which rejected the respondent's explanation for unreasonable treatment of the claimant. That explanation was that there was a culture within major law firms to summarily dismiss highly paid employees and then negotiate a settlement package with them.

146. 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.
147. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.
148. Where a hypothetical comparator is relied on, the question of whether the claimant was treated less favourably than someone without the relevant protected characteristic is often intertwined with the 'reason why' question and it may be appropriate to decide the two issues together: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.
149. In order for a tribunal to conclude that an alleged discriminator has been motivated by stereotypical views based on a protected characteristic, there must be a reason to conclude that the alleged discriminator has those stereotype views: B and anor v A [2010] IRLR 400, EAT.

Submissions

150. We were provided with written and oral submissions by both parties and have carefully taken these into consideration. We refer to them below only insofar as is necessary to explain our conclusions.

Conclusions

DIRECT SEX DISCRIMINATION

In relation to paragraph 35 Grounds of Claim:

Issue: Is Coralie Smith an appropriate comparator in that there was no material difference between the circumstances of Ms Smith and the Claimant aside from sex?

151. As formulated the complaints of less favourable treatment in respect of which Ms Smith is advanced as a comparator are:
- Being formally investigated for bullying;
 - Being dismissed because of allegations of bullying.

152. We concluded that Ms Smith was not an appropriate comparator. The most obvious material difference between her circumstances and those of the claimant was that a formal grievance was brought against the claimant and no such grievance was brought against Ms Smith. On our findings of fact, the claimant did not raise a formal grievance about Ms Smith. On the only occasion when he raised matters with Ms Mansell which might have been interpreted as bullying behaviour by Ms Smith, she properly referred him to the grievance procedure and explained that he could bring a formal grievance or an informal one. He did not choose to bring a grievance of any sort. We found no material difference between the support which Ms Mansell provided to Ms Decker and that which she provided to the claimant.
153. If Ms Smith was not an appropriate comparator in relation to the complaint about grievance investigation, she was even less appropriate in respect of the complaint about dismissal. Not only was there no formal grievance raised against Ms Smith, nor, on the evidence we heard, were there any performance concerns or a performance improvement plan in place in respect of Ms Smith. Ms Smith did not have under two years' service. Those were all material factors in the decision to dismiss the claimant which did not apply to Ms Smith.

Issue: If so, did the Respondent treat the Claimant less favourably than Ms Smith or a hypothetical comparator in that his alleged complaints regarding bullying by Ms Smith were not investigated but complaints made of bullying against the Claimant were investigated by the Respondent?

154. Since Ms Smith was not an appropriate comparator, we considered whether a hypothetical female comparator would have been treated differently from the claimant.
155. As the submissions on behalf of the claimant were developed, it appeared that there were two related complaints – that complaints of bullying against the claimant were investigated and that his complaints of bullying were not investigated.
156. In relation to the first complaint, the appropriate hypothetical comparator would be a woman against whom complaints of bullying in the form of a formal grievance were made. There was simply no evidence from which we could reasonably conclude that the complaints made against such a woman would not have been investigated. The evidence we had from Mr Hunt about the case he was involved in showed that when a formal grievance about bullying was brought against a woman, that grievance was investigated by the respondent.
157. The flipside of that question was whether a woman who had had similar discussions with Ms Mansell and others to those which the claimant had had would have had her complaints investigated. Our findings of fact were in essence that on the only occasion when the claimant raised with Ms Mansell a complaint about Ms Smith which seemed to be a potential grievance, she gave him appropriate advice about how he could raise the matter as a grievance. Again we could see no facts from which we could reasonably conclude that female employee would have been treated any differently.

158. It was suggested that the claimant had also raised his complaints to Ms Smith herself but it was not suggested to us in submissions that Ms Smith treated him differently then she would have treated a woman because she would have reported herself to HR had the claimant been a woman making similar complaints; we would have rejected such a submission. It was further said that he complained to Mr Spiers. Our findings of fact as to what was said to Mr Spiers are as set out above; there was nothing that should have provoked a grievance investigation and in any event Ms Smith had left the employment of the respondent by this point. We can see no facts from which we could conclude that a woman in the claimant's circumstances would have been treated differently.
159. We did not uphold this complaint.

Issue: In that the Claimant was dismissed following such allegations being made and no action was taken against Ms Smith / would have been taken against a hypothetical comparator

160. We have found that Ms Smith was not an appropriate comparator. We consider the question of whether a hypothetical comparator would have been treated differently in this respect below in relation to the final issue which is a duplicate of this one.

Issue: if the Respondent did treat the Claimant less favourably than Ms Smith / or a hypothetical comparator, was this because of his sex?

161. Based on our conclusions above, this issue does not arise for consideration.

In relation to paragraph 36 Grounds of Claim:

Issue: Is Kirsty Decker an appropriate comparator in that there was no material difference between the circumstances of Ms Decker and the claimant aside from sex?

162. We concluded that Ms Decker was not an actual comparator – there is a material difference between the person who raises a grievance and the person whom the grievance is directed against. That is not to say that both are not entitled to procedural fairness and we considered Ms Decker as an evidential comparator. We also considered whether Ms Twaites was an actual comparator in respect of one of the allegations below.
163. In looking at the allegations, it was relevant to us to make findings about Mr Hunt's handling of the grievance generally and these inform our conclusions on the individual issues. We found that he came to the grievance with a total lack of experience and training. He simply had no notion of how to conduct an investigation in a reasonably forensic manner. He then received little support from HR in terms of his day-to-day conduct of the investigation.
164. Mr Hunt formed the sort of very broad brush views about the truth or otherwise of the complaints that someone who has not been trained to do an investigation might easily form – if there was some evidence which supported Ms Decker's

allegations from apparently credible witnesses, he accepted that the allegations were probably true. Ms Smith whom he had know professionally for some time had supported Ms Decker's account and Mr Baig had also supported them in a generic way.

165. We accepted his evidence about his own experiences of bullying and that he certainly had no conscious perception that men were more likely to be bullies / behave aggressively than women.
166. It was also relevant to us in our understanding of Mr Hunt's mindset and approach that he changed tack when he believed he saw evidence which might cast doubt on his earlier conclusions, ie the behaviour of the claimant and Ms Decker in a meeting which he attended. He then sought further advice and intended to continue his investigation. Overall, it appeared to us that what he did unreasonably, he did out of what appeared to us to be an utter lack of experience and training combined with lack of a naturally forensic approach. We were careful however to consider whether there was any evidence before us which tended to show that his lack of experience and training were the doorway through which conscious or unconscious sex-based decisions were able to slip in.

Issue: if so, did the Respondent treat the Claimant less favourably than Ms Decker in:

allowing Ms Decker to be accompanied to the investigation meeting regarding her grievance but not inviting the Claimant to be accompanied to his investigation meeting?

167. We considered this issue also in relation to comparison with a hypothetical comparator and with Ms Twaites.
168. The facts were that Ms Decker was accompanied. Two witnesses were notified they could be accompanied - Mr Baig and Ms Twaites. Absent special reasons not to, it was clear that Mr Hunt offered witnesses accompaniment regardless of sex.
169. Mr Hunt accepted in cross examination that his rationale for not allowing the claimant to be accompanied was unsustainable. Did that unreasonableness cause the burden to shift?
170. We bore in mind that Mr Hunt had taken the view that Ms Decker was genuinely fearful of the claimant – a view which seemed to Mr Hunt to be supported by his own observations. The fact that Mr Hunt was able to see, when skilfully questioned, that allowing the claimant to have a companion was not likely to reveal to the claimant that it was Ms Decker who had complained did not persuade us that this this was not genuinely his thinking at the time. He was concerned that alerting the claimant to the formality of the meeting might tip him off that Ms Decker had brought a grievance; we could understand his thinking even if it was muddled. Inviting the claimant to a formal meeting might cause him to start wondering about the nature of the meeting – it might occur to him that someone had brought a grievance, he might conclude that person was Ms Decker. Had Mr Hunt had sufficient HR support, no doubt his approach would have been challenged and he would have taken a different view of what was appropriate.
171. Were there facts from which we could conclude that Mr Hunt would have taken a different approach if the sexes had been reversed? We could see no such facts.

Mr Hunt's actual evidence, which we accepted, showed he had no reason from his own experience to cast men in the role of aggressors and women in the role of victims of aggression in the workplace. We considered that his unreasonableness was explained by the factors we identified - a lack of experience, training and support.

172. We did not uphold this complaint.

Issue: allegedly interviewing those witnesses suggested by Ms Decker but not interviewing the witnesses requested by the Claimant (para 36.2 Grounds of Claim)?

173. We looked at Ms Decker as an evidential comparator but the appropriate actual comparator would have been a woman who was subject to similar complaints to those levelled against the claimant. The claimant says that Mr Hunt interviewed the witness suggested by Ms Decker, Ms Twaites, but did not interview a list of 'character' witnesses he proposed.

174. We accepted that Mr Hunt was intending to interview Ms Twaites in any event. She was the final person present at the 23 August meeting which formed a central part of the complaints. He also asked more general questions about her impression of the claimant. In his witness statement, Mr Hunt had said he did not interview any witnesses from the claimant's list because he was not interviewing general character witnesses, but in oral evidence he told us that he would have gone on to do further interviews once he had become less certain about his findings, had he not been taken off the grievance.

175. Ms Twaites was not a pure character witness – she was a witness to the relevant meeting whom Mr Hunt asked more general questions about the claimant. That was Mr Hunt's approach with all of the witnesses he spoke to.

176. The question for us was whether, had a woman in the claimant's position suggested a list of potential general witnesses to her behaviour in the workplace, Mr Hunt would have acted differently and interviewed those witnesses. It seemed to us that there was no evidence from which we could reasonably conclude that he would have. Due to his lack of experience, training and support, he initially finished his investigation when he felt he had enough evidence to broadly support the complaints which had been made. It was not at all clear to us in any event whether a reasonable investigation would have included interviews of some or all of the people the claimant had proposed. Because Mr Hunt had failed to define the terms of the investigation and identify which actual incidents he was considering, it was not possible to tell what further witnesses might have been necessary and indeed the extent if any to which a wider view of the claimant's behaviour in the workplace would have been relevant to that investigation.

177. Again there were simply no facts from which we could conclude that sex played a role in Mr Hunt's thinking and we did not uphold this complaint.

In relation to paragraph 37 Grounds of Claim:

Issue: Was the Claimant treated less favourably than a hypothetical female comparator against whom allegations of bullying behaviour that appear to have merit were made and against whom concerns over their attitude to males were raised, in that:

a comparator would have been informed of the allegations which raised concerns over their attitude to men whereas the Claimant was allegedly not

told how the allegations regarding his attitude to women were arrived at (para 37.1 Grounds of Claim)?

Issue: Whether a comparator would have been permitted to put forward her side of the events when the Claimant was allegedly not given any explanation of the complaints so was allegedly unable to defend himself (para 37.3 Grounds of Claim)?

178. We considered these two issues together because they covered the same ground: the fact that the claimant was not provided with details of the complaints made against him so that he could provide a response and state a case in relation to clearly articulated complaints.
179. Although in his statement Mr Hunt said that he had given the claimant all necessary information, his oral evidence was otherwise. He agreed with Ms Gardner's assessment of his investigation, in particular that the claimant had not had a right to reply. Some points were not put at all to the claimant, for example the allegation of treating women differently from men, or indeed specifics about the tone of emails.
180. We bore in mind that Mr Hunt had not even realised it was necessary to interview the claimant at all before reaching his conclusion.
181. Mr Greaves urged us to find that the explanation for the manifest unreasonableness of the investigation in this respect was stereotyping assumptions made by Mr Hunt that men were aggressive and women the victims of that aggression. The difficulty was that the actual evidence we had about Mr Hunt did not suggest that he had any such stereotypes. The more natural explanation for his unreasonable conduct of the investigation in this respect was what we found to be his lack of understanding, through lack of experience and training, of what the rudiments of a fair investigation might look like.
182. We did not uphold this complaint.

Issue: Whether a comparator would have been told the name of the grievant when the Claimant was not told the identity of the grievant (para 37.2 Grounds of Claim)?

183. Ms Gardner formed the view that the claimant should be told the name of the grievant if the grievance was to be pursued. This was advice which Mr Hunt should usefully have been provided with at the beginning of the process rather than at the end. He was woefully ill-served by the HR support he received. It was clear to us that he was genuinely concerned that Ms Decker was fearful of the claimant and conscious of the fact that the claimant and Ms Decker were operating in a very small team. Was there any evidence from which we could conclude that he would have acted differently if the sexes of complainant and person complained about had been reversed?
184. Again, we could see no such evidence, could see no evidence of stereotypical assumptions or from which we could reasonably draw the inference of stereotypical assumptions and ample evidence that Mr Hunt conducted an unreasonable process because he had no idea what a reasonable process should consist of.

185. We did not uphold this complaint.

Issue: Whether a comparator would have been subject to a reasonable investigation before being dismissed whilst the Claimant was allegedly not subject to a reasonable investigation before being dismissed (para 37.4 Grounds of Claim)?

186. There were two aspects of the failure to conduct a reasonable investigation prior to the claimant's dismissal: Mr Hunt's initial inadequate investigation and the failure, once Ms Gardner had pointed out that the investigation was not adequate, to conduct a new and fair investigation. In Mr Hunt's case, we have not found facts from which we could reasonably conclude that sex played a role.

187. We also scrutinised the conduct of Ms Shah and Mr Spiers, who decided not to conduct a further investigation and created documents setting out the rationale for dismissal which, as Mr Greaves pointed out, went further than Mr Hunt's conclusions in referring to concerns and evidence about the claimant's treatment of women. We were in no doubt that it was unfair to the claimant to have referred to this as a reason for dismissal in circumstances where there was no fair investigation into that matter and in fact no finding.

188. Given that the behaviour of Ms Shah and Mr Spiers was unreasonable, were there facts from which we could conclude that the unreasonable treatment was based on sex?

189. We considered that we had no actual evidence that either Ms Shah or Mr Spiers held the alleged stereotypical views about males and females and their participation in workplace aggression. Ms Shah's evidence about her actual experience was to the contrary. This was an area where because we were looking at a hypothetical comparator, it seemed to us that a Shamoon type approach was necessary – the question of whether the hypothetical female comparator would have been treated differently was entirely intertwined with the question of whether the treatment was because of sex.

190. We looked at the facts we had in the round – much time had passed since the grievance was raised as a result of Mr Hunt conducting a bungled investigation. The claimant and Ms Decker were both perceived to be unhappy as a result of the delay and lack of resolution. The issue had snowballed because of Mr Hunt's unfitness for the role he had been given and his lack of adequate support from HR.

191. The claimant was perceived as an undesirable employee because there was not only a grievance which was at the very least supported by evidence from other employees than the complainant, but also there were perceived performance issues reflected in the fact that he had been placed on the PIP.

192. The final piece of the jigsaw puzzle was that the claimant had less than two years' service and the respondent therefore believed he could be dismissed without a significant risk of him bringing successful Tribunal proceedings.

193. Essentially the driving forces behind the decision not to restart the investigation and conduct it fairly were a combination of Ms Shah looking for a way out of what had developed into a mess and her belief and the respondent's practice that it was acceptable not to follow a fair process with an employee who had less than

two years' service. The decision to proceed without a fair process was essentially treated by the respondent as a commercial decision. We did not consider these circumstances to be the same as the circumstances in Eagle Place in which the tribunal rejected the evidence given, on the particular facts of that case, about the alleged practice of major law firms and the respondent in particular in relation to a decision taken in the case of a long-serving employee who had the right not to be unfairly dismissed. It is not uncommon in the Tribunal's experience for employers to dispense with procedural requirements in the case of employees who do not have sufficient service to bring a claim for unfair dismissal. We do not condone that approach and we do not consider it was other than deplorable that this approach was taken in this case.

194. Additional unfairness was created by referring to evidence that the claimant was aggressive to women in particular; that seemed to us far more likely to have been included in the script and dismissal letter to bolster the reasons for proceeding as the respondent did in circumstances where we conclude that Ms Shah in particular would have been conscious of the unfairness of the process.
195. Had this been an unfair dismissal claim, the respondent would have been in grave difficulty defending it. However, when we looked at all the facts together, we simply could not see facts from which we could reasonably conclude that sex had played a role in the process. We were anxious to scrutinise the facts with care because it is undoubtedly the case that discrimination may be hidden under a cloak of incompetence and unreasonable decisions taken for commercial reasons. Equally incompetence is often simply incompetence and commercial decisions are just commercial decisions; the unreasonableness did not seem to us to be unexplained and we could not find facts from which we could reasonably conclude that the decision not to reopen the investigation was tainted by sex.
196. We did not uphold this complaint.

Issue If a comparator was dismissed at the end of the investigation, would she have been paid notice, whilst the Claimant was not paid for his notice period (para 37.5 Grounds of Claim)?

197. It was of course unreasonable for the respondent to have concluded that the claimant was guilty of gross misconduct so as to justify a summary dismissal with no payment of notice pay. The respondent did not call direct evidence on the conduct issues and conceded wrongful dismissal.
198. Mr Greaves again urged us to conclude that the only explanation for the unreasonableness must be stereotypical assumptions about sex – Mr Spiers and Ms Shah just assumed that men were likely to be aggressors and women to be victims and consequently treated the evidence gathered as sufficient to establish that the claimant was guilty of aggression, in particular towards women.
199. The difficulty with that submission was that the only evidence which might support it was the unreasonable treatment itself. The unreasonableness in this respect however seemed to us to be explained by the whole factual nexus we have outlined above. Having concluded that the way out of the mess which had been created was to terminate the claimant's employment with a settlement proposal, the respondent had committed itself to reliance on the inadequately investigated allegations which were the subject of the grievance. Furthermore, no doubt the respondent was in a better bargaining position to make a commercial settlement

with the claimant if the alternative was that he received nothing by way of notice pay.

200. We therefore did not find evidence from which we could reasonably conclude that a hypothetical comparator would have been treated more favourably than the claimant and this complaint is not upheld.

Issue: Was the Claimant's dismissal less favourable treatment because of his sex, contrary to section 13(1) EqA?

201. We have found that many individual aspects of the dismissal were unreasonable: the investigation was unfair; there were no reasonable grounds to conclude that the claimant was guilty of gross misconduct; the performance process was nowhere near a stage at which dismissal could fairly be contemplated.
202. We have however reached the conclusion in relation to each aspect of the unreasonableness that there were simply no facts from which we could properly conclude that the reasons for the unreasonableness were related to sex. It follows that we were unable to uphold this complaint.
203. If the parties are unable to agree the remedy for wrongful dismissal, they should write to the Tribunal jointly with dates to avoid for a half day remedy hearing.

Employment Judge Joffe
London Central Region
05/06/2021

Sent to the parties on:
07/06/21.

For the Tribunals Office