EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Wainwright**

Respondents: **(1) DST Financial Services International Ltd**
(2) DST Financial Services
(3) Mr Barrett
(4) Ms Kelly
(5) Ms Phillips

Heard at: **East London Hearing Centre**

On: **16, 17, 18 and 19 March 2021**

Before: **Employment Judge Jones**
Members: **Ms S Harwood**
Mr M Wood

Representation
Claimant: in person
Respondent: Ms Jennings of Counsel

JUDGMENT

The claimant was not dismissed. The claimant resigned. The complaint of unfair dismissal fails. The complaint is dismissed.

The complaint of breach of contract fails and is dismissed.

The complaint of age discrimination fails and is dismissed.

The complaints against the individual named respondents (3), (4) and (5) fail and are dismissed.

REASONS

Claim and Issues

1. The Claimant brought claims of unfair dismissal, sex and age discrimination. There was also a complaint of failure to pay holiday pay and breach

of contract relating 1 day's pay related to the notice. The claimant alleges that she should have been paid for 1 August 2019. The sex discrimination complaint was withdrawn and dismissed by way of withdrawal, at a preliminary hearing conducted by EJ Burgher on 10 March 2020.

2. The Tribunal was told at the start of the hearing that the holiday pay claim was withdrawn as the parties had resolved this issue between them.

3. The parties agreed a list of issues in this case. That list was in the bundle of documents at pages 67D to 67E of the hearing bundle and is referred to in detail at the end of these reasons.

Evidence

4. In this hearing, the Tribunal heard live evidence from the claimant.

5. From the respondent, the Tribunal had live evidence from Insia Valika who was Lead HR Business Partner for the SS&C/DST group during the claimant's employment; Collette Kelly, named respondent, Senior Director of Enterprise Change and the claimant's last line manager; Richard Barrett, named respondent, former Chief Operating Officer, who heard the claimants grievance; Michelle Hyatt, Head of Employee Relations; Kate Phillips, named respondent, Senior Employee Relations Specialist for the SS&C/DST group; Anthony Waring, Director, Client Change & Ops Transformation; Simon Tully, the Claimant's former line manager; and Nick Wright, CEO for the two legal entities.

6. The Tribunal had signed witness statements from all the witnesses who gave evidence.

7. The Tribunal made the following findings of fact from the evidence in the hearing. The Tribunal did not draw conclusions on all the evidence in the case but only made findings on those facts that are relevant to the agreed issues.

Findings of Fact

8. The claimant was employed by the Respondent companies as Director, Client Change. She began her employment in 2006. The Claimant's employment came to an end on 31 July 2019.

9. We find that there was a lot of respect for the claimant within the business and that she was held in high regard. She was clearly good at her job. She was also described by Nick Wright, the respondent CEO, as a strong performer.

10. On 17 April 2018, the claimant wrote a letter of resignation. She confirmed that she was giving three months' notice. The letter was addressed to her line manager, Simon Tully. The claimant handed the letter to Mr Tully.

11. This led to a discussion about the claimant's resignation during which Mr Tully told her that he had also recently resigned. It is likely that they had a good working relationship. They both agreed that there would be some instability for the team if they both left the respondent at the same time. That led to the claimant

having a conversation with Nick Wright on or around 23 April in which he queried the claimant's decision to resign.

12. Around this time, there were a number of discussions between the claimant and Mr Tully about her resignation. Mr Tully and Mr Wright were both agreed that there would be problems within their part of the business if both the claimant and Mr Tully left at the same time, so they were keen for her to stay. In those discussions various solutions to the issue were considered. It is likely that during those discussions the claimant indicated that she had been thinking of retiring and that she was leaving because she wanted a better work/life balance. She indicated that she would consider staying if she could reduce her time at work to 3 days a week. There was also a discussion about her bonus.

13. There were a series of emails in the hearing bundle, which showed that between the 11 and 18 May, there were discussions between Jo Penney, senior director of HR at the respondent, Lois Mclean, chief HR officer, Nick Wright, and William Slattery on this matter. The senior managers were informed that the claimant was interested in staying until '*year end'*, which at the respondent was 31 December. The discussions also included approval and payment of a retention/bonus payment, the payment date and the claimant going part-time.

14. On 16 May, Nick Wright emailed Mr Slattery and Ms Mclean. He stated that the claimant told *'us that she was retiring when Tully quit and was looking to go in June……we've persuaded her to stay until end of year but she wants a commitment on bonus. 20k would do it.'*

15. Eventually, they reached an agreement. The agreement was that the claimant would receive a bonus which would include her usual bonus, which would be paid out of sync with the usual way of agreeing and paying bonuses at the respondent. Bonuses would normally be paid in March.

16. The agreement was confirmed in a later email dated 18 May, in which Simon Tully stated that the claimant had agreed to stay in return for a £20,000 bonus payment. He asked that the agreement be made formal and summarised it as follows*: 'go three days a week, be a good citizen, get this bonus as long as you don't leave'*.

17. It is likely that in her conversations with Mr Tully, in April and May 2018, the claimant referred to her desire to retire and that this was part of the reason for her decision to resign. In her witness statement at paragraph 41, she confirmed that she told him that she did not want to stay beyond the end of that year, as she had been planning to retire, but that she would see how she went as time went on. It is possible, although he did not recall it, that he said to her during one of their conversations that she should keep her options open. It is likely that he also told her that she should ease herself into retirement to give herself time to gently wind down as well as ease the impact on the team of her leaving. It is likely that those statements were made before the parties reached their agreement as his intention in making them was to persuade her to stay. At the end of all these discussions, the claimant agreed to stay in the respondent's employment. The package that was agreed was that she would continue to work three days a week and be paid a retention/bonus payment of £20,000.

18. On 24 of May, a letter delivered to the claimant by hand from Jo Penney, set out the terms of the agreement. The main part of the letter which we focused on in the hearing, read as follows:

> *'Further to the recent discussions with Simon Tully following your resignation and subsequent retraction, I am writing to confirm you will be awarded a discretionary bonus of £20,000.00, subject to you remaining in employment with DST Financial Services International Ltd through to 31 December 2018 and satisfactory completion of activities as discussed with you. This bonus is inclusive of your DST Annual Incentive Plan discretionary bonus of £8,026.00 detailed in your 16th April 2018 Employee Statement. Subject to you meeting the above criteria, the £20,000.00 discretionary bonus will be paid on Bonus pay day, usually March 2018, and will be subject to statutory deductions (standard tax and N.I.)'.*

19. The letter also stated that the terms needed to remain confidential between the claimant and the respondent; which confirmed to the Tribunal that it was an unusual situation. The letter recorded that the claimant's hours would reduce from 37.5 hours per week to 22.5 hours and that her salary would reduce pro rata. The letter ended by stating that all other terms and conditions of the contract remained unchanged. The claimant was asked to sign and return a copy of the letter to the respondent.

20. It is likely that the claimant spoke with Simon Tully after she received this letter. The claimant's clear recollection was that he gave her the letter and that she gave it back to him once she signed it, following their further discussions. In live evidence, he did not recall seeing the letter but thought that it was likely that he had seen it. Like all the witnesses in this hearing, he was giving evidence two years after the events being discussed had occurred. Overall, Mr Tully's evidence was that the whole deal that he was part of negotiating between the company and the claimant was to see what could be done to persuade her to stay a bit longer, to ease the burden that would have been on the team if two senior managers left at the same time. It was never for her to stay on an indefinite basis.

21. On 1 June, the claimant wrote to Insia Valika, the HR business partner assigned to the team, to raise some queries on the email that she had received from Ms Penny. This gave us some insight into the claimant's understanding at the time, of the agreement that she had with the respondent. The claimant stated as follows:

> *'The latter states that I have retracted my resignation does that mean that I need to resign again 3 months before the end of the year? From my perspective I believe the agreement is that I leave at the end of December so, in effect, my notice period has been extended? But can you please clarify?'*

22. We find that the claimant's query was whether she needed to start the process of resignation again at the end of the year i.e. does she have to resign in October in order to leave at the end of December.

23. Ms Valika responded to the claimant's question about whether she needed to resign. In her email dated 5 June, she stated that the claimant would not need to resign but that her line manager would manage the situation with her, nearer the time. Although the claimant's evidence was that she was confused by Ms Valika's email, which we agree is not clear, she did not raise any query with Ms Valika about it at the time. She may well have spoken Tully about it but we had no evidence on what was said.

24. Although Ms Valika confirmed in the hearing that she had not seen Ms Penney's letter to the claimant dated 24 May, it is likely that she spoke to Jo Penney before responding to the claimant. Since they were both part of the respondent's HR support team, worked in the same office and Ms Penney was her manager, it would be unusual for not to have done so. Ms Valika decided that the only part of the email that she needed to respond to, was the question of whether the claimant needed to resign again at the end of her time with the respondent and her query on the holiday pay. That was why her response only dealt with those queries. In May 2018, there was no dispute between the parties. Ms Valika was asked to clarify whether the claimant need to resign again three months before the end of the year and she responded to that question.

25. On 10 June, the claimant signed a copy of Ms Penney's letter and return it to the respondent.

26. Once Mr Tully left the respondent's employment, he was not replaced. Instead, the Insurance and Funds Change teams were merged and in late July 2018, Collette Kelly took over the Senior Director role for the new merged Change function. Ms Kelly and the claimant had worked together before, in 2014.

27. During the handover from Mr Tully to Ms Kelly, he told her that the claimant had resigned around the same time as Mr Tully, that an agreement had been made with the claimant that she would stay until the end of December 2018 and that in the meantime, she was working a three-day week. Ms Kelly agreed that the claimant was very valuable to the organisation and had an awful lot of knowledge and experience. The claimant was working well and had a good performance review.

28. On 17 July, after a one-to-one meeting with Ms Kelly, the claimant sent her husband an email in which she expressed disbelief that Ms Kelly had asked her whether she really wanted to go at the end of the year.

29. We find it likely that the one-to-one meetings between them were conducted on a fortnightly basis, but we did not have any notes of those meetings.

30. By the time of the October one-to-one meetings, the claimant's mindset about work had changed. In their first October meeting, the claimant told Ms Kelly that she was happy and enjoying the three-day week. Ms Kelly informed her that she understood that she was leaving at the end of the year. She told the claimant that her role had not been budgeted for in the forthcoming year, 2019.

31. Ms Kelly told the claimant that she would try and get an extension to her contract to the end of the first quarter i.e. end of March 2019 as there was a lot of

work to do in the department, which both parties agreed the claimant could do. Although she was hopeful that she could stay on indefinitely, the claimant accepted the offer of work on the basis on which it was offered i.e. to end of March 2019.

32. We find it highly unlikely that Ms Kelly told the claimant that there had been a mistake in the budget or that not budgeting for her role was a mistake. In her written grievance the claimant referred to this conversation but did not state that Ms Kelly had told her that she had made a mistake. We also find that Ms Kelly was a senior manager within the respondent who was considered senior enough and responsible enough to take on Mr Tully's section of the business in addition to that which she managed before. If there had been a mistake, it would be a mistake of over £100,000 (if the claimant's wages and benefits are all added together) which would have been a serious matter. It is unlikely that someone of her seniority and responsibility would make such a mistake or if she had, it is unlikely that she would casually admit such a mistake to a direct report. We also had no evidence of a mistake having been made.

33. It is more likely, that when Ms Kelly took over that section, having been told that the claimant was leaving and being aware that the respondent was not going to replace her, she did not include the claimant or her role in the budget for the forthcoming financial year. The practice at the respondent which was not written policy but which we heard about from the respondent's witnesses, was that there was no automatic backfilling of any vacancies. The claimant did not challenge that evidence. The business of DST had been taken over by SS&C in 2017 and was in the process of reorganisation and consolidation. In that context, the senior managers had decided that they would not immediately replace anyone who left. Mr Tully was not replaced when he left. There were no plans to replace the claimant and no requirement to budget for her role for the new financial year that started in January 2019.

34. It was therefore highly unlikely that Ms Kelly told the claimant that she was going to go away and sort out the mistake in the budget. We find that there was no mistake and that Ms Kelly had not said that she made a mistake. There was nothing to sort out. We find it likely that the claimant hoped that Ms Kelly would be able to sort out a job for her or create a job for her but Ms Kelly had not promised to do so.

35. We also find it highly unlikely that during either of the one-to-one meetings in October 2018, Ms Kelly asked the claimant if she wanted to stay on indefinitely. It is more likely and is confirmed by Ms Kelly's actions after the 16 October meeting, that as the claimant was expressing a desire to stay in the respondent's employment, Ms Kelly offered to see if it was possible for her to stay to the end of Quarter 1 (Q1), 31 March 2019.

36. At the subsequent one-to-one meeting between herself and Ms Kelly in October, any hope the claimant had that she could keep her job or that Ms Kelly would secure her another job would have been thwarted as Ms Kelly told her once again that the post had not been budgeted for in the next financial year. It is at this point that the claimant said, *'Oh well, I've made my bed, I guess I'll have to lie in it'.*

37. They discussed various things that the claimant could do within the business but there was no discussion about any particular role either within Ms Kelly's department or elsewhere in the business. We find it likely that Ms Kelly suggested that in the process of change and reorganisation, there might be a post that could be suitable for the claimant and that in the meantime, she should look for other posts in other parts of the company. The claimant did not ask her for details of any particular post or what job she was referring to. We find it extremely unlikely that Ms Kelly promised the claimant anything in particular or that she agreed to the claimant staying on permanently.

38. Ms Kelly then enlisted the help of HR in getting an agreement to extend the claimant's contract until the end of March 2019. On 18 October 2018, Insia Valika emailed Jo Penney to let her know that the proposal was to *'extend the claimant til end of March'.* She asked whether it was necessary to get Nick Wright to confirm his agreement in an email. Ms Penney's response was that they should simply inform Mr Wright as '*it's not really an extension'*.

39. The claimant did not see this exchange of emails until she received the trial bundle.

40. Towards the end of 2018, Ms Kelly told the claimant that she needed to start to plan the transition of her responsibilities and activities elsewhere within the business. She told her that she would have to identify who, within the leadership team, they could be transitioned to. During January, Ms Kelly had more conversations with the claimant in their one-to-one meetings about the handover process in anticipation of her leaving date at the end of March. This was not a demotion but was in preparation for her leaving the company as had been previously agreed. Ms Kelly reiterated that the claimant's role would no longer exist after she left. The claimant had been informed back in October 2018 that the extension was only until the end of Q1 / early Q2 (31 March) 2019. Ms Kelly told the claimant that her responsibilities would be divided between Ian Russell and Anthony Waring, who were both directors in existing roles with responsibility for client delivery. The claimant was not happy about this decision.

41. After she spoke with the claimant, Ms Kelly arranged a meeting between herself, the claimant, Ian Russell and Anthony Waring to discuss how the process of transferring the work was going to be managed. The meeting happened on 31 January. In that meeting, Ms Kelly outlined that the claimant was retiring at the end of March and that they would need to review and reallocate the responsibilities across both of Mr Russell and Mr Waring's portfolios in a way that would make sense. The claimant did not complain to Ms Kelly, either in the meeting or afterwards, about her use of the word '*retire'*. It was also not something that the claimant complained about in their one-to-one meetings thereafter. However, the claimant was unenthusiastic about the transfer of her work in the way the respondent proposed as she believed that it was not a good fit. It was agreed that Messrs Russell and Waring had a lot of work on at the time. The claimant expressed to Ms Kelly that she thought that Mr Waring was more suited to the role but that Mr Russell was too project focused. But she did not indicate to Ms Kelly any surprise/upset about the mention of her retiring.

42. The claimant also did not dispute that she was leaving. It is likely that Mr Russell and Mr Waring were chosen to take on the claimant's work because they were delivering similar client change portfolios, had very similar roles to the claimant and were her peers in the respondent at director level. These discussions coincided with a larger reorganisation within the respondent.

43. Mr Waring's evidence was that he was aware that they had a small window of time to get all the information they needed from the claimant as she was leaving. He was aware that the claimant had a lot of knowledge and experience at the respondent and was keen to work with her to facilitate the process as well as possible.

44. Ms Kelly and the claimant discussed the possibility of extending her time at the respondent to the end of Q2; the 2nd quarter of the year, i.e. 30 June. The work that Mr Russell was engaged in was now estimated to end within the 2nd quarter of the year. The respondent needed him to complete the project that he was working on before he would have the capacity to progress the transition the claimant's work to himself.

45. The claimant and Ms Kelly met on 10 April 2019. This was a difficult meeting because Ms Kelly was aware that the claimant wanted to stay on. She proposed 31 May as the new date for the claimant's resignation to take effect. That date was set because the respondent hoped that by then Mr Russell would have completed the project he was working on, rather than by the end of June, and that he would be ready to accept handover from the claimant.

46. In setting that date, the respondent was aware that the claimant wanted to stay on indefinitely and was unhappy about it but Ms Kelly told her that her continuation into 2019 had been pushed as far as it could be. The claimant emailed her husband to tell him. She stated, *'looks like my time runs out at the end of May!!!'* She told him that she was feeling a bit wobbly about it. We find from that statement that she was aware that this was an extension and that it was unlikely that her time with the respondent would be extended any further.

47. Later that day she emailed Ms Kelly to query why she was not being given 3 months' notice, which she considered was her right. She attached the email that she had received from Jo Penney on 24 May 2018, which we referred to above. It is likely that she hoped it would confirm her entitlement to 3 months' notice. Ms Kelly had not seen that email before so when she received it, she came over to the claimant's desk and read it on the claimant's screen. She told the claimant that she would need to consult with HR and would get back to her.

48. Having not heard from Colette Kelly for 2 weeks, the claimant emailed again. They had a conversation on 24 April. Ms Kelly informed the claimant that the respondent would pay her three months' notice. She stated that as far as the respondent was concerned the claimant had resigned her employment back in 2018 and that the respondent had extended the end date as far as it was possible but that it was not possible to extend it any further. She reiterated that the claimant's role had not been in the budget for 2019.

49. The claimant was angry about this and the strength of her feeling is evident from a contemporaneous note that she sent to her husband a few days later. She stated that she felt that the respondent had used her when it was convenient but was now happy to terminate her without due process. The claimant stated that she had told Ms Kelly that she considered that this was a redundancy situation and that as she was permanently employed on a part-time basis, with no end date and no changes to her terms and conditions, the respondent should have gone through a redundancy process to terminate her contract.

50. They had another 1:1 meeting on 29 April during which Ms Kelly confirmed that the claimant's employment would come to an end on 31 July 2019. The claimant's expressed her anger at the respondent's decision not to keep her on. The claimant asked for the respondent's decision to be put in writing so that she could get some legal advice on the situation. Ms Kelly was clear with the claimant that her role had been cut from the 2019 budget because of her resignation and the agreed termination date at the end of 2018. The claimant continued to express her unhappiness about this. Ms Kelly stated in the meeting *'you were retiring. You were going'.*

51. On 1 May, Ms Kelly emailed the claimant to confirm a three-month notice period and that her final working day would be 31 July 2019.

52. Ms Kelly and the claimant continued to have 1:1 supervision/reporting meetings. They had worked well and got on well, until a 1:1 meeting on 13 May. Ms Kelly sent a summary of that meeting to Insia Valika in HR. The note records that the claimant was still very angry at the respondent and that she stated that Ms Kelly had '*fired'* her and '*terminated'* her. It is likely that this was a heated meeting. Ms Kelly stated that she wrote the letter on 1 May as the claimant had asked for a letter confirming the notice period. The claimant countered that she thought that there had been an agreement in December that she would remain employed as she expressed a desire to stay. She considered that from then on, her resignation was no longer valid. Ms Kelly remembered the conversation differently as it was in this conversation that she told the claimant that her post had not been included in the 2019 budget.

53. On 15 May, the claimant went to HR to see Jo Penney, the respondent's HR director. She was visibly upset. They were in a meeting for approximately 2 hours. The claimant expressed her feelings to Ms Penney about the situation. At the end of their meeting, Jo Penney told the claimant that although it might be too late for a grievance, she had the right to raise one and she should go ahead and do so. She explained the procedure that would be followed in addressing a grievance. This was reiterated in an email from Michelle Hyatt, Head of Employee Relations, later that day. She confirmed that the respondent proposed to address the claimant's concerns as a grievance and it would appoint an independent manager from the business to hear the claimant's grievance, supported by the HR team.

54. The claimant also instructed solicitors to correspond with the respondent on her behalf. On 30 May, the claimant's solicitor wrote to Ms Hyatt. She asked to be involved in everything related to the '*dispute which has arisen'*. In her reply,

Ms Hyatt stated that as this was an internal matter, the respondent would continue to correspond with the claimant, who could choose to consult her solicitor on the contents, if she wished. Ms Hyatt stated the same in a letter to the claimant.

55. Around this time Richard Barrett, the respondent's chief operating officer, decided that he wanted to retire. This led to some discussions around the structure of the operating team and the potential for the claimant's team and their responsibilities. The claimant was not involved in those discussions. After discussions between Mr Barrett, Christine Nott and Nick Wright, the respondent decided that there were synchronicities between Ms Nott's event management team and the work done by the claimant's team. The respondent decided that it would be better for the business as part of the wider reorganisation that was happening; to merge the claimant's team with Ms Nott's team rather than divide the work between Mr Russell and Mr Waring, as had originally been proposed. The claimant assumed that Ms Nott was around 50 years old but we had evidence in the hearing that showed that in July 2019, Ms Nott was 57 years old.

56. On 18 June, during one of their 1:1's, Collette Kelly spoke to the claimant about this latest development. The claimant was not happy about it as she felt that Ms Nott's team was not a good fit for her team. However, she agreed to work to make it happen and Ms Kelly fixed a meeting between herself, the claimant and Ms Nott for 24 June. The claimant continued to voice her concerns about the proposal.

57. On the following day, the claimant put her grievance in writing, addressed to Ms Hyatt. We find that it is likely that at the time she brought her grievance, the claimant had obtained some legal advice on her employment relationship with the respondent. In her grievance letter, the claimant recited the history of her resignation, the discussions she had with Simon Tully after the resignation and with Ms Valika once she had received Ms Penney's email; all of which we have already set out above. She wrote that, in a conversation with Collette Kelly in December 2018, Ms Kelly had asked her if she was happy to stay on indefinitely. We found above that it was unlikely that Ms Kelly asked her that question. She made no reference in the grievance to being told, in the conversation in December 2018, that there was no budget for her job. Instead, she stated that it was in a conversation in February 2019 that she was told that there was no budget for her job and this was said in conjunction with her being told that her work would be split between two male managers.

58. She did not, as she later submitted to the Tribunal, make the point in her grievance that even if her role was redundant, she should not have lost her employment. That was not part of her grievance.

59. In her grievance, the claimant alleged that the respondent's treatment breached the company equal opportunities and dignity at work policy. She also alleged that Ms Kelly had committed gross misconduct under the respondent's disciplinary and capability procedure. She alleged constructive unfair dismissal and unlawful discrimination on the grounds of age and sex by the respondent and by Ms Kelly.

60. When the respondent received the grievance, it was the beginning of the holiday season when senior employees usually take leave from the business. The claimant had herself taken some leave just before she sent in her written grievance. The respondent was mindful of the fact that it had to find an employee who was senior to the claimant to conduct her grievance hearing. Nick Wright had to be excluded from the list of managers who could conduct the hearing as he had been involved. Those factors made it more challenging to find a manager who could conduct the grievance hearing.

61. On 19 June, Michelle Hyatt wrote to the claimant to inform her that Richard Barrett had been identified as a manager who could conduct the grievance hearing. However, he had little to no space in his diary to fit it in. As a result, the claimant did not get a full day's notice of the grievance hearing. In the Tribunal hearing, Mr Barrett stated that the respondent would always try to give 2 to 3 days' notice of a grievance hearing but on this occasion, it was not possible. At around 4pm on 25 June the claimant was invited by email to a grievance hearing which was due to start the following morning. When she received the invitation, the claimant telephoned Michelle Hyatt to protest at the short notice. She said that it was unreasonable.

62. Ms Hyatt explained that it had been difficult to get time in Mr Barrett's diary. She told the claimant that if she was willing to wait, the appointment could be re-arranged but that it was likely to take a couple of weeks before he would be available as he also had holidays booked. The claimant felt that she had little choice but to go ahead with the scheduled meeting. She was unable to take the colleague of her choice as the notice was too short, but she was able to take another colleague. Kate Phillips of HR attended to support Mr Barrett.

63. The respondent's grievance policy was in the bundle of documents. It stated that its purpose was to ensure that employees could raise issues of concern, which it had not been possible to resolve in the course of the normal day-to-day work. The policy outlined a two-step process to be followed if the employee wished to invoke a formal procedure. In summary, in the 1st step, the employee would set out the grievance in writing, the company would then investigate the grievance and arrange a hearing, as soon as possible. The employee had a right to be accompanied to the grievance hearing, either by a colleague or by a trade union representative. The policy did not set out the amount of notice an employee should be given of the grievance meeting. At the end of the grievance meeting, the manager who conducted it, would confirm the outcome in writing and if the employee was unhappy with the outcome, they had the right to appeal. The 2nd step was the appeal process. The employee had to submit an appeal within 5 days of notification of the grievance decision. The manager hearing the appeal would be a manager not previously involved in the original decision. The manager hearing the appeal would discuss the matter with the employee and give a decision in writing as soon as reasonably practicable. That would be the final decision in the process.

64. Richard Barrett had experience conducting grievance hearings. However, he confirmed in the hearing that he had not had training in investigating grievances involving allegations of discrimination. The respondent was aware that the

claimant's grievance contained allegations of sex and age discrimination and that it had breached its own equal opportunities and dignity at work policy.

65. We find it likely that the meeting took approximately 30 minutes, as reflected in the minutes in the bundle. At the start of the meeting, Mr Barrett asked the claimant if she was prepared to continue as it was clear that she was unhappy about the short notice. She confirmed that she was. Mr Barrett intended to conduct the grievance in two parts. He would first meet with the claimant to find out as much as possible about the grievance, then conduct an investigation and if necessary, meet with the claimant again to clarify anything that came up in the investigation. In their first meeting on 26 June, he stressed to the claimant that allegations of discrimination were serious and that she would need to prove it to him. Ms Phillips told us in the hearing that it is likely that she advised Mr Barrett that he should tell the claimant that these were serious allegations and that she would need to prove them. He asked her if she had any evidence that would support her allegations. The claimant was taken aback by his direct approach. We find that he also gave her an opportunity to explain her grievance and tell her story.

66. It was agreed between the parties that the claimant got upset in the grievance meeting. We find it likely that she experienced Mr Barrett as direct and abrupt but Ms Phillips' evidence was that it was not unusual for someone raising a grievance to get upset in the meeting as they would have strong feelings about it all.

67. In relation to the discrimination allegations, she said that it was '*more of a feeling'*. She had also referred to the '*dynamics in the team'* as her reasons for feeling that she had suffered discrimination on the grounds of age and sex. He asked her for details of her complaint against Colette Kelly and how she felt the equal opportunities and dignity at work policies had been breached. Mr Barrett's evidence in the hearing was that because the claimant was unable to give any evidence around her discrimination complaints, it was difficult for him to take her complaints forward or investigate them further. The claimant talked about her role as though she was in a redundancy situation. For instance, she used the term '*selection process'* and asked if there are 5 members of staff and one needs to go; how did the respondent select that person?

68. We find it likely that that at the end of the meeting, Mr Barrett asked her what outcome she wanted. The claimant stated that she wanted a settlement package. He was not in a position to offer her a settlement. He told the claimant that he would soon be in touch with the decision but that firstly, he needed to speak to Collette Kelly, Jo Penney, Nick Wright and Insia Valika.

69. Mr Barrett was away on leave quite soon after the grievance meeting. He met with Ms Kelly on 1 July and with Messrs Russell and Waring on 9 July. A different person took the notes of his meeting with Ms Kelly which is why it is in a different font and format in the hearing bundle. In the meeting with Ms Kelly, Kate Phillips explained the difference between constructive and unfair dismissal. She is noted as saying that there was no constructive dismissal here. We find that this was not a preliminary judgment on the claimant's case. She was explaining the difference between constructive unfair dismissal and unfair dismissal which are different legal entities. The claimant's allegation was that she had been dismissed

by the respondent and therefore, the allegation Mr Barrett had to consider was whether she had been unfairly dismissed. The claimant did not raise a constructive unfair dismissal complaint in her grievance. There was no complaint of constructive dismissal in this case.

70. The claimant was involved in an awful road traffic accident on 6 July. She sustained multiple injuries, both physical and mental. She provided the respondent with a sick certificate, which was in the hearing bundle dated 8 July. She was signed off until 7 August.

71. Mr Barrett came to the conclusion quite soon after the grievance hearing that there was nothing in the discrimination complaints as the claimant had not been able to point to anything that she relied on to support them. He did not discover anything in his meetings with Ms Kelly or Messrs Waring and Russell that caused him to rethink that conclusion. In the draft grievance letter, which he prepared before meeting Ms Valika, he stated that he had been unable to find any evidence of discrimination. He had considered the dynamics of the claimant's team – as that is what the claimant stated gave rise to her belief that she had been the victim of discrimination – and found nothing to support her contention. He considered the age profile and gender profile of staff in the Change management team. It did not appear to him to be biased one way or another in terms of gender or of age.

72. In relation to the claimant's complaint of unfair dismissal, he wanted to speak to Ms Valika about that before he came to a conclusion. He considered that the claimant had resigned and that if she was going, her role would disappear as at the time, the respondent was not back-filling any roles that became vacant if an employee resigned. He was sure that the way the company was organised meant that once she resigned, the role would be taken out of the budget.

73. On 18 July, Michelle Hyatt telephoned the claimant to bring her up to date on the grievance process.

74. Mr Barrett met with Ms Valika on 22 July and spoke to Nick Wright on 23 July. Those meetings concluded his investigations. In the hearing he confirmed that he did not show Ms Valika the document the claimant referred to as the '*contract addendum'* (the letter dated 24 May from Jo Penney, which she signed) in the grievance investigation meeting. He believed that Ms Valika was aware of the letter. He did see the email exchange that the claimant had with Ms Valika. For him, the phrase *'retention and subsequent retraction'* in the 24 May letter was unhelpful. The letter did not clarify whether what had been retracted was the claimant leaving date or the whole resignation. He agreed with the claimant in the hearing that the letter did not give a specific end date and that it did say that all other terms and conditions remained unchanged. However, he considered that the claimant would have been on notice as she had not retracted her resignation. Even though the claimant told Ms Kelly that she wanted to stay on with the respondent, she never wrote to the respondent or her manager to retract her resignation. He concluded that even if the respondent's correspondence was unclear, the only correspondence from the claimant was her resignation and her agreement to the proposals in the letter dated 24 May. She never put a retraction of her resignation in writing to the respondent.

75. On 23 July 2019, the respondent sent the claimant a copy of the minutes of the 1st meeting she had with Mr Barrett. The claimant responded with some comments on the minutes, the most important of which was the incorrect spelling of her name. The claimant added some additional points she wanted to add to the minutes.

76. On 25 July, Mr Barrett conducted the 2nd meeting with the claimant. As she was off sick, this was done on the telephone. He was supported by Ms Phillips. He began the meeting by stating that he had concluded that there was nothing to her discrimination complaints and that he was going to focus on her complaint of unfair dismissal. He asked the claimant questions about what happened in 2018 in relation to her resignation and her expectations at the time. The minutes show that the claimant confirmed that she had resigned as there were particular personal circumstances going on for her at the time which led her to do so. They discussed the discussions that the claimant had with Mr Tully, Ms Valika and the various conversations the claimant how with Ms Kelly and in particular, in their 1:1 meeting in December 2018 and at the end of Q1. The claimant had the opportunity to comment on the information that Mr Barrett had gleaned from the interviews he conducted as part of his investigation of her grievance.

77. In that meeting the claimant confirmed that she did not wish to return to the company and that her leaving date would be 31July.

78. On 31 July, Kate Phillps emailed the claimant to let her know that Mr Barrett had reached a conclusion on her grievance. She was asked, as he was going to be on holiday for the next two weeks, whether she wanted to wait until his return for him to hold a meeting with her to give her the outcome in person or whether she would prefer to get it in writing. The claimant was already frustrated by the delay in the grievance process. She asked to have it in writing. The outcome was sent to her that afternoon.

79. In his letter dated 31 July, Mr Barrett concluded that the claimant's grievance was unfounded. He confirmed his decision that he could find no basis for the complaints of sex and age discrimination and that the claimant had not given him any specific examples or evidence of that.

80. In relation to her complaint of unfair dismissal, he concluded that the claimant resigned in April 2018 and stated her intention to retire. There had then been an agreement to the mutual benefit of both the claimant and the respondent, to extend her notice period to the end of December. He agreed that there was some unhelpful wording in some of the documents but, as he had said to her in their telephone meeting on 25 July, it was clear that there was no document in which she had retracted her resignation or withdrawn her notice. The claimant had attended meetings with Mr Russell and Mr Waring where the handover of her work was discussed and there had not been any discussion about any specific role that she was to undertake after that handover. Taking all of those matters into account, he decided that the claimant had not been unfairly dismissed but that the end of her employment was as a result of a mutually agreed end date with her line manager.

81. The claimant was given the right to appeal against the grievance outcome. She had to write to employee relations within 5 days of receipt of the outcome letter, giving her reasons for appealing.

82. The claimant indicated that she wished to appeal. The respondent clarified that the appeal would only be against the grievance outcome and not against the end of her employment. The respondent extended the time to allow the claimant the opportunity to lodge her appeal. The claimant had assistance from the solicitors who wrote to the respondent early on in the process. In the end, the claimant did not submit an appeal.

Law

Unfair Dismissal

83. Although the claimant's complaint was of unfair dismissal, the main question for the tribunal was whether in fact there had been a dismissal as the respondent disputed that it had dismissed her. The respondent's case was that the resignation on 17 April 2018 was the mechanism by which her employment eventually came to an end on 31 July 28, 2019.

84. Section 95 of the Employment Rights Act 1996 (ERA) defines a dismissal by the employer, as follows:

(a) Where the contract under which the employee is employed, is terminated by the employer, (whether with or without notice),

(b) There is a dismissal arising from the non-renewal of a limited-term contract, or

(c) The employee gives notice to terminate the contract and at the time s/he gave notice, s/he was entitled to do so because of the employer's conduct.

85. As dismissal is disputed, it is for the employee to prove that she was dismissed within the meaning of section 95. If she fails to do so, that will be the end of the case as the Tribunal was not considering a complaint of constructive unfair dismissal.

86. Once a resignation has been given, it cannot be withdrawn unless the employer agrees to that withdrawal or where, if given in heated moment, it is speedily retracted. The respondent relied on the cases of *Riordan v War Office* [1959] 1 WLR 1046 and *Bryan v George Wimpey & Co.* [1967] 3 ITR 28 as authority for the principal that an employee cannot unilaterally withdraw a resignation, once given; in the same way that an employer cannot unilaterally withdraw a dismissal with notice, once given.

87. The claimant did not dispute that she resigned her employment in writing to the respondent on 17 April 2018. In relation to the issue of whether there had been in an agreed retraction of that resignation, the respondent referred to Chitty of Contracts and section 40-174:

> *"In accordance with general contractual principles, it is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement will be effective by virtue of the mutual release by the parties of their obligations under the contract of employment. The agreement may be subject to terms, provided these do not, for instance, constitute an unlawful restraint of trade".*

88. It is necessary to apply the objective test applies whenever ambiguity occurs in correspondence between employer and employee. Where an employee has received an ambiguous letter, the EAT said in the case of *Chapman v Letherby and Christopher Ltd* [1981] IRLR 440, EAT, that the interpretation *'should not be a technical one, but should reflect what an ordinary, reasonable employee….. would understand by the words used'* and *'the letter must be construed in the light of the facts known to the employee at the date he receives the letter'.*

89. If the Tribunal's decision is that there has been a dismissal, the respondent's case was that it was for some other substantial reason. It would be the respondent's burden to prove that reason. The respondent submitted that because of the resignation, the claimant was not built in to the 2019 headcount and the respondent decided not to replace her but to subsume her role into Ms Kelly's role. They kept her on for as long as they could and tried to find other roles for her.

90. The claimant's case was that there had been insufficient consultation with her and a failure to properly deal with her grievance over the termination date.

91. If the Tribunal's judgment is that it was an unfair dismissal, the respondent also submitted that the claimant had contributed substantially to her dismissal by failing to raise any issue with it at the end of March when she knew that her job was going. The Tribunal does have the power to take into account the employee's contributory fault, even if there has been a dismissal. This will be reflected by a reduction in the compensation/remedy due to the employee by a percentage representing the employee's contribution to the situation leading to their dismissal.

Direct Age Discrimination

92. This was a complaint of direct age discrimination. The claimant relied on the over 55 age group. She relies on a hypothetical comparator.

93. Direct age discrimination is prohibited by section 13 of the Equality Act 2010. It occurs when A treats B less favourably than A treats or would treat the appropriate or hypothetical comparator; and such treatment is on the grounds of B's age. The relevant circumstances in B's case must be the same or not materially different to B's case.

94. The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also, because it relies on the drawing of

inferences from evidence. Section 136 of the Equality Act 2010 addresses that and follows on from the cases of *Igen v Wong* and other authorities dealing with the shift in the burden of proof. Section 136 provides that:

> *"(1)..*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

95. In the case *Laing v Manchester City Council* [2006] IRLR 748, tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassy v Nomura International plc* [2007] IRLR 246).

96. In every case, the Tribunal has to determine why the claimant was treated as she was. This will entail, looking at all the evidence to determine whether the inference of unconscious or conscious discrimination can be drawn. As Lord Nicholls put it in *Nagarajan "This is the crucial question"*. It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

97. Inferences can also be drawn from surrounding circumstances and background information. The Tribunal must consider the totality of the facts.

98. If the burden does shift, the employer is required only to show a non-discriminatory reason for the treatment in question; the employer is not required to show that he acted reasonably or fairly in relying on such a reason; see the case of Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865 para 22.

Applying the law to the facts above, following the agreed list of issues

Unfair Dismissal

Was the claimant dismissed or did she resign?

99. This was the central question in this claim. We found this to be an unfortunate case as it was clear from the evidence in the hearing that the claimant was held in high regard at the business and had been a valued employee.

100. However, it is undisputed between the parties and it is our judgment that this started when the claimant resigned her employment in writing on 17 April 2018. The claimant gave 3 months' notice, which would have meant that her last day of work would have been 16 July 2018. That was not the end of the matter.

101. It was her case that there was an agreement to retract her resignation when on 10 June, she signed the letter dated 24 May 2018. It was her case that this was why Simon Tully told her to '*keep her options open'* and that her contract was open ended thereafter.

Was there such an agreement?

102. The letter of 24 May from Jo Penney used the words '*resignation and subsequent retraction'* and confirmed that the claimant would be paid a bonus subject to her remaining in employment '*through to 31 December 2018*'. It also confirmed that all the other terms and conditions of the claimant's contract remained intact. In hindsight, the phrase '*resignation and subsequent retraction'* was not the most skillful as it does not clarify whether what was being retracted was the date of termination or the resignation itself. The most important part of the letter was ambiguous. In those circumstances, the tribunal has to consider the surrounding circumstances to determine what the phrase meant and what at the time, the parties understood it to mean. We remind ourselves that the interpretation of the letter should not be a technical one but should reflect what an ordinary and reasonable employee would understand by the words used. (*Chapman* above). It must be construed in the light of the facts known to the employee at the date he received the letter. At the time, what did the claimant understand was happening?

103. As stated above, it is our judgment that the question the claimant was asking in her letter of 1 June, was whether she needed to start the process of resignation again at the end of the year i.e. does she have to resign in October in order to leave at the end of December. Ms Valika certainly understood it that way. In her response she stated that the claimant would not need to resign again as she had already done so but that her line manager would manage the situation i.e. agree her exit date with her, nearer the time. It is our judgment that the claimant understood Ms Valika's response. If she was confused by it, it is likely that she would have asked for clarification as she had done previously. The fact that she did not do so confirms that she understood that she was expected to leave at the end of December and that there was no requirement for her to resign again at that time. It is therefore our judgment that in her email of 1 June, the claimant confirmed her understanding of the agreement with the respondent, that she would leave at the end of December and that what had happened here was that her notice period had been extended.

104. The claimant clearly understood that her notice period had been extended until the end of December. That is why she expressed disbelief, in the email to her husband on 17 July 2018, that Ms Kelly had sought confirmation from her that she was still leaving in December. There was no doubt in her mind that she was.

105. It is also our judgment that nothing said by Mr Tully in discussions between him and the claimant affected the claimant's contract of employment. Those were

discussions before the agreement had been reached. The only agreement between the respondent and the claimant that affected her contract of employment was as evidenced by the resignation letter and the letters dated 24 May (which the claimant signed on 10 June to confirm her agreement), her email of 1 June and Ms Valika's response of 5 June. There were no other relevant documents concerning the contract and there was no letter from the claimant retracting her resignation.

106. It is also our judgment that Mr Tully did not tell the claimant that she could stay with the respondent as long as she liked. He did not tell her that her contract was now open-ended. Mr Tully helped to facilitate an agreement between the claimant and the respondent which would retain her in employment after he left so that the team did not lose two senior managers at the same time. In exchange, the claimant was guaranteed a bonus, her holidays and wages and the opportunity to work a three-day week. It was an agreement that was mutually beneficial to both parties. Before Mr Tully left the respondent's employment, it was his clear understanding that the claimant had agreed to stay until the end of December. That is what he told Ms Kelly on handover before he left. That is also what is demonstrated in the contemporaneous emails between HR and Mr Wright and others in the management team, referred to at paragraphs 13, 14 and 16 above.

107. It is also our judgment that if the understanding between the parties had been that the claimant was now staying on indefinitely, there would have been no need for a date reference in relation to the payment of her bonus. The letter does not say that the bonus was conditional upon her remaining in employment until '*at least'* 31 December, as the claimant suggested in her grievance but stated *'through to'* 31 December which indicated an endpoint. Also, if the claimant was now staying in employment indefinitely, there would be no need to discuss her bonus at all, as she would have been paid a bonus in the usual way.

108. In conclusion, although the phrase '*resignation and subsequent retraction'* could be said in hindsight, to be ambiguous, it is our judgment taking account of the surrounding circumstances that existed at the time and the correspondence between the parties; that an ordinary reasonable employee would have understood the letter as confirmation that what had been retracted was the end date of the claimant's employment, rather than the resignation itself.

109. It is our judgment that there was no agreed retraction to the claimant's resignation in June 2018.

Was there an agreed retraction of the resignation at any time between October and 31 December 2018?

110. It is our judgment that by October 2018, the claimant had decided that she was enjoying working 3 days a week and that she now wanted to stay on with the respondent indefinitely. She had changed her mind. It is agreed between the parties that by the end of the year, the claimant no longer wanted to leave or retire. She made this clear to Ms Kelly in a 1:1 meeting between them in October 2018. However, the fact that an employee who has resigned no longer wants to leave does not mean that the employer has to accept retraction of the resignation and allow them to remain indefinitely. There would need to be an agreed retraction.

The respondent was under no obligation to agree to the claimant's desire to retract her resignation. The fact that it chose not to do so does not mean that it dismissed the claimant.

111. It is our judgment that the respondent was not replacing senior roles at that time. When Mr Tully left he was not replaced. Ms Kelly had to absorb his role alongside her other area of business. When Ms Kelly took over Change, the claimant had already resigned and her end date had been extended to 31 December 2018. In preparing the budget for her areas of the business, Ms Kelly did not include the claimant in headcount as the expectation was that the claimant was leaving at the end of December and that she would not be replaced. As had happened when Mr Tully left, the respondent was expecting to absorb the claimant's work into a different area business. Ms Kelly prepared her budget in good faith. In our judgment, it is unlikely that Ms Kelly thought that she was making a drastic change or dismissing anyone by not including the claimant in her headcount in the budget. There was no mistake.

112. It is our judgment that the reason that they had a discussion about this in October is because they both knew that December was coming up and that they needed to agree an end date to the claimant's employment. When the claimant indicated that she would actually like to stay on indefinitely, Ms Kelly made it clear that she could not as she was not in the headcount for the forthcoming year. That was what the claimant was referring to when she referred to having to lie in the bed that she had made. She appreciated that the situation was not reversible as she was not in the headcount for the forthcoming financial year. It is our judgment that Ms Kelly did not ask her to stay on indefinitely at this time. That would not have made sense when she also told her that she was not in the budget for the forthcoming year.

113. However, as the respondent was continuing in business, and there was enough work, Ms Kelly was able to keep the claimant on for another quarter. She offered the claimant the opportunity to work until the end of Quarter 1, 31 March 2019. It also meant that the handover process in relation to her work could be done in an organised and unrushed way.

114. It is our judgment that the handover process began in January 2019. It is our judgment that the plan was that the claimant was leaving at the end of March and sometime before that, she was going to handover to Mr Waring and Mr Russell. She took part in the handover meetings even though she did not agree that her work was a natural fit for Mr Waring and Mr Russell.

115. It is our judgment that the claimant was never asked to stay on indefinitely by anyone at the respondent. It is also our judgment that Ms Kelly did not promise her a new role in the business. Ms Kelly advised the claimant that she should look for opportunities during the extensions to the notice that they agreed. She also stated that she would consider the situation, if a role became available within the Change department, which never happened. The claimant was unable to point to a role that she was offered. She also could not point to a role that she says came up but was not given or offered to her.

116. The claimant's employment was never open-ended with the respondent following her resignation on 17 April 2018. From then on, there was always an end date to the time that she had with the respondent. Initially, following the letter she signed on 10 June, the end date was 31 December 2018. After the discussions in October 2018 with Ms Kelly, the end date they agreed on was 31 March 2019. On 10 April, Ms Kelly told her that the end date could be extended up to 31 May. After her complaint that she should have been given 3 months' notice, she was told in a meeting on 29 April (later confirmed in the letter of 1 May), that the end date would be 31 July 2019.

117. It is unusual for there to be so many extensions to an employee's notice period. It is also our judgment that the respondent ought to have put the extensions to the notice period in writing to the claimant. As there did not appear to be a dispute at the time, it is likely that it did not occur to the respondent to record those extensions in writing. The respondent agreed extensions to the claimant's notice period because as a director, the claimant - a senior employee who had been employed by the respondent for 13 years - had a wealth of experience and knowledge which was useful to the respondent. They also extended her notice period because it was apparent that the claimant wanted to stay in the business indefinitely and although that could not be accommodated, these extensions would give her time to find alternative employment, whether in the business or elsewhere.

118. There had been no issues with the claimant performance. It was the claimant's decision to resign her employment. At the time, her stated plan was to retire from work. She later changed her mind about this but there could only be an agreed retraction of that resignation if both parties agreed to it. The claimant could not unilaterally retract her resignation.

Judgment on the complaint of unfair dismissal

119. It is our judgment that the claimant's resignation was not retracted in May/June 2018 and that nothing that happened between the parties between October 2018 and 1 May 2019 constituted an agreed retraction of the claimant's resignation.

120. The claimant was not dismissed. The claimant resigned in April 2018 and her leaving date was extended by mutual agreement until 31 December 2018 and then until the end of March 2019 and lastly, to 31 July 2019.

121. The claimant's employment terminated as a result of her resignation. There was no dismissal. The complaint of unfair dismissal fails and is dismissed.

Breach of contract

122. Is the claimant entitled to an additional one day of notice pay? It was the claimant's case that she should have been paid for 1 August 2019.

Judgment on the complaint of breach of contract

123. It is our judgment that the claimant's employment was not terminated. The claimant resigned in April 2018 and her end date was varied by agreement in June 2018. The claimant's notice was extended until the end of March 2019 and later, on 10 April 2019, Ms Kelly proposed that the notice should come to an end on 31 May 2019. On 29 April, the claimant was told of the respondent's decision that her notice could not be extended beyond 31 July 2019.

124. It is our judgment that the claimant was not given a notice of termination. However, she did not agree to her employment ending on 31 July 2019 as she wanted to be extended indefinitely. The respondent had not agreed to a retraction of the claimant's resignation. It decided that it would only be able to agree to the claimant's notice being extended to 31 July 2019.

125. The claimant had three months' notice of the end of her notice period as she was given that notice verbally on 29 April 2019. The letter dated 1 May was simply a confirmation of what Ms Kelly had told her in the 29 April meeting.

126. The claimant was given appropriate notice of the end of her employment with the respondent. There was no breach of contract.

127. The complaint of breach of contract in relation to notice pay fails and is dismissed.

Direct Age Discrimination

128. Was the claimant treated less favourably because of her age? The claimant relies on the over 55 age group and on a hypothetical comparator. We refer to the specific allegations contained in the list of issues (using the numbering from the minutes of the preliminary hearing of 10 March 2020). The wording in the issues listed below is slightly different from that in EJ Burgher's minutes, to take into account typos. The issues are follows:

8.1 Ms Kelly not including the claimant's job in the 2019/2020 budget.

129. It is our judgment that Ms Kelly did the 2019 budget. It is our judgment that the reason why the claimant was not in the 2019 budget was because she had resigned. Ms Kelly had to plan for the next year including the expenditure that she would need to cover the staff that she was expected to manage. Because the claimant was expected to leave at the end of December 2018, Ms Kelly did not include her in the headcount in her department for the financial year beginning 2019.

130. We found no facts from which we could infer that the reason why the claimant and her job were not included in the 2019/2020 budget was because of her age.

131. It is also our judgment that the respondent did not replace Mr Tully when he resigned. Mr Tully was also a senior employee and we were not told whether he was in the over 55 age group. It was therefore not clear whether he was a proper comparator for this complaint. But it was helpful to us to note that when he

left the respondent's business, his role was not included in the budget and his duties were subsumed into Ms Kelly's role.

132. It is this tribunal's judgment that a hypothetical comparator i.e. someone of a different age group who resigned at the time the claimant did, would also not have been included in the headcount for their department in the forthcoming financial year.

8.2 The 3rd, 4th or 5th respondents giving the claimant notice of dismissal during a meeting on 1 May 2019 for 31 July 2019.

133. On 29 April 2019, in a 1:1 meeting, Ms Kelly informed the claimant that her notice would be treated as extended until 31 July. A letter dated 1 May sent by the respondent company to the claimant, confirmed that her last day of employment would be 31 July 2019.

134. Why did this happen (*Nagarajan*)? It is our judgment that this happened because the respondent decided that it could not extend the claimant's notice period any further. There had been two previous extensions to the claimant's end date before this. We do not agree that this was notice of dismissal. It was clarification of her last day of employment. As we have already decided above, the claimant was not dismissed.

135. It is unusual to have such a long notice period. But these were unusual circumstances.

136. However, there were no facts from which the Tribunal could infer that the decision not to extend the claimant's notice period any further was related to her age or her age group.

137. It was also not put to Ms Kelly in cross-examination that the reason she had decided not to put the claimant in the budget or not to extend her notice period any further was because of the claimant's age.

138. Instead, the clear evidence in the hearing was that the person who eventually took over the work that the claimant had been doing was of the same age group as the claimant. Christine Nott was 57 years old at the time she took over the work that the claimant had been doing. The claimant's work was not taken away from her but even if it was, it was not given to someone younger than her. Ms Nott was in the over 55 age group.

139. It is this tribunal's judgment that the respondent's decision to confirm the claimant's last day of employment as 31 July 2019 and not to extend her notice any further, was not done because of her age or her age group.

140. It is also our judgment that if a hypothetical comparator i.e. someone of a different age group was in the claimant's position, with her long service and experience; having resigned their employment and the respondent having not included them in the headcount for the next financial year; it is likely that, as in this case, the respondent would have reached the point where it could not extend their notice any further.

8.3 In early May 2019 Ms Kelly telling Mr Ian Russell and Mr Anthony Waring and her secretary that the claimant was retiring when she had been dismissed.

141. Ms Kelly informed Mr Russell and Mr Waring in January 2019 that the claimant was retiring at the end of March. That was what she had been told by Mr Tully at handover and the claimant had not told her anything else in any of their 1:1s thereafter. It was also stated in the meeting at the start of the handover discussions with the claimant in January 2019 that the reason why they were preparing a handover was because she going to retire. At that time, the claimant did not object the use of the term '*retire'*.

142. We heard no evidence on what was said to the secretary.

143. Simon Tully's evidence was that his discussions with the claimant were about her intention to retire, which is why he spoke to her about winding down gradually to retirement. It was not the respondent that introduced the concept of retirement into discussions with the claimant. It was the claimant who expressed her intention to retire at the time that she handed in her resignation in April 2018. Although she disagrees that the word was used in the meeting on 31 January, in our judgment, it is likely that it was. That was how Mr Waring became aware of the claimant's intention to retire.

144. It is our judgment that the words '*retire'* or '*retirement'* are not in themselves discriminatory words. It is true that by December 2018 and early 2019, the claimant had changed her mind and no longer wanted to leave, which is when she became uncomfortable with the word *retire*. However, the use of the word on its own does not demonstrate any less favourable treatment to the claimant related to her age.

145. The claimant's employment came to an end because she resigned and although the respondent was able to extend her notice period for a total of a year after the original date (July 2018 to July 2019), it was not prepared to extend it any further. That had nothing to do with retirement.

146. In our judgment, even if the word retirement had not been used by either the claimant or by the respondent, a hypothetical comparator who resigned as she had, would have been treated in the same way.

147. The claimant did not put to Ms Kelly that her actions or decisions were done because the claimant made discrimination complaints or because of her age.

148. It is our judgment that the claimant has failed to prove facts from which we could infer that Ms Kelly treated her less favourably because of her age/age group.

149. *8.4 Mr Barrett and Ms Phillips gave the claimant less than a day's notice of the grievance hearing on 26 June 2019.*

150. In our judgment, it is unfortunate that the respondent could not find another manager to hear the claimant's grievance so that she could have had a longer notice period of the date of the grievance hearing.

151. Mr Barrett was also a busy senior manager within the respondent. The claimant was given a choice to either have the grievance hearing on the 26 June or to have a longer notice period which would mean waiting until Mr Barrett returned from holiday. The claimant felt she had no choice but to accept the 26 June meeting because she wanted the matter addressed as soon as possible.

152. The question before the tribunal was not whether the respondent had other managers who could have conducted the grievance hearing or could have given the claimant longer notice. The question before the Tribunal is whether the decision to give her less than a day's notice was done because she was within the over 55 age group. We found no facts from which we could infer that the decision to give her less than a day's notice of the grievance hearing was because she was within the over 55 age group or was in any way related to her age.

8.5 Mr Barrett and Ms Phillips interviewed the claimant on 25 June 2019 and delayed the grievance outcome resulting in the claimant receiving it on the final day of her employment.

153. We found no facts from which we could infer that the reason that the grievance outcome was not given to the claimant until the end of her employment was because she was within the over 55 age group.

154. The respondent's grievance procedure did not give a set time by which the employee would be given the outcome of the grievance. Mr Barrett was therefore not in breach of any of the respondent's procedures.

155. Mr Barrett met with the claimant on 26 June and held some of his investigation meetings early in July. He made up his mind about the discrimination aspects quite early in the process as the claimant had not given him any evidence on which she based those allegations, that he could investigate. She had only referred to a *feeling* and to the '*dynamics of the team'*. She did not expand on what she meant by those words. She did not do so in the Tribunal hearing either. Mr Barrett considered the dynamics of the team and came to a decision.

156. In relation to the part of the grievance which referred to unfair dismissal, Mr Barrett investigated it by meeting with Ms Valika and Mr Wright towards the end of July. In the meantime, he was away from work again.

157. It was not put to Mr Barrett during the hearing that the reason why he conducted the grievance in the way that he did or took the time that he did, was because of the claimant's age. It was also not put to him that he took the time that he did with the grievance because the claimant had raised a discrimination complaint.

158. The Tribunal found no facts from which it could infer that the time taken to consider the grievance and provide the claimant with an outcome was done

because the claimant had complained about sex and age discrimination or because of her age. (The sex discrimination was live at the time of the grievance).

159. The claimant did not put to Ms Phillips that her actions or decisions were done because the claimant made discrimination complaints or because of her age.

160. Ms Phillips was the HR advisor in the grievance process. It is our judgment that she supported Mr Barrett in conducting the meetings. In the first meeting, she advised him to inform the claimant that in bringing a discrimination complaint she would need to prove it. She also clarified the difference between constructive unfair dismissal and unfair dismissal. It is our judgment that although Ms Phillips advised Mr Barrett, the decision on the claimant's grievance was his. It is our judgment that there was no evidence from which we could infer that Ms Phillips treated the claimant less favourably on grounds of her age or because she was in the over 55 age group.

8.6 *Mr Barrett rejecting the claimant's grievance on 31 July 2019. The claimant's allegation was that Mr Barrett and Ms Phillips took a dismissive approach to her grievance to ensure the age discriminatory dismissal*.

161. In the hearing, the tribunal was concerned as to whether Mr Barrett had conducted an in-depth investigation into the claimant's allegations of discrimination. After due consideration of the facts set out above, it is our judgment that the claimant did not give Mr Barrett any evidence from which he could investigate those allegations.

162. Allegations of discrimination must be taken seriously. It is our judgment that Mr Barrett took those allegations seriously and let the claimant know that as she had made those allegations, she needed to provide evidence, which would provide a starting point for his investigation. She referred to the dynamics of the team, which he investigated. His evidence was that he tallied up the gender/age breakdown of the Change team and found that there was no evidence of discrimination in relation to those characteristics.

163. This might have appeared to have been a cursory look at the issue of discrimination but without anything else to go on and bearing in mind there was an open letter of resignation from the claimant which had not been retracted in writing; it was not clear what additional investigation the claimant was expecting Mr Barrett to do.

164. In the circumstances, the tribunal found no facts from which we could infer that the way in which the grievance was handled, the rejection of the grievance, the decision to give her grievance outcome on 31 July 2019 or to give her less than a day's notice of the grievance hearing; were in any way related to her age/age group or to ensure an age discriminatory dismissal.

165. The claimant resigned and the respondent extended her end date as far as it could before deciding that it could not extend it any further. The fact that the claimant changed her mind at the end of 2018 and wanted to remain in employment does not mean that the respondent was obliged to agree and let her stay on indefinitely. It did not do so.

Judgment on the complaint of direct age discrimination

166. It is this Tribunal's judgment that there were no facts from which it could conclude that the claimant was treated less favourably by the respondents because of her age/age group in relation to the ending of her employment or the handling of her grievance. The burden of proof does not shift the respondent.

167. The claimant's complaint of age discrimination fails and is dismissed.

Employment Judge Jones
Date: 21 July 2021