EMPLOYMENT TRIBUNALS

Claimant:		**Respondents:**
Miss N Sithirapathy	v	PSI CRO UK Ltd (1)
		~~PSI CRO AG (2)~~
		Mr M Schmidt (3)
		Ms A Ruf (4)

Heard at: Reading (by CVP) **On:** 6 to 9 April 2021

Before: Employment Judge Hawksworth
Mr M Pilkington
Ms R Watts-Davies

Appearances
For the claimant: Mr E Kemp (counsel)
For the Respondents: Mr D Howells (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's employment with the first respondent terminated by mutual agreement. The claimant's complaints of unfair and wrongful dismissal fail and are dismissed.

2. The claimant was not entitled to be paid by the first respondent for the period 1 to 3 September 2017. Her complaint of unauthorised deduction from wages fails and is dismissed.

3. The claimant's complaints of direct discrimination because of sex and/or age, sexual harassment, harassment related to age and/or sexual orientation and victimisation against the first, third and fourth respondents fail and are dismissed.

REASONS

The claim, hearing and evidence

1. The claimant was employed by the first respondent as legal counsel from 1 August 2014. She moved to Switzerland to take up employment with PSI CRO AG on 4 September 2017. She was dismissed by PSI CRO AG on 19 October 2017.

2. After Acas early conciliation from 3 November 2017 to 3 December 2017, the claimant presented her claim on 28 December 2017. She complains of unfair and wrongful dismissal by the first respondent, deductions from wages, sex and age discrimination and harassment, harassment related to perceived sexual orientation, and victimisation.

3. The respondents each presented responses and they defend the claim. The claim against the second respondent was dismissed at a preliminary hearing on 10 April 2019, for reasons explained below.

4. The full merits hearing took place by video (CVP) from 6 to 9 April 2021.

5. The parties had agreed a bundle which was numbered up to page 682 (the electronic copy of the bundle had 789 pages). Page numbers in these reasons are references to the paper copy numbers in that bundle. The claimant prepared a supplemental bundle which had 69 pages and another bundle of mitigation documents. Copy sick notes were also provided during the hearing. The respondent did not object to the supplemental bundles, the mitigation documents or the sick notes.

6. The claimant's counsel prepared a chronology and cast list. Both the claimant's and respondents' counsel prepared opening notes.

7. There was an initial dispute between the parties as to the scope of the claims before us. At a preliminary hearing on 10 April 2019, Employment Judge Postle decided that the employment tribunal does not have jurisdiction to hear claims arising out of the claimant's employment in Switzerland during the period 4 September 2017 to 19 October 2017. He decided that the tribunal does not have territorial jurisdiction to hear the claims against the second respondent, PSI CRO AG, a company registered in Switzerland. At the hearing before us, the respondents' counsel submitted that EJ Postle's decision on jurisdiction was that the claims against the individual respondents, Mr Schmidt and Ms Ruf, were also outside the territorial jurisdiction of the tribunal. For reasons given at the hearing, we decided that EJ Postle's decision was in respect of PSI CRO AG only. He had not made a decision in respect of Mr Schmidt and Ms Ruf, and the claims against them remained in issue before us. The claimant's case, that Mr Schmidt and Ms Ruf were acting as agents of the first respondent and that the first respondent was vicariously liable for their actions, could proceed. Matters arising out of the claimant's employment in Switzerland during the period 4 September 2017 to 19 October 2017 could be pursued against the first respondent as post-employment discrimination, if and to the extent they arose out of and were closely connected to the employment relationship with the first respondent (which was for us to decide having heard the evidence).

8. We took the first morning for reading.

9. We heard the claimant's evidence on 6 and 7 April. The fourth respondent Ms Ruf gave evidence on 7 and 8 April. The third respondent Mr Schmidt gave evidence on 8 April (his evidence was interposed to allow him to give his evidence in the morning). Ms Strange, the first respondent's Senior HR Generalist, also gave evidence for the respondents on 8 April.

10. We heard submissions on 9 April. Both counsel had prepared written closing submissions.

11. There was insufficient time in the time allocated for the hearing for us to complete our deliberations and deliver judgment, and so we reserved judgment. The employment judge apologises to the parties and their representatives for the delay in promulgation of the reserved judgment, this was because of the large number of issues for determination in the case, and the current pressures of work in the employment tribunal.

The Issues

12. The claimant makes complaints of:

    12.1. unfair dismissal;
    12.2. wrongful dismissal in relation to notice period;
    12.3. unauthorised deduction from wages/breach of contract in respect of the period from 1 to 3 September 2017;
    12.4. direct discrimination because of age and/or sex;
    12.5. harassment related to age;
    12.6. sexual harassment/harassment related to sex; and
    12.7. harassment related to sexual orientation by perception; and
    12.8. victimisation.

13. The issues for determination by us were agreed (subject to the preliminary point explained above and a point about the fairness of the dismissal). They were set out in a list of issues which included a table summarising the factual allegations for the purpose of the Equality Act complaints (paragraphs 6.1 to 6.27). The list of issues was at pages 147 to 153 of the hearing bundle. The claimant's counsel prepared an amended version of the summary of factual allegations table with an added column setting out the type of discrimination alleged in relation to each allegation.

Findings of fact

14. We heard a lot of evidence over the course of the hearing. We do not attempt to summarise it all here. We set out below our findings of fact on those matters which we found most helpful to assist us to decide the issues of dispute which were before us.

15. The claimant was employed by the first respondent as legal counsel from 1 August 2014. The first respondent is a company incorporated in England. It is a wholly owned subsidiary of PSI CRO AG, a company incorporated in Switzerland. Both companies provide research services support to companies in the pharmaceutical and biotech industries. The claimant's contract of employment with the first respondent contained a mobility clause (page 194).

16. The claimant's role with the first respondent was her first legal counsel job. She was 25 at the time she joined the first respondent. She was managed for administrative and day to day purposes by the UK manager of the first respondent and, in relation to legal matters, by the second respondent's head of legal, Ms Ruf, who was based in Zug in Switzerland.

17. Ms Ruf is the fourth respondent and an employee of PSI CRO AG. At the relevant times the third respondent, Mr Schmidt, was employed by PSI CRO AG as acting country manager. He was also the Chief Financial Officer for the PSI group.

18. In 2015 Ms Ruf tasked the claimant with helping to develop the global and UK Clinical Trial Agreement Process Description. Towards the end of the project, Ms Ruf asked a senior legal counsel who was experienced in clinical trial work to become involved. Ms Ruf did so because she did not have time to conduct a detailed review herself. The senior legal counsel reviewed the claimant's work and helped sort out some delays. On the claimant's appraisal document in March 2016 this project was included as one of the claimant's objectives (page 575). The final document was completed in May 2016. It recorded that it had been prepared by the claimant, reviewed by the senior legal counsel and two others and then approved by Ms Ruf and one other (page 236g). We accept Ms Ruf's evidence that the review and approval process was standard for this kind of document.

<u>The offer of a move to Switzerland</u>

19. On 1 November 2016 the claimant and Mr Schmidt had a meeting in the first respondent's office. Mr Schmidt wanted to understand the possibility of the claimant accepting a position with PSI CRO AG in Switzerland. Shortly before the meeting with the claimant, Mr Schmidt spoke to the UK manager and asked her about the claimant's personal circumstances to see whether it was likely that she would be prepared to relocate to Switzerland.

20. In the meeting with the claimant Mr Schmidt offered her a role in Switzerland. He said that the job commanded an annual salary of 120,000 Swiss francs. He asked the claimant how old she was. When she told him, he replied, 'Your age will prevent you from commanding a higher salary.' The claimant felt that she was being singled out and treated differently to other employees, and that her age should not have been relevant to any considerations relating to the offer of a job in Switzerland. We accept the

evidence of Mr Schmidt that his comment referred to the fact that in the Swiss labour market there is generally considered to be a link between age and salary.

21. The claimant said that she was not interested in accepting a role in Switzerland at that point in time for personal reasons. Mr Schmidt asked the claimant what those personal reasons were. He said, 'You are not married, you don't have children and you do not have a boyfriend'. This comment was very blunt and clumsily put. The claimant was shocked and the discussion made her uncomfortable, as she did not know how Mr Schmidt knew personal information about her. However, Mr Schmidt said, and we accept, that he would have made the same comments to a male employee. We accept his evidence because we accept that these were relevant issues to consider in the context of a discussion about possible relocation where the company might be responsible for relocation costs including costs relating to the employee's family. Mr Schmidt was not commenting on the claimant's relationship status or sexual orientation, he was seeking to convey his understanding about the claimant's family commitments in the UK.

22. Mr Schmidt continued by telling the claimant an anecdote about the Swiss office's 'tolerance' of a lesbian member of staff. Mr Schmidt said that in telling the claimant this he was trying to explain that the sexuality or other personal circumstances of employees were not an issue for the company. We accept that, although what he said was, again, very clumsy and awkward, this was his intention.

23. The claimant felt humiliated, upset and angry about Mr Schmidt's comments. After the meeting she spoke to her UK manager about the conversation with Mr Schmidt. The UK country manager told the claimant that Mr Schmidt had asked her about the claimant's personal circumstances before the meeting, and this was how he knew about them.

<u>The claimant's work tasks and hours</u>

24. In December 2016 the claimant (who by this stage was 27) was told about a new study for a client called BioMarin. The claimant had previously been involved with a UK study for the same client. A legal counsel based in Poland was identified as the main contact for legal matters on the new study (page 263A). He had a global legal role and had previous involvement in another study for the same sponsor. He joined a Skype call about the study in December 2016 (page 261B). Another new project for the same client was awarded in April 2017 (page 308F). Ms Ruf notified the claimant and the global legal counsel about the new project. In May 2017 Ms Ruf asked the claimant to attend the project award call, as the backup to the global legal counsel (page 308A).

25. Also in December 2016 the claimant was asked to develop a regulatory reviewer template for the Health Research Authority (page 263D). Ms Ruf suggested that the senior legal counsel who had reviewed the claimant's

Clinical Trial Agreement Process Description may be able to assist as she had worked with other lawyers in other countries on similar templates. In July 2017 the claimant and the senior legal counsel worked together on a later version of the template (page 393A to 393D).

26. In February 2017 Ms Ruf emailed the claimant about her recorded hours for January. She had noticed that the total appeared low. The claimant apologised and said that this was due to late submission of timesheets. The late submission of timesheets meant that not all of the claimant's recorded hours were included in the month-end report. Ms Ruf replied to say that it was important to comply with the deadline and asked the claimant to make sure to submit her timesheets on an ongoing basis or at least at the end of every month (page 268A).

The claimant's promotion request and appraisal

27. In late 2016 the claimant spoke to her UK manager about her career development and promotion opportunities (page 261E). In January 2017 the claimant sent an email to her UK manager about promotion to senior legal counsel (page 262). The UK manager discussed this with Ms Ruf at a meeting later in January 2017. Ms Ruf said that the claimant was not ready for promotion to senior legal counsel and that she was not performing at the same level as the group's three senior legal counsel. The UK manager explained Ms Ruf's feedback to the claimant in a meeting on 1 February 2017 (page 266).

28. The claimant's appraisal was due to take place in March 2017. In preparation for the appraisal, the claimant asked colleagues for feedback on her performance and she submitted the feedback as part of her appraisal process. One of the colleagues who provided feedback was upset by the way the claimant collected feedback (page 276 to 277). That colleague later raised a complaint of bullying against the claimant following which the claimant made an informal complaint of harassment against her (page 306).

29. The claimant's appraisal meeting with Ms Ruf was on 10 March 2017. Ms Ruf completed a performance appraisal form after the meeting (page 580 to 595), although this took some time to finalise (pages 309 and 390). In the appraisal form, Ms Ruf commented on the claimant's planning and organisation, communication, collaboration and teamwork, accountability and leadership. Ms Ruf's comments were balanced in that she was largely positive but also gave guidance on areas where the claimant could develop or improve. Ms Ruf evaluated the claimant's performance as advanced on three of the core competencies and intermediate on the other two. Ms Ruf rated the claimant as having met expectations in each of five areas for assessment. The claimant's self-rating for each of these areas was that she had exceeded expectations. On communication skills, Ms Ruf commented that the claimant needed to be more aware of adapting her style of communicating to ensure that parties finish discussions feeling positive. She concluded that the claimant had a lot of potential in this area.

Another area for development was sharing more knowledge and expertise with peers.

30. Ms Ruf's overall assessment in the appraisal was that the claimant had met expectations in respect of the areas for assessment and for individual goals. The appraisal form concluded by recording that the claimant was keen to work towards promotion to Senior Legal Counsel. Ms Ruf's opinion was that the claimant had done a good job in the last year but that she was not ready for the next level. Ms Ruf commented that she felt that the claimant's self-assessment was somewhat unrealistic and not a true reflection of her role and position in the legal department.

31. In the appraisal meeting the claimant was very disappointed about being told that she was not ready to be promoted. Ms Ruf told her that developing management skills and sound judgment came with experience and that the claimant was still at the beginning of her professional career and needed to be patient with herself. She said that the claimant was still young and that it was normal that she was not yet at the same level as someone with many years of experience.

32. On the same day as her appraisal, 10 March 2017, the claimant spoke informally to the Deputy Head of Project Management for the PSI group. She was the former country manager for the UK. The claimant said she had suffered age discrimination during the appraisal. She also raised concerns about the comments that had been made to her by Mr Schmidt in November 2016. Neither Mr Schmidt nor Ms Ruf were aware that the claimant had raised these concerns.

33. On 13 March 2017 the claimant told her UK manager in an email that she did not feel that the appraisal had reached a satisfactory conclusion. The claimant said, "It sounded like I was delivering performance wise, but that the limiting factors for title change were my age and duration of service" (page 279). The claimant and her UK manager had some informal conversations about the claimant's concerns of age discrimination.

34. Later in March 2017 the claimant's UK manager and Ms Ruf had further discussions by email about the claimant's desire for promotion and career development. The UK manager told Ms Ruf that the claimant felt that she was being discriminated against because of her age. Ms Ruf replied to say that she found the allegation of discrimination quite absurd. She said there was a really big gap between the performance of the claimant compared with the performance of the three senior legal counsel and that she was mid-field when compared with the other legal counsel (page 294).

<u>Discussions leading to the claimant's new role</u>

35. On 10 May 2017 the claimant emailed Ms Ruf to ask whether they could take some time to discuss a long-term career development plan for her. Ms Ruf replied to say that they had discussed development and goals as part of the appraisal process, and she saw no reason for discussing the

same topic two months later. Ms Ruf felt that she spent more time discussing career development with the claimant than she did with other employees. However, she did not refuse the claimant's request for a discussion, and concluded her email saying, 'However, if there is anything you would like to bring up and discuss, I am obviously available for a talk' (page 313).

36. The claimant followed the email exchange by a call to Ms Ruf the next day, 11 May 2017. During the call Ms Ruf mentioned the possibility of a non-legal role in Zug. Mr Schmidt was looking for support on the real estate acquisition side of the business. The claimant emailed Mr Schmidt to say that she would be interested to hear more about the role (page 314). On 17 May 2017, after some discussions with Mr Schmidt, the claimant emailed him to say that she was excited about the prospect of moving to Switzerland (page 317). The following day she sent another email which concluded 'To emphasise, I am really very interested in the position' (page 316). Later that day she emailed again to say:

> "I'm really very excited! Thank you for the opportunity Martin – I really appreciate being given such a chance." (page 321).

37. A contract of employment for the new role was sent to the claimant on 22 May 2017 (page 331). The claimant asked some questions about the contract. The UK manager confirmed to Mr Schmidt and Ms Ruf on 20 May 2017 that the claimant was happy to accept the offer of the role in Zug (page 350). The claimant sent a signed copy of the agreement to PSI COR AG on 31 May 2017 and a copy signed on behalf of the employer in Switzerland was sent to her on 1 June 2017 (page 352). The contract provided that the claimant's employment with PSI CRO AG would commence on 4 September 2017 and that she would take over the function of Manager, Real Estate Portfolio and would report to Mr Schmidt. The annual salary was 90,000 Swiss francs (pages 234 to 236).

38. The claimant's move was notified to colleagues in PSI CRO AG on 7 June 2017 (page 360).

<u>The subject access request issue</u>

39. At around this time the claimant was dealing with legal issues arising from a subject access request made by an employee of the first respondent. This was the same employee who had raised concerns about the claimant's request for feedback for her appraisal, and had made a complaint of bullying against the claimant. The claimant had subsequently made a complaint of harassment against her (page 361B). The claimant sought external legal advice about the subject access request and in her email to the first respondent's solicitor she mentioned the possibility of a conflict of interest (arising from the grievances).

40. The claimant had a conversation with Ms Ruf about the employee's subject access request. They discussed the request for about an hour and

Ms Ruf tried to understand the situation. She asked the claimant what had prompted the request. The claimant did not mention the grievances which the claimant and the employee had raised about each other.

41. On 11 June 2017, the employee made a formal grievance complaint. It was against a number of staff, including the claimant (page 368 to 369). The claimant was on leave at the time. Ms Ruf spoke to Ms Strange, the first respondent's HR generalist, to learn more about the situation. Ms Strange told Ms Ruf about the complaints that the claimant and this employee had made about each other. Ms Ruf was unhappy that the claimant had not told her about these complaints when they were discussing the subject access request. She regarded this as a lack of honesty on the claimant's part. She also thought the claimant had shown a lack of professional judgment in dealing with the case when there was an obvious conflict of interest. Ms Ruf called the claimant to discuss this. She said that dishonesty was unacceptable for a legal counsel and that if the claimant had not been leaving the legal department she would have considered disciplinary action. Ms Ruf asked legal counsel in the US team to deal with the grievance instead.

<u>The termination of the claimant's employment with the first respondent</u>

42. At around this time, Ms Ruf checked with Ms Strange whether the claimant had handed in her notice for her UK employment contract (page 371) and reminded the claimant about this on 19 June 2017 (page 377).

43. The claimant drafted a termination agreement (page 233). This said:

> *"Following an intra-group company transfer from PSI CRO UK Ltd to PSI CRO AG, this letter documents the mutual agreement between PSI CRO UK Ltd (the employer) and Miss Nirosha Sithirapathy (the employee) to terminate Miss Nirosha Sithirapathy's existing employment agreement with PSI CRO UK Ltd as of 31 August 2017."*

44. The document was signed by the claimant and on behalf of the first respondent on 19 June 2017. We do not accept that the reminder by Ms Ruf to the claimant to terminate her UK contract by the end of August was done with the intention of terminating her employment on joining PSI CRO AG or that it was a deliberate attempt to prevent the claimant from having continuous service in her new role in Switzerland. It seems very unlikely to us that, to avoid a complaint of unfair dismissal, the respondent would have gone to the trouble of arranging a new role for the claimant in Switzerland.

45. The first respondent took steps to recruit a replacement for the claimant's UK role. The replacement role was at a lower level, junior legal counsel. The interview took place on 25 August 2017. The claimant was not asked to take part in interviewing candidates. The successful candidate was appointed in August 2017 and started in the role on 9 October 2017.

46. The claimant's employment with the first respondent ended on Thursday 31 August 2017. The claimant's new role in Switzerland started on Monday 4 September 2017. The claimant did some meeting preparation and document preparation regarding templates and transfer letters during the period 1 to 3 September 2017 but she was not paid for those days by either the first respondent or PSI CRO AG.

The claimant's employment in Switzerland

47. The claimant's first day in PSI CRO AG's office in Zug was 4 September 2017. In Switzerland, the claimant was no longer a member of the legal team, she now worked in the real estate team and reported to Mr Schmidt. There was not much office space available. The claimant was initially given a seat in the open plan area of the office, on the same floor as Mr Schmidt, near the reception. Two other new hires joined the real estate team at this time. They were older males. They were given separate offices, one in a separate part of the building to Mr Schmidt and one in the basement. The claimant moved to a shared office on 9 October 2017. As she was away on a business trip and annual leave for much of September, she worked in the Zug office for only 4 days before moving to the shared office.

48. On 5 September 2017, the claimant's second day in the Zug office, Mr Schmidt asked her to attend an external meeting with him. The claimant was expecting that they would walk to the meeting, but Mr Schmidt intended to drive there and so called the service lift that led to the corporate apartments and the car park rather than walking towards the front door. When the claimant hesitated before getting into the lift, he asked her, 'What's wrong? Are you scared?'. We accept that this was intended by Mr Schmidt as a joke to suggest the claimant might be worried about his driving skills. The claimant did not understand this and it made her feel uncomfortable and intimidated. In the car park, Mr Schmidt told the claimant about his cars. On the drive to the meeting Mr Schmidt pointed out some restaurants and other places, including places where he had conducted important deals.

49. On 6 September 2017 Mr Schmidt asked the claimant to go on a business trip to Argentina to handle a high value settlement. He said to the claimant, 'I wanted to send you there from the beginning.' The claimant understood this to mean that Ms Ruf had not wanted the claimant to go. Ms Ruf accepted that she had expressed some scepticism to Mr Schmidt about whether the claimant was the right person for this project but said she did not feel strongly about this. The claimant left to go to Argentina the same day.

50. When the settlement the claimant was working on in Argentina was concluded, a question arose about who would sign the settlement document on behalf of PSI CRO AG. The claimant discussed this with Ms Ruf. The claimant suggested that an external counsel who had an existing

power of attorney could sign the document. Ms Ruf initially thought that a new power of attorney should be prepared, but later agreed that the existing power of attorney should be used.

51. The claimant had been asked to attend some meetings in Madrid after her trip to Argentina. The intention was that she would fly back from Argentina to Zug via Madrid for the meetings on 15 September 2017. They were initial meetings with estate agents to discuss the possible purchase of an office building in Madrid. While the claimant was in Argentina, Ms Ruf was in Madrid for a different meeting and had a free day, so she met with the estate agents instead of the claimant. This avoided the need for the claimant to have to travel back to Zug via Madrid. In the event, the claimant had to stay longer in Argentina and did not return to Zug until 22 September 2017.

52. On her return to the office on 22 September 2017 Mr Schmidt and the claimant discussed the payment to the claimant of a relocation fee of 5,000 Swiss francs which was to cover certain mandatory fees the claimant had incurred when relocating. At Mr Schmidt's request, PSI CRO AG's receptionist prepared a power of attorney to allow the claimant to collect the relocation fee from PSI CRO AG's bank. The power of attorney required two signatures. Mr Schmidt signed the document. Ms Ruf was also asked to sign. She noticed that the standard power of attorney template had not been used, and the document had no end date. She asked for the document to be redrafted using the correct template and including an end date. The document was redrafted. Both Mr Schmidt and Ms Ruf signed the power of attorney and the claimant collected the agreed relocation fee.

53. The claimant was on holiday from 23 September to 8 October 2017.

<u>The claimant's dismissal by PSI CRO AG</u>

54. On 9 October 2017 the claimant returned to work after her holiday. On 12 October 2017 she was asked to attend a meeting in the HR office. Ms Ruf joined the meeting. Mr Schmidt was on holiday at the time. The claimant was told by the HR representative that her employment was being terminated by PSI CRO AG with 7 days' notice because of a reorganisation of the department. She was issued with a termination letter.

55. Ms Ruf did not speak during the meeting. After the meeting ended the claimant was upset. She went to her office and shut the door. Ms Ruf did not go into the claimant's office to speak to her because she did not want to disturb her when her door was shut. Ms Ruf checked again later and the claimant had left the office.

56. The next day, the claimant sent a WhatsApp message to Mr Schmidt. He was on holiday in Thailand at the time. He did not reply.

57. On 13 October 2017 the claimant called the UK country manager to see if she could return to her UK legal counsel role. The UK country manager told her that Ms Ruf had said this was not possible. The UK country manager told the claimant that she thought that this was because another lawyer had been appointed as junior legal counsel in the UK. She had started in the role on 9 October 2017. Ms Ruf said that the claimant could not return to her UK role because a new junior lawyer had already been hired, and there was no headcount budget for another lawyer. We accept that this was the reason why the claimant could not be reappointed to her old role.

58. The claimant's employment with PSI CRO AG ended on 19 October 2017.

59. After her dismissal by PSI CRO AG the claimant brought proceedings in Switzerland in the Cantonal Court of Zug in relation to her dismissal by PSI CRO AG. Those proceedings were initially stayed but continued after the decision of EJ Postle on territorial jurisdiction. The Cantonal Court concluded that the termination of the claimant's employment contract by PSI CRO AG was not abusive, and it dismissed her complaint regarding her dismissal by PSI CRO AG.

The law

Unfair dismissal

60. An employment contract may be terminated by the employee (resignation), by mutual agreement between the parties, or by the employer (dismissal). The question of whether there has been termination by agreement or a dismissal is a question of fact and law for the tribunal to determine. The tribunal needs to consider the intention of the employer and the attitude of the employee, and whether the employee is acting voluntarily or is under improper pressure from the employer.

61. The right to complain of unfair dismissal will only arise where there has been a dismissal. Section 95 of the Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed for the purposes of an unfair dismissal claim. It provides:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)1, only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Wrongful dismissal

62. Wrongful dismissal is dismissal where the employer is in breach of contract. Termination without notice (or with inadequate notice) will amount to a wrongful dismissal.

Unauthorised deduction from wages

63. Under section 13 of the Employment Rights Act 1996, a worker has the right not to suffer unauthorised deduction from their wages. Sub-sections 1 and 3 provide:

"Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

….

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. "

Direct discrimination because of sex and/or age

64. Sex and age are protected characteristics under section 6 of the Equality Act 2010.

65. Section 13 of the Equality Act provides:

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

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

66. The EHRC's Employment Code of Practice explains less favourable treatment at paragraph 3.5:

"The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person."

Harassment related to age or sexual orientation, and sexual harassment

67. Under section 26 of the Equality Act, a person (A) harasses another (B) if

"a) A engages in unwanted conducted related to a relevant protected characteristic, and

b) the conduct has the purpose or effect of –
i) violating B's dignity, or
ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b)."

68. The type of harassment prohibited by sub-section (2) can be referred to by the shorthand 'sexual harassment'.

69. Unwanted conduct 'related to' a protected characteristic has a broad meaning. The conduct does not have to be related to a protected characteristic which the claimant actually has. It includes situations where a person is perceived as having a particular protected characteristic (paragraph 7.10 of the EHRC's Employment Code of Practice).

70. In deciding whether conduct has the effect referred to, the tribunal must take into account:

'a) the perception of B;
b) the other circumstances of the case;
c) whether it is reasonable for the conduct to have that effect.'

71. There is therefore a subjective element (about the effect on the claimant herself) and an objective element (about whether it was reasonable for the conduct to have that effect on the claimant). In Richmond Pharmacology v Dhaliwal [2009] ICR 724, a case about race-related harassment, Mr Justice Underhill, then President of the EAT, said:

> *'While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…If, for example, the tribunal believes that the*

claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'

Victimisation

72. Under section 27 of the Equality Act:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protected act…"

73. 'Protected act' is defined in section 27(2) and includes:

"(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Post-employment discrimination and liability of principals

74. Section 108 of the Equality Act deals with post-employment discrimination. Sub-sections 1 and 2 say:

"(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and
(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act."

75. Section 109 provides for the liability of principals in respect of acts of agents. It says:

"(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2)Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

Burden of proof

76. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

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

(3) This does not apply if A shows that A did not contravene the provision."

77. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

78. In *Igen v Wong* [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

79. 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 has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

80. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

81. The tribunal must adopt a holistic rather than fragmentary approach. This means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round. In Fraser v University of Leicester UKEAT/0155/13, HHJ Eady QC described this as a requirement *'to see both the wood and the trees'.*

Time limit in discrimination complaints

82. The time limit for bringing a complaint of discrimination or victimisation is set out in section 123 of the Equality Act. A complaint may not be brought after the end of:

> "(a) the period of three months starting with the date of the act to which the complaint relates,
> (b) such other period as the employment tribunal thinks just and equitable".

83. Conduct extending over a period (also called a 'continuing act') is treated by virtue of sub-section 3 of section 123 as done at the end of the period.

84. When calculating the end date of the period of three months, time spent in a period of early conciliation is not counted (section 140B of the Equality Act 2010).

85. Employment tribunals have a wide discretion to extend time under the 'just and equitable' test in sub-section 1(b), but 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA). The burden is on the claimant to persuade the tribunal that it is just and equitable. This does not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable.

Conclusions

86. We have applied these legal principles to our findings of fact as set out above, in order to decide the issues for determination.

Unfair/wrongful dismissal

87. The first issue for us in respect of the complaint of unfair dismissal is whether the claimant was dismissed by the first respondent within the meaning of section 95(1) of the Employment Rights Act 1996 ("ERA 1996") or whether her contract of employment terminated by agreement or mutual consent

88. The claimant said she was pressured by Mr Schmidt into agreeing to terminate her employment with the first respondent and take up new employment with PSI CRO AG in Zug (issue 6.13 of the factual allegations in the list of issues, page 152). This issue was considered by Employment Judge Postle at the preliminary hearing on 28 and 29 January 2019 at which he decided that the tribunal has no jurisdiction to hear claims arising out of the claimant's employment in Switzerland. In reaching that decision, EJ Postle made findings of fact and reached conclusions about the claimant's allegations that she was put under pressure to accept a role in Switzerland and to terminate her employment with the first respondent. He

found that the claimant was not under pressure to take these steps, and that if she had not taken up the new position in Zug, she could have remained in her existing role with the first respondent. He found that the claimant agreed to a formal termination of her role with the first respondent and that she drafted the termination agreement recording this (paragraphs 19, 21, 23 and 45 of his reserved judgment and reasons dated 10 April 2019, pages 132 to 143).

89. The same conclusions were reached by the Cantonal Court of Zug in its decision relating to the claimant's complaint of abusive dismissal by PSI CRO AG (paragraphs 4.1 to 4.4, pages 672 to 678).

90. The findings and conclusions on these issues by EJ Postle and by the Cantonal Court of Zug formed a necessary part of their reasoning. The doctrine of 'res judicata' means that it is not open to us to consider this issue again. However, if we had had to make findings on the factual allegation at issue 6.13, we would have reached the same conclusion, for the same reasons as those explained by EJ Postle and the court in Switzerland. The contemporaneous documentary evidence does not support in any way the suggestion that the claimant was put under pressure to accept the post in Zug or to agree that her employment with the UK company would end. We consider the claimant's emails of 12 and 18 May 2017 in which the claimant contacted Mr Schmidt to ask about the new role, and thanked him for the opportunity, as well as the fact that the claimant drafted the termination agreement to bring her employment with the first respondent to an end by 'mutual agreement', to be particularly relevant.

91. We have concluded that the claimant's employment with the first respondent came to an end by mutual agreement. The claimant agreed that her contract with the first respondent would end so that she could take up a position with PSI CRO AG in Zug in Switzerland.

92. There were other arrangements which the parties could have put in place for the claimant to have taken up her post in Zug without terminating her employment with the first respondent. For example, the claimant could have been transferred to Zug under the mobility clause in her contract, or the parties could have agreed a secondment arrangement under which she could return to her employment with the first respondent if things did not work out in Zug. However, those were not agreements they reached. Rather, the claimant agreed to the termination of her employment with the first respondent to permit her to take up the new employment in Zug. That brought her employment with the first respondent to an end by mutual agreement. She was not dismissed by the first respondent.

93. As the claimant was not dismissed, her complaints of unfair and wrongful dismissal cannot succeed.

<u>Unauthorised deductions</u>

94. The claimant said that there was a deduction from her wages in that she carried on working for the first respondent until 3 September 2017 but was only paid until 31 August 2017.

95. We have found that the termination of employment agreement which the claimant prepared and which was signed by her and on behalf of the first respondent provided for the claimant's employment with the first respondent to end on 31 August 2017. Her employment with PSI CRO AG began on 4 September 2017.

96. There was no evidence of any agreement between the claimant and the first respondent that she would be paid for any work done during the period 1 to 3 September 2017, after her employment with the first respondent had ended, on the Friday and over the weekend before she began her new role.

97. We have concluded that the claimant was not entitled to be paid by the first respondent for the period 1 to 3 September 2017.

Equality Act complaints

98. We have dealt with the Equality Act complaints in the order in which they were set out in the summary of factual allegations in the list of issues. We have dealt with some of the issues together. There are 27 factual allegations. Some of the factual allegations are said to be more than one type of discrimination, so in all there are some 42 allegations of discrimination. We have first set out the factual allegation for each issue, then considered our factual findings in relation to that allegation, and then applied the relevant legal principles to reach our conclusions on each allegation. Finally, we have stepped back to consider the claimant's complaints in the round.

Matters during the claimant's employment in the UK

99. Issue 6.1: the claimant said that Ms Ruf allocated a Clinical Trial Agreement Process Description project to another employee and that this amounted to direct age discrimination.

100. We have found that Ms Ruf did not allocate the Clinical Trial Agreement Process to another employee. Rather, she asked a Senior Legal Counsel to act as a reviewer on the project. The claimant was given credit for preparing the process document. The process had three reviewers and two approvers. We have accepted that this was a normal approach for this kind of project. This did not amount to a detriment or to less favourable treatment of the claimant by Ms Ruf.

101. Issues 6.2, 6.3 and 6.4: in a meeting the claimant said she was not interested in moving to Switzerland for personal reasons. Mr Schmidt responded: "What personal reasons, you are not married, you don't have children, and you do not have a boyfriend". This was said to be direct sex

discrimination, sexual harassment or harassment related to sexual orientation by perception. In the same meeting, Mr Schmidt told the claimant an anecdote about the Swiss office's 'tolerance' of a lesbian staff member. This was said to be harassment related to sexual orientation by perception. In the same meeting, Mr Schmidt said to the claimant, "Your age will prevent you from commanding a higher salary" than 120,000 Swiss francs per annum in Switzerland. This was said to be direct age discrimination and age-related harassment.

102. We have found that Mr Schmidt said the words complained of in issues 6.2, 6.3 and 6.4.

103. We first consider the complaints of direct sex and direct age discrimination. This requires us to consider the treatment complained of and whether there is evidence from which we could conclude that it was less favourable treatment because of sex (in relation to issue 6.2) or because of age (in relation to issue 6.4). If there is, the burden shifts to the respondent to satisfy us that the treatment was in no sense whatsoever because of the protected characteristic.

104. The words used by Mr Schmidt in issue 6.2 were comments on the claimant's personal life. They were bluntly put. The claimant was shocked that Mr Schmidt knew about her personal life, and the comments made her feel uncomfortable. It was clear that the claimant would have preferred it if the comments had not been made and they amounted to a detriment. However, there is no evidence from which we could conclude that the comments amounted to less favourable treatment because of sex. We have accepted that Mr Schmidt would have made the same comments to a male employee in the context of a discussion about possible relocation. A male employee would not have been treated any differently.

105. If there had been evidence from which we could have concluded that the claimant was directly discriminated against on grounds of sex, such that the burden of proof shifted to the respondent, we would have been satisfied that this comment was not because of sex. Although it could have been put in a more sensitive way, it was a comment that Mr Schmidt would have made to any employee of whatever gender who raised personal reasons as an explanation for not being able to relocate.

106. The comment made by Mr Schmidt in issue 6.4 was about the claimant's age. We have concluded that it was a comment which we could conclude amounted to direct age discrimination, because of the explicit reference to age. This means that the burden of proof shifts to the respondent to show that the comment was not less favourable treatment because of age. We are satisfied that the comment did not amount to direct age discrimination. It was not less favourable treatment. It was an explanation of the position in the Swiss labour market, where, as we have found, there is generally considered to be a link between age and salary.

107. Next we have considered whether the comments made by Mr Schmidt complained of in issues 6.2, 6.3 and 6.4 were unlawful harassment. The comment at issue 6.2 is said to be sexual harassment (unwanted conduct of a sexual nature) or harassment related to sexual orientation. We do not find this comment to have been unwanted conduct of a sexual nature. It was related to the claimant's personal life but it was not conduct of a sexual nature. It was said in response to the claimant mentioning personal reasons in the context of a relocation. It was not an attempt to engage the claimant in discussions about personal or sexual relationships. It was also not related to sexual orientation. We have gone on to consider the remaining elements of the test of harassment in relation to this comment in any event.

108. The comments at issues 6.3 and 6.4 are related to the protected characteristics of sexual orientation and age. (The test is satisfied if the conduct is 'related to sexual orientation', it does not have to be 'related to the claimant's sexual orientation' to meet the definition.)

109. All the comments at 6.2, 6.3 and 6.4 were unwanted conduct. They made the claimant feel uncomfortable and, subjectively, had the effect of creating a humiliating environment for her.

110. Having considered the effect of the conduct on the claimant, we have to consider whether, taking into account the claimant's perception and the other circumstances of the case, it was reasonable for these comments (or any of them) to have had the effect they did. This is the objective part of the test for harassment. The comments were unfortunate and awkward. However, we bear in mind the importance of not encouraging a culture of hyper-sensitivity or of imposing legal liability to every unfortunate phrase. We have concluded that, in this case, taking into account the context of the discussion, these comments did not cross the line such that they amounted to unlawful harassment.

111. Issues 6.5 and 6.8: the claimant said she was the lead employee allocated to a client named Biomarin, but Ms Ruf decided to instruct the back-up employee to attend a client call instead of the claimant. This was said to have happened in December 2016/January 2017 and again in March 2017. This was said to be direct age discrimination.

112. We have not found that these events occurred as the claimant said. We have found that legal counsel based in Poland was the main contact for a study which began in December 2016 and for a new project which began in May 2017. He attended a Skype call about the study in December 2016, but the claimant attended a call in May 2017 as back up for the project.

113. We have found that the claimant was the back-up counsel for this client, not the lead. We have found that the employee who was appointed lead for the project was appointed because he had a global legal role and had previous involvement in another study for the same sponsor. The

appointment of the lead counsel for this client was not in any way related to the claimant's age.

114. Issue 6.6: Ms Ruf said to the claimant that she should stop working on the development of a regulatory reviewer template because Senior Legal Counsel would be working on it. The claimant said this was direct age discrimination.

115. We have not found that this happened. Rather, Ms Ruf told the claimant that the Senior Legal Counsel may be able to assist her, as she had experience working on similar templates. The claimant and the senior legal counsel worked together on the template. This was not a question of the claimant being taken off a project by Ms Ruf. There was no detriment or less favourable treatment. In any event, Ms Ruf's actions in respect of this project were not in any way related to the claimant's age.

116. Issue 6.7: Ms Ruf reprimanded the claimant for poor timesheet keeping/filing. The claimant said this was direct age discrimination.

117. Our factual findings in relation to this complaint were that the claimant missed the deadline for submitting her timesheets, resulting in an inaccurate report being produced at month end. Ms Ruf told the claimant that it was important to comply with the deadline and asked the claimant to make sure to submit her timesheets on an ongoing basis or at least at the end of every month. This was a normal management request which would have been made of any employee in the same circumstances. It did not amount to less favourable treatment and was not in any way related to the claimant's age.

118. Issue 6.9: Ms Ruf decided not to promote the claimant. The claimant said this was direct age discrimination, age related harassment, and victimisation. This allegation was one of the claimant's central complaints about Ms Ruf.

119. We have found that when the claimant raised the question of promotion in January 2017, Ms Ruf said that the claimant was not ready for promotion. She felt the claimant was not performing at the same level as the group's three senior legal counsel. Ms Ruf's view at the claimant's appraisal in March 2017 was the same.

120. Ms Ruf took a different view to the claimant of whether the claimant was ready for promotion. She felt that the claimant, who was around two and half years into her first legal counsel role, was still at an early stage of her career. Ms Ruf explained her view to the claimant. She provided the claimant with balanced feedback at her appraisal, acknowledging what the claimant had done well, as well as highlighting areas for development. Overall, she felt the claimant was meeting expectations for the legal counsel role, but was not ready for a senior legal counsel role. That view was based on the claimant's performance, it was not related to the claimant's age. The decision not to promote the claimant was not less

favourable treatment because of the claimant's age, or age-related harassment. We return to this in issue 6.10.

121. The claimant also said that the decision not to promote her was victimisation because of making protected acts. She relied on an informal grievance about age discrimination made in a conversation with the PSI group's Deputy Head of Project Management which took place on 10 March 2017 after her appraisal, and a complaint of age discrimination made in an email to the UK country manager on 13 March 2017. We have considered whether these amounted to protected acts.

122. In her conversation with the Deputy Head of Project Management, the claimant made an allegation of age discrimination. This was an allegation that Ms Ruf had contravened the Equality Act. The conversation was a protected act for the purposes of section 27 of the Equality Act.

123. In her email to the UK country manager the claimant said that she felt that age was a limiting factor for a title change. It was clear from the subsequent email correspondence that both the UK country manager and Ms Ruf understood the claimant to have made a complaint of age discrimination. The email was a protected act for the purposes of section 27 of the Equality Act.

124. Victimisation occurs where an employer subjects an employee to a detriment because they have done a protected act. We have to consider whether Ms Ruf decided not to promote the claimant because she did protected acts on 10 March and 13 March 2017.

125. We have concluded that Ms Ruf's decision that the claimant was not ready to be promoted to Senior Legal Counsel was not in any way related to the claimant's allegations of 10 March and 13 March 2017. It was very clear that she had already reached her view before the protected acts were done by the claimant. Ms Ruf had already conveyed her decision that the claimant was not ready for promotion in discussions via the UK country head in January 2017 and in the appraisal meeting itself. Both of these took place before the claimant did her protected acts.

126. Issue 6.10: During the claimant's appraisal meeting, Ms Ruf said that the claimant:

    (i) "lacked capabilities due to age"
    (ii) lacked management capabilities
    (iii) did not know how to get on with people.

127. The claimant says this is direct age discrimination and age-related harassment.

128. We have not found that Ms Ruf said that the claimant lacked capabilities due to age. We have found that she said that developing management skills and sound judgment came with experience, that the claimant was still

at the beginning of her professional career and needed to be patient with herself, that the claimant was still young and that it was normal that she was not yet at the same level as someone with many years of experience.

129. We have not found that Ms Ruf said that the claimant lacked management capabilities or that she did not know how to get on with people. We have found that she made balanced comments on the claimant's performance which were largely positive but she also gave guidance on areas where the claimant could develop or improve.

130. We have considered whether the comments made by Ms Ruf at the claimant's appraisal (as we have found them) were direct age discrimination. They were not less favourable treatment. The same comments would have been made to someone who was at the same career stage as the claimant, whatever their age. Using the words 'still young' in this context was another way of saying that the claimant was at the beginning of her professional career and was not a detriment to the claimant. If we had found that, because of the use of the word 'young', the burden of proof had shifted to the respondent in respect of these comments and in respect of the decision that the claimant was not ready for promotion, we would have been satisfied that Ms Ruf's comments and her decision that the claimant was not ready for promotion were based on her view that the claimant's performance was such that promotion was not merited, and were not in any way based on the claimant's age.

131. Ms Ruf's comments also did not amount to unlawful age-related harassment. They were comments about the claimant's career development made in the context of an appraisal. They were an attempt to reassure the claimant when she was clearly upset about being told that she was not ready for promotion. They did not violate the claimant's dignity or have the purpose of creating the environment required by the legal test. If they had that effect, it was not reasonable for them to do so.

132. The claimant and Ms Ruf clearly had different views about the claimant's performance and her readiness for promotion. Their views were not completely diametrically opposed: Ms Ruf felt that the claimant was performing much of her role well and meeting expectations. However, Ms Ruf basically felt that the claimant was pushing for promotion before she was ready for it. Ms Ruf's view was based on her experience of working closely with the claimant and on her knowledge and experience of the performance of other legal counsel and senior legal counsel. The claimant found Ms Ruf's view and the fact that she was not to be promoted difficult to accept. This made the claimant feel that Ms Ruf was being unfair to her. However, we are satisfied that Ms Ruf's perception of the claimant, her treatment of the claimant during her appraisal and her decision that the claimant was not ready for promotion were entirely based on her view of her performance in her role and were not related to the claimant's age.

133. Issue 6.11 and 6.15: Ms Ruf reprimanded the claimant in regards to a complaint made by another employee against the claimant. She blamed

the claimant for the complaints being raised by this employee against the first respondent. She said to the claimant during this conversation, 'If you weren't leaving already I would have turned this into a disciplinary.' The claimant says this was direct age discrimination and victimisation.

134. We have found that Ms Ruf said that if the claimant had not been leaving the legal department she would have considered disciplinary action. However, we have not found that Ms Ruf reprimanded the claimant because of the complaint made against her or that she blamed her for the complaints made against the first respondent. Rather, we have found that Ms Ruf was unhappy that when she and the claimant were discussing a subject access request by another employee, the claimant did not tell her that grievance complaints had been made by her and the same employee against each other. Ms Ruf saw this as a lack of honesty on the claimant's part and thought the claimant had shown a lack of professional judgment in dealing with the case when there was an obvious conflict of interest. This was the reason why Ms Ruf referred to the possibility of disciplinary action.

135. There was no evidence to suggest that Ms Ruf's actions were in any way prompted by or related to the claimant's age or to the complaints of age discrimination that the claimant had made in March 2017. There is no evidence from which we could conclude that the burden on this allegation shifts to the respondent. If there had been, we would have accepted that the respondents have shown that there was a non-discriminatory explanation for Ms Ruf's treatment of the claimant, that is because she was unhappy with how the claimant had dealt with this matter and regarded it as a serious issue.

136. Issue 6.12: the claimant was not invited to take part in interviewing candidates to replace her. This was said to be victimisation.

137. We have found that the claimant was not invited to take part in interviewing candidates to replace her. It was a management decision to decide who would be involved in that process. There was no evidence to suggest that the claimant's protected acts made in March 2017 played any part in the decision as to who would be involved with the interviews. We do not accept the claimant's suggestion that it would have been usual practice for someone who has given their resignation to be involved with recruiting their replacement.

138. Issue 6.13: Mr Schmidt pressured the claimant into agreeing to terminate her employment with the first respondent and take up new employment with PSI CRO AG in Switzerland.

139. As set out above in our conclusions on the dismissal complaints, the factual allegation underlying this issue has been determined against the claimant by EJ Postle and the Cantonal Court in Zug. Had we had to consider the factual background to this issue we would have reached the same conclusions as them. The contemporaneous documentation very

strongly supports the respondent's case that it was the claimant's decision to accept the role in Switzerland and that the termination of her employment with the first respondent to allow her to do so was by mutual agreement.

140. Issue 6.14: the claimant was offered a salary of 90,000 CHF by PSI CRO AG. This allegation of age discrimination against the Swiss company falls away because the claims against PSI CRO AG have been dismissed by EJ Postle.

141. Issue 6.16: the claimant was instructed to sign a termination letter by R4 which was a deliberate attempt to prevent C from having continuous service in her new role in Switzerland and was done with the intention of terminating her employment upon joining. This was said to be direct age discrimination and victimisation.

142. The factual allegations underlying this issue has been determined against the claimant by EJ Postle and the Cantonal Court in Zug. If we had had to decide the factual background to this issue we would have reached the same conclusions as them. The termination of the claimant's employment with the first respondent was by mutual agreement. Neither the termination of the claimant's employment with the first respondent nor the offer a new role in Switzerland were done with the intention of terminating the claimant's employment upon joining PSI CRO AG.

143. For completeness, we note here that if we had found any of the alleged incidents which took place during the claimant's employment in the UK to have amounted to discrimination, harassment or victimisation, we would have had to go on to consider the time limit. The claimant notified Acas for early conciliation on 3 November 2017 and presented her claim on 28 December 2017. The claimant did not explain why it would be just and equitable for her complaints about matters which occurred before 4 August 2017 to be heard out of time. This relates to issues 6.1 to 6.16 (other than issue 6.12, not inviting the claimant to interview candidates to replace her). We conclude that, if we had found there to have been any discrimination, harassment or victimisation in relation to issues 6.1 to 6.11 and 6.13 to 6.15, those complaints would have been presented out of time.

144. Issue 6.17: 31 August 2017 was the effective date of termination of employment with the first respondent. This issue seems to have been included as part of the chronology only, rather than as an allegation of discrimination or victimisation. In any event, we have concluded, as set out above, that the termination of the claimant's employment with the first respondent was by mutual agreement.

Matters during the claimant's employment in Switzerland

145. Issues 6.18 to 6.27 happened after the claimant's employment with the first respondent had ended, and she had moved to Switzerland to take up

employment with PSI CRO AG. With the possible exception of issue 6.25, they happened outside Great Britain.

146. The claim against PSI CRO AG itself has been dismissed by EJ Postle.

147. The basis on which the claimant makes these allegations is that the first respondent is liable for acts by Mr Schmidt and Ms Ruf, because Mr Schmidt and Ms Ruf were acting as agents of the first respondent, regardless of which physical office the claimant was based in, and because the discrimination arises out of and is closely connected to the claimant's previous employment relationship with the first respondent and therefore amounts to post-termination discrimination. In relation to issues 6.18 to 6.27, we have first considered our findings of fact and whether the acts amount to acts of discrimination, harassment or victimisation, before coming back (if necessary) to the questions regarding vicarious liability, agency, and post-termination.

148. Issue 6.18: Mr Schmidt placed the claimant in an open plan office in PSI CRO AG's premises. The claimant said that this was direct age discrimination and victimisation.

149. We have found that the claimant was given a seat in the open plan area of the office. Her two older colleagues were given offices. There was no evidence, other than this difference in treatment and difference in age that this treatment was because of the claimant's age. If we had found the burden of proof to have shifted to the respondent, we would have concluded that the allocation of seats for the new real estate team was not ideal for any of them, that there was not a lot of space available, and that we were satisfied that the decision to seat the claimant in the open plan area near to Mr Schmidt was not in any way related to the claimant's age or to the protected acts she did in March 2017.

150. Issue 6.19: When the claimant hesitated before getting into a lift, Mr Schmidt said to her: "What's wrong? Are you scared?" This was said to be sexual harassment, that is unwanted conduct of a sexual nature.

151. This was not conduct of a sexual nature. We accept that it was an awkward remark intended as a joke and that the claimant did not understand it. We considered the context, including Mr Schmidt's subsequent comments in the car pointing out restaurants and places of interest. These seem to us to be related to the claimant's recent arrival in the city, rather than being suggestive of conduct of a sexual nature. Further, we do not consider that the legal test of harassment is made out in respect of this comment. Although the claimant felt uncomfortable and intimidated, this comment did not, objectively, have the effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

152. The remaining issues, issues 6.20 to 6.27 are all said to be direct age discrimination and/or victimisation.

153. Issue 6.20: the claimant was sent on a trip to Argentina by Mr Schmidt. He said, “I wanted to send you there from the beginning”, insinuating that Ms Ruf did not want the claimant to go.

154. We have found that Ms Ruf did not feel strongly about this, but expressed some scepticism to Mr Schmidt about whether the claimant should go to Argentina. This was because of her concerns about whether the claimant was the right person for the task. These concerns were based on her knowledge of the claimant’s performance and experience, they were not related to the claimant’s age or the complaints of age discrimination which the claimant had made in March 2017.

155. Issue 6.21: Ms Ruf allocated a meeting in Madrid to another employee and did not include C in conversations about Madrid.

156. We have found that Ms Ruf conducted the meetings in Madrid with estate agents because she was in Madrid and had a free day, and this would avoid the need for the claimant to fly back via Madrid when she returned to Zug from Argentina. The meetings were administrative and were not an important career opportunity for the claimant. The claimant was not being excluded. It made sense for Ms Ruf to deal with these meeting while she was there, rather than for the claimant to have to travel specifically to Madrid. This was not a detriment or less favourable treatment of the claimant. In any event, it was not related to the claimant’s age or her March 2017 protected acts.

157. Issue 6.22: Ms Ruf did not employ external counsel on a deal when the claimant suggested that they might do so.

158. This relates to the signing of the settlement document. We have found that the claimant suggested that an external counsel who had an existing power of attorney could sign the document. Ms Ruf initially thought that a new power of attorney should be prepared, but later agreed that the existing power of attorney should be used. Ms Ruf did not immediately accept the claimant’s suggestion. She explored another option first and then agreed with the claimant’s proposed approach. This was not a detriment or less favourable treatment of the claimant. In any event, it was not related to the claimant’s age or her protected acts.

159. Issue 6.23: Ms Ruf did not sign a power of attorney form that the claimant presented to her, on the express grounds that the form had no date limitation.

160. We have found that Ms Ruf noticed that the standard power of attorney template had not been used, and the document had no end date. She asked for the document to be redrafted using the correct template and including an end date. She wanted to ensure that the correct form was used. This was a reasonable request. It did not suggest that Ms Ruf did not trust the claimant. Mr Schmidt and Ms Ruf signed the redrafted

document and the claimant collected her agreed relocation fee. Ms Ruf's refusal to sign the first document was not a detriment or less favourable treatment of the claimant. It was not related to the claimant's age or her March 2017 protected acts.

161. Issue 6.24: Ms Ruf did not see if the claimant was OK after she was dismissed by PSI CRO AG.

162. We have found that the claimant was upset after the dismissal meeting and went to her office and shut the door. Ms Ruf did not go into the claimant's office to speak to her. Ms Ruf checked again later and the claimant had left the office. Ms Ruf did not check on the claimant at first because she thought it was not appropriate to go into the claimant's office when her door was closed. This was not because of the claimant's age or because of the protected acts the claimant did in March 2017.

163. Issue 6.25: Ms Ruf instructed the UK country manager that the claimant could not be hired back in the UK office.

164. We have accepted that the reason that Ms Ruf told the UK country manage that the country manager could not be hired back in the UK office was because the claimant's replacement had already been recruited and had started in her new role with the first respondent. There was no headcount for another lawyer. Ms Ruf's decision, and any failure by the respondents to create an additional legal role in the UK for the claimant or to dismiss the claimant's replacement so that the claimant could return, were not because of the claimant's age or because of her protected acts.

165. Issue 6.26: the claimant contacted Mr Schmidt via WhatsApp messenger. He did not reply.

166. We have found that Mr Schmidt did not reply to the claimant's WhatsApp message. He was on holiday at the time. There is no evidence from which we could conclude that the failure to reply to the claimant's message was because of her age or her previous protected acts.

167. Issue 6.27: the effective date of termination of the claimant's employment with PSI CRO AG. This allegation of age discrimination and victimisation against the Swiss company falls away because the claims against PSI CRO AG have been dismissed by EJ Postle.

168. Having reached those conclusions in respect of the individual allegations of discrimination, harassment and victimisation, we step back and consider the claimant's case in the round. Many of the claimant's direct age discrimination allegations involving Ms Ruf concern decisions about allocation of work, or other instructions such as the reminder to complete timesheets on time. The claimant's sense of grievance about these matters reached a head when Ms Ruf told the claimant at her appraisal in 2017 that she did not think she was ready for promotion. The claimant did not agree with Ms Ruf about this and she also found it difficult to take

constructive criticism. She felt she was being treated unfairly and viewed Ms Ruf's decisions and actions through that lens. However, Ms Ruf's actions were proper management actions which Ms Ruf, as the claimant's manager, was entitled to take. We have in mind that discrimination can be unconscious as well as conscious, but we have not found any evidence to suggest that the claimant's age played a part in Ms Ruf's perception of the claimant or her performance, or the management decisions which Ms Ruf took which the claimant complains about. We have accepted the evidence of Ms Ruf about the reasons why she took the decisions she did.

169. Ms Ruf and Mr Schmidt both have quite direct management styles. Mr Schmidt in particular spoke very bluntly to the claimant. We have considered the allegations of harassment carefully. Some of the comments made to the claimant were very unfortunate and clumsy. However, we have concluded that they did not cross the line such as to amount to unlawful harassment.

170. In relation to the claimant's move to PSI CRO AG, factual findings were made by both EJ Postle and the Cantonal Court in Zug to the effect that none of the respondents had any ulterior motive in offering the claimant the new role or in requesting that she terminate her employment with the first respondent to take it up. We would have reached the same decision.

171. The claimant's complaints about matters that took place after her move to Switzerland were in the main complaints about management decisions which with she did not agree. There was no basis to suggest that the claimant's age or the protected acts she made played any part in the way she was treated in September and October 2017. We have not found that any of these matters amounted to direct age discrimination, victimisation or sexual harassment. Our conclusions on those matters mean that we do not need to consider whether Mr Schmidt or Ms Ruf were acting as agents for the first respondent when managing the claimant in her PSI CRO AG role in Switzerland or whether any of these matters arose out of and were closely connected with the claimant's employment with the first respondent.

172. In summary, having considered each of the individual allegations and considered the claimant's complaints in the round, we have concluded that the claimant's complaints are either not made out factually or do not meet the relevant legal tests and that issues 6.1 to 6.11 and 6.13 to 6.15 were presented out of time. For these reasons the claimant's complaints under the Equality Act cannot succeed.

173. We have therefore concluded that the claimant was not subjected to discrimination, harassment or victimisation. Those complaints fail and are dismissed.

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Employment Judge Hawksworth

Date: 6 July 2021

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office

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