EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Rudd	**v**	**Great Bowery (UK) Ltd**

Heard at: London Central
On: 21 – 25 June 2021
Chambers 29 June 2021

Before: EJ G Hodgson
Mr S Pearlman
Mr A Adolphus

Representation
For the Claimant: Mr K Zaman, counsel
For the Respondent: Ms M Tutin, counsel

JUDGMENT

Claim one - 2204586/2020

1. The claim of indirect discrimination fails and is dismissed.

Claim two - 2206759/2020

2. The claim of victimisation fails and is dismissed.

3. The claim of constructive unfair dismissal fails and is dismissed.

4. The claim of wrongful dismissal fails and is dismissed.

Both claims

5. All other claims have previously been struck out or have been dismissed on withdrawal.

REASONS

Introduction

1.1 Claim one, 2204586/2020 was issued on 24 July 2020. Claim two, 2206759/2020 was issued on 16 October 2020. Various claims were brought, which are considered below.

1.2 Some claims were either struck out or dismissed on withdrawal prior to this hearing. This full merits hearing considered those claims that remained in both claim forms.

1.3 The hearing proceeded as a video hearing. No party objected. I considered a video hearing was just and equitable.

The Issues

2.1 The issues were agreed at the hearing. The tribunal gave the parties a written record of the issues which is reproduced below. No party sought any amendment to the tribunal's record.

2.2 The issues in claim one are as follows.

Victimisation

2.3 It was agreed there was no victimisation claim.

Whistleblowing claims

2.4 Whilst the tribunal doubted that any whistleblowing claim had been brought, it was agreed that any such claim had been struck out in any event.

Harassment

2.5 It was agreed there had been a claim of harassment, in particular paragraph 26 of the particulars of claim referred to there being reference to the claimant having a relationship with another member of staff at a leaving party in the summer of 2019. It was also alleged that there were other claims of harassment, albeit these were not identified, and it is unclear to the tribunal they existed. In any event, any such claim had been withdrawn and it was acknowledged they had been dismissed. Therefore, there was no continuing claim of harassment.

Direct discrimination

2.6 It was agreed that there had been a claim of direct discrimination. The claim form had alleged that the decision to furlough the claimant was an

act of direct sex discrimination. It was unclear whether any other matter was put as an act of sex discrimination. In any event, the claimant accepted that all claims of direct sex discrimination in claim one had been withdrawn and dismissed.

Indirect discrimination

2.7 The nature of the indirect discrimination was unclear from the claim form, as had been noted by EJ Nicolle. The claimant's issues identify the PCP as follows, "The PCP relied upon is the practice of choosing to furlough staff in the photography division who had children."

2.8 The particular disadvantage was put as follows, “This put women at a disadvantage as they are more likely to have childcare responsibility at home with schools closed due to Covid-19." We discussed whether this had been put accurately by the claimant. The claimant was invited to apply to amend if either the PCP or the disadvantage as identified was inaccurate.

2.9 It was agreed there were no other claims in claim one.

2.10 The issues in claim two are as follows.

Victimisation

2.11 The claimant relies on three protected acts. The first protected act was her written grievance of 8 April 2020 which referred to her grievance concerning working from home. The second protected act was her oral comments during a grievance on 24 April 2020, when she referred to being discriminated against as a single widowed mother in relation to working at home for two days a week. The third protected act was the claimant raising orally in the appeal on 28 July 2020 that her selection for redundancy amounted to an act of discrimination. By reason of being a single mother and/or her status as a widow. She alleges she also referred to her first tribunal complaint.

2.12 The detriment relied on is being selected for redundancy. It being part of her case that the alleged redundancy situation and process was a "sham."

Whistleblowing

2.13 The claims of automatic unfair dismissal (section 103A Employment Rights Act 1996) and detriment (section 47B Employment Rights Act 1996) have been struck out by EJ Nicolle.

Indirect discrimination

2.14 It was agreed that there had been a repetition of the same indirect sex discrimination claim and it was agreed no new claim had been brought in claim two.

Direct discrimination/Harassment

2.15 It was also agreed there were no claims of direct discrimination or harassment in claim two.

Constructive unfair dismissal

2.16 The claimant alleges that she resigned because the respondent was in breach of the implied term of mutual trust and confidence. In her issues she referred to the following matters as contributing to or constituting the breach: bullying by Ms Thu Nguyen; Ms Liz Sands having knowledge of the bullying; by Ms Nguyen not being joined to the bullying workshop; poor treatment of the claimant because of her status as a single mother/widow; unfair assessment of her generation of revenue (being failure to take account of her revenue and dual role as agent/producer); the decision to furlough the claimant; and the alleged sham redundancy process.

2.17 The respondent denies dismissal. Further or in the alternative it alleges there was a fair reason being redundancy or the business reorganisation as some other substantial reason.

2.18 The claimant alleged that the final straw was being singled out for redundancy as communicated to her on 30 September 2020 (page 648).[1]

Wrongful dismissal

2.19 The claimant alleges that she is owed her notice period.

Evidence

3.1 The claimant gave evidence.

3.2 The following gave evidence for the respondent; Ms Thu Nguyen; Mr Wali Mohammad; and Mr Richard Kilner.

3.3 We received a bundle of documents.

3.4 The parties produced written submissions.

Concessions/Applications

4.1 It was common ground that both claims should be heard together, and the case management had proceeded on that basis.

4.2 Claim one, 2204586/2020 was issued on 24 July 2020. Claim two, 2206759/2020 was issued on 16 October 2020.

[1] I will refer to the numbering in the bundle where it may assist.

4.3 On 8 February 2021, EJ Nicolle held a public preliminary hearing. He struck out all section 47B and the 103A Employment Rights Act 1996. In addition, he recorded "The claims for direct sex discrimination under section 13 Equality Act 2010… and harassment under section 26 of the EQA are dismissed on withdrawal."

4.4 The accompanying reasons gave limited detail of the claims brought. It was unclear which allegations and heads of claim had been brought in claim one or claim two. Further, whilst there is reference to the continuing claim of indirect discrimination, the reasons do not set out the nature of that claim. It is clear he envisaged the victimisation claim or claims would proceed, but the detail was not set out. The reasons do not record what were the claims of direct sex discrimination or harassment.

4.5 During the hearing, we clarified the claims which remained and those which should be dismissed. Following that discussion, we gave the party a list of the remaining issues to ensure that we had recorded correctly those matters which should be dismissed on those matters which remain to be determined.

4.6 On the first day, we questioned whether sufficient time had been allocated. We noted that the issues had been narrowed. Having regard to the time available, we indicated that we could allow up to one day to complete cross-examination of the claimant and up to one day to complete cross-examination or the respondent's witnesses. We indicated we believed this was sufficient. We invited the parties to consider whether they agreed, and if they thought the timing insufficient, they should make an application for adjournment. We confirmed that we would use our powers to limit the length of cross-examination should the parties confirm that they wished to proceed in the time available. We indicated that allowing both parties one day to complete cross-examination should be more than sufficient in this case.

4.7 We questioned whether the PCP had been properly or adequately identified in the claim of indirect discrimination. In particular, the claimant stated in the proposed issues that the PCP was "Choosing to furlough staff in the photography division who had children." The claimant stated, "This put women at a particular disadvantage as they are more likely to have childcare responsibilities at home with schools closed due to Covid-19." We noted that this appeared to equate the disadvantage with a possible reason for disadvantage. It appeared to lack clarity. We confirmed that the claimant should consider carefully whether the PCP and this disadvantage as set out in the claimant's issues were accurate, and if not, she should apply to amend. Such application should be made on the second day.

4.8 By email at 08:24 on day two, 22 June 2021, the respondent applied to adjourn the hearing. The application alleged that the fact that it had been necessary to consider the issues had led to the first day being “lost.” It was said there were exceptional circumstances. As to the exceptional

circumstances, the respondent referred to a 27-page witness statement from the claimant and indicated that it was necessary for there to be extensive cross examination, which may last for longer than the day envisaged both in the tribunal's suggested timetable and the parties' agreed timetable. Further, it was alleged that redundancy in the context of furlough raised novel arguments. During oral submissions it was conceded that no novel legal points were raised, but it was said to be an unusual factual situation.

4.9 The claimant resisted the application. We refused the application to adjourn and reserved the reasons. We should summarise our reasons now.

4.10 It was necessary to consider the issues because it appeared they had not been defined or agreed by the parties. Unfortunately, and despite the tribunal making specific enquiry, the parties failed to bring to the tribunal's attention the fact that the issues had been considered and defined by EJ Nicolle during case management discussions on 7 December 2020 and 8 February 2021. The tribunal had not seen those documents. In any event, the consideration of the issues had only taken part of the afternoon on day one. We did not accept that day one had been "lost." There remained sufficient time to allow the respondent one day to cross examine the claimant, which was the period envisaged in the agreed timetable. That timetable had been agreed after all documents and witness statements had been exchanged and the parties had taken no issue with the time. In any event, we were satisfied that, despite the context of furlough, the factual dispute was straightforward. Whilst the matters relied on as breaches of contract were extensive and extended over the claimant's period of employment, there was no reason why the cross examination should last longer than one day. The bundle was extensive with over 1000 pages, but it was likely that only a limited number of pages would be referred to.

4.11 To the extent that there had been any delay on the first day there were two main causes. First, the parties failed to confirm that there had been previous consideration the issues by EJ Nicolle, despite the tribunal specific request for clarification. Second, the tribunal was not able to ascertain the position immediately because the parties had failed to file the bundle in a format which could be downloaded. That technical failure led to delay some wasted time. Nevertheless, the time wasted was such that the time remaining was sufficient.

4.12 We did not accept that the respondent could not cross examine the claimant in the time given. Nevertheless, should it become clear that there was insufficient time, time could be extended and if necessary, the claim could go part heard.

4.13 Adjournment would have led to significant delay. The claimant had been a litigant in person, albeit she had instructed a direct access barrister for the hearing. Adjournment would have led to an increase in costs. Moreover,

the claimant's personal position was precarious, and she currently faces eviction. Delay would have caused the claimant particular hardship. Adjournment may materially have affected her ability to participate in hearing at a later date.

4.14 In all the circumstances, we refused the application to adjourn.

4.15 Cross-examination of the claimant was completed on day two and there was no request for an extension of time, albeit we did allow a short lunchbreak which allowed slightly longer period cross-examination.

4.16 On day three, Mr Wali Mohammad gave evidence. Part of the factual matrix concerned the claimant's assertion that income earned from her production work should have been considered. However, there were no clear figures. As Mr Mohammed was the chief finance officer, EJ Hodgson asked him to confirm whether there were figures contained in the bundle demonstrating the production earnings attributable to the claimant. Mr Mohammed consider this and stated that the appropriate figure was £158,000. On being requested to confirm where the figures appeared in the bundle, he stated that they were not in the bundle, but instead he had accessed an undisclosed document which he had on his laptop. This led to a request for specific disclosure, which was granted for the reasons given orally at the hearing. In summary, it appeared that this was a relevant, or potentially relevant, document. It should be disclosed either because it was relevant and there was a continuing duty of disclosure, or because it had been specifically referred to in evidence and may be relevant. We rejected Ms Tutin's application to allow her to take instructions from Mr Mohammed. We gave oral reasons. We interposed the final witness and required Mr Mohammed to return on the morning of day 4 to complete his evidence.

4.17 The document was disclosed in accordance with our order on day four.

4.18 Cross examination of Mr Mohammad concluded on day 4. There was no further request for disclosure.

The Facts

5.1 The respondent manages various artists. It promotes artists, finds them work, and develops their careers. Whilst the legal title is Great Bowery (UK) Ltd, it appears the UK agency is universally referred to by a trading name as CLM. It was founded by Ms Camilla Lowther. The agency represents photographers, directors, stylists, set designers, and multimedia artists. It is divided into photography and styling divisions. The photography division produces stills and motion videos, particularly for advertising. CLM is involved in the fashion industry and supplies artists internationally.

5.2 CLM's main function is to act as an agency and to source work for artists. Most of its fees are generated in that manner. Photography and video

projects require production assistance. That production assistance may be provided by a variety of sources, including an artist's company, an independent firm, and in-house CLM production. Production is not the focus of CLM and is essentially a by-product of its main activity, which is acting as an agency for artists.

5.3 The claimant worked for CLM as an agent from 1997 to 2001. Thereafter, she ran her own production company, until the beginning of April 2018, when she once again joined CLM, as an agent.

5.4 The claimant has three children (we have not been given their ages). Her long-term partner died in 2015. The claimant received treatment for cancer in 2015/2016 and 2017. As a result of her personal circumstances, the claimant decided to simplify her working life and take full-time employment.

5.5 It has been a substantial part of the claimant's case before us that she was employed, in substantial part, because of her production skills. It has been suggested that part of her focus was to develop production. We do not accept that evidence. All agents are involved in production. She was employed as an agent and the main focus of the business was agency. The letter of employment (R1/10) states the claimant "will be employed as agent…" The offer letter of 13 April 2018 (R1/22) confirms her position is an "agent."

5.6 Both documents record her probation period is three months, albeit it is accepted that that the normal period was six months and there was some mistake or confusion when her contract was produced. There is no document thereafter which would suggest that the focus of the claimant's work was production. All the available documents emphasise the importance of the agency work, and her performance as an agent was the focus of all her reviews. There are a number of emails which acknowledge that she did undertake production, but that she should not do so to the detriment of her agency work.

5.7 The claimant lives in Oxfordshire. Most of the time, she commuted by train to London. She had responsibility for childcare, and this imposed significant time constraints. Prior to starting employment, she agreed her working hours would be 9 to 5. The normal working hours were from nine to six. All accepted that she would work on the train, and it is common ground that the nature of the work may require an agent to work at any time. Inevitably, agents work outside office hours.

5.8 Presuming no delay on the train or the tube. the claimant's commute was in the region of two hours each way. When the train was not operating, and the claimant was required to drive, the journey could be up to 3 hours each way. During her commute, the claimant would normally work on the train.

5.9 We do not need to consider every aspect of her work chronologically. We need to consider a number of broad areas particularly as follows: her requests for homeworking; her relationship with her line manager Ms Nguyen; her performance as an agent; the relevance of her production work; factors leading to the claimant being furloughed; the events leading to her proposed redundancy; her grievances; and her subsequent resignation. We will set out the basic position in relation to each of these matters and will consider any further details, as necessary, in our conclusions.

5.10 We have been presented with extensive and wide-ranging evidence. There were numerous disputes before us. We do not need to formally set out and resolve all of those factual disputes in order to reach our decision. We do not need to give the detail of every dispute before us. We do not need to record all the evidence to which we have had regard.[2] We note that we have had regard to all of the evidence in this case whether referred to directly or not. Having regard to proportionality this decision records those matters most relevant to our decision and which are necessary to explain the way we approached the factual disputes, the decisions we made in relation to them, their relevance to the issues, the reasons why we reached our conclusions.

The claimant's requests for homeworking

5.11 On 19 July 2018, there were difficulties with the train, and the claimant was required to drive to work. She made a request by email stating she was "getting rather frustrated wasting 3 to 4 hours driving" when she could be working. This request was refused by Ms Nguyen who stated "I do understand your frustration however I cannot set a precedent for people working from home as others have asked coming back from maternity and I said no…" It follows that her request was refused. We accept the Ms Nguyen did not wish to create a precedent.

5.12 We accept Ms Nguyen's evidence that this decision was, primarily, not hers. Ms Lowther, who founded the business, maintained a strict overview. Ms Nguyen was required to seek approval of any such decisions. Ms Lowther had a strong preference for individuals to work from the office. This included their being at their desks by 9 o'clock. Ms Nguyen was operating within that overarching environment. It was Ms Lowther's view that working from the office fostered cross communication, and improved profile and productivity. We do not need to resolve whether she was right. We have no doubt that that her perception drove the policy that applied at the time.

5.13 The claimant did not complain. Her issues with transport resolved. She went back to full-time commuting by train.

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[2] See *Meek v Birmingham City Council* 1987 IRLR 250 As recently approved in *DPP Law v Greenberg* 2021 EWCA Civ 672 at para 57(2).

5.14 On 25 September 2018, the claimant sent an email at 08:17 stating that there was major roadworks causing delay. Her being late was not unusual, but she would normally indicate the time she would arrive at the office. Ms Nguyen took no issue with the lateness in her reply, but she did ask the claimant to confirm the time she would be in. We accept Ms Nguyen's evidence that there was no difficulty; it was not an unusual state of affairs, but she did need to have the detail, as she would be asked by Ms Lowther.

5.15 We have been taken to no formal request for homeworking, or flexible working.

5.16 Eventually, the claimant was granted the right to work from home for two days a week and we need to describe how that came about.

5.17 Ms Nguyen was not aware that the claimant had a three-month probation period. This led to a degree of confusion. There was an initial probation meeting in October 2018. The exact date remains unclear. On 25 October 2018, Ms Nguyen had an email exchange with Ms Lowther. She recorded that she was due to have a probation meeting with the claimant. One issue was the claimant had stated to Ms Nguyen that she could not look after a particular client. (We need not consider this.) She also stated she was feeling exhausted because of the commuting and wanted to work from home two days a week. It is clear from the exchange between Mr Nguyen and Ms Lowther that there was some doubt about granting the claimant's request. Both were concerned not to set a precedent. Ms Lowther was concerned about the legal perspective.

5.18 There is dispute as to how the probation hearing proceeded. It may be that there are different perceptions. Ms Nguyen's perception, and we accept this was her true perception, is that the claimant indicated she may not be able to continue working at all. The probation meeting was not concluded, and it was left that the claimant would come back and clarify her position. There was nothing put in writing recording the meeting.

5.19 On 12 November 2018, the claimant sent an email which largely concerned holiday. This prompted Ms Nguyen to believe the claimant intended to stay and she set up a formal probation meeting. That reconvened probation meeting occurred in early December 2018.

5.20 At the probation meeting, Ms Nguyen stated the claimant appear to be having difficulties with her workload. We find that she had appropriate grounds for raising this. The claimant was performing less well than other agents; whilst the claimant may seek to explain this by the production work she was undertaking, we do not accept this fully explains her performance. We accept that Ms Nguyen believed the claimant's performance, as an agent, needed improvement. There was constructive discussion about the claimant's strengths and weaknesses. The probation period was extended. Later, it was confirmed on 13 May 2019 (R1/269).

5.21 Around this time, the claimant started looking for another job. In January 2019, she applied for another job. The claimant has not disclosed any details of this application.

5.22 Ms Nguyen had no further involvement with the claimant's request for homeworking. The claimant went directly to Ms Lowther. On 27 February 2019, the claimant had a meeting with Ms Lowther and Ms Annette Browne, HR director. It is unclear how this meeting came about. At that meeting, Ms Lowther agreed that the claimant could work from home two days a week. Part of the claimant's reason for her request was that she wanted to save money. She was also feeling exhausted.

5.23 The days that she would work from home were not formalised. There was a later agreement around September 2019 that she work from home on Mondays and Fridays. The exact agreement is not recorded in writing, whether by way of email otherwise.

Her relationship with her line manager Ms Nguyen

5.24 The claimant alleges that at the meeting on 27 February 2019 she told Ms Lowther and Ms Browne that Ms Nguyen had been bullying her. However, there is nothing in writing, either from the claimant or from anyone else, which would support the claimant's account. We find, on the balance of probability, had she raised an allegation of bullying, then one of the claimant, Ms Lowther, or Ms Browne would have made some reference to it, at least in an email. It may be that the claimant’s perception now is that she raised it. However, we find on the balance of probability that whatever she said (and she has not given as any detail of what she is alleged to have said) it could not have been understood by either Ms Lowther or Ms Browne as an allegation of bullying. When the claimant did make formal allegations later, a proper grievance procedure was followed. On the balance of probability if there were an allegation of bullying at this stage, it would have led to a paper trail.

5.25 Sometime in or around December 2019, Ms Lowther left the business that she had founded. Ms Nguyen became brand director for the respondent. She remained the claimant's direct manager. We accept Ms Nguyen's evidence is that this put the respondent in a vulnerable position with its artists and there was concern that the agency should maintain a strong presence in the market in order to preserve the business.

5.26 Following Ms Nguyen’s presentation to the head office, which was based in New York, it was necessary to give feedback to agents. On 25 February 2020, Ms Nguyen met with the claimant. Ms Nguyen was still concerned that the claimant was not performing strongly as an agent and was having difficulties. It is the claimant's case that Ms Nguyen told her she must return to work full-time and not work from home anymore. We do not accept the claimant's evidence. We prefer Ms Nguyen's account.

5.27 There had been a previous annual performance review. Ms Nguyen had made clear to the claimant that she needed to make progress as an agent, which included her having a target list. Part of the team objective was visibility. In that context, Ms Nguyen discussed with the claimant that it may be more advantageous for the claimant to be in the office more often because it could lead to the claimant having an increased knowledge of editorial, allow to meet more people, and provide further opportunity to increase revenue from artists. We reject the claimant's assertion that Ms Nguyen required her to return to the office five days a week. On the balance of probability, had there been a requirement imposed, one or other of them would have referred to it in an email. The reality is the claimant was never required to change her working pattern

5.28 The claimant alleges she was bullied by Ms Nguyen, albeit the detail of this is difficult to ascertain. Part of her evidence suggests that she was bullied throughout her employment. However, this is inconsistent with her own statement where she states that the alleged bullying by Ms Nguyen ceased shortly after her meeting with Ms Lowther and Ms Browne, presumably in February 2019. There is no specific allegation that it recommenced thereafter.

5.29 The claimant has drawn our attention to numerous emails, both directly passing between the claimant and Ms Nguyen, and emails that she was unaware of at the time passing between Ms Nguyen and others which she secured following a subject access request. We can find nothing in any of those emails which would suggest that Ms Nguyen's dealings with the claimant, whether directly or otherwise, were anything other than reasonable and professional. We find that Ms Nguyen's tone was, at all times, friendly and supportive. We do accept that Ms Nguyen, on occasions, showed a degree of frustration to others about several matters, including the claimant's pay; however, there is nothing to indicate that this affected the professional way in which Ms Nguyen related to the claimant.

5.30 The claimant alleges Ms Nguyen was well known for bullying. There is no credible independent evidence to support of that assertion. The claimant can point to no single complaint made either by her or anyone else.

5.31 The claimant alleges HR organised a workshop to address Ms Nguyen's bullying behaviour. That allegation is without merit. HR organised workshops; none related to bullying. None was directed at Ms Nguyen. Ms Nguyen did not avoid the workshops, albeit her work commitments caused her to seek postponement of attendance for at least one workshop.

5.32 There is nothing in Ms Nguyen's treatment of the claimant concerning her request for homeworking which could be seen as bullying. The initial line was firm, but it was consistent with the way others were treated, and it reflected the policy of Ms Lowther.

5.33 We accept there may be some confusion about the claimant's probation period. However, there is nothing sinister in that. Ms Nguyen proceeded with the probation meeting when she was told to by HR. It was initially adjourned because she believed the claimant was considering her position. It was concluded in December and signed off in May the following year.

5.34 The claimant's evidence relies largely on her own perception of the way she was treated and is almost entirely lacking in relevant detail. We have examined the most important points relied on, but we have had regard to the entirety of the evidence. It may be that the claimant resented Ms Nguyen, or disliked her management. However, both parties should act professionally, even if there is personal dislike. The claimant has pointed to no fact which would suggest that Ms Nguyen did anything other than behave appropriately and professionally at all times. We reject the assertion that there was any bullying.

The claimant's performance as an agent

5.35 There is clear evidence that the claimant performed less well than her two contemporaries. The claimant seeks to answer this by saying that she undertook more production work. There is some evidence that she undertook significant production work. In 2018, the fee income which could reasonably be attributed to the claimant, whether directly or in conjunction with others, was in the region of £258,000. This can be compared to Ms Nguyen's income at the time of over £800,000.

5.36 We do not accept the claimant's basic assertion that, in some manner, she was employed to undertake production work, or that production for her was a more important part of her task than for other agents. The primary role of all agents remained the same, and that was to secure work for artists. In relation to that, she performed significantly less well than the other two agents, and she has not sought to dispute that in evidence.

5.37 It is not for us to question the respondent's business decision. The claimant may be right in suggesting that the respondent ought to focus more on production work and giving it greater priority. However, we received rational reasons for the respondent's position. It is the respondent's case that production work arises out of the agency work. Moreover, production work is limited because it can normally only be undertaken in London, whereas the business is global. CLM concentrates on Europe. Whilst production can be a welcome by-product, unless the focus is maintained on securing work for artists, there is no business at all. The reality is that it was clear to the claimant, at all times, that her focus should be on her agency work. This included securing new artists and securing work for the artists that she represented.

5.38 The claimant complains that she was given a smaller roster of artists. We do not accept that there is any credible evidence that she was given fewer artists than any other new starter. Moreover, it is part of her role to secure

new artists. We also note that one of the claimant's original artists left, the claimant has not explained how that affected her performance, if at all. The reality is the claimant was employed as an agent, and the respondent was entitled to judge her performance as an agent. It applied objective criteria and it is not in dispute she performed less well than her two main colleagues in photography.

The relevance of her production work

5.39 All agents had production work. It may be that she performed reasonably in this area in 2018. We do not have detailed figures for 2019. By the time 2020 arrived, production work virtually disappeared because of the pandemic. The claimant seeks to persuade us that, in some manner, there was a greater emphasis on production work in her role than for other agents. For the reasons we have given we do not accept this.

Factors leading to the claimant being furloughed

5.40 In March 2020, the impact of the Covid-19 pandemic was accelerating. Many companies were struggling to understand the legal and economic ramifications and to cope with the imminent lockdown. The respondent was no exception. The respondent relied on income generated by placing artists in projects and receiving appropriate commissions. In addition, those projects would lead to some production work. Most of those projects involved some form of shoot, whether still or motion. Inevitably, that work could not continue.

5.41 Direction came from the board in America. We have seen projections which indicated a likely decline of 80% of revenue in quarter two, 60% in quarter three, and 20% in quarter four. In line with those projections, the figures were reviewed, and directions were given to various parts of the business to reduce staff numbers.

5.42 We have seen the relevant projections prepared at the time. It is the claimant's case to us that those projections are a fabrication. It is unclear when she says the fabrication occurred, but it is her case that there was a fabrication at the time purely to facilitate her being furloughed, and moreover, that fabrication occurred at the instigation of Ms Nguyen. On the claimant's side, there is her assertion, and the allegation that she believed that Ms Nguyen was the using this as an opportunity to get rid of the claimant. On the respondent's side, there is the fact of the pandemic, the fact that there was a lockdown, and the reality that the income was going to be significantly constrained. Moreover, the respondent's evidence is the projections were not unrealistic, if anything they were too optimistic. The reality is that the respondent's income was significantly constrained, and the impact has not yet finished.

5.43 The reality for the respondent was potential bankruptcy. Against this, the claimant points to the fact that she was ultimately offered £20,000 by way redundancy, and she suggests that this is evidence that bankruptcy was

not a real threat. Having regard to the size of this company, we understand there are 70 employees in the UK alone, £20,000 is a small sum. It tells us nothing about the potential effect on the respondent's finances. The claimant's case is supported neither by credible evidence, nor rationality. It is fanciful to suggest that the board in America, with all its legal responsibilities, fabricated a financial projection, at the behest of a manager in England, to furlough the claimant.

5.44 Following the government job retention scheme, Miss Nguyen was required to consider who could be furloughed. She considered the three agents in photography. The claimant had the lowest figures to date, and the poorest projected figures. The claimant has not sought to dispute Ms Nguyen's assessment. All she has done is suggest that Ms Nguyen should have considered the claimant's production work. The reality is that, despite the fact there was one production in the pipeline, there was no reasonable prospect of production work. (The production which was in the pipeline for September was postponed later.)

5.45 The claimant complains that there was little time given to her to make a decision. We find that this reflects the reality of the fast-moving situation and the uncertainties faced by the respondent

5.46 On 27 March 2020, Ms Nguyen, together with Ms Fiona Gould, met with the claimant remotely and informed her that she been selected for furlough. The claimant was offered HR support.

5.47 On 29 March 2020, the claimant raised several questions (R1/342). It is clear from those questions that the claimant had understood the basic structure of furlough pay. She asked for confirmation that she would receive her normal pay to 31 March. She sought clarification as to whether the £2500 monthly with net or gross. She asked what would be the effect on any redundancy pay. The claimant gave considerable thought to her position, and her questions are well informed and reasonable. She did ask why she was to be furloughed and not the other two photography agents. She stated "Please explain why this is fair and not discriminatory." Fiona Gould responded on 30 March 2020. The response (R1/344) stated that the reason was "A business decision, after careful assessment." She refers to the significant drop in revenue and the need to avoid layoffs or redundancies.

5.48 On 31 March 2020, Ms Gould sent the claimant a formal letter requesting her agreement to furlough. It confirmed that the claimant would receive £2,500 per month, but that any balance of income would not be made up by the company. The claimant indicated her agreement by signing the letter on 31 March 2020 (R1/352).

5.49 The claimant alleges she rescinded her agreement. Her statement does not explain how. There is reference to R1/353, being the claimant's email of 3 April 2020, but that email does not purport to withdraw her agreement. The reality is the claimant continued to receive her furlough pay; the

agreement was not rescinded.

5.50 On 1 April 2020, as well as the claimant, a production assistant in photography, Rosie, an agent, Cheryl, and a production assistant in styling, Valentina were also selected. On 1 June 2020, Audrey, an agent in the photography division, was selected for furlough. Of the four originally selected, only the claimant had children. Audrey, who was selected later, had children.

The events leading to her proposed redundancy

5.51 The coronavirus job retention scheme (CJRS) was extended from 1 August 2020 to 31 October 2020. The employer was required to pay national insurance and pension contributions and an increasing proportion of the employee's wage costs. The respondent reviewed the position in the belief that the CJRS was coming to an end in late October 2020. The proposals were driven at board level by an assessment of the likely income. This led to a selection matrix for redundancy. Ms Nguyen was required to apply the matrix to the existing photography agents. She was given specific selection criteria and she was told the potential pool was the three photographic agents within CLM. The criteria were as follows: number of artists each individual has direct responsibility for; aggregated actual year-to-date revenue generated by each artist from April to August 2020; and aggregated forecast revenue for each artist from September to December 2020. Ms Nguyen applied those criteria. The claimant was ranked third out of the three agents. The claimant has not sought to challenge the figures used. Instead, she seeks to challenge the criteria adopted by saying more emphasis should have been given to her production income.

5.52 We find that the respondent did consider there was a need for redundancies. In this round of redundancy, Ms Nguyen was given selection criteria that she was required to apply. She applied the criteria objectively having regard to the figures, which are not in dispute, and it was clear that the claimant was ranked third.

5.53 This then led to a consultation process. That consultation was to be undertaken by Ms Nguyen, but the claimant refused to cooperate. By that time, the claimant had started her first tribunal case. We also refer to her grievance below.

5.54 On 30 September 2020, the respondent notified the claimant of her provisional selection for redundancy (R1/658). The letter set out details of the rationale. It also included a proposed redundancy payment. The respondent identified one new job which was a junior styling agent role. Clearly this role was much more junior than the claimant's, but it was brought to her attention. She was invited to attend a meeting on 7 October 2020

5.55 The claimant refused to engage with Ms Nguyen by email of 1 October

2020. She stated, given her ongoing tribunal clam, that neither the Ms Nguyen nor Mr Mohammed should engage in the redundancy process,. She stated the reference to “junior” introduce an element of age discrimination.

5.56 The respondent nominated Mr Nick Bryning to deal with the consultation. He was Ms Nguyen's US counterpart. He held a consultation meeting on 12 October 2020. A number of matters were raised, and he indicated he would consider those and revert to the claimant.

5.57 The claimant did not proceed with the consultation process, instead she resigned on 13 October 2020 with immediate effect (1/719). The relevant part of the letter reads:

> **I feel that having exhausted Great Bowery’s internal procedures over the last six months without proper engagement of a number of the serious issues I have raised, I am left with no choice but to resign as my selection for redundancy is the last straw. This is in light of my recent and past experiences regarding the multiple breaches of my contract that includes direct and indirect discrimination, bullying and victimisation throughout my employment at CLM, the breach of my personal information on the basis of being selected for furlough and the basis of selection for redundancy**
>
> **Due to Great Bowery’s treatment of me as outlined above, the implied terms of trust and confidence in my contract in relationship to trusting Great Bowery has fundamentally and irrevocably broken down. I believe my selection for redundancy in preference to my 2 colleagues is a result of the fact that I have made a discrimination claim and have made a protected disclosure to the ICO regarding breaches of GDPR. I consider this to be victimisation.**

<u>The claimant's grievance</u>

5.58 On 3 April 2020, the claimant complained about the decision to furlough her. On 8 April 2020, the claimant sent a formal grievance (R1/382). We do not need to record the exact content, but we should summarise the main points of complaint. She alleged Ms Nguyen "advised" the claimant that Ms Nguyen no longer wished to work from home. She alleged she had been given inadequate reasons for being selected for furlough. She alleged her selection was an act of age discrimination, or in the alternative was some form of continuing act of victimisation. She referred to her subject access request. She stated she had not received the company handbook. She complained that the furlough letter had not specifically told her to seek advice. She alleged the process had an "absolute lack of dignity and respect." She complained about IT access being removed. She summarised her complaint by saying her time with the respondent had "seen the most utterly toxic behaviour.”

5.59 Mr Mohammed, finance director, was appointed to deal with the grievance. We reject the claimant's suggestion that he was not impartial. He had not been involved in any previous grievance. The fact that he had oversight of the company's finances did not disqualify him from hearing

this grievance.

5.60 We are satisfied that Mr Mohammed undertook a careful and detailed consideration of the claimant's grievance. It has been suggested that he should have undertaken some investigation into more general, unparticularised allegations of bullying against Ms Nguyen. We accept his explanation, which was to the effect that he investigated only those matters raised by the claimant and he did not interview others because the claimant identified no witness to any specific allegation. He did consider whether there was any evidence of complaints being raised previously against Ms Nguyen. In the absence of the claimant requesting him to interview specific individuals, we do not accept his approach can be criticised.

5.61 He did interview Ms Nguyen and put to her the allegations, as he understood them.

5.62 Mr Mohammed communicated his rejection of the claimant's appeal by letter of 1 July 2020 (R1/492). This is a detailed letter. It reveals a careful and systematic approach to the claimant's grievance. It sets out the key points investigated, which reflect those matters raised by the claimant. He accepted that the new work pattern constituted a change of contract, and the two-day pattern of working from home would continue. He rejected the assertion that the decision to furlough the claimant was based on age or other discriminatory grounds. He explained the rationale for the business decision, which revolved around the need to reduce costs. He set out specifically the basis of the claimant's assessment. He confirmed that of the seven agents at CLM the forecasts of future revenue during 2020 ranged from 45K to 228K the claimant was one of the two lowest. The two agents with the lowest forecast were furloughed on 1 April 2020. He explained how the respondent had accessed the claimant's personal email – the claimant completed a registration form on 27 May 2018 which gave that email. He rejected the assertion that not providing a company handbook was a breach of contract, as it was available on their internal system. He did not accept there was a need to advise her to seek legal advice before agreeing to furlough. He did not consider difficulty with using a video conference constituted a lack of dignity and respect.

5.63 The claimant appealed the grievous decision on 13 July 2020 (R1/499). The main points she raised were as follows: the consideration of allegations of bullying and victimisation was inadequate; the alleged bullying and victimisation had not been adequately addressed; she questioned the figures provided, but gave no detail; she alleged use of a personal email address was a breach of confidentiality; she did not accept there was a company handbook, and alleged she did not know that the information was on the internal system; she alleged insufficient consideration had been given to her concern about the assumed acceptance of furlough; and she alleged his response to the lack of video during the original furlough discussion was inadequate.

5.64 The appeal against the grievance decision was undertaken by Mr Richard Kilner, a non-executive director of the respondent. We do not accept the claimant's suggestion that he was not a suitable person. It was not necessary for the respondent to employ an outside agent. Mr Kilner had not been previously involved. He held the appeal on 28 July 2020, using Zoom. He discussed in detail with the claimant the nature of her complaints. The claimant rejected his suggestion that mediation with Ms Nguyen may be appropriate. He sent notes of the grievance appeal hearing to the claimant so that she could amend them. For the first time, during the appeal hearing, the claimant alleged that the selection for furlough was an act of sex discrimination. For the removal of doubt, we accept the respondent's evidence that the claimant never alleged sex discrimination previously. He communicated his decision by letter of 11 August 2020 (R1/610).

5.65 Mr Kilner rejected most of her appeal. For each decision he gave clear and cogent reasons. He found the decision to furlough was based on the selection process and the consideration of her prospective earnings. He considered the urgency of the situation. He considered the allegations against Ms Nguyen, and interviewed her before reaching a decision. He did not accept that there was evidence that Ms Nguyen bullied the claimant. He found that the respondent had legitimate access to the claimant's personal email, as she had added it to the internal system. He did not accept her grievance concerning the handbook, as it had been available. He reviewed whether it was necessary to tell the claimant to seek legal advice before being furloughed and concluded that it was not. He did not agree with the claimant's contentions about the videoconference. Lack of video would not necessarily constitute a lack of dignity and respect.

5.66 We are satisfied that he gave the claimant sufficient time to present her appeal. We accept his evidence that the hearing lasted two hours.

5.67 In the grievance appeal, the claimant had complained that a senior member of staff had, inappropriately, discussed the fact of the claimant's grievance with a former CLM member of staff. Mr Kilner established that the claimant was right and upheld her grievance in this respect. He recommended that action should be taken.

The law

6.1 Section 27 Equality Act 2010 defines victimisation -

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**

> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule**.

6.2 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.3 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question as posed in **Derbyshire** below which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason the treatment.

6.4 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **"37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and**

> **"by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'"**

Reasons for unfavourable treatment.

6.5 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.6 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. The motivation can be subconscious.

6.7 Section 19 Equality Act 2010 defines indirect discrimination

> **(1) A person (A) discriminates against another (B) if A applies a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are –**
> **.**
> **age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.**

6.8 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.9 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer**

> **no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.10 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

6.11 In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

6.12 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

6.13 In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

6.14 There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see **Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (**Tullett Prebon PLC v BGC Brokers LP** [2011] IRLR 420, CA.)

6.15 The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (**Nottinghamshire County Council v Meikle** [2004] IRLR 703, CA; **Wright v North Ayrshire Council** UKEATS/0017/13

6.16 **Omilaju v London Borough of Waltham Forrest** [2005] ICR 481 CA is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

6.17 We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

6.18 We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.

6.19 We note the case of **Bournemouth University v Buckland** 2010 IRLR 445 CA. the head note reads:

> **(1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.**
>
> **The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.**
>
> **It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement…"**

6.20 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

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

6.21 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust,[3] either requirement is sufficient.

6.22 In **Malik** the House of Lords held that the trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee and second, it was not necessary for the employee to be aware of the wrongdoing whilst employed. Third, the term may be broken even if subjectively the employee's trust and confidence is not undermined. Whether the term is broken must be viewed objectively.

Conclusions

The first claim

7.1 In claim one, only the allegation of indirect discrimination remains. The PCP is alleged to be as follows "The practice of choosing to furlough staff in the photography division who had children." Of those initially furloughed, the claimant was the only one who had children. One person was furloughed later in the year who also had children. There is no correlation at all between having children and furlough. Further, the respondent has explained its decision. The background was the reasonable and realistic view taken by the respondent that the respondent's income would dramatically decrease and that there would be a massive reduction in the potential work for agents. The board produced financial projections. It familiarized itself with the CJRS. The respondent considered whether individuals should be furloughed rather than laid off or made redundant. A rational and reasonable assessment was made of the likely fees to be generated by the three agents in photography. There was a rational reason for refusing to consider production fees, namely there would be little or no production. It was clear that the claimant was the poorest performer. Her selection was based on performance.

7.2 It follows that the respondent establishes its explanation for why it chose to furlough the claimant. In no sense whatsoever was the claimant's selection anything to do with the fact that she had children. It follows that the claimant fails to establish, as a fact, the PCP. The indirect discrimination claim fails.

7.3 We should add, lest we are wrong about the PCP, we are not satisfied the claimant has established that the PCP as alleged would have had a particular disadvantage to women. There were no male photography

[3] See, for example *Baldwin v Brighton & Hove City Council* [2007] IRLR 232

agents. However, in principle, the claimant must assert that the PCP would have applied equally to men.

7.4 We are not satisfied that the claimant has accurately stated the real disadvantage about which she complains. It seems to us the real disadvantage is more likely to be fact of furlough and the loss of income. Any man with children would have also, on the claimant's case, have been put on furlough. Although we do not need to reach a final decision on this, it is difficult to see how the claimant envisages establishing group disadvantage.

7.5 We accept that women are more likely to have childcare responsibility, but that is not the basis of the PCP as alleged.

7.6 One possible effect of furlough is to increase the amount of time available for childcare, and it is difficult to see how this would have been different for men and for women.

7.7 We invited the claimant at the beginning of the hearing to consider the way in which this claim was put because it appeared to be problematic. Having regard to the way the case was put in general, it is possible that the claimant was suggesting that the reason for her the selection was that there was hostility to her work arrangements, including working from home which stemmed, at least in part, from her childcare responsibilities. It follows that she alleged that hostility to her requirements arose out of her need to request homeworking, and occasionally time off to look after children, arising out of her childcare obligation. It follows that the claimant was suggesting that there was hostility to her because of her childcare responsibility, a responsibility more commonly falling on women. She then seems to suggest that she was selected because of that hostility. If that is the logic of her case, it is difficult to see that hostility as a neutral PCP applied equally to men and women. But any direct discrimination claim was withdrawn and dismissed.

7.8 We can only consider pleaded claims. It is possible that if there were hostility based on her need to provide childcare, it is arguable it could be an act of harassment or direct discrimination. However, all such claims were withdrawn. It appears the claimant may be confusing the PCP, the particular disadvantage, and the cause of the group/individual disadvantage. If the PCP were established, which it is not, and if it were applied equally to men and women, all those men and women with children would be furloughed. The disadvantage is, presumably, not being able to continue work and receive full pay. Men and women would be equally affected because men and women equally have children.[4] Standing back and considering how the claimant has advanced her case, it is possible to perceive that the claimant had in mind that the selection process was based on an active hostility to those who had requested adjustments to accommodate childcare. If that were her case, then it may

[4] Albeit they may not have the same primary childcare responsibility.

be possible to see a potential group disadvantage. However, such a case, if it had been pleaded, could not survive our finding about the true reason for selection for furlough.

7.9 For all the reasons we have given it follows that the indirect discrimination claims fail.

7.10 There are no claims remaining in claim one.

Claim two

7.11 We first consider the victimisation claim. The protected acts are not disputed by the respondent. On 8 April 2020, the claimant suggested treatment of her was because of her age. It is common ground this is a protected act. On 24 April 2020, during her grievance, she referred to age discrimination. It is accepted this is a protected act. On 28 July 2020 it is accepted the claimant, at the grievance appeal hearing, alleged her selection for redundancy was an act of sex discrimination. It is accepted this was a protected act.

7.12 The only detriment relied on is the selection for redundancy. It is part of the claimant's case that the alleged redundancy "situation process" was a sham. It is unclear what the claimant means by sham. It is not explained adequately in her witness statement. It was not addressed in the claimant's submissions.

7.13 For the reasons we have given, we find there was a redundancy situation. The pandemic led to a lockdown. That had a catastrophic effect on the respondent's income. The work dried up. There was a diminished need for agents to provide services to artists. It follows there was a diminished need for the agents' work, which was work of a particular kind. We would add that the production work also dried up and there was a diminished need for work of that kind. There was a clear redundancy situation.

7.14 We have considered in detail the redundancy procedure or process. The claimant was provisionally selected for rational objective reasons. The respondent considered the likely fee generation in the months going forward. It was clear that the claimant was the poorest performer out pf a pool of three. That pool was selected for reasonable and rational reasons. There was a rational reason for selecting her. The respondent started the process of consultation. The claimant would not engage with that process with her line manager. The respondent provided a suitable alternative manager. However, the claimant disengaged in the process and refused to complete it. In no sense whatsoever can it be said that the alleged redundancy situation, or the process adopted in considering the claimant's redundancy, was a sham.

7.15 The reality is that the claimant has not pursued this case at all. The victimisation case was put to no witness. It was suggested to no witness

that the reason for the claimant's selection of redundancy was because of any protected act.

7.16 We should note that in her statement, the claimant suggested that part of the reason for her dismissal was bringing the first claim. There can be no doubt that the first claim was also a protected act. However, it was never suggested to any witness that the first claim had anything to do with her selection for redundancy. The reality is that the respondent established its explanation on the balance of probability having regard to the clear and cogent evidence produced. No protected act as pleaded, or potentially implied by her statement, was any part of the reason for her selection for redundancy. The claim of victimisation fails.

7.17 The claimant alleges that she was constructively unfairly dismissed. The first question is whether she was dismissed at all. The claimant alleges that the respondent was in breach of the term of mutual trust and confidence; it is for her to prove that breach. We will consider those matters identified in the issues as being the breach or as contributing to the breach.

7.18 We have already considered the allegation that Ms Nguyen bullied the claimant. For the reasons we have given, we find that this allegation is without foundation. It is apparent the claimant formed a negative view of Ms Nguyen. However, Ms Nguyen was required to act as a manager. Ms Nguyen making decisions concerning the claimant’s requests, particularly for homeworking, may have been unwelcome to the claimant, but they were dealt with professionally and the responses were within her discretion. The claimant unhappiness is not evidence of any bullying.

7.19 The claimant alleges that Ms Sands, another manager, had knowledge of the bullying. To the extent that this is advanced as some form of breach, it appears to be in the context that Ms Sands should have taken action. However, no complaint was made to Ms Sands. The claimant suggests that bullying was common knowledge. However, there is no rational evidential basis for it. There was no evidence of any complaint ever being made against Ms Nguyen. There was never any reason for Ms Sands to take any action.

7.20 The claimant alleges that she raised allegations of bullying with Ms Lowther and Ms Browne. We reject that evidence. In any event, any fault for not pursuing such allegations would not be Ms Sands. No action, or failure of action by Ms Sands, contributed to any breach of contract.

7.21 It is alleged that Ms Nguyen was not joined in a "bullying workshop." There was no such workshop. There were several workshops put on by HR. None of them dealt with bullying and there is no basis for this allegation.

7.22 It is alleged there was poor treatment of the claimant "because of her status as a single mother/widow." It is difficult to understand exactly what

is meant. The specific allegation was never put to any witness. It appears there is no overlap with the general allegation that Ms Nguyen bullied the claimant. What is meant by this allegation is not addressed adequately or at all in the claimant's submissions.

7.23 We have considered the claimant's statement generally in order to ascertain what she appears to allege to be poor treatment.

7.24 She refers to the fact that she was not put on performance management. In no sense whatsoever was this a breach of the claimant's contract. It was clear that the claimant was not performing well in her role as an agent. However, that does not immediately lead to the need for a performance management process. Failing to institute performance management is not in itself a breach of contract.

7.25 Ms Nguyen maintained a dialogue with the claimant. She discussed the difficulties with the claimant's performance in the end of year appraisal. She discussed the difficulties in the probation meeting. She discussed the continuing problems on 25 February 2020. Ms Nguyen continued to offer constructive feedback and advice, which was consistent with her role as a manager. Her approach to performance management cannot be seen as a breach of contract.

7.26 The claimant complains that she attended a sales meeting which appears to have taken place in or around September 2018. Ms Lowther had invited the claimant. Ms Nguyen did not know she was attending. It is alleged Ms Nguyen said, "What are you doing here?" Ms Nguyen explained to us that she had not expected the claimant to attend, but, in fact, was pleased that she attended because the meeting concerned tedious administration and she was able to offload the task onto the claimant. The claimant did not dispute this evidence. The claimant's statement fails to say what happened as a result of the meeting. The words complained about are innocuous. We accept Ms Nguyen's evidence that she welcomed the claimant's presence. This is no evidence of poor treatment.

7.27 At one point the claimant sought clarification of the sums she generated by way of production work. However, the claimant's salary of £80,000 was increased by Ms Lowther to £110,000. It is common ground that this, effectively, rendered any possible bonus irrelevant, as any potential bonus was incorporated in her salary. Whilst there may be an argument the bonus should have been assessed by reference to production fees, the facts of this case do not support an assertion of poor treatment. The reality is the bonus is rendered moot because her salary was dramatically increased.

7.28 The claimant alleges, in general, unfair assessment of her contribution, particularly in relation to income generated by production. To the extent it is alleged that there was unfairness, that would relate to one of three matters: a bonus; selection for furlough; and redundancy. For the reasons

we have given, there can be no unfairness relating to any bonus, as, essentially, the bonus was paid upfront in the salary. We have already considered the reason for selection for furlough, and it was rational and reasonable, as was the reason for selection for redundancy.

7.29 There is no credible evidence of poor treatment. There was no poor treatment. There is no basis for finding unfair treatment was given because claimant was a single mother and widow.

7.30 The claimant relies specifically on the unfair assessment of her generation of revenue. We have considered this. We find no unfairness. The claimant relies specifically on the decision to furlough her. However, there is a clear rational and reasonable reason for selecting the claimant, as we have described. The claimant alleges specifically that the redundancy was a sham process. We have already considered this. We have found that the respondent makes out its reason. That reason was entirely reasonable and rational.

7.31 The claimant refers to the last straw of having been singled out for redundancy. The way she put this changed during the hearing. The letter of resignation is probably the most reliable indicator of her reason for resigning when she did. In her letter, she stated the last straw was her selection for redundancy. In her evidence she placed more emphasis on the nature of the consultation meeting. However, the claimant was selected for redundancy because of a reasonable assessment of the respondent's needs and an assessment of the claimant's contribution. In no sense whatsoever was it blameworthy.

7.32 The approach to the consultation meeting was dictated by the claimant's refusal to discuss the matter with her manager. The claimant then complained that the person who did the meeting had limited knowledge. However, the respondent had no choice other than to provide a substitute manager. Inevitably that person would only have limited understanding. He ascertained the claimant's concerns and promised to investigate and come back to her. None of that is blameworthy or unreasonable.

7.33 It follows that of all the matters relied on by the claimant in support of her contention that there was a breach of the term of mutual trust and confidence are not sustainable. Further, the matters relied on as a last straw do not in any sense whatsoever contribute to any breach and in themselves are not blameworthy in any event.

7.34 The reality is, there was no breach of the claimant's contract. As there was no breach of the claimant's contract, it was not open to her to resign and accept that breach.

7.35 It follows that her resignation was in breach of contract. She failed to give notice, when she was obliged to do so.

7.36 As there was no constructive dismissal, it follows that there is no dismissal for the purposes of unfair dismissal and the unfair dismissal claim fails.

7.37 We do not need to consider whether the respondent has established a potentially fair reason or has acted fairly; the claim of unfair dismissal fails at the first stage.

7.38 The final claim is wrongful dismissal. The claimant would be entitled to her notice if she resigned in response to the respondent's repudiatory breach of contract. The respondent was not in breach of contract. It was the claimant who was required to give notice. She failed to do so. It follows she is not entitled to notice pay.

7.39 For the reasons we have given, all the claims are dismissed.

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Employment Judge Hodgson

Dated: 3 August 2021

Sent to the parties on:

03/08/2021.

For the Tribunal Office