EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107706/2019 & 4114451/2021

Final Hearing held remotely at Glasgow on 12 – 19 and 21 May 2021

Deliberations on 24 – 28 May 2021

Employment Judge Hoey

Tribunal Member Mr Ashraf

Tribunal Member Ms Hutchison

Ms Lauren Walsh	**Claimant** **Represented by:** **Mr McFadzean** **(Solicitor)**
Inco Marketing Limited (in liquidation)	**First Respondent** **Represented by:** **Not present and not represented**
Neil Duncan Grant Ritchie	**Second respondent** **Represented by:** **Mr Maratos** **Consultant**
Colin Robert Abercrombie	**Third respondent** **Represented by:** **Mr Maratos** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claims of indirect discrimination pursuant to section 19 of the Equality Act 2010 and the claim in respect of a breach of the duty to make reasonable adjustments pursuant to section 20 of the Equality Act 2010 are dismissed following their withdrawal by the claimant.

2. The remainder of the claimant's claims are ill founded and are dismissed.

REASONS

1. The claimant had raised claims for unlawful disability discrimination (comprising failure to make reasonable adjustments, direct discrimination, indirect discrimination, victimisation and harassment), unfair dismissal and wrongful dismissal.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimant's agent, the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. While there were some connection issues, these were overcome. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Case management

3. The first respondent had gone into liquidation and consent of the Sheriff had been secured to allow the claims to proceed. The insolvency practitioner had advised the parties (and the Tribunal) that although no response had been

lodged on behalf of the first respondent, that was not to be taken that the claims were not disputed but was due to there being insufficient funds.

4. We discussed the claims as against the first respondent and I noted that in terms of rule 21 of the Employment Tribunal Rules it was permissible to issue judgment from consideration of the material before the Tribunal. No judgment had been issued and given the evidence that was to be led before the Tribunal related to the issues arising in terms of the claims against the first respondent, the Tribunal would consider the material before it before issuing judgment. That accorded with the position advanced in **Office Equipment Systems v Hughes** 2019 IRLR 201. To issue judgment without considering the facts found by the Tribunal in matters directly relevant to the claims (since the facts relied upon in the claim against the first respondent were included as facts relied upon in the claim against the second and third respondent) would be illogical since it could potentially result in the claim against the first respondent being upheld in circumstances where the Tribunal found the facts necessary to uphold the claim did not exist. It was consistent with the overriding objective and the authorities to consider the evidence before the Tribunal to determine what judgment to issue against the first respondent.

5. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. One of the real challenges in this case was the fact that at previous case management preliminary hearings, orders had been made to ensure the issues in this case had been focussed. That included that the parties work together and agree a statement of agreed facts (and disputed issues) and a list of issues in terms of the claims (and associated matters, such as the **Madarassy** factors relied upon by the claimant). This had not fully been done and on the first day of the hearing it was clear that both parties had not worked together to ensure the case was ready to proceed properly. Further documents had also been added to an already large bundle and the panel did not have all the documents when the hearing commenced on the first day (as they had been submitted later than the original bundle). It was in

the interest of the overriding objective to give the parties the first day (and night) to finalise the issues to be determined and to ensure the case could properly proceed. That would allow the parties to focus their questions to ensure the hearing could conclude within the time set. A statement of agreed facts and a list of issues were thereafter produced which assisted the Tribunal and the parties in focussing the issues in this case. Robust case management ensured that the Hearing was concluded within the allocated time (and the Tribunal sat earlier and later in the days it heard evidence to ensure this was done).

6. By the final day of the Hearing the claims proceeding had been revised and the claimant had withdrawn her claims of indirect discrimination and failure to comply with the duty to make reasonable adjustments.

7. A lengthy 12-page list of issues was produced. This was a revision of an even lengthier list of issues that had originally been produced with a very large number of claims and issues. I had asked that the parties work together to carefully focus what the real claims and issues in this case were in light of the overriding objective. Following discussions between the parties and by the end of the Hearing the issues to be determined had been considerably reduced, albeit there were still a very large number of issues to be determined.

8. We regret the length of this judgment and the time it has taken to produce it, but it has not been possible to be any more succinct given the very large number of facts needed to ensure each of the issues arising were properly considered and determined. It is representative of the very lengthy time taken to consider the facts and each of the issues arising in this case.

Issues to be determined

9. The issues to be determined are as follows (which is based on the agreed list which has been reordered and revised). For the avoidance of doubt it was accepted by the respondent that the claimant was a disabled person at the material time and that the respondent had the requisite knowledge. It was also

agreed that all matters of remedy would be determined at a later hearing if needed.

Direct disability discrimination (Equality Act 2010 section 13)

1. Did the first and second respondent do the following things:

a) During the 1st week of February 2019 until 26 February 2019 act in a way which showed frustration with and unhappiness of the Claimant's explanation of her health position and push the Claimant for responses on cause of health issues and timescale for and capabilities on return to work

b) On 19, 25 and 26 February 2019 the second respondent sought to acquire the claimant's shares in the first respondent

c) On 25 and 26 February 2019 the second respondent insisted on discussing the claimant's shares and employment matters despite the claimant making it clear that she was stressed and that this was too much for her while she was unwell

d) On 26 February 2019 the second respondent stated that he could not see how the claimant can perform as a director and shareholder in an SME business, and that there would be a role for the claimant based on what her capabilities were, and that they will work out what that role is at the time. The second respondent spoke of how the claimant's role and her shareholding were two2 separate things, and that he wanted the claimant to sell her shareholding back for £20,000. When challenged by the claimant that a decision on whether the claimant could perform as a director and shareholder with claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, second respondent arguing that this was his decision to make as he needed to think of what was right for the business.

2. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The claimant relied on a hypothetical comparator.

3. If it was, was the treatment because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)

4. Did the respondent treat the claimant unfavourably as follows?:

(a) By the second respondents failing to meet the claimant as envisaged between 3 and 10 January 2019 (for which the first and second respondents are responsible)

(b) By the second respondent on 25 February 2019 and between 13 to 20 March 2019 failing to have telephone calls with claimant as envisaged (for which the first and second respondents are responsible)

(c) By the first and second respondents on 10 January 2019 and 29 March 2019 not dealing with share structure as previously discussed

(d) 1st week February 2019 to 26 February 2019 – first and second respondents being frustrated with and unhappy with claimant's explanation of health position and pushing claimant for responses on cause of health issues and timescale for and capabilities on return to work – against first and second respondents

(e) 19, 25 and 26 February 2019 – second respondent seeking to acquire claimant's shares in first respondent – against first and second respondents

(f) 25 and 26 February 2019 – second respondent insisting on discussing claimant's shares and employment matters despite

claimant making clear that she was stressed and that this was too much for her while she was unwell – against first and second respondents

(g) 26 February 2019 - second respondent stating that he could not see how claimant can perform as a director and shareholder in an SME business, and that there would be a role for claimant based on what her capabilities were, and that they will work out what that role is at the time. second respondent speaking of how claimant's role and her shareholding were two separate things, and that he wanted claimant to sell her shareholding back for £20,000. When challenged by claimant that a decision on whether the claimant could perform as a director and shareholder with claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, second respondent arguing that this was his decision to make as he needed to think of what was right for the business – against first and second respondents

(h) Around 18 February 2019 – respondents disbanding team of claimant's reports without claimant's knowledge, agreement or consultation – against first and second respondents

(i) 27 to 29 March 2019 – respondents proceeding with allocation of shares in respondent with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation in fact going against the claimant's wishes – against first and second respondents

(j) 26 June 2019 to 27 August 2019 – Failing to progress the claimant's grievance in a reasonable fashion and timescale – All respondents

(k) 3 January 2019 to 16 September 2019 – Constructively dismissing the claimant and causing the claimant to leave her employment – All

respondents (although this was not advanced as a claim under section 15).

5. Did the following things arise in consequence of the claimant's disability:

a) ill health

b) ability to attend work/absence

c) change in attitude to claimant

6. Was the unfavourable treatment because of any of those things?

7. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were: "To manage the operational matters of the business in difficult financial circumstances, during a period of sustained loss making, historic under-delivery to clients, loss of clients and a trend away from the engagement of telemarketing services by the market in general, against the backdrop of a difficult economic climate for international clients caused by the pending Brexit situation at the time. The reality of this situation required significant personal financial commitment, ongoing crisis management and day-to-day fire-fighting, in an effort to save the business from failure. This involved real time decision making in the direct management of staff and customers, adapting to an rapidly evolving situation. In addition to this, the board of directors has a statutory duty to act in the best interests of the company and all of its shareholders, staff and creditors, and decisions regarding the day-to-day operations of the business were made in that context, at all times, by the executives charged with that responsibly in a high pressure situation."

Harassment related to disability (Equality Act 2010 section 26)

8. Did the respondent do the following things:

(a) 25 February 2019 and 13 to 20 March 2019 – second respondent failing to have telephone calls with claimant as envisaged – against first and second respondents.

(b) 1st week February 2019 to 26 February 2019 – respondents being frustrated with and unhappy with claimant's explanation of health position and pushing claimant for responses on cause of health issues and timescale for and capabilities on return to work – against first and second respondents.

(c) 19, 25 and 26 February 2019 – second respondent seeking to acquire claimant's shares in first respondent – against first and second respondents.

(d) 25 and 26 February 2019 – second respondent insisting on discussing claimant's shares and employment matters despite claimant making clear that she was stressed and that this was too much for her while she was unwell – against first and second respondents.

(e) 26 February 2019 - second respondent stating that he could not see how claimant can perform as a director and shareholder in an SME business, and that there would be a role for claimant based on what her capabilities were, and that they will work out what that role is at the time. Second respondent speaking of how claimant's role and her shareholding were two separate things, and that he wanted claimant to sell her shareholding back for £20,000. When challenged by claimant that a decision on whether the claimant could perform as a director and shareholder with claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, second respondent arguing that this was his decision to make as he needed to think of what was right for the business – against first and second respondents

(f) 8 to 13 March 2019 – second respondent being slow to respond to written communication from claimant (claimant's email dated 8 March 2019) – against first and second respondents.

(g) 13 March 2019 – second respondent requesting that matters be dealt with by phone and not in writing – against first and second respondents if victimisation not found.

(h) 13 March 2019 to date and ongoing – second respondent accusing claimant of making unfounded allegations in respect of what was said by second respondent to claimant on 25/26 February 2019, Second respondent claiming claimant had misheard him due to phone signal – against first and second respondents if victimisation not found.

(i) 13 March 2019 – second respondent accusing claimant in writing of upsetting him and making comments about him which he claims are untrue – against first and second respondents if victimisation not found.

(j) 27 to 29 March 2019 – respondents proceeding with allocation of shares in respondent with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation in fact going against the claimant's wishes – against first and second respondents if victimisation not found.

(k) 26 June 2019 to 27 August 2019 – Failing to progress the claimant's grievance in a reasonable fashion and timescale – All respondents if victimisation not found.

(l) 3 January 2019 to 16 September 2019 – Constructively dismissing the claimant and causing the claimant to leave her employment – Against all respondents if victimisation not found (although this was not progressed as a separate claim of harassment).

9. If so, was that unwanted conduct?

10. Did it relate to disability?

11. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

12. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

13. Did the claimant do the protected acts as follows:

a) Telephone conversation between claimant and the second respondent of 26 February 2019;

b) Email from claimant to second respondent dated 8 March 2019;

c) Email from claimant to second respondent dated 27 March 2019 and second telephone conversation between them of same date;

d) claimant’s solicitors’ email to second respondent dated 12 April 2019 - accepted as protected act;

e) claimant’s written grievance dated 31 May 2019 - accepted as protected act; and

f) claimant’s resignation email dated 16 September 2019 - accepted as protected act.

14. Did the respondents believe that the claimant had done or might do a protected act as a result of the above?

15. Did the respondent do the following things:

a. 13 to 20 March 2019 – second respondent failing to have telephone call with claimant as envisaged – against first and second respondents

b. 8 to 13 March 2019 – second respondent being slow to respond to written communication from claimant (claimant's email dated 8 March 2019) – against first and second respondents

c. 13 March 2019 – second respondent requesting that matters be dealt with by phone and not in writing – against first and second respondents

d. 13 March 2019 to date and ongoing – second respondent accusing claimant of making unfounded allegations in respect of what was said by second respondent to claimant on 25/26 February 2019, second respondent claiming claimant had misheard him due to phone signal – against first and second respondents

e. 13 March 2019 – second respondent accusing claimant in writing of upsetting him and making comments about him which he claims are untrue – against first and second respondents

f. 27 to 29 March 2019 – respondents proceeding with allocation of shares in respondent with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation in fact going against the claimant's wishes – against first and second respondents

g. 21 April 2019 onwards - Withdrawing offer of £20,000 for the claimant's shares – against first and second respondents

h. 31 May 2019 to 23 September 2019 – third respondent failing to deal with claimant's grievance reasonably and impartially – first and

third respondents in collaboration, by: not arranging for grievance to be heard by someone impartial; not taking into account information supplied by claimant (including her comments in initial investigation notes, and her notes of the telephone conversation with second respondent of 26 February); not investigating the matters complained of properly with second respondent; not taking a written statement from the second respondent and not exhibiting such a statement to the claimant; not interviewing Ms McNee; not taking into account information known to the third respondent in relation to the grievance regarding the offer to purchase the claimant's shares, the dilution of the Claimant's shares, and the disbanding of the claimant's team; third respondent not giving a witness statement; coming to an unreasonable decision on the facts; not meeting with claimant to discuss resolution as indicated; having EmployEasily essentially deal with the grievance despite claimant having made clear she did not want them to and the claimant being told that the third respondent was dealing with it; ignoring EmployEasily's investigation finding where this was unfavourable to Respondents

i. 3 June 2019 to 11 September 2019 – Lying and misrepresenting matters in response to the claimant's grievance during the grievance process – All Respondents, through the information provided by the second respondent in relation to the matters complained of in the grievance, and through the decision reached on the matters complained of

j. 26 June 2019 to 27 August 2019 – Failing to progress the claimant's grievance in a reasonable fashion and timescale – All respondents

k. 7 June 2019 to 27 August 2019 – refusing to allow the claimant's grievance to be heard by someone impartial - All respondents

l. 3 June 2019 to 23 August 2019 – third respondent misleading the claimant in relation to how her grievance would be dealt with – first

and third respondents in collaboration, by giving her the impression that the third respondent would investigate and make the decision

m. 1 June 2019 to 11 September 2019 – third respondent failing to investigate the claimant's grievance properly and consider the relevant issues arising from the grievance – first and third respondents in collaboration by: not taking into account information supplied by claimant (including her comments in initial investigation notes, and her notes of the telephone conversation with second respondent of 26 February); not investigating the matters complained of properly with second respondent; not interviewing Ms McNee not taking a written statement from the second respondent and not exhibiting such a statement to the claimant; not taking into account information known to the third respondent in relation to the grievance regarding the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team; third respondent not giving a witness statement; ignoring EmployEasily's investigation finding where this was unfavourable to respondents

n. 1 June 2019 to 11 September 2019 – third respondent ignoring and/or failing to take into account relevant information provided by the claimant in relation to her grievance – first and third respondents in collaboration, by: not taking into account information supplied by claimant (including her comments in initial investigation notes, and her notes of the telephone conversation with Second respondent of 26 February);

o. 3 June 2019 to 27 August 2019 – Ignoring and/or failing to take into account relevant information provided by the first respondent's HR Advisers namely the part of their finding in favour of the Claimant, if the respondents' position as to who decided the claimant's grievance is correct – All respondents

p. 3 June 2019 to 11 September 2019 – Failing to take into account information relevant to the claimant's grievance which was within the respondents' knowledge – All respondents, namely: the time taken to seek medical reports; what the second respondent said and did to claimant in February 2019; information known to the third respondent in relation to the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team;

q. 3 June 2019 to 27 August 2019 – third respondent purporting to come to a decision on a grievance when being a witness to certain grievance allegations under consideration, and ignoring the knowledge held as a result of being that witness in relation to the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team – first and third respondents in collaboration

r. 3 June 2019 to 27 August 2019 and ongoing – Accusing the claimant of making false allegations in her grievance – All respondents

s. 27 August 2019 – Arriving at an unfair and unreasonable decision on the claimant's grievance – All respondents

t. 27 August 2019 – third respondent failing to meet with the claimant to discuss resolutions to the claimant's grievance when it had been indicated that this would happen – third respondent

u. 27 August 2019 to 11 September 2019 – third respondent failing to respond properly to queries raised by the claimant following the grievance decision in relation to disclosure of statements and information collated by third respondent or Mr Sutherland, HR Adviser, during the grievance process, why Mr Sutherland had been so involved in the grievance process, why Mr Sutherland had upheld part of the claimant's grievance but the third respondent had not,

and why the third respondent had given no input on the grievance in relation to what he knew about the agreement as to how shares were to be allocated– first and third respondents in collaboration

v. 11 September 2019 – Unilaterally deciding to move the claimant on to a grievance appeal – All Respondents

w. 16 September 2019 onwards – Failing to take any steps to progress the claimant's grievance appeal – All Respondents

x. 3 January 2019 to 16 September 2019 – Constructively dismissing the claimant and causing the claimant to leave her employment – All respondents (although this was not progressed as a victimisation claim)

y. 23 September 2019 – Removing the claimant as a Director of the first respondent and representing to Companies House that she had resigned – All respondents

z. 16 September 2019 onwards – Setting up a new company Prosperohub Limited in order to prejudice the claimant in relation to her shareholding in the business and her ability to pursue the first respondent – second and third respondents

aa. September 2019 onwards – Continuing to misrepresent the facts in relation to the foregoing matters to the claimant and to the Employment Tribunal – All respondents

16. By doing so, did it subject the claimant to a detriment?

17. If so, was it because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

Unfair dismissal against first respondent

18. Did the first respondent through the actions or omissions of the second and third respondents or through their agent EmployEasily behave in a manner

towards the claimant which was in breach of the following implied contractual duties?

a) duty to act in a way which will not destroy/seriously damage trust and confidence

b) duty to support employees

c) duty to progress grievances in a reasonable manner

d) duty not to act towards the employee in a manner which breaches the Equality Act (the latter duty not being relied upon by the end of the Hearing)

19. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2. whether it had reasonable and proper cause for doing so.

Breach of contact (against first respondent)

20. Did the first respondent through the actions or omissions of the Second and third respondents or through their agent EmployEasily behave in a manner towards the Claimant which was in breach of the following implied contractual duties?:

(a) duty to act in a way which will not destroy/seriously damage trust and confidence

(b) duty to support employees

(c) duty to progress grievances in a reasonable manner

(d) duty not to act towards the employee in a manner which breaches the Equality Act (the latter duty not being relied upon by the end of the Hearing)

Application by second and third respondents

10. At the commencement of the Hearing the second and third respondent had applied for an insurance company to be added as a party to the claim in light of the Court of Appeal decision in **Irwell Insurance Company Limited v Neil Watson and others** 2021 EWCA Civ 67. Following a discussion and as the application had not been served on the insurer the second and third respondents agreed to reserve their position and renew the application prior to any remedy hearing if needed.

Evidence

11. The parties had agreed a bundle of some 832 pages.

12. The Tribunal heard from the claimant, her friends (Ms Duffy and Ms Low), her husband (Mr Walsh), a former colleague, Ms Neal, the second and third respondent and the first respondent's HR Business Partner (Mr Sutherland from EmployEasily, an HR company). The witnesses had each provided a written witness statement and they were cross examined and asked further relevant questions. It was agreed that the hearing was with regard to liability only, with remedy being reserved in the event of any of the claims being successful. The respondent also provided a witness statement from the liquidator of the first respondent, the contents of which were not contested.

13. In the week following the Hearing the respondent's agent sent an email to the Tribunal asking the Tribunal to consider a further communication that may have been relevant to a point put to one of the witnesses. The claimant's agent responded noting that the evidence had been led and it was not for the respondent's agent to give evidence. We only considered the evidence that

was led during the Hearing in our deliberations and in reaching our decision which was unanimous.

Facts

14. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what position was more likely than not to be the case.

Background

15. The first respondent's business was involved in digital marketing in various ways.

Contract of employment and policy documents

16. The claimant's most recent contract of employment was dated 21st October 2013. An amendment for one month company sick pay was added to this contract by the Second respondent. The claimant was contractually entitled to one month full sick pay but was paid in full until January, using some holidays. The claimant's contract was supplemented by a suite of policy documents, but these were not before the Tribunal.

17. The grievance policy was included within the employee handbook. The policy stated that the first respondent would deal with grievances "fairly and without unreasonable delay". The policy explained that the first respondent would investigate any grievance raised, hold a meeting and inform the employee of the outcome and offer an appeal.

18. The policy noted that the level of investigation needed would depend upon the grievance and can involve speaking to others. The investigation could be carried out by someone appointed by the first respondent. The policy stated

that an investigation may take place before holding a grievance meeting where that was considered appropriate or meet with the employee first.

19. Normally grievance meetings would be arranged within one week of receipt of the grievance. The purpose of the meeting was to allow the employee to explain the grievance and how they think it should be resolved and to assist the first respondent in making a decision based on the available evidence and representations made. Further investigations can be carried out as are necessary following the grievance meeting.

20. An outcome would ordinarily be issued within one week of the final grievance meeting to inform of the outcome or any further action intended. Where appropriate a meeting can be convened to give that information in person.

21. An appeal against the outcome can be made by the employee within one week seeking out the full grounds of appeal. Normally a more senior manager would hear the appeal and a decision would be issued normally within a week.

Claimant's roles

22. On 13 April 2007 the claimant commenced her employment by Intelligence Networking Limited in the role of Sales & Marketing Administrator and worked in various roles, including Campaign Manager (from January 2011); Campaign Services Manager (from February 2014); Operations Manager (from April 2014) and Operations Director (from December 2015).

23. During late 2015 when the second respondent was buying out his then business partner he chose to invest time in the claimant and her growth into the operational leadership role. The claimant and the second respondent worked well. When she was promoted to operations director she received a pay rise in excess of 40%. The telemarketing operations manager reported into the claimant and the claimant worked with the second respondent as a team to steer the business forward from an operational perspective. The second respondent worked with the then head of sales to manage sales and

achieve revenue targets. The second respondent was a very experienced sales professional.

New company emerges

24. Intelligence Networking Limited was solely owned by the second respondent. Intelligence Networking Limited also used the brand name "INCo". That company was suffering from financial problems. For the period of July 2015 the achievement of customer delivery targets of the business was on a downward trajectory. The business had missed targets and renewing customer contracts became very difficult due to the first respondent not meeting customer demands.

25. On or around December 2017 Intelligence Networking Limited was liquidated and a new company formed which was Exchangelaw (2017) Limited. Some employees were TUPE transferred to the new company, including the claimant. The new company did the same work as the old company. There was an asset purchase agreement between the new company and the old company.

Claimant becomes a shareholder

26. On 3 January 2018 the company name was changed from Exchangelaw (2017) Limited to INCO Marketing Limited ("the first respondent").

27. On 3 January 2018 the claimant became a 10% shareholder and Chief Operating Officer (COO). The claimant also became a director of the first respondent in the companies house sense. The first respondent did not request any payment from the claimant for her shares. The second respondent held 90% of the shares in the first respondent.

28. The claimant was given a 33% pay rise recognising the appreciation the second respondent had of her. The claimant and second respondent were business partners. The second respondent regarded the claimant as a friend.

New business partner arrives

29. During the course of 2018 the second respondent decided that he needed to make changes to the first respondent to seek to ensure it continued to be viable. The second respondent believed that the bandwidth and capability of the management team was limited and the business needed to diversify into other markets given the changes within the IT industry generally. He was also concerned that operational delivery was falling behind where he considered the business should be.

30. The second respondent recognised that the first respondent required someone with greater financial experience to allow informed decisions to be made and to allow the first respondent to expand into new areas, including professional services.

31. The second respondent concluded that the first respondent needed another business partner who had commercial and client delivery experience. The third respondent had worked with the first respondent (and claimant) before (as he had advised the business for around 5 years). He was a chartered accountant with over 30 years' experience and had significant experience of working with (and rescuing) faltering businesses (such as in his role as auditor) and of running successful businesses. The third respondent had been the accountant and worked as an adviser to the first respondent and so he understood the business and its challenges. The claimant had worked with him for a number of years in connection with his advice to the first respondent.

32. The second respondent told the claimant of the third respondent's arrival in around September 2018. The second respondent believed that the claimant may have had some resentment to his joining the business, but that was only a feeling derived after the event. One example that led the second respondent to conclude this was because he believed the claimant changed how she dealt with some high level matters following the third respondent's arrival to the business, such as calling a "quick board meeting" by email, which was different to how discussions with her had taken place. The claimant and third respondent had worked well together and there were no issues.

33. The third respondent joined the business in October 2018. It was intended that he would focus on business expansion and diversification.

34. The second and third respondent agreed that the third respondent would acquire a 40% shareholding. He would become Chief Commercial Officer ("COO"). The first respondent's business had prepared documentation which showed the shareholding split as 60% second respondent, 40% third respondent and 10% claimant. The third respondent had arranged to be included with the documentation a casting vote mechanism whereby the second respondent would retain some degree of control.

35. The issue as to the shareholding had not been finalised and the second respondent was considering matters but this did not affect the third respondent joining the business.

36. The third respondent joined the business in early October 2018 and it became obvious to him that the company was having operation difficulties resulting in the loss of revenue and significant cash flow problems. He had established the outline position prior to 12 October 2018.

Disability

37. On or around 19 October 2018 the claimant became a disabled person under the Equality Act 2010. The claimant was diagnosed with relapsing remitting MS and chronic neuropathic pain on 19 October 2018. The claimant informed the second respondent. The claimant's condition affected her in numerous ways. The claimant had undergone treatments and took medication to assist her with her condition.

Claimant and third respondent

38. The claimant discussed her disability with the third respondent and it was agreed that the third respondent would assume the claimant's role. He would become interim COO. He would assume control of operations and his proposed role, of seeking to diversify the business, would be placed on hold pending the claimant's return.

39. Immediately following the third respondent's joining the business he worked with the claimant for around 2 weeks, meeting her on a daily basis. The third respondent had learned of the significant operational issues that existed within the business. The claimant had been supportive of the third respondent taking on an operational role.

Financial contribution to the business

40. The third respondent identified that in addition to his skills, the business required significant cash injections in order to remain viable. In this regard between October 2018 and May 2019 he injected the sum of £336,000 into the business and took no remuneration over that period, despite working 50 to 70 hours per week. These issues were unforeseen by the third respondent. The second respondent worked similar hours during the material times.

Compassionate leave with pay at respondent's request

41. On 24 October 2018 the claimant contacted the second respondent by telephone and informed him that she wished to take a few days off but that she intended to return to work on 29 October 2018. On 28 October 2018 the Claimant contacted the second respondent by telephone to inform him that she was not able to return to work on the following day. On 5 November 2018 the second respondent contacted the claimant by telephone and asked that she take the rest of the year off work, on full pay, to adjust to the diagnosis, treatment and attend appointments. The claimant did so.

42. The third respondent, having worked in the business for a number of weeks, discovered that the business was very weak at operations management and client campaign delivery. He was keen for the claimant's return since she had the most experience and expertise in this area. He discovered that the team were around 400 leads behind. Given 2 or 3 leads were generated every day, there were serious concerns as to the business structure.

Team of business partners and approach to staff

43. The second and third respondents and the claimant worked as a team of 3 business partners. They supported each other and treated each other as partners, rather than employees of the business as such. It was for that reason that the second and third respondents agreed to ensure the claimant was given paid time off to manage the issues in her personal life at the time (and did not consider formal return to work meetings necessary). The second respondent regarded the claimant as a friend.

44. The first respondent had previously assisted an employee who had encountered financial difficulties for personal reasons. The second respondent had authorised payments to be made to the employee from the first respondent to assist with mortgage payments, as a goodwill gesture to assist the individual.

Return to work

45. On 3 January 2019 the claimant returned to work. The third respondent had purchased (from his own funds) equipment for the claimant and others, including an expensive laptop, ergonomic mouse and arm rest.

46. The claimant had agreed with the second respondent that she would return to work on a phased basis with 2 days in the first week, 3 days in week 2, 4 days in week 3 and 5 days in week 4 (with one day working from home).

47. The phased return had been agreed by the second respondent.

Discussion in office

48. During the claimant's return to the office in January 2019 the third respondent told her during a coffee break that he had experience of people, including within his own close family, with life changing conditions. He told the claimant that he had 2 friends who ran businesses who had MS and had managed to deal with their illness and their professional commitments.

49. The claimant had been told by the second respondent upon her return to work that he would arrange a catch up amongst the three of them (the claimant and the second and third respondent). Due to the pressure of business (and solely due to pressure of business) that meeting did not take place quickly enough for the claimant. The three individuals had been working hard following upon the claimant's return but had not found the time to catch up together.

50. On 10 January 2019 the claimant called a meeting with the second and third respondents which she called a "quick board meeting". She did so by sending the second and third respondents a meeting request via email headed "quick board meeting". No discussions as between the senior team had ever been prefaced in such a way. There was no agenda.

51. At the meeting the claimant explained that she was concerned she had pushed herself too hard and was concerned that she had returned to work too early. Both the second and third respondent reassured the claimant and it was agreed that the team would work together. It was a reassuring and placatory meeting.

52. The claimant wanted to explain at the meeting that she was glad to have returned. By the time the meeting took place it had become clear that her health had been affected such that it was unlikely that she could remain at work. There was a short discussion around what would happen if the claimant was unable to return to work (which included a discussion about the claimant's shares and how the respondents would seek to look after the claimant). Both the second and third respondent reassured the claimant that it was in everyone's interest to work together.

Share distribution

53. Before 10 January 2019 paperwork was drawn up to appoint the third respondent as a director of the first respondent, and to restructure the shareholding in the first respondent. That paperwork did not envisage a dilution of the claimant's shareholding; she would continue to hold 10%.

54. On the morning of 10 January 2019 (before the meeting of the three directors) the third respondent had a short meeting with the claimant. The third respondent gave the claimant a hand annotated drafted of the paperwork pertaining to his joining the first respondent as a shareholder and director. The third respondent explained what the process was and the issues arising. It was agreed that the claimant would review the paperwork. During that meeting the third respondent had made it clear to the claimant that he was delighted the claimant had returned to work.

55. The paperwork the claimant had been given had been prepared by the first respondent's solicitors (at the third respondent's request) and had the share distribution as initially envisaged (with the third respondent being given a 40% shareholding). The third respondent had made some handwritten comments on the paperwork which he had given to the claimant (and separately to the second respondent). There was to be a discussion in the near future as to the position. The position as set out in the papers was not final as it required the parties to finalise the position, which did not happen.

56. The second respondent considered the issue of share distribution further and decided that he was not comfortable with the proposed share distribution. He was concerned that the proposal could result in his losing control of the business he had created (despite the casting vote mechanism).

57. As a matter of company law it was within the second respondent's rights, as a 90% shareholder, to issue new shares and determine the basis for new shares to be issued, even if that resulted in minority shareholders having a diluted shareholding. There were remedies available in company law if a shareholder believed they were being unfairly prejudiced.

Claimant's second absence

58. Near the end of the day on 10th January 2019 the claimant took leave of absence because of sickness. She found that she had been pushing herself too much and was not ready to return to work. She was not to return to work.

Claimant contacts respondent re absence

59. By WhatsApp message from the claimant to the second respondent on 27 January 2019 the claimant made it clear that she was still too unwell to return to work. Her message, so far as relevant, said: "*I am messaging you and not calling but I don't want to get upset. For your benefit and mine I thought best to send you a message and we can speak tomorrow… I am not ready to return yet. No one is putting pressure on me to return, it's all my own pressure, but I am disappointed (as I am sure you can imagine) but I need to listen to my body and take some more time off. You've been so supportive and amazing through all of this and I cant thank you enough so please don't think I cant talk to you*."

60. The second respondent replied stating "*I know you will be feeling down about how you feel. You have to do what's right for you!!".*

61. The claimant replied stating: "*Thank you. It's just so frustrating... It's early days and this isn't going to be forever*."

62. The claimant asked the second respondent during a telephone call if she was to return the paperwork regarding the third respondent's appointment as director and the share restructure. The second respondent advised the claimant not to do anything at this stage.

63. There had been no urgency to resolve the shareholding issue and the second respondent wished time to reflect on how best to protect his position given the proposed changes and the effect of the arrangement that had been committed to writing and given to him by the third respondent. The third respondent was in no rush to have his shareholding issued nor to be formally appointed as director.

Financial position of the first respondent and reduction of claimant's pay

64. The first respondent was in a precarious financial position at this time (the full extent of which was unknown by the claimant) and the third respondent required to inject his own funds into the first respondent. The second and third

respondent agreed around the start of February that the business could no longer sustain paying the claimant full pay when she was absent. She was being paid around £5,000 gross a month. The second and third respondent agreed that the second respondent would call the claimant to inform her that her sick pay was ending. To assist her financially it was agreed between the second and third respondent that as her sick pay was going to end, the second respondent would call her and offer her £20,000 in respect of her shares. The third respondent believed that would have been affordable and fair, being the most tax efficient way to assist the claimant during a time they considered the claimant to require financial assistance. That was the sole reason why the respondents wished to make an offer for the claimant's shares.

65. The second and third respondent believed, at this time, that the value of the shares was significantly less than the sum offered, potentially nil, given the situation facing the business, but they wished to provide the claimant with financial assistance given the situation facing her, as they had done by paying her full pay during her earlier absence.

66. The third respondent understood that the claimant would be told that her contractual sick pay was ending and that she would be offered the sum of £20,000 for her shares.

Second respondent calls claimant – 7 February 2019

67. On or around 7th February 2019 the second respondent telephoned the claimant to inform her that her full pay would end and she would be paid SSP. The second respondent was stressed about making that call and he believed the decision could significantly affect the claimant's financial position. He understood the claimant was moving home. Given her monthly pay was around £5,000, the move to SSP could be significant for her. He was concerned as to how the claimant would cope financially.

68. When the second respondent told the claimant about the move to SSP she advised him that she had income protection insurance which would cushion the impact.

69. The second respondent was surprised. He was not aware that the claimant had such insurance and was of the view that as a business partner that was something that the claimant ought to have told him about some time before. This was because the first respondent was struggling financially and he believed that had the claimant disclosed the existence of the policy prior to that time, an alternative course may have been possible which could have limited the financial impact upon the business. The second respondent believed they were business partners and was surprised given the backdrop and financial position that the existence of the insurance policy was not something the claimant disclosed sooner.

70. The second respondent asked the claimant as to the prognosis in respect of her recovery with a view to planning ahead for the business. The second respondent wished to plan, as best he could, in light of the claimant's absence. He wished to develop a strategy for the business going forward in the short term given the significant financial difficulties the business was encountering at this time and the fact that the third respondent was covering the claimant's role, which meant that he was unable to focus on the diversification and the other duties. This had a significant impact upon the income to the business. The second respondent wanted to obtain as much information as possible to make an informed decision as to the future of the business.

71. The second respondent did not offer to purchase the claimant's shares during this call (as the third respondent understood would happen).

72. As part of the discussion the second respondent asked whether the symptoms experienced by the claimant were as a result of the change to medication the claimant had carried out or due to the MS. This was part of a general discussion about the claimant's health and a genuine concern about the claimant. The second respondent was sympathetic towards the claimant and seeking to understand the issues with which she was grappling with regard to her health at that time.

73. The second respondent also advised the claimant that whatever her health position would be, there would be a place for her in the business commensurate with her abilities at the time. He asked the claimant to consider what her capabilities might be when she returned to work. The claimant was unable to confirm the position as the impact of her disability changed on a day to day basis at that time.

74. The second respondent advised the claimant to consider the matters that had been discussed and they could discuss matters further. While neither party was able to determine what the future held, the second respondent was seeking to plan as best he could in light of a very difficult financial position within the business and in light of the uncertainty facing the claimant. The discussion was conversational in nature and the second respondent did not "badger" the claimant.

Financial position of business worsens

75. In around 19 February 2019 it had become clear to the second and third respondents that the financial position of the business had not improved. The first respondent had relied upon the third respondent to inject capital at the end of each month to make payroll commitments.

Change to staffing structure

76. From February 2019 the second and third respondents worked to arrest the worsening trading position of the first respondent. Both considered that the situation had been exacerbated by the inappropriate structure of the operational teams where client liaison and delivery were separated. The third respondent decided that the way in which staff members integrated would be restructured so all client activity would be dealt within a specific team, headed up by "Client Service Managers" who were previously "Campaign Managers".

77. That team had been under the claimant's supervision and the third respondent who was covering management of the team in her absence believed the team was ineffective and had failed to improve client service delivery. In an attempt

to make the team a coordinated and aligned unit collectively pursuing client objectives, these individuals were absorbed into client service teams.

78. There had been no direct dismissals at that time as some staff had reverted to sales roles, which had been agreed between the third respondent and the claimant (in late 2018) with the remainder having their job titles changed to client service manager evidencing the shift in focus of their activities and the creation of a team structure around each client.

79. The third respondent believed the change was necessary because of the poor performance of the affected staff, the continued loss of clients as a result of poor performance, the decline in the financial health of the business and the financial and operational issues that arose during the claimant's absence. The team was not disbanded but rather the structure of the team became more focused. The senior management of the function did not change.

80. The third respondent, as acting COO, reasoned that he needed support in running the team in question. It had 56 staff (which compared to 20 staff when the claimant had been at work). It was not possible for the third respondent to run that team and assistance was needed. The third respondent told Ms McNee, who had been client services director and had become operations director to support the third respondent run the team with 56 people in it, that he had made the decision, as acting COO, and that the claimant would assume control when she returned to her role (and the third respondent would cease to be acting COO).

81. Ms McNee had sought reassurance from the third respondent and he advised her that she would remain in position as she would continue to do the job she currently did, whether led by the third respondent as COO or the claimant as COO upon her return. The claimant's capabilities were not discussed. The COO role had not changed. While the job title of some of the management changed, the claimant's role (which the third respondent was covering on an interim basis) had not changed.

82. At the end of the meeting between Ms McNee and the third respondent, the third respondent was told by Ms McNee that the claimant had wanted to be part of the discussion but the structural change had been agreed by that stage. The claimant had not contacted the third respondent about this issue at that time by which stage the matter had been dealt with.

Offer to purchase shares

83. On or around 19 February 2019 the second respondent telephoned the claimant. He advised the claimant that both the second and third respondent were prepared to offer to purchase the claimant's shares in the first respondent for £20,000. He did so by telephone and told the claimant that he thought that sum of money would be a "good thing" for her. The claimant advised the second respondent that she would need time to consider the position.

84. The reason why the second and third respondent offered to purchase the claimant's shares was solely because they wished to give the claimant some financial peace of mind and reduce the financial burden she encountered. It was a goodwill gesture despite the financial difficulties encountered by the first respondent at this time and the belief that the shares were in fact worthless.

85. By this stage the third respondent had injected £170,000 into the first respondent.

Another call to claimant to discuss position – 25 February 2019

86. On 25 February 2019 the claimant telephoned the second respondent. The second respondent was on a train commuting to a business meeting in London during the call. There had been a bad reception and the call failed on a few occasions.

87. The claimant explained that she did not wish to sell her shares at this juncture. She also explained that she was unable to say what her work capabilities are until things improved. The second respondent explained to the claimant that

he was looking to plan ahead for the business and that there would always be a place for the claimant in the business whatever her capabilities were, when she was ready to return. The claimant was advised that she would be supported given the health challenges she faced.

88. On 25 February 2019 the claimant sent her MS Nurse's letter to the second respondent by WhatsApp. That letter stated that the claimant "*had been diagnosed with multiple sclerosis last year, which is a chronic neurological condition with an unpredictable diagnosis. Thankfully the claimant has started on disease modifying therapy early in the disease which will likely improve her prognosis significantly. Her symptoms are fatigue and neuropathic pain*." The nurse said that the claimant was adjusting to the long-term condition and symptoms. While learning how to self-manage symptoms can take time, the nurse was optimistic that the claimant would settle into the diagnosis and symptoms. A gradual return to work was likely.

89. It is not clear from the WhatsApp image when the letter had been received by the claimant but it is dated as issued to the claimant on 19 February 2019. The claimant had arranged for this letter because the second respondent had asked her whether the struggles she encountered were as a result of medication or MS during discussions.

90. Due to the challenges in having the discussion while on a train the second respondent told the claimant he would call her back later that evening. Due to (and solely due to) the amount of time the second respondent had been awake he was unable to do so. By WhatsApp message he said he would call the claimant the next day. The claimant asked that he call her in the morning and that was agreed.

91. The second respondent did not wish to seek external medical input at this stage. He was satisfied that there were ongoing discussions. The second and third respondent regarded the relationship amongst the three pope (including the claimant) as business partners and not as employees. The second respondent did not consider it necessary to seek external medical input given the nature of the discussions at that stage. The business environment was

also extremely challenging both operationally and in terms of the precarious financial position. The second respondent was working 70 hour weeks and was seeking to introduce new business and increase revenue, which was the principal focus at that time. He decided to await further input from the claimant when she was able to do so.

Telephone call of 26 February 2019

92. On 26 February 2019 the second respondent telephoned the claimant. He was again on a train in England on business and again the call failed on a number of occasions due to the lack of signal. The claimant explained that she was feeling stressed and that she was unable to discuss what her capabilities might be upon her return to work. She did not wish to discuss the position regarding the shareholding. The call broke up.

93. During the call the second respondent had advised the claimant that there would be a role for the claimant commensurate with her responsibilities. This was as part of a discussion as to the position and was intended to reassure the claimant that her role remained open to her, which failing there would be a place for her in the business.

94. The second respondent (and third respondent) were working very long hours in the business and the second respondent had been concerned to ensure the claimant did not feel under pressure to return. On 25 February 2019 the second respondent had left his home around 4.30am to make the relevant connections to attend business meetings in London and was too tired to call the claimant that evening, calling the claimant the following morning.

95. While the claimant believed the second respondent stated to her during that call that he did not see how the claimant could perform as a director and shareholder in an SME business we found this was not said. The claimant believed this was what the second respondent had said during the discussion but the discussion had focused on the second respondent's attempt to plan ahead and reassure the claimant as to the position. He had attempted to

reassure the claimant by explaining that there would be a role for the claimant commensurate with her capabilities at the time she felt fit to return to work.

96. The second respondent referred to the long hours that the second and third respondent were working and that he did not wish the claimant to feel under pressure to work those hours. He had told her that he did not want her to feel that she needed to work those hours, which were the hours she had worked prior to her disability.

97. The claimant explained that her medical professionals would be in a position to assess her fitness going forward. The second respondent explained that he had a role to play in the decision as he was responsible for the strategy of the business and was planning going forward which would involve the claimant in some capacity and he would be able to assist the claimant in identifying what roles she could undertake when she was able to return as he had the knowledge of the business and could work with the claimant to identify suitable roles or tasks in light of her capabilities at the time, which could have been COO.

98. The second respondent also stated that the operation had been broken for 6 to 8 months. The business was undergoing serious operational challenges.

99. The claimant stated that she did not want to sell her shares at this time and was not prepared to discuss the share issues further at that point.

100. The call had failed on around three separate occasions and was on a train. The second respondent sought to assure the claimant that her position remained in the business and that they wished her a return to work in due course.

101. The claimant was keen to continue the call (as the call had not reached a natural conclusion) and she sent the second respondent a message stating: *"Call me back when you have a signal".*

102. When the second respondent replied stating he would call the claimant back later she replied: *"This conversation cannot keep dragging on as it's causing*

me to be severely stressed. Under my current circumstances I cannot afford to be stressed right now. You have repeatedly asked me what you can do to help me and I've always said nothing. I've asked nothing of you up until this point and all I'm asking for is patience. I will let you know more even in a few weeks but right now I'm unwell and I need to focus on getting better. Please be patient and listen to what I and the nurse is saying. I will get better. I just need time."

103. The second respondent knew that the claimant was a very hard worker and that she was proud of the work she did. She was unaware at this time as to the very distressed financial position of the first respondent and she was focused, naturally, upon her health. During this time the claimant was seeking solace and support from her friends and husband. She presented to these persons her understanding of the position and her frustration at the lack of prompt responses which led to her becoming stressed. The responses from her friends were extremely critical of the second respondent and their views were very negative of the second respondent, as a result of what the claimant had told them.

104. During this time the second respondent (and third respondent) were under extreme pressure to seek to salvage the business by securing the existing business framework and to seek new business thereby procuring sufficient revenue to protect the viability of the first respondent. This led to extremely long working hours and both were placed under very considerable stress personally and professionally.

105. The sole reason for the second respondent having the discussion with the claimant was to manage the business and plan ahead as best he could in an appropriate fashion.

Claimant decides to surreptitiously record calls

106. Following the last call the claimant decided to install software on her mobile telephone that allowed her to record the telephone calls made to her. She did not disclose this to the second or third respondent when they called and only

disclosed the recordings after her employment ended (as part of the Tribunal process rather than during the grievance process).

Email from claimant to second respondent

107. On Friday 8 March 2019 the claimant emailed the Second respondent as follows:

"*It's been over a week since we last spoke and you haven't called or responded to my Whatsapp message. As I said in my message I do not wish for the conversation about selling my shares or what adjustments I may need to drag on as it is causing me unnecessary stress at a time when I am unwell. Your lack of response since my message has left me with an uncertainty about your acknowledgement of my request for patience and therefore sill causing me emotional stress which is affecting my physically due to my current circumstances. To be clear, as I stated in our phone call, I am not in a position to tell you what adjustments I made need when I return to work as I am not well enough to return yet but I intend to have this conversation when I am well. I am also not able to discuss your offer of purchasing my shares until I am well again so at the moment my answer to your question is "I do not wish to sell my shares".*

As I'm sure you can imagine I'm going through a very challenging time with coming to terms with the diagnosis and adjusting to medications and their various side effects. The nurse assures me that I will adjust, it will just take time. Neither her not I know how long this will take so patience is required to let this happen. In the meantime:

a. *I have share the letter the nurse wrote via WhatsApp with you (which you have not responded to)*

b. *I have offered for you to speak with my MS nurse*

c. *I have offered you access to my medical records*

d. *I am willing to attend an occupational health assessment when I am ready to return*

My offer for all of this is still open. I am being completely open and honest with you but I cannot tell you when I will be well enough to return to work because I do not know.

With this in mind I want to be emotionally open and honest with you regarding some of the comments you had me on your call with me last week. I have been a loyal employee to you for nearly 12 years and have always put the business and you first. Relationships, my personal time and my strength has been tested throughout my career with INCo and I believe I have given you professionalism and gone above and beyond to so what is right for the company. I do not intend for this to change. I have felt that for a number of years you and I have grown to become friends and I have shared important parts of my life with you. I have been concerned for you and comforted you as I would any of my friends. So for you to say the things you did on our call last week hurt me very much and I feel you have emotionally detached from the Lauren that you know. I am still that same person now and your consideration for me seems to be misplaced. When we spoke last Monday morning I said all I had to say however you wanted the conversation to continue that evening. What happened next was a series of sporadic calls not at the originally agreed time and from an inappropriate location, whilst on a train again. I shared with you a number of times that I'm still very unwell that my insomnia has developed to a chronic state which means I am unable to make decisions about shares and returning to work at this time. You didn't seem to take any of this on board and proceeded with a conversation about the operation, my role and my shares.

The most upsetting thing was the language you used regarding your view about my capabilities of being a shareholder when I do return to

work and that I'd be required to work 12 hour shifts and be "on it" which you couldn't see me doing/being capable of. What a way to kick someone when they are down! You are the only person who has said this to me Neil. Every MS doctor, nurse or other specialist has told me that my MS is table and that once I adjust to the stress of the diagnosis and the treatments I will be able to work and perform at a satisfactory level. The only adjustment that has been noted by the nurse is a gradual return which his standard practice for anyone who has a prolonged period of absence.

I do not need anyone to discourage me from getting well. You have no medical knowledge or MS so have no right to tell me anything of the sort. I'm angry hurt frustrated and disappointed at you for the approach you took and our conversation last week. I feel you have little regard for my wellbeing or how your actions and words would affect me. I've been left with a strong feeling that your offer to help me is not transparent and a thinly veiled attempt to exit me from the business.

I'm emailing you as I do not want a repeat of the last call and want to be clear that under no uncertain terms I am unable to discuss my shares or my return to work until I am well. Please can you acknowledge receipt of this so I can remove this stress from my life and focus on getting well?

It would be really good for you, Colin and I to get back to a place where we can talk about the future of the business and I can share with you my progress."

108. The second respondent had been working on a number of business critical matters during this time and had been unable to respond immediately.

109. On Monday 11 March 2019 (at 9.37pm) the claimant emailed the second respondent a further email attaching the email she sent on the Friday and

asked him to acknowledge receipt and provide a timeline when she would receive a response.

110. On 11 March 2019 the claimant also send the second respondent a WhatsApp message at the same time in the same terms. Two minutes later the second respondent replied stating: "*I just read your email at 8pm tonight. I have not fully digested it and will come back to you hopefully by tomorrow although I am in London."*

111. At 9.47pm the claimant replied stating "*A response tomorrow would obviously be my preference. If you are unable to respond tomorrow could you provide an update on when you will be table to respond*."

112. On 13 March 2019 the second respondent replied to the claimant's email, this being the first opportunity he had to properly respond given the pressures of business. In addition to long hours the second respondent was also receiving around 250 emails each day and he was trying to balance a response to the claimant, while respecting her wish to be left to recover, with her desire for a prompt response, with the serious business issues arising at this time. He replied stating:

"First as I have always said, I want you back in the business playing a role but only when you are ready. Everything that I have done for you and offered to you has been to make this as easy a process as possible for you. I Have said repeatedly that your health must come first despite what you have written.

In your WhatsApp message to me on 26 Feb you state that "I have asked nothing of you up until this point and all I'm asking for is patience. I will let you know more even in a few weeks". You asked me to be patient which is what I did!

To then get your email worded the way it is and making the points that you have is most upsetting and indeed the points are not true. In my opinion you have not had to ask for anything because I have given you absolutely everything possible without you having to ask for it. I have done this precisely because I care about you and want to support you through this tough time. I

can't see how anything I have done has been contrary to endeavouring to taking away stress and worry in either discussing your role or a discussion about offering to buy your shares

I am not going to respond individually to your comments about being emotionally honest you know who I am, what I stand for and how I treat people and I know you are going through a great deal currently, I am sorry that you have taken what was said that way and certainly do not wish you to feel the way you do/did.

I suggest we clear the decks and move on as we were before?

With regards to INCo and going forward, Scottish Enterprise have offered us conditional support which is contingent on Colin being registered at Co's House as a director (he now is), his directors loan is documented and evidenced to them (it now stands at £210k which is not what we agreed initially) and his shares are issued which we will progress asap.

To move things forward your final point about you and Colin and I talking more about the business and your progress, we are more than happy to do that as long as you are comfortable with that. I will give you a call later in the week although you know you can call me whenever you want. Cheers."

113. Also on 13 March 2010 the second respondent sent a WhatsApp to the claimant stating "*I hope your Dr appointment went well yesterday. I have replied to your email and hopefully we can all move forward. Cheers*." The claimant replied by thanking the second respondent and confirming she will respond no longer than the next day. The second respondent called the claimant to advise that no response was needed as the situation seemed to be getting "awfully back and forward" which was not desirable for either party. He asked if the claimant wanted to speak with him and if she did she could call him.

114. The sole reason for any delay in the second respondent replying to the claimant's communication was due to how busy he had been and the need for

him to manage the operational issues arising at the time, which caused significant stress.

Scottish Enterprise funding support conditions

115. Given the very serious financial challenges pertaining to the first respondent, the second and third respondent had urgently been seeking funding and other support. Discussions had taken place with Scottish Enterprise. With very little notice the first respondent was offered some form of support from Scottish Enterprise but that was conditional upon providing evidence that the third respondent had become a director and shareholder of the first respondent. That support was business critical and urgent and created the immediacy to formalise the arrangement. Until this point the shareholding position had not been expedited. Around this time the second respondent had concluded that the fairest approach for him was to reduce his shareholding and the claimant's shareholding proportionately. He had not considered other ways of ensuring control, such as retaining greater than 50% shareholding but resolved to reduce both his and the claimant's shareholding proportionately, which was what he considered fair to him.

Second respondent calls claimant on 27 March 2019

116. On 27 March 2019 the second respondent telephoned the claimant. The claimant knew that the call was being recorded (as she recorded all subsequent calls) but the second respondent was not aware of the fact what he said was being recorded.

117. The call was lengthy and the claimant and second respondent discuss the claimant's health and current position at some length. The call is conversational in nature and the second respondent is keen to support the claimant and both parties engage in some humour. It is a relatively good natured call consistent with the second respondent regarding the claimant as his friend.

118. During the call some operational related work matters were discussed and the second respondent explained that funding was being procedure from Scottish Enterprise The second respondent told the claimant that they needed to get the third respondent's shares issued. The second respondent had initially positioned the dilution of shares as being required but later confirmed this was not correct.

119. The second respondent explained to the claimant that he needed to call a board meeting to issue more shares. He stated that he was planning on doing that later in the week and the claimant would be welcome but she could attend via telephone if she wished. He explained that he needed to issue shares and allocate them to the third respondent. The claimant had understood that had already been done but the second respondent explained a board meeting was necessary to do so.

120. The second respondent then told the claimant that his and the claimant's shareholding would be diluted equally so his shareholding would reduce from 90% to 53.89% and the claimant's shareholding would reduce from 10% to 6% and the third respondent would have 40%.

121. The second respondent explained that this was "*a slight change from what I'd planned earlier but that it's only fair that you and I both go down at the same level to bring in [the third respondent*]."

122. The claimant asked why both shareholdings needed to be diluted and was told that he was giving up a significant amount of shares and there had been so many difficulties and he did not think it was fair for him to take the whole brunt of the situation. The claimant wanted to think about matters and speak later with the second respondent.

123. The call continued later during which she emphasised that she wanted to return to work and at the same position and that she should return with full capabilities. She explained that she had not agreed to a reduction and that the third respondent had not been brought in on that basis.

124. She gave the second respondent two options to consider and twenty four hours to revert to her. Firstly she would consider a resolution in terms of departing from the business and selling her shares and secondly if he proceeded to distribute the shares without her consent she would seek legal advice.

125. The claimant said that she felt she was being backed into a corner. The second respondent said that he did not wish that and wanted the claimant back in the business. He noted that he had to make decision about the business and himself. He explained that in the past he had not put himself first and while there had been discussions before about the position he did not consider that to be fair on him. He apologised for the timing of it but to get input from Scottish Enterprise they needed to move forward.

126. The second respondent said that he was no longer putting himself last any more as he had been making a large amount of personal sacrifices. He explained that he did not want to be the one taking all the brunt.

127. The claimant also explained that she needed to put herself first. The second respondent explained that he accepted that and that despite what she thought he had sought to put her first in his thoughts and actions. He explained that it was unfortunate that he phoned her from the train but that he had been so busy.

128. The second respondent noted that at the moment the business is worth "absolutely nothing.. it's not got a value". He indicated he would speak to the third respondent, given the investment he had made into the business.

129. The claimant said that some of the things the second respondent said had really hurt her. He asked what and she said "*such as that you don't see how I can perform as a director and shareholder and you don't see how I can return and do my job*". The second respondent said "*that's not what I said. What I said was I didn't see how you could come in and work the type of hours that Colin and I are working and nor would I want you to do that because it*

wouldn't be good for your health. That's what I said. Now maybe the line on the train and again that is my fault. I feel it was quite out of context. I do want you back in the business I said that on the call."

130. The claimant explained that she wanted to recover and the second respondent explained that this was critical to the business ongoing environment and had to be resolved.

131. The claimant asked if the original agreement could still be processed, her retaining 10% shares, which the second respondent said could but that it was not fair on him. The second respondent explained that he was genuinely sorry for any stress the claimant suffered.

Email from claimant on 27 March 2019

132. On 27 March 2019 the claimant sent an email to the second respondent. She stated;

"Firstly I would like to re confirm that it has always been my intention to return to work in my full capacity as soon as I am able which I will be once the side effects of medication is under control. This is difficult to put a time frame on as I am still in the process of ascertaining what actually works for me.

I am a holder of 10% shares in the business and am not willing to accept a dilution in order for you to allocate 40% to Colin. This is not what was initially agreed when you approached me to suggest Colin join the business last year and had I not been absent from the business due to my ill health we would not be having this conversation.

Only 2 weeks ago I told you I was too unwell to discuss my shares albeit the topic was slightly different as you wished to purchase these as opposed to today's conversation where you are suggesting giving these way without my consent. The pressure I feel I am currently under from

you is not helping my well being and it feels like you are backing me into a corner.

The fact you informed me today that you are holding a board meeting on Friday to allocate shares to Colin knowing full well I cannot attend this meeting is putting me under unnecessary stress.

Dealing with this this matter is causing me increased anxiety something I don't need at present. The way I see it we have wo options. First you insist on pursuing a diluted shareholding then I will seek legal representation to protect my rights and shareholding. Second is to create and agree an exit strategy to leave the business. You and Colin need to consider a more realistic offer for my shares, time served, notice and unused holiday and other benefits."

133. The next day the second respondent replied to the claimant stating: "*In terms of your request for an offer… we are happy to keep the offer made already of 20k on the table. I think it is a fair offer given where the business is. Happy to talk that through with you*."

134. On 29 March 2019 the claimant replied saying she would take advice during the next week and said: "*I trust no decision will be made without my consent*".

135. Five hours later the second respondent sent an email to the claimant stating that "*A document is being posted to you seeking your consent. I hope your health is continuing to improve and will do all I can to help you with that*."

136. On 19 March 2019 the claimant and the second respondent exchanged messages about how the claimant was progressing and discussed an issue as to a payment that the claimant had been asked to resolve by the bank. The claimant also wishes the second respondent happy birthday upon his birthday in March.

Solicitor's letter on claimant's behalf re her employment – 12 April 2010

137. On 12 April 2019 the claimant's solicitor sent an email letter to the second respondent. The communication began by noting the firm was instructed in connection with the claimant's employment situation and was having separate discussions with corporate law solicitors in relation to her shareholding position.

138. The email stated that the first respondent reacted to the claimant's diagnosis in a manner detrimental to her and diluted her shareholding as a result. The email stated that: "*We have advised our client that this leaves her in a potential constructive dismissal situation (as far as her employment is concerned) and a disability discrimination situation (relating to both less favourable treatment as an employee, less favourable treatment as a shareholder and victimisation after she raised the issue).*"

139. The email referred to there being issues in relation to a potential remedy in company law for the way in which the shareholding occurred.

140. The email then proposed a sum of money in respect of her shareholding and for loss of employment .

141. While that email was stated to be "without prejudice" it was lodged as a production by the claimant, and the privilege was waived

142. The second respondent forwarded the email to the third respondent upon his receipt.

Discussion between claimant and third respondent – 12 April 2019

143. On the same day that the claimant instructed her solicitor to send the foregoing letter raising serious concerns, the claimant had a very lengthy call with the third respondent. While she knew the call was being recorded, the third respondent did not know his discussion was being recorded.

144. On 12 April 2019 the claimant called the third respondent. This was a very lengthy call. The discussion was conversational in nature and the claimant's

health position was discussed. The third respondent told the claimant he was running on empty having worked so hard given the challenges the business created. The discussion also covered sick pay and the calculation.

145. The third respondent told the claimant that the second respondent had "gone nuts" in relation to paying sick pay for another employee who had been absent by reason of sickness and the third respondent explained that it was a legal requirement. This was a matter that the second respondent disputed was said but both the second and third respondent were concerned as to the approach taken by some employees who had taken time as sickness without advising the first respondent of their absence, thereby creating operational challenges.

146. The third respondent also voiced concerns about staff not properly pulling their weight and attending work.

147. There was a lengthy discussion about ongoing staffing issues and the call ended by the third respondent saying "*It was good to hear your voice*".

Claimant contacts second respondent

148. At the end of April and start of May the claimant contacted the second respondent and offered her condolences as to the passing of the second respondent's father. There was a short discussion as to health and the second respondent hoped the claimant was making good progress and she replied saying that things are moving forward slowly.

Claimant commences early conciliation

149. On 19 May 2019 the claimant commenced ACAS early conciliation in respect of the first and second respondent.

Claimant tells respondent grievance being prepared

150. On 23 May 2019 the claimant's solicitors wrote to the first respondent's HR adviser on the claimant's behalf confirming that she had commenced pre-claim conciliation with ACAS and would be submitting a grievance, and asking

whether the offer to purchase the shares, for £20,000, with no effect on her employment, was still open for acceptance.

151. On 30 May 2019 the adviser replied stating that "*my client is confident that the current value of the shares is nil given the current financial position of the company and consequently there is no consideration for her shares on offer. However, if she would like to instruct at her own expense an independent valuation by a mutually agreed firm my client would be prepared to revisit their position in respect of consideration for her shares*."

152. The second and third respondent believed that the offer made to sell the claimant's shares had been rejected by her and the third respondent had no funds available given his very significant investment into the business. That was the reason why the second and third respondent were not prepared to keep the offer of £20,000 open.

153. They also wanted the claimant to understand that her shares were in fact worth no money which an independent valuation would have demonstrated.

Medical examination requested

154. By letter dated 30 May 2019 which the claimant received in June the third respondent asked the claimant for her consent to obtain a medical report. The letter stated that this had been requested under cover of letter dated 27 May. The claimant was invited to attend for an independent occupational health practitioner to obtain a report on her fitness for work. This was to provide the first respondent with information as to the claimant's position.

155. On 6 June 2010 the claimant replied to the third respondent noting that her address had changed which explained the delay in receiving the letters. She provided her consent to approach her GP and provided a further copy of the letter he MS Nurse had written which she had sent to the second respondent on 25 February 2019.

Grievance

156. On 31 May 2019 the claimant submitted a written grievance by email sent to the second respondent. She raised the following matters:

"Since February 2019 I am concerned that I have been pressured unreasonably by Mr Ritchie to state the cause of my ill health in terms of whether this is a result of my condition of a result of my medication and to consider what my capabilities would be on my return at a very early stage

a. *On 19 February 2019 an offer was made to purchase my all my shares for no other reason other than I was diagnosed with MS*

b. *In telephone conversations that followed I made clear I could not make a decision about selling my shares or my future capabilities at that stage until I was more well but Neil continued to want to speak more about this. He also did not call back when he said he would on 25 February 209 adding further to the stress.*

c. *On 26 February 2019 Neil questioned my ability to be a director/shareholder. He indicated that when I returned to work I would be required to work 12 hour shifts and be "on it" which he couldn't see me doing. Being capable of. I have raised this with him and he denies having said this. He has sought to blame my interpretation on a bad phone signal as he was on a train but I could hear what he said. He said among other things: "I cannot see how you can perform as a Director and Shareholder in an SME business". I challenged him and told him it was not his decision to make as it's for the nurses and healthcare professionals who said I will return to an acceptable level of performance. He told me it was his decision as he needed to think what was right for the business and there will be a role for me based on my capabilities which would be worked out at the time.*

He spoke of how my role and shareholding were two separate things and he wanted me to sell my shares for £20,000. After my email and WhatsApp message and his delayed response he insisted matters be dealt with by phone rather than back and forth by email despite there being unresolved issues.

d. *Despite me making it clear I did not want to make decision on my shares until I was well enough to do so on 27 March 2019 he indicated he was calling a meeting to issue new shares to Colin which would dilute my shares. Despite me protesting he proceeded and diluted my shares. This would not have happened had it not been for my disability and my raising the issue of his conduct towards me. It had already been agreed how this would be dealt with, with my shares unaffected. The new more prejudicial arrangement has been pursued on the back of my health situation and the issues I have raised.*

e. *I queried as far back as January whether Neil wished me to return the shares paperwork to him to allow him to transfer some of his shares to Colin. He did not reply. He also did not reply to my invitations (plural) to him to speak to my medical advisers re my condition. He also did not acknowledge my MS nurse's letter which I provided to him on 25 February 2019 when I have gone to significant efforts to obtain this. Instead he has decided to take a different route as described above.*

f. *At the end of February 2019 Neil proceeded to disband a team of my direct reports despite me making clear I wished to be involved in this. I was not consulted at all about this. I found out from the Operations Director who was managing the team in my absence. She told me there was a meeting to be held to discuss it. I also spoke with Colin regarding this and offered to attend via conference if I was feeling able. Colin and I agreed I should attend. After a few attempts to contact Neil I reached him and he*

told me a decision had been made. There was to be no meeting. Had I not been diagnosed with MS I would clearly have been involved in this.

g. Since raising matters formally Neil has withdrawn his offer of £20,000 for my shares. I believe this is because of the issues I have raised."

157. The claimant explained that the issues caused her significant stress and damaged her health.

158. She stated that "*as you will appreciate my grievance will need to be heard by someone impartial*" and asked who it would be. She concluded by stating that the issues were extremely serious and she could not believe she had been treated in that manner because of being diagnosed with a serious condition.

Response to grievance

159. The second respondent was surprised by the grievance as he did not consider the relationship to have reached the position as suggested in the grievance. He was upset that the claimant felt the relationship had reached that level. Both the second and third respondents were surprised, shocked and puzzled as to how matters could have changed so quickly from offering significant funding to assist the claimant to the situation that had been set out in the grievance. The third respondent was surprised given the tone and nature of the discussions he had experienced with the claimant and the absence of any suggestion to him, from the claimant, as to the concerns she was raising given his knowledge of the claimant.

160. Given the second respondent was the principal focus of the grievance, the grievance was passed to the third respondent to progress. The second respondent did not take any material part in the progressing and concluding of the grievance, other than providing information to allow the third respondent to reach a decision. The second respondent continued to work around 70 hours a week focussing his efforts at this stage upon

seeking new business and increasing revenue to protect the failing business.

161. The third respondent took control of the grievance. Throughout the process he sought the assistance of their HR Business Partner (who had been engaged by the first respondent for some time to assist with HR related matters).

Further correspondence

162. On 6 June 2019 the claimant received a letter dated 3 June acknowledging the grievance. This letter noted that the grievance raised some very serious allegations which would need to be fully investigated in accordance with the staff handbook and grievance process.

163. The letter stated that normally there would be an initial meeting before investigating further and asked the claimant to complete the previous requests that had been issued with regard to obtaining a medical report from the GP or a letter form the GP confirming that it was appropriate for her to attend a grievance meeting and advising of any adjustments needed. The letter then said: "*In the meantime and to avoid any delay in progressing your grievance, a thorough investigation will be initiated by our HR Business Partners" and on receipt of the relevant medical report or letter a grievance meeting would be fixed to discuss the grievance further and the finding of the investigation. If she had any questions she was to contact the third respondent*."

164. On 7 June 2019 the claimant emailed the third respondent indicating that she would consult with her doctor and MS nurse regarding a grievance investigation meeting and indicated that she wished the grievance to be dealt with by someone other than the first respondent's HR advisers. Later in the evening the third respondent replied stating that their overriding objective was to ensure the grievance is treated fairly and objectively and in accordance with their procedure and the ACAS code. He then referred to their external HR Business Partners as being impartial and said: "*their*

involvement in the grievance is entirely consistent with our grievance procedures and our objective of ensuring your grievance is treated fairly and objectively".

165. By email of 8 June 2019 the claimant received from the third respondent an invitation to an Occupational Health appointment and notice of instruction to the claimant's GP.

Call between claimant and third respondent – 12 June 2019

166. On 12 June 2019 the claimant had a telephone conversation with the third respondent. This was a very lengthy call and was conversational in nature. While she knew the call was being recorded, the third respondent did not know his discussion was being recorded.

167. The claimant explained she had moved home and the third respondent said he had not known about that and apologised since that had delayed the claimant's receipt of the paperwork. The third respondent said that: "*basically we have got to the bottom of my barrel if you like so I don't have any more free cash to put in*". He explained that he had put into the business around £340,000, that staffing issues had not gone to plan and customer issues were causing concerns. He explained he had not taken any drawings since he started and it had been tough. He also explained that both the second and third respondent had to sign personal guarantees to obtain further finance.

168. There was a very lengthy discussion about operational matters and concerns the third respondent had. The third respondent explained that the second respondent continued to take drawings from the business which he had taken to finance very substantial debt that he had incurred previously.

169. The claimant then stated: "*I don't imagine the situation with me is making things any better*" and the third respondent replied: "[The second respondent] *has not really taken anything to do with that*". The third respondent told the claimant that he had asked the HR Business Partner if he could not just pick up the phone and speak to the claimant. He told her that

she had no idea where the business was at, although he noted he had mentioned the vast sums of his own capital that he had invested into the business. The claimant said that she had thought things had turned a corner due to some new business that had been secured. The third respondent explained that while there had been some new business there were still some very serious challenges. The business had not in fact turned a corner and was facing an even more serious threat to its continued survival.

170. The third respondent told the claimant that he thought she already had more than enough to deal with and that he had held off calling her because he did not consider it appropriate in terms of her health but he told the claimant that if she ever wanted updating she was to call him. She replied that: "*I would rather be given the choice to talk about stuff and be involved in things than you guys making that decision*." The third respondent told the claimant simply to phone or WhatsApp him and say when she was in a good place (health wise) and she could get an update. He said he hoped the update would not be as depressing as how matters stood at that time.

171. On 14 June 2019 the claimant emailed the third respondent saying she was upset as the proposed date for the medical examination was her birthday and she has changed this. She also attached a further 3 month fit note and a finance document that required to be completed by her. In relation to her grievance she stated that she did not think the HR Business Partner could hear the matter as she said they had already represented the company in her dispute with the company and provided their views in relation to the factual position. She said she was concerned at the prospect of a company hearing her grievance the officers of which she knew which would add further to the stress she was experiencing. She asked that her grievance be heard by someone independent and believed that would have been a reasonable adjustment in the circumstances.

Third respondent calls claimant

172. On 25 June 2019 the third respondent emailed the claimant saying he had tried to call her but did not manage to get her. He apologised for not coming back to her as he was "up to his eyes in it at the moment". He said he had sought advice on the matters that the claimant had raised in her email and would revert to her once he received a reply. He would also issue the request to the claimant's new doctor (as she had moved) as soon as possible.

Occupational health report produced

173. On 26 June 2019 the claimant attended an Occupational Health consultation and a report was produced for the attention of the first respondent's HR Business Partner. The report stated that: "*The claimant has been continuously absent since mid January 2019. Her GP is stating "MS Complications" on her fit notes, the recent one having been issued for 3 months. She was initially absent from November 2018 and attempted a phased return in January 2019. This was unsuccessful in view of ongoing MS related symptoms as well as side effects from MS medication*".

174. The claimant had a diagnosis of relapsing remitting MS. She has regular follow ups every 3 months with a nurse. She was also reviewed periodically by the consultant neurologist.

175. Her main MS symptoms were neuropathic pain and fatigue. She had been prescribed disease modifying medication. This aimed to reduce the likelihood of further relapses. It cannot influence neurological impairment that had already arisen. She was due to have a repeat MRI scan in early 2020 to gauge the effectiveness of this medication.

176. The neuropathic pain was variable in severity and can affect any part of her body. She had been prescribed neuropathic pain medication. She had been tried on five different ones so far. She seemed to be tolerating her current medication better although this was still at a low dosage.

177. Her fatigue was every present but variable from one to the next day in an unpredictable way.

178. The adviser answered some questions about disability which confirmed the impairment is life-long. The adviser stated that he thought there were no adjustments that could enable the claimant attend work and perform her duties. "Further medical recovery will need to occur before any return can be envisaged." She was therefore unfit for her duties at that time. It was not possible to say whether permanent adjustments would be required. It was the doctor's opinion that the claimant was capable of performing fully in a formal grievance procedure.

GP Letter

179. On 2 July 2019 the claimant's GP wrote a letter to the third respondent noting that the Doctor was not an occupational health physician but confirmed her diagnosis and that her impairment may be long term. The GP deferred to occupational health specialists as to the impact of the impairment.

Claimant lodges first claim

180. On 12 July 2019 the claimant lodged tribunal claim number 4107706/2019 against the first and second respondent claiming disability discrimination, harassment and victimisation. There was a 7 page paper apart in narrative style culminating in her stating that she believed she had been subjected to direct discrimination, unfavourable treatment because of things arising in consequence of her disability. Indirect disability discrimination, harassment related to her disability and victimisation because she raised disability discrimination complaints and through her solicitor.

Claimant chases for an update

181. On 17 July 2019 the claimant emailed the third respondent noting her GP advised that the letter had gone to the third respondent and sought an update She said: "*It has been six and a half weeks since raising my grievance and I still await an answer on my request that it be heard by an independent party. Could you provide this please*?".

182. The third respondent replied the same day by email apologising for the delay. He said: "*As you will be aware there have been a number of significant business issues over the 4-6 weeks. Additionally I'm off on holiday at the moment and return next week. I will be liaising with all parties on where we are with this matter immediately on my return*".

Third respondent on leave and serious business challenges arise

183. The third respondent had been on holiday for around 3 weeks in July. Upon his return to the office at the end of July 2019, the third respondent discovered that one of the first respondent's largest clients had decided not to renew their business with the first respondent. This reduced income by about a third and created further serious risks to the viability of the first respondent which required significant operational input from the second and third respondent.

184. Upon his return to the office, on 26 July 2019, the third respondent emailed the claimant noting that he was back in the office and thanking her for her patience. He said that he had caught up with his holiday correspondence but had not received any correspondence from the GP or nurse and had been unable to progress the grievance. He asked if she could chase these responses.

185. The next day, on 27 July 2019, the claimant emailed the third respondent stating that she had spoken with her nurse on 22 July who would email her answer to the questions as soon as possible. The letter was with the GP and should be received soon. She stated that she was able to participate in a grievance which had been confirmed in the occupational health assessment. She concluded: "*I'm very concerned that the company is failing to progress my grievance properly and reasonably I also still await an answer on my request that it be heard by an independent party. If progress is not made at this stage I feel it will amount to further discrimination/victimisation against me and a further breach of the company's contractual obligations to progress my grievance reasonably and not to act in a manner which may damage or destroy trust and confidence*".

Grievance meeting fixed

186. On 30 July 2019 the third respondent wrote to the claimant and invited her to a grievance meeting. In the accompanying email the third respondent stated that the grievance would be progressed in accordance with the grievance procedure. He stated he would "*not be engaging other parties to assist in this stage of proceedings*". He stated that with the assistance and support of the company's HR Business Support Partners he would hold an initial grievance meeting with the claimant to allow her to explain her grievance and how she think it should be resolved and to provide such evidence and representations she wished. He concluded the email by stating that after the initial grievance meeting there may be further investigations or meetings as considered appropriate. In this case the third respondent said he would chair the grievance meeting and decide the outcome which would be confirmed in writing and usually within one week of the final meeting.

187. In the letter of 30 July the third respondent stated that "*having had the chance this week to review for the first rime the OH report which confirms you are capable of participating fully in the grievance procedure. I am writing to invite you to a meeting to discuss the complaints raised in your grievance received by email on 31 May 2019*.".

188. He stated that the meeting was to be heard in the offices of the HR Business Partner on 8 August 2019. The grievance procedure was attached. The meeting would be chaired by the third respondent and an HR Business Partner would be present. The claimant was given the right to take a companion.

189. The letter enclosed a timeline of events and copies of documents obtained during the initial investigation into the complaints. If the claimant had further documents she wished to be considered she was to provide these to the third respondent. She was to confirm the date and time was acceptable.

190. The timeline and summary of events document that was sent with the letter summarised relevant events that had taken place and also referred to communications between the parties which were also attached. Relevant emails were also attached to the letter.

Claimant replies to grievance invite

191. On 6 August 2019 the claimant emailed the third respondent. She said that she was upset that the occupational health report had not been reviewed until now and that it appeared it had only been reviewed because of the previous email prompt.

192. She referred to her previous request that the HR Business Partner not be involved as she believed they were already representing the company in her dispute with the company and had indicated their factual position.. She said she was concerned at the prospect of a company hearing her grievance, the officers of which she knows which would add further stress which the company had not taken into account.

193. She then referred to the fact that it was proposed that the third respondent hear the grievance. She said she had requested it be heard by someone impartial. She said she did not think the third respondent could properly chair the meeting as he had recently come into the business as a shareholder with fewer shares than the second respondent, the main subject of the grievance, but he had essentially gone into business with him. Part of the subject of the grievance was the means by which the third respondent was given his shares and the claimant's shareholding were diluted and presumably the third respondent was party to discussions and decisions as to how his shareholding would be issued. That affected his impartiality and she was unsure how he could make any significant findings in her favour which would be contrary to the second respondent's position.

194. The claimant did say that she was willing to give the third respondent the chance to hear the grievance, under protest, to see if that resulted in a

satisfactory conclusion. She reserved her position with regard to her claims, and constructive dismissal.

195. She stated that she was concerned that "*even in the so called timeline of events which you have sent me, which are the events you believe have definitely occurred, there are inaccuracies and inadequacies*". She attached a table with her own comments next to the original comments. She said she found it strange and worrying that she gave significant details of what she say happened to her and the third respondent replied with a timeline of events which is contrary to what she said, presumably derived from what the second or third respondent said happened.

196. She asked to bring a friend as her companion and asked for it to be rescheduled.

197. The third respondent replied confirming a fresh date and that the request to bring her friend was acceptable.

Timeline and summary of events document provided to claimant and her comments

198. The first entry 8/9 October 2018 when the claimant disclosed her diagnosis to the second and third respondent and it was agreed the claimant would take paid sick leave until January to come to terms with the diagnosis and seek appropriate treatment.

199. The claimant's comment was that this was inaccurate since the diagnosis was on 19 October 2018. She said she told the second respondent on 16 May 2018 that information she received suggested it was "very likely she had MS" and in September the second respondent told the claimant that he had told the third respondent about her health condition (about which she did not mind). She said it was 5 November 2018 that the second respondent asked the claimant to take the rest of the year off, for which the claimant said she was grateful.

200. The next entry related to January 2019 where it was said that the claimant requested a meeting with the second and third respondent and declared "that she didn't feel she was going to be able to continue on the journey with them due to her diagnosis. The claimant was advised not to make any rash decisions and to continue to focus on her treatment".

201. The claimant denied she said this as it was implying she was talked out of resigning which is not the case. She returned to work on 3 January on a phased basis following her telling the second respondent her nurse recommended a phased return and it was agreed by the second respondent.

202. The claimant said she called a meeting following her return as she said the second respondent "kept telling her that the claimant and second and third respondent would catch up and it kept not happening". The claimant said she wanted to speak to both respondents to "let them know she was good and glad to be back in the business after being off in November and December". She "also wanted to know if later down the line things changed and she wasn't able to work, what would happen with her shareholding." She wanted to know her options as there was uncertainty as to the impairment.

203. The claimant said that at the meeting in January both the second and third respondents assured her that a fair sum would be offered to buy her shares back if she wished to sell them. She said that they also discussed if she was not able to work full time they would be open to employing her on a consulting basis or may even want to buy her shares from her if she wished to exit in 5 years and they wished to keep going.

204. The claimant said that the 5 year exit plan was first raised by the second respondent in September when the claimant was told by the second respondent that the third respondent would be joining the business. She said that on that date, 10 January 2019, paperwork was drafted to appoint the third respondent as a director and reclassify the shares, with 40 for the third respondent, 50 for the second respondent and 10 for the claimant.

205. The next entry related to 14 January to 1 May 2019 which referred to the exchange of WhatsApp, email and telephone discussions which were included in the appendix. The telephone calls were not included as the respondents did not know there was a record of them.

206. The claimant provided a detailed response. She said the appendix missed the screenshots and imagines the claimant sent to the second respondent of information. She confirmed she went home on 10 January 2019. Thereafter she said the second respondent asked on a call how she was and "if the symptoms she was experiencing were because of her illness or the side effects of medication". On the same call she said she offered to return the paperwork to make the third respondent a shareholder but was told by the second respondent that he would get back to her and she was not to do anything about it at that time.

207. On 5 February 2019 the second respondent called the claimant again and she said he asked how she was doing and asked again if the challenges she was having were due to the side effects of the illness. They spoke about the illness and a skiing trip and she said the second respondent "asked her to have a think about what her capabilities would be upon her return to work. He asked that she think about this and that they catch up again after his holiday." The claimant said she told him she was unable to give him that information as she did not know when she would be well but her nurse and doctor assured her she would recover and be able to return to work.

208. On the same call she said the second respondent told the claimant the sick pay ended and she understood how difficult that call would have been for the second respondent. She also said she made the second respondent aware that she had an income protection policy as she needed information from him to process the claim.

209. She said that on 15 February 2019 and on other occasions the claimant spoke to her nurse and a letter was sent to the second respondent form the nurse which was sent to the second respondent on 25 February 2019 which gave advice to the second respondent to be patient.

210. She also noted that on 19 February 2019 the second respondent called her and offered to purchase her shares for £20,000. She said he positioned it "as a way of helping the claimant financially" although he knew of her financial position and that she had income protection insurance. She said she would speak with her husband and revert the following week.

211. On 25 February 2019 the claimant said she called the second respondent and said she was unable to make a decision about the shares while she was unwell. She said the second respondent wanted to speak about this more but was on a train and asked if he could call her that evening. Instead he waited until the next morning to call, again from a train. The claimant said she told him of the stress the situation was causing and that she could not discuss adjustments or the shares at this stage but that the second respondent continued with the call. She alleged the second respondent said he could not see how the claimant "can perform as a director and shareholder in an SME business and that there would be a role for her based on what her capabilities were and that we will work out what that role is at the time." She said he said her role and shareholding were two separate things and he wanted her to sell her shares for £20,000 which she found upsetting and under threat. She said she challenged him as to his comments as to her not being a director and shareholder as that was not his decision and her medical professionals indicated she would return to an acceptable level of performance. She said the second respondent argued back that it was his decision as he needed to think what was right for the business. That made her feel as if her illness was a threat to the business.

212. The next entry was for 26 February 2019 and the table referred to a WhatsApp message form the claimant making reference to ongoing discussions "dragging on" and causing her stress. She acknowledged support had been offered on an ongoing basis and sought further patience and time.

213. The claimant's response was that no response was received by the claimant to reassure her the conversation would be put on hold as requested. Given the claimant had repeatedly informed the second respondent she was not well

enough to make discussions, he continued to have the conversation which resulted in days of stress.

214. The next entry was on 8 March 2019 where the claimant sent an email to the second respondent referring to a WhatsApp message of 26 February complaining about not receiving a response and reiterating that stress was being caused about questions relating to selling shares, returning to work and possible adjustments. The entry stated that the email confirmed she was not able to advise on return or adjustments or discuss selling shares but made clear she did not wish to do so. She offered consent for medical reports and outlined how aggrieved she was about the nature of the telephone call with the second respondent the previous week. She alleged that the second respondent said she could not be capable of being a shareholder or meeting the operational demands of her role in the future.

215. The claimant's response was to note that she had to chase the second respondent for a response to this email three working days after it had been sent which added further stress.

216. The next entry was for 13 March 2019 whereby the second respondent responded by email to clarify his position and deny the claimant's allegations as to the comments she said he made about the claimant's future capability as shareholder or director.

217. The claimant's comment was that the second respondent immediately called the claimant to ask she not respond and requested they draw a line under matters. Although the claimant felt matters were unresolved, she wanted to respect his wishes, as she hoped he would hers. She did not respond to the email.

218. The next entry related to a further exchange of WhatsApp message on 12 to 22 March 2019 to which the claimant does not comment.

219. The next entry was for 27 March 2019 where the claimant sent an email to the second respondent referring to an "earlier conversation". It reiterated the current situation as to her medical condition and outlined her issue about the

shares making it clear she was not happy to dilute her shareholding and she was not well enough to discuss it. She said she felt she was being backed into a corner and was stressed. She proposed two options that she would seek legal advice if the plan proceeds or a better offer is proposed.

220. The claimant's response was that on 27 March 2019 the second respondent called the claimant to ask how she was and speak about the business. She alleged he then told her the reason for the call was that he was calling a board meeting that week to issue more shares and allocate them to the third respondent. The claimant was welcome to attend the meeting but she did not need to be there. The claimant said she was told her and the second respondent's shares would be diluted equally so he would get 53.89 and she would get 6. She said she was not expecting it and did not agree to it and agreed to call him later that day, which she did together with an email. She said how hurt she was. She said the second respondent denied what he had said and blamed the phone signal and changed his position to being that he did not think the claimant could work 12 hour shifts nor did he want her to. She said the signal was clear and she knew what he said.

221. The next entry referred to 28 March 2019 and the second respondent sending the claimant an email advising that he was happy to keep the offer of £20,000 on the table for her shares. There was no comment on this or the next entry which referred to 29 March 2019 and the claimant sending the second respondent an email saying she would take advice.

222. The next entry referred to 29 March 2019 when the second respondent send the claimant an email saying an email would be sent seeking her consent regarding the share issue. The claimant said she did not consent.

223. Shares were allocated to the third respondent on 29 March 2019.

Correspondence

224. On 8 August 2019 the claimant emailed the third respondent with a copy of the letter from the MS nurse and that the GP said they had sent their response directly to the third respondent. Later that date the third respondent sent an

email to the claimant with the GP report he had received. The delay had been due to the correspondence not having been retrieved from the respondent's mailbox.

Grievance hearing – 9 August 2019

225. The claimant attended the meeting with her friend. Minutes were taken by an employee of the HR Business Partner and the third respondent chaired the meeting.

226. The hearing began by the third respondent noting the claimant had stated that she was not too happy with him hearing matters and the claimant said she felt he was too close but she was happy to continue. The third respondent indicated that he wanted to hear what the claimant wished to say.

227. She was asked to talk through her grievance points. She said she did not want to talk it through end to end due to being very emotional and as all the information was in the documentation

228. She said that since January 2019 she believed that the second respondent has treated her differently and his attitude has changed. He was not happy by the end of February that she was not selling her shares as she was not well enough to make the decision. Her shares were then diluted despite the original decision only to dilute his shares. His behaviour changed such as in the emails of 25/26 February and the second respondent continued to put pressure on her as to the shares and asked about her capabilities as to return to work.

229. The third respondent asked if the tone was sympathetic and she said no as he felt she was being put under pressure to explain her absence as to whether it was the illness of medication. She felt he was trying to work out what she was fit for. She believed he did not see how she could perform as director. He had scheduled a call at 9am which was not made until 945am and she was devastated and hurt by what was said. She felt as if the trust had gone and if she was to return she would feel like an inconvenience. She said she was

unsure what was going on and he failed to acknowledge what was said and then took 5 days to acknowledge the email on WhatsApp despite her having told him to stop asking him to respond. Two weeks later he asked again about the shares and had not listened to her. There was no need to dilute the shares.

230. She then said the offer of £20,000 was taken off the table because of the grievance, the phones calls and emails. She was upset.

231. The third respondent explained to the claimant that the second respondent was on holiday until 19 August 2019 at which point the third respondent would meet with him and if necessary meet with the claimant again.

232. The third respondent said to the claimant that if a further meeting was required with the claimant it would be arranged.

233. The third respondent also apologised for the time that it had taken to progress matters which was due to holidays and sickness absence. The paperwork had not been passed to the third respondent timeously but he would look to conclude the investigation as quickly as possible.

234. The claimant was asked if she had anything else to say and said she wanted to know why the second respondent offered to purchase her shares, why he behaved in the way he did and why he retracted the offer of shares. She felt trust had gone.

235. On 23 August 2019 the third respondent emailed the claimant to say his review had taken him slightly longer than anticipated and was not yet finished. He indicated that he intended to complete his enquiries early the following week and then get findings across to the claimant. He apologised for the time taken.

Further meeting with second respondent and third respondent

236. Following the second respondent's return from leave the third respondent caught up with him to further discuss what had been discussed between the claimant and second respondent . The second respondent confirmed what he

had told Mr Sutherland. That resulted in their being two different accounts as to what was said, the claimant's and the second respondent's.

Third respondent's view in light of evidence now produced

237. Although the claimant did not produce the transcript of the calls that she had recorded, having listened to them in the course of the Tribunal process, the third respondent would have concluded that it was more likely than not that the second respondent's account was accurate in light of the conversational tone and approach of the conversations between both parties.

238. He also was of the view that messages as between the claimant and her friends at the time of the incidents in question was what the claimant said rather than evidence supporting what she said as being accurate. The tone of the discussions between the claimant and second respondent, in the third respondent's view, suggested to him, after the event, that the second respondent's position was more credible, even taking account of the claimant's written communications to him, which was her suggestion as to what the second respondent said, rather than evidence of what was actually said.

Grievance investigation

239. The third respondent had asked the HR Business Partner to investigate the grievances that had been issued. The first respondent had a contract with the HR Business Partner whereby a significant monthly sum was paid in respect of HR and employment law advice. The claimant had worked with the HR Business Partner for a number of years in connection with HR matters pertaining to the first respondent.

240. He arranged to meet with the second respondent 8 days later, on 7 June 2019, and worked up a report which was headed "Confidential initial grievance investigation". This report is undated and was not provided to the claimant until after the outcome of the grievance was concluded. It was not read by the third respondent until after he had met the claimant.

241. Following the claimant's response, the third respondent considered this report together with the points the claimant had raised during the meeting.

242. The report under the heading "Background" stated that the initial investigation was commissioned following the receipt of a grievance on 31 May 2019 and at the time of writing a formal meeting with the claimant had not taken place and it may be necessary therefore to undertake further investigations in the event that new or additional facts arise that require investigation.

243. In relation to allegation one, the report noted that the second respondent acknowledged that on some occasions he did enquire about the claimants health but these were not the main purpose of his call. He denied any unreasonable pressure and was genuinely seeking to enquire as to her well-being.

244. The report noted that in the exchange of WhatsApp messages between the parties the first and only mention by the claimant about a conversation between them causing her severe stress was on 26 February 2019 and repeated in 8 March 2019. There was no mention by the claimant before 26 February 2029 and no further WhatsApp messages until 11 March. The report concluded that it is impossible to determine whether the second respondent was unreasonable and inappropriate so the allegation "is not upheld", there being insufficient evidence.

245. As to allegation two, the second respondent said he reason for the offer for the shares was "informal and primarily driven by a genuine desire to pass some funds to her in what could be a period of hardship". The consideration was not based on any formal valuation which would have been nil. It was not because of the MS but to help her. The second respondent denied unreasonably pressuring the claimant to sell. The only mention by the claimant about a conversation causing her severe stress was on 26 February 2019 repeated in 8 March 2019.

246. There was no way to decide what was said but it is understandable from the evidence that the claimant would believe the offer to purchase her shares was

the result of her MS diagnosis. The report therefore concluded this allegation would be "partially upheld" insofar as it was reasonable to see why the claimant would perceive the offer to purchase her shares was the result of her diagnosis. There was insufficient evidence that the sole or primary reason for offering was due to the diagnosis or that there was unreasonable pressure to purchase the shares.

247. As to allegation three, the second respondent had vehemently denied that during a call on 26 February 2019 he told the claimant he did not think she could meet the demands of her role when she returned or how she could perform as a director and shareholder. He had made it clear he wanted the claimant back into the business and her health came first. There was a lack of evidence to confirm exactly what was said and that allegation was "not upheld".

248. Allegation four was denied by the second respondent saying there was no formal agreement as to allocation of shares. Scottish Enterprise had made an offer of business critical support that was contingent on appointing the third respondent and issuing shares to him. The second respondent concluded that the most reasonable approach is for both the claimant and him to dilute their shares proportionately. Due to the time restrictions imposed by Scottish Enterprise he had no choice but to progress without delay. He complied fully with companies house and company law obligations. The only reason for his actions was to achieve a legitimate and critical business aim to protect the company. The claimant's MS was irrelevant to the action. That allegation was "not upheld".

249. As to allegation five, the company policy did not set out a timescale for seeking medical evidence as to illness. The second respondent said a letter had been issued on 24 May 2019 asking for a GP letter and on 29 May 2019 for an occupational health assessment. The report concluded therefore that this allegation was "false" as "the company did seek the claimant's consent to approach her GP and did refer her to an occupational health assessment prior to receiving her grievance and acted in accordance with the sickness policy".

250. As to allegation six, towards the end of February 2019 a company reorganisation was needed to ensure the operational efficiency of the company which led to redeployment or redundancy. The majority of the affected staff were direct reports of the claimant. At the relevant time the claimant was certified as unfit to work and had confirmed this, such as on 25 February 2010 making it clear she could not afford to be subjected to further stress and needed to focus on getting better and asked the respondent to be patient. She had said she would let the respondents know in a few weeks. The second respondent respected her wishes and did not contact the claimant about a planned reorganisation to respect her wishes. That did not affect or diminish her role as CEO or director. The allegation was "not upheld".

251. The final allegation was found to be "false" as the informal offer to purchase shares had not been withdrawn. After she rejected the informal offer, the second respondent reflected and considered that the shares were not worth anything and that if the claimant wished to obtain an independent valuation they could review the position. The informal offer was therefore still open to her.

252. The third respondent considered this report on or around 19 or 20 August 2019 alongside the other evidence he had obtained during the process.

Outcome of grievance

253. On 27 August 2019 the third respondent sent the claimant his grievance outcome letter. The letter set out the 7 grievances:

254. Firstly, that during telephone calls with the second respondent the claimant was put under unreasonable pressure to state the cause of her ill health, whether this was as a result of the MS or medication and to consider what her capabilities would be on return.

255. Secondly, that the second respondent offered to purchase her shares for £20,000 and because of her MS diagnosis and then placed her under unreasonable pressure to make a decision about selling the shares.

256. Thirdly, that during a call on 26 February 2019 the second respondent intimated to her that he thought she could not be capable of meeting the demands of her role on her return and could not perform as a director and shareholder.

257. Fourthly, that despite knowing her position on her health and thoughts on shares, the second respondent called a board meeting and diluted her shareholding contrary to what had been agreed.

258. Fifthly, that the second respondent did not reply to her invitation to speak with her medical advisers as to the diagnosis or respond to the letter from the MS nurse the claimant had sent to him.

259. Sixthly, that at the end of February 2019 the second respondent disbanded her team without consulting or involving her.

260. Finally, that the second respondent withdrew the offer to purchase her shares because she had raised matters formally via her solicitor.

261. The outcome letter stated: "*After taking into account the findings of the investigation, the information provided by you and our discussions at the grievance meeting, we have decided not to uphold your grievances for the following reasons:*

262. In respect of allegations one, two and three, it was impossible to corroborate your assertion that the content and nature of the various telephone calls which took place was inappropriate or unreasonable as alleged or at all. Consequently these three grievances could not be upheld due to there being insufficient evidence.

263. In respect of allegation four, there was no evidence that your MS diagnosis was in any way a factor in said decisions and actions being taken. However, there was evidence that Scottish Enterprise's offer of business critical support was contingent on significant investment being secured which could only be secured by securing financial investment, appointing a new shareholder and allocating shares in consideration of said investment and the decisions and

actions taken as a result, which were subject to tight time restrictions imposed by Scottish Enterprise were in full accordance with the company's articles and the Companies Act 2006. Consequently this grievance could not be upheld due to there being insufficient evidence.

264. In respect of allegation five, the company did see your consent to approach your GP and did refer you for an occupational health assessment prior to receiving your grievance email and although the company may not have acted in as timely a manner as you would have preferred it did act reasonably and in accordance with the sickness absence policy. Consequently this grievance could not be upheld because it is baseless.

265. In respect of allegation six, it was determined that a company reorganisation was required to ensure the future security prosperity and operational efficiency of the company and this ultimately resulted in some staff being redeployed or made redundant. During this time you were certified as being unfit to work and had intimidated to Neil on several occasions that you could not afford to be subjected to stress, were unwell, needed to focus on getting better and needed time. The decisions and actions taken were necessary and it was wholly reasonably not to involve you in the process given the circumstances and in consideration of your explicit wishes. You were not treated any less favourably than any other senior manager who was certified as unfit to work due to any time of ill health and on a continuous period of long term absence would have been treated and the decisions and actions taken in no way affected or diminished your role as COO or your role as a Director. Consequently this grievance could not be upheld due to there being insufficient evidence.

266. In relation to allegation seven it is simply not the case that the informal offer to purchase your shares was withdrawn because you had raised matters formally with a solicitor. In fact the informal offer to purchase your shares is still open to you subject to you instructing an independent valuation of the business by a mutually agreed firm art your own expense. Consequently this grievance could not be upheld because it is false."

267. The outcome letter concluded by offering the right of appeal which should be submitted in writing by 30 August 2019 to the third respondent stating the ground of any appeal. The letter concluded by stating (in bold): "*You should also note that if you decide to appeal against the grievance decision, your appeal will be heard by an external, mutually agreed, independent third party*."

Claimant replies to third respondent

268. On 29 August 2019 the claimant replied to the third respondent by email saying that the third respondent told her he would meet with the second respondent on 19 August 2019 and arrange a further meeting with the claimant to deliver his conclusion. The failure to do so was upsetting and a further breach of trust and confidence.

269. She said that she understood the delay had been due to the second respondent being on holiday which was why a meeting would not take place until 19 August. She said that the email on 23 August which apologised for the delay suggested that there had been no effort to check the position. She found it strange the first three grievances are determined because the claimant had no corroborating witness when she did have her notes taken at the time and yet the last allegation was something the second respondent could speak to was found to be false. The fourth allegation rationale gave no consideration to the points the claimant made, she said, and she was unclear why the outcome refers to "we" have decided.

270. She concluded that the outcome was poor and offers no resolution to an employee who was grossly mistreated. The decision added further insult and injury amounting to further discriminatory conduct and victimisation. She said she wished to review the witness statements and other information collated during the investigation and reserved her position.

271. On 31 August 2019 the third respondent replied to the claimant by email stating that: "*I appreciate that you may be upset with my decision not to uphold your grievance and I am of course happy to meet with you again to explain my reasons in more detail and to discuss how we might be able to resolve matters going forward. However I feel I must correct some of the points you have made in your email.*

272. First while I agree I advised you I would meet with Neil on 19 August to clarify some further points before making any decision, I said I would write to you with my findings before you and I had a further meeting, not after as you have suggested. I am happy to meet with you again to explain my reasons for my decision in more detail and discuss how we might be able to resolve matters going forward. Let me know when you are available but this will not be a rehearing of your grievance or an appeal meeting but for me to explain in more detail the reasons for my decision and to discuss possible resolutions. Something you have not previously set out in your grievance letter or at our meeting.

273. Second as I made clear in my letter you have the right to appeal and should you wish to do so your appeal will be heard by an independent third party. Although you have not explicitly said in your email you wish to appeal it does appear to me that you are not satisfied with the outcome so I would be grateful if you could confirm your wish to appeal so I can make the necessary arrangements given I will need to involve an independent third party which may take some time.

274. Third with regard to timelines delays and communication I reiterate that I have tried to progress smatters as quickly and reasonably as possible and communicate clearly with you throughout. On receipt of your grievance on 31 May I wrote to you on 3 June acknowledging receipt and advising I would need to make sure your doctor was satisfied it is appropriate for you to attend and what measures if any need to be in place. I noted a request for you to consent to approach your GP and OH which had been sent to you before you raised your grievance had not been returned and suggested you may wish to obtain

a letter from your GP instead to avoid any delays in progressing your grievance. No GP letter was provided and on receipt of your consent form we promptly wrote to your GP and MS nurse seeking a report and referred you for an OH assessment.

275. As of 27 July I had only just received the report from your GP and although I had received the OH and MS nurse report I was waiting for the GP report before determining whether the grievance meeting could proceed to ensure I had a fully informed view as I said I would do in my letter of 3 June. On receiving your email on 27 July and in consideration of your wish to proceed on the advice of your OH practitioner I wrote to you on 30 July inviting you to attend a meeting on 8 August which was rescheduled to 9 August on your request. At the meeting on 9 August I informed you I would meet with Neil as soon as possible after his return from holiday on 19 August to clarify some further points before making any decision and said I would write to you with my findings before arranging a further meeting with you. I did meet with Neil on 20 August and then carefully considered all the facts available to me before writing to you on 27 August to inform you of my decision and in doing so provided you with what I feel was a detailed explanation of my reasons.

276. Taking everything into consideration I believe I have managed your grievance fairly reasonably and as quickly as reasonably possible and have communicated with you clearly throughout the process. Regarding discussing a resolution I would point out that at no point in the progress have you intimated what resolution you were seeking despite being asked

277. Finally I note your wish to review witness statements and any other information collated during the investigation. Although there is no obligation to provide you with this information under the grievance procedure I have attached a copy of the investigation report which together with all of the information you have provided to me along with the documents all of which you are already in position was considered carefully before I made my decision. Given your specific grievances all make

references to interactions between yourself and Neil only and there were no witnesses identified by either you at any stage there are no witness statements.

278. *I hope my response helps provide clarity and look forward to you providing me with suitable dates and times so I can arrange a follow up meeting to provide you with more detailed explanation of the reasons for my decision in respect of your grievance and to discuss potential resolutions to the situation that will enable us to move forward*."

279. On 2 September 2019 the claimant emailed the third respondent saying she would look at the response in detail but asked him to confirm if there were notes or a record of the meeting with the second respondent and asked for these or a statement that there was none.

280. The claimant sent a further email chasing a reply by return on 9 September 2019. Later that day the third respondent advised the claimant by email that there were no additional notes from his discussion with the second respondent and the claimant had all the relevant information relating to the grievance. He noted that the claimant disagreed with his comments and decision and said it was not clear whether she wished to appeal which would be heard by an independent third party. He asked for confirmation of this given it would take some time to arrange.

281. On 11 September 2019 the claimant emailed the third respondent saying that she was trying to take it all on board. She referred to clause 26 of the investigation report which stated that the first respondent was informed he would be contacted by the investigating officer and that a meeting was held on 7 June 2019 but despite that no notes or statement was provided. She asked again for this. She also wanted to know why the HR Business Partner was investigating when she made it clear he would not hear the matter. She found this incredulous. She also asked the third respondent to explain why the third respondent did not uphold an allegation which the HR Business Partner had partially upheld.

282. The claimant also asked why in the investigation report with regard to allegation 3 there was no formal agreement as to allocation of shares despite the third respondent having multiple discussions and giving the claimant and second respondent paperwork for signing. She argued it was “ridiculous” just to accept what the second respondent said. She asked the third respondent to confirm why he did not state what he knew and did not give a witness statement.

283. On 11 September 2019 the third respondent replied to the claimant by email making it clear he had given the claimant all the relevant information and documents. He said he had made it clear that the overriding objective was to deal with the grievance fairly and objectively and follow the grievance procedure and ACAS Code. The HR Business Partner was impartial.

284. The third respondent explained that a grievance investigation was a fact finding exercise to collect all the relevant information as to what did or did not happen. The investigation officer was impartial in this case and was not involved in the matters being investigated.

285. He explained that the decision was entirely his and based on the evidence presented to him which derived from the documents he had, the findings from the investigation report and the claimant’s representations at the meeting and his own discussion with the second respondent which was to clarify a few points.

286. The third respondent pointed out he had asked the claimant twice if she wished to appeal but did not confirm and yet challenged the outcome of the grievance by email. Given the repeated challenges he said he would take it that the claimant did wish to appeal and would make the necessary arrangement with an independent third party.

Claimant chooses to resign

287. By email to the second and third respondent dated 16 September 2019 the claimant resigned her employment. She stated:

> *"It is with deep sadness that I write to you today to resign from INCo with immediate effect. As you know Neil's behaviour toward me has been very upsetting, caused me further illness, emotional and physical pain – at a point when I was already very unwell. I had hoped that through raising the grievance Neil would have told the truth and apologised for all that had one on. By your lies and betrayal have made it impossible to trust you anymore, this had made me feel even worse and I therefore cannot return to the business.*
>
> *Neil has continued to misrepresent matters through the grievance process, and indeed he had added to what he did before. For example, he has given the excuse for offering to purchase my shares that he did so because of likely hardship (presumably financial) that I would experience, when in fact he was well aware I had income protection insurance in place and he had no reason to believe that I was about to experience financial hardship. The grievance process itself has been completely inadequate, there have been delays and I feel misled as to how it would be dealt with even in terms of what would happen after my grievance meeting. I feel that the more detailed time line that I provided had essentially been ignored as has the documentary evidence which I offered, for example my notes of my conversations with Neil. In addition it is frankly beyond belief that when I have made clear that I do not want EmployEasily to deal with the grievance for a number of reasons and I have agreed with Colin dealing with it under reservation that I was not sure he could be impartial. I am then sent an Investigation Report which apparently covers the whole of the grievance investigation and I feel that Employ Easily has both been the investigating officer and come to the conclusions on the grievance. Gary seems to come to one conclusion that partially upholds by grievance and that is the one that is not communicated to me. Overall this is a gross betrayal of trust and I*

really cannot believe that any reasonable person would think this was an acceptable way to progress matters in the circumstances. I feel like you have chosen to fob me off by getting the HR company to give you answers to my grievance when I had made clear that I did not want them to conduct the grievance and Colin had said he would. Even if Colin has made the decision on the grievance, the rest of my dissatisfaction with how the grievance has been dealt with remains.

You have also chosen to accuse me of false allegations in relation to the question of whether Neil failed to take my up my suggestion of speaking to my medical professionals which is completely unacceptable and hurtful and shows the company failing to investigate my complaint properly. The reasoning given for the findings that I have falsely alleged that the offer to purchase my shares for £20,000 was withdrawn because I had raised matters seem to me like the company being disingenuous and playing with words, trying to make a distinction between offers and informal offers which does not exist, trying to suggest that no proper offer was made when it clearly was, and failing to consider the real question which is why an offer of £20,000 was made and then withdrawn. If, as the investigation report states, the offer was "primarily driven by a genuine desire to pass some funds to me in what could be a period of hardship" I find it difficult to see what has caused the company/Neil to lose that desire other than the fact that I have raise the issues I have.

I have raised some of my concerns regarding the conclusion of my grievance and the process followed. It is clear from the grievance decision and the investigation report that key points and relevant evidence relating to my grievance have been ignored or not properly considered. Extremely disappointingly Colin has failed to provide a full explanation when asked direct questions regarding his conclusions. This should not have been difficult had the matter been dealt with properly. My questions some of which still remain

unanswered, were an attempt for me to make sense of the decision but it does not make sense, other than making it clear that the company has no wish to investigate properly and come to a fair decision taking into account all the evidence. There are a number of examples of this, and the most painful for me is for Colin to ignore what he knew in relation to the reallocation of shares and issue me with a decision which he knows very well is contrary to what happened. Colin has done the same in relation to evidence relating to the redeployment/redundancy of staff in February 2019, ignoring that he knows that what the investigation report says is incorrect. Colin has essentially chosen to disregard the potential input of one of the most important witnesses on these points, namely himself! It is also incredible that no notes or statements have been taken through meeting with Neil, who is the subject of the grievance and it is apparent that he has not been properly questioned on my grievance.

Colin's reaction to my questions has been to not answer them properly and to try to simply move me on to an appeal. I find this insulting. I am completely capable of telling you whether I wish to appeal a decision or not. I am content to go through an appeal with a third party, however this does not change my decision to resign. A third party making a decision in my favour is not going to change what Neil has done, is not going to change that he has misrepresented the facts in the grievance process, is not going to change the fact that my grievance was not dealt with properly at all and is not going to change the fact that Colin has failed to have any proper input in the grievance process when he knew that Neil's position was false. After what has happened it would be impossible for me to continue or return to work for the company as the actions of the company, Neil and Colin have destroyed the relationship of trust and confidence between us, there has been a failure to support me or deal with my grievance properly and I have been discriminated against, harassed and victimised. That is why I am resigning.

I would stress that I have not taken this decision lightly. I love my job and I have strong feelings for and loyalty towards the company and to Neil, but I have been left in an impossible position. I believe that I have been constructively dismissed and I will pursue the matter in the Employment Tribunal."

Response to resignation

288. On 17 September 2019 the third respondent replied by email to the claimant acknowledging the resignation. The third respondent noted that the contract of employment required the claimant to give 4 week's notice and circumstances which varied from this equated to a breach of contract. He state that the company reserved its full legal rights in that regard.

289. He also stated: "*Your immediate resignation whilst still engaged in the formal grievance procedure seems both hasty and pre-emptive, particularly as you have not taken up the offer of an appeal meeting at which you would be afforded the opportunity to submit all your grounds to appeal to an independent third party, something you previously made clear you wanted and which we intimated would be the case from the outset and on several occasions thereafter.*

290. *I genuinely hope that you have given extremely careful consideration to your decision to resign in this way. In the circumstances. I believe it would be appropriate to give you a period of time to reconsider your decision to resign and would ask that you do so over the next few days and confirm your intentions to me by Friday 20 September 2019. If I do not hear from you by 20 September 2019 I will reluctantly have to conclude that your decision to leave the company remains unchanged and shall process your termination accordingly*."

291. The next day the claimant replied by email as follows:

"*Firstly for the avoidance of doubt I have resigned because of the matters complained of in my grievance and the subsequent manner in which it has been dealt with and not as you suggest only the latter.*

Secondly I am upset and disappointed that you would choose to respond to my resignation by accusing me of breach of contract and threatening me by saying you reserve your rights in that regard. This threatening behaviour toward me cannot continue but I am feeling that you/the company does not know when to stop.

I find it most unusual that you are now putting pressure on me and indeed trying to decide for me to involve an independent third party when this is something that you declined on several occasions. As I said in my resignation I am content to go through an appeal in relation to my grievance but a third party making a finding in my favour is not going to change what has happened and what you, Neil., the company have done. The trust and confidence between us has been destroyed and a decision by a third party is not going to change that. I have been constructively dismissed. If there is a third party appeal this will relate only to the decision on my grievance. It will not mean that I accept what has been done, nor will it mean that my employment is ongoing. This would be a separate matter from my employment which has ended.

I have already explained my position in some detail. You, Neil, the company should not think that it can treat me in any way it wishes and then say that I should be okay with this because an appeal is being offered. I am definitely not okay with this, and your actions have made it impossible for me to return to a job and business that I love. My decision stands, please process my resignation."

292. The third respondent acknowledged the claimant's email later that day.

293. Also, later that day the respondents arranged for the claimant to cease to be a director of the first respondent at Companies House as they believed the claimant was employed as director and when her employment ended, she was also no longer a director.

294. The claimant did not receive a P45 nor was she paid accrued holidays to which she was entitled.

295. On 16 October 2019 the claimant commenced early conciliation in relation to the 3 respondents.

296. On 13 December 2019 the claimant lodged a second Tribunal claim number 411445/2019 raising various claims under the Equality Act 2010, breach of contract and constructive dismissal.

First respondent's financial position

297. The first respondent had made around 23 staff redundant around May/June 2019 and net liabilities had been increasing. Net liabilities stood at £230,946 for the quarter ending March 2019 increasing to £394,178 for the quarter ending January 2020.

298. In the period April 2019 to December 2019 monthly turnover had dropped from around £155,000 (for April 2019) to £48,000 (December 2019).

299. The losses the first respondent sustained were initially absorbed by the third respondent's injection of capital. Once that capital ceased there was no ability to continue. Debt was increasing and losses were accumulating.

300. Around the end of 2018 the third respondent had approached the liquidator who had dealt with the liquidation of Intelligence Networking Solutions Limited. A request was made to allow the deferral of sums due by the first respondent to the liquidator following the purchase of the business (for around £230,000). As the first respondent was struggling financially the deferment request was granted.

301. There were further meetings with the liquidator of that company (to whom funds were owed by the first respondent) up to June 2019. The liquidator was satisfied that the first respondent was still loss making and director's personal funds of £336,000 had been invested into the business in an effort to achieve profitability.

302. In June 2019 following a number of redundancies to reduce costs, a further request to defer the £230,000 until later in 2019 was agreed.

303. By late 2019 it appeared to the second and third respondents that the first respondent might not survive. Credit was not being extended. Losses were increasing and new business was not being secured.

304. The second and third respondents sought advice of qualified insolvency practitioners given the loss making and a significant loss of clients in December 2019 and January 2020. The outcome of that advice was that the first respondent was only able to continue to trade with further capital from the directors, which failing the company would require to be placed in liquidation.

305. On 29 January 2020 the first respondent went into provisional liquidation. The liquidation was a compulsory liquidation. The petition for such liquidation was presented by the first respondent. All staff were dismissed as redundant in January 2020. The Sheriff granted permission for proceedings to proceed.

Second and third respondent progress another business

306. In late 2019 the second and third respondents had been exploring other business opportunities in the areas of technology, Customer Relationship Management (CRM) and digital business consultancy. They decided to develop a business proposition called ProsperoHub.

307. This business utilised the skills of the second and third respondent. It had been their intention to start a business which had CRM and data at its core. The new venture advertises consultancy work and configuration and set up of CRM systems with digital technology. The first respondent would be the type of business the new venture would have as a client. The first respondent used the technology to generate leads and carry out telemarketing whereas the new venture develops and trains people in the use of those functions, to do what the first respondent did.

308. The second and third respondent had resolved to embark upon this new venture. The idea was conceived in February 2019 following discussions with the European director of the technology. Matters progressed following a

conference in August 2019 in America when the second and third respondent met another director of the relevant application.

309. The new venture was financed by borrowing from the third respondent's wife. The activities carried out by the new venture differed from those carried out by the first respondent.

310. The new venture was incorporated on 17 September 2019 by the second and third respondent online.

311. At inception the new business had no clients, no staff and no premises. The business purchased some assets from the first respondent and took over the net directors loan (which was payable to the third respondent).

312. Some staff who had been employed by the first respondent whom the second and third respondent considered had the necessary skillset in the new venture were offered roles. That was due to their specific technical skill sets.

313. The liquidator of the first respondent was given full details as to the new venture. Neither the liquidator nor the Redundancy Payments Service considered there to have been a transfer of undertaking from the first respondent to the new venture. Employee claims (including a claim from the claimant as to unpaid holiday pay) was accepted by the Redundancy Payments Service. The liquidator believed that the reason for the liquidation was hat the business it operated had proven not to be commercially viable.

Observations on the evidence

314. With regard to the claimant, we found her generally to be credible. We accept that she did her best to present what she understood the position to be. Generally speaking she answered questions clearly and was direct in her responses in what we accept was an incredibly difficult situation for her. This was obviously a matter about which the claimant felt strongly.

315. On occasion we concluded that the claimant was mistaken in relation to events that had occurred. We concluded this after carefully analysing the evidence and in particular what was said by the parties at the time, from

evidence that existed around the time of the events in question and from the evidence before us, which we determined on the balance of probabilities. We did not consider the claimant to have been untruthful but rather we found that on occasion the claimant strongly believed things had been said and interpreted what had been said in a certain way, which was not always consistent with what was in fact said.

316. For example, the claimant believed from her discussions with the second respondent that her job had gone and that she would be given a job consistent with her capabilities at the time. This was what the claimant believed she had been told rather than in fact what she was told, which was that her role was still available, despite her impairment and absence and even if the claimant is unable to carry out that role given the very demanding requirements, the second respondent would ensure the claimant was employed in some capacity consistent with her capabilities.

317. The claimant formed the view that this was a negative discussion and intended to be disrespectful of her when in fact it was an attempt by the second respondent to seek to support the claimant and reassure her.

318. As a consequence of the claimant's belief we found that she would interpret what was said to her by the second (and latterly third) respondent in a negative way and infer that what was being said to her was not genuine and somehow an attempt to "back her into a corner" or remove her. That was extremely unfortunate given the relationship that had existed prior to this issue arising.

319. Once the claimant had concluded that (she believed) first the second respondent and then both the second and third respondent wished to remove her from the business, or at least persuade her to change her position, she found it difficult to accept what had occurred in the way that was intended, and objectively what had occurred.

320. The claimant's friends had been encouraging the claimant in her approach, who clearly supported the claimant and wished to help her.

However, her friends had been told what the claimant believed had occurred and her subjective belief as to the rational of the respondents which in turn in places reaffirmed the claimant's belief that the respondents wished to remove her and were treating her wholly adversely, rather than seeing matters objectively and in the spirit in which it was intended.

321. We fully accept the equally challenging position in which the claimant found herself but on occasion she failed to appreciate the very serious situation in which both second and third respondent found themselves. Thus when there was some delay in responding to the claimant she assumed this was intentional or at least disrespectful of her position, intending to cause her stress, when in reality the second and third respondent were working extremely long hours to try and keep a failing business afloat. Those pressures did not assist the second and third respondent.

322. An example of the claimant's misunderstanding of the respondents' approach was in how the claimant saw the respondents' offer to purchase her shareholding as wholly adverse to her when in fact the offer was highly likely to have been significantly to the claimant's financial advantage in contrast to the value of the shares.

323. There were a number of other examples as to the respondents seeking to assist the claimant which she regarded as negative (rather than as assisting her, which was the purpose). An example was the third respondent using their HR Business Partner to produce an initial investigation report (which was an attempt to have someone who was not directly engaged in the business identify facts that were available at the time in relation to the points raised by the claimant rather than as a barrier to progressing matters, which was how the claimant ultimately viewed it). Another example was in relation to the appeal to an independent third party which was offered to the claimant. Instead of proceeding with her appeal, she sought on a number of occasions to obtain further information from the third respondent. Regrettably by this stage the business was in a very serious position, the precise details and the precarious nature of which was something unknown to the claimant. The

second and third respondents were focussed on trying to save the business and there were no other parties within the business who could have dealt with the appeal.

324. Unfortunately at that very time when they were working even longer hours to protect the business the claimant wanted more information as to the approach the respondent took in relation to her grievance. The perceived lack of fulsome responses led to the claimant believing that there was a sinister motive at play, rather than recognising the reality the respondents faced at the time.

325. The information provided by the claimant's friends and her husband, were of little relevance, other than confirming what the claimant had sent at the time (which ought to have been matters agreed between the parties without the need for evidence to be led). They were unable to speak directly to the issues that occurred. While they were able to speak to the claimant's point of view at the time and what she said, as we indicated about, the claimant formed a view as to what the respondents were doing and her interpretation of what was said to her and how she perceived the treatment she was subjected to was what the claimant told these witnesses.

326. While we understood why the claimant chose to secretly record her fellow directors during mobile telephone discussions we did not consider that an acceptable practice. We were surprised as to why the recordings were not produced by the claimant during the grievance process, particularly when she had been told of the need to present any evidence she considered relevant to support her position. We approached what was said during these calls carefully given the claimant knew they were being recorded and her fellow directors did not.

327. Ms McNee did her best to recall the events in question. While she was of the view (in her witness statement) that the team was being "disbanded", a matter disputed by the respondents, a WhatsApp message she sent to the claimant referred to the team being "restructured". This supported the position advanced by the third respondent. His evidence was that the team was not

disbanded but it was structured in a more focused way, which was something the third respondent did as interim COO (as part of his role) to seek to improve the staffing structure. We preferred his evidence on that point. The third respondent was responsible for the restructure and his was his responsibility to ensure the team operated effectively.

328. We considered carefully the evidence of the second respondent. We carefully considered the points made in the claimant's agent's submissions in this regard. We do not accept that generally speaking the second respondent was not credible as alleged by the claimant's agent. We considered that he had done his best to recall events to the best of his abilities and assist the Tribunal where he could.

329. Nevertheless we did consider there to be some merit in the assertion that the written witness statement presented by the second respondent in places sought to augment challenges the second respondent had with the claimant. This appeared to us to be *an ex post facto* assessment perhaps as to reasons why the business had failed rather than issues that had occurred at the time. Thus the suggestions as to the claimant's performance being inadequate in places were views the second respondent had reached in retrospect rather than matters that had been specifically raised at the time. The second respondent accepted that his approach was to speak with people and look for solutions in a forward focused way rather than documenting concerns and issues looking back.

330. Equally we accept that the claimant had been responsible in no small measure for areas of the business that did now show any sustainable improvement and for which the third respondent became responsible upon his joining the business which he considered required urgent changes to stem the losses. There were undoubtedly failures for which the claimant was responsible, as much as there were failures for which the second respondent was responsible.

331. We found the third respondent to be clear and generally consistent in his evidence. He gave his evidence in a measured way and did his best to

recall events as he understood them. We did not accept the criticism of the third respondent by the claimant's agent that he was incredible because of how he referred to others within the business. The third respondent believed that the claimant and the second respondent were his business partners and as such they were in a different position to that of others, whom he considered junior colleagues.

332. The third respondent accepted he had make a mistake with regard to his witness statement and discussions with the claimant. Rather than showing that he was dishonest, it demonstrated that he was open and honest given he accepted he had erred and explained the position.

333. We did not accept the suggestion by the claimant's agent that the second and third respondent were not truthful in saying they were surprised when the grievance arrived. They were surprised that the relationship had reached the level it had given the oral discussions that had taken place.

334. We listened to the recordings and accept the respondent's agent's submission that broadly speaking the discussion the claimant has both with the second and third respondent is conversational and supportive. It was clearly a surprise for both respondents to receive the detailed grievance, notwithstanding the solicitor's letter that had been received (which was itself sent on a day when the claimant had a long and friendly chat with the third respondent). That would itself create surprise given there was no suggestion of any serious issues until the correspondence was received.

335. While it is of course possible to respond differently in writing to how one communicates verbally, the tone and approach of the verbal discussions were broadly supportive and convivial and entirely at odds with what was being suggested in writing. That was in part due to how the claimant was perceiving the respondents' actions, rather than in fact what had been occurring. We did not accept that there had been a demonstrable change in attitude by the second respondent to the claimant.

336. We have taken into account the claimant's agent's assertion that the respondents have been "entirely uncooperative in producing documents in relation to this claim, even when directly asked". While we accepted the third respondent's evidence that he communicated orally rarely by email, it was clear that there were documents which had not been produced. An obvious example is notes the HR Business Partner took during the meeting with the second respondent which he was able to consult during cross examination which for no good reason had not been disclosed to the claimant or the Tribunal. We have taken this failure into account in our assessment of the evidence.

337. We did not consider the claimant's agent's criticism of the respondents with regard to how they treat people with health problems as fair. We accepted the respondents' evidence that they had a difficulty with some staff and their attendance at work, which in part gave rise to the second respondent's comment about a colleague who was in receipt of SSP. The claimant was given full pay and treated with compassion in the immediate aftermath of her diagnosis and the respondents gave her time off work, without her asking for it and at a time when her involvement in the business would have been essential. We accepted the second respondent's evidence that they had assisted another employee on one occasion with regard to mortgage payments as a result of issues encountered in their life at the time. We considered that to be more reflective of the position adopted by the respondents when managing illness and staff.

338. We did not find it as simple as the claimant's agent suggested of simply accepting the claimant's evidence in preference to other evidence in the event of conflict. Instead we assessed each dispute and concluded from our assessment of all the evidence available to us what, on the balance of probabilities, the position was. Given the passage of time and the very serious issues facing the second and third respondent at material times it was not surprising that there were inconsistencies in their evidence and some errors. Both respondents were trying to save a failing business and protect the position of staff while trying to manage the absence of the claimant, where

possible. The claimant was convalescing. She has had time (and space) to reflect upon the position and her perception as to how she was treated.

339. With regard to specific disputes on relevant evidence that we required to resolve to determine the issues in this case we dealt with the issues of the claimant's performance above. We did not consider the second respondent to have been untruthful in his recollection of the claimant's performance but we found that his evidence with regard to his belief as to her abilities was with the benefit of hindsight and following the demise of the business. The second respondent accepted that he was not singling the claimant out as such but that she was in charge of operations and operationally the business failed. That was supported in part by the third respondent and his view of the operational side of the business following upon his joining the business.

340. We accepted the evidence of the third respondent who said that the discussion as to friends who had MS was not something he had said to the second respondent but something he had said to the claimant. We considered that the claimant was mistaken in believing it had been said to the second respondent in an attempt (as she claimed) to reassure him. We considered it more likely than not that this was said by the third respondent to the claimant during general conversation.

341. With regard to the conflict in evidence as to whom the third respondent told about having friends with MS, we preferred the evidence of the third respondent. It was he who raised the discussion and he raised private matters relating to his family. We considered it more likely than not that he would remember whom he told these issues. The claimant had just returned from a lengthy absence and was readjusting to the working environment and the situation facing her. We did not accept that it was the third respondent telling the second respondent this, which the claimant happened to overhear. We considered it more likely than not something the third respondent would have said to the claimant to share his family situation and experience of MS, something about which they were discussing. At that time the claimant and third respondent were discussing matters very regularly each day and it is

entirely credible that type of discussion took place, which we found more credible than the discussion alleged to have occurred between the third and second respondent, which the claimant alleged she overheard.

342. With regard to the "quick board meeting" on 10 January 2019 we considered the evidence of each of the participants, the claimant, the second respondent and the third respondent. Although there was disparity in what was said, we found that overall the view of each of the witnesses was that the meeting was reassuring and placatory. We were not satisfied that the third respondent's recollection was accurate in its entirety but concluded that this was more likely than not due to his desire to assist the claimant in her return to work and support her and his focus on that matter. Any discussion as to her shares and other issues were less likely to be relevant to him than it would to the claimant and the second respondent. It was in the formal sense not a board meeting (given there was no agenda or minutes) and as such the third respondent viewed the meeting as a relatively short catch up amongst 3 business partners. The approach the claimant took to fixing the discussion (and calling it a board meeting) was something that had not done before.

343. We considered that there may have been awkward moments during the meeting. At this time business was extremely challenging and the parties were seeing each other on a daily basis to deal with the operational issues. The second and third respondent were seeking to support the claimant in whatever way they could to assist her in her return to work and arranging a "quick board meeting" by the claimant in these circumstances was something the claimant had not done before. We found both the second and third respondent wanted to reassure her said to her return and focus on the immediate issues, rather than discussing what the future may hold

344. We considered how to resolve the dispute as between the claimant who was of the view that the offer to purchase her shares, she said, was because of her disability and the respondents, who argued it was to provide the claimant with financial assistance given the difficulties she encountered. We considered the arguments presented by the claimant's agent (principally

in relation to the claim under section 15 of the Equality Act 2010). We accepted the evidence of both the second and third respondent that the reason why the offer was made was to assist the claimant. It was not because of her disability. It was not less favourable treatment.

345. We concluded this because we considered that the respondents were in fact making a very significant financial gesture for the claimant. There was no reason why they had to do so. They could no longer afford to pay the claimant salary, which they had chosen, without request, to do for a number of months to allow the claimant to deal with the issues she faced. They did not consider any other alternative ways of helping the claimant and believed their offer was the best way to assist her.

346. We considered the evidence before the Tribunal. The second respondent accepted that he told the claimant about the offer around 12 days after the discussion that she was to cease to receive full pay and after the date he knew the claimant had an income protection policy. The second respondent was surprised when the claimant disclosed this because it was a relevant factor that business partners would normally discuss if it could have a bearing on what costs the business was incurring. Had the respondents known about the policy sooner, the financial position in relation to the first respondent and the claimant may have been dealt with differently. In other words the policy may have potentially been applicable thereby resulting in potentially significant cost savings for the first respondent, at a time cost savings were essential. It was natural for the second respondent to feel surprised when the claimant had not realised that the existence of such a policy could have had an impact upon the financial position of the respondents given their financial challenges.

347. He did not, however, know the specific details of the policy (as the claimant had not told him the specific details and he did not ask). He knew the claimant had moved house or was about to. He had also been told by the third respondent that the offer would potentially result in cost savings. This was because by paying the sum for the claimant's shares rather than paying salary, the claimant would receive a similar amount of income at lesser cost

to the respondent. He had not considered paying salary for a shorter period but that would not have provided the claimant with as much financial assistance, which was the purpose of the offer.

348. Both the second and third respondents did not require to expend further costs upon the claimant but chose to do so as a goodwill gesture. We accept that the third respondent did not know that the offer was not made at the same time as the claimant was told of the decision not to pay her sick pay but that was a mater within the second respondent's control. He waited for around 12 days before calling back and making the offer for the shares. He did so knowing that the claimant had an income protection policy but without knowing the full details. Even with that knowledge the second respondent proceeded to offer the claimant the sum agreed with the third respondent, which was further evidence of the second respondent's approach to the claimant – to try and assist her by offering her £20,000 for shares which were likely to be worth substantially less, and as a goodwill gesture given the challenges the claimant was facing and likely to face.

349. Given the financial position of the first respondent it was likely that the shares were worth little, if any cash, and the offer made was solely linked to assisting the claimant.

350. We accept that the communication of the offer by the second respondent was not clear and he could have handled the situation better but we take into account the full circumstances including the very serious financial challenges facing the second respondent personally, those facing the third respondent personally and the first respondent's precarious position which place into context the memories of the second and third respondent and the rational for their actions.

351. We do not accept the claimant's agent's argument that the "only reason seems to be the claimant' ill health/absence". We did not find that credible from the evidence before us and we preferred the evidence of the second and third respondent.

352. In terms of what was said between the claimant and the second respondent on 26 February, we did not consider it surprising that both parties had different recollections. The claimant was undergoing very serious ill health issues and was seeking to adjust her affairs. The second respondent was dealing with very serious challenges within the business with serious personal and professional financial issues. He was desperately seeking new business and trying to keep the business afloat. He was equally trying to work with the claimant to reassure her as to her position and help her as best he could to return to work. He also wanted to understand, as best he could, the claimant's health and its impact in terms of the business.

353. The discussions in February were very much part of the way in which the claimant and second respondent kept in touch, in a conversational and friendly way. The second respondent was raising matters relating to the claimant's health as much as she was raising these matters herself. This was not a one sided discussion with the second respondent continually asking the same question, in our view, as alleged by the claimant. We did not conclude that the second respondent was pressuring her, although we accepted that she believed she was under pressure. This was due to both parties having different perceptions during the call.

354. The second respondent noted in his evidence that with the pressures upon his time, there was no need for him to continue to have the discussions with the claimant. The discussions were not one sided but a dialogue between the claimant and the second respondent. Given the second respondent was taking the call on a train (with interruptions) and given the issues being discussed, the call had not reached a natural conclusion and it was necessary to conclude the discussion by having a further call. That was not due to the claimant's disability but rather due to the issues being discussed not having been fully discussed and both parties wishing to ensure they fully understood where they stood.

355. We note that the claimant in her evidence stated that she "took it" that the second respondent no longer saw it that she could her job. In other words

it was her perception as to what the second respondent believed rather than what he actually said. This accorded generally with the evidence in parts whereby the claimant believed that the second respondent was adopting a position (which she saw as adverse to her) when in fact he was seeking to help and reassure her. The correspondence by the second respondent subsequently explained what his position was and sought to resolve any conflict or misunderstanding, rather than, as the claimant believed, tell mistruths. The claimant was not fully aware of the serious challenges facing the business at this time and was frustrated at what she saw as a lack of priority being given to her by the second respondent in terms of when discussions took place and the timings of such discussions At this time the second respondent was travelling across the country and working very long hours trying to secure new business and income.

356. We set out above the reasons why we considered the evidence of the third respondent with regard to the alleged disbanding of the team to be more likely than not the case. We took into account the discussions the claimant had with the third respondent and the fact it had not been referred to by her as an issue until the grievance was raised. Given the very good relationship the claimant had with the third respondent if the claimant had wished to have been involved in the discussion she would firstly have raised it with the third respondent prior to the discussion in question (and not via an employee). Further, when the discussion took place without her involvement, she would have been in contact with the third respondent at the time, or even by sending an email about the issue. We preferred the evidence of the second and third respondent on this point. There was no doubt that the claimant was upset that operational decisions were being taken but these were decisions taken by the third respondent pursuant to his role. He had made it clear that the claimant could speak with him at any time and it was for her to contact him, given her health condition and his wish to respect that. We preferred the evidence of the third respondent to Ms McNee in this regard given it was the third respondent's decision to restructure the team in the way he wished.

357. We accepted the evidence of the third respondent that he had not considered the terms of the initial grievance report from Mr Sutherland until after he had met with the claimant. We carefully checked Mr Sutherland's evidence and while he said he had sent the report to the third respondent he did not say that this was sent to (and certainly not read by) the third respondent before the grievance meeting. We considered it more likely than not that the third respondent wanted to hear what the claimant had to say, speak with the first respondent and consider the evidence Mr Sutherland had obtained before reaching his conclusion. We considered that the surrounding business circumstances and the third respondent's return from holiday and other operational demands resulted in this finding being more likely than not to be true.

358. We considered whether or not the third respondent had agreed to meet with the claimant before the outcome had been confirmed. We note that this was not within the respondents' minutes of the grievance meeting but within the minutes prepared by the claimant's companion, which stated that a further meeting would be arranged. It was not clear precisely what the purpose of that meeting would be given it was uncertain what further information the third respondent would obtain and why a further meeting was needed before reaching conclusions. The third respondent did not recall there being any discussion as to meeting up again. We concluded that the likely discussion was that if a further meeting was required with the claimant it would have been arranged. We did not consider that the third respondent agreed to meet with the claimant again during the grievance meeting from the evidence before us.

Law

Jurisdiction

359. The complaints of disability discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees "in the course of employment".

360. The Equality Act 2010 applies to those relationships and circumstances that are set out within the legislation. Thus it applies to employees and applicants (section 39) and in particular the arrangements for deciding to whom to offer employment, the terms on which employment is offered (in terms of affording access to promotion, benefits, facilities and services), dismissals and detriments.

361. It also applies to contract workers (section 41), partnerships (section 44), officer holders (section 49), qualification bodies (section 53) and other bodies.

362. There are no provisions extending the provisions of the Equality Act 2010 (which apply to issues within the employment sphere) to companies or shareholders in terms of shareholder disputes or issues in connection with shareholder matters.

363. If discrimination occurs outwith the relationships that are set out in the Act, the Tribunal would not have jurisdiction to determine any claim. In this regard an Employment Tribunal does not have jurisdiction to determine a claim as between shareholders with regard to their shareholding since that not part of the claimant's employment. The issuing of share options and other benefits pursuant to a contract of employment would clearly be different since that such benefits would be part of the benefits of employment) but shareholder disputes are not employment disputes as such.

364. In relation to the scope of the Equality Act 2010, the Equality and Human Rights Commission Code of Practice ("the Code") notes at paragraph 1.4 that different areas of activity are covered under different parts of the Act, ranging from discrimination in the provision of services and public functions, to housing, employment and work related situations, education and membership organisations. Paragraph 1.5 states that the Code covers discrimination in employment and work related activities (under Part 5 of the Act) which is based on the principle that people with protected characteristics should not be discriminated against in seeking employment, when in employment, or when engaged in activities related to work.

365. It is important therefore to ensure in relation to claims brought before the Employment Tribunal the claim falls within the terms of the Equality Act 2010 in terms of the nature of the dispute. It is possible, for example, for a claimant to encounter issues that are covered by the Act (such as in relation to employment or work activities) and activities that not subject to the Act. The Tribunal would not have jurisdiction to deal with discrimination in areas to which the Act does not apply.

Burden of proof

366. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

373. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

374. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

375. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the

shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

376. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

377. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909*)*. Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

378. Thus in direct discrimination cases the tribunal can examine whether or not the treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.

379. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions for the reasons we set out below.

Direct discrimination

380. Discrimination is defined in section 13(1) as follows: “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.”

381. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: “On a comparison of cases for the purposes of section 13, 14 or 19 there must

be no material difference between the circumstances relating to each case."

382. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

383. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed** 2009 IRLR 884, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. That is what the Tribunal has been able to do in this case.

384. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council** 1990 IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 1999 IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan,** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the**

application of E) v Governing Body of the Jewish Free School and another 2009 UKSC 15**.** The burden of establishing less favourable treatment is on the claimant.

385. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** 2001 IRLR 377.

386. In **Glasgow City Council v Zafar** 1998 IRLR 36**,** also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

387. In **Shamoon v Chief Constable of the RUC** 2003 IRLR 285, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

388. It is also important to note that the treatment would be "because of the protected characteristic" if it was "a substantial or effective though not necessarily the sole or intended reason for the treatment" (**R v Commission for Racial Equality** 1984 IRLR 230).

389. Chapter 3 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Discrimination arising from disability

390. Section 15 of the Act reads as follows:-

> "(1) a person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

391. Paragraph 5.6 of the Code provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

392. In order for the claimant to succeed in his claims under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7).

(b) there must be something that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

393. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

> "A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

394. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

395. There are two causation issues. Firstly, the unfavourable treatment must be "because of something" which gives rise to the same considerations as in direct discrimination with the focus on the alleged discriminator's reasons for the treatment (**Dunn v Secretary of State** 2019 IRLR 298). The Tribunal must identify what the reason was, the reason being a substantial or effective reason, not necessarily the sole or intended reason.

396. Secondly the "something" must more than trivially influence the treatment but it need not be the sole or principal cause (**Hall v Chief Constable** 2015 IRLR 893 and **Pnaiser** above). It is enough if the unfavourable treatment is the cause of the something (irrespective of whether the respondent knew the something arose as a consequence of the disability – **City of York v Grosset** 2018 EWCA Civ 1105). This is a matter of objective fact decided in light of the evidence (**Sheikholeslami v University of Edinburgh** 2018 IRLR 1090 and **Risby v London Borough of Waltham**

UKEAT/0318/15/DM) and there may be a number of links in the chain and more than one relevant consequence may need consideration.

397. What amounts to unfavourable treatment was considered in W**illiams v Trustees of Swansea University Pension and Assurance Scheme** 2019 ICR 230 where the claim for an enhanced pension was not unfavourable treatment. Lord Carnwath in the Supreme Court opined that little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions of the Act. He further accepted that the Code provides helpful advice as to the relatively low threshold of disadvantage required. However, neither point could overcome the central objection to the case, which was that there was nothing intrinsically unfavourable or disadvantageous about the award a pension.

398. That reasoning was applied in **Private Medicine Intermediaries Ltd v Hodkinson** EAT 0134/15, where the Employment Appeal Tribunal stressed again that treatment that is advantageous will not be unfavourable merely because it might have been *more* advantageous.

399. **Williams** was distinguished by the Employment Appeal Tribunal in **Chief Constable of Gwent Police v Parsons** EAT 0143/18 where the Employment Appeal Tribunal upheld the decision of an Employment Tribunal that failure to pay an enhanced pension sum amounted to unfavourable treatment. The 'relevant treatment' was identified as the application of a cap to a payment that would otherwise have been substantially larger which was unfavourable.

400. If the an employee's disability-related absence provides merely the space or circumstance in which the employer identifies a genuine (non-discriminatory) reason for dismissal, then the requisite causative link between the unfavourable treatment (dismissal) and the disability will be found to be lacking. Hence Stacey J in **Kelso v DWP** UKEATS/0009/15/SM held: "the disability which the claimant claims to suffer is part of the background of the case. It is not on these pleadings possible to construe the

unfavourable act of dismissal as "treatment [which] is because of something arising in consequence of the disabled person's disability". Thus, there must be treatment, in this case dismissal; then there must be something arising from disability, in this case the claim for benefits. Final and vitally the treatment must be "because" of the "something. The claimant has agreed in her pleadings that she was dismissed because her employers thought she had been dishonest. That dishonesty is not something arising from disability."

401. In **Charlesworth v Dransfields Engineering Services Ltd** UKEAT/0197/16/JOJ Simler J returned to the issue as to the required mental process, stating: "It seems to me that the words are used synonymously to mean in both cases an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause." At paragraph 18 Simler J noted that there may be circumstances in which a factual matter that arises in consequence of disability is effectively a context for the decision, but not in any way the effective cause of it: But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. Here, the Tribunal concluded that the Claimant's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the Respondent was able to identify something it may very well have identified in other ways and in other circumstances, namely that the particular post was capable of being absorbed by others. That conclusion led the Tribunal to hold that what caused the Claimant's dismissal on these particular facts was the view that the Respondent could manage without him and that the absence formed part of the context only and was not an operative cause. In my judgment, that was a conclusion open to the Tribunal, applying the statutory test, and reached without error of law."

402. The fundamental matter for the tribunal to determine is therefore the reason for the impugned treatment.

403. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

404. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> "although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

405. The Code at paragraph 4.26 states that "it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."

406. In ***Chief Constable v Homer*** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

407. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

408. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

409. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

410. Chapter 5 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Harassment

411. In terms of section 26 of the Equality Act 2010:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct 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."

412. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim.

413. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed

as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'.

414. At paragraph 7.10 of the Code the breadth of the words "related to" is noted. It gives the example of a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

415. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906).

416. Section 26(4) of the Act provides that:

> "(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B;
>
> (c) the other circumstances of the case;
>
> (d) whether it is reasonable for the conduct to have that effect."

417. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by

reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”

418. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

419. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant’s dignity or creating the relevant environment) the claimant’s perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (**Lindsay v LSE** 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words “intimidating, hostile, degrading, humiliating and offensive” and said “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught”.

420. A constructive dismissal cannot constitute conduct for the purpose of a harassment claim (see **Timothy James Consulting Ltd v Wilton** 2015 ICR 764).

421. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Victimisation

422. Victimisation in this context has a specific legal meaning defined by section 27:

(2) 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.

(3) 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.

(4) 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.

423. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337.

424. Paragraphs 9.8 ad 9.9 contain a useful summary of treatment that may amount to a 'detriment': 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no

need to demonstrate physical or economic consequences but an unjustified sense of grievance alone would not be enough to establish detriment'.

425. The authorities show that the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. Thus the employee's own perception of having suffered a 'detriment' may not always be sufficient to found a victimisation claim.

426. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why". In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal or sole cause.

427. It is also important to note that in terms of section 212(1) of the Equality Act 2010, detriment does not include conduct that amounts to harassment.

428. Chapter 9 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Unfair dismissal

429. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

430. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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.

431. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> "…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

432. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> "The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

433. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

434. In **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

435. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The

formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King** UKEAT/0106/15/LA the Employment Appeal Tribunal put the matter this way (in paragraphs 12-15):

> **"12**. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:
>
> "… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."
>
> 13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.
>
> 14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."

436. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978**.**

437. If the claimant proves that her resignation was in truth a dismissal, section 98 governs the question of fairness.

Breach of contract

438. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

Submissions

439. During the Hearing we had agreed that both parties would present written submissions and have the opportunity to provide any supplemental submissions orally at the end of the Hearing. Both parties did so and their written submissions are on file. The respondent's agent's submissions focused on the facts which we have set out above. We have commented upon the respondent's agent's submissions, where relevant, in our discussion below in connection with each issue, albeit the respondent's agent's submissions did not consider each of the issues in detail, which we have done in response to the claimant's submissions and the legal and factual issues facing us.

440. The claimant's agent provided detailed submissions in relation to most of the issues arising, which we have produced, where relevant, below.

441. The respondent's position was essentially that there was no unlawful discrimination. The claimant's agent detailed submissions set out their position identifying why they say the claims should be upheld, which we considered in great detail. We took full account of both parties' submissions in reaching our decision in relation to each issue.

Discussion and decision

442. We have reached our decision having taken great care to consider all the evidence led before the Tribunal, both orally and in writing, and we considered the parties' oral and written submissions in great detail. We must apply the law to the facts as we have found (facts which we found after carefully considering the evidence and submissions). We are unanimous in our decision in respect of each of the issues. We deal with the issues as they have been arranged.

Direct disability discrimination (Equality Act 2010 section 13)

443. We shall take each incident in turn setting out the claimant's submissions, any relevant submissions from the respondent, and then our decision in

relation to each incident in turn, dealing with whether the act was made out and then whether it amounted to less favourable treatment because of disability.

444. The **first matter** relied upon was that from the first week of February 2019 until 26 February 2019 the second respondent acted in a way which showed frustration with and unhappiness of the claimant's explanation of her health position and pushed the claimant for responses on cause of health issues and timescale for and capabilities on return to work.

Claimant's agent's submissions

445. It was submitted by the claimant's agent that the claimant's evidence on this was clear and credible. The second respondent accepted her evidence in a number of respects. He admitted that he asked the same questions on 3 or 4 occasions. At times he denied speaking about the claimant's capabilities on return to work, but at other times he accepted that he would have been asking about this. The claimant's evidence was clear. The second respondent's was vague. This treatment only began after the claimant became disabled. The claimant's comparator was a hypothetical one in her circumstances. She was not aware of the respondents behaving similarly to other employees. The claimant argued that she has therefore made a *prima facie* case that she has been treated in this way because she had become disabled and the respondents had not discharged it. The claimant's agent noted that while they appreciated there may be an argument that had the claimant been off ill but without a disability diagnosis she would have been treated in the same way, "we do not believe that bears scrutiny as at this time there was no suggestion that she would be off sick long term, and in the absence of a disability diagnosis it would seem unlikely that the same pressure would be applied to someone just because they were off ill.

Decision

446. This issue had not been specified clearly identifying what exactly the respondents are said to have done when showing frustration and unhappiness but we have considered the evidence before us. In essence the claimant argued that it was the way in which the second respondent conducted the discussions and sought to pressure her into discussing the prognosis given her health position.

447. It was accepted by the second respondent that on around 3 or 4 occasions the discussion centred around the claimant's return to work. We did not consider that the second respondent was "frustrated" or "unhappy" with the answers the claimant gave. He was seeking to plan as best he could to ensure the business was not any more affected than inevitably it would be without one of the key players, the claimant (who was and remained COO), present. It was not unreasonable for him to ask the questions he did in all the circumstances of this case and we do not find that the way in which the second respondent conducted himself during these calls was unreasonable.

448. The discussions the claimant and the second respondent had were generally cordial and chatty. While the question as to the claimant's health and prognosis was raised on 3 or 4 occasions, it was not all at the second respondent's insistence and was on some occasions raised by the claimant.

449. The second respondent believed there was a good relationship in existence and that they had become friends. In his discussions with the claimant he was balancing the interests of the claimant with the needs of the business. He was asking questions to inform himself as to the position. He was keen to understand what the health issues the claimant encountered were – because he was genuinely interested. The discussion was part of the general exchange the claimant and second respondent had given their long history of working together.

450. He trusted the claimant and did not consider it necessary, at that stage at least, to seek the involvement of a third party with regard to the position of

the claimant. The directors regarded each other as business partners and trusted and supported each other. The discussions in question were discussions between two colleagues and friends which in no sense amounted to less favourable treatment.

451. The factual allegation underpinning this issue is not therefore made out. The respondents (by which we assume refers to the second respondent) was not frustrated with and/or unhappy with the claimant's explanation of her health and pushing for responses on cause of health and timescales for and capabilities on return to work.

452. Even if we had found this act to have occurred, we would not have found this act to have been less favourable treatment because of disability. There was no disadvantage. The claimant's agent argued that because it happened after she became disabled a *prima facie* case has been established. We did not consider a prima facia case had been established. We would not have been satisfied that the claimant had shown that there was anything other than a difference in status and a difference in treatment. We did not consider there to be evidence to show that the treatment could have been because of disability.

453. In any event we were satisfied from the evidence led that the reason why the second respondent was asking the questions he did was not because of disability but because of a desire to manage the business and because he considered himself a friend of the claimant with a genuine desire to chat about her health and support and reassure her. The reason for the treatment was in no sense whatsoever disability. That claim is ill founded.

454. The **second act** relied on is that on 19, 25 and 26 February 2019 the second respondent sought to acquire the claimant's shares in the first respondent.

Claimant's agent's submissions

455. The claimant's agent argued that this treatment only began after the claimant became disabled. The claimant's comparator was a hypothetical one in her circumstances. She was not aware of the respondents behaving similarly to other employees. The respondents had never sought to acquire her shares prior to her becoming disabled, in fact it had been agreed to bring in another shareholder without her being affected. It was submitted that the claimant has made a *prima facie* case that she has been treated in this way because she had become disabled. The burden of proof therefore shifted to the respondents to show on the balance of probabilities that she was treated as she was for a reason other than disability and the respondents had not done enough to discharge that. The claimant's agent noted that while we appreciate there may be an argument that had the claimant been off ill but without a disability diagnosis she would have been treated in the same way, he said it did not bear scrutiny as at this time there was no suggestion that she would be off sick long term, and in the absence of a disability diagnosis it would seem unlikely that the respondents would seek to acquire an employee's shares.

Decision

456. In relation to the **second issue** it was accepted the second respondent sought to purchase the claimant's shares, or provide her with a sum of money to support her.

457. We did not consider the Employment Tribunal had jurisdiction to determine this issue. This was a claim raised by the claimant in her capacity as a *shareholder* and not as an *employee*. She was arguing that as a shareholder she should not have been offered a sum in respect of her shares. She was not arguing that the offer was made in her capacity as an employee (since the employment relationship was unconnected to the offer and could have continued to exist irrespective of the shareholding position). While she happened to be both an employee and shareholder, the issue with regard to her shareholding (and the offer) was not part of the employment relationship but arose as a result of her position as shareholder. The failure to offer a sum of money in respect of shares is

not, in our judgment, a matter arising from her employment that falls within the scope of the employment provisions of the Equality Act.

458. The claimant's agent had submitted in relation to the jurisdiction issue that the issues were all bound up with her employment and as such no jurisdictional issues arose. We did not accept that submission. The claimant had herself understood that there was a distinction between the position in relation to her shareholding (with regard to corporate law and her rights as a shareholder) and her position as an employee. She had shares in the first respondent and her rights in that regard were not bound up with her employment. This was not a case where, for example, share options were issued as part of an employment contract. The shareholding was a separate issue entirely unconnected with her employment, with both her employment and shareholder rights co-existing within their respective legal frameworks.

459. We were satisfied that her claims with regard to how her shares were dealt with were not part of or related to her employment and as such the Equality Act 2010 did not apply to any discrimination with regard to how the shareholding was dealt with.

460. Even if we were wrong on that point, we considered whether this was less favourable treatment, noting that what for some could be considered more favourable treatment could be, for others, less favourable. We decided that this was not less favourable treatment since it was an offer to purchase her shares (at a price significantly beyond their value). The claimant could choose whether or not to accept the offer. The act of offering the sum in question was not less favourable treatment. We applied the reasoning from **Williams** in this analysis. We accept that a benefit can on occasion be less favourable treatment but in this case the treatment was not less favourable. An employee who was not disabled would have been treated in precisely the same way as the claimant given the way in which the respondents treated those whom they considered worthy of assistance.

461. If it were less favourable treatment, the claimant's agent argued that because she had not been asked to purchase her shares before, a *prima facie* case has been established. We did not require to resort to the burden of proof provisions since we were able to identify the reason why the respondents made the offer which was in no sense because of disability. It was not a substantial or effective reason for the treatment. As the claimant's agent noted, the respondents argued that they would have supported someone in the same position as the claimant who had been off work (or otherwise impecunious) who had not been disabled. From our analysis of the facts, disability was entirely unconnected to the reason why the second (and third) respondent offered to purchase the claimant's shares; it was because they wished to provide financial support and was in no sense whatsoever because of or related to the claimant's disability. That claim is ill founded.

462. The **third act** is that on 25 and 26 February 2019 the second respondent insisted on discussing the claimant's shares and employment matters despite the claimant making it clear that she was stressed and that this was too much for her while she was unwell.

Claimant's agent's submissions

463. The claimant's agent argued that the second respondent admitted this in respect of the shares, and partially admits this in relation to the employment matters. The second respondent admitted that he was aware on 25 February that the claimant did not want to discuss the matters further. This treatment only began after the claimant became disabled. The claimant's comparator was a hypothetical one in her circumstances. She was not aware of the respondents behaving similarly to other employees. It was argued that the claimant had made a *prima facie* case that she has been treated in this way because she had become disabled. The burden of proof therefore shifted to the respondents and that had not been discharged. The claimant's agent repeated the point made above that while the claimant can appreciate there may be an argument that had the claimant been off ill but without a disability diagnosis she would have

been treated in the same way, he did not believe it bore scrutiny as at this time there was no suggestion that she would be off sick long term, and in the absence of a disability diagnosis it would seem unlikely that the same pressure would be applied to someone in relation to their capabilities/requirements for adjustments on return to work and the causes of their ill health just because they were off ill. Similarly in the absence of a disability diagnosis it would seem unlikely that the respondents would seek to acquire an employee's shares.

Decision

464. The second respondent accepted that he had spoken with the claimant on 25 and 26 February and that the claimant had said that she was stressed but he did not accept that he maintained the discussion when the claimant said she was too unwell.

465. We accepted that the health issues facing the claimant were causing her stress. Equally the claimant had chosen to engage in a discussion with the first respondent. His evidence was that on occasion he found it challenging when discussing with the claimant since on occasion she said she wished time to get better and not discuss matters and on other occasions she wished to discuss matters and sought rapid responses to issues arising. Thus during the exchange the claimant had asked the second respondent to call her back but had stated that she did not wish to discuss the issues further. The second respondent did his best to reassure the claimant as to her position in the business and balance the operational needs of the business.

466. The second respondent wanted to discuss the offer of the purchase of shares, which was because the second (and third) respondent believed that it would have been financially beneficial for the claimant.

467. We accepted the second respondent's evidence that the reason why the conversation continued was because it had not been able to reach a natural conclusion during the train discussion and it was in the interest of

both parties to understand the respective positions before naturally ending the discussion. The claimant perceived this as badgering. The second respondent considered it part of general discussion between 2 senior employees. We preferred the second respondent's position and that he ceased to discuss matters when it became clear that the claimant did not wish to proceed with the discussion.

468. In evidence the claimant stated that she "took it" from what she had heard that this was what the second respondent meant. We considered that it was the claimant's belief and perception rather than what the second respondent had actually said and in fact what he had said was as he said in his later correspondence to clarify what the position was.

469. The discussion was essentially about working together as business partners and supporting each other going forward. The claimant believed that her position was being disrespected and the decision making being taken from her which was her belief but the second respondent had been seeking to reassure the claimant and explain her role would remain available.

470. The reason why the second respondent wished to discuss matter was solely because he wanted to plan ahead operationally. We do not accept a *prima facie* case had been established as argued by the claimant just because this happened after she was disabled. Even if the burden had transferred to the respondents we concluded that they had discharged it. We were able to conclude from the evidence before us that the reason why the second respondent was asking the questions and having the conversation he did was entirely unrelated to the claimant's disability and related to her being off work and the desire to support and reassure her. It was in no sense whatsoever because of disability. That claim is ill founded.

471. The **fourth issue** is that on 26 February 2019 the second respondent stated that he could not see how the claimant can perform as a director and shareholder in an SME business, and that there would be a role for the claimant based on what her capabilities were, and that they will work

out what that role is at the time. The second respondent spoke of how the claimant's role and her shareholding were 2 separate things, and that he wanted the claimant to sell her shareholding back for £20,000. When challenged by the claimant that a decision on whether the claimant could perform as a director and shareholder with claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, with the second respondent arguing that this was his decision to make as he needed to think of what was right for the business.

Claimant's agent's submissions

472. The claimant's agent argued that the second respondent admitted this stating that he could not see how the claimant can perform as a director and shareholder in an SME business and the claimant's evidence was clear and consistent with her position at the time whereas the second respondent's evidence was vague, and inconsistent. The second respondent tried to give the impression that he was only supportive and said nothing to give the impression that there may be any change to the claimant's role. The facts, it was argued, did not support the second respondent's position.

473. It was argued she had made a *prima facie* case that she has been treated in this way because she had become disabled and the respondents had not discharged the burden. The claimant's agent argued again that he appreciated there may be an argument that had the claimant been off ill but without a disability diagnosis she would have been treated in the same way, he did not believe that bears scrutiny as at this time there was no suggestion that she would be off sick long term, and in the absence of a disability diagnosis it would seem unlikely that the same comments would be made to an employee.

Decision

474. We did not find that the first respondent had said this in the way recalled by the claimant. The discussion was around managing the business and the claimant. It was in all parties' interests for the claimant to return to work given her skills and the operational position of the business (and the fact that the third respondent could not work on other matters as intended as he was covering many of the claimant's duties).

475. There was a general discussion about the future and of concerns going forward that the second respondent had, one being that he did not want the claimant to feel under pressure to return to working long hours, as had previously been the position.

476. We found that the claimant interpreted that as being that he did not think the claimant would be fit to do so. That was, we found, the claimant's perception or interpretation as to what was said. We found that the discussion was about the claimant's general return to work, the fact a role would be there for her if and when she was fit to return and that whatever her capabilities were at the time, the second respondent would ensure a role was available for her.

477. We did not find that the second respondent stated that he could not see how the claimant could perform as a director and shareholder in an SME business. We found this for the following reasons.

478. Firstly, there was no basis for the second respondent having that belief. No information had been given to him that would allow him to make that assertion and there was no reason for him to say so, given how close he was to the claimant and his desire to continue to work with her and support her going forward. There was no reason why the second respondent would think that the claimant could not perform in the manner intended going forward, and none had been suggested to him,

479. Secondly, he was clearly of the view that the role as employee was separate and distinct from the role of shareholder. There was nothing that needed to be done as such as a shareholder. We considered it more likely

than not that an experienced professional such as the second respondent would not have suggested that the claimant would be unable to perform as a director and shareholder since that does not make sense.

480. We considered the contemporaneous evidence and the points raised by the claimant's agent but we found the second respondent's position on this more credible in the circumstances. As the issue was not established on the facts, this claim is ill founded.

Stepping back to consider the reason why the respondents acted

481. With regard to the direct disability discrimination claim generally, we took a step back to consider whether any of the treatment relied upon was in any sense because of disability. We are satisfied that the reason why the respondents acted in the way they did (as relied upon for the purposes of this claim) was in no sense whatsoever because of disability, in the sense of disability was not a substantial or effective reason for the treatment. We noted that it did not need to be the sole of intended reason but from the facts before us each of the acts relied upon in support of this claim were in no sense whatsoever related to the disability.

482. We were alert to the fact that respondents rarely overtly discriminate and that motive is irrelevant. We carefully analysed all the evidence before us (and the claimant's agent's submissions) to consider what the reason for the treatment was. We were entirely satisfied that a hypothetical comparator (who was not disabled) would have been treated in precisely the same way as the claimant was treated. Disability was in no sense whatsoever a reason for the treatment.

483. The claim of direct disability discrimination is ill founded and is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

484. We turn now to the claim under section 15 of the Equality Act 2010.

485. We shall consider each individual acts relied upon in respect of this claim to consider whether it happened and then assess whether or not the unfavourable treatment, if found, was because of something arising in consequence of a disability, namely because of ill health or absence (which we considered were or could be matters arising from a disability). We did so by focusing upon the reasoning of person who made the decision that led to the treatment relied upon.

Something arising in consequence of disability

486. Before we turn to the specific acts we considered whether or not the 3 matters said to arise as a consequence of disability did in fact do so. While this is ordinarily something considered once the treatment had been established, it made sense in this case, given the number of issues arising, to consider this first.

487. The 3 matters relied upon as something arising in consequence of disability were ill health, absence and change of attitude (of the respondents to the claimant once they knew she was disabled).

488. We found no change of attitude to the claimant by any of the respondents. Although the claimant considered there to have been a change of attitude because of her disability, there was no such change. The circumstances she believed related to the change in attitude were the consequences of the very distressed business and operational factors that created significant challenges for the respondents, which the claimant perceived as relating to her. There was no change in attitude in the sense relied upon by the claimant as a matter of fact.

489. We accepted that absence and ill health were matters that arose because of the claimant's disability. Her disability caused her to have ill health which led to her absence from work.

490. We now turn to the specific acts relied upon and whether they have been established and if so whether they amount to unfavourable treatment and

if so, whether they happened because of something arising in consequence of disability (and are not objectively justified).

Specific acts relied upon

491. **Firstly** it was alleged that the second respondent failed to meet the claimant as envisaged between 3 to 10 January 2019. It was accepted that a meeting did not take place as quickly as the claimant would have liked upon her return.

Claimant's agent's submissions

492. The claimant's agent argued that this was because of the claimant's ill health which arose in consequence of the claimant's disability. The claimant had not experienced issues with meetings that had been planned taking place previously. The third respondent suggested that the claimant was not entitled to a return to work meeting and that at that stage a meeting would not be appropriate. The second respondent stated that he had not really thought about the claimant coming back to work. It was clear on the evidence that the claimant was seeking a meeting following and during her ill health, and the respondents were aware of this, but it was not organised. It was argued that the claimant had made a *prima facie* case that she had been treated in this way because of her ill health. The burden of proof therefore shifted to the respondents to show on the balance of probabilities that she was treated as she was for a reason other than her ill health. The respondents had not done enough to discharge that.

Decision

493. We found failing to meet the claimant when she wanted to meet was unfavourable treatment. Even although there were significant pressures on the respondents and the parties were seeing each other regularly, in principle failing to meet at the time the claimant wished to meet is unfavourable treatment but we found that the failure to meet the claimant when she wanted to meet was solely because the respondents were too busy at that time dealing with operational matters. We do not require to

have resort to the burden of proof provisions since from the evidence presented to the Tribunal we are satisfied the sole reason for the failure to meet the claimant was in no sense whatsoever connected to her absence or ill health. It was solely due to the operational requirements of the business at the time which was in no sense whatsoever unfavourable treatment because of something arising in consequence of disability. That claim is ill founded.

494. The **second act** relied upon is that the second respondent on 25 February 2019 and between 13 to 20 March 2019 failed to have telephone calls with claimant as envisaged.

Claimant's agent's submissions

495. The claimant's agent noted that it was accepted that this happened and that it happened because of the claimant's ill health and absence which arose in consequence of the claimant's disability. The claimant had not experienced issues of this kind previously. The claimant had made a *prima facie* case that she has been treated in this way because of her ill health and absence. The burden of proof therefore shifts to the respondents who had not done enough to discharge that. In respect of 25 February the second respondent claimed that he did not call because he had had a long day and went to bed yet he could have called the claimant. In respect of 13 March the second respondent claims that he did not call because he was not contacting the claimant as she had not reacted well to contact. However he had indicated to the claimant that he would call her.

Decision

496. We found that the failure to have the call when the claimant expected the call was unfavourable treatment but we do not consider it correct to say that the reason why the telephone calls did not happen when the claimant wished them to happen was because of her ill health or absence. The reason why the calls did not happen at the times sought was solely because of the pressure upon the second respondent at the time in question. He had been working away from home and was extremely busy.

He was unable to call in the evening due to the time he had worked and he required to rest in respect of the first call. With regard to the second call, pressure of business resulted in him being able to return the communication as swiftly as the claimant wished. We are able to find that the reason why he did so was entirely unconnected to absence, ill health or a change in attitude. It was not necessary to resort to the burden of proof provisions since we could make clear findings as to the reason for the treatment.

497. We find that in no sense whatsoever was the failure to call the claimant because of something arising in consequence of disability. This claim is ill founded.

498. The **third act** relied upon is that the first and second respondents on 10 January 2019 and 29 March 2019 did not deal with share structure as previously discussed.

Claimant's agent's submissions

499. The claimant's agent argued that this happened because of the claimant's ill health/absence or because she complained in relation to the second respondent's conduct. The claimant's primary position was that this is victimisation because she complained in relation to the second respondent's conduct, which failing that it is unfavourable treatment due to her ill health/absence. The claimant had not experienced issues of this kind previously. It had never been suggested previously that her shares may be diluted. Up until going off ill on 10 January 2019 it had been agreed and envisaged that she would retain her 10% shareholding. She only heard that the second respondent planned the dilution on 27 March 2019, which was 19 days after she had written her email of complaint in relation to the second respondent's treatment of her. The claimant argued she had made a *prima facie* case that she has been treated in this way because of her ill health/absence. The burden of proof therefore shifts to the respondents to show on the balance of probabilities that she was treated

as she was for a reason other than her ill health/absence which had not been discharged.

500. It was submitted that the respondents' evidence was entirely unsatisfactory. The second respondent argues in his witness statement that this happened due to the claimant's performance and his wish to be in control of the company. He then said that it was nothing to do with performance. The third respondent claimed he was aware it was to do with control of the company. However when asked if consideration was given to giving the second respondent the desired control via him taking 50.1% or 51% of the company, instead of 54%, thus diluting the claimant's shares significantly less, the respondents claimed they did not think of this possibility. Similarly they say that they did not think of the possibility of the third respondent getting a marginally smaller shareholding, instead of impacting the claimant. If they were not looking to treat the claimant unfavourably or victimise her then it is not credible that this would not have occurred to them, particularly as the third respondent is an experienced accountant.

501. The claimant's agent also noted that this is also relevant to the question of whether the second respondent's actions were a proportionate means of achieving a legitimate aim. The third respondent claimed he did not think about these things too much as he did not know the claimant and the second respondent's position and history and then did not know if the claimant would be bothered, as he thought the shares had little value. However, the second respondent claimed that he knew that the claimant would be unhappy, and that the Third respondent also knew this. In addition it should be noted that prior to giving his witness statement at no time does the second respondent give the claimant or anyone else his wish to control the company as his reason for diluting the claimant's shares. He could have done so on various occasions including: when he told the claimant about the dilution on 27 March; when they spoke again later that day when the second respondent is talking about feeling that he should not be the one to take the brunt of the shares and where he tries to suggest

that the Scottish Enterprise funding is what is causing this to happen but then admits that this could be done without changing what was "originally agreed" and then finally says that what he thinks is unfair on him is the percentage of shares he is giving up, rather than anything to do with control; when she emailed to him complaining about it; during the grievance process or in the tribunal responses.

Decision

502. We decided that this was not an employment matter nor a matter that fell within the Equality Act 2010. This was a matter that related to the claimant as a shareholder and not at all in connection with her employment (for the reasons set out above). The fact the claimant was also an employee was entirely unconnected to the shareholding issue. The same treatment would have occurred had the claimant not been an employee since the issue was how the second respondent structured the shareholding of the company over which he had majority control. We found that we did not have jurisdiction to consider this issue as it fell outwith the terms of the Equality Act 2010 and section 39.

503. Even if we were wrong on that matter, we concluded that while the treatment was unfavourable (since the claimant's shareholding was diluted), the reason why the second respondent changed the position in relation to the share structure was in no sense whatsoever due to ill health or absence. It was solely down to the second respondent's perception of fairness and his belief that all existing shareholders (him and the claimant) required to proportionately reduce their shareholding to accommodate the third respondent. It was entirely unconnected to the matters relied upon by the claimant. We accepted the second respondent's evidence that the dilution in shares would have occurred whether or not the claimant was absent or disabled, which was in no sense whatsoever the reason for the treatment.

504. We reached this conclusion by carefully considering the evidence and we considered the points raised by the claimant's agent and the argument that his evidence was not credible. We found the second respondent to be credible in his explanation as to why he changed his mind. He referred to this during his discussions with the claimant at the time, referring to fairness and discussions with his family. He had been under very significant pressure and previous business failures and debt had affected him. Upon reflection and upon consideration of the paperwork that had been drawn up, he realised that the suggested approach could lead to a loss of control (particularly if he was unable to deal with his affairs, thereby creating an issue in respect of the casting vote mechanism). He decided that the fairest way to deal with the share structure to ensure he maintained control was to dilute the shareholding proportionately.

505. We carefully analysed the claimant's agent's submissions in this regard and the argument that the second respondent's explanation was incredible. We did not uphold the argument. While the second respondent could have been clearer with regard to his reasons at the time, he was clear in referring to fairness as the reason for his decision and we found that his explanation was the reason why the shareholding was structured in the way it was. He was not required to explain in any detail at the time as to his specific reasons. While his communication as to his (personal) reasons could have been clearer, we accepted his evidence. We did not accept that the absence of a clear explanation showed that the reason was something other than that advanced before us. We were able to make a positive finding as to the reason. The reason was in no sense whatsoever due to ill health, absence or change in attitude.

506. This claim is ill founded

507. The **fourth issue** was that during the first week February 2019 to 26 February 2019 – the respondents being frustrated with and unhappy with claimant's explanation of health position and pushing the claimant for responses on cause of health issues and timescale for and capabilities on return to work.

Claimant's agent's submissions

508. The claimant's agent argued that the claimant's evidence on this was clear and credible. The second respondent accepted her evidence in a number of respects. He admitted that he asked the same questions on 3 or 4 occasions. At times he denied speaking about the claimant's capabilities on return to work, but at other times he accepted that he would have been asking about this. The claimant's evidence was clear. The second respondent's was vague. If this was not direct discrimination then it was because of the claimant's ill health/absence which arose as a consequence of the claimant's disability. It was argued that the claimant had made a *prima facie* case that she has been treated in this way because of her ill health/absence. The burden of proof shifted to the respondent and had not been discharged.

Decision

509. The first issue we had to determine was whether the discussion that took place was unfavourable treatment. The threshold in respect of unfavourable treatment is low. We carefully considered the evidence and concluded that the discussion that took place, as found by us, was not unfavourable treatment. The discussion that took place was a discussion between two senior employees who regarded themselves as friends.

510. We accept that the claimant ultimately decided that she did not wish to discuss the matter further but at the time the discussion that took place was friendly and generated by both the claimant and the second respondent. Although the claimant said she did not wish to discuss matters further in her email of 8 March 2019 she also asked the second respondent to call her and chased the second respondent and criticised him for not replying quick enough. The discussion was a two way discussion about the claimant's health and the business. The discussion was not unfavourable treatment.

511. If it was unfavourable treatment, we considered the reason for it. We would have concluded that the reason why the second respondent wished to

discuss matters was solely because he wanted to plan ahead operationally. We did not consider that the reason why the second respondent said what he did was in any sense whatsoever because the claimant was absent or because of ill health. It was not a discussion that took place because of the claimant's absence or ill health. The reason why the second respondent acted as he did was not in any sense whatsoever because of the claimant's absence or ill health.

512. We applied the reasoning of Simler J from **Charlesworth v Dransfields Engineering Services Ltd** UKEAT/0197/16/JOJ to this issue. We considered this to be a case in which a factual matter that arises in consequence of disability is effectively a context for the decision; it was not in any way the effective cause of it.

513. If we were wrong on that we considered whether or not the treatment was objectively justified. Firstly we considered the aim relied upon, namely to manage the operational matters of the business in difficult financial circumstances, during a period of sustained loss making, historic under-delivery to clients, loss of clients and a trend away from the engagement of telemarketing services by the market in general, against the backdrop of a difficult economic climate for international clients caused by the pending Brexit situation at the time. The reality of this situation required significant personal financial commitment, ongoing crisis management and day-to-day fire-fighting, in an effort to save the business from failure. This involved real time decision making in the direct management of staff and customers, adapting to an rapidly evolving situation. In addition to this, the board of directors has a statutory duty to act in the best interests of the company and all of its shareholders, staff and creditors, and decisions regarding the day-to-day operations of the business were made in that context, at all times, by the executives charged with that responsibly in a high pressure situation. We considered that was a legitimate aim.

514. We were satisfied that the treatment was rationally connected to that aim, in other words the treatment was carried out with a view to achieving the aim.

515. We accepted the respondent's agent's submission that the aim corresponded to a 'real need' on the part of the employer's business. This was a burden that the respondent had to discharge. It had to show that the treatment was an appropriate and reasonably necessary way to achieve those aims. The treatment must actually contribute to the legitimate aim.

516. We considered that it had been proportionately applied. We balanced the effect of the discussion upon the claimant against the needs of the respondents.

517. We considered whether or not a lesser measure would nevertheless to serve the aim. We balanced the position of the respondents with the discriminatory effect upon the claimant and intensely analysed the position in terms of the law in this area.

518. In short we critically evaluated the respondent's position from the facts. We are satisfied the aim was legitimate and it was pursued in this issue. We are satisfied that the measure was capable of achieving the aim as it was appropriate and reasonably necessary to achieve the aim and did actually contribute to it. Finally the aim was proportionate having balanced the discriminatory effect against the aim both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).

519. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents on the facts.

520. The **fifth** issue is that on 19, 25 and 26 February 2019 – second respondent seeking to acquire the claimant's shares in the first respondent.

Claimant's agent's submissions

521. The claimant's agent argued that the second respondent accepted that he did this, and that he did so on these 3 occasions. If this is not direct discrimination then the claimant's position was that it happened because

of her ill health/absence which arose as a consequence of her disability. She was not aware of the respondents behaving similarly to other employees. The respondents had never sought to acquire her shares prior to her ill health/absence, in fact that had drawn up paperwork to bring in another shareholder without her being affected. The claimant had made a *prima facie* case that she has been treated in this way because of her ill health/absence. The burden of proof shifted to the respondents and had not been discharged.

522. It was argued that the respondents' evidence as to why they sought to acquire the claimant's shares was not satisfactory or credible. Their original position was that this was a goodwill gesture to provide financial assistance to the claimant at a time of need. However in the first week of February the second respondent informed the claimant that she was moving on to statutory sick pay, and the claimant confirmed that she was fine with this as she had income protection insurance. This happened in the same call. An offer to purchase the shares was not made at that stage, it was made some 12 days later on 19 February. It was therefore not made because of a wish to provide financial assistance at a time of financial need. The second respondent belatedly sought to argue in these proceedings that he felt there could still be a financial need because of the claimant moving house and because the income protection cover would not cover all of the claimant's salary. The second respondent, it was argued was not credible. The third respondent also claimed categorically that if they had known that she had the income protection insurance "there would have been no offer" to buy the shares. They did know that the insurance was there, and they did make an offer 10 days later. This suggested firstly that the respondents were not being honest, secondly that they are completely inconsistent in what they are saying, and thirdly that there must have been another reason for offering to buy the shares. The only reason seemed, it was submitted, to be the claimant's ill health/absence.

523. In addition the claimant's agent pointed out that the third respondent tried to suggest in his evidence that the offer to buy the shares at £20k was a way of saving him money. When it was put to him that if he wanted to give the Claimant the benefit of £20,000 to assist her then this could be done by paying her that much in salary over a period, and then moving on to statutory sick pay, without touching her shares, he conceded that this could have been done but claimed not to have thought of it. This would be unbelievable for any employer, but particularly so for an experienced accountant. This is also relevant to the question of whether the second respondents actions were a proportionate means of achieving a legitimate aim, as they were not.

Decision

524. We do not consider that we have jurisdiction to consider this shareholder dispute issue for the reasons set out above. The issue was not in any sense related to the claimant's employment but was a dispute in connection with her shareholding (and the fact she was also an employee was irrelevant and unconnected to the issue).

525. If we were wrong on that, we considered whether the act itself was an act of unfavourable treatment. We were not satisfied that the offer to give the claimant £20,000 for her shareholding (which was worth little if any by way of cash value) was unfavourable treatment. While the threshold is low and people see benefits in different things (and a benefit can in some cases be unfavourable treatment), we concluded that the offer in this case was not unfavourable treatment. It was an offer, which the claimant could (and did) refuse. Even looking at matters solely from the claimant's perspective, the offer to purchase shares was an offer to her to relinquish her shares in return for a sum of money (in excess of the value of her shares). That offer by itself was not unfavourable or detrimental. It was a positive act.

526. The offer was generous given the financial position of the company. We accept that, if accepted, the claimant would lose the shareholding she had in the company but she would have been given, in return, a sum of money

which was likely to be far more than the value of the shareholding given the precarious financial position of the business. It was an offer, not a *fait accompli* and it was for the claimant to choose herself whether she take the money and relinquish her shareholding or not. The offer itself was, in our view, not unfavourable treatment.

527. This claim is ill founded.

528. The **sixth** issue is that on 25 and 26 February 2019 – the second respondent insisting on discussing the claimant's shares and employment matters despite the claimant making clear that she was stressed and that this was too much for her while she was unwell.

Claimant's agent's submissions

529. The claimant's agent's submitted that the second respondent admitted this in respect of the shares, and partially admitted this in relation to the employment matters. The second respondent admitted that he was aware on 25 February that the claimant did not want to discuss the matters further. The claimant's evidence was clear and credible. If this was not direct discrimination the claimant's position is that it was because of her ill health/absence which arose in consequence of her disability. This treatment only began after the claimant became unwell/absent. The claimant was not aware of the respondents behaving similarly to other employees. The claimant had made a *prima facie* case that she has been treated in this way because she became unwell/absent and the respondent had not discharged the burden of proof.

Decision

530. For the reasons set out above we do not consider the treatment of the claimant with regard to her status as a shareholder to fall within the jurisdiction of the Tribunal in this claim, since that was in her capacity as a shareholder and not in any sense relating to her employment.

531. We considered whether the questions the second respondent asked (in relation to her employment and, in the event we were wrong with regard to

the foregoing, with regard to her shares) was unfavourable treatment. We accept that the bar is low but the treatment must be unfavourable. We concluded that the treatment found was not unfavourable. It was a discussion between two senior officers within the first respondent during stressful times, for both individuals. We did not consider the discussion to cross the threshold to become inappropriate in the sense of unfavourable treatment. We have taken into account the fact that the claimant perceived the discussion, after the event, to be inappropriate but from the evidence presented to the Tribunal we concluded that the discussion was friendly, caring and was aimed to achieving a balance between reassuring and supporting the claimant whilst planning ahead for the operational requirements of the business.

532. If we were wrong on that, we considered whether the reason for the treatment was because of something arising in consequence of disability, namely the claimant's absence or ill health. We considered that the reason the second respondent had the discussion with the claimant was because he wanted to plan ahead operationally which arose from the claimant's illness, absence or attitude. It would have been treatment arising because of something arising from disability.

533. We then would have considered whether or not the treatment was objectively justified. Firstly we considered the aim relied upon, namely "to manage the operational matters of the business in difficult financial circumstances, during a period of sustained loss making, historic under-delivery to clients, loss of clients and a trend away from the engagement of telemarketing services by the market in general, against the backdrop of a difficult economic climate for international clients caused by the pending Brexit situation at the time. The reality of this situation required significant personal financial commitment, ongoing crisis management and day-to-day fire-fighting, in an effort to save the business from failure. This involved real time decision making in the direct management of staff and customers, adapting to an rapidly evolving situation. In addition to this, the board of directors has a statutory duty to act in the best interests

of the company and all of its shareholders, staff and creditors, and decisions regarding the day-to-day operations of the business were made in that context, at all times, by the executives charged with that responsibly in a high pressure situation". We considered that a legitimate aim on the facts.

534. We were satisfied that the treatment was rationally connected to that aim, in other word the treatment was carried out with a view to achieving the aim.

535. We considered that it had been proportionately applied. We balanced the effect of the discussion upon the claimant against the needs of the respondents. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents. Having intensely analysed the impact upon the claimant as against the needs of the respondent we would have accepted that the aim had been proportionately achieved.

536. In short, we critically evaluated the respondent's position from the facts. We are satisfied the aim was legitimate and it was pursued in this issue. We are satisfied that the measure was capable of achieving the aim as it was appropriate and reasonably necessary to achieve the aim and did actually contribute to it. Finally the aim was proportionate having balanced the discriminatory effect against the aim both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).

537. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents on the facts.

538. This claim is ill founded.

539. The **seventh** issue is that 26 February 2019 the second respondent stating that he could not see how the claimant can perform as a director and shareholder in an SME business, and that there would be a role for

claimant based on what her capabilities were, and that they will work out what that role is at the time and the second respondent speaking of how the claimant's role and her shareholding were two separate things, and that he wanted the claimant to sell her shareholding back for £20,000. When challenged by the claimant that a decision on whether the claimant could perform as a director and shareholder with the claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, the second respondent argued that this was his decision to make as he needed to think of what was right for the business.

Claimant's agent's submissions

540. The claimant's agent argued that the second respondent admitted this other than stating that he could not see how the claimant could perform as a director and shareholder in an SME business. The claimant's evidence was clear and credible and consistent with her subsequent email of complaint. The second respondent's evidence was vague, and inconsistent trying to give the impression that he was only supportive and said nothing to give the impression that there may be any change to the claimant's role. There was a strong suggestion the second respondent was giving the claimant the impression that she would not be able to come back to the same role and he did not clarify any misunderstanding at the time.

541. If this was not direct discrimination, the claimant was treated in this way because she became ill/absent, which arose in consequence of her disability. This treatment only began after the claimant became ill/absent. The claimant was never spoken to about her abilities to be able to perform as a shareholder or director in an SME business previously, nor about her role changing in the future, nor about a wish to acquire her shares. She was not aware of the respondents behaving similarly to other employees. The claimant had made a *prima facie* case that she has been treated in

this way because she had become ill/absent and the respondent had not discharged the burden of proof.

Decision

542. We did not find this factually to have been said as alleged. There was a reasonable discussion between the claimant and the second respondent as to the position in terms of her health and the business going forward. The second respondent sought to reassure the claimant that irrespective of her health, a position would be available for her and that she need to consider that she must return to the position that hitherto existed for her (and the position that existed for the second and third respondents, namely long hours). The issue had not been made out. The discussion was not unfavourable treatment.

543. If we were wrong on that, we would have found that the discussion was unfavourable treatment which was objectively justified. The legitimate aim had been proportionately achieved given the facts facing the respondents at this time and the desire to balance the claimant's position with the needs of the respondents. We considered the discussion that took place on the evidence was necessary and pursuant to the legitimate aim relied upon. It was proportionately achieved.

544. In short, we critically evaluated the respondent's position from the facts. We are satisfied the aim was legitimate and it was pursued in this issue. We are satisfied that the measure was capable of achieving the aim as it was appropriate and reasonably necessary to achieve the aim and did actually contribute to it. Finally the aim was proportionate having balanced the discriminatory effect against the aim both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).

545. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents on the facts

546. This allegation is not therefore made out.

547. The **eighth** issue is that around 18 February 2019 the respondents disbanded a team of the claimant's reports without the claimant's knowledge, agreement or consultation.

Claimant's agent's submissions

548. The claimant's agent argued that the respondents claim this did not happen. The claimant's evidence was consistent with Ms McNee. The second respondent admitted that he became aware that the claimant had been looking to meet about this. The third respondent denied that the claimant was in touch with the business at that time. This happened without the claimant's involvement because of the claimant's ill health/absence, which arose in consequence of her disability. It would be natural for her to be involved in something like this, and she was trying to be involved.

Decision

549. We did not find that the respondents did as alleged in this issue. We accepted the respondents' evidence that this fell within the remit of the third respondent and he had not received any request from the claimant, who was certified as unfit to work, to deal with this issue. The team was not, in any event, disbanded. There was a restructure of individuals and a re-labelling of their job titles but the team was not disbanded *per se*. The claimant was not at work and was hearing information second hand, through her colleagues. She had not contacted the third respondent and when the third respondent was told that the claimant wished to be involved, that was after the decision had been taken. The fact her colleagues, who were junior to her, were asked to carry out activities that were previously under her remit and supervision was a matter entirely for the third respondent carrying out the claimant's role in an interim basis. He did his best to maximise the operational efficiency of the business. It did not impact upon the claimant's role as such.

550. We accepted the evidence of the third respondent who stated that the team had been restructured in essence changing the nature of the individuals' job titles to become more client focussed.

551. The reason the claimant was not involved in the discussion was because it was the responsibility of the third respondent at that time and he had not received a request from the claimant to discuss the matter. It was therefore entirely unconnected with the claimant's absence or illness (which was background to the reason). It was not unfavourable treatment because of something arising in consequence of disability. The claim is ill founded.

552. The **ninth** issue is that on 27-29 March 2019 the respondents proceeded with allocation of shares in the first respondent with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation in fact going against the claimant's wishes.

Claimant's agent's submissions

553. The claimant's agent argued that it is clear on the evidence that this happened. It happened because of the claimant's ill health/absence or because she complained in relation to the second respondent's conduct. The claimant's primary position was that this was victimisation because she complained in relation to the second respondent's conduct, which failing that it is unfavourable treatment due to her ill health/absence. The claimant had not experienced issues of this kind previously. It had never been suggested previously that her shares may be diluted. Up until going off ill on 10 January 2019 it had been agreed and envisaged that she would retain her 10% shareholding. She only heard that the second respondent planned the dilution on 27 March 2019, which was 19 days after she had written her email of complaint in relation to the second respondent's treatment of her. The claimant had made a *prima facie* case that she has been treated in this way because of her ill health/absence and the

respondent had not discharged the burden of proof. The respondent argued they did not consider any other way of achieving the objective

554. It was submitted that if they were not looking to treat the claimant unfavourably or victimise her then it is not credible that this would not have occurred to them, particularly as the third respondent was an experienced accountant. The second respondent had not given control as the reason at the time.

Decision

555. As this matter related to the claimant's shareholding we did not consider the Tribunal had jurisdiction to consider the matter. In any event the sole reason for the dilution of the claimant's shares (which was unfavourable treatment) was solely to ensure the second respondent retained sufficient control of the business. We accepted his evidence that this change would have occurred whether or not the claimant was at work or not and entirely irrespective of her health position or the second respondent's attitude. It was entirely unrelated to anything arising as a consequence of disability. This claim is ill founded.

556. The **tenth issue** is that 26 June 2019 – 27 August 2019 – Failing to progress the claimant's grievance in a reasonable fashion and timescale.

Claimant's agent's submissions

557. The claimant's agent argued that it was clear on the evidence that this happened. The grievance did not proceed at a reasonable speed or in a reasonable manner. The claimant's primary position is that this is victimisation because she complained about the second respondent. In the event that it is not, the claimant's position is that this happened because of her ill health/absence, which arose as a consequence of her disability. The claimant has not seen grievances move forward in this manner previously. The claimant had made a *prima facie* case that she has been treated in this way because she had become ill/absent and the respondent had not discharged the burden.

Decision

558. We considered the evidence that was led before the Tribunal. The grievance was lodged on 31 May 2019. A grievance hearing did not take place until 9 August 2019 with the outcome issued on 27 August. In isolation that looks unreasonable particularly given the terms of the grievance policy which normally required a meeting within a week and a response thereafter. However, we did not look at matters in isolation and focussed on what happened at the time.

559. The claimant was certified as unfit to work during the time she lodged her grievance (and had in fact been absence since around 10 January 2019). The day before the grievance was lodged the respondents were seeking medical information as to the claimant's fitness. That would have a material bearing on whether she was able to participate in the grievance process.

560. We also note that the issues arising in the grievance had occurred some months prior to the grievance being lodged. In fact the claimant did not progress matters from the end of March 2019 until the end of May 2019 even although the grievance related to maters earlier in the year.

561. On 3 June 2019 the claimant was told that there would be an investigation into the issues she raised and once the position with regard to her medical position was clear matters could proceed. That was chased by the third respondent on 8 June and again on 25 June. The third respondent had sought to speak with the claimant on 25 June but had not managed to contact her.

562. The occupational health report was produced on 26 June and the GP letter on around 2 July albeit the third respondent did not receive the correspondence until later since there was an issue with the inbox and the third respondent was on holiday for around 3 weeks in July. The claimant had known about the third respondent's absence.

563. On 17 July the claimant had chased the third respondent who had replied that day to explain that he was on holiday and that he would progress immediately upon his return. He did so on 26 July by thanking the claimant for her patience and chasing the GP report (which had yet to make its way to him).

564. On 27 July the claimant had told the third respondent that she was fit to participate in the grievance hearing and that if matters did not progress expeditiously (from that date) she would consider that the grievance had not been dealt with reasonably. In other words the claimant was accepting that there were legitimate reasons for the delay but she was not prepared to wait any longer.

565. Within 3 days of that communication the third respondent had written to fix a grievance meeting which proceeded on 9 August.

566. The process must also be considered against the backdrop of the very serious operational and financial challenges affecting the first respondent and the significant stress placed upon the third respondent.

567. We do not accept that the reason for the timescales in this case were because of the claimant's absence or because of anything arising from the claimant's disability (whether her absence or ill health). The reason for the timescales were due to the desire to obtain up to date information as to the claimant's fitness and to deal with the operational issues arising at the time.

568. We accepted that the treatment was unfavourable in the sense that the claimant did not wish there to be any delay in the hearing of her grievance. We considered the terms of the claimant's communication of 27 July that suggested she was prepared to accept the position to that date as reasonable (and any further delays as unreasonable). There were no unreasonable delays.

569. We then considered the reason for the treatment. We found that the reason for the delay was not in any sense whatsoever connected to the claimant's

absence or ill health. The delay was solely due to the operational issues and the seeking of information about the claimant's ability to participate in the process.

570. If we were wrong on that we considered whether or not the treatment was objectively justified. Firstly we considered the aim relied upon, namely "to manage the operational matters of the business in difficult financial circumstances, during a period of sustained loss making, historic under-delivery to clients, loss of clients and a trend away from the engagement of telemarketing services by the market in general, against the backdrop of a difficult economic climate for international clients caused by the pending Brexit situation at the time. The reality of this situation required significant personal financial commitment, ongoing crisis management and day-to-day fire-fighting, in an effort to save the business from failure. This involved real time decision making in the direct management of staff and customers, adapting to an rapidly evolving situation. In addition to this, the board of directors has a statutory duty to act in the best interests of the company and all of its shareholders, staff and creditors, and decisions regarding the day-to-day operations of the business were made in that context, at all times, by the executives charged with that responsibly in a high pressure situation". We considered that a legitimate aim.

571. We were satisfied that the treatment was rationally connected to that aim, in other word the treatment was carried out with a view to achieving the aim. We considered that it had been proportionately applied. We balanced the effect of the delay upon the claimant and intensely analysed the treatment. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents. The legitimate aim relied upon was proportionately achieved on the facts we found.

572. In short, we critically evaluated the respondent's position from the facts. We are satisfied the aim was legitimate and it was pursued in this issue. We are satisfied that the measure was capable of achieving the aim as it

was appropriate and reasonably necessary to achieve the aim and did actually contribute to it. Finally the aim was proportionate having balanced the discriminatory effect against the aim both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).

573. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents on the facts

574. We did not consider this claim to have any merit.

575. The **eleventh issue** is that between 3 January 2019 and 16 September 2019 the claimant was constructively dismissed.

Claimant's agent's submissions

576. The claimant's agent noted that technically the resignation part of the constructive dismissal cannot ground an equality act claim, it is more the actions or omissions of the Respondents that led the Claimant to resign which can.

Decision

577. As the claimant's agent noted that this was not a separate claim given the reliance was on the matters that led to the resignation which we have covered above.

578. We were satisfied that there was no unfavourable treatment that arose as a consequence of something arising from the claimant's disability. In reaching our conclusion we identified who the decision maker was and what the reason for the treatment, as found by us to have happened, was. These claims are ill founded and are dismissed.

Taking a step back

579. We took a step back and considered the section 15 claim and in light of the evidence before the Tribunal.

580. We focused on the reasoning of the person who made the decision relied upon in respect of each issue. We considered whether there was unfavourable treatment and by whom. We asked whether the respondents treated the claimant unfavourably in the respects relied on by the claimant. We considered what caused the treatment, the reason for it. We focussed on the reason in the mind of the respondent. We noted that just as there may be more than one reason or cause for impugned treatment in direct discrimination claims, there may also be more than one reason in a section 15 claim. We noted that the "something" that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the unfavourable treatment, and amount to an effective reason for or cause of it.

581. We were satisfied having taken a step back and considered the evidence before us that none of the section 15 claims had merit.

Harassment related to disability (Equality Act 2010 section 26)

582. We then turned to consider the harassment claims. We shall consider each individual issue and assess whether or not it occurred and whether or not the constituent elements of the definition of harassment as set out in section 26 are satisfied.

583. The **first issue** was that on 25 February 2019 and 13-20 March 2019 the second respondent failed to have telephone calls with the claimant as envisaged.

Claimant's agent's submissions

584. The claimant's agent argued that it was accepted that this happened. The conduct was unwanted. It related to the claimant's disability. The claimant had not experienced issues of this kind previously. The claimant has made

a *prima facie* case that she has been treated in this way because of her ill health and absence. The burden of proof therefore shifts to the respondents who had not discharged it. The failure to call the claimant had the effect of creating an intimidating, hostile and offensive environment for the claimant.

Decision

585. While the second respondent did fail to call the claimant, as we set out above, the reason for the failure to call the claimant when she wished to have the calls was in no sense whatsoever related to disability. It was solely because of the operational pressures facing the second respondent at the time.

586. In any event, we considered that failing to call the claimant did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

587. We also considered whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that although the claimant was upset that the first respondent did not call her when she wished, we did not consider that reasonably viewed the conduct had the relevant effects. The conduct in question was not unlawful disability harassment.

588. We did not consider this claim to have merit.

589. The **second issue** was that from the 1st week February 2019 to 26 February 2019 the respondents were frustrated and unhappy with the claimant’s explanation of health position and pushing the claimant for responses on cause of health issues and timescale for and capabilities on return to work.

Claimant’s agent’s submissions

590. The claimant's agent submitted that the claimant's evidence on this was clear and credible. The second respondent accepted her evidence in a number of respects. He admitted that he asked the same questions on 3 or 4 occasions. At times he denied speaking about the claimant's capabilities on return to work, but at other times he accepted that he would have been asking about this. The claimant's evidence was clear. The second respondent's was vague. The conduct was unwanted. It related to the claimant's disability. The claimant had not experienced issues of this kind previously. The claimant had made a *prima facie* case that she has been treated in this way because of her ill health and absence. The burden of proof therefore shifted to the respondents who had not discharged it.

Decision

591. We set out above why we considered this discussion to have been a reasonable attempt by the second respondent to understand the claimant's position during a cordial exchange. We did not find the second respondent to have been frustrated and/or unhappy. We did not consider this conduct to be related to disability.

592. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

593. We also considered whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset by these discussions, we did not consider that reasonably viewed the conduct had the relevant effects. It was a cordial exchange based on a two way conversation.

594. It was not unlawful harassment.

595. The **third issue** is that on 19, 25 and 26 February 2019 the second respondent sought to acquire the claimant's shares in the first respondent

Claimant's agent's submissions

596. The claimant's agent submitted that the second respondent accepted he did this, and that he did so on these 3 occasions. The conduct was unwanted. It related to the claimant's disability, even on the basis of the respondents' alleged reason and it was harassment.

Decision

597. We did not consider this to be a matter falling within the jurisdiction of the Tribunal for the reasons set out above.

598. Even if it did, we did not consider the conduct to be not unwanted conduct related to disability. The claimant may not have wished to purchase the shares but the offer did not relate to her disability. Rather it was an attempt to provide a financial benefit to assist her during a period during which the respondents considered the claimant to require financial assistance.

599. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

600. We did consider whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset that the respondents were prepared to make her an offer for her shares, we did not consider that reasonably viewed the conduct had the relevant effects. It was an attempt by the respondents to lessen the impact of the financial situation facing the claimant. This claim had no merit.

601. The **fourth issue** is that on 25 and 26 February 2019 the second respondent insisted on discussing the claimant's shares and employment matters despite claimant making clear that she was stressed and that this was too much for her while she was unwell.

Claimant's agent's submissions

602. The claimant's agent argued that the second respondent admitted this in respect of the shares, and partially admitted this in relation to the employment matters. The claimant's position is consistent with her messages to her husband. The second respondent admitted that he was aware on 25 February that the claimant did not want to discuss the matters further. The claimant's evidence was clear and credible. The conduct was unwanted and related to her disability.

Decision

603. The claim insofar as it relates to the claimant's position as a shareholder is not within the Tribunal's jurisdiction for the reasons set out above.

604. The discussion that took place (even taking account of the shareholding matter) was in our view not unwanted conduct related to disability. The claimant had a cordial discussion in connection with her health (in the sense of how she was keeping) with the second respondent, a friend and colleague. It was not related to her disability.

605. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Its purpose was to balance nurturing of the claimant with managing the operational needs of the business.

606. We then considered whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset and stressed, we did not consider that reasonably viewed the conduct had the relevant effects. It was a cordial exchange based on a two way conversation between friends and business partners. From the evidence before us we did not consider that it was reasonable to consider the conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

607. The **fifth issue** is that on 26 February 2019 the second respondent stated that he could not see how the claimant can perform as a director and shareholder in an SME business, and that there would be a role for claimant based on what her capabilities were, and that they will work out what that role is at the time and the second respondent speaking of how claimant's role and her shareholding were 2 separate things, and that he wanted the claimant to sell her shareholding for £20,000. When challenged by the claimant that a decision on whether the claimant could perform as a director and shareholder with the claimant indicating that all of her healthcare professionals had said that she would return to an acceptable level of performance, the second respondent argued that this was his decision to make as he needed to think of what was right for the business.

Claimant's agent's submissions

608. The claimant's agent argued that the second respondent admitted this other than stating that he could not see how the claimant could perform as a director and shareholder in an SME business. The claimant's evidence in this respect was clear and credible. The conduct was unwanted. This treatment only began after she became ill/absent and it related to her disability. It was unlawful harassment.

Decision

609. This had not been factually made out. We found the second respondent had not said the claimant could not perform as a director and shareholder. We preferred the evidence of the second respondent in this regard. On that basis this claim fails. We found no unwanted conduct that related to disability.

610. The **sixth issue** was between 8 and 13 March 2019 the second respondent was slow to respond to written communication from the claimant.

Claimant's agent's submissions

611. The claimant's agent argued that this did happen. The claimant sent the second respondent an email of complaint which followed upon a conversation and WhatsApp message on 26 February 2019 which would have left the second respondent in no doubt that the claimant was unhappy with his conduct. The conduct was unwanted. The second respondent failed to reply from a Friday early morning to a Monday evening. This happened because of the claimant's ill health/absence. It was unlawful harassment.

Decision

612. While the timing of the response was not satisfactory to the claimant, the second respondent sought to respond when he was able to do so. It was not conduct related to disability since the reason for the delay was solely due to operational issues affecting the first respondent.

613. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

614. We considered whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset, we did not consider that reasonably viewed the conduct had the relevant effects. Given the factual matrix of this case it was not reasonable for the claimant to have the effects. There was a justification for the position. The delays were not unreasonable on the facts. This claim is ill founded.

615. The **seventh issue** was that on 13 March 2019 the second respondent requested that matters be dealt with by phone and not in writing.

Claimant's agent's submissions

616. The claimant's agent argued that it was accepted this happened. The conduct was unwanted. This happened because of the claimant's ill health/absence and related to her disability. It was unlawful harassment.

Decision

617. We did not consider this to be conduct related to disability. It was the second respondent asking the claimant to draw a line under matters and cease unnecessary protracted correspondence about the issues arising. We did not consider that the treatment was unwanted conduct related to disability. The second respondent had hoped that the parties could draw a line under any misunderstanding or concerns and work together going forward. He wished to avoid unnecessary correspondence and work together, in a cordial way, by telephone if necessary unless something required to be communicated in writing. That was not conduct related to disability.

618. In any event the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

619. We also found that the conduct did not have that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset, we did not consider that reasonably viewed the conduct had the relevant effects. It was a reasonable way for the second respondent to try and move things on and avoid needless written exchanges given the facts of this case. It was not unlawful harassment.

620. The **eighth issue** was from 13 March 2019 to date of the second respondent accusing the claimant of making unfounded allegations in respect of what was said by second respondent to the claimant on 25/26 February 2019 with the second respondent claiming the claimant had misheard him due to phone signal.

Claimant's agent's submissions

621. The claimant's agent argued that it was accepted this happened. The conduct was unwanted. This happened because of the claimant's ill health/absence. It related to her disability and was unlawful harassment..

Decision

622. We do not accept the claimant's agent's arguments that this conduct was accepted as having occurred by the second respondent. The second respondent set out what he had understood the position to be, to avoid any misunderstanding. That was not conduct related to disability. It was conduct by the second respondent to avoid uncertainty and was in no sense whatsoever related to disability.

623. We also found that what the second respondent said was true. It did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and it was not reasonable for the conduct to be regarded as having such effects.

624. The **ninth issue** is that on 13 March 2019 the second respondent accused the claimant in writing of upsetting him and making comments about him which he claims are untrue.

Claimant's agent's submissions

625. The claimant's agent argued that it was accepted this happened. The conduct was unwanted. This happened because of the claimant's ill health/absence and complaint about how she was being treated. It related to her disability and was unlawful harassment.

Decision

626. We found that the comments the second respondent made were accurate. It was not conduct related to disability. The conduct did not have the

purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

627. Given the comments were accurate we did not consider that the conduct we found happened had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

628. The **tenth issue** is that between 27 and 29 March 2019 the respondents proceeding with the allocation of shares in the first respondent with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation and going against the claimant's wishes.

Claimant's agent's submissions

629. The claimant's agent argued that it was clear on the evidence that this happened. The conduct was unwanted. It happened because of the Claimant's ill health/absence or because she complained in relation to the Second respondent's conduct and was unlawful.

Decision

630. For the reasons set out above we did not consider the Tribunal had jurisdiction to deal with the issue in relation to the claimant's status as a shareholder.

631. If we were wrong on that we considered that the conduct was unwanted but it did not in any sense whatsoever relate to disability. It related solely to the second respondent seeking to ensure he had and retained sufficient control for the reasons we set out above. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

632. We then considered whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and

whether it is reasonable for the conduct to have that effect. We found that while the claimant was unhappy that her shareholding had been diluted, we did not consider that reasonably viewed the conduct had the relevant effects. It was a matter that fell within the first respondent's rights under corporate law as a 90% shareholder and was carried out for the purposes we set out above.

633. The **eleventh issue** is that between 26 June 2019 and 27 August 2019 failing to progress the claimant's grievance in a reasonable fashion and timescale.

Claimant's agent's submissions

634. The claimant's agent argued that it was clear on the evidence that this happened. The grievance did not proceed at a reasonable speed or in a reasonable manner. The claimant's primary position was that this is victimisation because she complained about the second respondent. In the event that it is not, the Claimant's position is that this happened because of her ill health/absence and complaint, and is therefore related to her disability. .

Decision

635. From the facts before the Tribunal we found that the grievance was progressed in a reasonable timescale. It was not conduct related to disability but related to the operational demands of the business given the facts of this case.

636. The conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

637. We did consider whether the conduct had that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. We found that while the claimant may have been upset with the delay, she had stated that *further*

delays from the moment of her correspondence would be considered by her unreasonable. There were no further delays from that point. This was not unlawful harassment.

638. The final act was whether or not the claimant's alleged constructive dismissal was said to be an act of unlawful harassment but the claimant's agent (in our view correctly) confirmed that this was not being relied upon as a standalone act of harassment. As we find below, the claimant was not, in any event, constructively dismissed.

Taking a step back

639. We took a step back to consider the harassment claims generally. We spent a very considerable period of time considering the evidence led before the Tribunal, including the witness evidence and the productions to which our attention was directed and the parties' submissions. We considered the claimant's agent's submissions very carefully. For the reasons set out above we considered the conduct did not amount to unlawful harassment. Even if the conduct was unwanted and even where it did relate to disability we did not find that the constituent elements of the definition were satisfied applying the law.

640. We were alive to the fact that respondents rarely overtly discriminate and motive is irrelevant. We carefully analysed all the evidence before us (and the claimant's agent's submissions) to consider whether the conduct unwanted and whether it related to harassment and whether or not it had the proscribed effects. We were satisfied it did not in each individual case.

641. The harassment claims are ill founded and are dismissed.

Victimisation (Equality Act 2010 section 27)

642. Turning now to the victimisation claim, we consider firstly the protected acts relied upon and then whether or not the acts relied upon as detriments amounted to unlawful victimisation as required by section 27.

Protected acts

643. The first issue is to consider whether or not the acts relied upon, so far as not conceded, amount to protected acts**.**

Claimant's agent's submissions

644. It was submitted by the claimant's agent that all of these are protected acts on the basis that the second respondent accepted that at these times he was aware that the claimant was being treated unfairly for a reason connected with her disability. This would have been clear to the second respondent in the circumstances, even on the basis of what he claims the claimant said to him on 26 February. It was not necessary for the claimant to have stated specifically that she believed that there was a specific breach of the Equality Act.

Our decision

645. The **first act** relied upon was the telephone conversation between the claimant and the second respondent of 26 February 2019. There were no submissions as to what it was that was alleged to have been said by the claimant that satisfied the requirements set out in section 27(2) of the Equality Act 2010 but we considered the evidence carefully and applied the law. From the facts we found the claimant did not at any point during that call make any allegation (whether or not express) that there had been a breach of the Equality Act 2010. We do not accept that the discussion amounted to a protected act. The first act was not therefore a protected act.

646. The **second act** relied upon was the email from the claimant to the second respondent dated 8 March 2019. We considered this email carefully. The claimant believes that the first respondent was seeking to procure her exit from the business. She does not expressly suggest that the actions amount to unlawful discrimination at that stage but she clearly believed that she had been treated unfairly and within the context known to the second respondent we considered that the email could be regarded as the

claimant making an allegation (whether or not express) that there was a breach of the Equality Act 2010. The second act was therefore properly to be regarded as a protected act.

647. The **third act** was the email from the claimant to the second respondent dated 27 March 2019 and second telephone conversation between them of same date. We considered these communications carefully.

648. During the telephone call operational related work matters were discussed as were the claimant's shares and the need for a meeting to issue the shares (and thereby dilute the claimant's shares). The claimant explained that she had not agreed to a reduction and that the third respondent had not been brought in on that basis and she gave the second respondent 2 options to consider and 24 hours to revert to her. Firstly she would consider a resolution in terms of departing from the business and selling her shares and secondly if he proceeded to distribute the shares without her consent she would seek legal advice.

649. The claimant said that she felt she was being backed into a corner. The second respondent said that he did not wish that and wanted the claimant back in the business, He noted that he had to make decision about the business and himself. He explained that in the past he had not put himself first and while there had been discussions before about the position he did not consider that to be fair on him. He apologised for the timing of it but to get input from Scottish Enterprise they needed to move forward.

650. The second respondent said that he was no longer putting himself last any more as he had been making a large amount of personal sacrifices. He explained that he did not want to be the one taking all the brunt.

651. The claimant also explained that she needed to put herself first. The second respondent explained that he accepted that and that despite what she thought he had sought to put her first in his thoughts and actions. He explained that it was unfortunate that he phoned her from the train but that he had been so busy.

652. The second respondent noted that at the moment the business is worth "absolutely nothing.. it's not got a value". He indicated he would speak to the third respondent, given the investment he had made into the business.

653. The claimant said that some of the things the second respondent said had really hurt her. He asked what and she said "such as that you don't see how I can perform as a director and shareholder and you don't see how I can return and do my job". The second respondent said "that's not what I said. What I said was I didn't see how you could come in and work the type of hours that Colin and I are working and nor would I want you to do that because it wouldn't be good for your health. That's what I said. Now maybe the line on the train and again that is my fault. I feel it was quite out of context. I do want you back in the business I said that on the call."

654. The claimant explained that she wanted to recover and the second respondent explained that this was critical to the business ongoing environment and had to be resolved.

655. The claimant asked if the original agreement could still be processed, her retaining 10% shares, which the second respondent said could but that it was not fair on him. The second respondent explained that he was genuinely sorry for any stress the claimant suffered .

656. There was nothing discussed during that phone call in connection with bringing proceedings, giving evidence or information in connection with proceedings, doing anything in connection with the Equality Act or making an allegation (express or otherwise) that there had been a breach of the Equality Act. The claimant believed she was being "backed into a corner" and was not happy with the share dilution but there was never any suggestion by her such action breached the Equality Act or was connected to it in any way.

657. The email of 27 March 2019 from the claimant to the second respondent referred to the shares and the dilution. She said: "had I not been absent from the business due to my ill health we would not be having this

conversation". While this is finely balanced, we are prepared to accept that taken in context, the claimant had set out in that email an implied allegation that the action was a breach of the Equality Act 2010, since she was absent by reason of disability and she was saying the actions were arising from her absence. On that basis we considered the third act to amount to a protected act and considered it accordingly in the remainder of our judgment.

658. The **fourth act** was the claimant's solicitors' email to the second respondent dated 12 April 2019 which was accepted by the respondents to amount to a protected act.

659. The **fifth act** was the claimant's written grievance dated 31 May 2019 which was also accepted to amount to a protected act.

660. The **sixth act** was the claimant's resignation email dated 16 September 2019 which was accepted as protected act.

661. There was no dispute that the respondent knew the claimant had done or might do protected acts in terms of the second to sixth acts.

662. We considered the actions arising below and whether or not any of the protected acts were in any sense related to the decisions taken or whether the respondents believed the claimant had done or may do a protected act as we have found above.

The reason for the treatment

663. The next issue to determine is whether the acts relied upon as detriments occurred and whether the reason for the acts was the protected act (or because the respondents believed the claimant was going to do or had done a protected act).

664. The **first act** relied upon is between 13 and 20 March 2019 the second respondent failing to have a telephone call with the claimant as envisaged.

Claimant's agent's submissions

665. The claimant's agent argued that it is submitted that the "obvious explanation" for each of the detriments relied upon was that the claimant complained about the second respondent's conduct. The respondents knew that the claimant had done a protected act or that she may do so, and they reacted by doing what they did, closing ranks, denying her allegations when they knew them to be true, and following a grievance process which was unfair and designed from the outset to result in the important elements of the claimant's grievance being refused. It was submitted that there was no other sensible explanation for the fact that an experienced HR Adviser prepared an investigation report after only meeting with the second respondent which contained findings and conclusions.

666. It was argued that the claimant had made a *prima facie* case that she has been treated in the above ways because of her complaints against the second respondent. The treatments only occur after the claimant has submitted her complaints and the burden had passed to the respondent who had not discharged it.

Decision

667. We found that the reason why the telephone calls did not occur was because of the demands placed upon the second respondent's time. We did not consider any of the protected acts to be in any sense related to the second respondent's actions. The protected acts were entirely unrelated to the reason for the delays. That claim is ill founded.

668. The **second act** was that between 8 and 13 March 2019 the second respondent was slow to respond to written communication from the claimant.

669. We did not consider the reason for the time to have responded to the claimant to be in any sense whatsoever connected to any of the protected acts. The second respondent did his best to respond given the challenges

he faced and his attempts to keep the business afloat while communicating in an appropriate fashion with the claimant. While the claimant may not have been satisfied with the time taken, the reason for the delay was entirely unconnected to any protected act. That claim is ill founded.

670. The **third issue** was that on 13 March 2019 the second respondent requested that matters be dealt with by phone and not in writing.

671. We were not satisfied that this was a detriment given the background in this case. The claimant at the time wished to respect the request that matters of the nature in question be dealt with verbally rather in writing, thereby avoiding increasing the inbox of the recipients and ensuring matters are dealt with promptly. That was in no sense unfavourable towards the claimant and was to her advantage.

672. Even if the treatment was detrimental, we did not consider that the protected acts were in any sense whatsoever a reason for the treatment. The reason why the second respondent did not want further correspondence was because he wanted the parties to move on and draw a line under previous disputes and ensure any future discussion was by telephone. That was in no sense whatsoever related to any protected act.

673. The **fourth issue** was from 13 March 2019 the second respondent accusing the claimant of making unfounded allegations in respect of what was said by the second respondent to the claimant on 25/26 February 2019, with the second respondent claiming the claimant misheard him due to phone signal.

674. We found that what the second respondent had said was accurate. The treatment was not detrimental. In any event what the second respondent said was not because of any protected act. It was a discussion between two senior employees and friends about ongoing issues and managing the business going forward with the protected acts in no sense whatsoever a reason for the treatment.

675. The **fifth issue** was on 13 March 2019 the second respondent accusing the claimant in writing of upsetting him and making comments about him which he claims are untrue.

676. We found the second respondent to be correct in what he said and it was not detrimental treatment. The reason the second respondent said what he did was in no sense whatsoever due to any protected act but represented what he understood the position to be.

677. The **sixth issue** was between 27 and 29 March 2019 the respondents proceeding with allocation of shares with the effect of diluting the claimant's shareholding, the allocation being dealt with differently to what had been discussed previously, all without giving the claimant reasonable notice or consultation in fact going against her wishes.

678. For reasons set out above we did not consider we had jurisdiction to consider this claim as it related to the claimant's status as a shareholder and in no sense related to her employment.

679. If we were wrong as we set out above, the sole reason for the dilution of the shares was because the second respondent wished to retain sufficient control of the business. We take account of the claimant's agent's comments that this was the first contact after the complaint complained about his conduct and the second respondent denied the allegations but from the facts before the Tribunal we are satisfied the reason for the treatment was entirely unrelated to any protected act.

680. The **seventh issue** is from 21 April 2019 withdrawing the offer of £20,000 for the claimant's shares.

Claimant's agent's submissions

681. The claimant's agent argued that that the respondents' position on this was "incredible in the extreme". They argued that the offer was not withdrawn, but the second respondent and Mr Sutherland agreed that an

offer was made, there was then a complaint and negotiation on the possibility of severance, this did not lead to agreement, and on asking whether the offer was still open, and the answer was no, but that if the claimant wished to instruct and pay for a valuation of her shares (which the respondents viewed as worthless) then she could. This happened on the back of the claimant's solicitors sending their legal letter to the respondents. If the respondents had intended to make a goodwill offer to help the claimant in a difficult time to buy shares that they say were worthless, and the business position of the respondents continued to be bad, the only thing that changed that led to them not being willing to maintain the offer was the fact that the claimant had complained and had a legal letter sent.

Decision

682. Given this related to the claimant's shareholding and not as an employee we did not consider we had jurisdiction to consider this.

683. If we were wrong on that we considered the claimant's agent's submissions carefully. We accept that the denial of the offer being withdrawn appears anomalous but the correspondence did show that if the claimant had accepted the offer of obtaining a valuation of her shares and shown that they were of value, the respondents would have considered the matter but by this stage the claimant had essentially rejected the offer. She stated this expressly in her email of 25 February 2019.

684. Notwithstanding the uncertainty over the offer, we accepted the third respondent's evidence that the reason why the £20,000 was no longer available was because the financial position of the parties had materially changed. The third respondent had invested vast sums into the first respondent. It was from those sums of his personal savings that the third respondent had intended paying the sum to the claimant. He simply did not have the cash available from 21 April 2019 onwards to pay the claimant. He believed the offer that had been made to the claimant had been rejected by her and the circumstances had materially changed.

685. We did not consider that in fact to be anomalous. The offer had been intended as a goodwill gesture to assist the claimant at the time it was made. She did not wish to discuss the matter and decided not to accept it. When the matter was raised again the financial position had changed, both of the third respondent (who was funding the matter) and the first respondent. The reason why the offer was not reiterated was therefore due to the impecuniosity of the third respondent. It was in no sense whatsoever due to any protected act.

686. The **eighth act** was from 31 May 2019 to 23 September 2019 the third respondent failing to deal with the claimant's grievance reasonably and impartially by not arranging for grievance to be heard by someone impartial; not taking into account information supplied by the claimant (including her comments in initial investigation notes, and her notes of the telephone conversation with the second respondent of 26 February); not investigating the matters complained of properly with the second respondent; not taking a written statement from the second respondent and not exhibiting such a statement to the claimant; not interviewing Ms McNee; not taking into account information known to the third respondent in relation to the grievance regarding the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team; the third respondent not giving a witness statement; coming to an unreasonable decision on the facts; not meeting with the claimant to discuss resolution as indicated; having EmployEasily essentially deal with the grievance despite the claimant having made clear she did not want them to and the claimant being told that the third respondent was dealing with it and ignoring EmployEasily's investigation finding where this was unfavourable to the respondents.

Claimant's agent's submissions

687. The claimant's agent argued that it seems clear on the facts that Mr Sutherland must have been instructed to come to conclusions which were unfavourable to the claimant from the outset. The grievance outcome was predetermined. There was no effort to fully progress the grievance issues.

Decision

688. In assessing this matter we must view the facts from the perspective of the parties at the time the matters occurred.

689. The second respondent took no material role in dealing with the grievance. Matters were remitted to the third respondent to manage and he had relied upon the first respondent's HR Business Partner to assist in managing matters which was what they had been paid to do. It was not unreasonable to do so and that organisation was not biased as suggested by the claimant. Given the size of the first respondent and issues arising, the approach taken in dealing with each of the issues relied upon was not unreasonable or unfair.

690. We carefully looked at the evidence and concluded that in no sense whatsoever was any protected act the reason why the respondents acted in the way they did. The third respondent followed the guidance and advice of the HR business partner. He considered all the evidence that was placed before him. He sought the comments of the claimant and took them into account. He was not satisfied with the information she had presented nor her response and he chose to prefer the position of the second respondent. He did not require to speak with Ms McNee as the third respondent had direct knowledge of the issues.

691. We do not accept the submission that Mr Sutherland was instructed to come to the conclusions that he did or that the outcome was predetermined. The correspondence dated 3 June 2019 made it clear that a preliminary investigation would be undertaken and the claimant would then have the opportunity to present her position. It would clearly have been preferable for the initial report to have been sent to the claimant before the hearing but it was for the third respondent to determine how best to deal with the grievances before him. He did so to the best of his abilities amidst very challenging circumstances.

692. We accept that there were some errors in the reasoning, such as the suggestion that there were no witnesses given there was one witness in

respect of one of the allegations but ultimately it was a matter for the third respondent to assess. The failure to carry out a perfect process (as set out in the issue above) was not unreasonable. He believed what he had been told by the second respondent notwithstanding the information the claimant presented. On that basis the process followed was not unreasonable.

693. While a perfect process would have involved an impartial person to determine the grievance, and each of the points set out in the issue above would have been carried out, given the size and resources of the business, it was not unreasonable to have the third respondent determine the issue upon first instance in the way he did in our view. The grievance was substantially about the second respondent. The claimant was given the opportunity of an appeal to an independent third party. He reached a conclusion and adopted a process that was reasonable on the facts.

694. In all the circumstances and having carefully balanced the factors from the facts we found, we do not consider that the treatment relied upon in this claim amounted to a detriment. The respondents followed a fair process in the circumstances which was not disadvantageous to the claimant.

695. Given that issue was finely balanced, we then considered the reason why the process was followed in the way it was (and why the treatment relied upon occurred). We find that the protected acts relied upon were in no sense whatsoever a reason for the treatment in this issue. The third respondent adopted the process he did solely because of the operational issues arising and his desire to ensure a reasonable and fair process was followed. It was in no sense whatsoever connected to any of the protected acts. This claim is therefore ill founded.

696. The **ninth act** was from 3 June 2019 to 11 September 2019 by lying and misrepresenting matters in response to the claimant's grievance during the grievance process, through the information provided by the second respondent in relation to the matters complained of in the grievance, and through the decision reached on the matters complained of.

697. We did not find that there was mistruths in response to the claimant's grievance. The second respondent did his best to provide his response.

698. In any event we would have found that each of the protected acts relied upon were in no sense whatsoever the reason for the second respondent's approach to the grievance process given the challenges facing the business at the time. He gave his recollection as he saw it and the protected acts were entirely unconnected to his conduct. This issue is not made out.

699. The **tenth issue** is from 26 June 2019 to 27 August 2019 failing to progress the claimant's grievance in a reasonable fashion and timescale

700. As set out above we did not find this to be unreasonable. In any event we found that the reason for the way in which the grievance was progressed was in no sense whatsoever related to any of the protected acts. This issue has not been made out.

701. The **eleventh issue** is from 7 June 2019 to 27 August 2019 refusing to allow the claimant's grievance to be heard by someone impartial.

702. We concluded that it was detrimental on the face of it to have the third respondent hear the claimant's grievance (albeit on the facts of this case it was reasonable for the respondents to have adopted the process they did). We considered the reason why the process that was adopted was adopted and were satisfied that the reason why the claimant's grievance was not heard by an external party (as the claimant wanted) was in no sense whatsoever due to any protected act. It was due to the third respondent wishing to deal with matters fairly and economically. None of the protected acts had any connection whatsoever to this matter. The claim is ill founded.

703. The first respondent was a small business. It was perilously close to insolvency. It had agreed a retainer with an HR business partner with a view to support for employment law and HR related issues. The grievance that was raised was by and large about the second respondent, who was not materially involved in the decision making process.

704. The claimant's concern was that the HR business partner be the chair of the grievance. The decision maker was in fact the third respondent. The claimant had been told about this. She accepted the position, albeit under reservation.

705. Had the outcome been to the claimant's satisfaction matters would have ended there without further cost. Equally if the claimant was unhappy with the outcome she had the option of an appeal to an independent third party.

706. This was a decision taken solely on grounds of cost and expedition and was entirely unconnected to any protected act.

707. The **twelfth issue** was between 3 June 2019 and 23 August 2019 the third respondent misled the claimant in relation to how her grievance would be dealt with, by giving her the impression that the third respondent would investigate and make the decision.

708. We did not consider this to represent the position fairly. The claimant was not misled. The third respondent set out the position clearly in his communications to the clamant and in particular his letter of 30 July 2019. It was reasonable to utilise the internal HR function, which in this case was outsourced to a third party, to investigate matters. The letter that was issued on 3 June 2019 made it clear that preliminary investigation would take place before meeting with the claimant.

709. We did not consider the communication of the matter to amount to a detriment since it fairly and accurately set out the position.

710. Even if it was detrimental, we were satisfied that the conduct was in no sense due to any of the protected acts relied upon. The third respondent explained who would deal with the grievance and none of his acts from the evidence we found were in any sense, other than minor or trivial, because of the protected acts.

711. The **thirteenth issue** was between 1 June 2019 and 11 September 2019 the third respondent failing to investigate the claimant's grievance properly and consider the relevant issues arising from the grievance by not taking

into account information supplied by the claimant (including her comments in initial investigation notes, and her notes of the telephone conversation with the second respondent of 26 February; not investigating the matters complained of properly with second respondent; not interviewing Ms McNee not taking a written statement from the second respondent and not exhibiting such a statement to the claimant; not taking into account information known to the third respondent in relation to the grievance regarding the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team; the third respondent not giving a witness statement; and ignoring EmployEasily's investigation finding where this was unfavourable to the respondents.

Claimant's agent's submissions

712. The claimant's agent argued that it "seemed clear" on the facts that Mr Sutherland must have been instructed to come to a conclusion against the claimant from the outset. The grievance outcome was predetermined. The third respondent made no effort to fully progress the grievance.

Decision

713. We accepted that the claimant was unhappy with how the process was conducted and the outcome. To that extent we accepted that it amounted to a detriment. We did not consider the criticisms of the process to be fair. As we set out above, while the approach was not perfect, it was not unreasonable given the facts of this case.

714. Even if it were a detriment, we were satisfied from the evidence that the reason for the way in which the process was handled was entirely unconnected to any of the protected acts relied upon. The third respondent preferred the position advanced to him by the second respondent. That was a course open to him. With regard to Ms McNee, as the third respondent made the decision himself he did not require to speak with her as the matter was entirely within his direct knowledge. His approach was reasonable in the circumstances of this case. His approach was not

connected in any sense to any of the protected acts. This issue is not made out.

715. The **fourteenth issue** was from 1 June 2019 to 11 September 2019 the third respondent ignoring and/or failing to take into account relevant information provided by the claimant in relation to her grievance, by: not taking into account information supplied by the claimant (including her comments in initial investigation, and her notes of the telephone conversation with Second respondent of 26 February).

716. We considered the evidence before the Tribunal and did not accept that the third respondent ignored the evidence of the claimant. He took account of the information before him and chose to prefer the evidence of the second respondent. That was a matter for him. It was not in any sense due to or connected with any of the protected acts relied upon whatsoever. The factual basis of this claim is not made out.

717. The claim was essentially that the third respondent did not conduct the grievance hearing in a more substantial way or provide greater reasons for his decision. We did not consider the approach taken to be detrimental to the claimant. The third respondent offered the claimant a meeting during which he would have explained the reasons he adopted in more detail. He did his best to respond to the questions put to him in writing.

718. In no sense whatsoever were the protected acts a reason for the treatment. The third respondent dealt with the grievance as best he could, given the demands placed upon him at the time. The protected acts were in no sense whatsoever connected to his conduct. This issue is ill founded.

719. The **fifteenth issue** was between 3 June 2019 and 27 August 2019 ignoring and/or failing to take into account relevant information provided by the first respondent's HR Advisers namely the part of their finding in favour of the claimant, if the respondents' position as to who decided the claimant's grievance is correct.

720. The reason why the HR adviser had partially upheld the grievance about the offer to purchase her shares being related to her diagnosis was

because the HR adviser considered that the claimant perceived there to have been a connection between the offer to purchase her shares and the diagnosis but the third respondent having considered all the evidence determined that it was not possible to uphold the allegation at all. The allegation was not about the claimant's perception but about the reason for the treatment. The third respondent was not satisfied that the claimant's grievance had merit: it was her word against the second respondent's and on that basis he dismissed it.

721. That was a course open to him. While it was a decision that was unfavourable to the claimant, and in that sense a detriment, we did not consider any of the protected acts to be connected to the treatment in any way whatsoever. The protected acts were entirely unrelated to the treatment. This claim is ill founded.

722. The **sixteenth issue** was from 3 June 2019 to 11 September 2019 failing to take into account information relevant to the claimant's grievance which was within the respondents' knowledge, namely: the time taken to seek medical reports; what the second respondent said and did to the claimant in February 2019; information known to the third respondent in relation to the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team.

723. We did not consider the third respondent to have failed in this regard. The third respondent did his best in considering the evidence available to him and he issued a reply. The reason why the third respondent did what he did was, in our view from the evidence, in no sense whatsoever connected to the protected acts relied upon. The issue is ill founded.

724. The **seventeenth issue** is that between 3 June 2019 and 27 August 2019 the third respondent purporting to come to a decision on a grievance when being a witness to certain grievance allegations under consideration, and ignoring the knowledge held as a result of being that witness in relation to the offer to purchase the claimant's shares, the dilution of the claimant's shares, and the disbanding of the claimant's team.

725. We found that the third respondent came to a decision from the evidence before him. We accepted that the process could have been clearer and more detailed reasons given to the claimant for the decision that was reached and that would have been what happened had the claimant accepted the offer of a meeting for the third respondent to do so. From the facts before the third respondent he reached a decision that was open to him on the substantive points.

726. In any event none of the protected acts relied upon was in any way connected to the decision. There were in no sense whatsoever the reason for the actions. This claim is ill founded.

727. The **eighteenth issue** was between 3 June 2019 and 27 August 2019 accusing the claimant of making false allegations in her grievance.

728. We did not consider the allegations to have been false. The second and third respondents did their best during this process and did not make false allegations.

729. Even if there were inaccuracies we were satisfied that the protected acts relied upon were in no sense whatsoever connected to the treatment.

730. This claim has not been made out. It is ill founded.

731. The **nineteenth issue** is that on 27 August 2019 the third respondent arrived at an unfair and unreasonable decision on the claimant's grievance.

732. We did not consider this issue to have been made out. We did not consider the outcome to have been unfair and unreasonable. It was based on the information available to the third respondent and was a conclusion open to him. We found the third respondent did his best to reach a conclusion in respect of each of the grievances from the information before him.

733. In any event the decision reached was entirely unconnected to any of the protected acts relied upon and this claim has no merit.

734. The **twentieth issue** is that on 27 August 2019 the third respondent failed to meet with the claimant to discuss resolutions to the claimant's grievance when it had been indicated that this would happen.

735. We found that the third respondent had said he would arrange to meet with the claimant if he needed a further meeting. He did not need a further meeting and as a result no meeting took place. He did offer to meet with the claimant to explain his reasoning following the issuing of his decision. The third respondent offered the claimant a meeting to explain his reasons. The claimant was not therefore subjected to a detriment on the facts we found.

736. We considered the reason for the treatment and concluded that the treatment was in no sense whatsoever related to any of the protected acts relied upon. The third respondent sought to progress the grievance expeditiously and explain his reasons as best he could. He offered to meet the claimant to explain his reasons further if needed. The protected acts were entirely unconnected to the reason for the treatment in this claim. The claim is ill founded.

737. The **twenty first** issue is between 27 August 2019 and 11 September 2019 the third respondent failing to respond properly to queries raised by the claimant following the grievance decision in relation to disclosure of statements and information collated by the third respondent or Mr Sutherland during the grievance process, why Mr Sutherland had been so involved in the grievance process, why Mr Sutherland had upheld part of the claimant's grievance but the third respondent had not, and why the third respondent had given no input on the grievance in relation to what he knew about the agreement as to how shares were to be allocated.

738. We did not consider this issue to have been established. The third respondent gave the reasons for his decision. He offered the claimant a meeting to discuss the reasons in more detail, if she wished. He tried his best to respond to the questions asked but he reasonably considered that the claimant was essentially challenging the outcome of the grievance and those issues were more properly a matter for an appeal. He did provide all

the material he had relied upon, even although, technically he was not required to.

739. Given the operational issues and the perilous financial position of the first respondent, it was not unreasonable for the third respondent to limit the time and resources available and focus on the first respondent, while offering the claimant a meeting, and seeking to respond, as best he could, in writing to the issues raised.

740. We found that the protected acts were entirely unconnected to the reason for the actions. They were in no sense whatsoever the reason for the treatment. This claim has no merit.

741. The **twenty second** issue is on 11 September 2019 the respondent unilaterally decided to move the claimant on to a grievance appeal. We found that the third respondent concluded from the responses he received from the claimant that she was challenging the decision and therefore considered that she wished to appeal. The claimant accepted that an appeal would have been beneficial to her. We did not consider the decision to progress an appeal to be detrimental to her. It was an act that was in her favour. She indicated that she was prepared to appeal and therefore the conduct was not unwanted. The reason why the third respondent did this was solely because the claimant was clearly unhappy with the outcome. The protected acts played no part whatsoever in the reason for the treatment.

742. The **twenty third** issue was from 16 September 2019 failing to take any steps to progress the claimant's grievance appeal.

743. This was not a matter on which any evidence by either party was led. The claimant accepted that she did not reply to the third respondent's request for grounds of appeal. We were unable to reach a view as to what happened, including whether this was a matter the claimant chose not to pursue (given she had not set out any grounds for her appeal) or a matter the respondents chose not to progress. In the absence of any evidence on this point the claim is dismissed.

744. The **twenty fourth** issue is that from 3 January 2019 to 16 September 2019 constructively dismissing the claimant and causing the claimant to leave her employment.

745. We have set out above the reason why the claimant was treated. We did not consider the protected acts relied upon to have had any bearing whatsoever upon the reasons for the respondents' actions. The actions of the respondents were in no sense whatsoever related to any protected act. For those reasons the claim is ill founded.

746. The **twenty fifth** issue is on 23 September 2019 removing the claimant as a director of the first respondent and representing to Companies House that she had resigned.

747. We considered that this was not a matter over which the Tribunal had jurisdiction since it did not relate to her employment status (which had ended) but to her position in relation to companies house.

748. In any event the reason why the claimant's directorship ceased with companies house was because the respondents believed that the claimant's employment was connected to her being a director and when she ceased being an employee they considered her to have ceased to be a director. That was in no sense whatsoever connected to any protected act.

749. The **twenty sixth issue** is from 16 September 2019 setting up a new company, Prosperohub Limited, in order to prejudice the claimant in relation to her shareholding in the business and her ability to pursue the first Respondent.

750. We did not consider this to have been made out.

751. To the extent the claim relates to the rights the claimant has a shareholder we did not consider, for the reasons set out above, that the Tribunal has jurisdiction to determine that matter, since it was not in relation to the claimant's employment relationship.

752. We were also not satisfied the decision to set up the new company was a detriment. The first respondent had failed as a going concern. It failed due to the business being no longer operationally viable. It was the failing of the first respondent that was detrimental to the claimant since it affected her ability to seek a remedy. We did not accept that the new venture was created in any way to prejudice the claimant.

753. The reason why the new company was set up was because the second and third respondent wished to advance a new business proposition which they considered potentially profitable. It was significantly different to the first respondent and carried out materially different work. The reason for the facts relied upon in this claim was entirely unconnected to any protected act of the claimant which were in no sense whatsoever connected to the conduct relied upon.

754. The **final act** relied upon was from September 2019 continuing to misrepresent the facts in relation to the foregoing matters to the claimant and to the Employment Tribunal.

755. This was an unspecified allegation. We did not consider there to have been misrepresentation. We did find errors and some uncertainty but we were satisfied that the reason for the actions of the respondent was entirely unconnected to any of the protected acts relied upon. The protected acts relied upon were in no sense whatsoever connected to the way in which the respondents acted towards the claimant. This claim is ill founded.

Considering matters in the round

756. In reaching our decision as to the victimisation claim we took careful account of the evidence led before us and analysed the reason for the treatments in question. We spent a very large amount of time carefully analysing the evidence and the reasons for the acts and omissions relied upon, taking full account of the claimant's agent's submissions and the evidence we heard and the productions to which our attention was directed.

757. We did not accept the claimant's agent's submission that the "obvious explanation" for the events was that the claimant complained about the second respondent's conduct.

758. The respondents knew of the protected acts that we have found but we found no evidence that linked the making of the protected acts and the treatment relied upon in any sense whatsoever. We were careful to analyse the facts in light of the legal test as set out above. We considered the treatment and each of the protected acts in turn but found no evidence whatsoever to support the claimant's contention that any of the protected acts were in any sense whatsoever a reason for the treatment relied upon.

759. We did not accept the claimant's agent's submissions that the respondents "closed ranks" on the claimant. We did not consider it to be fair to say that they denied allegations they knew to be true. We accepted the third respondent's evidence that he approached the issues in determining the grievance that if he felt there was merit in any of the issues the claimant raised he would have upheld it. We did not accept the claimants agent's assertion that the process was "designed from the outset to result in the important elements of the claimant's grievance being refused."

760. While we agree that an experienced HR Adviser would not necessarily prepare an investigation report separate from and prior to hearing the claimant's position, from the facts of this case this was not something that was unfair or unreasonable. It was also relevant that this was not a normal employer/employee grievance given the claimant and second and third respondents worked together as and treated each other as business partners and given the grievance included matters relating to the claimant's shareholding (which was a corporate rather than employment issue).

761. The purpose of the report was clear and explicit and had been set out: prior to meeting with the claimant the position would be investigated. The claimant would have the opportunity to present her position and the respondent would consider all the evidence and reach a conclusion. That was what we found happened.

762. Having carefully considered the evidence led before us we were able to conclude that the protected acts relied upon were in no sense whatsoever related to the acts (and omissions) relied upon for each issue. We found that we did not require to resort to the burden of proof provisions since we were able to make direct findings of fact from the evidence before us and applying the authorities we set out above. We were alert to the fact that respondents rarely overtly discriminate and motive is irrelevant. We carefully analysed all the evidence before us (and the claimant's agent's submissions) to consider whether the protected act (or the belief the claimant was going to do a protected act) was in any sense a reason for the treatment. In each case we were satisfied that the reason for the treatment relied upon was in no sense whatsoever because of any protected act or that the claimant might do a protected act (or had done a protected act).

763. Taking a step back and considering matters we find that the protected acts relied upon were in no sense whatsoever connected to the acts and omissions of the respondents set out in the issues of this case. The victimisation claims are ill founded and are dismissed.

Unfair dismissal against first respondent

759. As the evidence led before the Tribunal directly related to the issues underpinning the unfair dismissal claim we considered that it was appropriate and consistent with the authorities and the overriding objective to consider the merits from the facts we heard which was in respect of each of the elements of this claim.

760. The liquidator of the first respondent indicated that the claim was resisted but that the absence of funds meant there was no basis to present a defence to the claim. The persons who were responsible for the actions were solely the second and third respondent and the agent for those respondents did make submissions in relation to the unfair dismissal claim.

We considered it would have been wrong of us simply to have accepted the position advanced by the claimant when we heard evidence testing the matters before the Tribunal which were germane to this claim.

761. The issues in respect of this claim were whether the first respondent through the actions or omissions of the second and third respondents or through their agent EmployEasily behaved in a manner towards the claimant which was in breach of the following implied contractual duties:

a. duty to act in a way which will not destroy/seriously damage trust and confidence

b. duty to support employees

c. duty to progress grievances in a reasonable manner

d. duty not to act towards the employee in a manner which breaches the Equality Act (albeit the latter duty was not insisted upon during submissions).

762. The issue was whether that breached the implied term of trust and confidence and the Tribunal will need to decide:

a. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

b. whether it had reasonable and proper cause for doing so.

763. The claimant argued that the actions as asserted above entitled her to resign as she had been constructively dismissed. The respondent argued that there was no breach and even if there were it was not just and equitable to award any compensation in light of the claimant's conduct, a senior employee and director who had covertly recorded discussions with fellow directors thereby destroying trust and confidence and acting in breach of company law duties.

764. We concluded that the claimant had not been unfairly dismissed.

765. We did not accept the assertion that the contractual duties relied upon by the claimant had been broken. Even if there been a breach, the breach was in no sense material or fundamental that entitled the claimant to resign. There was no breach of contract on the facts we found.

766. The claimant had decided that she could not continue to work for the respondents given the way in which she perceived she had been treated. Looking at matters objectively, for the reasons we have set out above, the respondents sought to deal with the issues facing them in a reasonable way and in our view did so. We understood the claimant's concerns and why she was stressed but that was due to her perception as to the reasons for the respondents' treatment of her rather than the facts of her treatment.

767. We found no breach of any implied or express term of the claimant's conduct from the evidence before us. That included in respect of the actions that led to the claimant's grievance. We did not consider that the actions of the respondents in any way prior to the grievance being lodged amounted to a breach of any term, express or implied, of the claimant's contract.

768. During that period the second respondent was balancing the interests of the claimant (who was severely stressed) with the interests of a severely stressed business. He did his best to work with the claimant and reassure her and speak with her in an appropriate way (and at appropriate times) while trying to keep the business afloat.

769. We found no evidence that justified the assertion that the respondents' conduct or attitude towards the claimant changed as a result of (or in any way connected with) her disability or at all. The respondents sought to work with the claimant and placed no unreasonable pressure upon her. On the contrary despite very serious operational challenges (in the very area for which the claimant was responsible) the respondents initially gave the claimant paid leave and then offered her a sum of money in respect of her

shareholding (a sum likely to be considerably in excess of its value) and tried to reassure her that her position had been unaffected.

770. While the claimant saw the discussions as an attempt to procure her exit from the business, from the evidence led before us, the respondents wanted (and in many respects needed) the claimant to remain with the business. They did their best to facilitate her return in a way that worked for her.

771. We accepted that there were occasions where the claimant was severely stressed with the circumstances facing her, but the second respondent sought to manage that by reassuring the claimant that whatever the position was when she returned to work, a post would be open for her. She was told that her role remained but that she was not to be concerned about it nor the pressure of work and instead to focus upon resolving the health issues as best she could. The claimant perceived that as an attempt to procure her exit and saw the respondents' actions through that lens thereby creating a difficult environment for her and the respondents to work together during her absence.

772. With regard to the grievance and process adopted we accepted that the process was not perfect but we did not accept the criticisms made of it by the claimant's agent. The process was reasonable given the size and resources of the first respondent and the position facing the business.

773. While the third respondent was not totally impartial, since he was at least a witness in respect of some of the issues, the grievance was essentially about the second respondent. An appeal was offered to an independent third party and we were satisfied that the third respondent did objectively consider the evidence before him and reach a reasoned conclusion.

774. The claimant herself agreed, albeit under protest, to the third respondent hearing her grievance. Her belief that the second respondent was in control of the process or that the HR business partner was determining the issues was not well placed. The HR business partner ascertained the facts from

the information available to him (the claimant having been told that such an initial process would be carried out in advance) and the outcome was reported these to the third respondent. While this report included "findings" it was necessarily findings based upon the information that had been obtained, The third respondent sought to ascertain the health position of the claimant and engaged the initial enquiry while that was being considered.

775. Once it was clear that she was fit to participate in the process the third respondent convened a hearing, listened to what the claimant had to say, made some further enquiries and considered all the evidence that had been obtained. We found that this included the report and what the third respondent had been told. A reasoned decision was issued. While it did not deal with all the points raised by the claimant, the third respondent concluded that he preferred the position advanced by the second respondent and issued a reasonably reasoned decision. It did not deal with all the evidential issues raised but did summarise the key reasons why the grievance was rejected. He did so fairly and objectively in our view and while the decision was not liked by the claimant it was not an unreasonable or unfair decision to make from the facts before the third respondent. For example although he did not interview Ms McNee, given the third respondent was in charge of the process (and made the decision as to the restructure) he did not need to speak with her since he knew what happened, unlike the claimant who had heard it second hand. She had the option of an independent appeal if she wished to challenge that issue (and the others).

776. The third respondent adopted a process and reached a conclusion that was reasonable in all the circumstances of this case taking account of size, resources, equity and the substantial merits of the case. While the process was not conducted within a week as envisaged by the policy, the claimant had raised matters some considerable time after they had occurred. She had not acted swiftly, which was understandable, but the speed with which matters progressed thereafter, taken in context, was also understandable

and reasonable. The respondents did seek to progress reasonably and keep the claimant up to date, given the challenges upon their time and the background of this matter.

777. The process following the grievance displayed an attempt to assist the claimant and respond to her queries. She was offered an independent appeal but instead of pursuing an appeal she continued to ask the third respondent in writing about concerns she had. The third respondent provided the written material he had considered, which was not strictly something he had to do. He offered the claimant a meeting to discuss his reasoning in more detail.

778. The claimant decided that the relationship had broken down and resigned. She did not pursue the appeal.

779. We did not find that the respondent had, without just and proper cause, acted so as to destroy the trust and confidence within the relationship. The respondents acted reasonably in progressing the claimant's grievance and in their determination of it. There was no breach of her contract, express or implied, that entitled her to resign as a matter of law. She was not constructively dismissed.

Breach of contact (against first respondent)

780. This issue relates to the foregoing in the sense that the same alleged breaches of contract were relied upon. We found no breach of any implied or express term. The respondent did not act in such a way (without just and proper cause) so as to destroy or damage the trust and confidence. The claimant was reasonably supported, her grievance was progressed reasonably and we found no breach of the Equality Act 2010 for the reasons above. For the reasons set out above we found that the respondents did not breach the claimant's contract in a material or fundamental way. Having carefully considered the evidence we found no breach of contract at all on the part of the respondents.

Observations

781. We wished to conclude our judgment with an observation. It was apparent to us that the issues the claimant faced were clearly of considerable concern to her and we have no doubt that they caused her significant stress and upset. One of the main drivers in this case was the claimant's belief, which was firmly held, that the respondents, and in particular the second respondent, had changed his approach and attitude to the claimant as a consequence of his understanding of the claimants illness. What the claimant did not see, however, was that at the same time she was viewing the actions of the respondents and assessing them as against how she expected them to react, the respondents were facing unprecedented and very serious stress and challenges, both in terms of operational delivery and in terms of very serious financial threats (both personally and professionally).

782. As a consequence of the challenges facing the respondents their ability to react was severely hampered. While the claimant knew of certain of the issues affecting the respondents she was not immersed in the issues as the second and third respondents were. She had been unable to see the serious issues facing the second respondent and his desire to be as supportive to the claimant as he could, given their close relationship, while at the same time ensure he drove the business forward and protected its viability, an endeavour in which he failed.

783. It was as a result of these parallel processes, the claimant seeking to have her position fully considered and dealt with in a manner that she expected on the one hand, with the respondents fighting serious battles professionally (and personally) that led to the perception the claimant had, and developed that the attitude of the respondents changed towards her.

784. We were satisfied from the evidence before us that the respondents did not change their attitude towards the claimant, in a negative way, following her absence as a result of the serious health issues she faced. They sought to act in a compassionate, supportive and understanding way, while trying to protect the business in which they had invested time, effort and

significant sums of money. The extent of the challenges the respondent faced, and the efforts made to meet those by the respondents was not fully known (and could not reasonably be fully known) by the claimant.

785. Finally, we wished to thank the parties and their agents, as we did upon conclusion of this case, given the way in which they worked together to assist the Tribunal to achieve the overriding objective.

Employment Judge: David Hoey
Date of Judgment: 24 June 2021
Entered in register: 28 June 2021
and copied to parties